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THE DEATH
OF THE
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CHAPTER 1
THE CONFIDENCE GAP

In retrospect, all historical events appear to fit nicely into their allotted time niches, seemingly reassuring us that even those who lived during these eras recognised the significance, the import, of what was then transpiring.

But realistically, this is seldom the case.

For example, consider Rome in 27 B.C. History marks this as the year that the Roman Republic collapsed, giving way to what we now call the Roman Empire. Yet the transition from a system of government run by the populace to a system run by those not responsible to the populace seems to have caused little concern to the average Roman citizen.1 The government services received were similar in both cases. The structure of the government under the emperor remained much as it had been before. Initially, then, it was difficult for the common man to detect any major harmful changes. It took the later abuses of Nero and Claudius, among others, to impress upon Rome the folly of its path and to impress upon history the importance of 27 B.C. Widespread public expression of discontent with government and lack of trust in Roman officials therefore did not surface until it was inconsequential—power had already passed from the general citizenry to an exclusive elite. That unnoticed, but important transition of power sealed the fate of one of the greatest civilisations the West has ever known.

Alarmingly, the United States faces an analogous crisis to—
day, advanced already to the stages of widespread public discontent with government and mistrust of elected officials. *Newsweek* noted prior to the 1976 election that according to Gallup Polls, voter confidence in government had eroded by more than 40 percentage points in 12 years. Whereas 76% of those polled in 1964 said they trusted officials in Washington to do what was right most of the time, only a meager 32% voiced such confidence in 1976.² Furthermore the study noted:

If there were a place on the (presidential election) ballot where one could simply vote “no confidence”, 52 percent of those surveyed said they were either very likely or fairly likely to do so.³

In the face of such clear disillusionment, the obvious question is "Why?". The stock answer tends to be a listing of recent governmental gaffes, always concluding with Vietnam and Watergate. However, it is my firm belief and the thesis of this paper that these are only symptoms of a far more dangerous malady. We, like the Romans, have reacted to a problem only as its results have taken on mammoth proportions. And we, like the Romans, involved deeply in the situation, have failed to note with proper historical perspective a process by which power to rule has passed from the general populace to small groups of individuals responsible in no way to the common electorate. Specifically, the process I refer to is Congressional delegation of Constitutional powers and responsibilities to administrative agencies and executive officials.

Constitutional government in the United States is premised upon "authoritative allocation of values."⁴ This means that
particular agencies and individuals, backed by the Constitution to establish their legitimacy, may dispense the existing limited number of advantages or opportunities to the unlimited number of people and groups that seek them. The constitution establishes legitimacy because it provides the "rules of the game" that spell out the principles and responsibilities that all of the power centers in our political system owe to one another. Those involved in the power struggles include individuals, interest groups (ranging from business executives to environmental lobbyists to mass communication representatives), the bureaucracy (including independent agencies, regulatory commissions, and cabinet staffs), state governments, the Supreme Court, Congress, and the President.

At its best, modern American government functions much as David Truman described in his work, *The Governmental Process.* Given diversity and change in a society, conflicts of interest will arise among segments of the population. In order to resolve these conflicts in a manner most favorable to them, these segments form themselves into interest groups.

It is important to note, Truman continues, that although each realm of society is characterized by interest group conflicts, the greatest concentration of such groups and the ones subjectively regarded as most important exist in the economic realm. The most powerful of these are the larger corporate entities.

In order to protect and or enhance their interests, most interest groups have to make claims on and through the most for-
mally powerful institutionalized group in society (as well as on other interest groups like themselves). In contemporary society, the institutionalized group with such power is the government (i.e. the "authoritative allocator of values" already mentioned).

When conflicts arise, the interest group with the best organization, leadership, propaganda and governmental access, and the most cohesion, status and money will always be the relative winner.

In concluding, Truman realizes the concept of legitimacy, saying that the most powerful groups in society are prevented from becoming oppressive through, among other factors, self-invoked and socially imposed "rules of the game". Thus balance and accountability are maintained.

Such a model can be used to explain many past and present interactions in a political framework. The clash of railroad interests and populist groups during the end of the nineteenth century offers an interesting example of legitimate governmental power centers laboring to allocate limited advantages to competing interest groups. But this example is intriguing in an even more important consideration: the business-populist clash symbolized an era when power was becoming more and more a federal phenomenon at the expense of state governmental systems. The transition was capped in the mid 1930's as the federal Supreme Court, last bastion of states' rights supporters, crumbled under the pressure of angry public sentiment, funneled at them during the Depression by F.D.R. 7
The gradual transition of power from state legislatures to the federal Congress must be considered not only legitimate, but, considering the problems of the time, almost a necessity. It was when Congress assumed this greater authority that the ball was bobbed, for in the following years, Congress, imprisoned by its archaic organization, motivated in part by expediency, and constantly frightened by domestic and international emergencies, failed to live up to its constitutional responsibilities. In seeking ways to deal with its problems, our national legislature began a policy of delegating its powers to administrative agencies and executive officials, new centers of power not accountable directly to the public in any way. Even their ties to Congress were and are tenuous. Congress, in an ever increasing number of important instances, has failed to provide even the most lenient standards and guidelines for these new arbiters of our fate... In some cases not even the power of the purse exerts an effective check against improprieties. 8

This is the transition of power that is at the root of so many problems today, leading to a breakdown in law and legitimacy. 9 This is the transition of power that in many ways has devitalized popular, republican government and replaced it with control by elites and agencies not responsible to common constituents. 10 This is the transition that has the makings of being our 27 B.C.
NOTES

1. I am indebted to Prof. Richard Scanlan, University of Illinois, for making this point clear to me during a lecture regarding Roman political organisation, February 7, 1978.


3. Ibid., p. 33.


CHAPTER 2
GOVERNMENT OF LAWS, NOT MEN

The Origin of Separation of Powers

The idea that powers within a government should be separated and balanced has a rich history, traceable to such scholars as Aristotle, Cicero, Aquinas, Locke, and Montesquieu.¹ The latter of these noteworthy gentlemen, a French philosopher, wrote in 1748:

When the legislative and executive powers are united in the same person or body, there can be no liberty . . . There would be an end to everything if one man or one body, whether prince, nobles, or people, exercised both of these powers.²

Blackstone, in his Commentaries, expressed much the same commitment some twenty years later:

Wherever the right of making and enforcing the law is vested in the same man, or one and the same body of men, there can be no public liberty.³

All of these writers and political theories were well known to American politicians and statesmen of the revolutionary period; and the theory of separation of powers was generally accepted by them as a fundamental political maxim. Imbued with this maxim, the framers of the first American state constitutions undertook to apply it as a legal principle in the organization of state governments. Fairlie notes:

All of the first constitutions made provisions for the three departments, and six of them inserted a general clause expressly distributing the powers of government to these three branches—the legislative, executive, and judicial.⁴

A look at the wording of several of the first state con-
stitutions bears out this observation. The Massachusetts Constitution, adopted in 1780, contained the following explicit proviso: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men." 

Maryland adopted the maxim in the most unqualified terms, declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other.

The language of Virginia was just as pointed on this subject. Her constitution declares, "that the legislative, executive, and judiciary departments, shall be separate and distinct; so that neither exercise the powers of more than one of them at the same time." North Carolina, South Carolina, and Georgia's compacts were all of the same mold, as were the principles behind the constitutions of the remaining states.

Madison, always the pragmatist, would probably voice disapproval regarding this analysis of history, as Federalist Papers 47 and 48 point out. To guarantee effective and efficient administration in government, he argued, there must be a certain amount of overlap between branches. But even Madison, extolling the benefits of government interaction, could never have envisioned or condoned the erosion of separation of powers to its
present point:

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. 8

And even more emphatically stating this doctrine, Madison continued:

An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others. 9

Considering that such strong statements supporting balanced government came from those who were skeptical of a separation of powers principle, it is not surprising that the Federal Constitution of 1787 recognized classification of powers and provided for separate branches of government. States the Constitution: "All legislative power herein granted shall be vested in a Congress of the United States"; "The executive power shall be vested in a President of the United States," and "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may establish." 10

The message was clear, the foundation set: Federal government, much like state governments, was to be a government of laws, not men.

Congressional Abdication of Power—Why?

Although this blueprint for national government was clear,
an important question still remained: which branch would try to dominate the other two? Madison's observation on this subject may seem surprising to us today:

The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. 11

In comparison to this imposing description, Congress today seems to be little more than the helpless, bumbling branch of the federal bureaucracy. Certainly, as this study will point out, delegation of power to unaccountable agencies and officials was, and is, the primary reason Congress has faltered. But our inquiry must pause here first to determine exactly why Congress found it necessary to abdicate power at all. Considering that much of Congressional delegation has taken place since power began to pass with increasing speed from the state to the federal level, Madison's warning and subsequent Congressional action seems especially curious.

There appear to be three overriding reasons why Congress has delegated its authority: Congress is (1) imprisoned by its archaic organization, (2) motivated by expedience and (3) frightened by domestic and international emergencies.

First of all, then, Congress has delegated its power because its archaic structure does not allow an alternative. It has long been realized that the 435 members of the House and the 100 members of the Senate seldom agree on anything except adjournment. Therefore, the committee system was instituted. The logic behind such a move was that in concentrating each congressman's expertise, time would be saved, the quality of the deci-
sion-making process would improve and the overall productivity of these two chambers would increase.

Unfortunately, the committee system was not the cure-all it was intended to be. Many times a congressman will have special knowledge of one committee's topic area but will be placed on another committee because of political manipulation. Furthermore, the seniority system entrenches individuals who are out of touch with the realities of today in positions of power and ultimate decision. And even if a committee survives the inadequacies of some of its members and the whims of its chairperson, it faces a power struggle with other committees which dictate protocol and appropriations. The well-researched bills of the Education Committee mean little if the Rules Committee simply won't schedule them for House consideration or if the Appropriations Committee overlooks them when dispensing finances. 13 Congressmen faced with these structural labyrinths are apt to take a chance delegating a problem to an outside center rather than dealing with it in the provided, archaic Congressional structure.

But there is a second reason why Congress seeks to delegate: expediency. Congressmen are politicians interested in getting re-elected. If one can delegate a decision and responsibility for that decision to another power center, is he not politically safer than if he handled it on his own? The congressman's position may be strengthened but the Congress as a whole is weakened, its power draining to other sources. Representative Higle, when speaking of inadequate Congressional
staffs, noted the congressman's infatuation with his constituency and re-election:

The men in power, however, usually don't see themselves as needing more staff. And to many other, less senior members, the lack of committee staff just isn't a pressing concern. It doesn't relate directly to their re-election hopes. They'd much rather take the people they have on their personal staffs and direct them toward servicing their districts, performing chores for constituents. That's far more important to them and their long-term chances of becoming committee chairmen than digging into the intricacies of the federal budget or pending legislation.14

Expedience, especially in connection with re-election hopes, therefore often either entices or pressures a Congressman to choose an easier, less controversial alternative: delegation to power centers outside Congress.

The last and perhaps most recently important reason that Congress has delegated power is Congressional inability and unwillingness to handle domestic and international emergencies. This phenomenon is witnessed most readily when Congress directly submits to the executive during an emergency. Senator Church summarized the far-reaching impact of such a course of action:

The problem of how a legislative body in a democratic republic may extend extraordinary powers for use by the executive during times of great crisis and dire emergency—but to do so in ways assuring both that such necessary powers will be terminated immediately when the emergency has ended, and that normal processes will be resumed—has not been resolved.

Revelations of how power has been abused by a President, certain presidential advisers, and high executive officials should give rise to new concerns about the potential exercise, unchecked by Congress or the American people, of these extraordinary emergency powers. Like a loaded gun lying around the house, the plethora of delegated authority could readily be used for purposes far removed from those
originally intended.\textsuperscript{15}

Machiavelli, centuries ago, acknowledged that great power may, on occasion, have to be given to the executive if the state is to survive, but warned of the grave dangers in doing so:

Yet it is not good that in a republic anything should ever happen that has to be dealt with extralegally. The extra-legal action may turn out well at the moment, yet the example has a bad effect, because it establishes a custom of breaking laws for good purposes; later, with this example, they are broken for bad purposes. Therefore, a republic will never be perfect if with her laws she has not provided for everything, and furnished a means for dealing with every unexpected event, and laid down a method for using it.\textsuperscript{16}

Congress, unfortunately, has not at all undertaken to provide such laws during recent major emergencies or to set down methods for approaching these situations. Nor has it wiped the slate clean of past delegations. As a matter of fact, the Special Senate Committee on the Termination of Emergency Powers Statutes found that there exist 470 special statutes which the President could invoke today if a declared national emergency existed, simply because these statutes were never taken off the books after their particular emergencies subsided.\textsuperscript{17} This is particularly bad precedent when we consider, as Chief Justice Hughes did, that emergency is not a solid ground for creating or enlarging constitutional authority:

Emergency does not create power. Emergency does not increase granted power or remove or diminish restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.\textsuperscript{18}

It is especially interesting to note that the Executive
branch has not wrested these powers from the Congress:

A review of these emergency statutes reveals a consistent pattern of law-making by which Congress, through its own action, and subsequent inaction, has transferred this awesome power to the executive, ostensibly to meet the problems of governing effectively in times of great crisis. The charge that the Executive branch usurped these powers from the legislative branch cannot be sustained. The contrary is true—the transfer has been routinely mandated by Congress itself in response to the exigencies of war and other grave emergencies.19

The conclusion to be drawn from such actions is simple yet disturbing: Congress, realizing that it lacks time and expertise to handle complex domestic and international crises, has abdicated much of its constitutional power and responsibility to other power centers, particularly the Executive branch of government.

Overall, then, three considerations—archaic organization, political expedience and aversion to dealing with emergencies—help us comprehend in part exactly why Congress would initiate and perpetuate delegation to other agencies and agencies of government. It is now instructive to review, in an historical progression, how delegation has become established, examining several specific case studies.
NOTES


2. Ibid.


7. Ibid.

8. Ibid., No. 48, p. 111.


CHAPTER 3
THE INNOCENT YEARS

Setting the Standards: Delegation's Early Stage

Long before any of the considerations just discussed became important reasons for Congressional delegation, Madison's pragmatic insights prophetically pointed to an increasingly heated national debate over the direction of public policy. Didn't efficient and effective federal administration almost require governmental branches to overlap and interact? And did such flexibility include Congressional delegation of legislative powers to administrative agencies or executive officials, including the President?

These and many other questions posed quite a dilemma for the courts as they tried to weed out a middle ground on which to build a solution. As was already noted, Article I of the Constitution says that "all legislative powers herein granted shall be vested in a Congress." On its face such language seems to forbid delegating legislative power, especially in light of the maxim, drawn from the law of agency, which states "delegata potestas non potest delegari"—that which is delegated cannot be redelegated.¹

And yet, despite the rigidity of all the mentioned restrictions, the courts realized that some legislative power must be delegated if government was to function. To this end, the courts set out to devise doctrines, which, while paying lip-service to the nondelegation principle, permit exceptions to it. One such
doctrine, and perhaps the cornerstone to delegation case history, stated that:

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.²

Perhaps more clearly, Cushman reiterates:

Congress may validly delegate to the President, or to administrative agencies, the power to act in carefully defined circumstance in precisely the same way that Congress itself would act were it not for the inconvenience of doing so. In order to make sure that a general legislative policy is kept attuned to changing conditions, Congress may authorize the President to pinch-hit for it, if and when foreseeable contingencies arise which require some legislative adjustment.³

Thus began the erosion of the deduced corollary of Separate Powers Doctrine; namely, "that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority."⁴

It must be said in defense of the courts, especially the Supreme Court, that there was a concerted effort to guarantee Congressional responsibility by requiring Congress to set down concrete guidelines for the agency or agent involved in the delegation. These standards were to be evidenced in Congressional statutes, and would become operative upon the occurrence of certain events or the finding of certain facts. The duty of the agency or agent was simply to determine such an events' occurrence or existence and proceed to enforce such laws pursuant to that determination.

There are several court cases which illustrate this approach.
In *Brig Aurora v. United States* (1813), the Court faced the delegation question with regard to the Non-Intercourse Acts of 1809 against France and Britain. According to this legislation, Congress permitted the President, if he found that either nation had ceased raiding our neutral shipping, to proclaim his findings and invoke an embargo against the remaining offender. France agreed to cease its pillaging and the President enforced the act against England. The court sustained the validity of this action, noting that it is within Congressional authority to legislate such that an act could apply conditionally. The logic behind the ruling was that:

Congress had made the policy; the President had merely found the fact upon which Congress had conditioned the application of the act; and the putting of the act into force was not an exercise of legislative power. In other words, Congress had not delegated its legislative power when it gave to the President the power to put the law into effect when he found that certain conditions, defined by Congress, had come into existence. The fact that Congress itself could have done what it directed the President to do did not make the delegation invalid.

Similarly, the case of *Field v. Clark* (1892) challenged the constitutionality of a provision of the Tariff Act of 1890 on the grounds that there had been an invalid delegation of power. Although the act provided a comprehensive list of tariff rates, it allowed specific agricultural items to be imported without charge. However, if the nation shipping such items enforced a tariff on our exported agricultural goods which, in view of our program of free entry, the President discovered to be "reciprocally unequal," he was instructed to suspend free entry "for such time as he shall deem just." When the President suspended
the free entry of certain cloth materials, the Court ruled that
the President had acted as a fact-finder, à la Brig Aurora:

The legislature, although it cannot delegate its
power to make a law, can make a law to delegate a
power to determine some fact or state of things
upon which the law makes, or intends to make, its
own action depend . . . There are many things upon
which wise and useful legislation must depend which
cannot be known to the law-making power, and, must
therefore, be a subject of inquiry and determina-
tion outside the halls of legislation. 7

Nevertheless, it should be noted that even at this early
stage, standards were already taking on the air of ambiguity.
The delicate judgment required in equating two countries' tariff
systems was hardly the "fact-finding" exercised in Brig Aurora.
Moreover, the idea that the President could fix the "duration"
of suspension seemed more a function of law making than of ad-
ministration. But because the Field case did describe that a
predetermined tariff rate was to go into effect when these
"facts" were found, the Court endorsed it as a valid delegation
of power.

The next two cases are especially interesting in that Con-
gress advanced its delegation beyond just the chief executive,
appealing directly to his subordinates. Thus, in Buttfield v.
Stanahan (1904), the Court upheld congressional delegation to
the Secretary of Treasury. 8 According to the Act of 1897, the
secretary, guided by the recommendations of a designated admin-
istration board, was authorized to fix and establish uniform
standards of purity, quality, and fitness for consumption of all
kinds of teas imported into the United States and was further
authorized to prevent importation of tea described as inferior
to such standards. The Court ruled that the statute evinced a purpose of Congress to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, because of their adjudged inferior quality. This, the Court said, was, in effect, the necessary primary standard that Congress had to set down so that the Secretary of Treasury could merely effectuate the legislative policy by carrying out his regular executive duties.

Although there can be little doubt that the Court ruled correctly in Buttfield, especially considering that an administrative board was provided to temper and guide the actions of the Secretary of Treasury, the doctrine of delegation seemed to be gathering a momentum of its own, unanswerable to any authority. The subject matter for delegation was becoming more mundane; the objects of delegation, the agents and agencies, were becoming farther removed from the electorate.

In Union Bridge Co. v. United States, the Court held that the Rivers and Harbors Act of 1899 also failed to effect an unconstitutional delegation of legislative or judicial power to the head of an executive department. The act authorized the Secretary of War to determine whether any bridge over navigable waters was or would be an unreasonable obstruction to free navigation of such waters. Involved parties were to be given reasonable opportunity to be heard and notice was to be given to the owners of the bridge if it was determined that alterations had to be made. In giving such notice, the President was directed to specify the changes or alterations recommended by the
Chief of Engineers and to prescribe a reasonable time in which to make them.

The Court relied on the fact that Congress itself could have made this determination as to any bridge, but investigations by Congress as to each particular bridge alleged to constitute an obstruction would be impracticable in view of the varied interests which require national legislation. Said the Court:

It is not too much to say that a denial to Congress of the right to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be to stop the whole government and bring about confusion, if not paralysis, in the conduct of public business.9

Needless to say, the Court was right—proper functioning of government required flexibility. Each one of these cases, separately, marked a degree of flexibility necessary to handle a particular problem. But taken as a whole, these cases meant much more. They symbolised the beginning of an evolution which changed separation of powers into a meaningless and misunderstood principle. But the root of the problem actually had very little to do directly with these cases. Instead, delegation was becoming firmly entrenched because the structure of American government was undergoing a fundamental metamorphosis, with power flowing to the federal level at the expense of state governments and the American public.

Discontent, Reformation and Regulation: The Initial Experiment

The period preceding the discontent of the 1880's must have been an innocent era indeed, making possible the following characterization by Lord Bryce, on the very eve of the revolution
in American public policy and administration:

It is a great merit of American government that it relies very little on officials [i.e., administrators] and arms them with little power of arbitrary interference. The reader who has followed the description of Federal authorities, may think there is a great deal of administration; but the reason why these descriptions are necessarily so minute is because the powers of each authority are so carefully and closely restricted. It is natural to fancy that a government of the people and by the people will be led to undertake many and various functions for the people, and in the confidence of its strength will constitute itself a general philanthropic agency for their social and economic benefit. There has doubtless been of late years a tendency in this direction... But it has taken the direction of acting through the law rather than through the officials. That is to say, when it prescribes to the citizen a particular course of action it has relied upon the ordinary legal sanctions, instead of investing the administrative officers with inquisitorial duties or powers that might prove oppressive.10

The American system Bryce was describing was one whose regulations were few, whose resources were many, and whose central government was unobtrusive.11 As a matter of fact, the first century of American government was one dominated by the virtually self-executing laws of Congress. Woodrow Wilson saw such "Congressional Government" as being possible for two reasons: (1) Congressional activity was insignificant, and (2) the Congress sought only to husband private action.12 Lowi's explanation of history seems to document this view:

Between 1795 and 1887, the key Federal policies were tariffs, internal improvements, land sales and land grants, development of a merchant fleet and coastal shipping, the post offices, patents and copyrights, and research on how the private sector was doing. Thus after a short Hamiltonian period when the Economic Constitution was written—including assumption and funding of debts, the taxation system, currency and banking structure, establishing the power to
subsidize--the Federal government literally spent one century in the business of subsidization. It was due to this quite special and restricted use of government that Congress could both pass laws and see to their execution.13

But the 1870's and 1880's witnessed the fall of this method of direct rule by the federal legislature. As the national government began to assume regulatory functions, direct rule was increasingly replaced by the practice of delegating power. Probably the single-most important event in causing a shift from "Congressional Government" to a government of regulation and delegation was the agrarian agitation of this same period. Cushman described the flavor of the time in great detail when discussing Munn v. Illinois (1877):

The close of the Civil War ushered in a period of rapid railroad expansion. In the East, where industrial development tended to keep pace with the multiplication of transportation facilities, railroad building proved satisfactorily profitable. In the west, however, where new country was being opened up and populations sparse, the railroads had difficulty in paying dividends and frequently yielded to the temptation to indulge in stock-watering, questionable manipulation of credits, and doubtful practices in respect to grants of lands; to rebating and discrimination; and to other objectionable practices. Pitted against the desperate efforts of the railroads to make profits was the Western farmer, who wished to enjoy adequate railroad facilities at reasonable rates in order to facilitate the movement of crops in sparsely settled communities and who resented the unfair or dishonest methods of which some of the roads were known to be guilty. Out of this conflict of interests grew the Granger Movement, an organised effort on the part of the Western farmers which finally culminated in state legislation designed to cure the worst abuses. Starting in Illinois in 1871, the movement spread to other states; and soon railroads and warehousemen in Minnesota, Iowa, and Wisconsin found themselves subject to severe regulation with respect to rates and services.14
Although this segment of American history would have exerted a profound impact on our nation regardless of any other considerations, its importance was underlined in the Supreme Court's decision regarding Wabash, St. L. & P. R. v. Illinois. In this case, the Court made railroads an interstate problem, whether Congress liked it or not, by declaring that the states could not regulate interstate railroad traffic within their own borders even in the absence of congressional action. This was indeed the categorical imperative for the commitment of the Federal government at long last to an "interventionist" role.¹⁵

Public policy and administration was undergoing a considerable face-lift. And as the government was revolutionized, the dilemma that sprang up everywhere was how to insure the decline of the legislature would not cause an equivalent decline in law and legitimacy of government. Lowi observed:

>This would be no minor achievement, if it were at all possible. Involved was no less than reducing the hallowed role of the legislature and revising the even more hallowed separation of powers, while yet maintaining a sense that we were a government of laws and not of men.¹⁶

Difficult as it may have been, this is what Congress tried to accomplish with the Interstate Commerce Act of 1887.
NOTES


2. C.W.Z. Railroad Co. v. Commissions of Clinton County, 1 Ohio St. 77 (1852).

3. Cushman, Cases in Constitutional Law, p. 89.


6. Cushman, Cases in Constitutional Law, p. 89.


CHAPTER 4
REGULATION -- THE FIRST STEP

Case Study: The Interstate Commerce Commission

The Interstate Commerce Act of 1887 provides a classic example of definitive delegation gone awry, particularly because the concerns and problems that then faced the Interstate Commerce Commission (ICC) are similar to those that plague almost all government regulation today.

Intensely concerned with the constitutionality of this new venture in federal administration, although perhaps not totally comprehending its significance as a model for the future, Congressmen from all walks of life voiced their apprehensions. Senator Brown warned:

(This legislation endows the ICC) with a greater power than that which is wielded by any sovereign in Europe. Indeed, the Czar of Russia could not have a more arbitrary power. The commission in its discretion has the power to suspend the law in the case of one railroad company and to refuse to suspend it in the case of another if it chooses to do so.

Actually, at the time, Brown's speech may have been an overstatement, although history seems to have borne him out. Because, from the beginning, the entire idea of vesting increased power in independent agencies was never separated from the expectation that guidelines and standards would go hand-in-hand with the delegation. Certainly the Interstate Commerce Act delegated the "full ambit of authority" -- executive, legislative, and judicial -- to a single body. But it was a considerably well-defined delegation, hemmed in by (1) statute and (2) common law. Lowi pointed out:
First, there was a fairly clear specification of standards regarding jurisdiction of the commission and regarding the behavior of the railroad deemed unlawful. There was no rigid codification, but conduct central to railroad abuses was specified quite sufficiently. These included such practices as rate discriminations, rebating, pooling and long-versus-short-haul adjustments. The commission's power to enjoin railroad rates that were "undue or unreasonable" was guided, therefore, by standards in the Act. Second, however, the Act itself was the culmination of a long history of public efforts vis-a-vis rail service and rates, efforts in state law and in the common law. In effect, congressional language, even where vague, had been "freighted with meaning" by history.  

Perhaps an in-depth examination of one of the facets of the Interstate Commerce Act would be instructive. A review of Section Four, the long-and-short-haul clause, neatly illustrates the interplay of timely administrative specification of standards and suitable legislative response. Studying the later progress of the commission, however, will show how its power and responsibilities expanded to the point where new guidelines had to be set by Congress. Unfortunately, Congress met the need for new, concrete standards with vague, and often unenforceable, legislation. The ICC's early success therefore mutated into the initial mangling of accountable delegation.

In Depth: Section Four

Here is how the long-and-short-haul clause embodied in Section Four of the Interstate Commerce Act appeared the day of its passage, February 4, 1887:

SEC. 4 It shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer dis-
tance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.3

The Congressional specificity involved in this section is striking. As a matter of fact, Section Four was set down especially to deal with any ambiguities that might have existed in the general standards of the Interstate Commerce Act. For example, Section Three noted that it was unlawful:

For any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.4

Thus, the Commission, guided only by Section Three, could have adopted policies directly at odds with what Congress really intended. But Congress was wise in its early delegations and made its intentions particularly clear. It centered its attention in Section Four on a specific type of discrimination, that which occurred "under substantially similar circumstances and conditions" and made it per se illegal.

The Commission's reaction to litigated challenges was encouraging in its specificity as well. The very day the Act took effect,
the Louisville & Nashville Railroad Company filed a petition seeking (A) a definition of what types of competition would qualify as creating "dissimilar circumstances and conditions," therefore avoiding the sanction of Section Four, and (B) a listing of practices not sufficient in scope to justify a greater charge for a short haul as opposed to a long haul. Judge Cooley, the ICC Chairman, wrote an admirably concrete, particularized opinion which included the following excerpts. In answer to the above mentioned first inquiry concerning competition and exceptions to Section Four, Cooley wrote:

The existence of actual competition entitling the carrier to charge less for the longer than for the shorter haul exists in the following cases: 1, when the competition is with carriers by water which are not subject to the provisions of the statute; 2, when the competition is with foreign or other railroads which are not subject to the provisions of the statute; 3, in rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition. 5

Regarding the second consideration, unjustified higher charges, he continued:

It is not sufficient justification therefore that the traffic which is subjected to such greater charge is local traffic, and that which is given the more favorable rates is not.

Nor is it sufficient justification for such greater charge that the short haul traffic is more expensive to the carrier, unless when the circumstances are such that it is exceptionally expensive, or the long haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

Nor that the lesser charge or the longer haul has for its motive the encouragement of manufacturers or some other branch of industry.
Nor that it is designed to build up business or trade centers; nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up.

The fact that the long haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.

Although such opinions are negatively awesome in that an agency sets down standards instead of a legislature, it is important to stress their positive nature -- specificity. Friendly observed:

To get the full flavor of Cooley's opinion, it ought to be read, in full, as against the vacuous and weasel-worded utterances characteristic of our day. The railroad lawyer who studied it in June of 1887 must have come away feeling he had learned quite a lot; he had eaten meat, not gelatin. The opinion did not settle every fourth-section case for him, something that would have been manifestly impossible, but it told him pretty well how the land lay.

Interaction Between the Legislature and Agency: The Creative Partnership

What Jaffe has called the "permanent creative partnership between legislation and administration" cannot readily exist unless the administrative agency continuously presents possible solutions for new problems to the legislature, which may then affirm, modify or reject the suggestions. This interaction was very much evident in the early years of the ICC's existence, as its case history illustrates.

For example, Cooley ruled, as quoted above, that "rare and peculiar cases of competition" might entitle carriers to charge less for the longer than shorter haul. However, the carriers so expanded this exception that it slowly became the rule, and the
commission was forced after five years to eliminate it as a consideration. The Supreme Court disagreed, ruling that "rare and peculiar cases of competition" might indeed be used to show that circumstances of operation were dissimilar enough to warrant increased charges for shorter hauls. Congressional reaction, the essence of accountable delegation, was evidenced in the Mann-Elkins Act of 1910. The "under similar circumstances and conditions" language of Section Four was totally eliminated, thereby enacting a stricter construction of the Interstate Commerce Act and limiting the delegation of authority to the ICC.

The Mann-Elkins amendment to Section Four provides yet another example of legislative-administrative interaction. In its Tariff Circular No. 6-A, issued shortly after passage of the Hepburn Act of 1906, the Commission announced that "it would be its policy to consider the through rate, which is higher than the sum of the local rates between the same points, as prima facie unreasonable, and that the burden of proof would be upon the carrier to defend such a higher through rate." Congress, using the Mann-Elkins Act as its tool, took this announcement, made it more specific, and placed it beyond administrative recall—the practice was no longer just "prima facie unreasonable," it was illegal, except that the Commission might grant relief from it just as with other Section Four prohibitions. There is little doubt that the Commission's initial guideline motivated Congress to legislate. Such interaction once again resulted in greater specificity.

Further interplay between the ICC and Congress is illus-
trated by the amendments to the fourth section in the 1920 Transportation Act. The Commission's authority to grant relief under Section Four was restricted in three respects: (1) the commission was not to permit "the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed"; (2) in permitting a circuitous route to lower the rates to or from intermediate points, "the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points"; and (3) the Commission was not to grant relief "on account of merely potential water competition not actually in existence." In each instance Congress affirmed positions the Commission had already announced. In light of experience, Congress chose to take the Commission's specifications of the general standard, which would otherwise have remained subject to re-argument and reconsideration, and to vest them with the force of law. Once again the creative partnership between the ICC and Congress produced well-defined delegation. But the same 1920 Transportation Act that provided these specifications and qualifications was to be more a nemesis than aid to accountable delegation.

Losing Control

It was the Transportation Act that added power over minimum rates to the ICC's existing power over maximum rates. Such a change seemed almost trivial, but Lowi realized:
Perhaps it is true that Congress did not appreciate what it was doing, but it is no less true that the change in ICC power at the time, when the railroads were passed back to private ownership, totally altered the Commission. Power over maximum rates was specified fairly clearly by the lists in the 1887 Act, by the 1906 Hepburn Amendment, and in common law. This was particularly true of the core of the ICC's jurisdiction—discrimination, exclusiveness, intimidation and such matters as attended monopoly power. Power to raise minimum rates was granted with no such specification. The 1920 Act was a grant to the agency to find out the meaning of the Act itself, because the ICC was instructed only to act on what was "just and reasonable." In effect this meant case-by-case bargaining (called "on the merits"), the results putting the Commission on every side of every issue.14

"Just and reasonable," "on the merits," "and fair share" were the phrases that would erode the Commission's objectivity and haunt Congressional control. The impact of this initial departure from well-defined delegation was especially far-reaching, since, as the Commission reported to Congress, "the country has experienced, in a very short space of time, a major transportation revolution."15 As the role of the Commission increased, its guidelines became less and less specific.

The power of setting minimum rates applied not only to railroads, but to motor transport as well. And in deciding cases involving these two groups, the ICC resorted to the practice of bargaining, a position that is associated with its loss of prestige:

Operating in the context of a vague enabling statute, it was impossible for the ICC to avoid developing what later came to be called, "congenital schizophrenia." The Commission has been on all sides of its own rules and rationalizations. ... The ICC often denied rate reductions below what was necessary for a carrier to gain or maintain a "fair share," despite the fact that a still lower rate would have been remunerative to the carrier without disrupting the market. "Fair share"
itself sounds like a rush could be applied to a group of truckers to keep the railroads happy. But it rarely works that way because much of the traffic deserting the railroads is due rather to Commission imposed, carrier-approved, artificially high rail rates, which if lowered would have resulted in increase of shares all around. 16

In effect, both groups were dissatisfied; the truckers thought they were losing funds because of Commission policies and the railroads were losing money as a result of Commission decisions.

What the Commission really needed in order to estimate "fair value" was "the best possible knowledge of full costs of services and so-called out-of-the-pocket expense." 17 However, as the Commission noted, in a classic understatement: "It is no simple thing to approximate the cost of a particular service on a particular commodity." 18 Lowi assessed the inadequacies of the ICC in this regard:

The ICC staff is not in any way equipped to assess the real value and functions of the carriers and carrier systems. It acquires little data completely independently. Often it appears as though a regional ICC official calls a carrier representative and asks, "By the way, what are you worth today?" Worse, the ICC has no data, is equipped to get no data, and seems to feel no need to acquire data on transportation investments, costs, or expenses below the level of total companies. It would thus be impossible for the ICC to assess "fair shares" or "fair profits" to help work out a balanced transportation system in a given metropolitan region.

It is obvious, as most specialized observers have concluded, that decisions are bargained out between the ICC and each individual contender, and then "the Commission selects whatever theory appears best to fit the case at hand."

This sort of situation is not flexible, only loose. It is not stable, only static. 19

The ICC and the Supreme Court

Three court cases are especially helpful in plotting the
evolution of its ICC's power from restrained to expansive.

In Interstate Commerce Commission v. Goodrich Transit Co. (1912), the Court upheld the provisions of the Hepburn Act of 1906, which authorized the Commission to require interstate carrier's accounts to be kept in a specified manner. The decision, capturing that era's concern for accountable delegation, noted:

Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power conferred.²⁰

However, Avent v. United States (1924) documents that exceptions to specified delegation were becoming acceptable. The Court ruled that no unconstitutional delegation of power resulted from adoption of the Transportation Act of 1920:²¹

Whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency requires immediate action in any part of the country, it is authorized to suspend its rules as to car service and make reasonable rules such as will best promote service in the interest of the public and to give directions for preference or priority in transportation or movement of traffic.²²

But soon exceptions were to become the rule. The Court held in N.Y. Central Securities Co. v. United States (1932) that:

An authorization to the Interstate Commerce Commission contained in the Transportation Act is not invalid for want of an intelligible standard or specific expression therein of legislative policy by reason of the fact that the Commission is empowered, after notice and hearing and finding of fact and law based on the record at said hearing, to sanction the acquisition by one carrier of control of another whenever, in its opinion, such acquisition will be in the "public interest."²³

The institution of "public interest", much like the acceptance of the other vague phrases already mentioned, symbolized ac-
quiescence of the Courts and Congress to less standing standards, to unaccountable delegation. Gone were the days where, as with Brig Aurora v. United States, the Court would protest anything but the most stringent of standards. As a result, the Interstate Commerce Commission was delegation's first victim and the first in a series of mounting challenges to republican government.
1. 18 Congressional Record 571 (1887).
4. Ibid.
6. Ibid.
12. Ch. 91 Section 406 Stat. 480.
18. Ibid.
23. Ibid.
CHAPTER 5
CONSTITUTIONAL CRISIS

Irresistible Force, Immovable Object: 
E.D.R. v. The U.S. Supreme Court

The majority of justices on the Supreme Court during the early 1930's, schooled in laissez-faire economic theory, dedicated to the principles of states rights and distressed by Franklin D. Roosevelt's New Dealings, found themselves caught in the web of Court doctrines allowing nonspecificity and reckless delegation. In fact, the casework involving unaccountable delegation had so outdistanced the meager sampling of ICC cases already presented in this paper that constitutional scholar E.S. Corwin observed in 1934: "Congress is enabled to delegate its powers whenever it is necessary and proper to do so in order to exercise them effectively." ¹

As late as 1934, the Court was still expanding executive officers' perogatives and creating nebulous guidelines in delegation litigation. For example, in U.S. v. Shreveport Grain & El. Co. (1932), the Court held as constitutional the delegation of legislative power in the Food and Drug Act which allowed its enforcement officers (1) to create "reasonable variations" in the requirement that the quantity, measure, or weight of food in packages must be marked on the outside of those packages and (2) to establish "tolerances" or "exemptions" regarding application of the afore mentioned rules to small packages.²

Radio Comm'n v. Nelson Bros. Co. (1933), also upheld vague delegation, the Court ruling that a provision in the Radio Act of 1927 requiring the Federal Radio Commission to act "as public
convenience, interest or necessity requires" was not a standard as indefinite as to confer an unlimited power. Valid for the same reason was the provision contained in the Communications Act of 1934, under which the Federal Communications Commission was to be guided by considerations of "public convenience and necessity" in issuing or withholding permits and licenses.

Such were the uncertain legal precedents with which the Supreme Court faced the chaotic depression years. Roosevelt, despite the Court's obvious philosophical and political disenchanted with his New Deal measures, seemed to sense the Court's legally weak foundation and certainly understood the political necessity of adopting far-reaching economic reforms. Riding the waves of popular support and Congressional rubber-stamping, F.D.R. implemented the most spectacular phase of his New Deal recovery program—the National Recovery Administration (NRA), an enormous organization set up under the authority of the National Industrial Recovery Act (NIRA). Its goals and organization were indeed encompassing:

(The NRA) sought to stimulate the volume of business and improve working conditions by raising wages, reducing hours, and eliminating child labor; to drive out unfair and destructive competitive practices; to conserve natural resources in certain basic commodities; and to relieve unemployment. These salutary results were to be accomplished by the establishment of "codes of fair competition" in the industries brought under the act. These codes were to be drawn up by the representatives of the industries in cooperation with government officials and were to be approved by the President, who was charged by the law with seeing that certain minimum standards with respect to working conditions and freedom from monopoly were observed. Should an industry be unable to formulate a code for itself, the President might impose a code upon it. Within 18 months codes were established in more than 700 industries. These codes were mandatory upon all those engaged in the industry,
whether they had participated in their formation or not; and the provisions were enforceable both by criminal prosecution and by civil process.\textsuperscript{5}

\section*{Confrontation}

The Court chose not to respond to Roosevelt's challenge until the NIRA had almost reached its expiration date on June 16, 1935. But the decisions that were to follow dealt a devastating blow to New Deal programs and hopes for progressive reforms. In \textit{Schechter Poultry Corporation v. United States}, Section 3 of the NIRA was held to be unconstitutional both as an invalid delegation of legislative power to the President and as an overextended exercise of Congressional power to regulate interstate commerce.\textsuperscript{6}

Small noted:

(\textit{The NRA}) was condemned as containing an unprecedented, unconstitutional delegation of legislative power to the President in that it supplied no standards for any trade, industry, or activity, and prescribed no rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead it authorized the making of codes to prescribe them. For that legislative undertaking it established no standards, aside from a statement of the general aim of rehabilitation and expansion of the national economy. By virtue of the broad scope of that statement and the nature of the few restrictions that were imposed, the discretion vested in the President as to approving or prescribing codes and thus enacting laws for the government of trade and industry was left unfettered.\textsuperscript{7}

The decision was perplexing in its return to Brug Aurora-like principles, especially in light of the favorable precedents vague delegation had accumulated. Weeks observed:

That the National Industrial Recovery Act far exceeded in its delegation of legislative power any previous grants may not be difficult to see. The question still remains, however, 'what is a standard'? It is obvious that past delegations have been very broad, particularly to quasi-legislative commissions. How much of a standard has been set up when a commission is limited
to nothing more definite than that its rates be 'just and reasonable' and that its rule be 'consistent with the public interest' (See: Radio Comm'n v. Nelson Bros. Co.). If these vague terms are to be given meaning in the last analysis by the courts, then it is obvious that the judicial branch throws itself open to the charge of usurping legislative authority. Moreover, many of the matters subject to the jurisdiction of bodies like the Interstate Commerce Commission are of such technical character as to preclude disposition by general legislative assemblies, and the boards themselves are competent to enunciate legislative policy. Furthermore, in the making of particular rules 'Considering the nature of the subject matter dealt with, it is quite apparent that any attempt on the part of the legislature to prescribe a standard which would result in effect in a prescription of the rules and regulations themselves. . .', would defeat the very purpose of such commissions. Perhaps in allowing vague statutory standards to be set for quasi-legislative commissions, the courts distinguish them from 'executive' officials to whom delegations of legislative powers are also frequently made.8

Perhaps, then, the only significant difference between the vague delegations in Schechter and those in Radio Comm'n was that the Supreme Court perceived the former as immediately threatening the balance between the three branches of federal government whereas the latter seemed to pose no such problem. Ironically, it would be the precedential value of Radio Comm'n and other unheralded vague delegation cases that would lead to the erosion of the separation of powers doctrine that the Supreme Court fought so adamantly to prevent by its stand in Schechter.

The Court continued its attack on Roosevelt's program during January 1935, when, in Panama Refining Co. v. Ryan, it invalidated the oil control provisions of the NRA on the ground that they delegated legislative power to the President.9 This section of the act had given the President power to forbid the transportation in interstate commerce of "hot oil" (oil produced
or withdrawn from storage in violation of state law) but, as the Court pointed out, the statute did not tell when or under what circumstances the transportation was to be permitted or prohibited: 10

So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not lay it down, as he may see fit. 11

The net precedential worth of the "Hot Oil Case," together with the Schechter case, seems to be that while very broad powers of administrative rule-making may be delegated to the President, there must be a legislative statement of policy sufficiently definite to prevent the exercise upon his part of pure discretion. 12

A Battle of Values

Politically, Schechter and Panama Refining Co. represented more than just the delegation of power issue; they reflected as well the battle of values between the Supreme Court's conservative politics and laissez-faire economics on one side, and F.D.R.'s dynamic social programs and activist fiscal policies on the other. This interplay is probably best illustrated by two cases which, in perspective, exemplify F.D.R.'s ultimate success in overwhelming the Court.

In Morehead v. New York ex rel Tipaldo (1936), a case that had virtually nothing to do with delegation, the Supreme Court held in a five-to-four decision that New York's minimum wage law for women and children was invalid. Justice Bultet, affirming the antiquated political and economic philosophies so characteristic of the Court's stands against F.D.R. and progressive pro-
grams, noted in the majority opinion that any minimum wage law, regardless of its provisions, would be invalid as a denial of due process of law.

Roosevelt, obviously astounded by the Court's naivete and pressured politically to continue his innovative programs took the offensive to offset the momentum gained by the Court in cases ranging from Schechter to Korematsu. The result was what is known as F.D.R.'s "court-packing" proposal, the justification for which he presented in a speech on March 9, 1937:

In its preamble the Constitution states that it was intended to form a more perfect Union and promote the general welfare; and the powers given to the Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met merely by local action.

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State legislatures in complete disregard (of the Founding Father's intentions).

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. This Court has been acting not as a judicial body, but as a policy-making body.

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws.

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a superlegislature as one of the justices has called—reading into the Constitution words and implications which are not there, and which were never intended to be there.
We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not men.  

So Roosevelt, using the same logic articulated by the Founding Fathers, although for purposes other than creating three equal branches of government, arrived at the same conclusion that the Massachusetts Constitution had recorded a century and a half before.

Among other things, Roosevelt's controversial proposal failed to muster Congressional support and even caused a rift in the Democratic party. But in losing the minor skirmish, Roosevelt registered a significant victory. Only months after the bill had been submitted to Congress and less than a full year after Justice Butler had asserted that no minimum wage law could be created Constitutionally acceptable, the Supreme Court upheld a Washington state minimum wage statute in West Coast Hotel v. Parrish, Justice Roberts crossing over to shift the five-to-four majority away from the Korematsu decision.  

More importantly, over the next several years, the older Supreme Court justices sensed their vulnerability and retired, leaving seven appointments open for F.D.R.'s New Deal philosophies.

The constitutional conflict and confrontation of the Depression-riddled 1930's presents an interesting dichotomy as we return to our consideration of the problems of delegation. In the short run, the Conservative nature of the Supreme Court was responsible for instituting more demanding delegation standards,
causing friction between the three branches of federal government and creating uncertainty. Thus an atmosphere emerged in which there was a brief return to specificity and accountability in delegation, as the next case study of the National Labor Relations Board will illustrate. However, in the long run, accountable delegation was dealt a crushing blow by F.D.R.'s virtual takeover of the Supreme Court. For Roosevelt's appointees re instituted and strengthened the precedents of vague delegation, creating the foundation from which sprang the uncontrolled delegation of our third case study: the Central Intelligence Agency.
1. Cushman, Cases in Constitutional Law, p. 91.
5. Cushman, Cases in Constitutional Law, p. 92.
   (1935).
8. O. Douglas Weeks, "Legislative Power Versus Delegated Legal-
11. Panama Refining Co. v. Ryan.
14. Murphy and Pritchett, Courts, Judges and Politics, pp. 321-
   324.
15. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
CHAPTER 6
LABOR RELATIONS--A RETURN TO NORMALCY?

Case Study: The National Labor Relations Board.

When the National Industrial Recovery Act (NIRA) became law in 1933, it established, among other things, statutory protection for laborers to organize and bargain collectively. The National Labor Board was created to settle controversies arising under the Act's provisions. When the Supreme Court swept through Part I of the NIRA in the Schechter case, the section encouraging labor to organize and bargain collectively was declared unconstitutional in a seemingly indiscriminate manner. However, sentiment supporting labor's right to bargain collectively remained strong enough to insure that right's legal recognition in the 1935 National Labor Relations Act (NLRA), also known as the Wagner Act.

The NLRA was refreshingly definitive, a product of the renewed pressure for specific delegation stirred up in the F.D.R.-Supreme Court struggle. The Act had three major areas of legislation. First of all, the Act obligated the employer to refrain from any coercion of the employee and made it illegal for the employer to assume any part in the formation of unions. Further, it imposed on the employer the obligation of accepting the practices of collective bargaining. Specifically the Act prohibited:

1. Interference with, restraint or coercion of employees in organization or collective bargaining.

2. Domination or interference with the formation or administration of any labor organization.

3. Encouragement or discouragement of membership in any labor organization by discrimination in the matter of hiring, or period, term, or condition of employment.
4. Discharge or discrimination against an employee because of a filing of charges against an employer.

5. The law further imposed on employers the affirmative duty of bargaining collectively with representatives selected by the employees pursuant to the provision of Section 9 of the Act.²

Secondly, the NLRA, because of a desire to give swift and effective protection to the rights of employees while still guaranteeing to employers the right to a full and fair hearing, disregarded the more formal procedures of criminal law, and adopted the principles of administrative law. Complaint, notice and hearing were all provided for in the Act, with the National Labor Relations Board acting as a quasi-judicial body, judging each case on its own merits in accordance with the law. Orders of the Board were to be subject to review by the Circuit Courts of Appeals, or by the District Courts when the former were not in session, the Board's orders being enforceable only when sustained by the courts.

Thirdly, to effectuate the principles of collective bargaining, the NLRA set forth procedures by which it could be determined who would rightfully represent the employees. The use of secret election and certification of the proper representative were therefore provided.

Early Efforts to Discredit the NLRA

Although the NLRA had passed with substantial majorities in both the House of Representatives and the Senate, many groups were still strongly opposed to it. For example, the National Lawyers Committee of the American Liberty League, comprised of fifty-eight of the nation's most prominent lawyers, attacked the
NLRA's National Labor Relations Board as being Congressional delegation that (1) allowed nonspecific standards of administration and (2) exceeded commerce clause powers of the Constitution. Their report seemed more like a modus operandi for attacking the Act than a mere academic study of it and soon lawyers around the country adopted the report as a brief-like guide for suits against the NLRA. The method most commonly used to upset the workings of the Board called or opposing employers to go before various District Courts and seek restraining orders and injunctions against the Board. The strategy was simple: if the Board was restrained by the District Courts from acting, then it could not very well apply the provisions of the Act, making the Act as inoperative as if it had never been written.

However, on April 12, 1937, the entire legal case against the constitutionality of the NLRA and its Board collapsed when the Supreme Court, in the new spirit of West Coast Hotel v. Parrish, handed down favorable decisions in all five cases pending before it. 3 The Court upheld the Board's decisions on all counts and completely repudiated arguments set forth by its opponents.

Of special note was Chief Justice Hughes comments on the delegation of administration issue:

"The procedural provisions of the Act are assailed. But these provisions as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. . . The Act established standards to which the Board must conform. There must be complaint, notice, and hearings. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by the evidence. The order of the Board is subject to review by the designated Court and only when sustained by the court may the order be enforced. Upon that review all questions of jurisdiction of
the Board and the regularity of its proceeding. . . are open to the examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation.

Rebuffed by the Supreme Court and with full realization that appealing to the New Deal-minded Chief Executive was fruitless, the Act's opponents were forced to turn to Congress for relief.

**Delegation in Check: The Amendment Process**

The NLRA, conceived in caution, structured by definitive statutory language and hounded by zealous opponents, became a model of accountable delegation. The in-depth relationship between Congress and the National Labor Relations Board (NLRB) is best understood by examining the amendments, riders and appropriations that characterized this interplay.

The amendment process, being a most potent Congressional weapon, offered itself as an obvious devise for NLRA opponents to use in trying to destroy or nullify the Act's provisions. As amendment poured into the Seventy-sixth Congress, three general categories began to emerge. The first group would have modified the NLRA very little or not at all except to exempt certain favored classes from the jurisdiction of the Act. In this group were S. 1550 (the Logan Bill) and K.R. 4400 (the Lea Bill), both of which sought to exempt certain agricultural laborers. In the second group, S. 1000 (the Walsh Bill), introduced at the request of the American Federation of Labor which claimed that the Board had discriminated against it in favor of
the C.I.O., modified the Act so that it would be more favorable to craft type unions like the A.F. of L. The third group of amendments, which included S. 1264 (the Burke Bill) and H.R. 4990 (the Hoffman Bill), would have changed the act almost completely. It was these bills that would have incorporated into the Act a list of unfair labor practices, the commission of which by employees or labor organizations would constitute a complete defense against labor charges of unfair activities on the part of the employer. Amendments of the third type were endorsed by the United States Chamber of Commerce and the National Association of Manufacturers.5

The testimony of the Act's opponents did not go unchallenged, as friends of the NLRA dominated the Senate and House Committees involved in the investigations. A common ploy used by opponents of the Act during testimony was to direct criticism at the Board instead of attacking the more popular principles behind the Act itself. In reply to a heated accusation that the Board was perverting and misinterpreting the will of Congress, Representative Ramspeck retorted:

I think that there are some members of Congress who would like to destroy this act, and instead of saying so frankly they are attacking the Board and its procedures, its staff and its operations under the act.6

Some of the more eloquent and pointed remarks in defense of the NLRA were made by Senator Wagner of New York, sponsor and author of the legislation. The Senator testified at great length on the proposed amendments and attacked with particular conviction those amendments seeking to remove the right of investigation and hearing from the Board and ultimately transfer
it back to the courts. The Act's opponents had urged such a change on the grounds that the Board was given an unlimited delegation of power since it combined the functions of investigation, prosecution, and decision. To this charge, Senator Wagner replied:

The concept of the administrative agency growing up in necessary response to the manifold complexities of modern government has been championed by Charles Evans Hughes and by countless other luminaries of bench and bar. In a very vital sense these administrative agencies have come to be regarded as the people's instruments of government, created to effectuate a particular policy more expertly, more sympathetically and more efficiently than was possible under the rigid formalism of court procedure. Above all, these agencies give the worker a fairer chance because he cannot afford to jump into the costly arena of federal litigation. Nor are the courts and the administrative agencies to be conceived of being in a relation of mutual hostility. Supreme Court Justice Stone has stated: 'Court and agency are the means adopted to obtain the prescribed end . . . Neither can rightly be regarded by the other as an alien intruder to be tolerated if it must be, but never to be encouraged or aided by the other in the attainment of the common aim'.

Perhaps the most powerful statement made during the proceedings supporting the Board's deference to the will of Congress came from the Chairman of the NLRB, J. Warren Madden, in an exchange of comments with Representative Barden of North Carolina:

And the advantage you have Congressman, is that you are on the Committee and are going to be one of the people to decide this matter and I am not. I shall have nothing to do with the decision. I come here and present my arguments. If they appeal to you and your brethren, I shall be very glad. If they do not, I, of course, shall get what I get.

It was clearly evident from the temper of both the House and Senate Committees that there was little chance for the pro-
posed amendments to be brought to the floors of the respective Houses. The Board and the NLRA had weathered the amendment process, the first test of their accountability.

**Indirect Change: The Rider**

When opponents to the NLRA realized that direct attacks via the amendment process were ineffectual, they resorted to a less obvious but more successful weapon: the rider. The rider is particularly relevant to our study of accountable delegation in that it, like an amendment, can be used to restrict the activities of an independent agency like the National Labor Relations Board. A case in point is the rider to the Appropriations Bill of 1944. Originally designed to prevent the Board's involvement in the Kaiser Shipbuilding Company representation case, this rider had far-reaching consequences. Specifically, the rider forbade the Board's use of funds:

... in connection with a complaint arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. Provided, that hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months.

This provision virtually tied the hands of the Board and nullified a long standing policy of the Board, previously stated in a report to Congress:

The Board is frequently presented with the question whether to order an election for choice of representatives in the presence of a collective bargaining unit contract. The Board in such cases must weigh and resolve the conflicting interests in maintaining the stability of contractual relationships established by previous collective bargaining and in protecting the right of the majority of employees to a collective bargaining representative.
Contracts covering members only, contracts made with a company dominated union, and contracts made with a labor organization which did not represent a majority of the employees when made, are clearly no bar to elections. Similarly, agreements entered into or renewed after the initiation of representation proceedings before the Board, or after the request of a rival union for recognition as exclusive representative, are in general no bar. 11

The above quotation neatly expresses the principles under which the Board operated in representation cases. The Appropriation's rider overthrew the Board's past policy in its entirety. So long as a contract had been in force for three months the Board was powerless to act, no matter what the circumstances of the case. Under the provisions of the rider, an unscrupulous employer might circumvent the NLRA by the mere act of signing an exclusive representation contract with a union, and unless a complaint was filed within three months of the contract's signing, the Board would be unable to take action.

Such a union might well be a company union, outlawed under the NLRA, but now protected from the Board by the rider. A closed shop contract made with a company union would thereby force all employees to become members of the union on penalty of discharge and with no opportunity for redress. Similarly, a closed shop contract made by a minority group could accomplish the same effect. For example, a contract made with the original work force, no matter how small, would be valid no matter how the number of employees may have swollen, thus depriving the majority of the right to organize and bargain collectively through unions of their own choosing, a right supposedly assured under the NLRA.

To make the matter even more disastrous to the avowed
principles of the Act, the rider make no mention of procedure in case of renewal of such contracts. There was doubt as to whether a charge could be filed within three months of the renewal of a contract or whether the renewal would be construed as being a mere continuance of the previous contract with no new three months period allowed for filing charges.

Against such Congressional action the Board, deferring once again, had no recourse except that of appeal to Congress. In its annual report to Congress and the President, the Board noted:

Constituting as it does a restriction on the use of funds for the fiscal year of 1944, the amendment will remain in effect until June 30, 1944, unless it is sooner repealed. The Board has endeavored and will endeavor to interpret and apply the amendment strictly in accord with the intent of Congress . . . . In view of the destructive impact of the amendment upon the basic principles of the Act, however, the Board earnestly hopes that Congress will not find it necessary to continue the prohibition imposed upon it.12

Despite the pleas of the Board, Congress added much the same rider to the Appropriations Act of 1945. However, a few changes in favor of the Board were made. A phrase was inserted into the rider that would allow another three months for the filing of complaints after each contract renewal. Another clause removed contracts made by companies with company dominated unions from the rider's protection. Jaffe's "creative partnership between legislation and administration" seemed to emerge once again after a long hibernation.

It's interesting to note that, as before, the Board was very quick to assure Congress that it would not stray from Congressional guidance:

The Board has endeavored to give full effect to the
Congressional purposes in enacting the limitation. For example, when passage of the less restrictive limitation for fiscal year 1945 permitted the Board to proceed with a case which the previous limitation had barred, the Board, in the exercise of its discretion, abated for the period during which the limitation for fiscal year 1944 was in effect, back pay to discriminatorily discharged employees and reimbursements of dues and assessments checked off pursuant to the terms of an unlawful closed shop contract. 14

In using the rider to record a hard-fought victory, the opponents of the NLRA aided this study's understanding of delegation, illustrating once again the accountable interplay between the NLRB and Congress.

The Buck Stops Here: Appropriations

Possibly the most important control that Congress has over administrative agencies is control of the governmental purse strings. Through its control of appropriations, Congress is able to impress its will on an agency and may even force the agency out of existence by the mere negative act of failing to appropriate money. As a device for guaranteeing accountable agencies, the appropriating power of Congress has many possibilities.

One of the clearest examples of the use of appropriating power and its effects on agencies and agency personnel can be seen in the successful purge of the Economics Research Division of the NLRB and its Chief Economist, Dr. David J. Saposs.

There were two primary reasons for the Smith Special Committee's investigation of Saposs. First of all, it was charged that Saposs held, and formulated policy according to, socialistic philosophies. Secondly, it was felt that the Division headed by Saposs supplied so much expert testimony via its econo-
mists that the Board's proceedings were unfair to respondents. Two excerpts from the Smith Committee Majority Report document this analysis:

That a person of such definite Socialistic leanings as Saposs... should occupy a policy making position of trust... appears but another exemplification of indiscreet personnel management by the Board.\textsuperscript{16}

The record discloses that Saposs is employed to hold himself in readiness to supply, through himself or his staff, so-called expert testimony on any subject, at any time and in any case which the Board feels needs bolstering.\textsuperscript{17}

Regarding the first of these contentions, Senator Wagner responded:

...the real basis of the House objection was the individual who heads the particular division, David J. Saposs, because of some radical views he is alleged to hold. He vigorously denies holding such views. The House Committee felt that he ought not to be employed, and not being able to bring any other grounds for his removal, the Committee abolished the division in order to get rid of him.\textsuperscript{18}

With regards to the second contention, it should be noted that the Board was not the only agency that used the testimony of its own experts and trained specialists. One of the most common justifications for using administrative agencies in place of courts is that such agencies can provide the expert opinion in complicated and technical fields that the courts cannot.

Unimpressed with such rhetoric and logic, the Smith Committee began its search for statutory grounds on which to base the Division's elimination. The NLRA prohibited the Board from appointing individuals "for the purpose of statistical work where such service could be obtained from the Department of La-
bor." Dr. Isadore Lubin of the Bureau of Labor Statistics of that Department, testified before the Smith Committee that the Board's Economic Division did not duplicate the work of his Bureau and that in all cases where work was done for the Board a charge was made for that service. However, that explanation did not placate the majority of members in either the Smith or Appropriations Committees. In considering appropriations for the year ending in June, 1941, the latter Committee intimated that it could see no reason for a Division of Economic Research and that it expected the Division to be eliminated. Furthermore, in appropriating money for that year the Committee delivered a subtle hint to the Board by cutting the Board's fund request for the Division from $69,000 to $24,000. Thus, even though the NLRA pointedly omitted provisions for outlawing a division that did not duplicate the work of the Department of Labor, the Appropriations Committee unilaterally chose to effectuate the Economic Research Division's demise by whittling away its monetary resources.

The Board was placed in a difficult position. It could either obey the expressed will of Congress, as specified in the NLRA, and continue the Division, or acquiesce to the decision of the Appropriations Committee, the source of its funds and its lifeblood, and let the Division fade away.

The Board at first chose to follow the direct will of Congress as expressed in the NLRA. Instead of eliminating the Economic Research Division, the Board allowed it to function much as it had before, changing its name to the Technical Research Division on the grounds that its new name more accurate-
ly described its work.

The confrontation was hardly resolved, however. In October, 1941, the House of Representatives inserted the following provision in the Deficiency Appropriation Bill:

After the date of the enactment of this Act, none of the appropriation "Salaries, National Labor Relations Board, 1941" shall be obligated for the Division of Technical Service. Provided, that not to exceed $3,200 may be expended in performing those functions necessary to keep records and to make a report to Congress and to the President as required by Section 3(c) of the National Labor Relations Act. 19

The Board, finally put in a situation without options, bowed to Congressional control over its internal mechanisms.

To enemies of the Act and of the Board, the elimination of the Division was a major victory. The entire unwieldy weight of the legislative body had been put into action for the purpose of removing one man from the government payroll. The Board and its supporters were obviously in sympathy with the earlier formulated Minority Report for the Smith Committee regarding an amendment to remove Sapos as that was later rejected on the House floor.

Apparently the real explanation for the amendment proposed by our colleagues was the testimony in the record with reference to the economic philosophy of Dr. Sapos, head of the Economic Research unit. If the excerpts from his writings which were read into the record are a fair example of his views, we disapprove as strongly as our colleagues of a person entertaining such views holding an important position in the Government. We do not feel, however, that the abolition of a whole division performing a useful function is a logical way of dealing with the problem of one office holder whose views are abhorrent to our Committee. The record shows the importance of the economic data prepared by the Division. The use of such material is inherent in the case of remedial legislation, such as the National Labor Relations Act, which deals with incidents of economic and industrial strife. 20

Where attempted amendments had failed and limiting riders
were moderately successful, the appropriations device had clearly accomplished its goals. Regardless of the degrees of success these methods provided for the opponents of the NLRA and its Labor Board, they are important to our delegation study because they were mechanisms properly used to assure the NLRB's accountability. Unfortunately, this was not a return to normalcy, only a brief interlude with it.

2. Public Law No. 198, Section 8, July 5, 1935.


6. House Committee on Labor, Hearings to Amend the NLRA, 76th Congress 1st session, 1939, p. 1204.

7. Ibid., pp. 293-4.

8. Ibid., p. 414.


13. See Footnote 8, chapter 4.


15. Silver, Congressional Control, pp. 38-44.


17. Ibid., pp. 33-4.


19. Public Law No. 612, October 4, 1940.
CHAPTER 7
LAPSING BACK INTO UNCERTAINTY

Domestic Delegation

The interaction between Congress and the National Labor Relations Board offered a classic example of definitive delegation and agency accountability. In the larger context of the Depression and World War II eras, however, this example was virtually a strange mutation, somehow straying off the increasingly popular path of standardless delegation. The court, sporting seven new F.D.R. appointees, stood ready to approve innovative and less specific delegations to accommodate the needs of an economically unstable nation. The Congress, beginning to understand the inadequacies of its archaic structure in dealing with economic and international problems, grew less confident in its ability to cope with these demands and expediently sought to delegate decisions to other power centers, particularly administrative agencies and executive officials.

A case that can be viewed as one of the last strong links to the specific delegation time period is Opp Cotton Mills v. Administrator (1941). It was in this case that questions arose regarding the Fair Labor Standards Act which sought to raise the minimum wage to a 40¢ per hour limit "as rapidly as economically feasible without substantially curtailing employment." The Court upheld the Act against allegations that the expressed statutory requirements left the responsibilities assigned to the Administrator and the industry committee so vague and indefinite as to be practically without Congressional guide or control.

The Court held that where, as in the present instance,
the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow, and the record of its action which is required by statute to be kept or which is in fact preserved, are such that Congress, the courts, and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function by Congress.²

It was this accurately worded principle of accountability that deteriorated so rapidly in the cases to follow.

In Yakus v. United States (1944), the Court held that the Emergency Price Control Act did not involve any unconstitutional delegation of Congressional legislative powers in allowing the Price Administrator to fix prices in war time.³ Under the act the Administrator was authorized, after consultation with representative members of industry, to fix prices of commodities which "in his judgement will be generally fair and equitable and will effectuate the purpose of the Act" when, in his judgement, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of the Act." The Administrator was directed to give due consideration, so far as practical, to prices prevailing during a designated base period, and to make adjustments for relevant factors of general applicability. Although it held these standards to be specific, the Court introduced a frightening line of logic. To paraphrase Small, the Court intimated that Congress was not confined to that method of executing its policy which involved the least possible delegation of discretion to administrative officers, and consequently, a statute could not be successfully challenged simply because it allowed an administrator to determine facts, exercise judgement or formulate subsidiary policy.⁴ The Court had
seemingly reached an impasse; gone were the days of Field v. Clark's definitive statement that "The legislature . . . cannot delegate its power to make law." Moreover, the principles of the Yakus decision were not limited to that case. In Bowles v. Willingham (1944), the considerations which supported the delegation of authority under the Emergency Price Control Act of 1942 over commodity prices were declared to be equally applicable to sustain the delegation therein over maximum housing rentals.6

In Fahey v. Mallonee (1947), the Court upheld as constitutional Section 5(d) of the Home Owners Loan Act of 1933 which gave the Federal Home Loan Bank Board the following poorly defined powers:

(The Act grants full power to provide in the rules and regulations herein authorized for the appointment of conservators or receivers, to take charge of federal savings and loan associations, and to require an equitable adjustment of the capital structure of the same, and to release any such association from such control.8

In sustaining the statute, which was devoid of any explicit standards whatever, the Court went to great lengths to make clear that this decision would not necessarily govern the disposition of dissimilar cases. But by this time the trend of the Court's decisions in domestic delegation cases was unmistakeable; it was accepting less specific standards and bestowing greater concentrations of authority, including the seeds of per se law-making power.

**Foreign Affairs Delegation**

As early as 1813 with the Brig Aurora case and 1891 with
the Field v. Clark case, a type of delegation separate from domestic delegation in its origins but similar to domestic delegation in its results began to evolve: foreign affairs delegation. The case of Fong Yue Ting v. United States (1893) set up the philosophical parameters of such an approach:

While the United States is closely governed in its domestic affairs by the constitutional requirements of the federal system, in its dealings with other nations it must be in a position to speak and act as a nation among other nations. Thus, while it may exercise only its delegated powers in the field of international affairs, these delegations of power do not mark the limit of its authority to cope with international problems.

Several questions arise regarding such a doctrine. Is the power of Congress to deal with international affairs still a legislative power which cannot be delegated to the President? Does the maxim mentioned in the Hampton case, that delegated power cannot be redelegated, apply to the power over foreign affairs?

The Supreme Court set out to answer such questions by holding in the U.S. v. Curtiss-Wright Corp. case (1936) that no unconstitutional delegation of legislative power to the President was effected by the Joint Resolution of 1934. The Resolution provided that if the Executive found that prohibition of the sale of war munitions to the countries engaged in conflict in the Chaco (Bolivia and Paraguay) might contribute to the restoration of peace, and if, after consultation with other American Republics to attain their cooperation, he made a proclamation to that effect, it would be unlawful to sell, except under such limitations as the President prescribed, munitions to the countries then engaged in conflict, or to any one acting in their
behalf, until otherwise ordered by the President or Congress. The Court in upholding the Resolution, rejected arguments contending that these foreign affairs decisions were being left to the President's unfettered discretion, not controlled by any standard:

Not only, as we have shown, is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

U.S. v. Curtiss-Wright, like the preceding foreign affairs delegation cases, was exclusively external to the United States
in nature. The problem that started to arise in World War II, though, was that often the justification and authority given by the Court for external, foreign affairs delegation cases was applied to internal, domestic delegation cases as well. *Stewart & Bros. v. Bowles* (1944) was such a case. Normally, penalties in excess of those provided in a statute cannot be imposed administratively by officers enforcing the law. However, the Court in *Stewart* upheld a suspension order issued by the Office of Price Administration which denied the privilege of dealing in oil to a dealer who had violated rationing regulations, although express authorization for such a penalty was absent from the Second War Powers Act. The Court's decision was justified on the grounds that the suspension order was a means permissible under the statute for effectuating its objective: conservation of an essential war material. Thus, the Court interpreted a vague domestic delegation statute, that was being enforced in a war situation, as if it were a foreign affairs type delegation, sacrificing a domestic legal standard in the process.

*Lichter v. United States* (1948) was accorded similar analysis. The undefined term, "excessive profits" contained in the first Renegotiation Act of 1942, which authorized recovery of such profits by the United States, was held by the Court to constitute an adequate definition of legislative policy and standards, and was deemed sufficient to sustain this Act against the challenge of unconstitutional delegation of legislative power to administrative officials. Although there was a history of administrative practice to substantiate the Court's decision, it still relied partially on the national emergency justification: in
time of war, the Constitution was not to be construed in a manner that would hinder rather than assist the populace in defending their nation. Once again the rationale of foreign affairs delegation was used to help resolve a case fundamentally dealing with domestic delegation.

The Supreme Court's changing attitudes combined with increasing Congressional deference to the decisions and practices of administrative agencies and executive officials created a foundation for the mixing of domestic and foreign affairs delegation principles during World War II and the subsequent Red Scare era. All the necessary components were now present for constructing delegation's Frankenstein—The Central Intelligence Agency.
2. Small, Congressional Delegation, p. 22.
8. Small, Congressional Delegation, p. 28.
10. Fong Yue Ting v. United States, 149 U.S. 698 (1893).
Case Study: The Central Intelligence Agency

For nearly twenty years after the Second World War, a fear pervaded American consciousness—the fear of Communism. This fear, reinforced by the experiences of World War II, particularly the Pearl Harbor attack, stimulated a recognition within government that it was essential to create a centralized body to collate and coordinate intelligence information. The make-shift Office of Strategic Services (OSS) had simply become outmoded and friction between competing military intelligence services fragmented the quality of intelligence endeavors.

There was considerable disagreement over what the structure and authority of the postwar intelligence service should be.¹ President Truman and his senior advisors concluded that, unlike the OSS, this centralized body should be civilian in character. The military, on the other hand, strenuously opposed any such plan, particularly because America's competing intelligence assets were virtually all in the armed services. Ironically, the military's opposition to diminishing its authority over intelligence was equaled only by the State Department's reluctance to accept any greater responsibility or role in the field of clandestine operations.

Nevertheless, six months after V-J Day, and three months after he had disbanded the OSS, President Truman established the Central Intelligence Group (CIG), the direct predecessor of the CIA. The CIG's existence was brief, however, as it never was
able to overcome the constraints and institutional resistances found in the National Intelligence Authority, an overseeing body consisting of the Secretaries of State, War and Navy and their representatives.

Out of the confusion that ensued, a statutory monstrosity arose, codifying standardless delegation and effectuating a breakdown of Constitutional values—The National Security Act of 1947. Though largely concerned with the creation of the National Security Council (NSC) and the unification of the military services within the Departments of Defense, the Act also created a Director of Central Intelligence (DCI) and a Central Intelligence Agency (CIA). Regarding the CIA specifically, the Act was nothing short of open-ended:

It shall be the duty of the Central Intelligence Agency, under the direction of the National Security Council

1. to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security;

2. to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;

3. to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using, where appropriate, existing agencies and facilities;

4. to perform, for the benefit of existing intelligence agencies, such additional services of common concern as the National Security Council determine can be more efficiently accomplished centrally;

5. to perform such other functions and duties related to intelligence affecting the national securi-
ty as the NSC may from time to time direct 3

The lack of guidelines was astounding: the Agency was authorized to carry out unspecified "services of common concern" and, more importantly, could "carry out such other functions and duties" as the National Security Council might direct. In time, both Congress and the President sought to place parameters on the CIA's standardless powers by using the conventional channels of appropriation, investigation and direct oversight. But the increasing use of delegation without guidelines had eroded the effectiveness of such checks to the point that the CIA was virtually unaccountable to the American people.

**Appropriations: A Hole in the Purse**

As the preceding NLRB case study forcefully illustrated, the power of the purse often served as Congress' trump card. The Founding Fathers considered accountability by means of appropriations of such great importance that they wrote in the Constitution:

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.4

Thus, it was not only rampant delegation, but a significant rejection of Constitutional norms as well that evolved when Congress legislated the National Security Act of 1947, accepting the following clause:

Notwithstanding any other provision of law, sums made available to the Agency by appropriations otherwise may be expended for purposes necessary to carry out its functions.5

More difficult to comprehend was later Congressional support for
the even broader wording of the Central Intelligence Agency Act of 1949, which gave the Director of Central Intelligence the option of:

(expending funds) without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of confidential, extra-ordinary or emergency nature, such expenditures to be accounted for on the certificate of the Director.6

The possibilities for abuse under such carte blanche delegation were frighteningly limitless. One startling example of what the CIA did with Congressional funds was documented by Marchetti and Marks, two former CIA agents:

CIA mercenaries or CIA-supported foreign troops need air support to fight their "secret" wars, and it was for just this purpose that the agency built a huge network of clandestine airlines which are far and away the largest and most dangerous of all the CIA proprietaries.

Incredible as it may seem, the CIA is currently the owner of one of the biggest—if not the biggest—fleets of "commercial" airplanes in the world. Agency proprietaries include Air America, Air Asia, Civil Air Transport, Intermountain Aviation, Southern Air Transport, (DELETED) and several other air charter companies around the world.7

These CIA squadrons, unknown and unaccountable to any civilian or governmental authority, were used in "intelligence programs" including (A) the transportation of arms for Operation Phoenix (which according to the CIA's own figures was responsible for 20,587 North Vietnamese civilian deaths) and (B) the alleged trafficking of heroin from Southeast Asia to the U.S.8

But airlines were not the CIA's only claim to financial impropriety. CIA funds have been used to support the needs of other agencies without Congressional review or consent:

There have been times when the fund has been used
for the highly questionable purpose of paying expenses incurred by other agencies of government.

In 1967 Secretary of Defense Robert McNamara promised Norwegian officials that the U.S. government would provide them with some new air-defense equipment costing several million dollars. McNamara subsequently learned the equipment was not available in the Pentagon's inventories and would have to be specially purchased for delivery to Norway. He was also informed that, because of the high costs of the Vietnam war for which the Defense Department was then seeking a supplemental appropriation from Congress, funds to procure the air-defense equipment were not immediately at hand. Further complications arose from the fact that the Secretary was then engaged in a disagreement with some members of Congress over the issue of foreign military aid. It was therefore decided not to openly request the funds for the small but potentially sticky commitment to the Norwegians. Instead, the Pentagon asked the CIA (with White House approval) to supply the money needed for the purchase of air-defense equipment. The funds were secretly transferred to the Defense Department.

Another example of financial impropriety just as destructive to accountable government as was the secret transfer of funds from the CIA to other agencies found documentation in the Marchetti and Marks work:

The agency has tended to play fiscal games that other government departments would dare not engage in. One example concerns the agency's use of its employee retirement fund, certain agent and contract-personnel escrow accounts, and the CIA credit union's capital, to play the stock market. With the approval of the top CIA leadership, a small group of senior agency officers has for years secretly supervised the management of these funds and invested them in stocks, hoping to turn a greater profit than normally would be earned through the Treasury Department's traditional low-interest but safe bank deposits and bond issues.

Because of its dealings and independence, the CIA, in terms of financial assets, was not only more affluent than its official annual budget reflected, it was one of the few federal agencies that had no shortage of funds:
In fact, the CIA has more money to spend than it needs. Since its creation in 1947, the agency has ended almost every fiscal year with a surplus—which it takes great pains to hide from possible discovery by the Office of Management and Budget (OMB) or by the congressional oversight subcommittees. The risk of discovery is not high, however, since the OMB and the subcommittees are usually friendly and indulgent when dealing with the CIA. Yet, each year the agency's bookkeepers, at the discretion of the organization's top leadership, transfer the excess funds to the accounts of the CIA's major components with the understanding that the money will be kept available if requested by the director's office. This practice of squirrel ing away these extra dollars would seem particularly unnecessary because the agency always has some $50 to $100 million on call for unanticipated costs in a special account called the Director's Contingency Fund.  

All factors considered, three consequences can be gleaned from the CIA's activities subsequent to Congress' initial standardless delegation. First of all, Congress was unable to pinpoint CIA programs it did not like and eliminate them by withholding funds as it did with the NLRB's Economic Research Division. Secondly, the possibility existed that Congressional funds might be used for other agency's programs which Congress had rejected or not specifically approved. Thirdly, the CIA, through its business prowess, was accumulating funds of its own so that even if Congress reestablished itself as keeper of the purse, the agency would have options other than complete compliance with legislative mandates. Use of appropriations was not the tool to guarantee accountability.

Investigation: One Hand Clapping

What Congress intended to create with its legislation in 1947 and 1949 seemed overwhelmed by what it actually wrought. The record clearly suggests that the legislative intent in 1947
was to create an agency for the collection, evaluation, analysis, interpretation and communication of information on foreign affairs to decision makers. Congress did not intend in 1947 to create an agency for covert political operations. The 1949 legislation was somewhat ambiguous in this regard, for in giving the Director of Central Intelligence a great deal of discretionary authority for the secret expenditure of funds it removed the CIA from the usual requirements for disclosure of personnel, methods and expenditures. It is not clear that Congress as a whole realized what was being given up in 1949 and for what purpose. It would seem that the purpose was in part covert operations; similarly it would seem that Congress was deceived in this regard.\textsuperscript{12}

Congress sought to correct its perceptive deficiencies with regard to the CIA through various committee investigations. Senator Howard Baker's comment as to the success of such investigations was instructive:

\begin{quote}
I do not think there is a man in the legislative part of government who really knows what is going on in the intelligence community.\textsuperscript{13}
\end{quote}

The legislator's failure to grasp the intricacies of the CIA's workings must be viewed in a more comprehensive perspective, however. For, in their attempts to deal with the results of their vague delegations, Congressmen faced the formidable combination of agency secrecy and Congressional archaic structure:

Congress has a committee structure for monitoring the intelligence community. It would appear that certain types of intelligence information are in fact given only to the chairman and ranking minority member of these committees; the other members
appear to be both somewhat complacent and decidedly reticent. A sharp view of this situation has been expressed by Congressman Drinan, who asserted in 1973: 'The senior members of the House and of the Senate have conspired to prevent the younger members of the House and Senate from knowing anything about the CIA.' And the Director of Central Intelligence testified in 1973 that 'the appropriations arrangements [for the intelligence budget] are in accordance with the wishes of the Appropriations Committees.'

The result of these encumbering traditions and adaptations was that the investigatory process of Congress provided little assistance to attempts at imposing some semblance of accountability on CIA activities. Despite investigations of such involvements as the Cuban missile Crisis, the Pueblo incident, the secret war in Laos, the secret funding of Radio Free Europe and the CIA role in Watergate-related matters, one fact remained unaltered: of the more than 200 bills introduced to expand Congressional control over the intelligence community, not one was enacted. It was no wonder that Senator Stuart Symington observed: "There is no federal agency in our government whose activities received less scrutiny than the CIA." The scrutiny usually evidenced by Congressional investigations was obvious in its absence as legislators failed once again to provide greater CIA accountability.

Direct Control--Feast or Famine?

It was commonly thought that the President would succeed where Congress failed. On face value, such a belief seems sensible: if the President represents people who want CIA accountability and the President has the power to insure CIA accountability by virtue of his position as head of the NSC, then CIA accountability to the people will be effectuated
through the Presidency. However, less superficial analysis of
the logic of such an argument reveals two weak underlying assump-
tions: (1) that the President will represent the people at the
expense of his own policy initiatives and (2) that the President
gains enough power over the CIA to insure compliance with his
directives simply by virtue of his NSC position.

The President, although probably the individual most able to
compel CIA reform and accountability, is also least likely to do
so for the simple reason that in the CIA he has a potent inter-
national tool:

Nowhere in the 1947 Act was the CIA explicitly em-
powered to collect intelligence or intervene se-
cretly in the affairs of other nations. But the
elastic phrase, 'such other functions,' was used
by successive presidents to move the Agency into
espionage, covert action, paramilitary operations,
and technical intelligence collection. 17

Reportedly Nixon luxuriated in his ability to control the fate of
other nations, as his policy directives regarding Allende and
Chile illustrated:

Like Caesar peering into the colonies from distant
Rome, Nixon said the choice of government by the
Chileans was unacceptable to the president of the
United States. The attitude of our chief execu-
tive seemed to be: If—in the wake of Vietnam—I
can no longer send the Marines, then I will send
the CIA. 18

Policy initiatives of a President may therefore hamper his
motivation to seek CIA accountability. But the question remains:
Just how able is the President to mandate CIA accountability?
Two excerpts from the New York Times illustrate the CIA's defi-
ance of even the chief executive's orders:

--The Central Intelligence Agency maintained a se-
cret poison arsenal and developed sophisticated
hardware to deliver the toxins despite a presiden-
tial order to eliminate the poison stockpile.\textsuperscript{19}

--U.S. intelligence agencies ignored a presidential order revoking a plan authorizing illegal domestic spying, according to Senate Intelligence Committee Chairman Frank Church.

'The decision of the President seemed to matter very little,' said Church, D-Idaho.\textsuperscript{20}

The CIA, as the embodiment of delegation run riot, absorbed with intimidating ease the best shots that Congress and the President could muster from their Constitutional arsenal in support of after-the-fact standards and accountability. The truly sad consequence of such a clash was that in overwhelming Constitutional safeguards, standardless delegation seriously damaged fundamental American principles and images as well. As an example of changing perceptions caused by unaccountable delegation, consider the following passage:

> It is a multi-purpose, clandestine arm of power... more than an intelligence or counterintelligence organization. It is an instrument for subversion, manipulation and violence, for the intervention into the affairs of other countries.\textsuperscript{21}

In 1961, it was clear that this statement by CIA Director Allen Dulles referred to the KGB, Russia's intelligence agency. Today, in 1978, such a distinction is not immediately possible.
NOTES


2. The NSC has only four statutory members: the President, the Vice President, and the Secretaries of State and Defense. The Director of Central Intelligence (DCI) and the Chairman of the Joint Chiefs of Staff often attend as advisors.


5. 61 Stat. 497.

6. 63 Stat. 208 (This is known as the Director's Contingency Fund.).

7. Marchetti and Marks, *The CIA and the Cult of Intelligence*, pp. 149-160.

8. Ibid.

9. Ibid., pp. 79-80.

10. Ibid., p. 80.

11. Ibid., pp. 78-79. (See also footnote 6.).

12. Fain, *The Intelligence Community*, p. 520.

13. Ibid., p. 519.


15. Ibid.

16. Ibid.

17. Ibid., p. 15.

18. Ibid., p. xxii.


CHAPTER 9

THE DEATH OF THE AMERICAN REPUBLIC?

The Central Intelligence Agency's contribution to the breakdown of American Constitutional values and principles should not be looked upon as an isolated instance but rather as an example of a much more widespread problem. The very structure of traditional American political interaction has been greatly altered as standardless delegation has become ever-increasingly established in our perceptions and our laws.

No longer can we look to the Truman model, presented in Chapter 1, as being reflective of American political systems. Well-organized, powerful interest groups look not to the Congress, President or Supreme Court as being the "most formally powerful institutionalized group in society," but instead turn to that small, unaccountable sector of real power allocators: the administrative agencies and executive officials.

Our study has shown that such unaccountable agencies are always potentially vulnerable to advances from and manipulation by vested interest groups other than the electorate. These interest groups can be economically motivated (the railroad interests and the ICC), politically oriented (Nixon and the IRS) or even internally spawned (the Director of Central Intelligence and the CIA). In delegation fun riot's system of politics, allocating power is not structured around established "rules of the game"; instead power begets power.

One fortunate aspect of the agency system is that it is still fragmented to the extent that large-scale manipulation is
beyond the resources of most interest groups. Thus, the principles behind the "rules of the game" are still intact to an extent. However, skillfully placed influence and/or manipulation can virtually erase the fragmentation obstacle.

For example, consider the fact that delegation run riot has not been an agency phenomenon exclusively. Our case studies illustrated increased delegation of power to executive officials as well. Over the past several decades, the President's personal advisory staff has expanded greatly, and individuals like the National Security Advisor have become more independent as Cabinet members and other more traditional executive official have gained greater liberties. Such powerful, yet independent and unaccountable individuals are inviting prey for the most powerful interest groups in society, for their goal is to obtain direct access to the Chief Executive. It has been argued that David Rockefeller realized this political scheme and in order to promote policies and legislation that would establish greater trade and interaction between the U.S., Japan, and West Germany (and thus insure his investments and banking interests) he created what is known as the Trilateral Commission prior to the 1976 election. The Commission, which consisted of 200 of the leading industrial and political leaders in this country, sought to create proposals to effectuate after the '76 election and endeavored to insure that the new presidential administration would indeed implement them. A look at the names of some of the members of the Commission is a chilling testimony to its success: Jimmy Carter (President), Walter Mondale (Vice President), Zbigniew Brzezinski (National Security Adviser), Cyrus Vance (Secretary of State), Harold
Brown (Secretary of Defense), and Michael Blumenthal (Secretary of the Treasury).

The mere possibility that such a situation could exist, if it does not already, should be cause for serious reevaluation of political systems theory in America. Delegation run riot has wrought the possibility that the highest officials in the land might be accountable only to the most powerful interest groups. Three observations can be made about this state of affairs. First of all, it may be too late for Congress to reverse the present trend of delegation run riot. Even if the Federal Legislature was to limit every future statute in every possible detail, present organs of standardless delegation might never succumb to such limitations. Secondly, if administrative agencies and executive officers survive as it seems they will, political theory should account for them—they constitute a fourth branch of government. Thirdly, if the American Republic is to survive the emergence of a fourth branch of government, a new system of checks and balances must be devised.

Much like another republic 2000 years ago, the American Republic is in jeopardy. Adaptability can determine whether history is a mere teacher or a foreboding prophet.
TABLE OF CASES

Associated Press v. NLRB, 301 U.S. 103 (1937)
Avent v. United States, 266 U.S. 127 (1924)
Bowles v. Willingham, 321 U.S. 503 (1944)
Brig Aurora, The, v. United States, 7 Cranch 382 (1813)
Buttfield v. Stranahan, 192 U.S. 470 (1904)
C. W. & Z. Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. 77 (1852)
Fahey v. Mallonee, 332 U.S. 245 (1947)
Field v. Clark, 143 U.S. 649 (1891)
Fong Yue Ting v. United States, 149 U.S. 698 (1893)
Hampton v. United States, 276 U.S. 534 (1928)
Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 395 (1934)
ICC v. All Alabama Midland Ry. 168 U.S. 144 (1877)
Lichter v. United States, 334 U.S. 742 (1948)
Morehead v. New York ex rel Tipaldo, 298 U.S. 587 (1936)
Nat. Broadcasting Co. v. United States, 319 U.S. 190 (1943)
NLRB v. Freuhauf Trailer Co., 301 U.S. 49 (1937)
NLRB v. Friedman-Harry Marks Co., 301 U.S. 58 (1937)
NLRB v. Jones and Laughlin Steel Corporation, 301 U.S. 1 (1937)
Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941)
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)
Schechter Corp. v. United States, 295 U.S. 490 (1936)
Steuart & Bros. v. Bowles, 322 U.S. 398 (1944)
Union Bridge Co. v. United States, 204 U.S. 364 (1907)

United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936)


Washington, Virginia and Maryland Coach v. NLRB, 301 U.S. 103 (1937)

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

Yakus v. United States, 321 U.S. 414 (1944)
BIBLIOGRAPHY


Marchetti, Victor and Marks, John D. The CIA and the Cult of Intelligence. New York: Dell, 1974.


United States House of Representatives Report 1902. 76th Congress 3rd Session, 1940.


