DELEGATIONS TO ADMINISTRATIVE AGENCIES UNDER THE N. I. R. A. AND THE A. A. A.*

INTRODUCTION

It is necessary, at the outset, to qualify this discussion of delegation of legislative power to administrative agencies under the N. I. R. A.[1] and the A. A. A.[2] It is highly doubtful for one thing, if the precedents will avail much in attempts to predict the constitutional status of these acts. Manifestly the amount of work done and the success of those efforts up to the time the test cases reach the Supreme Court, and the consequences of declaring the codes, licenses, and marketing agreements unconstitutional, will influence that court in its decision. The declaration that "a national emergency productive of widespread unemployment and disorganization of industry . . . is declared to exist"[3] may in itself furnish the basis for sustaining the validity of the recovery legislation upon the unusual grounds of emergency.

It is advisable, further, to eliminate the question as to whether or not there is, in a realistic sense, a delegation of legislative power. For that would not settle the question. It would be difficult to assert that allowing administrative officers to regulate future activities in forest preserves[4] or to suspend tariff provisions and substitute new ones[5] is not to permit them to legislate. The analysis here will be confined to the question of whether the delegations are proper within the doctrine of previously decided Federal cases.

HISTORY

The constitutional law principle that the legislature cannot delegate its powers to the executive department has no basis in express language of the Constitution, but derives "largely from the language of the Constitution . . . by which legislative power is vested in the legislative body, or on the proposition that the government is a representative democracy wherein the people have divested themselves of all legislative power and cannot resume it without a change in the fundamental law."[6] It is a corollary of the theory of separation of powers.

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* A recent note on the constitutional problems involved in the recovery legislation, including the delegation of legislative power, appears in (Nov. 1933) 47 Harvard Law Review 93.

[1] Act of June 16, 1933, 48 Stat. 191, 15 U. S. C. A. 701 (Supp. 1933).

[2] Act of May 12, 1933, 48 Stat. 31, 7 U. S. C. A. 601 (Supp. 1933).

[3] N. I. R. A., sec. 1.

[4] United States v. Grimaud (1911) 220 U. S. 506.

[5] Field v. Clark (1892) 143 U. S. 649.

[6] See: Duff and Whiteside, Delegation of Power (1929) 14 Cornell Law Quarterly 168, for a discussion of the general theory and history of delegation.

The first venture of Congress into the debatable field of legislative delegation of power, was in 1794, when President Washington was given the power, when in his opinion public safety should so require, "to lay an embargo on vessels and revoke the same whenever he shall think proper."[7] This statute was never questioned as delegating the legislative power to the executive. The first controversy to reach the Supreme Court was the *Brig Aurora* case, which involved the power of Congress to make the revival of the Non-Intercourse Acts of March 1, 1809, depend upon a proclamation of the President that Great Britain and France had not revoked or modified certain edicts which violated rights of American neutrality.[8] Although counsel for the appellant contended in this case that to make the revival of a law depend upon the President's proclamation is to give that proclamation the force of law, and so to transfer legislative power to the President, the Supreme Court, speaking through Mr. Justice Johnson, declared that it could see no reason why the legislature could not revive the acts "either expressly or conditionally, as their judgment shall direct."[9] In the opinion there is no consideration of the later developed rule against delegation of the legislative power.

It was in the case of *Field v. Clark*[10] that Mr. Justice Harlan declared the doctrine against legislative delegation in the form now recognized, although the court held in that case that an act giving the President the power to suspend tariff provisions relating to free introduction of certain foreign commodities if he found foreign levies to be "reciprocally unequal and unreasonable" was not a delegation of legislative power." It was stated in the opinion that not only had Congress laid down an intelligible rule for the executive to follow, but that "the true distinction is between delegation of power to make a 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.[11]

Since the decision in *Field v. Clark*, which was decided in 1892, the Supreme Court, in the cases in which the question of delegation has arisen, has been content to state the quoted principle, only for the purpose of asserting its inapplicability to the particular case in controversy. In *First National Bank v. Union Trust Company*,[12] the Court said, "The contention that the au-

[7] 1 Stat. 372.
[8] Aurora v. United States (1813) 7 Cranch 382.
[9] *Ibid.*, l. c. 388.
[10] N. 5, above.
[11] *Ibid.*, l. c. 653; quoted from Cincinnati, W. and Z. R. R. Co. v. Clinton County Commissioners (1852) 1 Ohio St. 88.
[12] (1917) 244 U. S. 416.

thority was void because of conferring legislative power on a board (in this case the Federal Reserve Board) is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them." In the *Selective Draft Cases,* the Supreme Court asserted that "the contention has been so completely adversely settled as to require reference only to some of the decided cases."[13] The most recent case in which the problem was considered at any length is *Hampton & Co. v. United States* (1928), which involved the "flexible tariff" clause of the Tariff Act of 1922.[14] Quoting the rule announced in *Field v. Clark,* the Court proceeded to show that the discretion of the executive was only as to facts which Congress had not the ability to determine, and that to deny Congress the power to make such a delegation would be to deny it the means to make effective its express authority over foreign trade.

From the standpoint of execution of the delegated functions, the legislation may be placed into two categories. On the one hand there is the type of delegation in which the enforcement of a law depends upon fact-finding by an executive.[15] The *Brig Aurora* case, above quoted, is illustrative of this. On the other hand, there is the type in which the Congressional Act is to be amplified by executive rules and regulations whose formulation involves an exercise of discretion. Such a case was *United States v. Grimaud,* which considered legislation providing for the establishment and improvement of forest reserves by the Secretary of Agriculture, who had power under the law to make necessary regulations to effectuate the legislative purpose.[16]

NECESSARY ELEMENTS

The first thing that an Act of Congress of the sort here in question must do is to indicate from its language a policy or purpose for delegation. When the delegation is of fact-finding no difficulty is involved because the Supreme Court has been willing to concede that the executive may be required to determine when a situation calls for measures designated in the law (as a change in attitude towards violation of neutral rights).[17] But by judicial interpretation it seems that no demand is made for a more definite purpose in general delegations. The Supreme Court has held that

[13] United States v. Stephens (1918) 247 U. S. 504.

[14] 276 U. S. 394.

[15] See, Note (1933) 31 Michigan Law Review 786 for a detailed case analysis.

[16] The regulation involved in the Grimaud case, n. 4, above, was a prohibition against grazing of sheep on certain forest reserves without a government permit.

[17] Aurora v. United State, n. 8, above.

the "elimination of undesirable residents of the United States" is standard enough for the Secretary of Labor to act in deporting aliens;[18] that the freeing of navigation from unreasonable obstructions arising from defective bridges is sufficient to give such power to the Secretary of War;[19] that the fixing of reasonable rates to be charged by interstate carriers is a power delegable to a commission;[20] that the standard of "public interest" is sufficient to allow the Interstate Commerce Commission to approve acquisition of control of one carrier by another.[21]

In the second category, other general criteria are defined beyond which the executive may not go. In the *Grimaud* case, the Secretary of Agriculture could make rules to insure the "objects of such reservations; namely, regulate their occupancy and use, and preserve forests thereon from destruction."[22] Usually before the executive establishes any regulation (as tariff changes) he is required to provide an opportunity for interested parties to be heard.[23]

SHIFT OF EMPHASIS

It is apparent from a survey of these cases that there is a remarkable tendency to shift emphasis from the theory of delegation to *necessity for* delegation. This fact is obviously important to the N. I. R. A. and A. A. A. because in these acts the need for concentrated authority and power is manifest. One writer has reached the extremity of saying that the question is not whether there is an unlawful delegation, but whether it was Congress' *duty* to delegate in the specific case.[24] There are, it seems, two reasons for this tendency. One is that "In order to legislate intelligently and in detail members of Congress individually must know more things and know them more accurately and intimately than is humanly possible;"[25] the other, that legislation has to depend often on certain contingencies, as in the *Hampton case,* which are likely to occur during a time when the legislature is not in a position to function, or to function rapidly. It would be difficult to assert that these two factors do not characterize

[18] United States v. Williams (1904) 194 U. S. 279.
[19] Union Bridge Co. v. United States (1907) 204 U. S. 364.
[20] Interstate Commerce Commission v. Goodrich (1912) 224 U. S. 194.
[21] In Securities Corporation v. United States (1932) 224 U. S. 194, it was said, with reference to "public interest" that "it is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations."
[22] United States v. Grimaud, n. 4, above; l. c. 507.
[23] Hampton v. United States, n. 14, above.
[24] Cheadle, Delegation of Legislative Functions (1918) 27 Yale Law Journal 892.
[25] *Ibid.*, l. c. 892.

the problems which the N. I. R. A. and A. A. A. are calculated to meet.

Consequently, although the Supreme Court has not explicitly recognized this change, the formula announced in *Field v. Clark*, as Handler suggests, ". . . is an empty one. Actually every delegation by Congress, no matter how broad, has been sustained by the courts."[26] If the "elimination of undesirable residents of the United States" furnishes a sufficiently definite criterion for the Secretary of Labor to follow, it is difficult to conceive of any basis more indefinite on which to overthrow a delegation.[27]

POLICY OF CONGRESS UNDER THE N. I. R. A. AND A. A. A.

The most significant difference between the delegations in the N. I. R. A. and A. A. A. from previous delegations, is in their vastly increased scope and extent. Practically all the delegations included find some basis of precedent to sustain them individually. Unquestionably, because of the need to relieve grave economic distress, Congress has gone far in placing authority in the hands of a few in an attempt to cope with depression problems.

The general policy of Congress in conferring power on the President under the N. I. R. A. is declared to be "to remove obstructions to the free flow of interstate and foreign commerce . . .; and to provide for the general welfare" by organizing industry and trade groups for cooperative action, elimination of unfair competitive practices, and increasing both purchasing power and employment.[28] Similar purposes are outlined in the A. A. A. to establish a balance between production and consumption of agricultural commodities, to provide favorable marketing conditions, to reestablish an agricultural purchasing power, and to extend foreign markets.[29] It seems apparent that so far as the declaration of legislative policy is concerned, Congress has provided a declaration that is tenable within the purview of the past Supreme Court decisions. As previously indicated, this is as definite as the Secretary of Agriculture's power over forest reservations "to improve and protect forests within reservations and secure favorable conditions of water flows,"[30] or the Interstate Commerce Commission's power over the distribution of coal "in the case of emergencies."[31] More specific guides, as will be shown, are laid down for particular delegations.

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[26] Handler, National Industrial Recovery Act (1933) 18 American Bar Ass'n Journal 440; l. c. 446.

[27] Avent v. United States (1924) 266 U. S. 127.

[28] N. I. R. A., sections 1 and 3.

[29] A. A. A., sec. 2.

[30] United States v. Grimaud, n. 4, above.

[31] Avent v. United States, n. 27, above.

For purposes of convenience and clarity, it is better to undertake an examination of the specific delegations to which Congress has resorted by classifying them into several categories. While these necessarily are not wholly separable, three clear divisions are: (1) Powers of providing administrative agencies and processes; (2) powers operating directly upon private persons, partnerships, and corporations; (3) powers operating by means of penalties for violation of administrative rules and regulations.

POWERS AFFECTING ADMINISTRATIVE PROCESSES

Under the first classification there is little judicial authority upon the power of Congress to authorize the executive to prescribe the comprehensive administrative scheme. Under the N. I. R. A. the "President is . . . authorized to establish such agencies, . . . to appoint, without regard to provisions of civil service laws, such officers and employees . . . as he may find necessary, to prescribe their . . . duties, and tenure," and to fix their compensation as he may see fit, to effectuate the policy of the Act.[32] He may delegate any of his functions and powers to officers and research agencies to help carry out his functions.[33] A somewhat analogous situation was presented by the Reconstruction Acts during the post-Civil War days when President Johnson, by act of Congress, was given power to establish military government in the Southern states.[34] The Supreme Court in cases involving these statutes held the question of delegation to be a political one and without the cognizance of the judiciary—particularly since no property rights were involved. In other cases considering delegation of the legislative power on the "necessity" basis, Congress was held to be "compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."[35] If broad delegations of this type can be sustained, nothing prevents authorization of a further delegation of power by the President to administrative agencies established by him.

Similar to the President's power outlined above, is that of the Secretary of Agriculture under the A. A. A. He "may appoint such officers and employees, . . . and such experts as are necessary to execute the functions vested in him by this title" without regard to the civil service laws or regulations.[36] He has certain

[32] N. I. R. A., sec. 2(a).
[33] N. I. R. A., sec. 2(b).
[34] Mississippi v. Johnson (1867) 4 Wall. 475.
[35] Buttfield v. Stranahan (1903) 192 U. S. 470, l. c. 496. In the statute under consideration the Secretary of the Treasury was given authority to exclude importation of impure tea.
[36] A. A. A., sec. 8.

other criteria which he must observe. Salaries are limited to $10,000; provisions of the Classification Act of 1923 must be followed.[37] To avoid any technical conflict which may arise in the administration of the two Acts, Congress has given the President the further power to delegate any of his functions under the N. I. R. A. to the Secretary of Agriculture.[38]

The other delegation of this type is given the Federal Emergency Administrator of Public Works under section 201 of the N. I. R. A., who is empowered to institute an administration whose function it is to prepare a comprehensive program of public works. For criteria, projects are included "among other things"[39] for highway construction and repairs, public buildings, conservation of resources on land and water, and drainage improvements.[40] Financing to carry out the public works prescribed is an incidental power to the program itself.[41] The necessity of experienced agencies to investigate and prepare plans, the profound effect in providing labor for unemployed, and the extent to which work on these approved programs has been carried, seem to militate against the possibility of a judicial declaration of unconstitutionality so far as public works are concerned.

POWERS AFFECTING INDIVIDUALS

It is under this second classification that the government has come to affect, more intimately than ever before, the activities of the industrial organizations. Here are found the powers relating to codes, licenses, oil regulation, and finance.

By virtue of his power to prescribe "codes of fair competition," the President in effect, may control the actions of industries whose activities affect interstate commerce. However, the President has to be limited by a number of criteria sufficiently definite that "he can carry out the legislative will."[42] Before approving a code, the President must be satisfied of the following conditions:

(1) That all interested groups have a right to be heard in forming the code.[43] This has been accomplished through the appearance of parties representing private interests, who are interested in a particular code, and through the development of government agencies, including the Labor Board, the Consumers' Board, and the Producers' Board. These agencies were established under the law by the President and his Administrator to advise them with respect to industrial conditions which might affect the provisions of any code.

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[37] A. A. A., sec. 10(a).
[38] N. I. R. A., sec. 8(b).
[39] N. I. R. A., sec. 202.
[40] N. I. R. A., sec. 202.
[41] N. I. R. A., sections 204 and 205.
[42] Mahler v. Eby (1924) 264 U. S. 32.
[43] N. I. R. A., sec. 3(a).

(2) That the code is "not designed to promote monopolies or to eliminate or oppress small enterprises."[44]

(3) That the code effectuates the policy of the Act.[45]

(4) That: "Associations submitting codes impose no inequitable restrictions on admission to membership" and represent their trade.[46]

(5) That the code, as submitted, contains the basic labor provisions outlined in the Act.[47]

All these limitations are general in nature, but necessarily so, because each industrial group requires specific attention to meet its needs. Congress cannot be expected to be acquainted with conditions in each trade, large or small, to the extent that it could rationally prescribe its hours of labor, its wages, etc. Much difficulty is avoided by making these agreements voluntary;[48] nevertheless, if any industry is operating contrary "to the public interest" and policy of the act, the President, upon his own motion, "may prescribe and approve a code of fair competition for such trade or industry . . ., which shall have the same effect" as any voluntary code,[49] subject to a few incidental limitations. The President, however, can do this only when there has been given an opportunity for public notice and hearing (as in the case of the oil and steel industries).[50] It is highly probable that the Supreme Court will first adjudicate the constitutionality of the N. I. R. A. through considering those disputes arising from the imposition of an involuntary code. Assuming that Congress itself has the power to regulate industry in the manner attempted in the codes (a separate constitutional question), the criteria seem definite enough to meet any requirements the Supreme Court has established. This would not seem to be a delegation of legislative power "in any real sense"[51] or "in any real constitutional sense."[52] To deny the validity of the delegation would be to deny Congress efficacious means to execute its power.

Resting upon the same constitutional bases as the code provisions are the licensing powers of the President under the N. I. R. A.[53] Whenever he finds destructive wage or price cutting "or other activities contrary to the policy of the Act," "after such

[44] N. I. R. A., sec. 3(a).
[45] N. I. R. A., sec. 3(a).
[46] N. I. R. A., sec. 7(a).
[47] N. I. R. A., sec. 7(a).
[48] N. I. R. A., sec. 3(a); sec. 4(a).
[49] N. I. R. A., sec. 3(d); sec. 7(c).
[50] N. I. R. A., sec. 3(d); sec. 7(c).
[51] Field v. Clark, n. 5, above.
[52] Union Bridge Co. v. United States, n. 19, above. See, Wickersham, Delegation of Power to Legislate (1925) 11 Virginia Law Review 183.
[53] N. I. R. A., sec. 4(b).

public notice and hearing as he shall specify," he can, as a condition to continuing a trade or industry, require it to obtain a license.[54] He may require importers to be licensed.[55]

The President may "from time to time cancel or modify any order, approval, license, rule, or regulation issued under this title."[56] This is not different from the previously discussed tariff or forest reserve delegations. In fact, the Act requires the code, license, or other agreements to contain an express provision for modification. If, then, he can establish codes, by virtue of those same codes so providing, he can modify them.

Section 9(a) of the N. I. R. A. adds pipe lines of oil companies to the list of carriers subject to the jurisdiction of the Interstate Commerce Commission. The President may "initiate before the Commission proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable rates."[57] The power of rate regulation has never been denied to the Interstate Commerce Commission in previous cases involving interstate carriers, because "if Congress were required to fix every rate, it would be impossible to exercise the power at all." Therefore, the appointment of a commission is dictated by "common sense."[58]

The delegations under the A. A. A. to the Secretary of Agriculture can be justified in the same manner as can the delegations to the President under the N. I. R. A. It is sufficient to list them, as illustrative of the desire of Congress, or rather the Congressionally enforced desire of the President for centralized control as the means for meeting the problems of recovery.

The Secretary of Agriculture can enter marketing agreements with processors and producers after due hearing to interested parties;[59] issue processing licenses;[60] require licensees to make any reports he deems necessary;[61] and levy a processing tax upon "the first domestic processing of the commodity, whether of domestic production or imported."[62] It is of interest to note that in the case of the processing tax there is a combination of the fact-finding type of delegation of legislative power and the more discretionary type. The Secretary of Agriculture can appoint his aids to help him administer the powers delegated; but detailed provisions as to exchange value, base period, index numbers, and

[54] N. I. R. A., sec. 4(b).
[55] N. I. R. A., sec. 3(e).
[56] N. I. R. A., sec. 10(b).
[57] N. I. R. A., sec. 9(a).
[58] Interstate Commerce Commission v. Goodrich, n. 20, above.
[59] A. A. A., sec. 8(2).
[60] A. A. A., sec. 8(3).
[61] A. A. A., sec. 8(4).
[62] A. A. A., sec. 9(a).

the like, are explicitly required of him to guide him in determining the amount of the tax.[63] Congress' partial delegation in the case of the processing tax of its power over interstate commerce is a parallel to Congress' sustained partial delegation of its exclusive tariff power. Although the Secretary of Agriculture may suspend the tax if it is, in his judgment, harmful to a basic agricultural commodity, the discretion here is only as to the execution of the law.[64]

At the present writing, delegation to the President and Secretary of the Treasury, under Title III of the A. A. A., of the power of Congress to coin money and to regulate its value, has become the subject of nation-wide discussion in controversies relative to the gold regulations and the "commodity dollar."[65] The purpose of this particular delegation is "to expand credit."[66] The President may fix the weight of gold in the dollar;[67] accept silver in payment of foreign debts;[68] and issue new currency.[69]

POWERS OVER PENAL OFFENSES

The third type of delegation, defining offenses, has received judicial sanction often, and deserves only a brief treatment. The two recovery acts provide penalties for the violation of codes,[70] oil regulations,[71] processing regulations,[72] public works regulations,[73] employees' speculation regulations,[74] and falsification on application for a loan.[75] As pointed out in the *Grimaud* case, if Congress prescribes the punishment, the courts will inflict it.[76] And further, if Congress expressly provides that a breach of any of the rules and regulations of the administrative officers in charge is subject to the prescribed penalty, the legislation is not violative of any constitutional principles.[77] Consequently, if the Supreme Court holds the delegations lawful, no difficulty with penal regulations may be anticipated.

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[63] A. A. A., sec. 9(a), (b), (c), (d).
[64] As determined in the Hampton case, n. 14, above.
[65] Title III of the A. A. A. reads: "Title III—Financing—and Exercising Power Conferred by Section 8 of Article I of the Constitution; to Coin Money and to Regulate the Value Thereof."
[66] A. A. A., sec. 43(4).
[67] A. A. A., sec. 43(b) (2).
[68] A. A. A., sec. 45(a).
[69] A. A. A., sec. 43(b) (1).
[70] N. I. R. A., sec. 3(f); sec. 10(a).
[71] N. I. R. A., sec. 9(c).
[72] N. I. R. A., sec. 207(b); sec. 209.
[73] A. A. A., sec. 10(c).
[74] A. A. A., sec. 10(g).
[75] A. A. A., sec. 35.
[76] See also the earlier case of United States v. Eaton (1892) 144 U. S. 677.
[77] United States v. Grimaud, n. 4, above; l. c. 521.