



NORTH CAROLINA LAW REVIEW

Volume 12 | Number 2

Article 1

2-1-1934

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Recommended Citation

Robert H. Schnell & Robert H. Wettach, *Corporations As Agencies of the Recovery Program*, 12 N.C. L. REV. 77 (1934).

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CORPORATIONS AS AGENCIES OF THE RECOVERY PROGRAM†

ROBERT H. SCHNELL* AND ROBERT H. WETTACH**

On January 16, 1934, Comptroller General McCarl refused to countersign warrants for approximately \$100,000,000 of Treasury disbursements to the Public Works Emergency Housing Corporation,¹ known as the Federal Housing Corporation, the main purpose of which is to build low-cost apartment houses as slum-clearance projects. The effect of the Comptroller General's ruling was that the Federal Housing Corporation could not spend a cent on housing projects until he approved the expenditures. He also held that it could not take over parcels of land until the Department of Justice had searched the title and approved it. These assertions met with vigorous protest from Secretary of the Interior Ickes. The argument of the Comptroller General is two-fold: (1) the Federal Housing Corporation is not legal as it is set up under an emergency statute, the National Industrial Recovery Act, and yet it is to be a permanent organization; (2) if it is legal, then its expenditures are subject to his control.

If the Federal Housing Corporation is without power to purchase real estate, for instance, preliminary to a slum-clearance project, until the Comptroller General approves the expenditure, then Secretary Ickes was correct in his assertion that the funds of the Federal Housing Corporation would be hopelessly tied up and its projects seriously hampered. He took up the matter with the President immediately. Later news items indicated that the work of the Housing Corporation was at a standstill under the McCarl ruling until either the Comptroller General would yield or Congress would pass further legislation. The latest news item (February 2, 1934) is to the effect

† This article is an outgrowth of a paper prepared by Mr. Schnell for the seminar course in Constitutional Law, which was devoted to a consideration of legal and constitutional problems presented by the Recovery legislation and subsequent administrative developments.

After reading the printer's proof of this article, attention was for the first time called to VAN DORN, *GOVERNMENT OWNED CORPORATIONS* (1926), which appears to be an excellent book concerning the war-time corporations in particular. However, the work on this article and conclusions reached are independent of anything in the book.

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¹ *N. Y. Times*, Jan. 17, 1934, at 1; *Time*, Jan. 29, 1934, at 14.

that Secretary Ickes had reached an understanding with the Comptroller General which cleared the way for federal housing and slum clearance.

The Federal Housing Corporation was organized under the authority of Title II of the National Industrial Recovery Act,² by which the President is authorized to create a Federal Emergency Administration of Public Works, all the power of which shall be exercised by an Administrator, "and to establish such agencies . . . as he may find necessary." The President may also delegate any of his functions and powers under Title II to such officers, agents and employees as he may designate or appoint.

By executive order of the President, the requisite authority for establishing the Federal Housing Corporation was delegated to the Public Works Administrator, Mr. Ickes, who announced on October 28, 1933³ that papers for incorporation were filed at Wilmington, Delaware, the incorporators being Harold L. Ickes, Frances Perkins and Robert D. Kohn (Director of the Housing Division of the Public Works Administration), acting as individuals and not in any official capacity. Each holds one share of stock of no par value. However, the charter provides that they hold the stock in trust for the sole use, purposes and benefit of the United States and cannot transfer it except to someone authorized by the President, the Administrator of Public Works, or some other designated official to receive and hold such stock. The Federal Housing Corporation gets its funds from the Public Works Administration and the Reconstruction Finance Corporation, the original amount being unofficially fixed at \$200,000,000. It is also authorized to borrow money without limit from any source. The corporation has perpetual existence, and besides its main purpose which is to build low-cost apartment houses as slum clearance projects, it is authorized to engage in numerous activities which may arise in connection with such housing projects, such as constructing roads, parks, playgrounds, sewers, bridges, utilities incidental to housing projects, to provide equipment of all kinds and to manage and maintain such buildings, etc.

By creating government-owned corporations under state charters, does the administration avoid government red tape and thus put that part of the Recovery program beyond the power of the Comptroller General to approve expenditures and audit accounts?

² 48 STAT. 200 (1933), 40 U. S. C. A. §401 (a).

³ *N. Y. Times*, Oct. 29, 1933, at 1.

The General Accounting Office was set up in 1921 with the Comptroller General at the head. He holds office for fifteen years, is not subject to reappointment and is removable only by joint resolution of Congress.⁴ The Comptroller General is thus the agent of Congress to see to it that the moneys which Congress appropriates are expended as Congress intended. The act provides that "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."⁵ While this language, if standing alone, might possibly be broad enough to include authority to audit accounts and pass upon claims arising out of contracts made by government-owned private corporations, the only case involving this point reached the opposite conclusion.

In *Skinner and Eddy Corporation v. McCarl*,⁶ a petition for writ of mandamus was brought to compel the Comptroller General to pass upon certain claims against the Government. These claims arose out of contracts made with the United States Shipping Board Emergency Fleet Corporation. Most of the contracts refer to the Fleet Corporation as "representing the United States." The claims were presented to the Comptroller General because Skinner and Eddy wished to be in a position to use them as a credit, if the United States should, as threatened, sue them on the contracts. Mr. McCarl declined to consider the claims, asserting that he had neither the duty, nor the power to do so; and that the duty of passing upon them rests with the Shipping Board. The Supreme Court sustained his contention. The Shipping Board, pursuant to specific authority to form one or more corporations,⁷ which should be dissolved at the expiration of five years from the conclusion of the then present European War, organized the Emergency Fleet Corporation, with an authorized capital stock of \$50,000,000, under the general laws of the District of Columbia as a private corporation with power to purchase, construct and operate merchant vessels.⁸ The Act authorized the Shipping Board, with the approval of the President, to sell any or all of the stock in such corporations owned by the United States, provided

⁴ 42 STAT. 23 (1921), 31 U. S. C. A. §§41-43.

⁵ 42 STAT. 24 (1921), 31 U. S. C. A. §71.

⁶ 275 U. S. 1, 48 Sup. Ct. 12, 72 L. ed. 131 (1927).

⁷ Act of Sept. 7, 1916, 39 STAT. 728 (1916).

⁸ Pamphlet, *Certificate of Incorporation and By-Laws of the U. S. Shipping Board Emergency Fleet Corporation* (Govt. Printing Office, 1917).

that at no time shall the United States become a minority stockholder. This corporation has been continued as the Merchant Fleet Corporation.

The Supreme Court speaks of the Emergency Fleet Corporation as an instrumentality of the Government, while at the same time having the qualities of a private corporation. Thus, "being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations, it does not enjoy the priority of the Government in bankruptcy proceedings and its employees are not agents of the United States subject to the provisions of Sec. 41 of the Criminal Code."⁸ This recognition of the Emergency Fleet Corporation as an entity separate from the Government is the basis for the decision in the *Skinner and Eddy* case. Its financial transactions are to be handled and audited in accordance with commercial practice by the Board of Directors or the officers of the Fleet Corporation, charged with the responsibilities of administration. This argument that the Fleet Corporation is an entity distinct from the United States or any federal department or Board, and that to its own corporate officers and Board of Directors are committed the control and auditing of its financial transactions would seem to preclude the present attempt by the Comptroller General to control the expenditures of the Federal Housing Corporation.

This incident, however, focuses attention on the use of corporations as instrumentalities of the New Deal, and on legal problems likely to result. The use of corporations as instrumentalities of the federal government is not any innovation. There are two types: (1) the federal corporation and (2) the government-owned private corporation. The first receives its charter directly from Congress or from some agency set up by Congress for that purpose. The second receives its charter from some state, or the District of Columbia, but is owned by the federal government.

I. FEDERAL CORPORATIONS

The federal corporation is most common, the earliest being the Bank of North America, chartered and used by the Continental Congress in 1781 to aid in the fiscal operations of the government.⁹ This was followed in 1791 by the first Bank of the United States, whose charter expired in twenty years,¹⁰ and by the second Bank of the

⁸ *Supra* note 6 at p. 6.

⁹ HOCKETT, *POLITICAL AND SOCIAL HISTORY OF THE U. S.* (1930) 183, 183 n.

¹⁰ 1 STAT. 191 (1789).

United States, in 1816, whose charter expired in Jackson's administration.¹¹ It was this second Bank of the United States which gave rise to *McCullough v. Maryland*,¹² in which Chief Justice Marshall expounded the doctrine of implied powers, deciding that Congress has the power to charter banks and other corporations as appropriate means of exercising the existing powers of the federal government—in that case, the combined currency and fiscal powers.

Under the same grant of powers, the National banking structure was first set up in 1863 to help finance the Civil War.¹³ This law, with its numerous amendments, is still operative today. Under it, banks obtain charters from the federal government through a designated official, the Comptroller of the Currency. Today, there are a number of banking and credit corporations which receive their charters under the authority of an Act of Congress but from some designated agency of the United States. The Federal Reserve Banks are authorized pursuant to the Federal Reserve Act of 1913 and receive their charters from the Comptroller of the Currency.¹⁴ The Federal Land Banks,¹⁵ National Farm Loan Associations¹⁶ and Joint Stock Land Banks¹⁷ organize and incorporate under the Federal Farm Loan Act of 1916 and receive their charters from the Farm Loan Board. Under the 1923 amendment to the Farm Loan Act, Federal Intermediate Credit Banks were authorized which were to be chartered by the Farm Loan Board,¹⁸ but the National Agricultural Credit Corporations, also authorized under this act, receive their charters from the Comptroller of the Currency.¹⁹ Federal Home Loan Banks are authorized by the Federal Home Loan Bank Act of 1932 and receive charters from the Federal Home Loan Bank Board.²⁰

The Banking and Credit Corporations are all either chartered directly by Act of Congress or indirectly through some government agent. Thus under the Home Owner's Loan Act of 1933,²¹ the Federal Home Loan Bank Board is authorized to create the Home Owners Loan Corporation to provide emergency relief for home

¹¹ 3 STAT. 266 (1816).

¹² 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819).

¹³ Act of Feb. 25, 1863, 12 STAT. 665 (1863), 12 U. S. C. A. §21 *et seq.*

¹⁴ 38 STAT. 254 (1913), 12 U. S. C. A. §221 *et seq.*

¹⁵ 39 STAT. 362 (1916), 12 U. S. C. A. §671 *et seq.*

¹⁶ 39 STAT. 365 (1916), 12 U. S. C. A. §711 *et seq.*

¹⁷ 39 STAT. 374 (1916), 12 U. S. C. A. §811 *et seq.*

¹⁸ 42 STAT. 1454 (1923), 12 U. S. C. A. §1021 *et seq.*

¹⁹ 42 STAT. 1461 (1923), 12 U. S. C. A. §1151 *et seq.*

²⁰ 47 STAT. 725 (1932), 12 U. S. C. A. §1421 *et seq.*

²¹ 48 STAT. 129 (1933), 12 U. S. C. A. §1463.

owners who cannot refinance or pay mortgages on their homes. The Corporation is authorized to issue capital stock to an aggregate amount of \$200,000,000 to be subscribed for by the Secretary of Treasury and bonds not to exceed in value a total of two billions of dollars, the interest of which is guaranteed by the United States, and at this writing, the present Congress is expected to authorize the United States to guarantee the principal as well. The Federal Home Loan Bank Board members form the Board of Directors of this corporation. The Federal Home Loan Bank Board is authorized by the above act, to provide for the organization, incorporation, chartering and operation of Federal Savings and Loan Associations.²² The Farm Credit Act of 1933 provides for the organization and chartering by the Governor of the Farm Credit Administration of twelve Production Credit Corporations,²³ and twelve Banks for Coöperatives²⁴ (one of each in each federal reserve district), and any number of Production Credit Associations²⁵ and a Central Bank for Coöperatives with its principal office in the District of Columbia.²⁶

Towering over all of these banking and credit corporations is the Reconstruction Finance Corporation (RFC) and its prototype, now finally liquidated and wound up, the War Finance Corporation. The War Finance Corporation was established by Congress in 1918²⁷ to help provide credits for industries and enterprises necessary or contributing to the prosecution of the war. It was capitalized at 500 millions of dollars, all of which was subscribed by the federal government. The Corporation was authorized to issue bonds in an amount aggregating not more than three billions of dollars. The Secretary of the Treasury was chairman of the Board of Directors, the four others being appointed by the President. Although it was the original intention to end the existence of the War Finance Corporation within six months after the expiration of the War, Congress, in 1921, directed that the activities of the War Finance Corporation be revived to assist in the financing of the exportation of agricultural and other products to foreign markets.²⁸ Later in the year, a bill was passed amending the original act and extending the

²² 48 STAT. 132 (1933), 12 U. S. C. A. §1464.

²³ 48 STAT. 257 (1933), 12 U. S. C. A. §1131.

²⁴ 48 STAT. 257 (1933), 12 U. S. C. A. §1134.

²⁵ 48 STAT. 259 (1933), 12 U. S. C. A. §1131d.

²⁶ 48 STAT. 261 (1933), 12 U. S. C. A. §1134f.

²⁷ Act of April 5, 1918, 40 STAT. 506 (1918).

²⁸ 41 STAT. 1084 (1921), ch. 9.

life of the War Finance Corporation to July 1, 1922 with an additional period to permit winding up of its affairs.²⁹ This second amendment was added to enable the corporation to provide loans and credits for those engaged in producing and/or marketing staple agricultural products. A further amendment added in 1929 transferred to the Secretary of the Treasury the liquidation of and winding up of the corporation.³⁰

The RFC, incorporated under the Hoover administration in January, 1932,³¹ is the key corporation of the entire financial structure of the Recovery program. It is largely the conduit through which the funds flow to the various agencies. It was incorporated to provide emergency financing facilities for financial institutions, which were in turn expected to aid in financing agriculture, commerce and industry. This attempt to bolster up our tottering financial institutions failed. The original incorporating act was amended in July, 1932,³² because Congress wanted "to relieve destitution, to broaden the lending powers of the RFC, and to create employment by providing for and expediting a public-works program." Various acts have contained amendments to the lending powers of the RFC by empowering it to lend money to the Boards or corporations set up by such acts.³³ Thus, the RFC is authorized to make loans to banks and trust companies, mortgage loan companies, credit unions, federal land banks, joint-stock banks, federal intermediate credit banks, agricultural credit corporations, railroads, insurance companies, states, territories, political subdivisions of states, private corporations engaging in building public improvements, and to most of the corporations set up by the Administration to carry out its Recovery program.

The RFC is managed by a Board of Directors, consisting of the Secretary of the Treasury and six other persons appointed by the President. Not more than four of the seven directors shall be of the same political party and not more than one can be appointed from any one Federal Reserve district. The Act of Congress creating the RFC limits its existence to ten years, but it is very likely that this will be extended from time to time. The authorized capital stock is 500 millions, all owned by the Secretary of the Treasury for the

²⁹ 42 STAT. 181 (1921), ch. 80.

³⁰ 45 STAT. 1442 (1929), 15 U. S. C. A. §374.

³¹ 47 STAT. 5 (1932), 15 U. S. C. A. §601 *et seq.*

³² 47 STAT. 714 (1932), 15 U. S. C. A. §601 *et seq.*

³³ Pamphlet, *Reconstruction Finance Corporation Act as amended* (Govt. Printing Office, 1933).

government. Including the 1933 amendments to its lending power, it appears that the RFC is authorized to issue bonds, notes, debentures, or similar obligations to the amount of \$3,875,000,000.00, in addition to such sums as it may have to borrow to enable it to carry out the provisions of the Agricultural Adjustment Act, the Bank Conservation Act and the Home Owners' Loan Act.³⁴

Not only has the RFC been granted the ordinary powers of a corporation, but it has been given the free use of the mails and the facilities and services of any board, commission or executive department of the government. The counterfeiting of its securities, false statements to it, unauthorized use of its name, fraud on it and embezzlement from it are federal criminal offenses.

The RFC is like a great public bank. It sells its obligations (to date there has been no public offering of RFC bonds as the Treasury has purchased all issued) and makes loans in accordance with the terms of the Act incorporating it as amended. The limitations on its lending powers deal with types and amounts of loans, security required, method of repayment, etc. Like any bank, security is taken for each loan. Some loans are being repaid promptly, but a great many defaults are to be expected with the result that the RFC will have to take over much of the security it holds. Since all of its property goes to the United States upon liquidation, it is highly probable that the United States will become owner of railroads, banks and many other properties and businesses. Since the United States guarantees the bonds of the RFC, there is a great likelihood that the net result of this venture will be an additional burden on the taxpayer.

The present Congress has passed a further amendment, extending the lending powers of the RFC to February 1, 1935 and providing an additional fund of 850 millions of dollars for its operations. Judging from the experience of the War Finance Corporation, it will be surprising if the affairs of the RFC are wound up within the next thirty years.

The Banking Act of 1933 created the Federal Deposit Insurance Corporation to aid in the liquidation of closed banks and to insure bank deposits.³⁵ The board of directors consists of the Comptroller of the Currency and two other persons appointed by the President. To get the Corporation started, the Secretary of the Treasury sub-

³⁴ *Ibid.* at 7 n. 16.

³⁵ 48 STAT. 168 (1933), 12 U. S. C. A. §264.

scribed for \$150,000,000 worth of the capital stock. In addition, each Federal Reserve Bank, is required to subscribe to Class B, non-profit sharing, capital stock in an amount equal to one half of its surplus on January 1st, 1933, thus providing an additional 135 millions. This probably accounts for the change which permits each Federal Reserve Bank to pay into its surplus fund all its net earnings after expenses and dividends have been paid instead of requiring that 90 per cent of the net earnings be paid to the United States as a franchise tax with only 10 per cent being paid into surplus. Every bank which is a member of the federal reserve system and every national bank has to own Class A, profit sharing but non-voting, capital stock in an amount equal to one half of one per cent of its total deposit liabilities. This should bring in approximately 200 millions, making a total of around 500 millions available for the corporation. The amount of stock owned by each bank is to be adjusted each year as its deposits increase or decrease. The shares of stock cannot be transferred or hypothecated. State banks, to obtain the advantages of permanent deposit insurance, have to become national banks or join the Federal Reserve system. The Corporation is authorized to issue bonds, notes, and debentures in an amount aggregating not more than three times the amount of its capital. Such bonds are not guaranteed by the United States. The funds of the corporation have to be invested in United States securities, except that current funds may be deposited in any Federal Reserve Bank or with the Treasurer of the United States. The details of the insurance of bank deposits are set forth in the Act.

Thus we hope to prosper under a vast system of financial and credit corporations, either directly created by Act of Congress or authorized by Congress to be formed for specific purposes, with some governmental agency empowered to issue charters. They are all federal corporations, with such advantages as accrue from that fact.

The earliest federal corporation set up to combat the present business depression was the Textile Foundation, incorporated in 1930 to conduct "scientific and economic research for the benefit and development of the textile industry, its allied branches, and including that of production of raw materials." The board of directors consists of the Secretary of Commerce, the Secretary of Agriculture, and three more persons who are familiar with the textile industry and allied branches. The directors were also the incorporators. The

Foundation received its funds by the payment to it of amounts payable to the Treasury by the Textile Alliance, Incorporated. Reports of its proceedings have to be submitted to Congress and the President each year.³⁶

The Tennessee Valley Authority is a non-stock corporation created by Congress to take over and operate the government property at Muscle Shoals and to direct and control the reforestation, flood control, and other projects in the development of the Tennessee Valley.³⁷ The board of directors consists of three men appointed by the President. The Corporation was given the government's property at Muscle Shoals, part of it outright and the rest as trustee for the United States. Congress authorized whatever appropriations might be necessary to carry out the Act; and, in addition, the TVA was authorized to issue \$50,000,000 worth of bonds on the credit of the United States. All the ordinary powers of a corporation were granted and in addition, it was given the right to exercise the power of eminent domain in the name of the United States. Whatever profits the TVA may earn are to be paid into the Treasury. The things to be accomplished and the methods for doing them are set forth in the statute in detail.

More recently, the Electric Home and Farm Authority was authorized by executive order on Dec. 19, 1933 and incorporated in Delaware on Jan. 17, 1934,³⁸ for the purpose of providing easy credit to farm and home owners for the purchase of electrical appliances in those areas which will be furnished cheap electric power by the Tennessee Valley Authority.

Section 201 of Title II of the Securities Act created a body corporate to be known as the Corporation of Foreign Security Holders, which was not to take effect, however, until the President should find it to be in the public interest and so proclaim it.³⁹ For diplomatic reasons, it has been decided that the President will not make the necessary proclamation to start the corporation functioning.⁴⁰

³⁶ 46 STAT. 539 (1930), 15 U. S. C. A. §501, *et seq.*

³⁷ 48 STAT. 58 (1933), 16 U. S. C. A. §831 *et seq.*

³⁸ U. S. News, Jan. 29, 1934, at 56.

The latest federal corporation to be set up is the federal Farm Mortgage Corporation which was created to help refinance farm mortgages, largely in connection with indebtedness of farmers to the Federal Land Banks. It is authorized to issue up to two billion dollars worth of bonds, guaranteed by the government as to both interest and principal, to obtain funds. *Id.* at 63.

³⁹ 48 STAT. 92 (1933), 15 U. S. C. A. §77bb.

⁴⁰ *Time*, Oct. 30, 1933, at 48; *The Literary Digest*, Jan. 6, 1934, at 37.

In addition to setting up federal corporations to be used by the government, Congress has granted charters to corporations established for private gain and to eleemosynary and educational institutions.⁴¹ Exercising its legislative power in the District of Columbia, Congress also enacted a general incorporation law providing for the chartering of corporations to engage in business in the District of Columbia.⁴² During the period of railroad expansion to the West, Congress chartered the Union Pacific,⁴³ the Northern Pacific,⁴⁴ the Atlantic and Pacific,⁴⁵ and the Texas Pacific⁴⁶ railroad companies. These railroads were under the patronage and partial control of the government. These are mentioned merely to indicate the scope of the incorporating power of the federal government. In this article, these corporations, not directly engaged in carrying out governmental activities, are not discussed.

One may well pause to inquire into the authority of Congress to create this array of corporations. Congress has the power, under the Constitution, to charter corporations if such corporations are necessary and proper instrumentalities to carry out the legitimate ends of the federal government.⁴⁷ The currency and fiscal powers, sufficient to justify the creation of the second Bank of the United States, are also adequate for the establishment of all the various banking and credit corporations discussed above. Thus the Federal Land Banks and Joint Stock Land Banks were sustained⁴⁸ on the authority of *McCullough v. Maryland*. Similar reasons would be ample to sustain the Reconstruction Finance Corporation or the Federal Deposit Insurance Corporation. The power to charter the trans-continental railroads is found in the commerce clause. It is likely that the Tennessee Valley Authority, for instance, will be upheld as a proper means of carrying out the commerce power and the resulting power over navigable streams. This would be sufficient to authorize the building of dams, reforestation and the use of marginal lands for flood control. The ownership of power and nitrate plants at Muscle

⁴¹ 38 SEN. DOC., 62 Cong. 2d Sess. No. 655; INDEX TO THE FEDERAL STATUTES at 262-263.

⁴² D. C. CODE (1929) tit. 5.

⁴³ Act of July 1, 1862, 12 STAT. 489 (1862).

⁴⁴ Act of July 2, 1864, 13 STAT. 365 (1864).

⁴⁵ Act of July 27, 1866, 14 STAT. 292 (1866).

⁴⁶ Act of March 3, 1871, 16 STAT. 573 (1871).

⁴⁷ *McCullough v. Maryland*, *supra* note 12.

⁴⁸ *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 41 Sup. Ct. 243, 65 L. ed. 577 (1921).

Shoals would imply that the government make some reasonable use of such government properties, but whether that also implies the power to distribute electric power and commercial fertilizer is more doubtful.

In addition to the question of constitutionality, interesting questions arise as to the legal status of these corporations and the incidents to be attached to it.

A federal corporation, any of the above, is considered as a domestic corporation in each state in which it does business.⁴⁹ It is not, however, a citizen of any particular state for the purpose of giving jurisdiction to the federal courts on the ground of diversity of citizenship;⁵⁰ neither does federal incorporation alone involve a federal question;⁵¹ but for the purpose of jurisdiction in the federal courts, a federal question is involved wherever the United States owns more than half of the capital stock,⁵² or a national bank is a party.⁵³

⁴⁹ *Twin Falls National Bank v. Reed*, 44 Idaho 573, 258 Pac. 526 (1927); *In re Cushing's Estate*, 40 Misc. Rep. 505, 82 N. Y. S. 795 (1903); *Commonwealth v. Texas and Pacific Railroad Co.*, 98 Pa. St. 90 (1881); *Texas and Pacific Railroad Co. v. Weatherby*, 41 Tex. Civ. App. 409, 92 S. W. 58 (1906).

⁵⁰ *Bankers' Trust Co. v. Texas and Pacific Railroad Co.*, 241 U. S. 295, 36 Sup. Ct. 569, 60 L. ed. 1010 (1916); *cf. Tennessee Valley Authority Act of 1933* [48 STAT. 63 (1933), 16 U. S. C. A. §831g (a)] ("The Corporation (TVA) shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits.") and *The Farm Credit Act of 1933* [48 STAT. 266 (1933), 12 U. S. C. A. §1138.] ("each such bank, association, or corporation [formed under it] shall, for the purposes of jurisdiction, be deemed a citizen of the State or District within which its principal office is located").

⁵¹ 43 STAT. 941 (1925), 28 U. S. C. A. §42; *Federal Land Bank of Omaha v. U. S. National Bank*, 13 F. (2d) 36 (C. C. A. 8th, 1926); *Joint Stock Land Bank of St. Louis v. Fithian*, 43 F. (2d) 866 (D. C. Ill. 1930). However, previously suits involving a federal corporation did raise a federal question and were removable to federal courts. 18 STAT. 470 (1875); *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319 (1884).

⁵² 43 STAT. 941 (1925), 28 U. S. C. A. §42; *Federal Intermediate Credit Bank of Columbia, S. C. v. Mitchell*, 277 U. S. 213, 48 Sup. Ct. 449, 72 L. ed. 854 (1928), *rev'd* 21 F. (2d) 51 (C. C. A. 4th, 1927). Again the *Farm Credit Act of 1933* provides an exception in that "no district court of the United States shall have jurisdiction of any action or suit by or against any Production Credit Corporation or Production Credit Association upon the ground that it was incorporated under this chapter or that the United States owns a majority of the stock in it." 48 STAT. 266 (1933), 12 U. S. C. A. §1138.

As an illustration of government-owned corporations which have become privately owned, reference may be made to the Federal Land Banks, 98 percent of the stock of which was owned by the Government when they were first created in 1916, whereas in 1926, the Government holding amounted to less than two percent. See *Annual Reports of the Secretary of the Treasury*, 1917, p. 38; 1926, p. 106.

⁵³ 18 STAT. 320 (1875), 12 U. S. C. A. §94.

Except so far as Congress permits, a state cannot control, regulate or tax a federal corporation.⁵⁴ In the acts incorporating the Reconstruction Finance Corporation,⁵⁵ the Federal Deposit Insurance Corporation⁵⁶ and the Home Owners Loan Corporation,⁵⁷ Congress specifically provided for exemption from all taxes except those on their real property.⁵⁸ States may tax the real property of national banks and also national bank stock under certain conditions.⁵⁹

II. GOVERNMENT-OWNED PRIVATE CORPORATIONS

The government-owned private corporation is a more recent development in the technic of public administration. A number of such corporations were used by the United States to assist in carrying on the World War. Probably the most important one of these, the United States Emergency Fleet Corporation, was discussed at the beginning of this article. In addition, there were the Food Administration Grain Corporation⁶⁰ (later called the United States Grain Corporation), authorized by the Food Control Act and organized under the Laws of Delaware, the United States Spruce Corporation,⁶¹ organized by the Director of Aircraft production under the laws of the District of Columbia, the United States Spruce Production Corporation organized under the laws of Washington,⁶² and the United States Housing Corporation,⁶³ organized under the laws of the District of Columbia by order of the President to help provide housing for war needs. In turn, the Housing Corporation took out charters

⁵⁴ *McCullough v. Maryland*, *supra* note 12; *First National Bank of Louisville v. Kentucky*, 9 Wall. 353, 19 L. ed. 701 (U. S. 1869); *Union Pacific Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 786 (U. S. 1873); *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196 (1875); *Williams v. City of Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. ed. 275 (1912).

⁵⁵ 47 STAT. 9 (1932), 15 U. S. C. A. §610.

⁵⁶ 48 STAT. 168 (1933), 12 U. S. C. A. §264 (p).

⁵⁷ 48 STAT. 129 (1933) 12 U. S. C. A. §1463 (c).

⁵⁸ The Central Bank for Coöperatives, Production Credit Corporations, Production Credit Associations, and Banks for Coöperatives are exempt from taxes except those on their real property and tangible personal property. 48 STAT. 263 (1933), 12 U. S. C. A. §1138c. As to Federal Savings and Loan Associations, "no State, territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or coöperative thrift and home financing institutions." 48 STAT. 132 (1933) 12 U. S. C. A. §1464 (h).

⁵⁹ R. S. §5219 (1923), 12 U. S. C. A. §548.

⁶⁰ Act of Aug. 10, 1917, 40 STAT. 276 (1917); Act of March 4, 1919, 40 STAT. 1348 (1919); Executive Orders, Aug. 14, 1917, March 4, 1919.

⁶¹ Act of July 9, 1918, 40 STAT. 845, 888-889 (1918).

⁶² Act of July 9, 1918, 40 STAT. 888 (1918) subc. 16, as amended.

⁶³ Act of May 16, 1918, 40 STAT. 550 (1918) ch. 74; Act of June 4, 1918, 40 STAT. 594 (1918) ch. 92.

in New York and Pennsylvania for its operations there.⁶⁴ In the above corporations, the initial capital was provided by the United States Treasury and the original incorporators were usually members of the Administration in important positions, who were to subscribe to, own and vote the capital stock for, and on behalf of, the United States. Of course, the Treasury provided the funds with which these corporations operated. For example, the total appropriations received by the Shipping Board and its subsidiaries, principally the Emergency Fleet Corporation, exceeded three and one-half billions of dollars and the net worth of its assets in 1927 was less than 300 millions of dollars.⁶⁵

The government-owned private corporations of the New Deal are modeled upon these war-time corporations. We have already discussed the Federal Housing Corporation. In October, 1933, the Federal Surplus Relief Corporation⁶⁶ was also organized in Delaware, empowered to purchase, store, handle and process surplus farm or other commodities and to dispose of the same to relieve suffering or to adjust commodity prices. Like the Federal Housing Corporation, the charter contains broad powers to purchase, acquire, own, mortgage, sell or otherwise convey or dispose of real and personal property of every description and to carry on any and all other business necessary or convenient to the attainment of the foregoing objects or purposes. The liberal incorporation laws of Delaware may account for these sweeping powers found in the charters of both the Federal Housing Corporation and the Federal Surplus Relief Corporation. It is the latter corporation which is to engage in the purchase of marginal farm land, with an initial allotment of 25 millions of dollars for that purpose. The Commodity Credit Corporation⁶⁷ was also organized in Delaware last October to make loans of 10 cents per pound to cotton producers on the unsold portion of their crop this year. The capital stock is \$3,000,000⁶⁸ subscribed by the Secretary of Agriculture and the Farm Credit Administration, and an initial loan of \$250,000,000 was arranged for from the Recon-

⁶⁴ *Ibid.*; *Report of the U. S. Housing Corporation* (Govt. Printing Office, 1920) vol. 1.

⁶⁵ *Annual Report, U. S. Shipping Board* (1927) 121-124.

⁶⁶ *N. Y. Times*, Dec. 21, 1933, at 1; see certificate of incorporation, *id.* at 4 (The certificate of incorporation was dated October 4th, but no announcement was made until December 20th.).

⁶⁷ *N. Y. Times*, Oct. 7, 1933, at 19; *N. Y. Times*, Oct. 18, 1933, at 31.

⁶⁸ Compare this with the capitalization of \$1000 with which the Housing Corporation commenced operations.

struction Finance Corporation. Cotton producers, to become eligible for loans, must agree to participate in the campaign for the reduction of cotton acreage.

Under the decision in *McCullough v. Maryland*,⁶⁹ if Congress has the power to act directly in any matter, it follows that it may act through a corporation, if that is an appropriate agency. It matters not, therefore, whether a federal corporation or a federally-owned private corporation is used. The test of legality is in the power of Congress to engage in the particular activity for which the corporation is organized. No constitutional objections to the war-time private corporations owned by the federal government were raised in any of the decisions. The courts seem to have accepted the United States Emergency Fleet, Housing and Spruce corporations without question. Of course, the emergency of war may be said to have justified the creation of those corporations. As pointed out by the Comptroller General, the state corporations owned by the federal government to carry out the Recovery program are permanent organizations, whereas the statutes under which they are authorized are emergency measures. Title II of the Recovery Act, under which the Federal Housing Corporation is created, provides that the agencies established under the act shall cease to exist after the expiration of two years from the date of enactment and any of their remaining functions transferred to such departments of the Government as the President shall designate.⁷⁰ It would appear from this that some further legislation would be needed to enable the Federal Housing Corporation to continue to function long enough to complete construction work on any of the slum-clearance projects now under way. There is no real objection in having a corporation with perpetual existence used to further an emergency program. As certain aspects of that program become more permanent, such a corporation is ready for continued operations.

In the last analysis, the Recovery corporations will be subjected to the same tests of constitutionality as the Recovery legislation which has authorized those corporations.⁷¹ If the federal government,

⁶⁹ *Supra* note 12.

⁷⁰ 48 STAT. 200 (1933), 40 U. S. C. A. §401 (d).

⁷¹ Among the numerous discussions of constitutionality, the following may be noted: (Note) *Some Legal Aspects of the National Industrial Recovery Act* (1933) 47 HARV. L. REV. 85; Wahrenbrock, *Federal Anti-Trust Law and the National Industrial Recovery Act* (1933) 31 MICH. L. REV. 1009; Handler, *The National Industrial Recovery Act* (1933) 19 A. B. A. J. 440.

under the modern concept of the commerce power, may regulate local business because of its effect upon the restoration of business in interstate channels, then a corporation may be set up to assist in restoring the normal flow of interstate trade and commerce. The emergency provides the setting in which we realize how interwoven all business activities in this country are—how the proper regulation of interstate commerce calls for all manner of local regulation of manufacturing, mining, agriculture and other productive activities, as well as the distribution of products to the consuming public. This interdependence of all business, realized as never before because the depression gave us a new view of the facts, has brought to maturity the expanding commerce power, under which the federal government may regulate business and agriculture, may clear the slums, buy surplus foods and marginal lands and lend money on cotton, and may use such corporations as are deemed advisable for the carrying out of these and other legitimate purposes.

The federally-owned private corporation has the same exemption from state taxation as the federal corporation. As long as title to property is held by a government-owned private corporation as an instrumentality of the United States, such property is not subject to taxation by any state or local subdivision. To this effect are a number of cases involving war-time corporations owned by the federal government—the Emergency Fleet Corporation,⁷² the United States Housing Corporation⁷³ and the United States Spruce Production Corporation.⁷⁴ The property of such a corporation is not taxable even in the state of its incorporation.⁷⁵ The cases treat the property as if owned directly by the United States, disregarding the corporate fiction. It might have been better to hold that the tax was invalid because its effect would be to interfere with the efficient exercise of powers granted by the Constitution.⁷⁶ It is interesting to note that the United States Housing Corporation made agreements with local government units to pay amounts equal to what it would have paid as special assessments and ad valorem taxes had its property been

⁷² *United States v. Coghlan*, 261 Fed. 425 (D. C. Md. 1919); *King County, Wash. v. U. S. Ship. Board E. F. Corp.*, 282 Fed. 950 (C. C. A. 9th, 1922).

⁷³ *New Brunswick v. United States*, 276 U. S. 547, 48 Sup. Ct. 371, 72 L. ed. 693 (1928).

⁷⁴ *U. S. Spruce Prod. Corp. v. Lincoln County*, 285 Fed. 388 (D. C. Ore. 1922).

⁷⁵ *United States v. Clallam County, Wash.*, 283 Fed. 645 (D. C. Wash. 1922) *aff'd* 263 U. S. 341, 44 Sup. Ct. 121, 68 L. ed. 328 (1923).

⁷⁶ Note (1923) 36 HARV. L. REV. 737.

subject thereto.⁷⁷ While the federal government may have to pay incorporation fees to the states for the charter privilege, it is doubtful, under the above cases, whether the states could collect any further taxes of any sort from these government-owned private corporations.

Federally-owned corporations are domestic corporations in the state of incorporation. The conclusion would seem to be that they are citizens of such state for purposes of jurisdiction in the federal courts on the ground of diversity of citizenship. All of the cases involving the war-time corporations are found in the federal courts. This is partly due to the fact that in a number of the cases, the United States was a party. That the United States is a proper party plaintiff under real party in interest statutes⁷⁸ is held in cases where the United States brought suit to enjoin the collection of taxes against the Spruce Production Corporation,⁷⁹ the Emergency Fleet Corporation⁸⁰ and the United States Housing Corporation;⁸¹ in a case to recover an overpayment made by the Fleet Corporation under a contract;⁸² in a bill to quiet title of property requisitioned by the Housing Corporation;⁸³ and in a suit in admiralty to recover demurrage under a charter party made by the Fleet Corporation.⁸⁴ Of course, it is clear that the government-owned corporation is also a proper party plaintiff, as well as the United States.

If cases involving the Emergency Fleet Corporation are followed, a federally-owned private corporation cannot claim immunity from service of process on the ground that it is a government agency⁸⁵ and it is subject to suits in general like any other corporation.⁸⁶ But it is not subject to attachment or garnishment,⁸⁷ nor may a court of admiralty proceed in rem against it by seizing its property

⁷⁷ *Report of the U. S. Housing Corporation* (Gov't Printing Office, 1920) Vol. I at 347.

⁷⁸ The federal courts follow the state rules as to parties under the Conformity Act, 28 U. S. C. A. §724. See DOBIE, *FEDERAL PROCEDURE* (1928) §153.

⁷⁹ *United States v. Clallam County, Wash.*, *supra* note 75.

⁸⁰ *United States v. Coghlan*, *supra* note 72.

⁸¹ *New Brunswick v. United States*, *supra* note 73.

⁸² *Russell Wheel & Foundry Co. v. United States*, 31 F. (2d) 826 (C. C. A. 6th 1929).

⁸³ *United States v. Stein*, 48 F. (2d) 626 (D. C. Ohio 1921).

⁸⁴ *United States v. Czarnikow-Rionda Co.*, 40 F. (2d) 214 (C. C. A. 2nd 1930).

⁸⁵ *Commonwealth Finance Corp. v. Landis*, 261 Fed. 440 (D. C. Pa. 1919).

⁸⁶ *Gould Coupler Co. v. U. S. Ship. Board E. F. Corp.*, 261 Fed. 716 (D. C. N. Y. 1919).

⁸⁷ *McCarthy v. U. S. Ship. Board E. F. Corp.*, 53 F. (2d) 923 (App. D. C. 1931).

within the court's jurisdiction.⁸⁸ Perhaps the reason for these decisions may be found in the argument of Mr. Justice Stone, in *U. S. Shipping Board Merchant Fleet Corporation v. Harwood*,⁸⁹ quoting from *Sloan Shipyards Corporation v. Emergency Fleet Corporation*,⁹⁰ as follows: "The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States." The first of the above cases recognizes that the Fleet Corporation is bound by its contracts as any private corporation and that contracting parties must resort to the property and funds of the Fleet Corporation for satisfaction of claims and to such indemnity as the government provides. The second case holds that the Fleet Corporation does not enjoy the priority of the United States in bankruptcy proceedings. Both cases treat the Fleet Corporation as a distinct entity although they recognize its quasi-public character as an agency of the United States. But because these corporations are agencies of the United States, it follows that there may not be a direct interference with their activities through a seizure of property by attachment or garnishment or in admiralty.

The legal problems arising from the existence of these government-owned private corporations may be attributed to their dual aspect of private corporation and governmental agency. In *U. S. v. Strang*,⁹¹ employment of the defendant by the Fleet Corporation as an inspector was held not to make him "an agent of the United States" within the Criminal Code prohibiting any member of a firm from acting as officer or agent of the United States for transaction of business with that firm. This recognized the corporation as a separate entity, whose employees are not appointed and are not subject to removal by the President, notwithstanding all of the capital stock is owned by the United States. Following this case, Congress made it a federal offense to defraud any corporation in which the United States is a stockholder,⁹² and this statute was held sufficient to sustain an indictment charging fraud against the United States by

⁸⁸ *U. S. Ship. Board. E. F. Corp. v. Rosenberg Brothers & Co.*, 276 U. S. 202, 48 Sup. Ct. 256, 72 L. ed. 531 (1928).

⁸⁹ 281 U. S. 519, 526, 50 S. Ct. 372, 74 L. ed. 1011 (1930).

⁹⁰ 258 U. S. 549, 42 Sup. Ct. 386, 66 L. ed. 762 (1922).

⁹¹ 254 U. S. 491, 41 Sup. Ct. 165, 65 L. ed. 368 (1921).

⁹² 18 U. S. C. A. §§80, 82, 83, and 84.

making fraudulent claims against the Fleet Corporation.⁹³ This statute makes fraud against the corporation equivalent to fraud against the United States because it would result directly in pecuniary loss to the government.

The emphasis on the governmental agency aspect is shown in *U. S. Grain Corporation v. Phillips*,⁹⁴ wherein a commander of a United States destroyer was refused extra compensation for transporting gold belonging to the Grain Corporation, which he would have received from a private corporation for similar services and in *Fleet Corporation v. Western Union*,⁹⁵ wherein the Fleet Corporation was held to be a department of the government within the meaning of the Post Roads Act and therefore entitled to reduced rates for telegraphic messages.

Therefore it would seem to be a reasonable deduction from all of the cases involving government-owned private corporations to say that whenever the interest of the government is sufficiently involved the courts will disregard the corporate entity and protect the United States.

This conclusion would also seem to preclude any regulation or control of such corporations by any state whenever the federal interest is adversely affected. We have seen this proposition upheld in the tax cases. The same view is evinced in *Stockton v. Baltimore and N. Y. R. Co.*,⁹⁶ decided by Justice Bradley of the Supreme Court while sitting in the circuit court in New Jersey, which disposes of the matter of state control in the following language:

"It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. . . . But in the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state. . . . At all events, if Congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon state corporations for carrying out its own legitimate purposes. What right of the state would be invaded?"

⁹³ *United States v. Walter*, 263 U. S. 15, 44 Sup. Ct. 10, 68 L. ed. 137 (1923).

⁹⁴ 261 U. S. 106, 43 Sup. Ct. 283, 67 L. ed. 552 (1923).

⁹⁵ 275 U. S. 415, 48 Sup. Ct. 198, 72 L. ed. 345 (1928).

⁹⁶ 32 Fed. 9, 14 (1887).

The corporation thus employed, or empowered, in executing the will of Congress, could do nothing which the state could rightfully oppose or object to."

These words are even more significant because the case involves an act of Congress authorizing a New York Railroad corporation, already existing and concerned in the enterprise,⁹⁷ to build a bridge across Staten Island Sound connecting New York and New Jersey, and New Jersey had passed a statute prohibiting the erection of any such bridge without permission from the legislature.

The war-time United States Housing Corporation sought to avoid any conflict with state authorities by taking title to real estate in Illinois in the name of the United States, because the Illinois statute prohibited any foreign corporation from holding real property, and in forming a Pennsylvania corporation as a holding company to own property in Pennsylvania in order to avoid local restrictions.⁹⁸ But the Housing corporation was a federal agency and in reality not subject to state regulations applying to ordinary business corporations, and the yielding to those regulations would not have been necessary if there had been a desire to force the issue. This position is clearly stated by Mr. Justice Field in *Pembina Mining Co. v. Pennsylvania*,⁹⁹ as follows: "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, . . . or to exact conditions for allowing the corporation to do business there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign." The doctrine that a state cannot regulate a federal agency would therefore seem to apply to the government-owned private corporation engaged in carrying out some legitimate federal enterprise, even when the regulations of the incorporating state itself are involved.

In conclusion the question arises, why should the federal government, which, within its proper sphere, may create corporations as it pleases, seek charters for its agencies under the Recovery program in a state like Delaware, which has been so often criticized for the

⁹⁷ Compare the use of the Grain Stabilization Corporation, recognized as such under the Agricultural Marketing Act of 1929, 12 U. S. C. A. §1141g, which in the recent case of *Board of Trade v. Wallace*, 67 F. (2d) 402 (C. C. A. 7th., 1933) is designated at p. 408, "a governmental instrumentality created by law, and operating under the general supervision of the Farm Board to carry out a definite governmental policy."

⁹⁸ *Supra* note 77.

⁹⁹ 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650 (1888).

laxity of its incorporation laws? And why should the federal government employ the Corporation Trust Company to secure these corporate charters, making the Corporation Trust Company resident agent in Delaware? Perhaps it is the very laxity of the Delaware incorporation laws and the wide scope of corporate powers granted that attracts the federal government just as it has attracted many less creditable organizations in the past. The fact that these important governmental agencies are being incorporated in Delaware, suggests the desirability of the adoption by Congress of a general incorporation law which will be compulsory for all corporations engaging in interstate commerce or in carrying out any of the powers of the United States.¹⁰⁰

Finally, why is there such an extensive use of corporations by the government at this time? One answer is found in the statement that, "They provide the Executive with ready means for cutting through the red tape that entwines the regular governmental organization, and for getting around legal restrictions that might hamper action in syphoning money from the Treasury to the vast new federal projects."¹⁰¹ The recent action of the Comptroller General in attempting to tie up the funds of the Federal Housing Corporation is in point. Another answer is that, while these corporations are federal agencies, they are also private corporations, employing commercial methods,¹⁰² and are under the management of corporate officers and a Board of Directors, who hire and fire employees and agents as in any private corporation, and who are not bound by any civil service requirements. It might be argued that the use of these corporations helps the government credit because the debts of the corporations are not the debts of the government. Bonds, which the corporations issue, represent corporate indebtedness, although the United States may guarantee the bonds and will ultimately have to bear any losses. The principal reason, however, for the use of corporations, federal and state, to carry out the Recovery program is found in the condi-

¹⁰⁰ Thelen, *Federal Incorporation of Railroads* (1917) 5 CALIF. L. REV. 273; Bunn, *Federal Incorporation of Railway Companies* (1917) 30 HARV. L. REV. 589.

¹⁰¹ *U. S. News*, Oct. 16, 1933, at 341.

¹⁰² "Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States." Brandeis, J. in *Skinner and Eddy Corp. v. McCarl*, *supra* note 6, at p. 8. Justice Brandeis cites for this the *Annual Report of the Inland Waterways Corporation*, 1925, pp. 2-3.

tions which face us today. As in all great emergencies, the need is for speedy and effective action. The very scope of the program under the New Deal legislation demands the greatly increased use of the corporate device in order to get things done. But such an extensive use of corporate agencies by the federal government is more than an emergency expedient. It is a development of permanent significance in the field of public administration.