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## A Problem in the Personnel of the Federal Corporation

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EDWARD S. STIMSON, A.M., Ohio State University, 1922; S.J.D., University of Michigan, 1930, submits *Conflict of Workmen's Compensation Laws*. Mr. Stimson is the author of *Jurisdiction and the Power of Taxation*, and of numerous Law Review articles concerned with jurisdictional questions.

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## Notes

### A PROBLEM IN THE PERSONNEL OF THE FEDERAL CORPORATION

#### I.

The processes of government at times seem recurrent and cyclical rather than evolutionary. In the early nineteenth century the lack of a mature and adequate doctrine of the police power was supplied in this country by a resort to the governmentally owned and operated corporation as a means of controlling through monopoly or competition certain forms of economic activity.<sup>1</sup> Soon, however, this form of horizontal control began to give place to an ever increasing imposition of administrative regulations from above. At the time of the World War the government had almost completely evacuated the field of business enterprise and had retired into a regulatory Olympus from whence it ruled the scene through legislative enactment and administrative orders.<sup>2</sup> With the War came a temporary reflowering of the government corporation;<sup>3</sup> but peace brought speedy

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<sup>1</sup> Notable examples are: the Bank of the United States, 1 Stat. 191 (1791); 3 Stat. 266 (1816); and see *McCulloch v. Maryland* (1819) 4 Wheaton 316; the various state banks, see *Bank of the United States v. Planters Bank of Georgia* (1824) 9 Wheaton 904; *Bank of Kentucky v. Wister* (1829) 2 Peters 318; *Briscoe v. Bank of Kentucky* (1837) 11 Peters 257; *Darrington v. Bank of Alabama* (1851) 13 Howard 12; states frequently owned stock in railroad companies, see *Western and Atlantic Railroad Company v. Carlton* (1859) 28 Ga. 180; *State ex rel. Clark v. Stanley* (1872) 66 N. C. 59. For a case in which the United States subscribed for stock in a state chartered canal company see 12 Ops. Atty. Gen. 350 (1868). Refer to Field, *Government Corporations, a Proposal* (1935) 48 Harv. L. Rev. 775.

<sup>2</sup> Exceptions to this general tendency existed in the colonial possessions of the United States. In the Canal Zone the government purchased and operated the Panama Railroad Company; see 30 Ops. Atty. Gen. 508 (1915); *Panama Ry. Co. v. Curran* (C. C. A. 5, 1919) 256 Fed. 768; *Salas v. United States* (C. C. A. 2, 1916) 234 Fed. 842; *Jacobson v. Panama Ry. Co.* (C. C. A. 2, 1920) 266 Fed. 344; 27 Ops. Atty. Gen. 19 (1908). In Alaska the Alaska Northern Railway, *Ballaine v. Alaska Northern Ry* (C. C. A. 9, 1919) 259 Fed. 183.

<sup>3</sup> The most familiar of the War corporations are: The United States Shipping Board Emergency Fleet Corporation 39 Stat. 731 (1916); The

liquidation; and, with minor exceptions,<sup>4</sup> this form of governmental activity became atrophied during the post War decade. On the other hand, bureaucratic controls had become so complex and ubiquitous as rather to choke than to regulate their objects.<sup>5</sup> With the advent of the New Deal the bureaucratic system threatened to assume staggering proportions; this complication, however, brought with it a possible solution; for step by step with the extension of new governmental controls has come the creation of an innumerable army of governmentally owned and operated corporations to share in and perhaps ultimately to relieve the bureaucratic burden.<sup>6</sup> Thus a type of control originally necessitated by a lack of administrative machinery has now in part been called into being by a very plethora of administrative mechanisms. The cycle is complete.

But the traditional guise in which the federally owned corporation appears should not be allowed to obscure the novel and unorthodox uses to which it is being bent. As the government makes its presence felt in spheres hitherto consecrated to private enterprise, the mask it dons is corporate.<sup>7</sup> There is reason to suspect that the government corporation, which now appears as a somewhat disconcerting intruder into the realm of private business, may become a basic and permanent factor in the economic society of the future. Its adaptability to these important uses is a matter of more than academic concern. Whether the govern-

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United States Grain Corporation 40 Stat. 1917 (1917); The United States Spruce Corporation 40 Stat. 888 (1918); The United States Housing Corporation 40 Stat. 550 (1918); The War Finance Corporation 40 Stat. 506 (1918).

<sup>4</sup> The Inland Waterways Corporation 43 Stat. 360 (1924); The Federal Intermediate Credit Banks 42 Stat. 1454 (1923).

<sup>5</sup> For a perhaps prejudiced but nevertheless significant description of the workings of bureaucratic government see Beck, *Our Wonderland of Bureaucracy* (1932).

<sup>6</sup> Among the more important are: The Reconstruction Finance Corporation 47 Stat. 5 (1932), 15 U. S. C. sec. 601; The Federal Deposit Insurance Corporation 48 Stat. 168 (1933), 12 U. S. C. sec. 264; The Home Owners Loan Corporation 48 Stat. 129 (1933), 12 U. S. C. 1463; The Federal Savings and Loan Corporation 48 Stat. 1256 (1934); The Public Works Emergency Housing Corporation (See Executive Order No. 6470 of November 1933; the corporation was organized under the general incorporation laws of Delaware to serve as a federal agency under the general authority vested in the Executive by N. I. R. A. 48 Stat. 200 (1933), 40 U. S. C. 401 a); The Tennessee Valley Authority 48 Stat. 58 (1933), 16 U. S. C. 831; The Commodity Credit Corporation (see executive order No. 6340 of October 1933); The Federal Subsistence Homestead Corporation (1933) established by Secretary of the Interior; The Production Credit Corporation 12 U. S. C. 1131 (1933).

<sup>7</sup> The Tennessee Valley Authority in respect to its commercial activities is perhaps the most familiar example of governmental participation in business as a competitor. Less obvious but even more significant is the effect of the Reconstruction Finance Corporation with the vast possibilities of creditor control over private debtors inherent in its loan operations.

ment enters the economic forum to supply services for their own sake, or to regulate through competitive "yardsticks," it must of necessity shed some of the encrusted impedimenta which usually adhere to political agencies and take on some of the flexibility of the private enterprise. It is highly desirable that the government agency act as nearly as possible as an autonomous, non political unit competing on equal terms with the private businesses for which it purports to serve as a "yardstick."<sup>8</sup> These advantages in some measure have been attained by the government corporation. Freedom from accountability to the Comptroller-General is an important step in the direction of financial autarchy.<sup>9</sup> The government corporation is suable as an individual for its contracts and torts; the facile pleas of sovereign immunity generally have been forbidden it.<sup>10</sup> The problem of tax exemption presents greater difficulty; both the private concerns which compete with the government corporations, and the states in which the corporations operate, complain of the unfairness of exempting these instrumentalities from taxation.<sup>11</sup> Legally the question still awaits a definitive answer;<sup>12</sup> in practical effect, so far as the

<sup>8</sup> See note (1934) 43 Yale L. Journal 815 dealing specifically with the Tennessee Valley Authority. Van Doren, Government Owned Corporations (1926) at pp. 258-79, declares that the two primary advantages to be derived from the use of the corporation are (1) a flexibility approximating that of the private business concern, (2) freedom from the political influence incident to congressional budgeting.

<sup>9</sup> In *United States ex rel Skinner and Eddy Corporation v. McCarl*, Comptroller General (1927) 275 U. S. 1 it was held that the Comptroller General had no authority to pass on claims against the Fleet Corporation; the Court declared, "—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." (at p. 8) And see *Federal Sugar Refining Co. v. United States Sugar Equalization Board Inc.* (D. C. S. D. N. Y. 1920) 268 Fed. 575, at 587. In a comparatively recent case a state owned bank was held not subject to audit by the state auditor, *State ex rel. v. Waters* (1920) 45 N. D. 115, 176 N. W. 913. And see 37 Ops. Atty. Gen. 1, 7 (1932). Certain dangers in financial autonomy have been pointed out by McGuire, *Government by Corporations* (1925) 14 Va. L. Rev. 182.

<sup>10</sup> On contract: *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation* (1922) 258 U. S. 549; *Olson v. United States Spruce Production Corporation* (1925) 267 U. S. 462; in tort: *Panama Railroad Company v. Minnix* (C. C. A. 5, 1922) 282 Fed. 47 are the leading cases. The authorities upholding this proposition are too numerous for detailed enumeration. The early leading case is *Bank of the United States v. Planters Bank of Georgia* (1824) 9 Wheaton 904. Exceptions will be noted later.

<sup>11</sup> See note (1934) 43 Yale L. Journal 815.

<sup>12</sup> The immunity of federally owned corporations from state taxation finds strong support in *McCulloch v. Maryland* (1819) 4 Wheaton 316; *Osborn v. Bank of the United States* (1824) 9 Wheaton 738. Also consult such holdings as *Owensboro National Bank v. Owensboro* (1899) 173 U. S.

present is concerned, the solution has been reached by voluntary concession on the part of the federal government; thus the Tennessee Valley Authority is directed by statute to remit, in lieu of taxes, a certain proportion of the gross proceeds from the sale of power to the states in which the sales are made.<sup>13</sup> In these respects, then, the government corporation is prepared to take its place in the economic life of the nation, not as a mere arm of the government, alternately trammelled by bureaucratic restrictions and pampered by sovereign prerogatives, but rather as a self-sufficient unit operating under the same conditions as the private enterprises which it is competitively to regulate.<sup>14</sup>

But one problem of fundamental importance in the attainment of autonomy remains. The possibilities of political control through the appointment and removal of the managers of the government corporation are such as to threaten the independence elsewhere attained through freedom from financial and procedural restraints. Under the doctrine of *Myers v. The United States* the executive possesses almost unlimited powers of appointment and removal of federal officers.<sup>15</sup> Yet the new government corporation, if it is to perform its desired functions of

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664; *Smith v. Kansas City Title and Trust Co.* (1921) 255 U. S. 180. The War time corporations were accorded immunity by the courts. *Clallam County v. United States* (1923) 263 U. S. 341; *New Brunswick v. United States* (1928) 276 U. S. 547; *King County v. U. S. S. B. Emergency Fleet Corporation* (C. C. A. 9, 1922) 282 Fed. 950. These decisions, however, may have been influenced by the fact that these bodies were instrumentalities used in furtherance of the World War, rather than commercial ventures. It is quite possible that the doctrine of *South Carolina v. United States* (1905) 199 U. S. 437 may apply to state taxation of federal corporations engaged in activities predominately commercial. For a recent instance of federal taxation of a state owned corporation see *North Dakota v. Olson* (C. C. A. 8, 1929) 33 Fed. (2nd) 848. Refer to *Thurston, Government Proprietary Corporations* (1935) 21 Va. L. Rev. 465.

<sup>13</sup> 16 U. S. C. 831 (L). And Congress has expressly, although perhaps unnecessarily, permitted state taxation realty held by the Reconstruction Finance Corporation, 47 Stat. 9 (1932), 15 U. S. C. 610; the Federal Deposit Insurance Corporation, 48 Stat. 177 (1933), 12 U. S. C. 264 (p); The Home Owners Loan Corporation, 48 Stat. 130 (1933), 12 U. S. C. 1463 (c).

<sup>14</sup> "It is this tendency to regard agencies of the government as sections of one vast hog trough from which anyone is justified in taking his fill if he can push himself up to it that constitutes the great danger of public participation in economic enterprises." "If they (the courts) take a firm attitude toward government proprietary corporations regarding them, to be sure, as public trusts, but at the same time as commercial enterprises that are to stand upon their own feet, bear their own burdens, and answer for their liabilities, a real service will be rendered by the courts to the nation." *Thurston, Government Proprietary Corporations* (1935) 21 Va. L. Rev. at 501, 502.

<sup>15</sup> *Myers v. United States* (1926) 272 U. S. 52. The doctrine that the power of appointment to office is essentially and solely executive has been criticised; see note (1929) 42 Harv. L. Rev. 426 showing early exercises of the power by Congress. For a capable discussion, *People v. Hurlbut* (1871) 24 Mich. 44.

efficient technological production of goods and services, should be controlled by a staff of experts rendered relatively free from political influence by certainty and length of tenure. The fear that this independence cannot be attained has provided one of the most effective weapons for those opposed to governmental participation in commercial enterprise. It is a test that the government corporation eventually must meet. Certainty of tenure is not easily compatible with the executive power as defined in *Myers v. The United States*. Although the writer of this note has no desire to enter into political controversy, there is reason to believe that under some conditions freedom from political influence and certainty of tenure could better be obtained were the power of appointment and removal vested in Congress, or in an impartial board or agency elected by Congress, rather than in the President. Thus far, of course, there has been little attempt to place the appointment of the managers of the recently created corporations beyond the executive power. Congress has been content to place the function of appointment directly in the President,<sup>16</sup> or in administrative officers,<sup>17</sup> or to add a corporate directorship to the duties already inhering in certain administrative offices.<sup>18</sup> There may come a time, however, when the attempt will be made to place the appointment of corporate managers in the hands of a body elected by Congress, and thus to avoid the possibility of facile executive removals, and the opportunities for political pressure therein involved. It is the purpose of this note to examine the possibility of attaining this in spite of, or rather as an exception to the rule of *Myers v. The United States*. It will be necessary first to discuss the actual precedents for legislative appointment of such corporate officials; then, as a result of the paucity of authorities, to attempt a solution through an examination of the nature of the government corporation and the functions it performs. Although the discussion will include all forms of corporations owned in whole or in part by the government, our interest is centered primarily in the type which more nearly approximates the ordinary commercial corporation in some of its functions—such as the Tennessee Valley

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<sup>16</sup> The Tennessee Valley Authority is to be managed by a board of three directors appointed by the President with the consent of the Senate, 16 U. S. C. 831; the board of directors of the Reconstruction Finance Corporation comprises the Secretary of the treasury and six others appointed by the President with the consent of the Senate, 12 U. S. C. 601 ff; The Federal Deposit Insurance Corporation is managed by a board consisting the Comptroller General and two others appointed by the President, 12 U. S. C. sec. 264 (b).

<sup>17</sup> The Home Owners Loan Corporation is managed by members of the Federal Home Loan Bank Board, 12 U. S. C. 1463; Regional Agricultural Credit Corporations by officers appointed by the Farm Credit Administration, and for Production Credit Corporations see 12 U. S. C. 1131ff.

<sup>18</sup> See note 16 supra.

Authority and the Reconstruction Finance Corporation; for it is this type rather than that which is merely a somewhat disguised administrative agency, which depends for its efficacy most particularly upon the solution of our problem.

## II.

Legislative appointment of managers of government corporations is not new to the American political scene. An historical survey must begin with the Smithsonian Institute which, although perhaps not strictly a corporation, in its organization and functioning constitutes a close approximation to a corporate body. This institution from its origin has been governed by a Board of Regents consisting partly of executive and judicial officials, partly of managers elected by Congress.<sup>19</sup> Charitable and educational institutions have from time to time been incorporated in the District of Columbia, the incorporators specifically named, managers specifically appointed by Congress and provisions made for the incorporators to elect successor managers.<sup>20</sup> Election by Congress of seven of the ten members of the Board of Managers of the incorporated "National Home for Disabled Volunteer Soldiers" was provided for;<sup>21</sup> and it has been held that such managers were not "officers" of the federal government as to prevent congressmen from being elected to their number.<sup>22</sup> The exercise of these appointive powers by Congress has not been challenged.

It was customary for the directors of the early state banks to be elected by the state legislature.<sup>23</sup> Legislative appointments of the trustees of state benevolent or educational corporations have been upheld.<sup>24</sup> A contrary result was early reached in the case of an attempt on the part of a state legislature to appoint the directors of a state owned railway corporations; the act was held an invalid legislative usurpation of the executive function of ap-

<sup>19</sup> 9 Stat. 102 (1846).

<sup>20</sup> The Howard Institute and Home, 14 Stat. 69 (1866), to be maintained by donations; annual report to Secretary of the Interior; board of trustees for the first year named by Congress; Carnaigie Institute of Washington 33 Stat. 575 (1904); American National Red Cross 33 Stat. 599 (1905), Congress specifically named incorporators who were to elect six members of the central governing committee; the President to appoint twelve others; National Conservatory of Music of America 26 Stat. 1093 (1891). And note Centennial Board of Finance 17 Stat. 203 (1872).

<sup>21</sup> 24 U. S. C. 73.

<sup>22</sup> 26 Ops. Atty. Gen. 457 (1907).

<sup>23</sup> *Briscoe v. Bank of Kentucky* (1837) 11 Peters 257; *Darrington v. Bank of Alabama* (1851) 13 Howard 12.

<sup>24</sup> *Hovey v. State* (1889) 119 Ind. 386, 21 N. E. 890; *People v. Freeman* (1889) 80 Cal. 233, 22 Pac. 173; *Richardson v. Young* (1910) 122 Tenn. 471, 125 S. W. 664; but contra see *State v. Kennon* (1857) 7 Ohio St. 547; *Pratt v. Breckinridge* (1910) 112 Ky. 1, 65 S. W. 136.

pointment.<sup>25</sup> In this case, however, the state constitution contained an express and positive prohibition against election of officers by the general assembly.<sup>26</sup>

Precedents remained in this indeterminate state until the decision in *Springer v. The Philippine Islands*.<sup>27</sup> The Philippine Government owned substantially all of the stock in certain commercial corporations. The Legislature passed an act vesting the power to vote the government-owned stock in the National Coal Company in the Governor General, the President of the Senate and the Speaker of the House; these legislative officers by means of this power then elected the directors and managing agents of the Company. The Organic Act of the Islands provided that "all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General." The United States Supreme Court held that the appointment of managers of the corporation was an executive function which the legislature could not perform. When urged that the relation of the government to the stock of the company was proprietary rather than sovereign in nature, the Court replied, "The property is owned by the government, and the government in dealing with it, whether in its quasi-sovereign or in its proprietary capacity, nevertheless acts in its governmental capacity." ". . . It must deal with the property of the government by making rules and not by executing them. The appointment of managers (in this instance corporate directors) of property or a business, is essentially an executive act which the legislature is without capacity to perform directly or through any of its members."<sup>27a</sup> A dissent by Justices Holmes and Brandeis was based on the now famous dictum that the executive and legislative functions of our government are not divided into "water-tight compartments"; and that, since the acts of the corporation were of a commercial rather than governmental nature, the voting of stock, a fortiori, could not be an executive act.<sup>28</sup>

At first glance the majority opinion in *Springer v. The Philippine Islands* would appear to seal our question with a negative answer. It is submitted, however, that the case does not conclusively dispose of the power of Congress to appoint corporate managers; it may be distinguished on several grounds from our pres-

<sup>25</sup> State ex rel. Clark v. Stanley (1872) 66 N. C. 59; State ex rel. Howerton v. Tate (1873) 68 N. C. 546; and see People ex rel. Nichols v. McKee (1873) 68 N. C. 429; People v. Bledsoe (1873) 68 N. C. 457.

<sup>26</sup> State ex rel. Clark v. Stanley, supra note 25.

<sup>27</sup> (1928) 277 U. S. 189.

<sup>27a</sup> Ibi. at p. 203.

<sup>28</sup> Ibi. at page 211; and note "—ownership would not make voting upon the stock an executive function of the government when the acts of the corporation were not." at p. 212.



ent problem: the Organic Act of the Philippine Islands, as has been noted, contains a far more explicit and mandatory limitation of "executive" power to the Governor General than the provisions dealing with the executive and legislative powers in the Constitution of the United States;<sup>29</sup> furthermore, the court, when its attention was drawn to the precedents afforded by the Smithsonian Institute and other bodies whose officials for a period of many years had been elected by Congress, admitted the practice, failed to challenge the validity of these legislative exercises of the appointive power and sought to find a distinction between stock companies such as the National Coal Company, and non stock organizations "of like character" to the Smithsonian.<sup>30</sup> The implications of this distinction are interesting and will be discussed later.<sup>31</sup> At this point it is sufficient to note that the problem, so far as the appointive powers of the United States Congress over the new governmental corporations are concerned, cannot be regarded as settled by the decision in the *Springer* case, even if we give weight to its somewhat broad dicta which admittedly strayed beyond the scope of the actual facts in the case.<sup>32</sup> It is, then, important to examine the principles which may influence the Court should it in the future be called on to define the powers of Congress in the premises.

### III.

Of primary importance in determining whether the managers of a government corporation can be appointed by Congress or a body under congressional control is the question whether these managers are officers of the United States government. If so, the doctrine of *Myers v. The United States* would seem to conclude that their appointment must be vested in the executive. One means of escape from this conclusion may rest in the extent to which the courts have gone in conceding to the government corporation an independent corporate entity; for by clothing the corporation with a distinct personality it may be possible so to isolate its managers as to render them not servants of the government, but rather of the corporation. The familiar example of the corporate director who is the agent of the corporation but not of the shareholders will immediately present itself.

In many respects this separate personality has been judicially respected. As noted above, the corporation and not the govern-

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<sup>29</sup> U. S. Const. Art. II sec. 1; U. S. Const. Art. II sec. 2; and see note (1929) 42 Harv. L. Rev. 426.

<sup>30</sup> *Springer v. Philippine Islands*, supra note 27 at p. 204.

<sup>31</sup> See page 240-1 infra.

<sup>32</sup> McReynolds dissented on the ground that the majority opinion "goes much beyond the necessities of the case." He chose to rest his opinion on the specific words of the Organic Act.

ment has been held liable to suit on contract or in tort.<sup>33</sup> In one case a contract was signed "United States of America, By United States Shipping Board"; below this the Fleet Corporation added its own corporate signature. The contract was held solely that of the Fleet Corporation; the court declared "A corporation, as such, has no authority to sign the name of its stockholder to a contract and bind him as sole or joint obligor."<sup>34</sup> On the other hand, the War corporations were exempted from state taxation.<sup>35</sup> And they have been held entitled to the lower rates required to be given by the Western Union Telegraph Company to "communications between the several departments of the government and their officers and agents."<sup>36</sup> Whether the corporation can plead sovereign immunity from garnishment is a matter of conflict.<sup>37</sup> These diverse holdings are supported by various rationalizations. The intent of Congress perhaps is given predominate attention.<sup>38</sup> Other cases hold that when the government engages in commercial activity it doffs sovereign prerogatives.<sup>39</sup> This will merit further discussion later.<sup>40</sup> A substantial number of decisions, however, rest firmly on the ground that the corporation is a separate entity and as such is not to be confused with the government.<sup>41</sup> The corporate form as an isolating factor was

<sup>33</sup> *Supra* note 10. And see *U. S. S. B. Fleet Corporation v. Hardwood* (1929) 281 U. S. 519, holding that parties contracting with the Fleet Corporation could look only to the corporate assets for satisfaction.

<sup>34</sup> *U. S. S. B. Fleet Corporation v. Tabas* (C. C. A. 3, 1927) 22 Fed. (2nd) 398, at p. 400.

<sup>35</sup> *Supra* note 12.

<sup>36</sup> *U. S. S. B. Fleet Corporation v. Western Union Telegraph Company* (1928) 275 U. S. 415. But compare *Commercial Pacific Cable Company v. Philippine National Bank* (D. C. S. D. N. Y. 1920) 263 Fed. 218, affirmed 269 Fed. 1022. Again the War may have influenced the former decision.

<sup>37</sup> *Pro: McCarthy v. U. S. S. B. Merchant Fleet Corporation* (C. C. A. 1931) 53 Fed. (2nd) 923; *certiorari denied* 285 U. S. 547, ("it (the corporation) functions as an instrumentality or department of the government"). *Con: Haines v. Lone Star Shipbuilding Company* (1920) 268 Pa. 92, 110 Atl. 788; *Commonwealth Finance Co. v. Landis* (D. C. F. D. Pa. 1919) 261 Fed. 440.

<sup>38</sup> *The Lake Monroe* (1919) 250 U. S. 246; *Gould Coupler Co. v. U. S. S. B. Fleet Corporation* (D. C. S. D. N. Y. 1919) 261 Fed. 716.

<sup>39</sup> See *Gould Coupler Co. v. U. S. S. B. Fleet Corporation* *supra* note 38, at p. 718; *Federal Sugar Refining Company v. United States Sugar Equalization Board Inc.* (D. C. S. D. N. Y. 1920) 268 Fed. 575, at p. 587; and see *Western and Atlantic Ry. v. Carlton* (1858) 28 Ga. 180.

<sup>40</sup> See p. 239 ff. *infra*.

<sup>41</sup> *Bank of the United States v. Planters Bank of Georgia* (1824) 9 Wheaton 904—this case, however, contains germs both of the separate entity theory and of the commercial enterprise theory. See p. 908; *Lindgren v. U. S. S. B. Fleet Corporation* (C. C. A. 4, 1932) 55 Fed. (2nd) 117, *certiorari denied* 286 U. S. 542; *Sloan Shipyards Corporation v. U. S. S. B. United States ex rel. Skinner & Eddy Corporation v. McCarl* (1927) 275 U. S. 1 *Fleet corporation* (1922) 258 U. S. 549, at p. 565; *Panama Railway v. Curran* (C. C. A. 5, 1919) 256 Fed. 768; 35 Ops. Atty. Gen. 490 (1928;

stressed in *United States v. Strang*<sup>42</sup> where it was held that an inspector of the Fleet Corporation was not affected by a provision of the criminal code that no officer or member of a firm contracting with the United States should be an agent of the United States; the agents of the Fleet Corporation were held agents of an entity separate from the United States, being appointed and removed not by the President or Congress (sic) but solely by officers of the Fleet Corporation. The court said, "generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation."<sup>43</sup> Similarly it has been held that the holding of office in the Fleet Corporation did not prevent one from holding another office under the government, as this did not constitute the forbidden holding of two federal offices.<sup>44</sup> It has been said that the officers of the Panama Railway Company, the stock in which is owned by the United States, are not by that fact officers of the United States.<sup>45</sup> Nor, apparently, do the Civil Service requirements apply to the personnel of these organizations.<sup>46</sup> These analogies are persuasive. Certainly the possibility suggests itself that Congress might deal with the government corporation in the role of the shareholder in the private concern; as the owner of stock it might not only vote upon fundamental policies, but elect directors as well. This admittedly is to indulge the corporate form to the utmost, yet the project is not lacking in logical justification. Innumerable difficulties naturally arise. In many cases the government corporation is organized by administrative officers under the general incorporation laws of a state.<sup>46</sup> Except in questions of citizenship the courts have made little distinction between these and corporations created by Congress. Obviously, however, Congress will enjoy less practical and per-

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National Home for Disabled Veteran Soldiers v. Parrish (1912) 229 U. S. 494; Cox v. Lykes Brothers (1924) 237 N. Y. 376, 143 N. E. 226.

<sup>42</sup> (1921) 254 U. S. 491.

<sup>43</sup> *Ibi.* at p. 492.

<sup>44</sup> Dalton v. United States (1931) 71 Court of Claims 421. And see Osborn v. Bank of the United States (1824) 9 Wheaton 738 at 866.

<sup>45</sup> 27 Ops. Atty. Gen. 19 (1908); and see, for managers of the National Home for Soldiers, 26 Ops. Atty. Gen. 457 (1907). Contra see Holden v. University Ry. (1869) 63 N. C. 410, where said that directors of state owned railroad were "officers" of the state; State ex rel. Howerton v. Tate (1873) 68 N. C. 546, where the court declined to decide whether the directors of a state owned railroad company were legally officers of the state, but nevertheless decided that such must be appointed by the governor and not by the legislature. The constitutional provisions of North Carolina, however, were decidedly explicit in denying appointing power to the legislature.

<sup>46</sup> 37 Ops. Atty. 1 (1932); but see Civil Service Arts and Rules, (amended to Sept. 15, 1934) at p. 45.

<sup>46</sup> See Field, Government Corporations, a Proposal (1935) 48 Harv. L. Rev. 775; and consult note 6 supra.

haps also less legal control over the personnel of such administratively organized corporations. Another distinction is that between stock and non stock corporations drawn by the court in *Springer v. Philippine Islands*. It is difficult to see the rationale behind this. The possible complications, however, are numerous; at this stage one is forced to be content with propounding rather than with answering questions.

Accordingly, reliance upon the corporate form to isolate directors and managers from the appointive power of the executive by no means can afford a definite solution. The factor of corporate isolation is too variable to serve as a certain standard; whether the courts will regard the government corporation as an entity in itself or as a mere arm of the sovereign, in the past has depended largely upon the interests involved and the practical result desired to be attained. This procedure may possess merit as a pragmatic method; but it renders prediction difficult.

#### IV.

A more fundamental approach to the problem will be concerned with the functions rather than the form of the government corporation. In *South Carolina v. United States*<sup>47</sup> a distinction was drawn between the functions of a state which were strictly governmental and those of a commercial nature. If it is possible to make such a distinction in the case of the activities of the federal government, one might argue as did Mr. Justice Holmes, dissenting in *Springer v. Philippine Islands*, that the directors of a corporation engaged in commercial rather than governmental activities are not governmental officers in the constitutional sense, and hence that appointment of such by congress is not an usurpation of the executive power. In a suit against the Planters Bank of Georgia in which the state of Georgia owned part of the stock, Marshall gave early expression to this possibility: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."<sup>48</sup> That this reasoning equally

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<sup>47</sup> (1905) 199 U. S. 437. A liquor dispensary owned and operated by the state of South Carolina was held taxable by the federal government; the liquor business was held not a governmental activity within the traditional definition; also the familiar *in terrorem* argument was given weight; the court pointed out the possible decline in taxes to the national government which would result if the states were to engage in business and plead sovereign immunity from taxation of instrumentalities used in these activities.

<sup>48</sup> (1824) Whraton 904, at pp. 907, 8.

applies to situations where the state owns all the stock in the corporation is indicated by a subsequent decision.<sup>49</sup> There is respectable authority that the doctrine of liability to suit may rest rather on the commercial nature of the enterprise than on the corporate form.<sup>50</sup>

To what extent the national government constitutionally can own stock in and operate corporations engaged in "commercial" enterprises is at present a matter of acrimonious debate.<sup>51</sup> An additional problem is whether all activities on the part of the government are not necessarily always "public."<sup>52</sup> An affirmative answer to this question will result in denying the validity ultimately of distinguishing between activities of a "commercial" nature and those of a "governmental" nature, and hence, putting aside for the moment the issue of corporate form, it would not be possible to hold that the director of a governmentally owned enterprise was any less a "public officer" than one engaged in a more traditional department of government. Something of this is implicit in the majority opinion in *Springer v. Philippine Islands*.<sup>53</sup> Yet it would seem that in actuality there exists a practical difference of wide degree between purely governmental and proprietary or commercial activities even though both are entered into by the sovereign. This distinction is not without weighty judicial support.<sup>54</sup>

It is paradoxical that the majority opinion in the *Springer* case declared that the legislature could not elect the directors of the National Coal Company, engaged as it was in commercial enterprise, but admitted that Congress might appoint the managers of corporations engaged in such traditionally governmental activities as the encouragement of arts and sciences, education and

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<sup>49</sup> *Bank of Kentucky v. Wister* (1829) 2 Peters 318.

<sup>50</sup> See *Gould Coupler Company v. U. S. S. B. Fleet Corporation* (D. C. S. D. N. Y. 1919) 261 Fed. 716, at 3 and especially see *Ballaine v. Alaska Northern Ry. Co.* (C. C. A. 9, 1919) 259 Fed. 183, where a government owned corporation was held immune from suit because the United States was acting in its "sovereign capacity" to transport mail, troops, etc.; the court distinguished the holdings in the Panama Railway cases on the ground that in the case of the latter the United States had entered into a "commercial business," and that hence the government corporation was to be treated as any other private corporation.

<sup>51</sup> For recent competent discussions of the problem see Culp, *Creation of Government Corporations by the National Government* (1935) 33 Mich. L. Rev. 473; and note (1935) 83 U. of Pa. L. Rev. 662.

<sup>52</sup> "The government can never act in a private capacity, it is necessarily always public." Thurston, *Government Proprietary Corporations* (1935) 21 Va. L. Rev. at p. 449.

<sup>53</sup> *Supra* note 27.

<sup>54</sup> *Bank of the United States v. Planters Bank of Georgia*, *supra* note 48; and consult note 50 *supra*.

public charity.<sup>55</sup> The shoe, it would seem, should be on the other foot.

The functional test places narrower limits to the number of corporations the personnel of which Congress could control than does the simpler test of mere corporate form. It is, however, precisely the commercially engaged government corporations which in the future may be in particular need of freedom from political dictation by the executive. It is to be hoped that in such an event the courts will be able to effect this liberation. The combined factors of corporate form and participation in commercial activities may assist the judicial process.

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### CORAM NOBIS IN MISSOURI

It might seem advisable as a matter of logical procedure in a discussion concerning the nature and extent of the writ of error *coram nobis* that one's reasoning should start with the definition of a judgment, and a consideration of the nature of a judicial determination or sentence of a court in a cause within its jurisdiction. If we turn to that venerated authority Lord Coke, we find that the learned judge characterized judgments as "the very voyce of law and right."<sup>1</sup> It is true that every judgment directly enforces some right or suppresses some wrong, thereby producing the end sought by a humanely conceived law and that, in truth, may be the "voyce of law and right."<sup>1a</sup> The meaning of the word "judgment" as changed by the Missouri statute, is defined as "the final determination of the right of the parties in the action."<sup>2</sup> To start with the primary emphasis upon the nature of a judgment demands that we never lose sight of the fact that a judgment imports absolute verity, and is the highest form of obligation. This is supported by the celebrated maxim: It is to the interest of the state that litigation come to an end.<sup>3</sup> A consideration, however, of the writ of error *coram nobis* as one of the methods of vacating a judgment, seems to require that the definition, nature and extent of this remedy should be considered first, rather than that the nature of a judgment be placed to the forefront. To accord the main emphasis to the scope of the writ of error *coram nobis* does not mean that we

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<sup>55</sup> Supra page 236; and see examples of Congressional appointment cited page 234.

<sup>1</sup>Co. Litt. 39 a. 1 Freeman on Judgments, 2.

<sup>1a</sup> 1 Freeman on Judgments, 3.

<sup>2</sup> R. S. Mo. (1929), section 1070. *Kansas City v. Wourshoeffler* (1913) 249 Mo. 1, 155 S. W. 779; *Orchard v. Wright-Dalton-Bell Anchor Stone Co.* (1910) 225 Mo. 414, 125 S. W. 486.

<sup>3</sup> *Jeude v. Sims* (1914) 258 Mo. 26, 166 S. W. 1048.