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# THE DELEGATION OF FEDERAL LEGISLATIVE POWER TO EXECUTIVE OFFICIALS

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# THE DELEGATION OF FEDERAL LEGISLATIVE POWER TO EXECUTIVE OFFICIALS

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"LEGISLATIVE authority cannot be delegated to executive officials." Thus runs a generally received principle of constitutional law, a principle which has been enforced by certain state courts of final appeal. In the federal system, although from time to time verbally affirmed by the Supreme Court, it has never received actual application before the decision in the recent case of *Panama Refining Co. v. Ryan.*[1] The principle, obviously especially vital and important in the light of the "New Deal" legislation generally, becomes a matter of the utmost immediate import because of this decision.

It will be the purpose of this article to attempt (1) a chronological survey of the previous Supreme Court cases relating to alleged delegations of legislative power, and (2) an analysis and discussion of the *Panama Refining Co.* decision in the light of this background. No discrimination is made between delegations of state and of federal legislative power, as the Supreme Court makes no such discrimination.[2]

## I

### SURVEY OF PREVIOUS CASES

The first case in which the question appears to have arisen is that of *Cargo of the Brig Aurora.*[3] This was a case arising under the Non-Intercourse Act of March 1, 1809,[4] as extended by an act of May 1, 1810,[5] and by the President's proclamation of November 2 of that year. By the former act the importation of goods from Great Britain and France was interdicted until the end of the next session of Congress. By the latter it was provided that if either interdicted nation should revoke

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[1] (U. S. 1935) 55 Sup. Ct. 241. Decided by the United States Supreme Court, January 7, 1935.

[2] Certain illuminating state decisions will necessarily be taken into account. This article does not attempt to deal with delegation of legislative or administrative powers to judicial bodies or attempts to confer judicial powers on executive agencies.

[3] 7 Cranch (11 U. S.) 382 (1813).

[4] 2 Stat. 528.

[5] 2 Stat. 605.

her edicts as to American commerce, then three months after the proclamation of the President to that effect, the former act should be revived as against the other interdicted nation. The President having so proclaimed as to France, more than three months thereafter the Brig Aurora imported goods from Great Britain.

In the Supreme Court, Ingersoll for the owners argued that "Congress could not transfer the legislative power to the President. To make the revival of a law depend on the President's proclamation, is to give to that proclamation the force of a law." [6] He proceeded to argue that such was not the intention of Congress. Law, for the prosecution, answered: "The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." [7]

In the very brief opinion of the Court the point was ignored, Mr. Justice Johnson merely observing: [8] "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct." The condemnation of the cargo was affirmed and the question did not appear again before the Supreme Court in any form for over seventy years.[9]

Then in the *Railroad Commission Cases* [10] the question was again raised. The delegation attacked was that of a statute of Mississippi [11] subjecting railroads to the supervision of a regulatory commission. The Supreme Court followed the highest state court in declaring that this was not contrary to the Mississippi Constitution.[12] It is noteworthy that in the same year in the *Express Cases* [13] the Court, speaking through the same justice, declared that requiring railroads to afford certain facilities was "regulation . . . legislative in its character, not judicial. . . . it must come, when it does come, from some source of legislative power. . . ."

Such is the meagre amount of the decisions prior to *Field v. Clark*.[14]

[6] 7 Cranch (11 U. S.) 382 at 386.

[7] 7 Cranch (11 U. S.) 382 at 387.

[8] 7 Cranch (11 U. S.) 382 at 388.

[9] Wayman v. Southard, 10 Wheat. (23 U. S.) 1 (1825), often cited in this connection, is concerned with an alleged delegation of legislative power to the judiciary.

[10] 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191 (1886).

[11] Act of March 11, 1884, Laws of Mississippi 1884, p. 31.

[12] One justice not participating and two dissenting on other grounds. Opinion by Waite, C. J.

[13] 117 U. S. 1 at 29, 6 Sup. Ct. 542, 628 (1886).

[14] 143 U. S. 649, 12 Sup. Ct. 495 (1892).

This case involved provisions of the Tariff Act of October 1, 1890,[15] authorizing the President "to suspend, by proclamation . . . the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides" from countries which impose "duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides . . . he [i.e., the President] may deem to be reciprocally unequal and unreasonable. . . ." The Court met the contention that this was an unconstitutional delegation by the authority of *The Brig Aurora*,[16] by "precedents in legislation" (i.e., acts of Congress conferring "upon the President powers with reference to trade and commerce, like those conferred by" the provisions in question),[17] and by

[15] C. 1244, sec. 3, 26 Stat. 567 at 612.

[16] 7 Cranch (11 U. S.) 382 (1813).

[17] Of these precedents one dates from Washington's administration (Act of June 4, 1794, c. 41, 1 Stat. 372, authorizing the President for a limited time when Congress was not in session, to "lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation" "whenever, in his opinion, the public safety shall so require" "under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper"); two from that of John Adams [Act of June 13, 1798, c. 53, sec. 5, 1 Stat. 565 at 566, suspending commercial intercourse with France and providing that on disavowal of, and satisfaction for, aggressions on the rights of the United States by France "then and thereupon it shall be lawful for the President . . . being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted . . ."; Act of Feb. 9, 1799, c. 2, sec. 4, 1 Stat. 613 at 615, further suspending such intercourse and providing

> "That at any time after the passing of this act, it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interest of the United States, by his order, to remit and discontinue, for the time being, the restraints and prohibitions aforesaid, either with respect to the French Republic, or to any . . . place belonging to the said Republic, with which a commercial intercourse may safely be renewed; and also to revoke such order, whenever, in his opinion, the interest of the United States shall require";

proclamations were issued under the latter act authorizing trade with certain ports in Santo Domingo, 9 ADAMS, WORKS OF JOHN ADAMS 176-177 (1854)]; in addition to the statute passed upon in The Brig Aurora, another statute from the administration of Jefferson (Act of Dec. 19, 1806, c. 1, sec. 3, 2 Stat. 411, suspending until July 1, 1807, an act prohibiting the importation of certain manufactured goods from Great Britain or her colonies and authorizing the President to continue such suspension until not later than the second Monday in December "if in his judgment the public interest should require it"); two statutes from the administration of Madison (Act of March 3, 1815, c. 77, 3 Stat. 224, abolishing discriminating duties against foreign vessels and goods imported therein "whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished"; Act of March 3, 1817, c. 39, 3 Stat. 361, prohibiting the importation of plaster-of-paris in foreign vessels from countries not permitting its export in American vessels and providing that if such discrimination be removed "the President . . . is hereby authorized to declare

the following language quoted from the decision of the Supreme Court of Pennsylvania in *Locke's Appeal*:[18]

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful

that fact by his proclamation, and the restrictions imposed by this act shall, from the date of such proclamation, cease" as to the countries therein named; proclamations were issued under both acts, 3 Stat., App. 1); one from that of Monroe (Act of Jan. 7, 1824, c. 4, sec. 4, 4 Stat. 1 at 3, renewing the Act of March 3, 1815, cited above; one from that of John Quincy Adams (Act of May 24, 1828, c. 111, 4 Stat. 308, in further renewal of the last mentioned act under which numerous proclamations have been issued by many Presidents, 4 Stat., App. pp. 814, 815, 816; 9 Stat., App. pp. 1001, 1004; 11 Stat., App. pp. 781, 782, 795; 13 Stat., App. p. 739; 14 Stat., App. pp. 818, 819; 16 Stat., App. pp. 1127, 1137; 17 Stat., App. pp. 954, 957; 21 Stat. 800; 23 Stat. 835; 24 Stat. 1028); one from that of Jackson (Act of May 31, 1830, c. 219, 4 Stat. 425, abolishing all duties on tonnage of vessels of foreign nations provided the President of the United States should be satisfied that the discriminating or countervailing duties of such nations "so far as they operate to the disadvantage of the United States" had been abolished); one from that of Pierce (Act of Aug. 5, 1854, c. 269, sec. 2, 10 Stat. 587, whereby that President extended by proclamation the benefits of the British treaty of June 5, 1854, to Newfoundland on having received satisfactory evidence of the assent of that colony, 11 Stat. 790); one from that of Johnson (Act of March 6, 1866, c. 12, 14 Stat. 3, authorizing the Secretary of the Treasury to suspend its provisions forbidding the importation of cattle and hides whenever he shall determine that such importation from a given country will not tend to spread cattle disease, and further authorizing the President to suspend such provisions generally "whenever in his judgment" such importation would be without such danger); and one from that of Arthur (Act of June 26, 1884, c. 121, sec. 14, 23 Stat. 57, imposing tonnage duties on certain foreign vessels and authorizing the President to suspend the same "from time to time" in so far as they exceeded equivalent taxes levied by nations from whose ports the vessels came; proclamations were issued under this act, 23 Stat. 841, 842, 844). The act in the case at bar renewed the powers of the Secretary of the Treasury as granted by the Act of March 6, 1866, above cited. The provisions of three of these acts had been permanently incorporated in the Revised Statutes. Rev. Stat. of 1878, secs. 2493, 2494, 4219, 4228. In relation to these statutes the Court said (at pp. 690-691):

> "While some of these precedents are stronger than others . . . they all show that, in the judgment of the legislative branch of the government, it is often desirable . . . for the protection of the interests of our people . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations. If the decision in the case of *The Brig Aurora* had never been rendered, the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."

[18] This case [72 Pa. 491 (1873)] upheld a statute leaving the question of licensing the sale of liquor to the voters of each locality but has been much cited on all questions of delegation of legislative power.

legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation." [19]

The question of delegating railroad regulation to a commission was again raised in *Reagan v. Farmers' Loan & Trust Co., No. 1.*[20] The right so to delegate was thoroughly upheld, the Court saying:[21] "There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation," citing as authority the *Railroad Commission Cases.*[22] The Court reiterates throughout its opinion that the commission is performing "mere administrative work," [23] "the merely administrative duty of framing a tariff of rates for carriage." [24] Yet on the very next page after the last-quoted statement the Court refers to that tariff as an "act of quasi legislation." [25]

The next alleged delegation involved a federal revenue statute [26] requiring that all oleomargarine be packed in containers "marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The sale of oleomargarine in any other containers was declared a crime

[19] Mr. Justice Lamar, with whom Fuller, C. J., concurred, expressed *obiter* a strong opinion that the provisions in question were an unconstitutional delegation of legislative power but concurred in the decision on another ground.

[20] 154 U. S. 362, 14 Sup. Ct. 1047 (1894), involving a Texas statute of April 3, 1891.

[21] 154 U. S. 362 at 393-394, per Brewer, J.

[22] 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191 (1886).

[23] 154 U. S. 362 at 397.

[24] 154 U. S. 362 at 399.

[25] This seeming confusion of thought was facilitated by the contention of the defendant in error that *judicial* power was being delegated. The question of the delegation of *legislative* power was hence not directly raised. Plaintiff in error cited a number of state cases upholding the delegation of rate making to commissions. One of these, McWhorter v. Pensacola & Atlantic R. R., 24 Fla. 417 (1888), is distinguished by the highly remarkable reasoning that since the state can "leave" the fixing of rates to the railroad itself it must be able to "delegate it to a different body." (P. 472.) ". . . the Legislature in the act under consideration, did not delegate to the Commission any power so far its own exclusively that could not be delegated." (P. 474.)

The principal case was followed in Reagan v. Mercantile Trust Co., No. 1, 154 U. S. 413, 14 Sup. Ct. 1060 (1894), in Reagan v. Mercantile Trust Co., No. 2, 154 U. S. 418, 14 Sup. Ct. 1062 (1894), and in Reagan v. Farmers' Loan & Trust Co., No. 2, 154 U. S. 420, 14 Sup. Ct. 1062 (1894).

[26] Act of Aug. 2, 1886, c. 840, sec. 6, 24 Stat. 210, U. S. C. tit. 26, secs. 543-544.

punishable by fine and imprisonment. In *Ex Parte Kollock* [27] the petitioner, having been duly convicted under the statute, petitioned the Supreme Court for a writ of habeas corpus on the ground that it was unconstitutional to delegate the "power to determine what acts shall be criminal." In refusing the writ the Court said: [28] "considered as a revenue act, the designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer." [29]

In two decisions [30] in the year in which *Ex Parte Kollock* was decided, the Court in defining the authority of the Interstate Commerce Commission under the then existing terms of the Interstate Commerce Act [31] described the power to prescribe rates as "legislative." In the earlier of the two cases,[32] the question being whether the act gave the Commission such power, the Court used the following language: [33] "To prescribe rates which shall be charged in the future,— that is a legislative act. . . . The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function. . . . Congress has not conferred upon the commission the legislative power of prescribing rates. . . ." [34]

This viewpoint is again affirmed in *McChord v. Louisville & Nashville Railroad*, where an injunction restraining the Kentucky Railroad Commission from fixing rates was denied for the following reason: [35] "The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction."

The next case in which the question of delegation was raised is

[27] 165 U. S. 526, 17 Sup. Ct. 444 (1897).

[28] 165 U. S. 526 at 536.

[29] This case was followed in Ex parte McCaully, 165 U. S. 538, 17 Sup. Ct. 995 (1897).

[30] Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry., 167 U. S. 479, 17 Sup. Ct. 896 (1897), and Interstate Commerce Comm. v. Alabama Midland Ry., 168 U. S. 144, 18 Sup. Ct. 45 (1897).

[31] Act of Feb. 4, 1887, c. 104, sec. 12, 24 Stat. 383, as amended by Act of March 2, 1889, c. 382, sec. 3, 25 Stat. 858.

[32] Interstate Commerce Comm. v. Cincinnati, New Orleans & Texas Pacific Ry., 167 U. S. 479, 17 Sup. Ct. 896 (1897).

[33] At 499, 505, and 511.

[34] Harlan, J., dissented from both decisions on the ground that the act gave the power in question. The quoted decision was followed in Savannah, Florida, & Western Ry. v. Florida Fruit Exchange, 167 U. S. 512, 17 Sup. Ct. 998 (1897).

[35] 183 U. S. 483 at 495, 22 Sup. Ct. 165 (1902). Opinion by Fuller, C. J.

*Consolidated Coal Co. v. Illinois*,[36] involving an Illinois statute[37] for the inspection of coal mines by state inspectors. By this enactment every coal mine was to be inspected "as often as he [i.e., the inspector] may deem it necessary and proper, and at least four times a year." The mine owner was to pay the fees of the inspectors. In sustaining a suit for such fees the Court said:[38] "While it is undoubtedly true that legislative power cannot be delegated . . . to the executive, there are some exceptions to the rule," citing *The Brig Aurora* and *Field v. Clark*. "In enacting a law with regard to the inspection of mines, we see no objection, in case the legislature find it impracticable to classify the mines for the purposes of inspection, to commit that power to a body of experts. . . ."

Two years later in *Buttfield v. Stranahan*,[39] the statute attacked was the Federal Tea Inspection Act of March 2, 1897,[40] requiring that all tea imported should come up to "uniform standards of purity, quality, and fitness for consumption" to be established by the Secretary of the Treasury on recommendation of a board of tea experts by him appointed. The tea rejected for importation in the case at bar was admittedly pure but of low "cup quality."

Counsel for the importer relied on a strong line of state cases,[41] some of them condemning delegations of power much less extensive

[36] 185 U. S. 203, 22 Sup. Ct. 616 (1902).
[37] Act of May 28, 1879, Ill. Laws, 1879, p. 157.
[38] 185 U. S. 203 at 210-211. Opinion by Brown, J.
[39] 192 U. S. 470, 24 Sup. Ct. 349 (1904).
[40] 29 Stat. 604, c. 358.
[41] These cases were:

(1) O'Neil v. American Fire Ins. Co., 166 Pa. 72, 30 Atl. 943 (1895). Here the insurance commissioner of the state had been authorized by a statute (Act of April 16, 1891, Pa. Pub. Laws for 1891, p. 22) to prepare and file in his office "a printed form, in blank, of a contract or policy of fire insurance" which should then be the Standard Fire Insurance Policy of the State. This statute the Supreme Court of Pennsylvania held void on the following reasoning (at pp. 76, 78-79):

" 'Under a well-balanced constitution the legislature can no more delegate its proper function than can the judiciary.' . . . The Act . . . is a delegation of legislative power because,

"First. The act does not fix the terms and conditions of the policy. . . .

"Second. It delegates the power to prescribe . . . the policy . . . to a single individual.

"Third. The appointee clothed with this power is not named but is designated only by his official title. He is the person who may happen to be insurance commissioner when the time comes to prepare the form. . . .

"Fourth. The appointee is not required to report his work . . . but simply to file in his own office the form of policy he has devised. It does not become a part of the statute in fact, is not recorded in the statute book, and no trace of it can be found among the records of either branch of the legislature. . . .

than that in the statute in question. But the Court answered their contentions: [42]

> "Whoever might be interested in knowing the directory part of the statute . . . had to go beyond the act of assembly and inquire of the appointee. . . .
>
> "It will not do to say that the preparation of the form was an unimportant matter of detail. . . . It was the sole purpose of the act. . . . Take out the form . . . and the act is without meaning or effect. . . .
>
> "We do not see how a case could be stated that would show a more complete . . . surrender of the legislative function. . . ."

(2) Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738 (1896), relying on the preceding case as authority, held void a Wisconsin statute (Wis. Laws 1891, c. 195, p. 224) empowering the State Insurance Commissioner to prepare a State Standard Policy which "shall as near as the same can be made applicable, conform to the type and form of the New York Standard Fire Insurance Policy." The Court said (at p. 74): ". . . a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the . . . appointee or delegate of the legislature, so that, in form and substance, it is a law in all its details *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event."

(3) The same court followed up its decision by holding void in State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347 (1897), a statute (Sanborn & Berryman, Ann. Stat. of Wis., sec. 1409) conferring power upon the State Board of Health "to make such rules and regulations and to take such measures as may in its judgment be necessary for the protection of the people of the state from . . . dangerous contagious disease." The Court said (at p. 402): "The true test and distinction whether a power is strictly legislative, or whether it is administrative . . . 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution.' . . ." quoting Cincinnati, W. & Z. R. R. v. Clinton County Comrs., 1 Ohio 77 (1852).

(4) In Harmon v. State ex rel. Gard, 66 Ohio 249, 64 N. E. 117 (1902), the Supreme Court of Ohio came to a like determination in regard to a statute (Act of March 1, 1900, 94 Ohio Laws 33) requiring the examination of steam engineers and providing that (sec. 6) "if, upon examination, the applicant is found trustworthy and competent, a license shall be granted him." The Court said (at pp. 252, 253):

> "the examiner is made the exclusive judge as to whether an applicant is trustworthy and competent. No standard is furnished . . . as to qualification, and no specifications as to wherein the applicant shall be trustworthy and competent, but all is left to . . . the examiner. He is the autocrat with unlimited discretion. . . .
>
> "Thus allowing the examiner . . . to, in effect, make the law . . . limited only by his will as to what shall constitute the standard . . . is granting legislative power. . . . The constitution does not recognize . . . administrative power. . . . no necessity exists for such a power, as all powers are included in the legislative, executive and judicial."

Contrast with Harmon v. State ex rel. Gard, the Wisconsin case, State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947 (1889). This upheld a statute (Wisconsin Laws of 1889, c. 383, sec. 4) authorizing drainage commissioners to order the drainage or reclamation of land "if they shall be of the opinion that the public health or welfare will be thereby promoted." Said the court (at p. 630): "The Legislature may determine the necessity of the exercise of the power, and the extent to which the exercise shall be carried, or it may delegate the exercise of that right to officers. . . ."

[42] 192 U. S. 470 at 496. Per White, J. Brewer and Brown, JJ., not participating.

"the statute, when properly construed . . . but expresses the purpose to exclude the lowest grades of tea. . . . This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of Field v. Clark. . . . it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." [43]

In *Jacobson v. Massachusetts*,[44] a state statute [45] authorized a local board of health to require vaccination against smallpox "if, in its opinion, it is necessary for the public health or safety" and imposing a fine for non-compliance. Appellant in the case had been so fined, and contended that the Board of Health had been invested with "arbitrary powers." [46] The Court said, in upholding the statute: [47]

"the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. . . . the legislature of Massachusetts required the inhabitants . . . to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere . . . and surely it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions. To invest such a body with

[43] The decision in the principal case was followed in Buttfield v. Bidwell, 192 U. S. 498, 24 Sup. Ct. 356 (1904), and in Buttfield v. United States, 192 U. S. 499, 24 Sup. Ct. 356 (1904).

[44] 197 U. S. 11, 25 Sup. Ct. 358 (1905).

[45] Massachusetts Rev. Laws, 1902, c. 75, sec. 137.

[46] The case was not treated by either counsel or Court as a matter of legislative delegation. It has, however, been since frequently cited as such and the facts are certainly as strong as those in many of the cases where the question of delegation was specifically raised.

[47] 197 U. S. 11 at 25, 27. Per Harlan, J. Brewer and Peckham, JJ., dissenting.

authority over such matters was not an unusual nor an unreasonable or arbitrary, requirement."[48]

Another case involving the delegation of power to boards of health soon followed. *New York ex rel. Lieberman v. Van De Carr*,[49] arose under a city ordinance[50] requiring milk dealers to obtain a permit from the Board of Health which should prescribe the conditions thereof. This was attacked as permitting arbitrary discrimination. For the validity of the ordinance several important state cases[51] were cited in

[48] This case was followed in Cantwell v. Missouri, 199 U. S. 602, 26 Sup. Ct. 749 (1905), in Moeschen v. Tenement House Dep't, 203 U. S. 583, 27 Sup. Ct. 781 (1906), and in Rixey v. Cox, 235 U. S. 687, 35 Sup. Ct. 204 (1914).

[49] 199 U. S. 552, 26 Sup. Ct. 144 (1905).

[50] New York City Sanitary Code, sec. 66.

[51] Two of these cases are of special interest:

(1) Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224 (1889). This case arose under a statute (Acts & Resolves of Mass., 1878, c. 244, sec. 2) conferring on the Police Commissioners of Boston power for "regulating and restraining . . . itinerant musicians." Defendant was a cornet player in a procession of the Salvation Army and was not licensed to play as required by the Commissioners. The Court said in upholding his conviction (at p. 382-3):

"The defendant contends that the power to make the rules in question could not be delegated to the board of police. . . . No authority has been cited, and after some examination we have found none, which holds that the Legislature cannot authorize a particular board of officers, who have charge of the whole or a portion of the affairs of a city, to make reasonable police rules and regulations which shall be binding upon the people, with penalties imposed for a violation of them. . . . A majority of the court is of the opinion that there is no constitutional objection to this delegation of authority."

(2) Blue v. Beach, 155 Ind. 121, 56 N. E. 89 (1900). This case involved a statute (3 Burns' Ind. Rev. Stat. 1894, sec. 6718) providing that it shall be the duty of local boards of health to take prompt action to arrest the spread of contagious diseases. Action by such a board excluding unvaccinated children from the schools during a smallpox epidemic was upheld by the Court in the following language:

"While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction. . . .

"When these boards adopt rules or by-laws, by virtue of legislative authority, such rules and by-laws . . . have the force and effect of a law of the legislature, and, like an ordinance or by-law of a municipal corporation, they may be said to be in force by the authority of the State. . . . [p. 130].

"It can not be successfully asserted that the power . . . is an improper delegation of legislative authority. . . . this constitutional inhibition can not properly be extended so as to prevent the grant of legislative authority, to some administrative board or other tribunal, to adopt rules, by-laws, or ordinances . . . to carry out a particular purpose. It can not be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. . . . there are many mat-

argument. In upholding the ordinance, the Court said: [52] " '. . . the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority.' " [53]

The next case to arise involved taxation. A Michigan statute [54] provided that railroads should be taxed at a rate to be determined by the state tax commissioners by taking the total amount of taxes assessed by local taxation authorities throughout the state and dividing that by the total assessed valuation of all other property within the state as determined by such authorities. In *Michigan Central R. R. v. Powers*,[55] this statute was assailed as a delegation of the taxing power of the legislature. The Court answered: [56] ". . . where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate." [57]

Then came an attack on a federal statute [58] providing that "whenever the Secretary of War shall have reason to believe that any railroad or other bridge . . . over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters" he shall, after hearing, give notice directing the alteration of such bridge, "and in giving such notice he shall specify the changes, recommended by the Chief of Engineers, that are required to be made, and shall prescribe in each case a reasonable time in which to make them." [59] Failure to obey such notice was declared to be a misdemeanor

> ters relating to methods or details which may be, by the legislature, referred to some designated ministerial officer or body. All of such matters fall within . . . the right of the legislature to authorize an administrative . . . body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. . . ." (Pp. 132-133.)

The court then quotes the language of the Pennsylvania Supreme Court in Locke's Appeal, 72 Pa. 491 (1873).

[52] 199 U. S. 552 at 561-562. Per Day, J. Holmes, J., concurring on another ground.

[53] Quoting Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673 (1904), a case involving a delegation of authority to a city council.

[54] Michigan Laws of 1901, Act No. 173, secs. 11 and 12.

[55] 201 U. S. 245, 26 Sup. Ct. 459 (1906).

[56] 201 U. S. 245 at 297. Per Brewer, J.

[57] In accordance with this decision a great number of cases arising under the same act were similarly determined. See list, 201 U. S. 245 at 302-303.

[58] River and Harbor Act of March 3, 1899, c. 425, sec. 18, 30 Stat. 1121 at 1153.

[59] 204 U. S. 364 at 366.

punishable by fine. In *Union Bridge Co. v. United States*,[60] a conviction under this act was sustained, the Court resting its decision on *The Brig Aurora*,[61] *Wayman v. Southard*,[62] *Field v. Clark*,[63] *Buttfield v. Stranahan*,[64] and *Locke's Appeal*.[65] The language of the last named case was requoted from *Field v. Clark* [66] and comprises the essence of the reasoning of the Court.[67]

Next followed an interesting series of cases about utility regulation. In the first of these [68] the delegation attacked was a charter power given a city council to fix telephone rates.[69] In upholding this the Court described it as being "legislative in its character" [70] and as being "purely a legislative function." [71]

In a case decided the same day[72] the Court prevented regulation of street car service by the Hawaiian courts where the power had been conferred by territorial statute [73] upon the Governor and the Superintendent of Public Works. The Court said: [74] "This power of regulation . . . is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation," citing *Reagan v. Farmers' Loan & Trust Co.*,[75] and *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry.*[76]

Next came *Knoxville v. Knoxville Water Co.*,[77] in which the Court held that rate making by a subordinate body such as a city council was entitled to the presumption of validity regularly accorded to legislation. "The function of rate-making is purely legislative in its charac-

[60] 204 U. S. 364, 27 Sup. Ct. 367 (1907).
[61] 7 Cranch (11 U. S.) 382 (1813).
[62] 10 Wheat. (23 U. S.) 1 (1825).
[63] 143 U. S. 649, 12 Sup. Ct. 495 (1892).
[64] 192 U. S. 470, 24 Sup. Ct. 349 (1904).
[65] 72 Pa. 491 (1873).
[66] 143 U. S. 649, 12 Sup. Ct. 495 (1892).
[67] Opinion by Harlan, J., from which Brewer and Peckham, JJ., dissented; Moody, J., not participating.
[68] Home Telephone Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50 (1908).
[69] Given by Sec. 31 of the Los Angeles City Charter.
[70] 211 U. S. 265 at 271.
[71] 211 U. S. 265 at 278. Opinion by Moody, J.
[72] Honolulu Rapid Transit Co. v. Hawaii, 211 U. S. 282, 29 Sup. Ct. 55 (1908).
[73] Revised Laws of Hawaii, 1905, c. 66, sec. 843, par. 4.
[74] 211 U. S. 282 at 290-291. Per Moody, J., Fuller, C. J., dissenting.
[75] 154 U. S. 362, 14 Sup. Ct. 1047 (1894).
[76] 167 U. S. 479, 17 Sup. Ct. 896 (1897).
[77] 212 U. S. 1, 29 Sup. Ct. 148 (1909).

ter, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power." [78]

Contrasting with this case is the decision in *Interstate Commerce Commission v. Illinois Central R. R.*,[79] that the Commission in minutely regulating the apportionment of freight cars to coal mines was exercising "merely administrative functions." [80]

The statute attacked in the *Union Bridge Case* [81] was again before the Court in *Monongahela Bridge Co. v. United States.*[82] An extended examination of authorities was declared to be unnecessary, former decisions having "concluded" "all the material questions." [83] "The Court has heretofore held . . . that a denial to Congress of authority, under the Constitution, to delegate to an Executive Department or officer the power to determine some fact or some state of things upon which the enforcement of its enactment may depend, would often render it impossible or impracticable to conduct the public business, and to successfully carry on the operations of the government." [84] ". . . the statute did not in any real, constitutional sense delegate . . . any power that must, under our system of government, be exclusively exercised . . . by the legislative . . . branch of the Government" and "could not reasonably be taken as a delegation of legislative . . . power." [85]

Then in *United States v. Grimaud*,[86] came an assault on the powers delegated to the Secretary of Agriculture [87] in controlling the National Forest Reserves. These were to "make rules and regulations . . . to

[78] 212 U. S. 1 at 8. Opinion by Moody, J.

[79] 215 U. S. 452, 30 Sup. Ct. 155 (1910).

[80] 215 U. S. 452 at 470. Opinion by White, J., Brewer, J., dissenting. This case was followed in Interstate Commerce Comm. v. Chicago & Alton R. R., 215 U. S. 479, 30 Sup. Ct. 163 (1910), and in Brady v. United States, 283 U. S. 804, 51 Sup. Ct. 559 (1931).

[81] Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907).

[82] 216 U. S. 177, 30 Sup. Ct. 356 (1910).

[83] Citing The Brig Aurora, 7 Cranch (11 U. S.) 382 (1913); Wayman v. Southard, 10 Wheat. (23 U. S.) 1 (1825); Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 (1892); Cincinnati, W. & Z. R. R. v. Clinton County Com'rs, 1 Ohio St. 77 (1852); Locke's Appeal, 72 Pa. 491 (1873); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); and Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907).

[84] 216 U. S. 177 at 192-193.

[85] 216 U. S. 177 at 192 (1910). Opinion by Harlan, J., Brewer, J., dissenting.

[86] 220 U. S. 506, 31 Sup. Ct. 480 (1911).

[87] By 33 Stat. 628, c. 288.

regulate the occupancy and use and to preserve the forests from destruction," [88] and any violation of such rules and regulations was made punishable by fine and imprisonment. A conviction for violating such rules was upheld, the Court saying: [89]

> "when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' [90] by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress. . . . But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. . . . But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offence." [91]

An alleged delegation of power by a state legislature was very cursorily disposed of in *Red "C" Oil Manufacturing Co. v. Board of Agriculture.*[92] Power was given to the board by a North Carolina statute [93] "to make all necessary rules and regulations for the inspection . . . and to adopt standards of safety, purity or absence from objectionable substances and luminosity . . . which they may deem necessary to provide the people of the State with satisfactory illuminating oil." The Court said: [94] "The legislative requirement was that the illuminating oils furnished . . . should be safe, pure and afford a satisfactory light. . . . We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable." [95]

Powers of the Secretary of War were again attacked in *Philadelphia Co. v. Stimson.*[96] By Act of Congress of September 19, 1890,[97] "where

[88] 220 U. S. 506 at 517, 522.

[89] 220 U. S. 506 at 517, 518, and 521. Per Lamar, J.

[90] Quoted from Marshall, C. J., in Wayman v. Southard, 10 Wheat. (23 U. S.) 1 at 43 (1825).

[91] This case was followed in Light v. United States, 220 U. S. 523, 31 Sup. Ct. 485 (1911).

[92] 222 U. S. 380, 32 Sup. Ct. 152 (1912).

[93] Oil Inspection Act of 1909, sec. 2. Quoted, 222 U. S. 380 at 390 n.

[94] 222 U. S. 380 at 394. Per White, C. J.

[95] Citing Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907); and United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911).

[96] 223 U. S. 605, 32 Sup. Ct. 340 (1912).

[97] C. 907, sec. 12, 26 Stat. 426 at 455.

it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may . . . cause such lines to be established, beyond which no piers, wharves, bulk-heads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him. . . ." Violations of any rule or regulation of the Secretary were made punishable by fine or imprisonment. An injunction against the enforcement of the act was refused, the Court saying: [98] "Congress . . . acted within its constitutional power in authorizing the Secretary of War to fix the lines." [99]

Increased powers granted the Interstate Commerce Commission by Act of June 29, 1906,[100] were resisted in *Interstate Commerce Commission v. Goodrich Transit Co.*[101] By this act the Commission was given power to prescribe a uniform system of accounting for all interstate carriers "by railroad or partly by railroad and partly by water." This power was upheld, the Court saying:[102] ". . . having laid down the general rules of action under which a commission shall proceed, [Congress] may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress." [103]

Twice within the year following this decision did the Supreme Court affirm that the rate-making power was legislative even when

[98] 223 U. S. 605 at 638. Per Hughes, J.

[99] Citing Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907); and Monongahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356 (1910).

[100] C. 3591, 34 Stat. 584.

[101] 224 U. S. 194, 32 Sup. Ct. 436 (1912).

[102] 224 U. S. 194 at 214 (1912). Per Day, J., Lurton and Lamar, JJ., dissenting.

[103] This viewpoint contrasts strongly with one evidenced in a decision cited by counsel for the carriers:

Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241 (1894). A state statute (Minnesota Laws, 1889, c. 217, sec. 1) authorizing the State Insurance Commissioner to frame a standard fire insurance policy which should conform as nearly as possible "to the type and form of the New York Standard Fire Insurance Policy" was held void.

> "There was no reason why the legislature could not pass this act as well as the commissioner. . . . the regulation of many matters of detail, exceptional matters, and matters which cannot well be regulated by the general provisions of law, may perhaps be delegated. . . . But this is not such a matter. There is no necessity for changing from time to time, between legislative sessions, the provisions which should be put in such a standard form, so as to meet changing conditions." (At pp. 194-195.)

delegated. In the *Minnesota Rate Cases* [104] an injunction against the enforcement of rates imposed by a state railroad commission was refused. "The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it. . . ." [105]

In *Louisville & Nashville R. R. v. Garrett* [106] the state legislature had contracted with the railroad that the latter might maintain a certain schedule of rates subject to the legislative power of repeal. Thereafter the legislature created a railroad commission with power to regulate rates. The railroad contended that since the legislature had not repealed the schedule of rates granted it could not be changed by the commission and that the act creating the latter delegated *judicial* power. In rejecting these contentions the Court said: [107]

> "prescribing rates for the future is an act legislative, and not judicial, in kind. . . . It pertains, broadly speaking, to the legislative power. The legislature may act directly, or . . . it may commit the authority to fix rates to a subordinate body. . . . the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. . . . the finality of the act did not change its essential character. . . . it was final as a legislative act within the Commission's authority. . . . The order of the Railroad Commission in fixing rates was a legislative act, under its delegated power. It had 'the same force as if made by the legislature.' . . . It is for this reason that it is a 'law' passed by the State, within the meaning of the contract clause. . . . As it had full legislative effect, the appellant could not assert against its operation the provision of a contract which had previously become subject to legislative alteration."

In *Plymouth Coal Co. v. Pennsylvania*, [108] a power granted by state statute [109] to engineers of adjoining mine owners together with the state mine inspector to determine the necessary thickness of the coal barrier between the mines was attacked as a delegation of *judicial* power. The power was upheld and described as "*quasi* legislative." [110]

[104] 230 U. S. 352, 33 Sup. Ct. 729 (1913).

[105] 230 U. S. 352 at 433. Per Hughes, J., McKenna, J., concurring in result.

[106] 231 U. S. 298, 34 Sup. Ct. 48 (1913).

[107] 231 U. S. 298 at 305, 307, 308 and 318. Per Hughes, J.

[108] 232 U. S. 531, 34 Sup. Ct. 359 (1914).

[109] Act of June 2, 1891, Art. 3, sec. 10, Pa. Laws, 1891, p. 176 at 183.

[110] 232 U. S. 531 at 544. Opinion by Pitney, J.

Power granted the Interstate Commerce Commission was again opposed in the *Intermountain Rate Cases*.[111] Section 4 of the Act to

[111] 234 U. S. 476, 34 Sup. Ct. 986 (1914). Citations by counsel in the principal case lead to an interesting chain of state decisions, not all alike in their bearing but all of distinct value on the subject in hand:

(1) Noel v. People, 187 Ill. 587, 58 N. E. 616 (1900). This case involved the Illinois Pharmacy Act. By sec. 8 of that statute (Hurds Ill. Rev. Stat. 1897, p. 1075 at 1076) "The Board of Pharmacy may in their discretion issue permits . . . to sell . . . proprietary medicines under such restrictions as the Board . . . may deem proper." (Quoted, 187 Ill. 587 at 590.) This provision the court held void, saying (at pp. 591-592): "Laws, thus conferring discretionary and arbitrary power upon statutory officials . . . amount in effect to a delegation by the legislature of its legislative functions to the board or officials in question."

(2) State v. Thompson, 160 Mo. 333, 60 S. W. 1077 (1901). In this case an act regulating race track gambling (Act of April 7, 1897, sec. 2, Missouri Laws of 1897, p. 100) was attacked. It authorized the state auditor to license bookmaking if satisfied of the good character of the applicant and of the track where he intended to operate. In upholding the state auditor's power the court said: "The power delegated to the State Auditor is not the power to make a law, but is a power to determine a fact or things, upon which the action of the law depends, and it can not be said to be legislative in its character." The court then quoted from Locke's Appeal, 72 Pa. 491 (1873).

(3) Commonwealth v. Sisson, 189 Mass. 247, 75 N. E. 619 (1905). In this case the statute involved (Act of Aug. 1, 1904, Mass. Rev. Laws, Supp. 1902-1908, c. 91, sec. 8) authorized the State Fish and Game Commission to forbid the discharge of sawdust into rivers where such discharge was injurious to the fish and the fish were of sufficient value to warrant the order. The Commission acted without hearing interested parties, and in upholding its action the court said (at pp. 252, 254):

> There is a "right of the Legislature to delegate some legislative functions. . . . they could . . . leave it to the board to settle in each particular case the practical details required to harmonize best conflicting rights. . . . the action of the fish commissioners . . . is unquestionably legislative in character, and . . . is valid. . . . The board is no more required to act on sworn evidence than is the Legislature itself, and no more than in case of the Legislature itself is it bound to act only after a hearing or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the Legislature in enacting a statute. . . . where it is legislative it is final and no hearing is necessary. . . . The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature if a remedy should be given."

(4) Pierce v. Doolittle, 130 Iowa 333, 106 N. W. 751 (1906). This case involved a statute (Iowa Code, Supp. 1907, sec. 2573) providing that anyone who knowingly violates a rule of the State Board of Health should be guilty of a misdemeanor. In upholding the statute, the court said (at p. 336): ". . . the Legislature may provide for the punishment of acts in resistance to, or violation of, the authority conferred upon such subordinate tribunal or board." The court then quoted from Blue v. Beach, 155 Ind. 121, 56 N. E. 89 (1900).

(5) State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681 (1909). In this case the statute involved (Act of March 23, 1906, Kentucky Laws 1906, c. 137, p. 466) provided (sec. 3) that the State Racing Commission should have power "to prescribe the rules, regulations and conditions under

Regulate Commerce[112] permitted the Commission to impose higher rates for short than long hauls. No basis of decision was stated in the statute but the Court interpreted it as implying that the power was given where the commission believed such rates were necessary in order to meet competition. This, the Court held,[113] was not "a delegation to the Commission of legislative power which Congress was incompetent to make."[114] Further on[115] the power is referred to as "administrative."

The creation of a State Board of Motion Picture Censors was attacked as a delegation of legislative power in *Mutual Film Corp. v. Industrial Commission.*[116] By an Ohio statute[117] such a board was created under the supervision of the State Industrial Commission and was[118] to approve "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character. . . ." Exhibition of films without the approval of the Board was declared a crime. In upholding the statute, the Court said:[119]

> "While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal

which running races shall be conducted. . . ." This provision was held constitutional, the court saying (at pp. 186-187, 188, 189):

> "A police regulation that is not a total prohibition necessarily implies a discretionary selection of the persons by whom, and the times and places when and where, and the conditions upon which, the thing to be regulated, may be done. . . . the Legislature selects the subject, and indicates the public policy with respect thereto. The subject is thereby brought within governmental control. Its free indulgence is deemed harmful. To so determine is the exclusive prerogative of legislation. The selection of the persons, places, and times, and the regulation of the conditions upon which it is to be exercised, are matters of executive detail, which may be, and which are always, delegated to the ministerial body. . . . The Legislature declares what is the law, the commission ascertains the facts—that is, the situation—upon which the law is applied."

[112] 24 Stat. 380, c. 104.

[113] Speaking through White, C. J.

[114] 234 U. S. 476 at 486, citing Field v. Clark, 143 U. S. 649 (1892); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907); and Monongahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356 (1910).

[115] 234 U. S. 476 at 490.

[116] 236 U. S. 230, 35 Sup. Ct. 387 (1915).

[117] Act of April 16, 1913, 103 Ohio Laws 399.

[118] By sec. 4.

[119] 236 U. S. 230 at 245-246. Per McKenna, J.

> principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution. . . . legislative power is completely exercised where the law 'is perfect, final and decisive in all of its parts, and the discretion given only relates to its execution.' " [120]

The next attack was on the Federal Reserve Act.[121] By section 11 (k) of this statute the Federal Reserve Board was given authority, "To grant by special permit to national banks applying therefor . . . the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe." In *First National Bank v. Fellows ex rel. Union Trust Co.*,[122] the Court said:[123] ". . . we think it necessary to do no more than say that a contention . . . that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them." [124]

[120] This decision was followed in Mutual Film Corp. v. Industrial Comm., 236 U. S. 247, 35 Sup. Ct. 393 (1915), and in Mutual Film Corp. v. Hodges, 236 U. S. 248, 35 Sup. Ct. 393 (1915).

[121] Act of Dec. 23, 1913; 38 Stat. 251, c. 6.

[122] 244 U. S. 416, 37 Sup. Ct. 734 (1917).

[123] 244 U. S. 416 at 427. Per White, C. J.

[124] Citing Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 (1892); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911); Monongahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356 (1910); and the Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986 (1914). Van Devanter and Day, JJ., concurring on another ground.

Citations by counsel in this case reveal two interesting Minnesota decisions:

(1) State ex rel. Beek v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134 (1899). Here attack was made on a statute (Minn. Laws 1899, c. 225) authorizing the State Warehouse Commission to fix the amounts of bonds to be required of commission merchants for the protection of their consignors. The Commission was to determine the amount for each case separately. In sustaining the legislation the court said (at p. 501): "Fixing the amount of such a bond, and the requirements as to sureties, are purely administrative duties. It is necessary to lodge discretion somewhere, as manifestly it would be impracticable for the statute to prescribe the amount of bond for each of the numberless cases which arise."

(2) State v. Great Northern Ry., 100 Minn. 445, 111 N. W. 289 (1907). The attack was here upon a statute (Minn. Rev. Laws 1905, sec. 2872) requiring railway companies to apply to the State Railroad Commission for power to increase their stock and authorizing the Commission to grant or refuse and to "prescribe

In the *Selective Draft Law Cases*,[125] an argument based on the administrative features of the Selective Service Act [126] was dismissed in much the same language and on many of the same authorities.[127] The same summary manner of sustaining wartime legislation was also exemplified in *McKinley v. United States*.[128]

Further cases on the nature of rate making followed. In *Oklahoma Operating Co. v. Love*,[129] it was held that where the statutes of a state forbade the courts to review rate-making orders a denial of constitutional rights resulted, the Court saying: [130] "The order . . . in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory." [131]

the manner in which and the terms upon which" the increase should be made. No standard for the Commission's decision was given. In holding the act void the court said (at pp. 473, 477, 480-481):

> "The terms and conditions upon which railway corporations may be created, the powers and capital stock they may have, the purposes for which they may increase their capital stock, and the limitations and conditions to be imposed upon the right to such increase, are exclusively matters for legislative action, which cannot be delegated. . . . 'The difference between the power to say what the law shall be, and the power to adopt rules and regulations, or to investigate and determine the facts . . . is apparent. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law.' . . . The statute under consideration is so clearly an attempt to delegate . . . legislative power . . . that we must, and do, for that reason hold it to be unconstitutional."

[125] 245 U. S. 366, 38 Sup. Ct. 159 (1918).

[126] Act of May 18, 1917, 40 Stat. 76, c. 15.

[127] Opinion by White, C. J. This case was followed in Jones v. Perkins, 245 U. S. 390, 38 Sup. Ct. 166 (1918); Goldman v. United States, 245 U. S. 474, 38 Sup. Ct. 166 (1918); Kramer v. United States, 245 U. S. 478, 38 Sup. Ct. 168 (1918); Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168 (1918); Yanyar v. United States, 246 U. S. 649, 38 Sup. Ct. 332 (1918); Stephens v. United States, 247 U. S. 504, 38 Sup. Ct. 579 (1918); Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205 (1920); and O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. 444 (1920).

[128] 249 U. S. 397, 39 Sup. Ct. 324 (1919). The case upheld a provision of the Selective Service Act (40 Stat. 83, c. 15, sec. 13) authorizing the Secretary of War to fix a limit around military stations within which the maintenance of a bawdy house should be a federal crime. Memorandum opinion by Day, J.

[129] 252 U. S. 331, 40 Sup. Ct. 338 (1920).

[130] 252 U. S. 331 at 335. Per Brandeis, J.

[131] This case was followed in Kansas City Southern Ry. v. Hooper, 278 U. S. 563, 49 Sup. Ct. 35 (1928).

This viewpoint was affirmed in the almost identical case of *Ohio Valley Water Co. v. Ben Avon Borough.*[132]

The next case again involved what may be termed the maritime authority of the Secretary of War. This authority included[133] power to approve the construction of bridges over navigable waters. Under this power the Secretary had approved the construction of a railroad bridge across the Sacramento River in replacement of another on condition that the piles of the former bridge should be razed down to seven feet below the lowest low water mark. This was done and when a dredge was injured by running on the stumps so left the Secretary's order was pleaded in defense of a suit for damages.[134] In upholding this defense the Court said:[135]

> "By this legislation Congress . . . committed to the Secretary of War administrative power in so far as administration was necessary. . . . In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation. . . . 'Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution . . . to prescribe the way in which the question of obstruction shall be determined.' "[136]

Then followed a case[137] involving a state statute[138] establishing a dentistry examining board and requiring all persons wishing to practice dentistry to pass an examination in order to be licensed. No further provision was made as to the examination. To a claim that this statute delegated legislative power to the examiners the Court, speaking through Mr. Justice Brandeis, replied:[139]

[132] 253 U. S. 287, 40 Sup. Ct. 527 (1920). Per McReynolds, J. Brandeis, Holmes, and Clarke, JJ., dissenting on another ground.

[133] By Act of Sept. 19, 1890, 26 Stat. 454, c. 907, sec. 7, and Act of July 13, 1892, 27 Stat. 110, c. 158, sec. 3.

[134] In Southern Pacific Co. v. Olympian Dredging Co., 260 U. S. 205, 43 Sup. Ct. 26 (1922).

[135] Per Sutherland, J. 260 U. S. 205 at 208, 210.

[136] Quotation taken from Monongahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356 (1910).

[137] Douglas v. Noble, 261 U. S. 165, 43 Sup. Ct. 303 (1923).

[138] Washington Laws of 1893, c. 55.

[139] 261 U. S. 165 at 169-170.

"The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. . . . But the legislature need not make this general finding. To determine the subjects of which one must have knowledge . . . the extent of knowledge in each subject; the degree of skill requisite; and the procedure to be followed in conducting the examination; these are matters appropriately committed to an administrative board."[140]

Then twice more the Court affirmed the legislative nature of rate making, once[141] in refusing to review a rate-making decision as not being judicial work for itself, and once[142] in refusing to permit a lower federal court to fix rates as not judicial work for it.

It next proceeded in two cases to uphold further increased powers of the Interstate Commerce Commission. In *Avent v. United States*[143] it was confronted by an attack on the validity of a provision of the Transportation Act of 1920[144] empowering the Commission in emergencies to make "reasonable directions" "in the interest of the public and the commerce of the people," including directions "for preference or priority in transportation." The case involved a conviction for obtaining a shipment of coal in violation of the Commission's rules as to priority, and the Court said:[145] "That it [Congress] can give the powers here given to the Commission . . . no longer admits of dispute. . . . The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed. . . . Congress may make violation of the Commission's rules a crime."[146]

[140] Citing Mutual Film Corp. v. Industrial Comm., 236 U. S. 230, 35 Sup. Ct. 387 (1915). The principal case was followed in Fife v. Louisiana State Board of Medical Examiners, 274 U. S. 720, 47 Sup. Ct. 590 (1927), in Griffin v. Powers, 275 U. S. 495, 48 Sup. Ct. 83 (1927), and in Dr. Bloom, Dentist, Inc. v. Cruise, 288 U. S. 588, 53 Sup. Ct. 320 (1933).

[141] In Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 Sup. Ct. 445 (1923), per Taft, C. J.

[142] In Terminal R. R. Ass'n v. United States, 266 U. S. 17, 45 Sup. Ct. 5 (1924), per Butler, J.

[143] 266 U. S. 127, 45 Sup. Ct. 34 (1924), per Holmes, J.

[144] Act of Feb. 28, 1920, 41 Stat. 456 at 474-476, c. 91, tit. IV, sec. 402 (15).

[145] 266 U. S. 127 at 130-131.

[146] Citing Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452, 30 Sup. Ct. 155 (1910); United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911); Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907); the Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986 (1914); and Mutual Film Corp. v. Industrial Commission, 236 U. S. 247, 35 Sup. Ct. 393 (1915).

In *United States v. Michigan Portland Cement Co.*,[147] a similar conviction was upheld, the Court saying:[148] "Service Order No. 23 herein was issued under the Transportation Act and had the force of law."

Then followed two cases concerning powers delegated to the President. In *United States v. Chemical Foundation*[149] the government attacked a provision of the amended Trading with the Enemy Act[150] whereby seized patents were to be put up to public sale " 'unless the President stating the reasons therefor, in the public interest shall otherwise determine. . . .' "[151] The Court upheld a private sale approved by the President, saying:[152]

> "the United States argues that, as construed below, the provision in question is unconstitutional because it attempts to delegate legislative power to the Executive. . . . The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act. When the plenary power of Congress and the general rule so established are regarded, it is manifest[ly] . . . not a delegation of legislative power."

In *Hampton, Jr. & Co. v. United States*,[153] an attack was made on the so-called flexible provision of the Tariff Act of 1922.[154] This empowered the President to increase or decrease customs duties up to 50 per cent of those specified in the act upon ascertaining that the cost of production in competing countries was not equalized with such cost in the United States by the duties already imposed. In ascertaining such cost the President was to consider "insofar as he finds it practicable" differences in conditions of production, advantages granted the foreign producer by foreign persons or governments, and "any other advantages or disadvantages in competition." In upholding the action of the President under this power the Court said:[155]

[147] 270 U. S. 521, 46 Sup. Ct. 395 (1926).
[148] 270 U. S. 521 at 525. Per Taft, C. J.
[149] 272 U. S. 1, 47 Sup. Ct. 1 (1926).
[150] Act of March 28, 1918, c. 28, 40 Stat. 459 at 460.
[151] Quoted at 272 U. S. 1 at 9.
[152] 272 U. S. 1 at 11-12. Per Butler, J. Sutherland and Stone, JJ., not participating.
[153] 276 U. S. 394, 48 Sup. Ct. 348 (1928), discussed 31 MICH. L. REV. 786 at 795 (1933).
[154] Act of Sept. 21, 1922, c. 356, tit. III, sec. 315, 42 Stat. 858 at 941.
[155] 276 U. S. 394 at 405-406, 409. Per Taft, C. J.

"The well-known maxim '*Delegata potestas non potest delegari*' . . . has had wider application in the construction of our Federal and State Constitutions than it has in private law. . . . [They] divide the governmental power into three branches . . . and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power . . . and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President. . . . This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

"The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. . . . [156] The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body . . . the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise." [157]

The next two cases again involved the authority of the Interstate Commerce Commission. In *Arizona Grocery Co. v. Atchison, Topeka & Santa Fé Ry.*,[158] a shipper was endeavoring to recover rates paid under a schedule approved by the Commission at the time of shipment

[156] Citing United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911); Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); and Ex parte Kollock, 165 U. S. 526, 17 Sup. Ct. 444 (1897).

[157] The principal case was followed in American Baseball Club v. Philadelphia, 290 U. S. 595, 54 Sup. Ct. 128 (1933), and in Coale v. Pearson, 290 U. S. 597, 54 Sup. Ct. 131 (1933).

[158] 284 U. S. 370, 52 Sup. Ct. 183 (1932).

but later held by it to be unreasonable. In refusing relief the Court said: [159]

> "When . . . the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute. . . . in declaring a maximum rate the Commission is exercising a delegated power legislative in character. . . . The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose. . . . it may not in a subsequent proceeding, acting in its quasi-judicial capacity . . . retroactively repeal its own enactment. . . . The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function. . . . Congress . . . in effect, vests in the Commission the power to legislate in specific cases as to the future conduct of the carrier."

In *New York Central Securities Corp. v. United States*,[160] an attack was made on the authority of the Commission over the acquisition of control of one carrier by another. According to the Interstate Commerce Act[161] leases of one carrier by another were to be authorized, "Whenever the commission is of opinion, after hearing," that it "will be in the public interest . . . under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises." [162] The lessor might assume liability for the lessee's securities "to the extent that . . . after investigation . . . of the purposes and uses . . . of the proposed assumption" the Commission determined. It was only to authorize this if it found that the assumption "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier . . . and (b) is reasonably necessary and appropriate for such purpose." [163] The Court upheld both these provisions of the statute, saying: [164] "So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is

[159] 284 U. S. 370 at 386, 387, 388, 389, 390 (1932). Per Roberts, J., Holmes and Brandeis, JJ., dissenting.

[160] 287 U. S. 12, 53 Sup. Ct. 45 (1932).

[161] U. S. C. tit. 49.

[162] U. S. C. tit. 49, sec. 5 (2).

[163] U. S. C. tit. 49, sec. 20a (2).

[164] 287 U. S. 12 at 25. Per Hughes, C. J.

raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity."[165]

In *Sproles v. Binford*[166] an attack on a provision of the Texas Motor Vehicle Act[167] permitting the state highway department to grant 90-day permits to oversize or overweight vehicles was repelled. The Court said:[168] ". . . the authority given to the department . . . is of a fact-finding and administrative nature, and hence is lawfully conferred. . . . This authorization, in our judgment, does not involve an unconstitutional delegation of legislative power."

In *United States v. Shreveport Grain Co.*,[169] an indictment for quantity misbranding under the Pure Food and Drug Act[170] was assailed because the statute[171] permitted "reasonable variations" from the quantity label to be established by "those charged with the administration of the act." The statute was sustained, the Court saying:[172] "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."[173]

Finally, we have the case of *Norwegian Nitrogen Products Co. v. United States*.[174] This again was an attack on the flexible provision of the Tariff Act of 1922.[175] This required a cost investigation by the Federal Tariff Commission before changing rates. In the instant case plaintiff, an importer, demanded a judicial hearing before the Commission and was refused. In holding this refusal proper, the Court said:[176]

> "What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process. . . . the hearing assured by the statute to those affected by

[165] Citing the Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986 (1914), and Avent v. United States, 266 U. S. 127, 45 Sup. Ct. 34 (1924).

[166] 286 U. S. 374, 52 Sup. Ct. 581 (1932).

[167] Texas Laws 1931, c. 282, sec. 2.

[168] 286 U. S. 374 at 397. Per Hughes, C. J.

[169] 287 U. S. 77, 53 Sup. Ct. 42 (1932).

[170] U. S. C. tit. 21.

[171] U. S. C. tit. 21, sec. 10.

[172] 287 U. S. 77 at 85, through Sutherland, J.

[173] Brandeis, Stone, and Cardozo, JJ., concurred in this.

[174] 288 U. S. 294, 53 Sup. Ct. 350 (1933).

[175] See Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 Sup. Ct. 348 (1928).

[176] 288 U. S. 294 at 305, 317-318. Per Cardozo, J. McReynolds, J., dissenting.

the change is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. . . . Much is made by the petitioner of the procedure of the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers, and that of the Public Service Commissions of the states when regulating the conduct or the charges of public service corporations. . . . There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative. . . . Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed." [177]

Summing up the previous cases, without any undue attempt at clarifying that which the Supreme Court itself has left more or less nebulous, two general conclusions may fairly be arrived at:

(1) Wherever a question has arisen as to the validity of the delegation of alleged legislative power it has been uniformly upheld, and

(2) Powers which have been held non-legislative for the purpose of upholding their delegation have for other purposes in other cases (and sometimes in the same case) been held to be legislative or quasi-legislative. This is notably true of powers of regulation as applied to public utilities.

## II

## THE PANAMA REFINING COMPANY CASE

### 1. *Legal Reasoning*

In the *Panama Refining Co.* case [178] the statute attacked was Section 709 (c) of the National Industrial Recovery Act,[179] which reads as follows:

"The President is authorized to prohibit the transportation in

[177] In the subsequent case of Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 53 Sup. Ct. 627 (1933), the question of delegation may be in some sense involved although not specifically mentioned by either counsel or court. It was there determined "that the Congress had the power to give authority to delete stations, in view of the limited radio facilities available and the confusion that would result from interferences" to the Federal Radio Commission. This "is not open to question." "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." Opinion by Hughes, C. J.

[178] Panama Refining Co. v. Ryan, (U. S. 1935) 55 Sup. Ct. 241.

[179] Act of June 16, 1933, c. 90, tit. 1, sec. 9, 48 Stat. 200, U. S. C. tit. 15.

interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

The principles laid down in the decision holding this provision void are substantially:

(1) Congress cannot delegate to any executive or administrative official or board complete and unlimited power to legislate in regard to a subject matter without reference to any standard.

(2) Congress, in delegating regulatory authority to any executive or administrative official or board, must make the exercise of such authority dependent upon some finding of fact which must appear in the executive or administrative regulation.

The first of these principles is not (verbally at least) a surprise. It is not new for the Court to say that delegated powers must be referred to a standard; it is only new for this requirement to be enforced. It is true that in this case for the first time we have a statute in which no standard is specifically mentioned; but of what real value is the mention of such vague standards as "unless the President . . . in the public interest shall otherwise determine"? [180]

But if a standard is necessary, it seems clear that here we have none and the conclusion that the provision is void follows. Mr. Justice Cardozo, dissenting, denies this and finds a standard implicit within the act. First pointing out that "as to the nature of the *act* [181] which the President is authorized to perform there is no need for implication," [182] he then proceeds to contend that a standard governing his action is to be found in section 1 of the statute. This broadly phrased "declaration of policy" [183] the Court rightly feels lays down no standard for the regulation of the oil industry. Mr. Justice Cardozo feels that standards

[180] As in United States v. Chemical Foundation, 272 U. S. 1, 47 Sup. Ct. 1 (1926).

[181] Italics his.

[182] (At p. 254.) I.e., the President is accorded the simple choice to prohibit or not to prohibit the interstate transportation of certain named goods to which a stigma of illegality under state law has attached.

[183] Section 1 of the Industrial Recovery Act (U. S. C. tit. 15, sec. 701) is as follows:

"A national emergency productive of widespread unemployment and disor-

are found in the specific phrases (1) "to eliminate unfair competitive practices," (2) "to conserve natural resources," (3) to "promote the fullest possible utilization of the present productive capacity of industries," and (4) "except as may be temporarily required" to "avoid undue restriction of production." How can there be any standard of judgment here as to whether or not to permit transportation of oil illegally produced or withdrawn from storage? Taken alone, phrases (1) and (2) peremptorily call for prohibition of the practice; phrase (3) calls for its allowance; phrase (4) is self-contradictory. Taken together the three non-meaningless phrases cancel each other. None of them furnish any standard for choice.

The truth is that section 1 of the Recovery Act is not a setting of standards but a general statement of purpose. It has no specific reference to any particular industry and the attempt to extract from it a standard applicable to interstate commerce in petroleum is not convincing.

The second principle determined[184] by the Court is both new and surprising. As authority for it the Court relies on *Wichita R. & Light Co. v. Public Utilities Commission*,[185] and *Mahler v. Eby*.[186] In neither of these cases is any such constitutional point determined.[187] In the former a state public utilities commission had been authorized by statute

> ganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

[184] An argument might be made that this holding is, strictly speaking, *obiter*. Since it is determined that an act delegating regulatory authority must set a standard, a further holding that in acting under such standard the regulatory authority must be required to make and set forth a finding of fact might, in a case where no standard appears, be considered as dealing with a matter not properly before the Court. But this view is perhaps too technical to be insisted upon.

[185] 260 U. S. 48, 43 Sup. Ct. 51 (1922).

[186] 264 U. S. 32, 44 Sup. Ct. 283 (1924).

[187] See Mr. Justice Cardozo's demonstration of this in his dissenting opinion in the Panama Refining Co. case, 55 Sup. Ct. 241 at 260.

to change rates after hearing on finding them to be "unjust, unreasonable, unjustly discriminatory or unduly preferential." The commission changed rates after hearing without in terms finding them to be liable to any of the strictures named. In holding this action void the Court said: [188]

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. . . . We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State."

*Mahler v. Eby* is similar. Congress had provided by statute for the deportation of aliens convicted of violating the Selective Service and Espionage Acts "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States." The Secretary of Labor having ordered the deportation of several such aliens, the Court held his determination void because he had made no recital that these aliens were undesirable. The Court said: [189] "The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise. . . ."

In neither of these cases was it held that a finding of fact must be required. In the *Wichita Light* case it was said (at p. 59) that in creating a certain type of "administrative agency" "a certain course of procedure and certain rules of decision" must be required. But it was not held that such procedure or rules must include a finding of facts. It was merely held that if such a finding was required it must be recited. And the holding in *Mahler v. Eby* is no more extensive.

Mr. Justice Cardozo argues that such a requirement is improper in the instant case:

"The President, when acting in the exercise of a delegated power,

[188] 260 U. S. 48 at 59. Per Taft, C. J.
[189] 264 U. S. 32 at 44. Per Taft, C. J.

is not a quasi judicial officer, whose rulings are subject to review upon certiorari or appeal . . . or an administrative agency supervised in the same way. Officers and bodies such as those may be required by reviewing courts to express their decision in formal and explicit findings to the end that review may be intelligent. . . . Such is not the position or duty of the President. He is the Chief Executive of the nation, exercising a power committed to him by Congress, and subject, in respect of the formal qualities of his acts, to the restrictions, if any, accompanying the grant, but not to any others. One will not find such restrictions either in the statute itself or in the Constitution back of it. The Constitution of the United States is not a code of civil practice." [190]

To this reasoning may be opposed the following on the part of the majority: [191]

"While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted . . . we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess of what the state may allow. If legislative power may thus be vested in the President or other grantee as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the state's requirements. . . .[192] And, if that legislative power may be given to the President or other grantee, it would seem to

[190] 55 Sup. Ct. 241 at 259-260. The dissenting Justice also demonstrates (55 Sup. Ct. 257-258) that in the proclamations under the "precedents in legislation" referred to in Field v. Clark it was not the practice of our early Presidents to include any declaration of facts found.

[191] 55 Sup. Ct. 241 at 248.

[192] Witness United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143 (1919), upholding the constitutionality of an act of Congress prohibiting the transportation of liquor into "dry" states although the law of the state in question permitted importation of a limited amount. The Court said (at pp. 424-425):

". . . Congress possesses supreme authority to regulate interstate commerce. . . . Congress may exercise this authority in aid of the policy of the state, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the particular policy or law of any given State. . . . it is for Congress to determine what legislation will attain its purposes. The control of Congress over interstate commerce is not to be limited

follow that such power may similarly be conferred with respect to the transportation of other commodities in interstate commerce with or without reference to state action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it, as the person or board or commission so chosen may think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation."

The majority affirms, then, that the anti-delegation principle is no respecter of persons. It permits of no qualifications. If power can be delegated to the President without a standard for his judgment being provided it can in like manner be delegated to the lowest executive or administrative official.

Superficially this may seem unrealistic. It might be contended that the dignity and responsibility of the President's position is an obvious fact which the Court ought to take into account. Actually it may be realism of the highest kind.

The President of the United States is indeed in a very different position from that of a subordinate executive agent. This fact might properly be given great weight in a situation where it was reasonable to suppose that the action in question was in any real sense that of the President. But is it ever actually so in the case of congressional delegations? Is it not obviously necessary and notoriously true that such delegations to the President are always in substance re-delegated, so that the action and judgment involved is always in substance that of a subordinate, merely validated by the President's signature? This being true, is not the Court justified in refusing to differentiate between the President and other executive officers?

### 2. *Effect*

The practical effect of the decision in the *Panama Refining Co.* case is a matter for the future to determine. A standard must be imposed by legislation delegating regulatory power, but how real must that standard be? If *United States v. Chemical Foundation* [193] is to be fol-

by state laws. . . . When Congress acts, keeping within the authority committed to it, its laws become by the terms of the Constitution itself the supreme laws of the land."

The reasoning of the majority on this point may be considered as an answer to Mr. Justice Cardozo's language about "the nature of the act" performed. See note 180, supra.

[193] 272 U. S. 1, 47 Sup. Ct. 1 (1926).

lowed, it will not extend further than to require the addition of a few vague words to federal statutes and Presidential proclamations. "If the public interest requires," the one must say. "The public interest requires," the other must answer. Under this precedent the effect of the decision might be very like that of the Statute of Uses which has been said merely to have added six more words to every English conveyance.[194] It will be for the Court to determine whether to make its requirements more substantial.

The theoretical effect remains to be considered. Are legislative delegations now permitted or are they not? The former confusion continues and is worse confounded. Where formerly the student of the subject found conflicting language but decisions all one way, he now finds decisions conflicting as well.

To say this, it is not necessary to show that the constitutional theory of the decision is in conflict with that of any other case. The case is self-contradictory. Having held the act to be "an unconstitutional delegation of legislative power" because no standard is set for the President's action,[195] it then declares: [196] "If the citizen is to be punished for the crime of violating a *legislative* order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown." So delegations, valid or void, are equally legislative.

It is obvious, however, that those who look to the Supreme Court for protection against extensive delegations to the Executive should not take too much confidence from this decision. No substantial barrier to delegation is raised by the *Panama Refining Co.* case. A standard must be set, but previous cases teach how vague such a standard may be and there is certainly nothing here irreconcilable with those cases. The Court has indeed set a limit, but it is formal rather than substantial and the slightest care in bill drafting will avoid infringing it. All in all, we may conclude that the case changes nothing and that its importance can very easily be exaggerated.

[194] The futility of such a requirement is strongly exemplified by the fact that in Mahler v. Eby the judgment was not that the alien convicts be liberated but that they be detained in custody until the Secretary of Labor should have time to act. Can there be any doubt that his action was merely to add a few words about "undesirable residents" to the order of deportation, or that in the Wichita Light case the only result was to cause the commission to add a few words about "unjust rates"?

[195] 55 Sup. Ct. 241 at 246-248.

[196] 55 Sup. Ct. 241 at 253. Italics the writer's.