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Economic Controls: Executive Power and the Delegation of Congressional Authority

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ECONOMIC CONTROLS: EXECUTIVE POWER AND THE DELEGATION OF CONGRESSIONAL AUTHORITY

INTRODUCTION

On August 15, 1971, the President of the United States inaugurated what has become popularly known as the "1971 Wage-Price Freeze". The "Freeze" is basically a ninety day moratorium on wages, prices, rents and salaries which hopefully will stabilize the U.S. economy, presently plagued by inflation, unemployment and a balance of payments deficit. The President's action was a dramatic one to most Americans, evoking a wide spectrum of response ranging from hearty approbation to disconsolate dismay. Naturally, much discussion is aimed at the practical economic wisdom of the action. Another question, however, often initially appears. If only for a fleeting moment, citizens wonder where the President got the authority to declare the freeze. Most then assume that it must be legal, and some others realize that he was empowered to do so by the Economic Stabilization Act of 1970.[1] Notwithstanding the Stabilization Act, as the nation experiences an economy largely under Executive Control, it is now appropriate to survey the legal doctrines concerning the inherent domestic powers of the President and the supposed "non-delegability" of Congressional law-making authority. The Stabilization Act provides only the barest skeleton upon which the President can build his program of wage and price control. The whole situation provides an opportunity for a hopefully informative and thought provoking review of the President's proper role in domestic affairs, especially those touching upon national economic control and planning. The point of this discussion will be first to study the limited "inherent" domestic Presidential powers, and then to go on to the more relevant issue of Congressional power delegated to the Chief Executive. Before doing that, however, it might be helpful to take a brief look at the Stabilization Act itself, and the President's subsequent actions.

The Economic Stabilization Act of 1970 provides in part:

> The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities.
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> . . . The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally.[2]

1. Economic Stabilization Act of 1970, P.L. 91-379, as amended P.L. 91-558, P.L. 92-8, 84 Stat. 709 (1970), 12 U.S.C.A. §1904 (note) (1971 Cum. Supp., p. 53).
2. Id. §202.

The remainder of the Act provides for Executive delegation of the given authority;[3] for fines of $5,000 in the event of willful violation of orders and regulation;[4] and, for injunctive relief to the government to restrain past, present or prospective violations.[5] The President's authority to act under this title expires April 30, 1972.[6]

Thus empowered, the President issued Executive Order No. 11615 of August 15, 1971[7] providing for the stabilization of prices, rents, wages and salaries. Acting pursuant to "authority vested in . . . [him] . . . by the Constitution and statutes of the United States, including the Economic Stabilization Act of 1970 . . . as amended . . ."[8] the President ordered that:

> Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.
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> . . . Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.
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> . . . The provisions of section 1 and 2 hereof shall not apply to the prices charged for raw agricultural products.[9]

To implement this program, the President also created the Cost of Living Council,[10] and vested it with all the Presidential powers granted by the Stabilization Act.[11] The Council was further authorized to re-delegate its authority,[12] to issue orders and regulations,[13] and "take such other actions as it determines to be necessary and appropriate to carry out the purposes of this order."[14] The Cost of Living Council, through several Executive agencies, is now administering the "Wage-Price Freeze"; and for the purposes of this discussion the structure for administration will not be further considered. Mindful of the content of both the Economic Stabilization Act and Executive Order No. 11615, attention can be properly turned to the questions of inherent domestic Executive

3. Id. §203.
4. Id. §204.
5. Id. §205.
6. Id. §206.
7. 36 F.R. 15127 (1971).
8. Id.
9. Id. §1.
10. Id. §2(a).
11. Id. §3(a).
12. Id. §4(b).
13. Id. §4(a)(iii).
14. Id. §4(a)(iv).

power and the delegability of Congressional law-making authority.

INHERENT DOMESTIC POWERS OF THE PRESIDENT

The basic inherent powers of the President of the United States are set out in Article II of the Constitution. Clause 1, Sec. 1 of Article II states "The Executive Power shall be vested in a President of the United States of America." Section 2 designates the President as ". . . Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. . . ." That same section later grants the President the ". . . Power, by and with the Advise and Consent of the Senate, to make treaties, providing two thirds of the Senators present concur. . . ." The last clause of Section 3 charges the President with taking care ". . . that the Laws be faithfully executed. . . . " The balance of Article II imposes upon the President authority and specific limitations in regard to the appointment of executive and diplomatic officers, appointment of Justices of the Supreme Court, filling Senate vacancies, calling special meetings of Congress, recommending legislation and vetoing Acts of Congress. In scrutinizing any official act of the President, its validity depends upon its being either an exercise of the true Article II "Executive Powers" of the President or the exercise of powers properly given the President by Congress. In the words of one commentator:

> In so far as any broad claims of presidential prerogative rest upon the language of the Constitution and find support in a delegated power theory, they must be derived from the clauses vesting the executive authority in him, constituting him the head of the armed forces (and imposing on him the duty to enforce the laws). Such a claim must also be viewed in the light of the first section of Article I which vests in the Congress all the legislative powers delegated to the federal government under the Constitution.[15]

As conceptually straightforward and appealing as the above analysis might be, the question of what is the actual content of the true "Executive Power" in any given fact situation may be far more complicated.

The Federal Convention determined[16] that "The Executive Power of the United States shall be vested in a single person . . . ,"[17] and that "His stile shall be 'The President of the United States of America'. . . ."[18] The real question to be raised in connection with the "Executive Powers" granted to the President was whether that phrase was merely a general description of the specific powers enumerated throughout Article II, in contrast to the possibility that the Article II, clause 1 statement, that "the Executive Power shall be vested in a President . . . ," was in and of itself a greater general grant of all the executive power of the sovereign

15. Kauper, **The Steel Seizure Case: Congress, the President and the Supreme Court,** 51 Mich. L. Rev. 141, 144 (1952) (hereinafter cited as Kauper).
16. **The Constitution of the United States. Analysis and Interpretation.** Annotations of Cases Decided by the Supreme Court of the United States to June 22, 1964, prepared by the Legislative Reference Service, Library of Congress, S. Doc. No. 39, 88th Cong., 1st Sess. 426 (1964) (hereinafter cited as Annotations).
17. M. Farrand, **The Records of the Federal Convention,** 185 (1st ed. 1911) (quoting from a Report of the Committee of Detail to the Convention, August 6, 1787).
18. Id.

United States. Alexander Hamilton in defending Washington's Proclamation of Impartiality in the context of the war between France and Britain concisely defended the proposition that the Constitution granted the President the general overall sovereign executive Power of the United States:

> The second article of the Constitution of the United States, section first, establishes his general proposition, that "the Executive Power shall be vested in a President of the United States of America." The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.* It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, "All legislative powers herein granted shall be vested in a congress of the United States." In that which grants the executive power, the expressions are, "The *executive power* shall be vested in a President of the United States." The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications,* which are expressed in the instrument.[19]

In accord with the broad sweep of Hamilton's thought, various Presidents have taken executive action in ways which precluded judicial review.[20] Until 1952 and the *Youngstown Sheet and Tube*[21] litigation, the authoritative cases dealing with Presidential exercise of "Executive Powers" only hit upon limited employments of those powers in narrow areas of the question. There had been no panoramic surveys of executive authority, nor had there been much litigation in the almost *untouched*

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19. Annotations, supra note 2, at 427 (citing 7 **Works of Alexander Hamilton** 76, 80-1 (J.C. Hamilton ed. 1851) and noting that Hamilton was interpreting the executive power clause in light of the views of Blackstone, Locke and Montesquieu as to the location of power in the conduct of foreign affairs).
20. See discussion in Chief Justice Vinson's dissenting opinion, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 683-700 (1952).
21. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

theatre of questions involving the Presidential prerogative in domestic affairs.[22] Before reaching *Youngstown Sheet and Tube* a review of these previous cases might help flesh-out the judicial doctrine until then.

The first important judicial pronouncement came in the Civil War *"Prize Cases"*[23] testing the parameters of the President's Executive Powers as Commander in Chief of the nation's armed forces. Four ships had been seized pursuant to President Lincoln's April 1861 executive order declaring a blockade of Confederate ports. A federal court order condemned the ships and the owners appealed. In a 5:4 decision the Supreme Court sustained the seizure of three of the four vessels. In answer to the question "Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States . . . ,"[24] Justice Grier speaking for the majority stated: "A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[25] He further stated:

> By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.[26]

The Court went on to uphold the blockade and find that in suppressing the insurrection it was up to the President to determine whether he met such resistance as to make it proper to designate those involved as belligerents within the meaning of international law. ". . . This court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."[27] Here the Court upheld the right of the President in exercise of his Executive Powers to treat certain states of the Union as belligerents in a situation which basically was a national internal political struggle before Congress had specifically so authorized him. The situation was, however, a distinctively military one and the impact of the decision is blunted by ref-

22. Kauper, supra note 1 at 142.
23. Prize Cases, 67 U.S. 635 (1862).
24. 67 U.S. at 665.
25. Id. at 666.
26. Id. at 668.
27. Id. at 670.

erences to less specific Congressional authorizations to employ the armed forces of the United States in cases of invasion or insurrection against the United States.

The second case of interest also grew out of the Civil War and questioned whether the impressment into Union service of several steamers amounted to an "appropriation" of property for which the U.S. Court of Claims was the appropriate forum in which to seek remuneration. The precise holding is not important to the present inquiry but some of the Court's language has been considered to be a comment on the Executive Powers of the Federal Government in times of grave public danger as well as war:

> Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war. . . .
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> Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified.[28]

Much of what was said was dicta in context of the Russell case, but indicated a judicial humour not completely unreceptive to the proposition that certain far reaching powers lay in the hands of the President as the chief executing officer of the inherent powers of the Federal Government.

In 1890, the Supreme Court heard the case of *In Re Neagle*[29] upholding the release of a U.S. Marshall on a federal writ of habeas corpus. The U.S. Marshall had killed a man while acting as bodygurd of Justice Field of the Supreme Court as he conducted his duties as Circuit Justice for the 9th Circuit in California. The basic question was whether the Marshall was acting pursuant to the laws of the United States in acting as

28. United States v. Russell, 80 U.S. 623, 627-8 (1871).
29. 135 U.S. 1 (1890).

Justice Field's bodyguard and thereby entitled to seek a writ of habeas corpus securing his release from a California Sheriff holding him on a charge of murder. The U.S. Marshall had been appointed by the U.S. Attorney General to protect Justice Field. The Court held that the U.S. Statute giving circuit courts power to issue writs of habeas corpus on petition of a person alleged to be in custody "for an act done or omitted in pursuance of a law of the United States . . ." did not require that the law be by express act of Congress. Any obligation fairly and properly inferable from the Constitution, or any duty of a United States officer to be derived from the general scope of his duties under the laws of the United States, was a "law" within the meaning of the statute. Under the U.S. Constitution, Article 2, §3 declaring that the President of the United States "shall take Care that the Laws be faithfully executed," the President has the power, through the Attorney General, to direct a U.S. Marshall to protect a U.S. Justice in pursuit of his official duties. This case seemingly points up the question of the President's inherent power to attend to the "faithful execution" of the "laws" on the domestic scene outside of his military or international powers and without the express direction of Congress. The potential influence of this case was however somewhat reduced by a late reference by the majority to section 788 of the then U.S. Revised Statutes which gave the U.S. Marshall the same powers in each state, in executing the laws of the United States, as the sheriffs have by law in executing the state laws. The Court then noted that the California law provided that the sheriffs shall preserve the peace and declared that homicide was justifiable when committed in resisting an attempt to murder any person. The Court was unwilling to let the decision stand without some reference to at least partial Congressional approval of the Marshall's action on behalf of the Executive.

Another controversy gauging the Executive's powers in domestic affairs was *In Re Debs.*[30] The setting was the famous Pullman Car Strike of 1894 wherein Debs and other officers of the American Railway Union were boycotting the Pullman Palace Car Company by striking railway lines using the Pullman Cars. Debs was before the Supreme Court appealing a lower court contempt citation for failing to call off the strike. The argument was made that Federal Courts were without power to enjoin interference with interstate commerce because Congress had not specifically so provided. The argument was also made by the government, that the President, aside from any Congressional grant, had the power to remove serious obstructions to interstate commerce in the public interest. The Court largely depended upon the first argument in coming to decision holding that while it may be competent for the government, through the executive branch and in the use of the entire executive power of the Nation, to forcibly remove all such obstructions, it was equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any of them, and if

30. 158 U.S. 564 (1895).

such are found to exist or threaten to occur, to invoke the power of the courts to remove or restrain them. The Court did not deny the possibly broad powers of the executive vis-a-vis interstate commerce, but it was unwilling to explore the proposition beyond making such discussion mere dicta in the case.

In *United States* v. *Midwest Oil Company*,[31] the Supreme Court upheld the action of the President in withdrawing from theretofore authorized citizens the right to explore and claim certain public lands for the purpose of oil prospecting and development. All public lands containing petroleum or other mineral oils had been declared by Congress to be "free and open to occupation, exploration, and purchase by citizens of the United States . . . under regulations prescribed by law."[32] As a result of very liberal policies concerning these rights of "occupation, exploration and purchase," the available lands were rapidly being claimed and the U.S. Government was losing its rights to oil and petroleum products which were becoming increasingly more essential to the function of the American Navy. Despite the general grant by Congress to American citizens of the right to these oil claims, the Supreme Court upheld the Executive Order[33] temporarily withdrawing these rights because it found a long continued practice of the President, acquiesced in by the Congress, to withdraw in the public interest, from entry or location, public land that otherwise would have been open to private acquisition created in the President an implied grant of power to make the temporary withdrawal order as agent of the Congress in aid of the administration of the public domain and in aid of probable pending legislation. The court recognized that Congress held ultimate responsibility for the management of public lands, but allowed the President to temporarily suspend a Congressional mandate concerning those lands in accord with an established practice in the interests of the United States.

Hamilton's enlarged conceptions of the executive power were seemingly ratified by the Supreme Court in the 1926 *Myers* case.[34] A postmaster was dismissed from his post by the Postmaster General, acting by direction of the President. The case presented "the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed with the advise and consent of the Senate."[35] A previous Act of Congress[36] required the consent of the Senate to removal by the President of postmasters of the first, second and third classes. The Court held this Act invalid, maintaining that the President, under Article II of the Constitution had sole power of removal. Speaking for the majority, Mr. Chief

31. 236 U.S. 459 (1915).
32. Act of February 11, 1897, ch. 216, 29 Stat. 526.
33. See United States v. Midwest Oil Co., 236 U.S. 459, 467 (1914) (citing text of Proclamation of President Taft of September 27, 1909 entitled "Temporary Petroleum Withdrawal No. 5").
34. Myers v. United States, 272 U.S. 52 (1926).
35. Id. at 106.
36. Act of July 12, 1876, ch. 179, §6, 19 Stat. 80, as amended 39 U.S.C. §3311 (1962).

Justice Taft said:

> The requirement of the second section of Article II that the Senate should advise and consent to the presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used. Madison, I Annals, 402, 463, 464. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended. This is the same construction of article 2 as that of Alexander Hamilton. . . . [supra page 9][37]

This case is especially interesting to the present discussion because it involved Presidential action in direct contravention of a Congressional mandate, and the decision in the President's favor had to be squarely based upon his inherent Article II powers.

A decade later the Court addressed itself to the question of the President's role in international affairs. Justice Sutherland speaking for the Court in *United States* v. *Curtiss-Wright Corp.*,[38] upheld the validity of A Joint Resolution of Congress[39] empowering the President to prohibit the sale of arms and munitions to certain South American nations then in armed conflict if he finds that such embargo might "contribute to the reestablishment of peace between those countries." In reaching this decision the Court determined that the Joint Resolution was not an unconstitutional delegation of legislative power to the President. The powers of the Federal government over internal and foreign affairs are different in origin. The colonies never had foreign powers, and neither did the states severally possess such powers. When the Union was formed, the colonies granted to it power over domestic affairs. However, "[a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[40] Therefore, in the international field the sovereignty of the United States is complete. Furthermore, in international relations the President is the sole organ of the Federal Government.[41] Because of the usual delicacy of foreign operations, and because of the peculiar powers of the President in this area, any Congressional legislation which is to be properly made effective in the international field must allow the President a degree of freedom and discretion not permitted in domestic affairs. The practical conclusion to be drawn from this case is "that the constitutional objection to delega-

37. 272 U.S. at 118.
38. 299 U.S. 304 (1936).
39. Act of May 28, 1934, ch. 365, 48 Stat. 811.
40. 299 U.S. at 316.
41. 299 U.S. at 319 (citing Marshall's argument of March 7, 1800 in the House of Representatives, Annals, 6th Cong., col. 613).

tion of legislative power does not apply to a delegation by Congress to the President of its 'cognate' powers in this field; that in short, the merged powers of the two departments may be put at the President's disposal whenever Congress so desires."[42]

Youngstown Sheet and Tube

On April 8, 1952, President Truman issued Executive Order 10340[43] directing the Secretary of Commerce to seize and operate most of the nation's steel mills. The Order offered no prior specific statutory authorization, but rather the President promulgated the order "by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States. . . ."[44] Secretary of Commerce Sawyer immediately issued possessory orders directing the presidents of the seized corporations to serve as operating managers for the United States. The presidents obeyed under protest and brought proceedings against the Secretary praying for declaratory and injunctive relief. The District Court granted the plaintiffs' motions for temporary injunctions,[45] and the Supreme Court granted certiorari[46] after the Court of Appeals issued stay orders.[47]

The President issued the Order because the U.S. was locked in "deadly combat with the forces of aggression in Korea."[48] A controversy between the United Steel Workers of America, C.I.O., and the nation's steel producers had not been settled by collective bargaining or through the efforts of the Wage Stabilization Board, and consequently a strike was scheduled for 12:01 a.m., April 1, 1952.[49] In the judgment of the President "a work stoppage would immediately jeopardize and imperil our national defense . . . [and] . . . in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies. . . ."[50] The next morning the President sent a message to Congress reporting his action, conceding Congress's power to supersede his order.[51] The President sent another special message to Congress twelve days later.[52] Congress did not act on either of these occasions, and had not acted at the time of the Supreme Court's review.[53] In the District Court the government argued that the President in his action relied "upon a 'broad residium of power' sometimes referred to as 'inherent' power under the

42. Annotations, supra note 2 at 380.
43. Exec. Order No. 10,340, 3 C.F.R. 65 (Supp. 1953).
44. Id. at 66.
45. Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (1952).
46. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937 (1952).
47. Sawyer v. United States Steel Co., 197 F.2d 582 (1952).
48. Exec. Order No. 10,340, 3 C.F.R. 65 (Supp. 1953).
49. Id.
50. Id. at 65-6.
51. 98 Cong. Rec. 3912 (1953).
52. 98 Cong. Rec. 4130 (1953).
53. Youngstown Sheet & Tube, 343 U.S. 579, 583 (1952) (hereinafter cited as Youngstown Sheet & Tube).

Constitution."[54] The Supreme Court noted the argument that a "strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had 'inherent' power to do what he had done—power 'supported by the Constitution, by historical precedent, and by court decisions.' "[55] Justice Black delivered the Court's opinion, framing the pertainent question as: "[I]s the seizure order within the constitutional power of the President?"[56]

In approaching the problem, the Court first observed that the President was claiming no right to act as he did by virtue of any act of Congress, and in the opinion of the Court "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[57] The alleged power not flowing from an act of Congress, the Court then noted that:

> . . . it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "the executive Power shall be vested in a President * * *"; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."[58]

The Court then went on to dispose of the various possible aspects of expressed Executive Powers which in the aggregate would imply a Presidential power to do what had been done. The Court held that the order could not be upheld as an action of the Commander in Chief of the nation's armed forces despite the expanding modern concept of "theatre of war" and many authorities upholding the broad powers of military commanders engaged in day to day fighting in a theatre of war. The job of keeping labor disputes from stopping production the Court observed, is one for the nation's legislators not its military leaders. The order was held to be constitutionally invalid as an exercise of the inherent executive power vested in the President. In the words of the Court:

> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States * * *." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing

54. Youngstown Sheet & Tube v. Sawyer, 103 F. Supp. 569, 573 (1952).
55. Youngstown Sheet & Tube, supra, note 38 at 584.
56. Id.
57. Id. at 585.
58. Id. at 587.

> Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[59]

In answer to the proposition that the President was also taking care "that the Laws be faithfully executed" Justice Black replied: "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[60] Having laid to rest the major portion of the government's case the Court addressed the last proposition offered by the government, namely, that other Presidents without congressional authority had taken possession of private enterprises in attempting to settle labor disputes. Notwithstanding such past situations the Court maintained that ". . . Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.' "[61]

In brief summary of the *Youngstown* case, several points are important. There was no statute expressly or impliedly authorizing the President to seize the property involved. Authority for the Presidential action was not discernible in the "aggregate" of Executive Powers granted the President by Article II, nor was the President properly acting pursuant to his "war powers" as Commander in Chief of the Armed Forces. *The power the President was attempting to exercise was the law making power, a power vested in Congress alone.* Even if Congress had quietly allowed other Presidents to take possession of this power in the context of other labor disputes this fact in no way divested Congress of its exclusive authority to make the laws for the United States and all officers thereof.

There was a strong dissent to the posture assumed by the majority. Chief Justice Vinson conducted an exhaustive survey of past seizures and assumptions of power by Presidents in the face of national emergencies and concluded that what President Truman had done basically had been surpassed by previous Presidents and the present action was by no means extraordinary in the present situation. The opinion rested heavily upon the proposition that the President was acting within his authority to faithfully execute the laws of the land and was taking appropriate measures in a time of emergency to implement the Congressional intention that the Korean conflict be pursued and defense of the nation be sustained. The Congressional provisions for maintenance of industrial peace had failed in this time of emergency when the union announced a strike despite the efforts of the Wage Stabilization Board. While the authority of Congress is supreme in this area, the President's actions were valid in the emergency context unless repudiated by Congress.

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59. Id. at 587-8.
60. Id. at 588.
61. Id. at 588-9.

Summary

What can be reasonably said to be the corpus of the Executive Power doctrine in the wake of Youngstown Sheet and Tube? One commentator answers this question succinctly:

> Congress by vitrue of its legislative powers has the paramount authority to prescribe procedures and programs to be followed in meeting an emergency situation of this kind; whatever authority the President may have by virtue of his office is subject to legislative limitation. The dissenting judges, it should be emphasized, did not assert the supremacy of executive prerogative over congressional legislative authority. It is fair to conclude also that all the Court agreed that the President's action could not be justified as an exercise of his military power as Commander in Chief of the armed forces. Indeed, the case should serve as a particularly valuable precedent in precluding an extensive interpretation of the President's autonomous military powers as a basis for executive control of the internal economy when the country is not in a state of declared war and not threatened with imminent invasion. Finally, the case shows a common area of agreement in that the interpretations placed upon the President's powers are based on the language of the Constitution, a common willingness to accept the premise that the President's powers are delegated powers and that the President's actions must be justified on the basis of the grants of authority under Article II. The theory of inherent power in the conduct of foreign affairs, advanced in the *Curtiss-Wright* case finds no echo in these opinions dealing with presidential powers respecting internal matters. In the end, the members of the court seem pretty well agreed that whatever constitutional power the President has to take action in a non-military situation, apart from specific authorization by Congress, must rest on the general power stated in section 3 of Article II that the President "shall take Care that the Laws be faithfully executed."[62]

THE FEDERAL NON-DELEGATION DOCTRINE

The delegation of legislative power has been defined as "an attempt by a legislature to amplicate its legislative power by delegating to another the power to enact a law, whether in form or effect, or to bestow upon another the power to determine the effectiveness of a specific act."[63] The classic statement of the federal non-delegation doctrine was pronounced in the leading case of *Field* v. *Clark*: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[64] This doctrine is "wholly judge-made."[65] Article I of the Constitution itself solely provides: "All legislative Powers herein granted shall be vested in a Congress of the United States[66] . . . (and) . . . Congress shall have Power . . (to) make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."[67]

62. Kauper, supra, note 1 at 176.
63. Ballantine's Law Dictionary 327 (3rd ed. 1969).
64. 143 U.S. 649, 692 (1892).
65. K. Davis, **Administrative Law Text** 33 (1959) (hereinafter cited as Davis).
66. U.S. Const. art. I, §1.
67. U.S. Const. art. I, §8.

Delegation was not considered by the Constitutional Convention except to defeat a proposal by Madison that the President be given power "to execute such other powers . . . as may from time to time be delegated by the national legislature"[68] as unnecessary. Though the non-delegation doctrine has been restated as recently as 1932,[69] and apparently upheld several years later in the famous *Schecter* "Sick Chicken" case,[70] the Supreme Court since then has specifically upheld many delegations of legislative power by Congress, and has not once struck down such delegation to a regularly constituted administrative agency.[71] Before reaching the *Schecter* controversy and the cases which follow, a brief look at the development of the federal doctrine of non-delegability is in order.

The Developing Non-Delegation Doctrine

As pointed out above, the classic formation of the federal non-delegation doctrine appeared in *Field* v. *Clark*.[72] Congress had conferred on the President the power to suspend by proclamation the introduction of tea, molasses, coffee, sugar and hides into the United States from another country when he was satisfied that any country producing such articles imposed duties on American products which the President deemed "to be reciprocally unequal and unreasonable."[73] The Court upheld this deceptively simple direction as a sufficiently narrow directive to the President as to effectively deprive him of any law-making function in-so-far as the determination of "free list" foreign commodities were concerned. In reality the President was given considerable practical latitude in controlling imports from foreign nations in those commodities. This fact notwithstanding, the Court delivered several broad generalizations, first noting that "Congress cannot delegate legislative power to the President,"[74] then going on to say that "[n]othing involving the expediency or the just operation of such legislation (The "Reciprocal Treatment" Trade Statute) was left to the determination of the President . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will has to take effect."[75] The President was not acting as a lawmaker.

A more explicit grant to the Executive of the power "to make laws" might be implied in *Buttfield* v. *Stranahan*,[76] though the Supreme Court disagreed. The Tea Inspection Act of March 2, 1897[77] made it unlawful "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption"[78] and then

68. Davis, supra note 65 at 33.
69. "That the legislative power of Congress cannot be delegated is, of course, clear." United States v. Shreveport Grain & Elevator Company, 287 U.S. 77, 85 (1932).
70. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).
71. Davis, supra note 65 at 32.
72. 143 U.S. 649 (1892).
73. Tariff of 1890, ch. 1244, §3, 26 Stat. 612.
74. 143 U.S. at 692.
75. Id. at 693.
76. 192 U.S. 470 (1903).
77. Ch. 358, 29 Stat. 604-5.
78. Id. §1.

directed the Secretary of the Treasury to "fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States."[79] One of the appellant importer's teas had been rejected by Federal Tea Inspectors because, in light of the Treasury Secretary's regulations, they were "inferior to standard in quality." The Court upheld the rejection and the statute because a "primary standard" had been provided in that a proper construction of the statute indicated an intention to exclude the lowest grades of tea, for whatever reason they were inferior. Essential to the Court holding here was probably its belief that "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."[80]

In 1905 Congress empowered the Secretary of Agriculture[81] to make provisions for the protection of public lands and reservations. He was authorized to "make such rules and regulations and establish such service as will ensure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."[82] Any violation of the Act, or such rules and regulations as were promulgated under it, was a criminal offense meriting a maximum $500 fine or a maximum twelve months in prison, or both.[83] As a result of his authorization, the Secretary of Agriculture on June 12, 1906 issued Regulation 45 requiring certain persons grazing cattle on public lands to secure permits.[84] In *United States* v. *Grimaud*,[85] the defendants were charged with driving and grazing sheep on a federal reserve without a permit. Defendants claimed that Congress had delegated its power to determine a federal crime to an executive official of the government. The Court would not accept this line of reasoning, and upheld the Secretary's Regulation with an opinion which in a certain sense further befuddled the whole issue of delegability. The Court ". . . admitted, that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."[86] Further the Court asserted that "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 offense."[87] The inherent weaknesses of such an assertion are apparent. Perhaps the principle to be taken from this case is that the rule making function is delegable, provided that its operations are limited. In reference to the making of the contended regulation, the Court pointed out that the executive officers "did not go outside of the

79. Id. §3.
80. 192 U.S. at 496.
81. Act of February 1, 1905, ch. 288, §1, 33 Stat. 628.
82. Act of June 4, 1897, ch. 2, 30 Stat. 35.
83. Rev. Stat., §5388 (1873).
84. 220 U.S. at 509 (citing text of "Regulation 45" promulgated by the Secretary of Agriculture, June 12, 1906).
85. 220 U.S. at 509 (1911).
86. Id. at 517.
87. Id. at 521.

circle of that which the act itself had affirmatively required to be done . . ."[88] Despite this advance, the Court had still not made clear what limits there actually were on the authority to make administrative rules granted the Executive.

In 1926, Chief Justice Taft speaking for the majority in *Mahler* v. *Eby*[89] upheld legislation allowing the Secretary of Labor to deport alien "undesirable residents" who fell within certain classes of persons enumerated in the act.[90] Noting that past legislation and practice had given the Secretary of Labor sufficient indicia of who were undesirable aliens, the Chief Justice went on to say: "Our history has created a common understanding of the words 'undesirable residents' which gives them a quality of a recognized *standard*."[91] In this momentary allusion to the concept of a standard, Chief Justice Taft introduced the fundamental principle upon which the present theories concerning limits of Congressional delegation are based.

Four years later the Chief Justice took an opportunity to develop this idea. The Flexible Tariff Act of 1922 provided in pertinent part:

> . . . whenever the President, upon investigation of the difference in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classification or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. . . . Provided, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in title 1 of this act, or in any amendatory act. * * *
>
> That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.[92]

The Congressional Act gave the President impressive powers, in that he could virtually make a tax rate and thereby repeal the previous Congressional determination. The general policy of the act was clear but as a practical matter the mechanics of its application in a given situation could allow the President, with a considerable modicum of validity, to come to

88. Id. at 518.
89. 264 U.S. 32 (1924).
90. Act of May 10, 1920, ch. 174, §1, 41 Stat. 593.
91. 264 U.S. at 40 (emphasis added).
92. Ch. 356, §315, 42 Stat. 941.

any politically advantageous conclusion he desired.[93] Furthermore, expediting the act was discretionary with the President, and he could ignore the advice given him by the tarriff commission. Notwithstanding these sharp objections, in *J. W. Hampton, Jr. & Co.* v. *United States,*[94] the Supreme Court sustained the constitutionality of the act saying: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[95] Congressional delegations to be valid had to provide some "intelligible principle" to guide and limit activity of the executive officer. In regard to the question of whether executive officers exercising discretion in the conduct of delegated duties were actually acting as lawmakers, the Court noted that an executive officer can act only after the legislature has done the legislative act in empowering him, and then went on to cite[96] with approval the Supreme Court of Ohio:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done, to the latter no valid objection can be made.[97]

This decision faintly suggests a principle which was soon to become the first judicial attempt to reconcile the non-delegation doctrine with decisions sustaining substantial delegation of legislative power. A theoretical attempt would be made to distinguish true legislative power and its concommitant but subsidiary analogue in the realm of executive administrative action—the idea that an executive administration merely "filled up" the Congressional directive or acted as a fact finder in order that the legislative policies might be carried out. This attempt was best expressed in 1932 in the *Shreveport Grain & Elevator Co.*[98] case where the Court declared: "But 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."[99] The "fill-up" doctrine was largely laid to rest within a decade as opinions of the Supreme Court became more straight-forward concerning the matter. In 1940, with only one Justice dissenting, the Supreme Court stated: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."[100] In that same decade the New Deal was desperately trying to pull the nation out of the "Great Depression" and the Court decided the only two cases it has ever handed down invalidating Congressional delegations to public

93. Jaffe, **An Essay on Delegation of Legislative Power,** 47 Col. L. Rev. 359, 361-2 n. 11 (1947).
94. 276 U.S. 394 (1928).
95. Id. at 409 (emphasis added).
96. Id. at 407.
97. Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners, 1 Ohio St. 77, 88-9 (1852).
98. Unittd States v. Shreveport Grain & Elevator, 287 U.S. 77 (1932).
99. Id. at 85.
100. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

authorities.

The Non-Delegation Doctrine Applied

The first denial of delegated Congressional power to the President involved the reknowned "Hot Oil" case in 1935. Section 9(c) of the National Industrial Recovery Act[101] had authorized the President

> . . . to prohibit the transportation 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. . . .[102]

Section 9 of the NIRA had been designated by Congress as the "Oil Regulation." Pursuant to Section 9(c), the President had approved a "Code of Fair Competition for the Petroleum Industry," and designated the Secretary of the Interior as administrator fully vested with the powers of the President under 9(c) who in turn issued Regulations for enforcement of the Code.[103] In *Panama Refining Corp.* v. *Ryan,*[104] the appellants appealed an order enjoining violations of both the "Petroleum Code" of "fair competition" and the Regulations issued thereunder.[105] "Plaintiffs attacked the validity of section 9(c) as an unconstitutional delegation to the President of legislative power and as transcending the authority of Congress under the commerce clause."[106] Assuming without deciding that Congress had power to interdict interstate commerce as provided for in 9(c), the Court recognized that:

> . . . the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.[107]

Determined to take this tack, the Court proceeded to thoroughly examine Title 1 of the NIRA for any declared congressional policy guidelines for the President in respect to Section 9(c). Having gone through Section 9(c), 9(a) and 9(b), the Court turned to Section 1 where, in the Court's words, it found a "general outline of policy"—that a national emergency existed; that it was Congress's policy to remove all impediments to the free flow of commerce, to prevent unfair competitive practices, to promote the fullest utilization of industry, etc.—containing "nothing as to the circumstances or conditions in which transportation of petroleum or

101. Ch. 90, 48 Stat. 195.
102. Id. at 9(c), 48 Stat. 200.
103. See text of opinion setting out the complex series of Executive Orders and authorizations accomplishing this end. Panama Refining Co. v. Ryan, 293 U.S. 388, 405-10 (1935).
104. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (hereinafter cited as Panama).
105. Ryan v. Amazon Petroleum Corp., 71 F.2d 1 (1934); Ryan v. Panama Refining Company, 71 F.2d 8 (1934).
106. Panama, supra, note 104, at 411.
107. Id. at 415.

petroleum products should be prohibited—nothing as to the policy of prohibiting or not prohibiting the transportation of production exceeding what the states allow."[108] Further investigation of Title 1 gave the Court no reason to change this early finding, and remarks made at this stage of the inquiry point up the bases of the subsequent holding:

> The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy. We find nothing in section 1 which limits or controls the authority conferred by section 9(c).[109]

The Court went on to note both Article I Section 1 of the Constitution vesting all legislative powers in Congress; and Article I Section 8 empowering Congress to make all necessary and proper laws for carrying to execution its duties. The Court echoed the classic non-delegability doctrine saying "(t)he Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[110] The Court recognized that Congress of necessity must, and could, deal flexibly with the complex conditions often encountered, leaving to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature to apply."[111] For purposes of this discussion, the Court's decision was capped off several paragraphs later when Chief Justice Hughes said:

> . . . from the beginning of the government, the Congress has conferred upon executive officers the power to make regulations—"not for the government of their departments, but for administering the laws which did govern!" United States v. Grimaud, 220 U.S. 506, 517. . . . Such regulations, become, indeed binding rules of conduct, but they are valid only as subordinate rules and where found to be within the framework of the policy which the Legislature has sufficiently defined.[112]

Commentators seem to question whether this was truly a legitimate holding on the part of the Supreme Court. As one scholar put it: "The *Panama* case involved a narrow power with a somewhat vague but recognizable standard. It should have been upheld and probably would have been if the Court had not been eager to chastise the New Deal's failings.

108. Id. at 417-8.
109. Id. at 418-9.
110. Id. at 421.
111. Id.
112. Id. at 428-9.

The decision, however, does not raise an acute problem because the alleged lack could be remedied with a few well chosen words to serve as a standard.[113]

The next case posed a far more fundamental application of the non-delegability doctrine. In *A.L.A. Schecter Poultry Corp.* v. *United States,*[114] the infamous "Sick Chicken" case, the Supreme Court unanimously held that Section 3 of the NIRA, authorizing the President to approve or prescribe codes of "fair competition" was an unconstitutionally broad delegation of legislative power.[115] This case represents a concrete and direct application of the non-delegability doctrine to major national legislation in a time of severe economic national emergency. Writers question the present viability of the *Schecter* decision,[116] but it stands as an unavoidable chapter in the history of Congressional delegation. The standards in terms of expressed Congressional policy were the same as in the *Panama* case, but the issues were different. The *Panama* holding rested upon the *vagueness* of the Congressional standard. The *Schecter* opinion went right to the heart of the matter. The Court found that the Congress had exceeded its authority to delegate legislative power, and the issue was the improper delegation itself.

Section 3 of the National Industrial Recovery Act provided in part that

> . . . Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided,* That such code or codes shall not permit monopolies or monopolistic practices: *Provided further,* That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.[117]

The legislative policy which was supposed to be effectuated by these "codes" was set out in Section 1 of the NIRA:

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113. Jaffe, **An Essay on Delegation of Legislative Power,** 47 Col. L. Rev. 561, 573 (1947) (hereinafter cited as Jaffe).
114. 295 U.S. 495 (1935).
115. Id. at 542.
116. Jaffe, **supra** note 113 at 581; Davis, **supra** note 65 at 38.
117. National Industrial Recovery Act. Ch. 30, §(a), 48 Stat. 196.

> . . . A national emergency productive of widespread unemployment and disorganization 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.[118]

The "Live Poultry Code" was promulgated under Section 3, and petitioners in Schecter were convicted of violating the Code and of conspiracy to do so.[119] The Circuit Court of Appeals sustained the conspiracy conviction and the conviction on sixteen counts for violation of the Code, reversing conviction on two counts charging violation of requirements as to minimum wages and maximum hours of work as these were not within the congressional power of regulation.[120] In the lower courts the defendants argued that: (1) the Code had been adopted pursuant to an unconstitutional delegation of legislative power by Congress; (2) that it attempted to regulate intrastate transactions beyond the authority of Congress; (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment.[121] The Supreme Court agreed with the petitioners that the delegation was in fact unconstitutional,[122] and that Congress did attempt regulation of intrastate affairs as concerned the attempt to control wages and working hours in this particular situation.[123] In light of these holdings the Court felt it unnecessary to consider the due process arguments.[124] Present attention is here properly focused upon the delegability question in isolation, because the intrastate commerce question had no influence on the Court's finding of unconstitutional delegation of Legislative power.

Turning to the opinion of the Court, Chief Justice Hughes noted early that the declared purpose of the "Live Poultry Code" was "(t)o effect the policies of title I of the National Industrial Recovery Act."[125] Counsel for the government urged that the provision of the statute authorizing the creation of such codes be viewed in light of the "grave national crisis."[126] The Court answered this prayer by declaring:

118. Id. at §1, 48 Stat. 195.
119. United States v. Schecter, 8 F. Supp. 136 (1934).
120. United States v. A.L.A. Schecter Poultry Corp., 76 F.2d 617 (1935).
121. United States v. Schecter, 8 F. Supp. 136, 141-2 (1934); United States v. A.L.A. Schecter Poultry Corp., 76 F.2d 617, 620 (1935) (the court's opinions impliedly meet an "intrastate commerce" type of argument, and expressly do address the question of improper Congressional delegation).
122. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).
123. Id. at 550.
124. Id. at 551.
125. Id. at 523.
126. Id. at 528.

> . . . Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.[127]

Moving on to the more specific delegability question, the Court reviewed its reasoning in the Panama case—the legislative power and responsibility for making all necessary and proper laws is vested in Congress; Congress may adapt legislation to complex situations if done without abdicating its legislative responsibility by laying down policies and standards which selected instrumentalities fill out or determine the application thereof to a particular fact situation; but the wide range of already acceptable delegations must not "be allowed to obscure the limitations of the authority to delegate. . . ."[127] Accordingly the Court determined to look to the statute in order to see whether Congress overstepped these limitations.

The problem was "whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."[128] The Court also distinguished the present case from its predecessor Panama:

> The aspect in which the question is now presented is distinct from that which was before us in the case of the Panama Refining Company. There the subject of the statutory prohibition was defined. . . . (citation omitted) . . .
>
> . . . That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. . . . (citation omitted) . . .
>
> . . . As to the "codes of fair competition," under section 3 of the act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.[130]

Chief Justice Hughes criticized the lack of any definition of "fair competition." Did it refer to any previous definition established by the law or was it a convenient way to allow the President to designate its meaning by whichever codes he prescribed or approved.

The common law recognized "Unfair Competition," a narrow con-

127. Id. at 528-9.
138. Id. at 530.
129. Id.
130. Id.

cept largely limited to business torts—fraud, misappropriation, misrepresentation and the like. Such a definition obviously did not encompass the objectives sought by the NIRA. The Federal Trade Commission Act introduced the concept of "unfair methods of competition." The meaning of this phrase was definitely broader in content than the analogous common law notion, but the precise meaning had to be found in context of a particular fact situation. To do this Congress established a commission, a quasi-judicial body, with provisions for all necessary administrative protections.

> In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject matter. We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range and a new significance.[131]

A statement of the authorized objectives and content of the "codes of fair play" was supposedly found in the "Declaration of Policy" in Section 1, title 1 of the Recovery Act and according to Section 3 of the same title, the approval of a code by the President was dependent upon his finding that it "will tend to effectuate the policy of this title." Recognizing the broad sweep of Section 1 the Court maintained that

> . . . the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficient measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this act sort are styled "codes of fair competition."[132]

Mindful of this, Chief Justice Hughes returned to the idea that Congress could not give the President "unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[133] The Court then looked to the Recovery Act to discover what real limitations had been put on the President. There were none except that: (1) the approved codes could not operate to promote monopolies or oppress small business; and (2) trade or industrial groups proposing such codes had to be truly representative imposing no inequitable restrictions on membership. The Court

131. Id. at 533-4.
132. Id. at 535.
133. Id. at 538.

found that such a sweeping delegation found no basis in past decisions upon which the government relied and wrapped it all up by saying:

> . . . Section 3 of the Recovery Act . . . [citation omitted] . . . is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.[134]

For the immediate purpose of this discussion, the point to note is that in the case of the NIRA's codes of "fair competition" there was no "adequate definition of the subject to which the codes . . . (were) . . . addressed."[135] In the *Panama* case, section 9(c) at least defined the subject of the statutory prohibition (transportation of petroleum and petroleum products), although it accorded the President unconstitutionally broad discretion. Here in *Schecter* the case is different. Section 3 of the Recovery Act doesn't really define "unfair competition" while authorizing the President to prescribe or approve far reaching Codes for the prevention of it. The real pivotal fact in this decision was that the President could determine the very essential nature of the legislation by deciding what its subject matter was. In reviewing the cases following *Schecter,* a general drift will be seen away from the seemingly rigorous application of the non-delegability doctrine in *Schecter,* but never will so broad a delegation be seen, without giving the Chief Executive some more explicit directions as to the very essential nature of the legislation.

Decline of the Classic Non-Delegation Doctrine

The Federal non-delegation doctrine enjoyed its greatest acceptance during the 1930's as evidenced by the *Panama* and *Schecter* decisions. During the 1940's, judicial reliance on the doctrine weakened and the Court upheld delegations without real standards or intelligible principles. The most recent history of the non-delegability doctrine has seen the Court uphold cases of major administrative policy making without meaningful statutory guidance. Today, commentators are beginning to recognize that the non-delegability doctrine is largely a failure and are suggesting its alteration and modified reemployment. Before reaching those suggestions, however, it seems proper to first look back to 1943.

In *National Broadcasting Company* v. *United States,*[136] the National

134. Id. at 541-2.
135. Id. at 531.
136. 319 U.S. 190 (1943).

Broadcasting Company decided to attack the validity of the Federal Communications Commission's Chain Broadcasting Regulations. These regulations were intended primarily to reach the major networks' monopolistic programming practices which the Commission found excluded the listening public from programs produced by independent stations or smaller networks. This attempted regulation "involved something clearly beyond what was contemplated"[137] in 1934 when the Commission was created[138] to license broadcasting stations. The enabling statute in part provided that:

> . . . the Commission from time to time, as public convenience, interest or necessity requires, shall . . . (s)tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . .[139]

The legislative history of the Act, and any reading thereof, yielded no Congressional guidance as to the monopolistic practices the Commission's Regulations were intended to reach. NBC in consequence maintained that the Federal Communications Commission was attempting to exercise authority not delegated to it. The Court replied that:

> . . . The Act itself established that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.[140]

The Commission was given a touchstone in performing this duty—"public interest, convenience, or necessity"—"a criterion 'which is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' "[141] The "public interest" to be served was the interest of the listening public in "the larger and more effective use of radio." In upholding the action of the Commission, the Supreme Court said its duty was at an end when the Court found the action was based upon findings supported by evidence and was made pursuant to authority granted by Congress. It was not for the Court to say that the public interest would be furthered or retarded by the regulations. This decision, coming less than a decade after Schecter, clearly indicated a new, "relaxed" judicial disposition toward the delegation of Congressional authority.

The Emergency Price Control Act of 1942[142] provided for the establishment of the Office of Price Administration under the direction of a

137. Davis, **supra** note 65 at 33.
138. Communications Act of 1934. ch. 652, §1, 48 Stat. 1064.
139. Id. at §303(g), 48 Stat. 1082.
140. 319 U.S. at 215-6.
141. Id. at 216.
142. Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23.

Price Administrator appointed by the President. The Act set up a comprehensive scheme for the Administrator's promulgation of regulations or orders fixing such maximum prices of commodities and rents as would effectuate the Act's purposes and conform to the standards it prescribed. The Act was created as a war time measure to expire on a specified date unless sooner terminated by Presidential proclamation. Section 1(a) read:

> . . . It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes . . .[143]

The Standards which were to guide the Administrator were set out in Section 2(a):

> Whenever in the judgment of the Price Administrator . . . the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 . . . for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.

the statute went on to provide that the Administrator should, "so far as practicable" consult with representatives of the industry effected, and upon request of that industry, create a committee to make "recommendations" concerning price controls.

The petitioners in *Yakus* v. *United States*,[145] were convicted of selling

143. Id. at §1(a), 56 Stat. 23-4.
144. Id. at §2(a), 56 Stat. 24-5.
145. 321 U.S. 414 (1944).

beef at prices above the maximum prescribed by the Administrator. They challenged the Emergency Price Control Act as an unconstitutional delegation of legislative power by Congress. The Court recognized that as an emergency war measure Congress had constitutional authority to prescribe commodity prices, and disagreed with the petitioners that the Act was an unconstitutional delegation of its legislative power. The purposes of the Act specified in Section 1 denoted the objective of the Administrator and the standards in Section 2 defined the boundaries within which prices having those purposes were to be fixed. "It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards . . ."[146] The Act was a proper Congressional exercise of its legislative power. Congress stated an objective, prescribed the method of achieving that objective, and laid down for the Administrator standards to guide his determination of when to exercise his power and the particular prices to be established. The Court noted the NIRA and distinguished it:

> "The Act is unlike the National Industrial Recovery Act . . . (citation omitted) . . . considered in Schecter Poultry Co. v. United States . . . (citation omitted) . . . which proclaimed in the broadest terms its purpose to 'rehabilitate industry and to conserve natural resources.' It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform.

Satisfied that the Emergency Price Control Act was a permissible exercise of the National legislative power the Court sustained the petitioners convictions.

In 1948 the Supreme Court sustained another large delegation of Congressional power. The petitioners in *Lichter* v. *United States,*[148] were accused by the Undersecretary of War of realizing excess profits on government procurement and construction contracts during World War II in violation of the first Renegotiation Act.[149] That Act basically authorized government officials to recover "excessive profits" made by government contractors without actually defining "excessive." In the words of the statute:

> . . . The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from

146. Id. at 423.
147. Id. at 424.
148. 334 U.S. 742 (1948).
149. Renegotiation Act of 1942, ch. 247, §403, 56 Stat. 245.

> such contractor or subcontractor . . .
> . . . In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable . . .[150]

The petitioners offered the defense that the statute on its face was an unconstitutional delegation of Congressional power. The argument was based on the claim that the Act's delegation of authority "carried with it too slight a definition of legislative policy and standards."[151] The determination of the meaning of "excessive profits" by an administrative official was an exercise of the legislative power rather than a mere exercise of administrative discretion under valid legislative authority. The original Renegotiation Act contained no definition of excessive profits but a later amendment defined them as "any amount of a contract or subcontract price which is found as a result of negotiation to represent excessive profits.[152] The Court construed this elusive definition as Congressional approval of administrative practice before the amendment.[153] The Court noted other sections of the first Renegotiation Act calling for renegotiation clauses in future contracts over $100,000, if, in the "judgment of the Secretary, the profits can be determined with reasonable certainty."[154] "This statement indicated a relationship between current 'excessive profits' and those which later might be determined with 'reasonable certainty.' "[155] The Court also pointed out that the Secretary was not to allow for unreasonable compensations, reserves or costs in renegotiating a contract or determining excessive profits. Speaking for the Court, Mr. Justice Burton declared:

> . . . It is in the light of these statutory provisions and administrative practices that we must determine whether the Renegotiation Act made an unconstitutional delegation of legislative power. On the basis of (a) the nature of the particular constitutional powers being employed, (b) the current administrative practices later incorporated into the Act and (c) the adequacy of the statutory term "excessive profits" as used in this context, we hold that the authority granted was a lawful delegation of administrative authority and not an unconstitutional delegation of legislative power.[156]

Having previously determined that the Renegotiation Act was a valid exercise of Congress's war powers, the Court went on to recognize that a grant of constitutional power implied the power of delegation sufficient to effect its purposes.

> This power [to delegate legislative authority] is especially signifi-

150. Id. at §403(c), 56 Stat. 245-6.
151. 334 U.S. at 774.
152. Revenue Act of 1943, ch. 63, §701(4)(A), 58 Stat. 79.
153. 334 U.S. at 774.
154. Renegotiation Act of 1942, ch. 247, §403(b), 56 Stat. 245.
155. 334 U.S. at 776.
156. Id. at 778.

> cant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. In peace or in war it is essential that the Constitution be scrupulously obeyed, and particularly that the respective branches of the Government keep within the powers assigned to each by the Constitution. On the other hand, it is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect in order that, through the Constitution, the people of the United States may in time of war as in peace bring to the support of those purposes the full force of their united action.[157]

Taken together, the *NBC, Yakus* and *Lichter* cases characterized a judicial turnabout which largely denied the judiciary's extreme position in *Panama* and *Schecter.* It was becoming increasingly more obvious to observers that the Supreme Court really did not intend all that those two cases could imply. One contemporary commentator discussing the *Lichter* holding has said:

> . . . Justice Burton's opinion holding the Act valid confirms the general suspicion that the only two Supreme Court decisions which ever invalidated delegations to the executive branch of the government were probably wrong. The usual attitude of the Supreme Court is one of great leniency toward the congressional effort to be articulate in its command to the executive branch; and particularly where, as here, it is difficult to be explicit the statute will be upheld.[158]

This tendency to uphold statutes where it was difficult for Congress to be explicit was at that time becoming manifestly obvious as the Court began to uphold delegations without definite standards or "intelligible standards," eventually allowing agencies to make determinations of major policy without legislative guidance. Brief mention only will be made of three early cases illustrating this development in order that attention can be given to two very contemporary cases illustrating these principles in modern practice.

Fahey v. *Mallonee,*[159] involved the Home Owner's Loan Act of 1933[160] which authorized the Federal Home Loan Bank to regulate the reorganization, merger or liquidation of building and loan associations with power to appoint the necessary conservator or receiver.[161] The Act stated no standard, no policy, no intelligible principle. Nonetheless, the Court sustained the legislation because it involved mere regulation in a well established field.

> . . . The provisions are regulatory. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies

157. Id. at 778-9.
159. Frank, The United States Supreme Court, 1947-48, 16 U. Chi. L. Rev. 1, 16 (1948).
159. 332 U.S. 245 (1947).
160. Home Owners Loan Act of 1933, ch. 64, 48 Stat. 128.
161. Id. at §5(d), 48 Stat. 133.

> which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators . . .
>
> A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields.[162]

In *American Trucking Associations* v. *United States*,[163] appellants attacked new rules of the Interstate Commerce Commission governing the use of leased or exchanged equipment. These rules effectively prevented "trip leasing," a practice which allowed agricultural commodity carriers—exempt from the Motor Carrier's Act[164]—to make a trip one way, then temporarily lease the equipment to a regulated carrier so as to not return empty. Appellants urged that nowhere in the Act was there an expressed delegation of power to control, regulate or affect leasing practices and in no separate provision of the Act was there a direct implication of such power. The Court agreed, but upheld the Commission's action because it bore a reasonable relationship to the regulatory scheme of the Motor Carrier's Act. In defending its position the Court declared:

> . . . As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. . . . (citations omitted) . . . Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.[165]

In that same year the Supreme Court suggested the idea that administrative agencies could, and in some situations should, make major policy decisions on the basis of their own judgments rather than those they suppose to be of Congress. The case was *Federal Communications Commission* v. *R.C.A. Communications, Inc.*,[166] where the Radio Corporation of America challenged the FCC's granting of a license to a public-service international radio telegraph carrier who would operate in competition with RCA Communications' existing facilities. The Communications Commission granted the license on the basis of the "national policy in favor

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162. 332 U.S. at 250.
163. 344 U.S. 298 (1953).
164. Interstate Commerce Act, Part II, ch. 498, §201, 49 Stat. 543. as amended, ch. 722, §15, 54 Stat. 919.
165. 344 U.S. at 309-10.
166. 346 U.S. 86 (1953).

of competition"[167] because it was "reasonably feasible"[168] to have both radio telegraph companies operating. The Court reminded the FCC that its actions were to be based upon what it found to be in the "public interest, convenience, or necessity"[169] and noting that "(t)he Commission . . . seems to have relied almost entirely on its interpretation of national policy"[170] the Court found that

> . . . it is improper for the Commission to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts. Had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation . . . To say that national policy without more sufficies for authorization of a competing carrier whereever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress . . . We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonably feasible. This is so precisely because the exercise of its function gives it accumulating insight not vouchasafed to courts dealing episodically with the practical problems involved in such determination.[171]

The force of the decision was that in considering this matter the Commission should have considered its function free of specific legislative guidance by Congress. The FCC failed in that its ". . . conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress's judgment that such authorizations are desirable."[172] These fleeting references should point up the Supreme Court's changed attitude toward delegations which during the 1930's might have been received with hostility. Not only could administrators in the appropriate circumstances operate without expressed Congressional direction, but in addition were sometimes expected to take the initiative in developing policies where their Congressional mandate seemed to demand it. These basic principles, though no longer really novel, govern administrative practice today. The question of unconstitutional delegation, if raised in litigation, barely troubles the Supreme Court. The first case following will illustrate a modern Congressional delegation without a standard or "intelligible principle," while the last will illustrate major policy making by an executive agency, the FPC.

Contemporary Non-Delegation

State of Arizona v. *State of California*[173] involved a dispute between those states concerning the proper apportionment of the waters in the

167. Id. at 89.
168. Id. at 88.
169. Communications Act of 1934, ch. 652, §303, 48 Stat. 1082.
170. 346 U.S. at 91.
171. Id. at 94-6.
172. Id. at 96.
173. 373 U.S. 546 (1963).

mainstream Colorado River. The controversy was controlled[174] by the Boulder Canyon Project Act of 1928[175] and the essential questions became: (1) the validity of the original apportionment by the Secretary of the Interior; and (2) the validity of any future apportionment by the Secretary in case of water shortage. The southwestern water controversy was one of old and immense proportions. Control of the now low and tomorrow rampaging Colorado River was the key to the development of seven southwestern states[176] during the early twentieth century. Notwithstanding the obvious benefits of cooperation, these states could never agree on any cooperative project to deal with the River. The involved area could be roughly divided into an Upper Basin Area and a Lower Basin Area (itself comprising California, Nevada and Arizona). Faced with the problem, Congress passed the Project Act whereby the U.S. government would sponsor the extensive facilities necessary to tame the Colorado if the seven states involved properly ratified the Colorado River Compact, agreeing irrevocably to join together in this project. The Compact guaranteed the three Lower Basin states 7,500,000 acre-feet of water yearly, but required that California agree never to demand more than 4,400,000 acre-feet per year from that amount and never more than one half of the excess. Debate before passage of the bill indicated that of the water going to the Lower Basin Area, Arizona would need 4,400,000 acre-feet and Nevada only 300,000. The Act therefore contained a clause empowering California, Arizona and Nevada to make a private compact among themselves dividing the 7,500,000 acre-feet available to the Lower Basin in the following proportions: 4,400,000, 2,800,000 and 300,000 acre-feet respectively.[177] This agreement was to become binding on ratification of the Colorado River Compact.[178] The Compact was properly ratified and California agreed to its 4,400,000 primary limit.[179] The Lower Basin states did not, however, join in the optional compact suggested by Congress. These matters accomplished, the rest of the Boulder Canyon Project became operative. Section 8(b) of the Act had allowed the Basin states to freely create another compact satisfactory to themselves, concerning the use of waters accruing to the states and subsidiary to the Colorado River Compact.[180] This compact was to have Congressional approval by January 1, 1929 or thereafter be always "subject to all contracts, if any, made by the Secretary of the Interior under Section 5 hereof prior to the date of such approval by Congress."[181] As with the previous optional compact, the Lower Basin states chose not to reach agreement. Therefore, on the completion of Boulder Dam, the Secretary of the Interior made contracts with various water users in California for 5,362,000 acre-feet, with Nevada for 300,000 acre-feet

174. Id. at 551-2.
175. Ch. 42, 45 Stat. 1057.
176. 373 U.S. at 552-4.
177. Boulder Canyon Project Act, Ch. 42, §4(a), 45 Stat. 1059 (hereinafter cited as Project Act).
178. Id.
179. 373 U.S. at 561-2.
180. Project Act at §7(b), 45 Stat. 1062.
181. Id.

and with Arizona for 2,800,000 acre-feet. The Secretary was purporting to act under the authority of the Project Act. Section 5 of that Act authorized the Secretary to

> . . . contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon . . . Contracts . . . shall be for permanent service . . . no person shall have or be entitled to have the use for any purpose of the water stored . . . except by contract made as herein stated.[182]

In the absence of the compacts suggested by Congress, the Secretary had to exercise his Section 5 powers, contracting away the 7,500,000 acre-feet of water available to the Lower Basin. This amounted to an actual apportionment of the mainstream waters entering that area. Arizona's suit raised the question of the validity of this apportionment because Section 5 allegedly provided no standard for the exercise of this power delegated to the Secretary by Congress. On its face, the argument seemed fair.

The Court disagreed and held that the Secretary of the Interior's contracts with Arizona for 2,800,000 acre-feet of River water and with Nevada for 300,000 acre-feet, together with the limitation of California to 4,400,000 effected a valid apportionment of the first 7,500,000 acre-feet of mainstream water in the Lower Basin. Viewing the legislative history of the Act and reading the "persuasive" Sections 5 and 8(b) the Court concluded that Congress intended the Secretary to apportion the waters through his §5 contracts. Answering the question of improper delegation for lack of sufficient standards, the Court said:

> The argument that Congress would not have relegated to the Secretary so much power to apportion and distribute the water overlooks the ways in which his power is limited and channeled by standards in the Project Act. In particular, the Secretary is bound to observe the Act's limitation of 4,400,000 acre-feet in California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water. This necessarily leaves the remaining 3,100,000 acre-feet for the use of Arizona and Nevada, since they are the only other States with access to the main Colorado River. Nevada consistently took the position, accepted by the other States throughout the debates, that her conceivable needs would not exceed 300,000 acre-feet, which of course, left 2,800,000 acre-feet for Arizona's use. Moreover, Congress indicated that it thought this a proper division of the waters when in the second paragraph of §4(a) it gave advance consent to a tri-state compact adopting such division. While no such compact was ever entered into, the Secretary by his contracts has apportioned the water in the approved amounts and thereby followed the guidelines set down by Congress.[183]

The Court noted that there were other "significant" limitations and standards in the Secretary's power to distribute stored water—river regulation, flood control, river navigation, irrigation and domestic uses, satisfaction of present perfected rights, power, revenue, etc.

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182. Project Act at §5, 45 Stat. 1060.
183. 373 U.S. at 583-4.

Still, however, another question remained. What should be done in a time of shortage? Did the Secretary have to make a pro rata sharing of the water among the three states? The Supreme Court thought not. The Secretary was vested with considerable control over the apportionment of the River's waters, and "[w]hile the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice as we see it, is primarily his, not . . . ours."[184]

There was a strong dissent by three Justices, especially to the proposition that the Secretary could apportion in times of shortage as he saw fit. The dissenters felt that there was no real limitation on an immense amount of the Secretary's authority. Citing *Schecter, Panama,* and *Youngstown Sheet & Tube,* the dissent declared: "The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts."[185] Despite the dissent's strong language, the six Justices of the majority clearly held that the Congressional delegation was valid.

The *Permian Basin* rate case[186] is another modern controversy illustrating the relative contemporary weakness of the non-delegation doctrine. As was noted earlier, the Supreme Court since *Schecter* has sustained major policy decisions made by the executive without statutory guidance, as well as delegations without meaningful standards. Such policy making is often tantamount to executive law making, and occurs today generally when older agencies are confronted with new economic conditions or novel business practices not known or foreseen at the time the agency was created. The obvious question is, do the agencies have the power to deal with these new considerations without further Congressional guidance. The Supreme Court has held that they do,[187] often in face of the fact that the agency itself for years considered itself not empowered to do what it finally decided it had to do.[188] *In Re Permian Basin Area Rate Cases*[189] is a good example of an agency assuming new functions not apparently required or authorized by an enabling statute.

The Federal Power Commission was created by Congress in 1920.[190] The Natural Gas Act[191] empowered the Commission to regulate the transportation and sale of gas in interstate commerce but it did not ". . . apply to . . . the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."[192] In other words, the Act's specific provisions did not apply to producers or well-head sales of natural gas. Accordingly, until the Supreme Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,*[193] the

184. Id. at 593.
185. Id. at 626.
186. In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968).
187. United States v. Southwestern Cable Co., 392 U.S. 157 (1968); American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway, 387 U.S. 397 (1967).
188. Id.
189. 390 U.S. 747 (1968).
190. Federal Water Power Act, ch. 285, §1, 41 Stat. 1063.
191. Ch. 556, 52 Stat. 821.
192. Id. at §1(b).
193. 347 U.S. 672 (1954).

FPC had assumed that it had no power to regulate those activities. The Court held to the contrary. The legislative history, past decisions and the statutes language lead the Court to the decision that such a producer or vender was a "natural gas company" within the meaning of the term as defined by the Natural Gas Act.[194] Before the decision the Commission's duties were fairly straightforward and of manageable proportions. Thereafter the administrative task became complex and immense. Section 5(a) provides in part:

> Whenever the Commission . . . shall find that any rate, . . . charged . . . by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate. . . .[195]

Where the FPC was formerly regulating only the rates of "natural gas companies" actually transporting gas interstate, producer and well head sales now had to be supervised. In addition, the traditional "costs of service" type rate-making was largely inappropriate for gas producers, since Gas producers are not really public utilities, in that they have no franchises or guaranteed areas of service. They are intensely competitive vendors of a wasting commodity often discovered after expensive and sometimes unrewarded research; their unit costs rise and fall with fortune; their capital input is often not matched by a constant quality or quantity output. Applying the "costs of service" type of rate analysis to each individual producer was a prohibitive burden on the Commission's resources. By 1960 the FPC's resources had so broken down that it announced proceedings by which it would determine maximum producers' rates for each major producing area. The Commission did in fact eventually put into effect a national scheme of area rate regulation. The Permian Basin was such a rate area, and the appellants challenged the Power Commission decision. There were several issues in controversy, but the pertinent one for purposes of this discussion was: Did the Commission have the ". . . statutory and constitutional authority to employ area regulation. . . ."[196] In other words could the FPC ". . . regulate producers' interstate sales by the prescription of maximum area rates, rather than by proceedings conducted on an individual producer basis.[197]

In reaching its decision, the Supreme Court first examined several interrelated considerations not leading directly to its decision on the delegation issue, but of interest in the context of Congressional authority to create and delegate power to enforce price controls. The Court pointed out that Congressional price ceilings do not *per se* violate the Constitution:

> It is plain that the Constitution does not forbid the imposition, in

194. Id. at 677.
195. Natural Gas Act, ch. 556, 52 Stat. 823.
196. 390 U.S. at 767-8.
197. Id. at 768.

> appropriate circumstances, of maximum prices upon commercial and other activites. A legislative power to create price ceilings has, in "counries where the common law prevails," been "customary from time immemorial . . ." (citation omitted). . . . Its exercise has regularly been approved by this Court . . . (citations omitted) . . . No more does the Constitution prohibit the determination of rates through group or class proceedings. This Court has repeatedly recognized that legislatures and administrative agencies may calculate the rates for a regulated class without first evaluating the separate financial position of each member of the class. . . .[198]

Furthermore, there is no constitutional objection where certain higher cost producers are more adversely affected by a maximum price or where the value of regulated property is reduced in consequence of the regulation. Regulation can also constitutionally limit the return on a capital investment. Price control is "unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . ."[199] (citation omitted). Nonetheless, the just and reasonable standards of the Natural Gas Act met with the applicable constitutional standards. Any reasonable rate could not be attacked as confiscatory, and in calculating rates, the FPC could take into consideration all of the interests Congress commissioned it to reconcile (consumer, investor, etc.). The opinion clearly indicated that Congressional price controls are constitutional, and Congress can delegate the power to create them.

Returning directly to the Court's treatment of the delegation issue, the question became whether, despite the absence of any constitutional deficiency, area regulation was inconsistent with the terms of the Natural Gas Act. The Court thought not;[200] through the national power over interstate commerce, Congress intended to create an agency for regulating the wholesale distribution of gas moving interstate to public service companies. It was proper, the Court found, for the Commission to balance investor and consumer interests. The Court noted that it

> . . . has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred . . . (citations omitted) . . . the Commission's broad responsibilities therefore demand a generous construction of its statutory authority . . . "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself . . ." (citations omitted) . . . (R)ate making agencies . . . are permitted, unless their statutory authority otherwise plainly indicates, to make the pragmatic adjustments which may be called for by particular circumstances.[201]

Since achieving the FPC's statutory objectives may depend upon more expeditious administrative methods than theretofore employed, considerations of feasibility and practicality were "certainly germane" to the issue

198. Id. at 768-9.
199. Id. at 769-70 (citation omitted).
200. Id. at 777.
201. Id. at 776-7.

in question. The Court therefore could not ". . . conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted."[202]

The *Arizona* and *Permian Basin* cases are modern illustrations of the non-validity of the federal non-delegation doctrine today. The Supreme Court decisions after *Schecter* have approved delegation involving no real standards, and have allowed broad policy making by agencies. As noted earlier, the doctrine is basically judicially-derived, and the Supreme Court seems willing to let it pass largely unnoticed. Justice Douglas' dissent in *Arizona* stated that preventing undue delegation of power kept major societal policy decisions in the hands of legislators who are responsive to the people, as well as set meaningful standards for judicial review.[203] These benefits are probably illusory. As Professor Davis has pointed out—after discussing early pre-*Field*[204] delegations without standards:

> Of course, today's governmental undertakings are much more complex and the need for delegated power without meaningful standards is much more compelling. A modern regulatory agency would probably be an impossibility if power could not be delegated with vague standards. Typically, a regulatory agency must decide many *major* questions that could not have been anticipated at the time of the statutory enactment; typically, legislators are unable to write meaningful standards that will be helpful in answering such major quesions; and typically, the protections lie much less in standards than in frameworks of procedural safeguards plus executive, legislative, or judicial checks.[205]

In reference to the Supreme Courts' 1932 statement in *Shreveport*: "That the legislative power of Congress cannot be delegated is, of course, clear"[206]—Professor Davis observes:

> The 1932 statement was an anachronistic statement of an earlier attitude. The later purpose, already well along in its life cycle, was to require meaningful standards when power was delegated: "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." . . . (citation omitted) . . . The doctrine has clearly failed to accomplish this later purpose.[207]

Professor Davis has suggested that the real focus of judicial attention should be on the safeguards against abuse of administrative discretion regardless of whether the statutory authority provides clear standards.[208] Congress in experience has been allowed, and undoubtedly will be allowed to delegate its law making authority. Any real challenge to the exercise of delegated authority in the future will probably be based upon the approach suggested by Davis. Though not herein discussed, the

202. Id. at 777.
203. **State of Arizona v. State of California,** 373 U.S. at 626 (1963).
204. Field v. Clark, 143 U.S. 649 (1892).
205. K. Davis, **Administrative Law Treatise** 47 (1970 Supp.) (hereinafter cited as Administrative Law).
206. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).
207. Administrative Law, **supra** note 205 at 42.
208. Id. at 40-1, 50-8.

Permian Basin case contains some good examples of challenges to the administrative function itself.[209] Any direct challenge to the delegation of Congressional power would in all likelihood be a futile exercise.

CONCLUSION

Youngstown Sheet & Tube seemed to make clear that the theory of inherent Executive power in the conduct of foreign affairs, has found no favor in the Supreme Court opinions dealing with Presidential powers respecting internal affairs. In domestic matters the President's supposed authority to act must be based upon some power granted him by Article II of the Constitution. Any domestic action that he takes, apart from a military situation and without specific authorization from Congress, must be in some way based upon his general Article II, Section 3 duty to "take Care that the Laws be faithfully executed."

The series of decisions following *Schecter,* especially the most recent, seem to largely indicate a judicial abandonment of the classical Congressional non-delegation doctrine. The Supreme Court today has evidently determined that the doctrine really is not functional. Broad delegations to Executive officers without meaningful standards are constitutionally acceptable, and likewise are major policy-making activities of Executive instrumentalities. Congress can clearly, within liberal limits, delegate its law-making function to the President.

In light of the foregoing conclusions, and considering the extensive discussion above, it is highly unlikely that any challenge to the Economic Stabilization Act of 1970 would be successful on the basis of an unconstitutional delegation of legislative authority. One commentator in 1947 thought that *Schecter* might serve as a constitutional bar to excessive delegation in the event of peacetime economic planning,[210] but the decisions since then largely belie such an assertion. *Schecter* might not be an anachronism, but there seems to be no good reason to believe otherwise.

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209. See generally In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968).
210. Jaffe, supra note 113 at 581.