THE TURNEY MEMO

Reproduction, C.E. Turney, Office of Legislative Counsel of the United States Senate, Memorandum on Constitutionality of Provisions of Air Commerce Act of 1926 Delegating Regulatory Powers to Secretary of Commerce (July 1, 1929)

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INTRODUCTION

In 2002, Thomas Merrill and Kathryn Watts published a pathbreaking article arguing that the Progressive and New Deal Congresses followed an elegant drafting convention to communicate whether agency actions resulting from legislative grants carried the force of law.[1] In their telling, Congress included statutory references to "sanctions" to communicate that implementing regulations carry the force of law.[2] Merrill and Watts argued that Congress adopted this drafting convention in response to several

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* Cornell J.D., 2019; Attorney, United States Department of Justice. I appreciate my coclerks at the Eastern District of Texas who were especially supportive whenever I broached the topic of the Turney Memo and my other scholarly pursuits. Special thanks go to Adam Berenbak, the researcher at the Center for Legislative Archives in the National Archives, who helped me locate a copy of the Turney memo. Lastly, I would like to thank the *Notre Dame Law Review* for giving this publication a home after the Turney Memo's near-century in the dark.

My only alterations are meant to make the memo more readable to modern audiences. I changed the typeface of Turney's citations and updated discarded spellings of common words.

1 Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493 (2002):

> [T]he history of rulemaking during the Progressive and New Deal eras reveals that key participants in the legislative process did not regard such grants as ambiguous. Starting around World War I, Congress began following a convention for indicating whether an agency had the power to promulgate legislative rules. Under this convention, the requisite textual signal was provided by the inclusion of a separate provision in the statute attaching "sanctions" to the violation of rules and regulations promulgated under a particular rulemaking grant. If the statute prescribed a sanction, then the authority to make "rules and regulations" included the authority to adopt legislative rules having the force of law.

2 *Id.*

Supreme Court decisions[3] but lamented that much of Congress's internal analysis was lost to time.[4] With that context, the memorandum reproduced below is a missing link in the field of administrative law and legislation.

This memo, authored by legislative counsel C.E. Turney, was discovered while I prepared an article on the meaning of the "force of law."[5] While reviewing different sources from the 1930s and 1940s, I found references[6] to C.E. Turney's memo on the constitutionality of the Air Commerce Act of 1926.[7] It was considered a pathbreaking analysis on the developing doctrines of judicial review of agency actions.[8] Because the memo received praise from the generation of administrative law mavens that preceded the enactment of the Administrative Procedure Act of 1946,[9] I sought out a copy of the Turney memo. To my disappointment, there were no publicly available copies and the memo had faded into obscurity by the 1950s.

Eventually, after digging around in the Library of Congress and the National Archives, I discovered an original copy of the memo in all its decaying-onion-skinned glory. Because of the sensitive binding and crumbling pages, I endeavored to reproduce the memo with this brief introduction.

The Turney memo fills an important gap in the historical record. When Merrill and Watts wrote their article on the force of law drafting convention in 2002, they had to piece things together in *Da Vinci Code* fashion by connecting a web of unrelated statutes, regulations, and legislative histories.[10] They were able to deduce the convention's existence *despite* their explicit finding that no primary source document preserves Congress's

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3 *See id.* at 499–503 (discussing the impact of United States v. Eaton, 144 U.S. 677 (1892) and United States v. Grimaud, 220 U.S. 506 (1911)).

4 *See id.* at 495 ("[T]he convention was never explicitly memorialized in an authoritative text, such as a statute, a legislative drafting guide, or a prominent judicial decision. It remained part of the unwritten 'common law' of legislative drafting . . . .").

5 Beau J. Baumann, *The Force of Law After* Kisor, 42 PACE L. REV. (forthcoming 2021) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674688 [https://perma.cc/DFN2-UKAN]).

6 For example, Frederic P. Lee ranked Turney, along with Fred T. Field, as one of the earliest figures to distinguish between legislative and interpretive regulations. *See* Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 n.1 (1940) (referencing Fred T. Field, *The Legal Force and Effect of Treasury Interpretation*, *in* THE FEDERAL INCOME TAX 91 (Robert Murray Haig ed., 1921)). Lee, like some of his contemporaries in the 1930s and 1940s, wrote that Turney gave the fullest expression to that distinction and developed a working theory for the "force of law." *See id.*

7 Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (codified as amended at 49 U.S.C. §§ 171–214) (Supp. II 1925).

8 *See, e.g.*, Lee, *supra* note 6.

9 *See id.*

10 *See* Merrill & Watts, *supra* note 1, at 495 ("[T]he only way to establish the existence of the convention is to examine a significant number of regulatory statutes and their associated legislative histories, supplemented by contemporary writings by knowledgeable participants in the legislative and administrative processes.").

knowledge of the convention or its analysis of the underlying Supreme Court precedents.[11] The Turney memo provides that analysis in the inter-war years, the exact period that Merrill and Watts identified as the rise of the drafting convention.[12] In doing so, it vindicates Merrill and Watts and provides key insights into the nascent administrative law that emerged after World War I.

Turney discussed the nondelegation doctrine, the standards used to determine the validity of implementing regulations, and the effect of the regulations promulgated under the Act. With respect to nondelegation, Turney advised the Senate that the doctrine was a paper tiger.[13] To Turney, the broad nondelegation principle articulated in *Field v. Clark*[14] ultimately collapsed against the weight of the cases distinguishing new regulatory schemes from *Field*'s formalistic principle.[15] Taking the case law holistically, the memo suggests that the Supreme Court permitted even the most expansive delegations if its judgment led it to conclude that it was more convenient for Congress to delegate to agencies than for it to flesh out the details itself.[16] Turney called this principle a test of convenience.

The Turney memo provides important context for administrative law scholars and historians alike. While I do not assume that Turney spoke for the entire legal community, his perspective provides some insight into the administrative law landscape in the inter-war years. The nondelegation doctrine, for example, is sometimes taught as having a clear through line from *Field v. Clark* to *Schechter Poultry*.[17] As Keith Whittington and Jason Iuliano have suggested, both the critics and the proponents of the nondelegation doctrine have assumed that "during the nineteenth and early twentieth centuries, the nondelegation doctrine served as a meaningful check

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11 *See id.* ("[T]he convention was never explicitly memorialized in an authoritative text, such as a statute, a legislative drafting guide, or a prominent judicial decision. It remained part of the unwritten 'common law' of legislative drafting . . . .").

12 *Id.* at 493 ("Starting around World War I, Congress began following a convention for indicating whether an agency had the power to promulgate legislative rules.").

13 *See, e.g.*, Turney, *infra* at 6 ("The impossibility of establishing clearly the limits of constitutional delegation of such power is due to the fact that that the general rules and principles on which the Court professes to rely are transcended by many of the decisions under them . . . .").

14 *See* 143 U.S. 649, 692–94 (1892).

15 *See* Turney, *infra* at 6 ("The court early laid down a broad principle that the legislative power vested in Congress by the Constitution could not be delegated, under the theory of separation of governmental powers and the maxim that delegated authority cannot be redelegated, and then hastened to mark out the distinction between legislative power, the power to make the law, which was undelegable, and administrative power, or the power to carry the law into effect, the exercise of which by the executive might involve certain rulemaking power.").

16 *See id.* at 12 ("Here, then, is an indication that in determining whether a delegated power is legislative or one of 'administrative detail', the court does not consider whether it is a power to establish substantive rules for future conduct so much as whether it is more convenient for Congress to exercise or to delegate them.").

17 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

on the unbridled expansion of the administrative state."[18] Scholars have subsequently torn down this narrative.[19] They have demonstrated that the nondelegation doctrine only ever limited Congress's delegations during a brief stint of the New Deal period.

The Turney memo demonstrates that the typical narrative also incorrectly describes the mindset of the inter-war generation of legal thinkers (and, perhaps, the legislators) who pioneered the pre-New Deal expansion of the administrative state. While a memo produced by the Office of Legal Counsel for the United States Senate is not authoritative in the views it espouses, the memo provides a more pragmatic, on-the-ground alternative to the views of the academy, which was not preoccupied with the realities of administrative expansion.[20]

That is not to say that the Turney memo is unsophisticated. Its doctrinal insights are also easily transportable to modern debates in the administrative law field. For example, the memo recalls what Adrian Vermeule calls the "official theory."[21] According to Vermeule, the courts adopted the theory that, even when the executive is operating in a way that appears legislative or judicial, the realities of administration mean that agencies are really exercising executive power in operating within the terms of delegations.[22]

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18 Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380 (2017).

19 *See id.* at 381 (purporting to demonstrate that the typical narrative "is wrong").

20 For a discussion of the legal services provided by Congress's present-day, non-partisan staff, *see generally* Jess M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 PENN. L. REV. 1541 (2020) [hereinafter Cross & Gluck]. Discussing the authoritativeness of the Office of Legal Counsel in the years prior to the Legislative Organization Act of 1946 is a somewhat fraught enterprise that has so far gone undiscussed in the literature. Pub. L. No. 79-601, §§ 203-205, 60 Stat. 836, 836–37. Today, after the Act's effects have taken hold, the Offices of the House and Senate Legislative Counsel are confined to drafting the text of federal enactments. *See* Cross & Gluck, at 1544; *see also* Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 501–31, 84 Stat. 1140, 1201–4 (codified as amended at 2 U.S.C. §§ 271–282e) (describing the Office of Legislative Counsel). But the text of the Turney Memo evinces a different role. Turney was responding to a question posed by members of Congress and providing legal advice on the constitutionality of federal enactments. So, the role of the Senate Office of Legislative Counsel, in this case, appears to be an unorthodox blend of the roles we would today ascribe to the Legislative Counsel and the Congressional Research Service (CRS). *See* Cross & Gluck, at 1544 (describing the CRS as "the research arm of Congress that provides in-depth legal and policy analysis of existing and proposed legislation or other issues"). Without a more thorough excavation of the National Archives, it is perhaps best to analogize the role of the Senate Office of Legislative Counsel in the inter-war years to the CRS of today—Turney was working in an influential congressional "think tank[,]" *id.* at 1560 (quoting STEPHEN W. STATHIS, CRS AT 100: THE CONGRESSIONAL RESEARCH SERVICE: INFORMING THE LEGISLATIVE DEBATE SINCE 1914, at 25 (2014)), that represented a highly refined version of the issues at hand. *See id.* at 1560–63. While it is difficult to say whether Turney's memo was influential or just attuned to the perception of elite lawyers is difficult to say. But that it was "right" about much of what it had to say is confirmed by the Merrill and Watts study. *See* Merrill & Watts, *supra* note 1, at 495.

21 ADRIAN VERMEULE, LAW'S ABNEGATION 53 (2016).

22 *See id.*

The Turney memo suggests that the legal and legislative communities were, perhaps, aware that the nondelegation doctrine was largely an empty limitation on Congress's authority up to the passage of the Air Commerce Act. Turney's tone is one of outright skepticism, suggesting that his generation did not view the rise of the administrative state as a symptom of the "Constitution-in-exile."[23] The memo provides context for the nondelegation doctrine's rise and fall in the subsequent decade.

The remaining contributions of the memo are twofold. First, Turney suggests that "[t]he single test for determining the validity or invalidity of regulations made by an administrative officer or body under a delegation of power is whether or not the regulation is within the scope of the authority granted."[24] The "reasonableness" of a regulation, like nondelegation, was a low bar. Second, Turney casts light on the meaning of the "force of law."[25] Turney suggests that, for the purposes of civil and criminal penalties, a regulation carried the force of law if Congress delegated to agencies the ability to flesh out those penalties.[26] These contributions are valuable for contemporary debates, and I encourage readers to consider Turney's analysis when characterizing the administrative law of the inter-war years.

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23 *See* Douglas H. Ginsburg, *Delegation Running Riot*, 1 REGULATION 83, 84 (1995) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)). "[F]or [sixty] years the nondelegation doctrine has existed only as part of the Constitution-in-exile . . . . The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty . . . ." *Id.*

24 Turney, *infra* Part II ("Analysis of the [Supreme Court's] decisions, however, indicates that the court means [by its reasonableness requirement] only that the regulation must not be so unreasonable or arbitrary that Congress could not have enacted it as a valid law, or that it must be 'reasonably adapted to carrying out the purposes of the delegation.'").

25 *See generally* Baumann, *supra* note 5, at 12 n.97 (collecting sources that suggest that the "force of law" is one of the most difficult and poorly defined concepts in the administrative law field).

26 *See* Turney, *infra* Part III ("A number of cases were cited under the preceding topics which establish that when violation of regulations is made a crime by the statute delegating the authority, the courts in criminal prosecutions will apply the administrative specification of crimes just as if it were embodied in the statute which has adopted them in advance.").

MEMORANDUM ON CONSTITUTIONALITY OF PROVISIONS OF AIR COMMERCE ACT OF 1926 DELEGATING REGULATORY POWERS TO SECRETARY OF COMMERCE

The provisions of the Air Commerce Act of 1926 authorizing the Secretary of Commerce to provide by regulation for the granting of registration and rating of aircraft and airmen, the establishment of air-traffic rules, etc., and punishing violations by a civil penalty which may be remitted or mitigated by the Secretary, raise the following questions:

1. Does the provision involve an unconstitutional delegation of legislative power?
2. What is the test of the validity of regulations made under such a statutory authorization?
3. What is the force of such regulation?

* * *

1. DOES THE PROVISION INVOLVE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER?

While it is impossible to infer from the decisions of the Supreme Court a rule laying down definite limitations upon delegations of regulatory powers to administrative bodies and officials, it seems clear that such delegation as that made by the Air Commerce Act is valid, on the basis of decisions supporting similar or broader delegations of power.

The impossibility of establishing clearly the limits of constitutional delegation of such power is due to the fact that the general rules and principles on which the Court professes to rely are transcended by many of the decisions under them, and the fact that there are no Supreme Court decisions adverse to such statutes to serve as indications of the elastic limit of the Court's tolerance of such delegation. The court early laid down a broad principle that the legislative power vested in Congress by the Constitution could not be delegated, under the theory of separation of governmental powers and the maxim that delegated authority cannot be redelegated, and then hastened to mark out the distinction between legislative power, the power to make the law, which was undelegable, and administrative power, or the power to carry the law into effect, the exercise of which by the executive might involve certain rulemaking power. This doctrine has undergone considerable strain until now it is clear, although the court still says "purely legislative" powers cannot be delegated,[1] that there

1 In Knoxville v. Knoxville Water Co. (190[9]), 212 U.S. 1, the Supreme Court said: "The function of rate-making is purely legislative in its character, and this is true, whether it is expressed

are "quasi-legislative" powers which may be delegated to the executive under the guidance of a "primary standard" or "general rule" which expresses the will of the legislature, leaving the executive authority only to "fill up the details." Such a rule becomes of little value as a test for doubtful cases because of the willingness of the court to uphold delegations of power in which Congress can hardly be said to have established a "primary standard" or "general rule" or even to have expressed its purpose much more definitely than by merely limiting the field in which executive discretion may operate. The unreliability of the general rules expressed in the decisions is shown by the fact that every time the Supreme Court has been confronted with a lower court's decision holding a congressional statute invalid as an unconstitutional delegation of power, although the lower court's decision may follow by cogent reasoning from the application of the rules apparently established by prior dicta of the high court, the Supreme Court has always found a way to uphold the statute without avowedly departing from these rules. If any rule has been established by decisions apart from dicta, it is that the test of validity of such a delegation is whether it is more convenient for Congress to delegate the lawmaking power (it is useless to argue that the Supreme Court means what it says to the effect that the lawmaking power must be exercised by Congress only) than to exercise it itself.

Under section 161 of the Revised Statutes—

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Regulations made under this section and similar sections with respect to certain officers have been dealt with by the Supreme Court on the same basis as those made under special and broader authority; therefore, this memorandum does not attempt to separate regulations into "types" differentiated only by degrees of dignity ranging from "procedural" regulations to those which present a more difficult question not because of a difference in the nature of the delegation but because the delegated power is broader and harder to reconcile with the concept of "filling up the details." Most "procedural" regulations have a very direct bearing on the substantive rights of the persons affected by them.

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directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated."

The court has said that to prevent the vesting of rate-making power in a commission from being a "pure delegation of legislative power," the Commission must be restricted by a "certain course of procedure and certain rules of decisions." Wichita R.R. & Light Co. v. Public Utilities Commission (1922) 260 U.S. 48, 59; Mahler v. Eby (1924), 264 U.S. 32, 44. But this test is not, and cannot be, applied to delegations of regulatory power to executive officers such as are the subject of this memorandum.

Cases on Delegation of Legislative Power

In *Wayman v. Southard* (1825) 10 Wheat. 1, the Court upheld the 17th section of the Judiciary Act of 1789, giving the courts power to "make and establish all necessary rules for the orderly conducting business in the said courts." Chief Justice Marshall said:

> It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself . . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under those general provisions, to fill up the details.

In *Aldridge v. Williams* (1845), 3 How. 9, the validity of a statute authorizing the Secretary of the Treasury to prescribe regulations to insure just appraisal of imports was not questioned as an unconstitutional delegation of power. These regulations were of course of the procedural class, in which delegation is most necessary and least contested.

In *Belden v. Chase* (1894), 150 U.S. 674, the court gave the force of law to regulations promulgated by the Board of Supervising Engineers under an authorization to establish "such regulations to be observed by all steam vessels in passing each other, as they shall from time to time deem necessary for safety." The validity of such a delegation was not discussed, although little restraint was placed on executive discretion.

In re Kollock (1897), 165 U.S. 526, involved the Oleomargarine Act of 1886. This Act provided that oleomargarine containers should be "marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe," imposing a criminal penalty for violation of the regulations. To the argument that this statute involved an unconstitutional delegation of power and contravened the rule that a criminal statute must clearly define the offense to be punished, the court said:

> The criminal offense is fully and completely defined by the Act and the designation by the Commissioner of the particular brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offence . . . .
>
> And considered as a revenue act, the designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the executive power to confer. *United States v. Symonds*, 120 U.S. 46; *Ex parte Reed*, 100 U.S. 13; *Smith v. Whitney*, 116 U.S. 167; *Wayman v. Southard*, 10 Wheat. 1.

Butterfield v. Stranahan (1904), 192 U.S. 470, has been much relied on in later decisions on delegation of power. Here the statute (29 Stat. 604) forbade importation of tea which was "inferior in purity, quality, and fitness for consumption," and gave the Secretary of the Treasury power to "fix and establish uniform standards of purity, quality, and fitness for consumption." The court was

> of the opinion that the statute when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard and devolved upon the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

The court relied on the presumption in favor of the validity of statutes, and it must be conceded that the statue prescribes not so much a "primary standard" as the field in which executive discretion may operate, under an exceedingly indefinite expression of legislative policy. The case illustrates well the tendency of the court to go far to bring contested statutes within the requirements set by the language of early decisions.

Union Bridge Co. v. United States (1907), 204 U.S. 364, involves a somewhat different type of delegated power from the power to make general regulations, but has been cited in almost every later case involving delegation of the latter type. The Secretary of War was authorized to determine whether particular bridges over navigable streams were "unreasonable obstructions to the free navigation of such waters." The court decided

> that the act in question is not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him . . . . By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative power.

Again the court is relying greatly on the fact that Congress has prescribed a "general rule," but none can be found in the statute more definite than the requirement of reasonableness, which leaves a great deal of detail to be filled in. The court stresses the inconvenience which would arise if Congress itself were required to pass on each case. *See also Monongahela Bridge Co. v. United States* (1910), 216 U.S. 177, and *Hannibal Bridge Co. v. United States* (1911), 221 U.S. 194, *Louisville Bridge Co. v. United States* (1917), 242 U.S. 409, 424.

In *Wisconsin v. Illinois* (1929), decided January 14, 1929, delegation to the Secretary of War of power to regulate diversion of water from navigable bodies of water was held valid:

> The determination of the amount that could be safely taken from the Lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be depicted by Congress.

In *St. Louis Iron Mountain and Southern Railway v. Taylor* (1908), 210 U.S. 281, the court upheld on the authority of the *Butterfield* case and the *Union Bridge* case a statute authorizing the American Railway Association and the Interstate Commerce Commission to prescribe a "standard height of drawbars for freight cars," with no limitation on what that height might be.

Under section 20 of the Interstate Commerce Act, the Interstate Commerce Commission is empowered to prescribe regulations for keeping accounts by carriers. In *Interstate Commerce Commission v. Goodrich Transit Co.* (1912), 224 U.S. 194, the court held that this was not an unlawful delegation of power, saying:

> The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by Congress.

While the case thus does not present an apt analysis of the nature of the commission's action in prescribing a uniform system of accounts for carriers, it does show that if such a regulation is necessary and cannot be made by Congress as conveniently as by an administrative body, the delegation will be upheld without an specific "general rule" or "standard" in the statute to restrict and guide the executive discretion, although the court speaks as if its decision were based on the existence of such a standard. It is also interesting that the court here seems to concede that some kinds of legislative or quasi-legislative powers can be delegated; that only "purely legislative" power, whatever that is, must be exercised by the legislature itself.

A leading case on the power of Congress to delegate power to make regulations is *United States v. Grimaud* (1911), 220 U.S. 506. Under the acts establishing forest reservations the Secretary of Agriculture was authorized (33 Stat. 628) to

> make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . , and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this Act or such rules and regulations shall be punished as prescribed in Rev. Stat. § 5388.

The Secretary promulgated certain regulations, among them one requiring a permit for the grazing of sheep on such reservations. The lower court in *United States v. Grimaud et al.* (D.C.S.D. Col. 1909), 170 Fed. 205, held the statute unconstitutional as a delegation of legislative power, because it left to the Secretary power to designate and define the acts which should constitute a crime. The lower court declared that

> the statute does not declare the grazing of sheep, without permission, to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty, and then leaves it to the Secretary of the Interior to determine what acts shall be punishable . . . . If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground.

The Supreme Court first sustained the lower court, and then on rehearing after changes in its membership upheld the statute as one conferring power on an administrative officer to fill up the details under a general policy laid down by Congress. The regulations, it said,

> all relate to matters clearly indicated and authorized by Congress. The subjects which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized to "regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules, regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

The authority to make rules, says the court, 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. It is easy to see that, without admitting it, the court has modified the doctrine that legislative power cannot be delegated, by distinguishing such power from another kind of lawmaking power which it calls the power to make administrative rules and regulations. The latter power is of inferior dignity because it can be exercised only to carry out the will of Congress. Yet it is apparent that Congress has not expressed its will very definitely, and that in holding that the Secretary is merely filling up the details the court is not applying a rigid rule. The reason for this elasticity is implicit in another paragraph, which furnishes probably the true test of whether such delegation is to be upheld. The test is that of convenience:

> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent and not delegating to him legislative power.

Here, then, is an indication that in determining whether a delegated power is legislative or one of "administrative detail," the court does not consider whether it is a power to establish substantive rules for future conduct so much as whether it is more convenient for Congress to exercise or to delegate them. It must be borne in mind that in the *Grimaud* case the executive discretion was limited only as to the field of action and the broadest statement of the legislative purpose.

Red "C" Oil Co. v. North Carolina (1912), 222 U.S. 380, involved State legislation, but the principles to be applied were the same as those applicable to federal statutes. The State law required that all kerosenes or other illuminating oils should be subject to inspection and test to determine their safety and value for illuminating purposes. This inspection was to be made by the Board of Agriculture, which was empowered to

> Make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety, purity or absence from the objectionable substances and luminosity when not in conflict with this Act, and which they may deem necessary to provide the people of the State with satisfactory illuminating oil.

It would appear that the board's discretion was limited only as to the subjects on which it might be excised, but the court said:

> The remaining contention is that the act is repugnant to the state constitution because it attempts to delegate to the Board of Agriculture the exercise of legislative powers. The legislative requirement was that illuminating oils furnished in North Carolina should be safe, pure and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils would measure up to these standards. We think a sufficient primary standard was established and that the claim that legislative powers were delegated is untenable.

In *Mutual Film Corp. v. Ohio Industrial Commission* (1915), 236 U.S. 230, the court said of the objection that a motion picture censorship statute furnished no standard of what was "educational, moral, amusing, or harmless" that such terms

> get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct . . . . Upon such sense and experience, therefore, the law properly relies . . . . If this were not so, the many administrative agencies created by the State and National Governments would be denuded of their utility and government in some of its most important exercises become impossible.

The reluctance of the court to overthrow statutes as unconstitutional delegations of power and the firmness with which the propriety of such delegation is now established are again illustrated by the Selective Draft Law Cases (1918), 245 U.S. 366, in which the court simply declared:

> We think that the contention that the statute is void as vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U.S. 649; *Butterfield v. Stranahan*, 192 U.S.

> 470; *Intermountain Rate Cases*, 234 U.S. 476; *First National Bank v. Union Trust Co.*, 244 U.S. 416.

Yet the act conferred discretion of the broadest character upon the executive branch. For similar disposition of the question, *see Brushaber v. U.P. R.R. Co.* (1915), 240 U.S. 1, and *First National Bank v. Union Trust Co.* (1917), 244 U.S. 416.

In *McKinley v. United States* (1919), 249 U.S. 397, a statute was upheld authorizing the Secretary of War to "do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or hawdy houses within such distance as he may deem needful of any military camp," etc.

McKinley was convicted for setting up a brothel within five miles, the distance prescribed by the Secretary of War. Although the Secretary's judgment on the point of distance was subjected to no express legislative limitations, the court said:

> Congress having adopted restrictions, designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in the statute under consideration, may leave the details to the regulation of the head of an executive department, and punish those who violate the restrictions.

In *Avent v. United States* (1924), 266 U.S. 127, the court, in passing on a statute giving the Interstate Commerce Commission power in an emergency "to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits," at last used language in describing the definiteness of the legislative standard required which will support the breadth of delegation which has been repeatedly upheld. Mr. Justice Holmes declared,

> That it [Congress] can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce Commission v. Illinois Central R.R. Co.*, 215 U.S. 452; *United States v. Grimaud*, 220 U.S. 506; *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133. The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public fixes the only standard that is practicable or needed. *Union Bridge Co. v. United States*, 204 U.S. 364; *Nash v. United States*; 229 U.S. 373, 376, 377; *Intermountain Rate Cases*, 234 U.S. 476, 486; *Mutual Film Co. v. Industrial Commission of Ohio*, 236 U.S. 230, 246.

Field v. Clark (1892), 143 U.S. 649, has been much relied on to support statutes delegating legislative power. The case arose under the "reciprocity" provision of the Tariff Act of 1890. Under this provision the President was authorized to suspend the provisions granting free introduction of certain commodities from a foreign country

> whenever, and so often as the President shall be satisfied that the government of any country producing or exporting . . . any of such articles, imposes duties or other exactions upon the agricultural or other

> products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable.

On the basis of numerous legislative precedents and the case of *The Aurora* (1813), 7 Cranch 382, the court held that there was no delegation of legislative power. Under the interpretation of the statute by the court, the President simply determined the existence of a contingency prescribed by Congress for the operation of the act, as in the *Brig Aurora* case, which dealt with the act by which the President was authorized to proclaim the revival of the non-intercourse laws if Great Britain or France failed to modify their edicts so that they ceased to violate the neutral commerce of the United States. That statute was upheld on the ground that the President did not make the law but simply proclaimed the fact which determined its operation. In *Field v. Clark*, the court again declared that Congress could not invest the President with the power of legislation, but held that nothing involving "the expediency or just operation" of the legislation was left to the President, as "the suspension was absolutely required when the President ascertained the existence of a particular fact." Lamar, J. and Fuller, C.J. in a separate opinion distinguished the case from the *Brig Aurora* case by stressing the part that the language of the statute gave to the President's independent judgment, since the suspension of the free provision was to depend on the existence of such foreign tariffs as "he may deem to be reciprocally unequal and unreasonable" and to be "for such time as he shall deem just." The Justices insisted that the President was unquestionably vested with legislative power to determine the occasion and duration of the operation of the section, as distinguished from the administrative power to find the existence of a set contingency determined by the legislature.

This case was followed in the recent case of *Hampton v. United States* (1928), 276 U.S. 394. The Tariff Act of 1922 empowers and directs the President to increase or decrease duties imposed by the Act so as to equalize the differences which, after investigation by the Tariff Commission, he finds between the costs of production of certain articles at home and in competing foreign countries. Declaring again that Congress cannot delegate power to make the law, the court upholds the statute on the ground that Congress had adopted in the act

> the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing differences from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan.

The court also points out that the extent the legislature may go in seeking assistance from another branch must be determined "according to common sense and the inherent necessities of the governmental co-ordination."

The various cases upholding the rate-making power of the Interstate Commerce Commission are not dealt with in this memorandum, although they furnish further examples of the readiness of the courts to uphold delegation of legislative power. The only standard set for the commission is that of "reasonableness," which in that context, however, has more definite meaning than it has when used with reference to other subjects.

* * *

Summary

The cases then seem to show that the court has constantly relaxed the rule against delegation of power without admitting that it has done so. The cases bristle with declarations that the lawmaking power cannot be delegated. In *Field v. Clark* and finally even in the *Hampton* case, as well as others, we find quoted with approval the statement of Judge Ranney of the Ohio Supreme Court in 1 Ohio St. 77:

> 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.

Yet it must be admitted that in every case upholding delegation of the power to make regulations the court has permitted administrative officers to exercise a discretion as to what the law shall be. Even the test that Congress must prescribe a standard or general rule does not seem useful for the testing of questioned legislation, since the Supreme Court has always stretched it far enough to uphold the statute, no matter how vague or broad that "general rule" or "standard" may be. It has been shown that in practice no more has been required than delineation of the field of executive discretion and some kind of an indication of the legislative policy.

The real test must be, then, the one more or less directly suggested by the court in several of the cases—that of the convenience of the case. If it would be too arduous for Congress to work out all the details, and if the executive officer has a special competence in the field, it is probable that the delegation to him of exceedingly broad powers will be upheld as a mere administrative filling up the details in the execution of a clear Congressional policy.

As has been said, there are no Supreme Court cases invalidating statutes delegating power, so the demar[c]ation between delegable and non-delegable power is not established. But no demonstration should be needed to show that the regulatory powers conferred upon the Secretary of Commerce by the Air Commerce Act are no broader than those sustained in many decided cases—e.g., the *Grimaud* case, *Beldem v. Chase*, the *Kollock* case, *Buttfield v. Stranahan*, the *Red "C" Case*, the *McKinley* case, and the *Avent* case. The policy of Congress to regulate air navigation in the interest

of safety is expressed as definitely as in the policy or standard in most of those cases.

Air navigation is eminently a field requiring regulation by specialists rather than by Congress itself, and suitable regulation requires an attention to details which that body cannot practically give. It seems clear that the convenience and necessity of the delegation justify it.

The Air Commerce Act Does Not Involve Definition of an Offense by Executive

That the provision is not invalid as a delegation of power to define a crime or offense is also settled by the cases discussed. In each case where the violation of the regulations has been made a crime and such an objection has been made, the court has dismissed it. See especially, *United States v. Grimaud*, *supra*, where, in answer to the lower court's decision that the Secretary of Agriculture in effect defined a crime, the Supreme Court simply replied that the crime was created by the statute which declared that violation of the regulations should be punishable and fixed the penalty, and that is no objection that the Secretary "fills in the details"—even though, until the Secretary does so, it is hard to see what crimes have been created and defined by the act. Among other cases similarly upholding criminal punishment for violation of regulations are *In re Kollock* (1897), 165 U.S. 526; *McKinley v. United States* (1919), 249 U.S. 397; *La Burgogne* (1908), 210 U.S. 95; *United States v. Foster* (1914), 233 U.S. 515; *Ludloff v. United States* (1883), 108 U.S. 176; *Avent v. United States* (1924), 266 U.S. 127; and *United States v. Foster* (1914), 233 U.S. 515. *United States v. Eaton*, 144 U.S. 677, stands only for the proposition that violation of regulations authorized by law is not a crime unless the statute so declares and fixes a penalty. In *Rosen v. United States* (1918), 245 U.S. 467, the crime depended for definition on a departmental regulation.

Fixing of Penalty by Executive; Remission or Mitigation

While the decisions do not expressly decide the point, it appears that Congress must fix the penalty, since in the cases cited it will be found that the Court usually mentions Congressional specification of the penalty as if it were an important element in the definition of the offense. *See United States v. 11150 [P]ounds of Butter* (1911), 195 Fed. 657, for an express declaration that executive officers may not prescribe forfeitures, fines, or penalties. It has been suggested that if this is true, the Air Commerce Act is objectionable in that the power of the Secretary to remit or mitigate the penalty prescribed by the Act in effect gives him the power to fix the penalty. But executive remission of penalties has long been upheld by the courts. *See*, *The Laura* (1885), 114 U.S. 411. There can now be no question of the power of Congress to vest this discretion in administrative officers. No distinction can be made between the character of the remission when the offense is a

violation of regulations under an act and when it is a violation of the act itself. The court has always upheld punishment for violations of regulations on the ground that in effect they are violations of the act authorizing the regulation and prescribing penalties for their violation. Certainly the administrative officer is no more given authority to fix the penalty in the one type of case than in the other. It may be worthwhile to mention, nevertheless, that the Court of Appeals of the District of Columbia, in *Smallwood v. District of Columbia* (1927), 17 Fed. (2d) 210, and in *Croson v. District of Columbia* (1924), 2 Fed. (2d) 924, has upheld without much discussion the provision of the District of Columbia Traffic Act authorizing the Director of Traffic not only to make regulations governing traffic but to prescribe reasonable penalties of fine and/or imprisonment not to exceed ten days for violations of the various regulations. The court relied strongly on the unquestioned propriety of delegation to municipalities of power to define offenses, but the delegation here was to an individual officer of that somewhat anomalous municipality, the District of Columbia. In *Carrazo v. D.C.* (1925), 10 Fed. (2d) 983, and *White v. D.C.* (1925), 4 Fed. (2d) 163, convictions for violations of these regulations were sustained with no consideration of the question involved in the delegation of power to fix penalties.

2. WHAT IS THE TEST OF THE VALIDITY OF REGULATIONS MADE IN THE EXERCISE OF SUCH A DELEGATED POWER?

The single test for determining the validity or invalidity of regulations made by an administrative officer or body under a delegation of power is whether or not the regulation is within the scope of the authority granted. In addition to this test the court frequently mentions that the regulation must not be "unreasonable." In the absence of decisions invalidating regulations for unreasonableness, it is difficult to state the meaning of that requirement, if it is an additional requirement. Analysis of the decisions, however, indicates that the court means only that the regulation must not be so unreasonable or arbitrary that Congress could not have enacted it as a valid law, or that it must be "reasonably adapted to carrying out the purposes of the delegation." That there is no further requirement of "reasonableness" is shown by the refusal of the court to hold regulations invalid because they are unwise. If this is true, the requirement of reasonableness means no more than that the regulations must be within the scope of the delegation which Congress can make and has made.

Regulations are sometimes held bad by the courts because they conflict with the statute. This again is simply the statement of one characteristic of a regulation that places it outside of the authority granted, rather than an additional requirement, since obviously the power to "fill in the details," however broad, does not carry with it a grant of authority to override the expressed will of Congress. The language of the court is sometimes to the

effect that the regulation is beyond the authority conferred because it conflicts with the statute.

A regulation is invalid, then, if it goes beyond the authority which Congress has delegated by operating on subject matter not within the purview of the grant of power, by being so unreasonable or arbitrary as to be beyond the constitutional power of Congress itself, or by conflicting with express statutory provisions. The scope of delegated authority may be narrow, as is that conferred by § 161 of the Revised Statutes, in which case the court will be more inclined to find that the regulations do not bear the necessary "reasonable relation to the object of the statute," or it may be very broad, as in the *Grimaud* case, *supra*, for example, in which case the executive discretion suffers almost no judicial restraint.

But whether the authority is great or little, the executive has the benefit of any doubt, for the court indulges a presumption of validity in the case of administrative regulations analogous to that which governs in the case of Congressional statutes. In *Boske v. Comingore* (1900), 177 U.S. 459, the court stated this principle as follows:

> At any rate the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress. In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

That Congress will not review the judgment or discretion exercised by the officer is established by *Utah Power & Light Co. v. United States* (1917), 243 U.S. 389. Regulations of the Secretary of the Interior governing use of public lands and rights of way over public land for the generation and transmission of electric power were, according to the power company, inappropriate to the protection of the interests of the government. The court answered:

> If any of the regulations go beyond what Congress can authorize or has authorized, those regulations are void and may be disregarded; but not so such as are thought merely to be illiberal, inequitable, or not conducive to the best results.

In *United States v. Eliason* (1842), 16 Pet. 291, the court declared that regulations of the Secretary of war "cannot be questioned or denied because they may be thought unwise or mistaken." *See also United States v. Dickey* (1925), 268 U.S. 378, declaring that the discretion confided in the Commissioner of Internal Revenue to make lists of taxpayers available for

public inspection "in such manner as he may determine" is limited only by his own sense of what is wise and expedient.

In view of the liberality of the court in dealing with regulations, it is not surprising that it seldom decides that a regulation does not come within the authority granted unless it can be held that the regulation conflicts with express provisions of the statute. *Morrill v. Jones* (1883), 106 U.S. 466, is a characteristic case. Congress provided the animals imported for breeding purposes should be admitted free of duty under such regulations as the Secretary of the Treasury might prescribe. The regulations promulgated under this authority required that such animals must be of superior stock. The court disposed of the regulations with unusual brevity:

> In the present case we are entirely satisfied that the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock'. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specifically imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. This is not the office of a treasury regulation.

See also United States v. United Verde Copper Co. (1905), 196 U.S. 207.

United States v. George (1913), 228 U.S. 14, and *Williamson v. United States* (1908), 207 U.S. 425, are cases in which land office regulations requiring testimony in certain cases in addition to that called for by the act were declared invalid on the ground that the statutory provisions were explicit and expressed the will of Congress that so much proof of regulations were explicit and expressed the will of Congress that so much proof and no more should be required, and that regulations inconsistent with that standard could not be supported under the power to make regulations for the governance of the department. In *United States v. Maid* (1902, D.C.S.D.Cal.), 116 Fed. 650, a similar case under land-office regulations, the court succinctly said: "A rule of a department, to be valid, must be consistent with the legislation of Congress."

In *United States v. 200 Barrels of Whiskey* (1878), 95 U.S. 571, the court overthrew regulations made by the Commissioner of Internal Revenue to procure a uniform system of gauging, inspecting, etc., in dealing with distilled liquors. Section 57 of the act provided for forfeiture of liquor found in casks not marked and stamped as required by the law. Section 96 provided a more severe penalty for the neglecting, omitting, or refusing to do or causing to be done anything required or prohibited by the act, if no specific penalty was imposed by another section. A regulation of the commissioner placed an affirmative duty on the distiller to see that liquor casks were gauged and stamped. The defendant was prosecuted under section 96 (the

general penalty provision) for violating this regulation by not causing the casks to be stamped. The court held that so applied regulation was invalid because section 57 specified the penalty to be imposed in cases of unmarked or unstamped casks:

> The rules and regulations which the Commissioner of Internal Revenue is authorized by section 2 to prescribe cannot have the effect of bringing the case under the operation of the penalty prescribed in section 96, if it was already covered by section 57. The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions.

United States v. Symonds (1887), 120 U.S. 46, arose under an act of Congress providing special pay for sea-service in the Navy. A regulation of the department provided that certain service on shipboard should not be considered sea-service. This regulation was ruled out as conflicting with the express will of Congress.

But in *United States v. Antikamnia Chemical Co.* (1914), 231 U.S. 654, the court upheld regulations under the Food and Drug Act which would seem to come under the rule forbidding additions to the expressed will of Congress. The Act required labels to state the presence and quantity of certain substances or their derivatives. The regulations added the requirement that if a derivative was present, the label should further state the name of the substance from which it was derived. The court held that the regulations were not bad as adding to the requirements of the act, but were simply administrative, and properly adapted to carrying out the Act.

The principle that regulations must not be beyond the constitutional power of Congress itself—and implied limitation, of course, in every delegation of power—is illustrated by the case of *Illinois Central Railroad v. McKendree* (1906), 203 U.S. 514. The Secretary of Agriculture was authorized to establish quarantine lines in certain cases, and established one which in terms applied to intrastate as well as interstate commerce. It was held that Congress itself could not prescribe such a quarantine line, and therefore the regulation could not be within the scope of the Secretary's delegated authority.

On the same principle regulations purporting to have retroactive effect have been held invalid. In *United States v. Davis* (1889), 132 U.S. 334, it was held that the President, in regulating the length of service and compensation of special deputy marshals at elections, could not make these regulations retroactively applicable so as to invalidate a claim for services performed before their promulgation. *See also United States v. Alabama Great Southern Railroad Co.* (1892), 142 U.S. 615, and *United States v. Macdaniel* (1832), 7 Pet. 1.

However, if the regulations are not in conflict with any terms of the statute and not unconstitutional in themselves, the court is reluctant to hold that the executive branch has exceeded the field of regulation granted to it.

The doctrine of the *Antikamnia Co.* [c]ase, *supra*, that the regulations need only be "properly adopted to carry out the act" characterizes the liberality of the court in dealing with cases under a grant of power to make merely administrative regulations, while the *Grimaud* case, *supra*, well illustrates the same tendency in connection with grants of broad power to fill in the details of the statute itself. There the words of the statute did not so much as hint at the particular nature and subject-matter of the regulations involved, yet the court held them to be conformable to the broad grant of power and reasonably adopted to the effectuation of the congressional policy.

3. What Is the Force of Valid Regulations Made under a Valid Delegation of Power?

If the regulation is found by the court to be a valid exercise of constitutionally delegated power, it will in all respects be regarded and applied by the courts as the law of the land, as if it were embodied in a congressional statute itself.

A number of cases were cited under the preceding topics which establish that when violation of regulations is made a crime by the statute delegating the authority, the courts in criminal prosecutions will apply the administrative specification of crimes just as if it were embodied in the statute which has adopted them in advance.

Regulations have also been treated as law with the result of bringing acts within the prohibitions of conspiracy and perjury sections of the Revised Statutes, even in cases where the regulations came under the rule of *United States v. Eaton* (1891), 144 U.S. 577, which held that though regulations had, "in a proper sense, the force of law," no criminal prosecution could be had for their violation when such violation had not been made a crime by Congress.

Caha v. United States (1894), 152 U.S. 211; *United States v. Morehead* (1917), 243 U.S. 607; *United States v. Smull* (1915), 236 U.S. 405; and *United States v. Bailey* (1835), 9 Peters 238, all uphold convictions for perjury under § 125 of the Revised Statutes or a similar statute denouncing perjury or false swearing in a case or proceeding in which an oath is required "by a law of the United States." The affidavit or testimony in which the perjury was committed in each case was required not by a statute but only by a departmental administrative regulation made under § 161 of the Revised Statutes or analogous authority. Yet even these regulations were held to have the force of law for the purpose of bringing the perjury within the scope of the penal statute. Similar prosecutions for perjury failed only because the regulations were held invalid in *United States v. George* (1913), 228 U.S. 14, and *Williamson v. United States* (1908), 207 U.S. 425.

Haas v. Henkle (1910), 216 U.S. 462, upheld a conviction for conspiracy to bribe an officer to violate his official duty. The violation of official duty consisted in giving out advance information about departmental reports on the cotton crop, which was forbidden by departmental regulation

under § 161 of the Revised Statutes. *United States v. Birdsall* (1914), 233 U.S. 223, in an analogous case.

In *Rosen v. United States* (1918), 245 U.S. 467, the defendant was indicted under a statute punishing theft from an authorized depository for mail matter. A regulation of the Postmaster General provided that for the purposes of that penal section private letter boxes should be considered such depositories. The court held that Congress obviously intended such "detail" should be so supplied, and that

> Such a regulation, if fairly within the scope of the authority given by Congress to make it, has the force and effect of law, and violations of it are punishable under the act which it supplements.

In *United States v. Sacks* and *United States v. Janowitz* (1921), 257 U.S. 37 and 42, convictions for altering obligations of the United States were upheld. The acts of the defendants consisted in removing war savings stamps from cards to which they were attached. This was not contrary to statutory provision but to a regulation of the Treasury Department which made all such stamps attached to cards nontransferable. The court held that acts intended to circumvent the regulations were acts in violation of law under the criminal-code provision.

Ex parte Reed, 100 U.S. 13, and *Gratiot v. United States* (1846), 4 How. 80, declare that Army and Navy regulations made by the heads of the departments under statutory authority "have the force of law."

Aldridge v. Williams (1845), 3 How. 9, placed departmental regulations on the same footing as statutory provisions under an act directing that duties should be laid on valuation determined "in accordance with such regulations as may be prescribed by law." In *Roughton v. Knight* (1911), 219 U.S. 537, compliance with procedural regulations of the land department was held a condition precedent to the vesting of rights in land granted by a statute, where the regulations were appropriate to execution of the statute. *St. Louis, Iron Mountain and Southern Ry. v. Taylor* (1908), 210 U.S. 281, holds failure to provide cars with drawbars of the height designed by the American Railway Association and the Interstate Commerce Commission, under statutory authority, such a breach of legal duty as to constitute negligence in a civil action for wrongful death.

Courts will take judicial notice of regulations as of statutes. *Caha v. United States* (1894), 152 U.S. 211.

Federal departmental regulations take the same precedence over State law as a Federal statute. In *Philadelphia Co. v. Stimson* (1912), 223 U.S. 605, harbor lines established by the Secretary of War under Congressional authority were held to supersede earlier harbor lines established by the State. In *Wisconsin R.R. Comm. v. C.B. & Q. R.R.* (1922), 257 U.S. 563, an order of the Interstate Commerce Commission was the basis of an injunction against the enforcement of a State law limiting fares to 2 cents a mile. *Boske v. Comingore* (1900), 177 U.S. 459, held that a State court could not punish as contempt refusal of a Federal officer to file certain reports made to him

by distillers. The reports were made confidential by a departmental regulation, and the court granted a writ of habeas corpus to the officer as one held in custody contrary to United States law. In *Blanset v. Cardin* (1921), 256 U.S. 319, the court gave the force of Federal law to certain Interior Department regulations. Indians were given power by Congress to make wills in accordance with regulations prescribed by the Secretary of the Interior. Such regulations were held to supersede state law governing wills. "The regulations of the department are administrative of the act and partake of its legal force," said the court.

Maryland Casualty Co. v. United States (1920), 251 U.S. 342, held that reserves required by regulations of a State insurance department are reserves required by law, under the 1913 income tax, allowing reserves required by law to be deducted in computing net income of insurance companies. The court said that

> It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.

Belden v. Chase (1894), 150 U.S. 674, contains a strong statement of the force of regulations made under a grant of power exactly analogous to that embodied in the Air Commerce Act of 1926. The decision of the lower court was reversed because it disregarded the obligatory force of rules made by the board of supervising inspectors, who were authorized to establish such regulations to be observed by vessels in passing each other as they deemed necessary for safety. The court declared:

> The rules laid down by the latter [the board] as thus authorized have the force of statutory enactment, and their construction . . . is for the court, whose duty it is to apply them as a matter of law upon the facts of a given case. They are not mere prudential regulations, but binding enactments . . . .

"Interpretative Regulations"

Some confusion arises from the fact that courts do not give conclusive effect to departmental interpretation of the law, whether such interpretation is embodied in particular decisions or in general form under the title of orders or regulations. While it is obvious that enforcement of a statute requires departmental construction of its meaning, such construction can be no more than persuasive on the judiciary, though it gains weight from long standing acquiescence and presumption of congressional ratification.

"Interpretative regulations," are not regulations in the same sense as the true administrative regulations which are the subject of this memorandum. They are not made under any express statutory rulemaking authority as are the latter, but are simply expressions of departmental opinion and have no binding force on anyone.

Clear as this distinction may seem, the decisions of the Supreme Court have not clearly differentiated between the two, and the confusion in its decisions on the point is not hard to understand. Every true regulation is based on an interpretation of the statute to the administration of which it is directed, and quite usually a statement of this interpretation is embodied in the regulations as drafted. See, for instance, the regulations made under the Air Commerce Act, in which sections which merely restate statutory provisions are mingled with those which add detail to general provisions. Other departmental regulations commonly have the same characteristic. It is not hard to see why the Supreme Court has not bothered itself much in close cases to distinguish between so-called regulations which merely interpret the statute and true regulations which were intended as an exercise of regulatory power, for the distinction is in practice of little importance. If either type of regulation conflicts with the statute, the court disregards it, and the question of consistency or inconsistency is all that is necessary to be decided.

In many cases the court has recognized departmental construction as such and has disregarded it in forming its decision, or given it some or controlling weight according to its venerable standing or presumed legislative approval by reenactment of the statute after it was so applied in administration. In the greater number the departmental construction has been expressed in the decision of particular cases, in which its interpretative nature is of course obvious.

But given a departmental interpretation of general application, issued in the form of an order or regulation, it is not clear sometimes whether the executive branch is only saying what it thinks Congress meant or is trying to add a little detail under § 161 of the Revised Statutes. Sometimes the court draws the distinction clearly between interpretation and regulation; sometimes it simply holds the "regulation" invalid as conflicting with the statute without clearly indicating how it is to be classified. This can be illustrated by a question from *United States v. United Verde Copper Co.* (1905), 196 U.S. 207. An Act of Congress permitted use of timber for mining purposes, giving the Secretary of the Interior power to make rules and regulations. The regulations provided that no timber should be used for smelting purposes, "smelting being a separate and distinct industry from that of mining." The court disposed of the regulation in the following language:

> The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power . . . . If rule 7 is valid the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation . . . . Congress has selected the industries to which its license is given and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries recognized by Congress the

> license given to them or invest the Secretary of the Interior with the power of legislation.

On the other hand the court may clearly recognize the distinction between interpretation and regulation, as in *Smith v. U.S.* (1898), 170 U.S. 372:

> The decision of the department was not in any sense a regulation under section 161 of the Revised Statutes, but was the opinion of the Secretary upon the law and regulations as they existed. Such opinion is entitled to and it receives great respect and consideration by this court, but it is not binding upon us as a valid regulation of the department and cannot be so regarded.

Lynch v. Tilden Co. (1924), 265 U.S. 315, is a case in which a departmental regulation apparently intended as a substantive administrative regulation is disregarded, because the court holds it an attempt to fix the meaning of an indefinite statute by administrative action. See, for a similar case involving, however, "rulings" of the Treasury Department, *United States v. Standard Brewery* (1920), 251 U.S. 210. In *National Lead Co. v. United States* (1920), 252 U.S. 140, a regulation of the Treasury Department was treated as a mere interpretation, which, however, is given the court's approval. In *Goldfield Consolidated Mines Co. v. Scott*, (1918), 247 U.S. 126, regulations are overruled because they embody an erroneous construction of the statute. *See also Cotton v. Hawaii* (1908), 211 U.S. 162; *Robertson v. Downing* (1888), 127 U.S. 607; *Smietanka v. First Trust & Sav. Bank* (1922), 257 U.S. 602; *Greenport Co. v. United States* (1923), 260 U.S. 512; *United States v. Field* (1921), 255 U.S. 257; *Miles v. Safe Deposit Co.* (1922), 259 U.S. 247; *La Belle Iron Works v. United States* (1921), 256 U.S. 377.

The many cases represented by those just cited do not weaken the proposition that valid departmental regulations have the force of law, but simply exemplify the distinction between regulation and interpretation and the rule that regulations must not conflict with the statute as construed by the court. This rule is equally applicable whether the case involves a true regulation based on an administrative construction, or a mere interpretation without real regulatory character.