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Administrative Agencies and Non-Delegation of Legislative Power

By Enrique M. Fernando *

I. Need For Administrative Agencies and Non-Delegation—

The increasing complexity of industrial and social problems and the growing recognition of the role of the Government in promoting social and economic rights for all call for the creation of more administrative agencies.[1] For Congress does not possess either the time or the technical skill to enact detailed regulations for the carrying out of the policies laid down. It is a difficult enough task determining its broad outlines. To require more would be to demand the impossible.[2]

And yet under the constitutional scheme in the Philippines as well as in the United States, legislation creating such administrative agencies might be assailed on the ground that there has been an unconstitutional or improper delegation of legislative power. For the rule is well settled both under Philippine and American adjudications that the power to make laws is vested in Congress and Congress solely, and that it cannot escape its duties and responsibilities by delegating power to any other body or authority.[3] It is also equally well settled that the authority to promulgate rules and regulations, in itself analogous to the law-making function, may be delegated under certain circumstances to implement the legislation as enacted and to effectuate its policies.[4] The latter may be characterized as the administrative authority to issue regulations, an authority the administrative agencies may exercise. The question then

* Associate Professor, U.P. College of Law, LI.B., U.P., LI.M. (Yale)

[1] *Pangasinan Transportation v. Public Service Commission*, 40 O. G. 8th Sup. 57; Laski, H., The Growth of Administrative Discretion in 4 Selected Essays on Constitutional Law 219; Landis, J., The Administrative Process, pp. 7-46.

[2] Cf. *Pangasinan Transportation v. Public Service Commission*, 40 D.G., 8th Sup. 57; Carr, C., Delegated Legislation, Jaffe, L., An Essay on Delegation of Legislative Power. 47 Col. Law, Rev. 359, at 361; Laski. H., op. cit.; Landis, J., op. cit.

[3] *Compania v. Board*, 34 Phil. 136; *United States v. Ang Tang Ho*, 43 Phil. 1; *People v. Vera*, 37 O. G. 164; *Field v. Clark*, 143 U. S. 649; *Panama Ref. Co v. Ryan*, 293 U. S. 388; *Schecter Poultry Corporation v. United States*, 295 U. S. 495.

[4] *Rubi v. Provincial Board*, 39 Phil. 660; *People v. Vera*, 37 O. G. 164; *Panama Ref. Co. v. Ryan*, 293 U. S. 388; *Cincinnati R. Co. v. Clinton County Com.*, 1 Ohio State 77.

is that of defining the line which separates it from the legislative power to make laws which cannot be delegated.

It can thus be readily seen that creation of an administrative agency to deal with a particular problem is no guaranty of its solution. The legislative act creating it may have to run the gauntlet of attack on its constitutionality. Cognizant as the judiciary is of the increasing need for such measures, it may view with sympathy enactments of the above sort and condemn to futility attacks against them. Nonetheless, the possibility still exists that a judiciary unsympathetic to any governmental action could plausibly justify its decision against such legislation on the ground that there was an improper or unconstitutional delegation of legislative power.[5]

A. **Separation of Powers—**

The principle against delegation of legislative power is an accepted corollary of the doctrine of separation of powers.[6] The classical statement is that of Locke, namely: "The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."[7]

It is submitted that a proper understanding of the doctrine of separation of powers demonstrates that it does not preclude administrative implementation of any regulatory scheme framed by the legislature. The notion that there are three powers in government is as old as Aristotle.[8] It is to Montesquieu, however, to whom the honor belongs of being the first to announce the modern principle. But his debt to Locke seems to be considerable.[9] Montesquieu demands in the name of civil freedom and security that the different public functions should be exercised by different persons.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, and execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to

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[5] *Compania v. Board*, 34 Phil. 136; *United States v. Ang Tang Ho*, 43 Phil. 1; *People v. Vera*, 37 O. G. 164; *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Schecter Poultry Corp. v. United States*, 295 U. S. 495.

[6] *People v. Vera*, 37 O. G. 164.

[7] Cf. "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain until the constitution itself is changed." (1 Cooley, Constitutional Limitations, 8th ed., 224.)

[8] Bluntschli, J. K., Theory of the State, 3rd ed., 515.

[9] Bluntschli, J. K., op. cit., Laski, H., Grammar of Politics, 296.

> the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.[10]

The above principle affected Blackstone's account of the English constitution. "Blackstone advocated the separation of powers in two forms: first, the separation of powers between the legislative, executive and judicial; and second, in a form more commonly associated with his name between Commons, Lords, and Crown." He was not blind to the supremacy of Parliament nor was he unaware of the practice and propriety of blending. He had reasons for the separation of powers in two forms, specialization and efficiency and the perfection of liberty.[11]

The theory of separation of powers as thus expounded found favor with the leaders of the American revolution and of the American Constitutional Convention. John Adams, Thomas Jefferson, and James Wilson were among the converts.[12] And Madison, along with Hamilton and Jay in the Federalist, "had the task, among others, of explaining the principle of the separation of powers, and proving that the principles of the Constitution had not dishonored it." [13] Madison, however, never advocated the extreme view that the legislative, executive, and judicial departments were to be kept totally separate and distinct from each other.[14] He construed Montesquieu's principle to mean, "that these departments ought to have no partial agency in, or no control over the acts of each other." [15] So that only "where the **whole** power of one department is exercised by the same hands which possess the **whole** power of another department are the fundamental principles of a free constitution subverted.[16] Tyranny exists, when there is, "accumulation of powers in the same hands." [17]

It is in the light of the above that the doctrine of separation of powers as embodied in the American and in the Philippine Constitutions should be understood. It is to be noted that, unlike several States of the United States,[18] there is no distributing clause in either of the above con-

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[10] Esprit des Lois, Book XI, Chap. VI.

[11] Sharp, M., The Classical American Doctrine of "The Separation of Powers" in 4 Selected Essays on Constitutional Law, 168, 173.

[12] Sharp, M., op. cit., 177-179

[13] Sharp, M., op. cit, 183

[14] Sharp, M., op. cit., 183

[15] The Federalist, no. 47

[16] The Federalist, no. 47

[17] The Federalist, no. 47

[18] Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia before 1787 and since then all except a handful of states including New York, Pennsylvania, Ohio, Wisconsin, Kansas, Delaware, North Dakota, and Washington. Bondy, W., Separation of Governmental Powers.

stitutions with reference to the three powers, executive, legislative, and judicial. But their embodiment in separate articles with the express provision that the executive power is vested in a president,[19] the legislative power in Congress,[20] and the judicial power in the Supreme Court and in such inferior courts as may be established by law,[21] is a clear admission of the adoption of the principle.[22] There is likewise recognition that the above three powers are distributed among three coordinate and substantially independent departments, each of which has exclusive cognizance of matters within its jurisdiction and is supreme within its own sphere.[23]

But as Justice Holmes clearly pointed out, the area that belongs to each cannot be demarcated with precision and certainty:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. * * * When we come to the fundamental distinctions, it is still more obvious that they must be received with a certain latitude or our government could not go on.
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> "It does not seem to need argument to show that however we may disguise it by veiling words, we cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into water-tight compartments, were it ever desirable to do so which I am far from believing that it is, or that the constitution requires." [24]

Moreover, neither under the Philippine nor the American Constitutions was it intended that the three departments are to be kept separate and distinct and to be absolutely unrestrained and independent of each other.[25] They have provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government and to insure protection of one department from attempts of the other at encroachment.[26]

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[19] Art. VII, sec. 1, Constitution of the Philippines and Art. II, sec. 1, United States Constitution.

[20] Art. VI, sec. 1, Constitution of the Philippines and Art. I, sec. 1, United States Constitution.

[21] Art. VIII, sec. 1, Constitution of the Philippines and Art. III, sec. 1, United States Constitution.

[22] Angara v. Electoral Commission, 63 Phil. 139.

[23] *Severino v. Governor General*, 16 Phil. 366; *Tarlac v. Gale*, 26 Phil. 338; *Abueva v. Wood*, 45 Phil. 612; *Angara v. Electoral Commission*, 63 Phil. 139; *People v. Vera*, 37 O. G. 164; *Vera v. Avelino*, G. R. no. L-543; *Kilbourn v. Thompson*, 103 U. S. 168; *Government v. Springer*, 277 U. S. 189.

[24] Holmes, J., Diss. in *Government v. Springer*, 277 U. S. 189.

[25] *Kilbourn v. Thompson*, 103 U. S. 168; *Angara v. Electoral Commission*, 63 Phil. 139.

[26] I Story, Commentaries on the Constitution, 393, Kilbourn v. Thompson, 103 U. S. 168; Angara v. Electoral Commission, 63 Phil. 139.

The President, thus, both in the Philippines and the United States has to approve legislation, although a bill may become a law notwithstanding his refusal by his veto being overruled.[27] Congress through the Senate of the United States,[28] and through the Commission of Appointments [29] in the Philippines has to approve the appointments of such officers. Likewise, both Philippine and the American Congress exercise the judicial power of impeachment.[30] And the judiciary in turn, with the Supreme Court as the final arbiter, may effectively check the other departments in exercise of its power to determine the validity of legislative acts properly challenged in appropriate legal proceedings.[31]

The picture that thus emerges is that of "circles which partly overlap." [32] Obviously, there may be common ground which each of the three powers may occupy. What is forbidden is the intrusion by one on territory belonging solely and exclusively to another. Short of that the merging or the blending of functions is allowable, that is on the assumption that in those uncertain cases, it could be shown that a function is either legislative, or executive, or judicial.

In ascertaining the power of any of the above departments to act, the best test seems to be to locate in the Constitution authorization for exercise thereof.[33] In the absence of such authorization and there being no prohibition, it does not necessarily follow that such performance of any function by any of the three branches is a departure from the principle of separation of powers. Each of the three departments can be called upon to help in the general work of government. If action is called for and a law is appropriately passed to meet the need, the execution thereof should be transferred to an agency, whether actually existing or newly created which can best discharge it.[34]

The three departments, while separate and coordinate, are not thereby intended to be antagonistic.[35] The checks and balances do not call for one department frustrating the other. More specifically, the separation of powers should not be construed to mean that the Congress must settle all details of policy. To the executive, as much as to the legislative branch, belongs discretion. While Congress must determine policies as far as is practicable, for their enforcement and translation into

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[27] Section 7, Art. I, Constitution of the United States; Section 20, Art. VI, Constitution of the Philippines.

[28] Section 2, Art. II, Constitution of the United States.

[29] Section 10, Art. VII, Constitution of the Philippines.

[30] Section 2, 3, Art. I and Section 4, Art. II. Constitution of the United States; Art. IX, Constitution of the Philippines.

[31] *Angara v. Electoral Commission*, 63 Phil. 139.

[32] Green, Frederick, Separation of Governmental Powers, 29 Yale Law Journal, 369, 375.

[33] 3 *Willoughby on the Constitution*, 2nd ed., 1619.

[34] Green, op. cit., at p. 379.

[35] *Abueva v. Wood*, 45 Phil. 612.

action, the executive and administrative branch may be pressed into service.[36] The fact that they are coordinate parts of one government does not preclude one of the two branches from invoking the aid of the other. In determining what it may do in seeking assistance from such other branch, the extent and character of the assistance must be fixed according to common sense and inherent necessity of the situation.[37] There is no denying the fact, then, that a great deal of latitude should be granted to the legislature, not only in the expression of what may be termed legislative policy but in the elaboration and execution thereof.[38] Without this power, legislation would become oppressive and yet imbecile.[39] The doctrine of separation of powers obviously does not demand the impossible or the impracticable of the legislative body.[40]

B. Trend in Cases on Non-Delegation—

And yet, both the Philippine and the American Supreme Courts have nullified the statutes on the ground of unlawful delegation of legislative powers.[41] In those cases there was a finding that the line separating the proper from the improper delegation had been passed. The Judiciary was able to say that what was delegated was legislative power, and under the well settled doctrine that could not be done. As in many other cases dealing with constitutional doctrines, the courts have a great deal of latitude in determining what is allowable and what must be denied.[42] So it would not be difficult for a court entertaining a strong feeling against any particular legislative measure to seize upon the doctrine of improper delegation of legislative power as one of the grounds for invalidating it.

The trend seems to be, however, against too great a reliance on this doctrine as the basis for annulling the statutes. The Philippine Supreme Court lately had occasion to say that in view of the growing complexity of modern life, the multiplication of subjects of governmental regulations, and the increased difficulty of administering the laws, there is a growing tendency towards delegation of greater powers by the legis-

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[36] Cf. *Opp. Cotton Mills, v. Administrator*, 312 U. S. 126.

[37] *Hampton Jr. and Co. v. United States*, 276 U. S. 394, Cf. *Richardson and Connolly v. Scudder*, 160 N.E. 655; Cardozo, diss. *Panama Ref. Co. v. Ryan*, 239 U. S. 388; Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts, 37 Harv. Law Rev. 1010.

[38] *People v. Vera*, 37 O. G. 164.

[39] *People v. Reynolds*, 5 Gilmon 1.

[40] *Opp. Cotton Mills v. Administrator*, 312 U. S. 126.

[41] *In the Philippines, Cia. Gral. de Tabacos v. Board of Public Utility Commission*, 34 Phil. 136; *U. S. v. Ang Tang Ho*, 43 Phil. 1; *People v. Vera*, 37 O. G. 164. In the United States, *Panama Ref. Co .v. Ryan*, 293, U. S. 388; *Schecter Poultry Corp. v. United States*, 295 U. S. 495.

[42] Cf. McGowen, John D. An Economic Interpretation of the Doctrine of Delegation of Governmental Powers, 12 Tulane Law Rev. 178. See notes in 15 B.U.L. Rev. 324 and 23 Calif. Law. Rev. 435.

lature, and towards the approval of the practice by the courts.[43] Earlier it had stated that a growing tendency is to give prominence to the necessity of the case.[44]

The same thing would seem to be true of the American Supreme Court, as its decisions both before and after 1935 would seem to indicate. In both the *Panama Refining Case* [45] and the *Schecter case*, [46] case, the American Supreme Court relied upon this doctrine to hold the National Industrial Recovery Act unconstitutional. But while the doctrine announced in the *Schecter* case may still hold, later cases have thrown considerable doubt on the continuing vitality of the rationale in the *Panama Refining Case*. [47]

Whenever the court feels, however, that a particular measure should be stricken down on this ground, it can always rely on the well settled principle that the legislative body cannot shirk the performance of a duty cast upon it by the Constitution. In the words of Cooley: "the power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved. Nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust. It must act immediately upon the matter of legislation and not through the intervening mind of another." [48] The power to legislate not being a right but a duty to be performed, it must rely on its own judgment.[49]

C. **Legislative Power—**

What then is this legislative power which cannot be delegated? Broadly speaking, it would seem to be the authority under the Constitution to make laws and to alter and repeal them.[50] As Justice Holmes puts it:

> "Legislation... looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." [51]

Legislation governs an undetermined multitude of persons and future transactions.[52] With the qualification that a statute may be private

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43 Pangasinan Trans. v. Public Service Commission, 40 O. G., 8th sup. 57.
44 Rubi v. Provincial Board, 39 Phil. 660.
45 293 U. S. 388.
46 295 U. S. 495.
47 *Yakus v. United States*, 321 U. S. 414; *American Power Co. v. S. E. C.*, 329 U. S. 90
48 I Cooley, Constitutional Limitations, 8th ed., 224.
49 *United States v. Barrias*, 11 Phil. 327.
50 *Government of the Philippines v. Springer*, 50 Phil. 259, 276.
51 *Prentis v. Atlantic Coast Line*, 211 U. S. 210.
52 Weeks, Legislative Power versus Delegated Legislative Power, 4 Essays on Constitutional Law, 228, 231-234.

or local in character, the foregoing generalization is not too inaccurate. As thus viewed, legislation would seem to be synonymous then with what is sometimes called the general policy-framing function of government.[53]

The legislature has a special charge to conserve the general interests of the community and to look beyond the horizons of the present to the concerns of the future In its hands rests, therefore the duty of defining the general interest and safeguarding the well being, education, security, liberty, and opportunity of its citizens And in this complex age, with all the multifarious demands on government to make effective social and economic rights, the function of legislation becomes even more difficult and intricate than ever. For one thing, it has to be in many cases highly technical. It must be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. It would be futile for it to attempt to work out details of large legislative changes. It is not always in session; it cannot, even if it wishes to, alter or repeal at will the statutes to make them responsive to the demands of changing situations. And for a statute to include in detail all aspects of legislative policy might be to make them obsolete, cumbersome, and prolix.

The test applied as to whether or not there is improper delegation is the completeness of the statute in all its terms and provisions when it left the hands of the legislature.[54] The statute is complete where the legislature describes what job must be done, who is to do it, and what is the scope of his authority.[55] For in a complex economy that may indeed be the only way in which the legislative process can go forward.

A distinction has been made between delegation of power to make the laws which necessarily involves a discretion as to what it shall be, which constitutionally may not be done, and delegation of authority or discretion as to its execution to be exercised under and in pursuance of the law, to which no valid objection can be made.[56] The Constitution is not to be regarded as denying to the legislature the necessary resources of flexibility and practicality.[57] It would be sufficient, therefore for the

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53 Cf. 'W'hat, then, does the legislative power mean? Broadly speaking, there are but two functions of government: 1. The choosing and adopting of policies. 2. The carrying out of these policies through the making and enforcing of detailed rules. But this broad division probably does not correspond with our division of functions under the Constitution because it would include the policy-initiating, diplomatic and treaty making powers of the President. But the power over this function—the power of ultimately choosing the policy to be adopted—is the legislative power given to Congress over those subjects committed to its care, and is the essence of legislative power generall." (Cheadle, John B. The Delegation of Legislative Functions, in 4 Selected Essays on Constitutional Law 250, 256).

54 *People v. Vera*, 37 O. G. 164; *Cia. Gral. v. Board of Public Utility*, 34 Phil. 136.

55 *Bowles v. Willingham*, 321 U. S. 503.

56 *Cincinnati W and Z. R. Co. v. Clinton County Commissioners*, 1 Ohio St. 77.

57 *Panama Ref. Co. v. Ryan*, 239 U. S. 388; *Sunshine Anthracite Coal v. Adkins*, 310 U. S. 380.

legislature to delineate clearly the general policy, the public agency which is to apply it, and the boundary of this delegated authority.[58]

D. **Permissible Delegation—**

The question as to unlawful or improper delegation may not arise where the Constitution itself provides that the power of law making may be exercised by any other constitutional agency.[59] The Constitution of the Philippines authorizes Congress to empower the President in times of war or other national emergency, for a limited period and subject to such restrictions Congress may impose, to promulgate rules and regulations in accordance with a declared national policy.[60] Likewise, he may be authorized, subject to such limitations and restrictions as it may impose, to fix within specified limits, tariff rates, import or exports quotas, and tonnage and wharfage dues.[61] It may not be so easy in view of the foregoing provisions to contest the delegation of authority to the President as therein contemplated.[62] A clear case of delegation is the power to legislate granted to municipal corporations [63] and territorial governments.[64] Popular participation in legislative processes through initiative and referendum is not now considered as an unlawful delegation of legislative power.[65] And lately, the American Supreme Court has expressed the view that Congressional legislation which is to be made effective through negotiation and inquiry within the international field, must often accord to the President a degree of discretion and freedom from such statutory restrictions which would not be admissible where domestic matters alone were involved.[66] That is to accord recognition to the very delicate plenary and exclusive power of the President, as the sole organ of the Federal Government in the field of international relations.

E. **Where Delegation of Authority May Give Rise to Questions—**

In all other cases the question of delegation may arise. It is of course admitted that Congress cannot possibly fulfill the work itself and must be vested with the authority to allocate the functions of carrying out its policy to other agencies within the government. Likewise, the authority delegated should be adequate to assure the realization of the objectives and purposes embodied in the legislation.[67]

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58 *American Power Co. v. S. E. C.*, 329 U. S. 90.
59 *People v. Vera*, 37 O. G. 164.
60 Section 26, Art. VI, Constitution of the Philippines.
61 Section 22, par. 2, Art. VI, Constitution of the Philippines.
62 *People v. Vera*, 37 O. G. 164.
63 *Rubi v. Provincial Board*, 39 Phil. 660; *Stoutenburg v. Hennick*, 129 U. S. 141.
64 *United States v. Heinzen*, 206 U. S. 370.
65 *People v. Vera*, 37 O. G. 164.
66 *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304.
67 Cf. "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. But the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details . . Then the burden of minutial would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." Sunshine Coal Co. v. Adkins, 310 U. S. 390.

Where the legislative act relates to some immediate and specific subject matter it can be drafted with full foresight of the instances in which its provisions would be applicable and of the possible circumstances which may render its operation inadvisable.[68] Save in this instance, delegation of authority is not only proper but called for. It is especially so where the relations regulated are highly technical and the regulation requires a continuous course of decision. For then the legislator neither has the competence nor the time. Besides, delegation in such cases would further assure flexibility in administration and the successful handling of emergency situations.

Likewise, it may be sufficient reason for delegation that the legislators can agree on general policy but not on details. There may be the hope then that the machinery of government could be adjusted to the ends which need to be served. The question of the proper governmental agency to exercise a given function and of the most indispensable form of administrative organ should be answered in terms of the concrete results to be obtained. It is the amount of authority delegated, the use to which it is put, and the effects and by-products that are decisive.[69]

The course of legislation both in the Philippines and in the United States shows that the agency chosen may be the Executive himself,[70] anyone of his Cabinet secretaries,[71] other executive officials,[72] or administrative boards and tribunals, like the Public Service Commission, the Federal Communications Commission [73] the Inter-State Commerce Commission.[74]

1. Authority delegated—ascertainment of fact or condition—

The task devolving upon any one of the above officials or agencies differs with the kind of legislation in question. Where the subject to be regulated is simple and where conditions that are apt to arise in the future may be foreseen with some degree of accuracy, the legislature could validly condition its operation, suspension or revival upon a fact or contingency that may arise thereafter. Such fact or contingency may be ascertained by any other agency or official without raising the question of delegation of powers.

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[68] Powel G. T. R., Separation of Powers, 27 Pol. Science Quarterly 215.

[69] *Municipality of Cardona v. Municipality of Binangonan*, 36 Phil. 475; *United States v. Ang Tang Ho*, 43 Phil. 1; *The Brig Aurora*, 7 Cranch 382; *Field v. Clark*, 143 U. S. 649; *Hampton Jr. Co. v. United States*, 276 U. S. 394; *Panama Ref. Co. v. Ryan*, 293 U. S. 388; *Schecter Poultry Corporation v. United States*, 295 U. S. 495.

[70] *Calalang v. Williams*, 40 O. G., 9th sup. 239; *Mulford v. Smith*, 307 U. S. 38; *Currin v. Wallace* 306 U. S. 1; *United States v. Rock-Royal Co-operative*, 307 U. S. 533.

[71] *Rubi v. Provincial Board*, 39 Phil. 660; *People v. Rosenthal*, 38 O. G. 998.

[72] *Pangasinan Transportation v. Public Service Commission*, 40 O. G., 8th sup. 57.

[73] *National Broadcasting Co. v. U. S.* 319 U. S. 190.

[74] *Interstate Commerce Commission v. Louisville and N. R. Co.* 190 U. S. 273.

The power to determine conditions vested in the President under which the statute would be operative was held valid as early as 1813 by the American Supreme Court.[75] It is now beyond question that laws may be made effective on certain contingencies as by promulgation of the executive or by adoption of the people of a particular community.[76]

Chief Justice Marshall in *Wayman vs. Southard* [77] is authority for the view that the legislature may delegate a power not legislative which it may itself rightfully exercise. The power to ascertain facts is such a power which may be delegated. There is nothing essentially legislative in ascertaining the existence of facts or conditions as the basis of the taking into effect of a law.

A law in the Philippines empowering the Director of Public Works with the approval of the Secretary of Public Works to close to any and all classes of traffic, national roads "whenever the condition of the road or traffic thereon make such action necessary or advisable in the public convenience and interest" was held by the Philippine Supreme Court to amount merely to "be the ascertainment of the facts and circumstances upon which the application of said law is to be predicated.[78]

This administrative function which cannot always be directly discharged by the legislature is merely that of determining when the proper occasion exists of executing the law. It is not the determination of what the law shall be. And the Supreme Court quoted *Locke's Appeal* [79] to the following effect.

> "To assert that a law is less than a law, because it is made to depend on a future event or condition is to rob the legislature of the power to act for the public welfare whenever the law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know."

The suspension of the applicability of a law may be made to depend on a fact or contingency ascertained by the executive, an official under his jurisdiction, or administrative boards and tribunals. Thus, in *Cruz vs. Youngberg* [80] decided by the Supreme Court of the Philippines on October 26, 1931 the validity of a law prohibiting the importation into the Philippines of foreign cattle was sustained notwithstanding the fact that there was a proviso therein that the then Governor-General of the Philippines may with the consent of the presiding officials of both houses

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[75] *The Brig Aurora*, 7 breach 382.
[76] *People v. Vera*, 37 O. G. 164.
[77] 10 Wheat. 1
[78] *Calalang v. Williams*, 40 O. G., 9th sup. 239.
[79] 72 Pa. 491.
[80] 56 Phil. 234.

raise such prohibition "entirely or in part if the conditions of this country make this advisable or if the disease among foreign cattle has ceased to be a menace to the agriculture and livestock of the lands."

It is of interest to note that the first case in which the question of delegation of powers appears to have arisen in the United States Supreme Court, *the Brig Aurora*[81] decided in 1813, dealt with the revival of an act upon Presidential proclamation to that effect. The act in question was the Non-Intercourse Act of March, 1809. There was a later Act of May 1, 1810. By the former, the importation of goods from Great Britain and France was interdicted until the end of the next session of Congress. By the later Act it was provided that if either country should revoke her edicts as to American commerce, then three months after proclamation of the President to that effect, the former Act would be revived as against the other interdicted nation.

In the very brief opinion of the court, the question of delegation was hardly touched upon. Mr. Justice Johnson merely observed. "We can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . either expressly or conditionally as their judgment should direct."

Since 1813, there has not been a case decided by the American Supreme Court wherein the operation, suspension, or revival of a law dependent on executive proclamation to that effect has been considered unconstitutional.

Two other cases are worth mentioning. In the case of *Field vs Clark*[82] decided in 1892, that portion of the Tariff Act of October 1, 1890 authorizing the President to suspend by proclamation the provisions thereof relating to the free introduction of sugar, molasses, coffee, tea and hides from countries which impose "duties or other exactions upon agricultural or other products of the United States which in view of the free introduction of such sugar, molasses, coffee, tea and hides . . . he may deem to be reciprocally unequal and unreasonable" was assailed as unconstitutional on the ground of invalid delegation of legislative powers. The court sustained the validity of the provision on the authority of *The Brig Aurora*,[83] previous legislative enactments of analogous character, and on the doctrine of *Locke's Appeal*[84] previously mentioned. The court further went on to observe:

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[81] 7 Cranch 382.
[82] 143 U. S. 649.
[83] 7 Cranch 382.
[84] 72 Pa. 491.

> "Legislative power was exercised when Congress declared the suspension should take effect upon a named contingency. What the President was required to do was simply an execution of the act of Congress. It was not the making of a law." [85]

Also, there is the case of *Hampton Junior and Company vs. United States* [86] decided in 1928. The President of the United States was given authority under the Tariff Act of 1922 to ascertain differences in the costs of production in the United States and the competing countries and to determine and present the changes in classifications or increases or decreases in any rate of duty provided in such act for the purpose of equalizing the costs of production, his authority to increase or decrease such rates of duty, however, being limited to not exceeding 50 per cent of the rates. The validity of the delegation of such authority was involved. This flexible tariff provision was sustained by the American Supreme Court. It recognized the fact that Congress may feel itself unable conveniently to determine exactly when its exercise of legislative power should become effective because it is made to depend on future conditions. The time for its effectivity may then be left to a decision of the executive.

2. Authority delegated—issuance of rules and regulations.

A more difficult question arises where the legislature may be regulating matters of more complex and intricate character and may find itself unable to foresee the conditions under which its effective administration depends. In such cases there may be need for an executive or administrative agency to implement such legislative measures by additional rules and regulations.[87]

A recital of the field of activities embraced and covered by such measures would make the need for supplementary rules and regulations evident. Thus both in the Philippines and in the United States there has been regulation of such matters as labor and tenancy relations,[88] securities,[89] public utilities,[90] industrial recovery,[91] agriculture,[92] and price [93] and rent control [94] to mention but a few. The inability of any legislative body to determine in detail the mode of its administration is evident.

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[85] 143 U. S. 649, p. 693.
[86] 276 U. S. 394.
[87] Cf. Carr, Cecil T., Delegated Legislation (1921)
[88] *International Hardwood v. Pangil Federation*, 40 O. G. 9th sup. 118; *Opp. Cotton Mills v. Administrator*, 312 U. S. 126.
[89] *People v. Rosenthal*, 38 O. G. 998.
[90] *Cia Gral. de Tabacos v. Board of Public Utility*, 34 Phil. 136; *Pangasinan Trans. v. Public Service Commission*, 40 O. G. 18th sup. 57.
[91] *Schecter Poultry Corp. v. United States*, 295 U. S. 495.
[92] *Mulford v. Smith*, 307 U. S. 38.
[93] *U. S. v. Ang Tang Ho*, 43 Phil. 1; *Yakus v. United States*, 321 U. S. 414.
[94] *Bowles v. Willingham*, 321 U. S. 503.

If legislation of such matters is not to be paralyzed, the doctrine of delegation of legislative powers should be less inflexible and should be stripped of its rigidity. At the same time, it cannot be denied either that the legislative power has certain responsibility to discharge which it cannot under the present constitutional scheme in the Philippines and in the United States just ignore.[95] How then in cases properly for the courts of adjudication has the doctrine been made to adapt itself to present conditions? The judiciary both in the United States and in the Philippines have sought to answer by the formula of sufficiency of standards.

3. **Sufficiency of standards—**

> "The rules governing delegation of legislative power to administrative and executive officers are applicable or are at least indicative of the rule which may be here adopted. An examination of a variety of cases on delegation of power to administrative bodies will show that the ratio decidendi is at variance but, it can be broadly asserted that the rationale revolves around the presence or absence of a standard or rule of action—or the sufficiency thereof—in the statute, to aid the delegate in exercising the granted discretion. In some cases, it is held that the standard is sufficient; in others that it is insufficient; and in still others that it is entirely lacking. As a rule, an act of the legislature is incomplete and hence invalid if it does not lay down any rule of definite standard by which the administrative officer or board may be guided in the exercise of the discretionary powers delegated to it." [96]

> "The Constitution has never been regarded as denying the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while 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 is to apply." [97]

> "Only if we can say that there is an absence of standards for the guidance of the administrator's action so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed would we be justified in overriding its choice of means." [98]

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[95] *U. S. v. Barrias*, 11 Phil. 327; *Cia. Gral. de Tabacos v. Board of Public Utility*, 34 Phil. 136; *U. S. v. Ang Tang Ho*, 43 Phil. 1; *People v. Vera*, 37 O. G. 164; *Panama Ref. Co. v. Ryan*, 293 U. S. 388.

[96] *People v. Vera*, 37 O. G. 164.

[97] *Panama Ref. Co. v. Ryan*, 293 U. S. 388.

[98] *Yakus v. U. S.*, 321 U. S. 414.

It has not always been thus. When legislation was enacted with sufficient particularity and related to relatively simple matters, the delegation of authority to executive or administrative agencies to promulgate supplementary rules and regulations was looked upon as merely "filling in" matters of detail. This doctrine dates back to a pronouncement of the Chief Justice Marshall in the case of *Wayman vs. Southard*[99] decided in 1825. "It will not be contended that Congress can delegate to the Courts, or to 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 these important subjects, which must be entirely regulated by the legislative itself, from those of less interest in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

As a matter of fact in the first Philippine case where the question of delegation of legislative power was raised, *United States vs. Barrias*,[100] decided in 1908, the validity of Section 6 of Act No. 1136 authorizing the collector of customs to make public suitable rules and regulations to carry into effect and to regulate the lighterage of other exclusive harbor business, was sustained, even in the absence of any standard for the guidance of the collector in issuing such rules and regulations. The Supreme Court contented itself in saying

> "The necessity of confiding to some local authority the framing, changing, and enforcing of harbor regulations is recognized throughout the world, as each region and each harbor requires peculiar rules more minute than could be enacted by the central lawmaking power, and which when kept within their proper scope, are in their nature police regulations not involving an undue grant of legislative power." [101]

In a later case,[102] the Philippine Supreme Court expressly affirmed that the "regulations adopted under legislative authority by a particular department must be in harmony with the provisions of the law and for the sole purpose of carrying into effect its general provisions." It added that by such regulations the law could not be extended. "So long, however, as the regulations relate solely to carrying into effect the provisions of the law, they are valid."

In the first case, *Cia. Gral. de Tabacos vs. Board of Public Utilities*,[103] decided on March 6, 1916, where the Supreme Court of the Philip-

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99 10 Wheat. 1
100 11 Phil. 327.
101 11 Phil. 327, at 329.
102 *United States v. Tunasi Molina*, 38 Phil. 119, 124.
103 34 Phil. 136.

pines annulled a statute on the ground of unlawful delegation of legislative power, the language then was not the absence of a "standard" but the absence of a "rule" or even a suggestion by which the power delegated "is to be directed, guided, or applied." In the later case of *United States vs. Ang Tang Ho*,[104] decided in 1922, where a law empowering the then Governor General to fix the selling price of rice was declared invalid as constituting an unlawful delegation of legislative power, no mention was made of the term "standard." It was not until 1937 in the case of *People vs. Vera*,[105] that the nullification of a law on the ground of unlawful delegation was predicated on the absence of a "standard."

In the United States it was not until 1935 in the Panama Refining case[106] where for the first time the American Supreme Court annulled a federal act on the ground of unlawful delegation of legislative power that the requirement for a standard was stated with definiteness, as early as 1904, however, in the case of *Buttfield vs. Stranahan*,[107] mention was made of a "primary standard" which would guide the Secretary of Treasury in effectuating "the legislative policy declared in the statute." The term "primary standard" was once again employed in the case of *Red C Oil Manufacturing Co. vs. Board of Agriculture*[108] decided in 1912 and as late as the case of *United States vs. Shreveport Grain Company*[109] decided in 1932. The *Hampton Junior Company* case.[110] decided in 1928, speaks of "an intelligible principle." At present, however, the insistence seems to be, as shown above, on the presence of a "standard."

a. Meaning of sufficiency of standards—

What does the requirement of a standard amount to? It implies at the very least that the legislature itself determines matters of principle on fundamental policy. Otherwise the charge of complete abdication may be hard to repel. A standard thus defines legislative policy, marks its limits, and maps out its boundaries. It indicates the circumstances under which legislative command is to be effected.[111] It is the criterion by which legislative policy and purpose may be carried out.

What standard will be deemed sufficient is difficult to say obviously. It has been suggested by authorities that a standard should be one sufficiently definite to enable the courts to determine whether admin-

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104 43 Phil. 1.
105 37 O. G. 164.
106 293 U. S. 388.
107 192 U. S. 470.
108 22 U. S. 380.
109 287 U. S. 77.
110 276 U. S. 394.
111 *Opp. Cotton Mills v. Administrator*, 312 U. S. 126.

istrative officers keeping within the power delegated to them.[112] There is the suggestion that it is merely a question of reasonableness.[113] The case of *Federal Radio Commission vs. Nelson Brothers* is a warning that that it should not be so indefinite "as to confer an unlimited power."

And yet Philippine courts have considered the following standards as sufficient: "public welfare";[114] "necessary in the interest of law and order" [115] "public interest";[116] "justice and equity and substantial merits of the case."[117]

American courts, on the other hand, have considered the following as sufficient standard: "public interest" [118] "national security or defense" [119] "just and reasonable" [120] "unfair methods of competition"; [121] "unreasonable high prices";[122] "highest minimum wage rates having due regard for economic and competitive conditions";[123] "to stabilize and reduce rentals";[124] "films as are in the judgment and discretion of the Board of Censors of a moral, educational, or amusing and harmless character." [125]

b. **Broad judicial discretion in matter of standards—**

A cursory glance at the above would suffice to show that the courts can if they wish to, go very far in sustaining delegation of authority and finding the presence of a standard. For here, as in other fields of constitutional law, the courts likewise enjoy a great deal of discretion in determining for themselves whether or not such a requirement has been met. The nullification of the National Industrial Recovery Act was brought about by the inability of the Supreme Court to locate sufficient standards.[126] As far as this point is concerned though, later cases have shown a more liberal tendency in detecting the presence of standards. The same has been true in the Philippines after the case of *People vs. Vera* [127] decided in 1937.

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112 *United States v. Rock Royal Co-op*, 307 U. S. 533.
113 *Rubi v. Provincial Board*, 39 Phil. 660.
114 *Mun. of Cardona v. Mun. of Binangonan*, 36 Phil. 547.
115 *Rubi v. Provincial Board*, 39 Phil. 660.
116 *People v. Rosenthal*, 38 O. G. 99; *Pangasinan Trans. v. Public Service Commission*, 40 O. G., 8th Sup. 57.
117 *Int. Hardwood and Veneer Co. v. Pangil Federation of Labor*, 40 O. G., 9th sup. 118.
118 *Avent v. United States*, 266 U. S. 127.
119 *Dakota Central Tel. Co. v. Dakota*, 250 U. S. 163.
120 *Tagg Bros. v. United States*, 280 U. S. 420.
121 *Federal Trade Commission v. Appel. and Bro.*, 291 U. S. 304.
122 *Sunshine Coal Co. v. Adkins*, 310 U. S. 380.
123 Opp. Cotton Mills v. Administrator, 312 U. S. 126.
124 *Bowles v. Willingham*, 321 U. S. 503.
125 *Mutual Film Corp. v. United States*, 295 U. S. 495.
126 *Schecter Poultry Corp. v. United States*, 295 U. S. 495
127 37 O. G. 164.

Thus both in the Philippines and in the United States the standard need not be in the same paragraph.[128] And in the *Yakus*[129] case, decided in 1944, made it clear that in locating the standard the declaration of purpose is not to be ignored. To the same effect is the later case of *American Power Company vs. S.E.C.*[130] where it was stated that standards need not be tested in isolation but referred to the purpose of the act, its factual background, and its statutory context. The case of *Hirabayashi vs. United States*[131] went further. There the Supreme Court considered together the executive order, the proclamation of the military commander, and the statute validating the act taken by the executive to find the standard as known was set forth in the act itself. The Court stated that they were not to be "read in isolation from each other."

If the above judicial pronouncements mean anything at all, they mean as previously asserted that the judiciary has wide latitude in cases wherein the question of delegation of power is involved. Like other constitutional principles this doctrine of delegation of powers can be made to do service on behalf of interests bent on resisting governmental action. The judicial response to their plea for the voiding of the statutes on the ground of undue delegation may depend not only on the extent of power regulated but also on the existing situation.[132]

Thus, the war time measures of President Roosevelt both with reference to protection against espionage and sabotage on the part of people of Japanese descent during the early years of the war,[133] and price control measures[134] to ward off inflation have been sustained.

His attempts to meet the great economic emergency existing in the United States by the National Recovery Act[135] however met with scant sympathy from the courts which relied on the doctrine of non-delegation to put an end to the experiment. The American Supreme Court could hardly be accused of being blind to the need for action on the part of the federal government to meet the then grave and pressing emergency when President Roosevelt took office in 1933. But the broad range of power delegated to the president through the formulation of "codes of fair competition", to govern the entire industrial economy must have been more than the Supreme Court was willing to uphold.[136] It may

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128 *Pangasinan Trans. v. Public Service Commission*, 40 O. G., 8th sup. 57; *Yakus v. U. S.*, 321 U. S. 414.

129 321 U. S. 414.

130 329 U. S. 90.

131 320 U. S. 81.

132 Cf. Landis, the Administrative Process, 1938, chs. I and 2; Jackson, R. J. The Struggle for Judicial Supremacy, 1941, pp. 92-95; 109-114.

133 *Hirabayashi v. United States*, 320 U. S. 81.

134 *Yakus v. United States*, 321 U. S. 414.

135 *Schecter Poultry Corp. v. United States*, 295 U. S. 495.

136 Cf. McCowen, J. D., An Economic Interpretation of the Doctrine of Delegation of Governmental Powers, 12 Tulane Rev. 179.

be, too, that at the time when the case was decided some measure of recovery had been attained and a great deal of irritation had been occasioned by the administration of the National Industrial Recovery Act.[137] Likewise, the fact that the "codes of fair competition" in effect amounted to a delegation of power to private business must have occasioned grave doubts in the Supreme Court as to the propriety thereof.[138] And the doctrine of non-delegation of power, no less than that of interstate commerce was handy for the purpose of putting an end to such an experiment in delegation on too sweeping a scale.

It was the *Panama Refining* case [139] however, decided early in 1935, that marked the first time wherein the American Supreme Court annulled a statute on the ground of undue delegation. It held invalid Section 9-C of the National Industrial Recovery Act authorizing the President to exclude from interstate commerce oil which had been produced or withdrawn from storage in violation of state restriction on production. The rationalization of the court was that no standard was found in Section 9-C. Justice Cardozo dissenting found such standard in Section 1 which declares the policy of the entire act. Later cases would seem to sustain the view of Justice Cardozo.[140]

In the Philippines, too, the courts have set aside legislative acts on the ground of invalid delegation of legislative power. The latest case in point where it was so done was that of *People vs. Vera*[141] decided in 1937, is not a reliable guidepost in determining the future judicial response to the plea of unlawful delegation. In the first place, later cases by the Philippine Supreme Court have shown a more sympathetic view to the question of delegation of authority by the legislature in its attempt to solve some of the current economic and social problems in the Philippines.[142] And it is not to be lost sight of that the case of *People vs. Vera*, dealt not with legislation in the social and economic field but with that of institution of probation as part of the penal system in the country. Whether rightly or wrongly at the time the case was decided, both the executive and the legislative branches of the Philippines had given expression to the view that the probation act should be repealed. The only reason it remained on the statute books was that a repealing measure had to be vetoed by the President of the Philippines because of some doubts entertained by him as to its propriety.

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137 Jackson, R. H., The Struggle for Judicial Supremacy 112.
138 49 Harvard Law Rev. 332-333.
139 293 U. S. 388.
140 *Yakus v. United States*, 321 U. S. 414; *American Power Co. v. S. E. C.*, 329 U. S. 90.
141 37 O. G. 164.
142 *People v. Rosenthal*, 38 O. G. 998; *Pangasinan Trans. v. Public Service Commission*, 40 O. G., 8th sup. 57; *International Hardwood v Pangil Federation of Labor*, 40 O. G. 9th sup. 118.

The Supreme Court then was merely carrying out the wishes of the two other branches in saying that the act itself could not be sustained on the grounds of unlawful delegation of legislative powers. This it rationalized thus:

> "The challenged section of Act No. 4221 is Section 11 which reads as follows: 'This Act shall apply only in those provinces in which the respective provincial boards have provided for the salary of a probation officer at rates not lower than those now provided for provincial fiscals. Said probation officers shall be appointed by the Secretary of Justice and shall be subject to the direction of the Probation Office.' In testing whether a statute constitutes an undue delegation of legislative power or not, it is usual to inquire whether the statute was complete in all its terms and provisions when it left the hands of the legislature so that nothing was left to the judgment of any other appointee or delegate of the legislature, (6 R. C. L., p. 165) In *United States vs. Ang Tang Ho,* (1912), 43 Phil. 1, this court adhered to the foregoing rule when it held an act of the legislature void in so far as it undertook to authorize the Governor General, in his discretion, to issue a proclamation fixing the price of rice and to make the sale of it in violation of the proclamation of a crime The general rule, however, is limited by another rule that to a certain extent, matters of detail may be left to be filled in by rules and regulations to be adopted or promulgated by executive officers and administrative boards. (6 R. C. L. pp. 177-179). For the purposes of the Probation Act, the provincial boards may be regarded as administrative bodies endowed with power to determine when the Act should take effect in their respective provinces. They are the agents or delegates of the legislature in this respect. The rules governing delegation of legislative power to administrative and executive officers are applicable or are at least indicative of the rules which be here adopted. An examination of a variety of cases on delegation of power to administrative bodies will show that the ratio decidendi is at variance but, it can be broadly asserted that the rationale revolves around the presence or absence of a standard or rule of action of the sufficiency thereof in the statute, to aid the delegate in exercising the granted discretion. In some cases, it is held that the standard is sufficient; in others that it is insufficient; and in still others that it is entirely lacking. As a rule, an act of the legislature is incomplete and hence invalid if it does not lay down any rule of definite standard by which the administrative boards in the exercise of their discretionary power to determine whether or not the Probation Act shall apply in their respective provinces. What standards are fixed by this Act? We do not find any and none has been pointed to us by the respondents. The Probation Act does not, by the force of any of its provisions, fix and impose upon the provincial boards any standard or guide in the exercise of their discretionary power. What is granted, if we may use the language of

> Mr. Justice Cardozo in the recent case of Schecter, *supra*, is a 'roving commission' which enables the provincial boards to exercise arbitrary discretion. By section 11 of the act, the legislature does seemingly on its own authority extend the benefits of the Probation Act to the provinces but in reality leaves the entire matter for the various provincial boards to determine. In other words, the provincial boards of the various provinces are to determine for themselves whether the Probation Law shall apply to their provinces or not at all. 'The applicability and application of the Probation Act are entirely placed in the hands of the provincial boards.' If a provincial board does not wish to have the Act applied in its province, all it has to do is decline to appropriate the needed amount for the salary of a probation officer. The plain language of the Act is not susceptible of any other interpretation. This, to our minds, is a virtual surrender of legislative power to the provincial boards. * * *

As a matter of fact, in the case of *People vs. Vera*, the Supreme Court could have avoided, if it wished to, having to pass on the validity of the present act. And in the assumption that the case could not have been decided without passing on the constitutional question, no supplementary rules or regulations being required of the provincial boards, the absence of standards in guiding their discretion as to whether or not to appropriate money should not have proved fatal.

Section 11 excepted, the Act is complete on its face. Section 11 merely provides for the mode of appropriation for the probation officers. Its absence could have been supplemented by a later appropriation measure. Its insertion therein should not have nullified the rest of what otherwise is a good law.

In the two other cases previously cited, *Cia. Gral. de Tabacos vs. Board of Public Utilities*,[143] and *United States vs. Ang Tang Ho*,[144] the adverse decisions on the ground of unlawful delegation of legislative power are even less defensible. So the Supreme Court in a later case has implied of the *Cia. Gral. de Tabacos* case.[145] The assailed portion of the law was Section 16 of Act 2307, empowering the Public Utility Commission after due notice by order in writing to require a public utility

> "to furnish annually a detailed report of finances and operations, in such form and containing such matters as the Board may from time to time have by order prescribed."

This was condemned by the Supreme Court of the Philippines on the ground that a statute authorizing the Board of Public Utility Commis-

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[143] 34 Phil. 136.
[144] 43 Phil. 1.
[145] *Pangasinan Transportation v. Public Service Commission*, 40 O. G. 8th sup. 57.

sion to require detailed reports from public utilities "leaving the nature of the report, the contents thereof, the general lines which it shall follow, the principle upon which it shall proceed, indeed all other matters whatsoever to the exclusive discretion of the Board, is not expressing its own will or the will of the state with respect to the public utilities to which it refers."[146] The Court considered then that by the provision questioned, the legislature delegated to the Board of Public Utilities, all of its powers over the subject matter in manner almost absolute and without laying down a rule or even making a suggestion by which that power is to be directed, guided, or applied.[147] It is unlikely now that a statute along similar lines would meet with judicial condemnation.

It is not likely either that a statute contained in the other Philippine case dealing with unlawful delegation of legislative powers empowering the then Governor General to fix the maximum sale of price of palay, rice or corn because of extraordinary rise in said commodities would be declared invalid on the ground of abdication of legislative powers. While the Supreme Court of the Philippines in this case of *United States vs. Ang Tang Ho* [148] based its decision of the doctrine of non-delegation, it appears from the opinion that the nullification of the act was due to the hostility entertained by the majority of the court to any attempt on the part of the legislature at price fixing. Thus:

> "We make the broad statement that no state or nation living under a republican form of government, under the terms and conditions specified in Act No. 2868, has ever enacted a law delegating the power to any one, to fix the price at which rice should be sold. That power can never be delegated under a republican form of government."

The last statement has been disapproved by the *Yakus* case.[149] It thus runs counter at present both to persuasive authority and to the necessities of the situation. Even at the time of its utterance, it hardly was distinguished for its conformity to common sense.

F. Accountability of Administrative Agencies—

If the foregoing appraisal were correct, it would seem to follow that a protest based exclusively on the notion that there is such a conceptually defined "legislative power" which is known beforehand and which cannot be delegated is not likely to meet with success. The tendency to delegate is an inevitable one. Its need and desirability cannot be questioned. In no other fashion may processes of administration

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[146] 34 Phil. 136, 138
[147] 34 Phil. 136, 138
[148] 43 Phil. 1
[149] 321 U. S. 414.

be carried on intelligently and efficiently. Administration needs freedom and must be trusted. Too detailed control may result in the paralyzation of administrative functions. An attitude of blind resentment and indifference to the force and significance of the administrative process is not likely to serve the ends of good government.

Nonetheless there must be in each instance where delegation is challenged a careful scrutiny of the amount of power delegated and the use to which it is put. While the legislative body must be prepared to entrust administrative agencies with power, it must be vigilant about the use to which the power is put. This is merely to express a fundamental democratic concern. It is to assure democratic control of the governmental mechanism. In the apt word of Laski:

> "It may be true as Rathenau declared that we need to emancipate ourselves from the principle of popular choice and move towards the principle of ability. But it is necessary to remember that in a democracy the ultimate principle is, after all, self-government, and that means, in the last resort, that final decisions must be made by elected persons.
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> "The territorial assembly built upon universal suffrage seems, therefore, the best method of making final decisions in the conflicting wills within the community. That assembly, as should be noted, could not, at least in theory, act in an irresponsible fashion. It could, in the first place, be the creature of electoral will; and the more fully that electorate was informed, the more fully the legislature would respond to its desires. It could, in the second, be subject to the need to consult the organized wills of the community before it acted upon them. * * * [150]

This is not to ignore the fact that both in the Philippines and the United States the President is as such a representative of the popular will as the legislative body. As a matter of fact the tendency is to emphasize, and rightly so, the role of the President as popular leader. More than the elected representatives and senators, he represents national as opposed to sectional interests. But there is a greater assurance of democratic control, there is likely to be more weight to the electoral franchise, if the popularly elected legislative body exercises oversight over administrative agencies. Thereby administrators would be put on their guard against too hasty and arbitrary action that might in the interest of efficiency and dispatch result in an arbitrary disregard of personal rights. That is to avoid the suspicion that with the tendency to delegation going on unchecked and the growth and proliferation of administrative agencies, Congress would be reduced to "merely a timid

[150] Laski, H. Grammar of Politics, 84, 87.

and formal appendix to bureaucracy."[151] It is not enough, therefore, for the legislature to formulate policy in terms of legally binding enactments. It cannot remain unconcerned with the mode and manner in which such policies received administrative implementation. Hence the need for accountability of administrative agencies to the legislature.

How may the legislative body hold administrative agencies accountable? The answer is furnished by the powers the legislature possesses. It creates the agencies, defines the scope of their authority, appropriates funds for them, and may have a say in the personnel which runs them.

As has been previously noted, whenever the need for governmental regulation arises, legislative response usually takes the form of entrusting the task to an existing governmental agency or the creation of a new one. In either case, the scope of the authority that may be exercised by such regulatory agency depends upon the statute applicable. In the formulation thereof, and granted the premise that the legislature in pursuance of an end deemed desirable would want to see its attainment by appropriate means, it is likely that the administrative structure, whether already in existence or newly created, would be given powers and responsibilities adequate to enable it to operate effectively. If experience proves the statute to be inadequate, the need for an extension of the powers is demonstrated. It is for the legislature then to supply the deficiency with an amendatory act. But it is not compelled to act in a particular way. It has full freedom to do away with the existing structure and create a new one. It may even withdraw from that particular field of regulation and leave it to private volition. And it is not unlikely at all that there would be voices heard urging this particular course of action. This is not to say that such ought to be the legislative response. It is merely to emphasize the fact that the legislature, having the power to create, has the power to abolish. Not that it is free to disregard the realities of the situation. Some sort of regulation may be unavoidable. And the legislature may not just sit supinely by and do nothing. But even in such a case, it enjoys the freedom to choose among various alternatives as the way out of the situation. It has the power to enact the statute, to amend it when necessary, and even to repeal it. The life of the administrative agency is dependent upon its will. This is power of no mean significance. The administrative authorities are likely to be cautious in embarking upon projects for which the statute creating them affords no clear justification. They have a sword of Damocles hanging over their heads. Again, this is not to argue for the justification of any timorous or fearful ad-

[151] Kefauver and Levin, A Twentieth-Century Congress, 145.

ministration. It is merely to underscore the fact that the legislature as the source both of life and of authority of an administrative agency has the requisite weapon with which to hold it accountable.

Then, too, the legislature is the source of funds for the various administrative agencies. Without the necessary financial assistance, the administrative agencies are impotent whether for good or for ill. They have to come before the legislature as supplicants for the money to get them going, and once going, to allow them to continue. Ordinarily, the appropriations are on a yearly basis. Every year then they have to justify their continuance. Here again the legislative body is in an excellent position to exercise its control over them. "Supply is the life blood of efficient administration and access to the means of supply is a closely confined process of our government."[152] The crippling effect of a reduced appropriation is obvious. The fidelity of administrative agencies, therefore, to the purposes informing their creation can be assured by the power over the purse which the legislative body possesses. Its potency as a vehicle of control cannot be overestimated. Again, a legislative body a majority of which is hostile to the government taking an active part in the ordering of life in the community and is loath to extend the scope of governmental regulation may precisely hit upon the indirect means of denying adequate financial assistance to put to an end what it deems to be an unwelcome intrusion in affairs purely private. It is not in this sense that control over the purse leads itself legitimately to holding administrative agencies to accountability. The assumption is that administration is not to be harrassed and embarrassed by withdrawal of financial assistance. Rather attention is directed to power of the legislature over appropriations as another effective means whereby delegation of power to administrative agencies is kept within bounds. And enough has been said to demonstrate how effective it could be.

Not as drastic as the failure or reduction in appropriations but perhaps equally, if not even more effective, is the power of the legislative body to examine the mode and manner of expenditure of public funds by the administrative agencies concerned. The threat of withdrawal of financial support is always in the background, of course. But the emphasis here lies more in the effective oversight of the use to which money is put and legislative policy carried out by the agency in question. In the Philippines the actual work is under the Constitution entrusted to the Auditor-General.[153] He is, however, under obligation to report to the Congress of the Philippines.[154] In the United States, the following proposal has been advanced:

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[152] Landis, J. M., The Administrative Process, 60.
[153] Section 1, Art. XI, Constitution of the Philippines.
[154] Section 4, Art. XI, Constitution of the Philippines.

"Legislatures may also become more effective organs of control by requiring the administrative agencies to maintain an operations audit. Many departments now carry on such an audit, but it is unknown to others. An operations audit is designed to ascertain what results have been achieved. The traditional audit is designed to ascertain whether funds have been extended legally. This object is of course important, but it gives the legislature no indication of what the people are getting for their money, or whether they are getting all that could properly be expected.

"An operations audit is a refinement of the legislative tour of inspection. It ascertains what has been accomplished with appropriations—how many patients admitted to a hospital, how many miles of highway constructed, how many pupils taught at a given standard of education, how many inspectors of public water supplies. In so far as possible an operation audit also ascertains unit costs, and compares them with previous experience and with normal expectation. This kind of audit is thus distinct and separate from the fiscal audit.

"Such an audit can best be conducted by the agency itself. The legislature, as a control agency needs (1) to see that this audit is provided for generally, and with safeguards to ensure reliability; (2) to take advantage of its results. One safeguard might be an independent check, from time to time, upon the methods of operations audit; this could be arranged at little cost by retaining a firm of industrial engineers or outside public administration experts. The task of using the results is less easily arranged. One lead can be found in the work of the House of Commons Committee of Public Accounts, which is continually responsible for a critical review of results achieved by the British government. It is a sort of permanent Truman Committee with a Chairman taken from the minority party.

"It is by means such as these that the legislative can best discharge its important duties of over-all supervision as the people's representatives. Control in detail runs the risk of causing administrative paralysis. In our times the legislature must be prepared to vest power in administrative officers; but it needs also to be eternally vigilant in the use of power."[155]

The foregoing does not exhaust the modes whereby a legislative body may hold an administrative agency to accountability. It has likewise a say in the personnel that will be entrusted with the job of administration, unless the function is vested directly in the President. In the Philippines a Commission of Appointments composed of members of both houses has to give its approval to Presidential appointments.[156]

[155] White, Leonard D. "Legislative Responsibility for the Public Serve." In New horizons in Public Administration, 16-18.

[156] Section 10, Art. VII, Constitution of the Philippines

In the federal government of the United States, the Senate has identical function.[157] In the cases, therefore, where the tenure of administrators is for a limited period, the legislative body, or one branch thereof, can see to it that only men that could best serve the purposes for which a statute has been enacted get the opportunity to translate policy into action. And even if the tenure were for life, some administrative agencies discharging quasi-judicial functions being in a better position to get the most competent men if it were so, still the legislature, or one branch thereof, has the opportunity to pass upon the qualifications of those nominated before confirmation. It may be that partisan considerations may dictate legislative action in this respect. That is not to be denied. The facts of political life would make a denial absurd. It cannot be gainsaid either, however that this feature of the checks and balance system can be utilized for some measure of control over the administrative agencies if the legislative body were so minded. It could, if it wishes to, insist on the men best qualified, or at least the best among those who could be interested. And what is more, the knowledge of the appointee, that his nomination for a succeeding term needs once legislative approval again would not be, without its influence in the manner in which he discharges his duties.

Granted the necessity and desirability of legislative control over the administrative agencies and granted too, that the legislative body has the powers to give assurance that such control could be had, the next question is how it should act in meeting a particular problem after it has laid down the general policy to be followed. It may be noted that it may not have the time with many other claims equally pressing for its attention. This would indicate that the question of control might largely remain a matter of theory, or if attempted, would likely to prove ineffective. It is not necessarily so, however. Such has been the conclusion of those who have given careful thought and attention on the subject. Thus Kefauver and Levin have this to say:

> "In addition to the broad scope of the proposed reports on the floor of the Senate and the House, the committees need three types of service from the respective departments they are charged with overseeing. First, they need periodic reports from key men in the executive agencies, and advance information on plans that would involve national policy and will require further legislative action. Second, they require day-to-day liason with the agencies to handle routine matters and provide competent coordination with committee staffs. Third, they should have a definite system for review of rules and regulations to be issued by executive agencies in carrying out the intent of laws passed by Congress.[158]

[157] Section 2, Art. II, Constitution of the United States.
[158] Kefauver and Levin, "A Twentieth-Century Congress, 145

White has this to offer:

"I put forward these statements in order to lay the groundwork for a brief examination of the problem, how can legislatures be best organized to put into effect whatever standards of administration they may wish to impose upon the executive branch. The essential requirement is to establish a central crossroads over which all prospective legislation bearing on administration must pass, and a reviewing agency of some weight to inspect such legislation in the light of accepted standards. Doubtless a variety of specific means need to be devised to meet different situations. The Judiciary Committee of the Rules Committee in some legislatures, the Legislative Council in others, perhaps a new Committee on Administrative Legislation in still others, would perform this service effectively. Consideration by a bill drafting bureau or reference library would be desirable to check on technical language, but those agencies could not be expected to carry the load of negotiation and persuasion which may be involved in keeping administrative legislation up to accepted standards.

"This observation suggests the principal duty of the reviewing agency stationed at the crossroads. It is to ensure so far as possible that legislation embody provisions which facilitate good administration—'good' in the sense of being competent and energetic, honest and impartial, economical and responsible. Whether the job can be done by reliance on persuasion alone, or whether it requires some form of committee control over the work of other committees cannot be foretold; experience will provide an answer, indeed probably more than one.

"An alternative form of organization to improve administrative legislation would be the creation of three over-all committees (preferably joint committee), on budget, personnel, and planning. Some coordination among them could be brought about by making the chairman of each a member of the other two.

* * *

"These suggestion in favor of the discovery and publication of standards of administrative legislation, and proposing a legislative agency to facilitate the regular observance of such standards are not put forward as a cure for all legislative ills. Their efficacy for the specific purpose in view, indeed, depends upon more deeply seated remedies for the relative weakness of representative bodies. * * *

"These observations are not intended to cast doubt upon the necessity and desirability of legislative control of the administrative system. It is a part of our democratic tradition,

with roots in distant reaches of English constitutional history, that the representative assembly is the principal source of administrative authority, the exclusive source of funds, and the guardian against the dangers of bureaucracy. The forms of legislative control, however, demand reconsideration. At present, they have deteriorated into unless proceedings.

"By way of example, the annual inspection of state institutions has become, in some states nothing more than a pleasant junket. If it be the state university, the visiting representatives are taken on a tour of the campus, inspect the site of needed buildings, review a parade, eat an adequate luncheon, and attend a football game. Intensely partisan investigations are no more effective in securing intelligent consideration of administrative problems and needs. Control through patronage is politically effective, but certainly is not a solution from broader points of view.

"The control of administration which theory and practice assign to administrative bodies is designed to protect the general interests of the state by maintaining a competent and responsible public service. Here again the legislature will gain if it does not try to do too much—to control in detail. A legislative body is not well equipped to supervise administration in detail, even though it were continuously in session. It must concentrate where it can be effective. This system that by giving attention to a limited number of key points it can reach the whole structure. In large measure, the legislature discharges its duty by creating strong agencies of self-control within the administrative system which can quickly detect and remedy administrative faults and omissions.

"The national government is moving slowly in this direction. The gradual evolution of the Bureau of Budget and its Division of Administrative Management suggests a much more intelligent and constructive type of administrative control than that so highly developed, not to say over-extended, by the comptroller-General of the United States.

"In state governments its line of reasoning suggests that legislatures will be well advised to rely heavily upon the forms of control characteristic of an integrated administrative structure. One of their main responsibilities will then be to see to it that these administrative controls are properly put to use. Concentration of attention at this point will yield returns over a wide area which otherwise is likely to be overlooked. To insure proper legislature supervision a standing committee is essential; preferably a standing Committee on Administrative operations, with a membership overlapping that of the proposed Committee of Administrative legislation."[159]

[159] White, Legislative Responsibility for the Public Service.

And from Dimock:

> "Finally, in our list of administrative topics as applied to Congress, we come to control, which is most simply defined as checking up on results and holding people responsible. This is the second of major functions of Congress, but its controls have never been adequately organized or regularized. Congressional investigation, one of the legislature's principal weapons, was aptly characterized by Woodrow Wilson as a fishing expedition, sweeping the dirty corners, looking the barn door after the horse is stolen. Congress must develop a technique whereby executive officers, from Cabinet members down, can be brought before it, asked for information, and allowed to give explanations whenever it sees fit. Nothing would do more to alleviate the current legislative-executive jealousy and rebuild the self-esteem of Congress. And it would be good for the executives as well. If they revealed an inability to get along with the public, which Congressman Ramspeck says is an indispensable characteristic of an executive, they would soon have to develop it. Congressman Kefauver's resolution proposes a workable solution, a question period similar to that found in the British Parliament but without membership in the legislative body." [160]

G. Resume—

The basic assumptions of course, is that democracy must be maintained. It is assumed further that democracy is not incompatible with rationality and competence, does not weigh the scales in favor of comfortable drift as against planned action. Such being the case, while the principle that the legislative body cannot abdicate its functions to determine which policies shall control must be adhered to in a steadfast manner, it is equally paramount that the discharge of such responsibility cannot be nullified by too narrow a view of the extent of the power delegated.

For the trend is not toward less but more governmental functions, not towards less but more complexity. To require that statutes leave legislative hands with a detailed and minute directions of coping with such problems on the pain of such statutes being nullified if this test were not met would be to take a stand in favor of legislative impotence. It is to demand the impossible.

The correct solution would seem to lie rather not in a vigorous and irresponsible condemnation of delegation to administrative agencies as such, but to accept the conditions that call for delegation, determine the

[160] Dimock, Administrative Efficiency within a Democratic Polity

extent of the power that must be delegated to achieve the purpose for which a statute is enacted, and to devise safeguards to protect the essential lawmaking powers of the legislature without undue insistence that it retain more than the necessary controls. Objectives or ends must be left to the popularly elected branches of government. Means for the most part can be entrusted to expert hands. It is not enough to inveigh against the dangers of bureautic tyranny. Polemics cannot solve the vexing and intricate problems of government. Rather there should be a recognition that all agencies of government can be called upon to play their role in the solution thereof. It is to the legislature to announce the policy to be pursued. The administration takes care of the rest. But, and this is an important caveat, it must be held responsible and accountable for its actions.

The door of admission to the bar must swing on reluctant hinges, and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe counsellor and the place of a leader.

JUSTICE BREWER