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Ross D. Netherton

AREA-DEVELOPMENT AUTHORITIES: A NEW FORM OF GOVERNMENT BY PROCLAMATION

ROSS D. NETHERTON*

Let it be understood in the very beginning that the views of this writer regarding Public Authorities are partisan. He believes that recent years have witnessed the emergence of a new instrumentality of local government, the species of which are sometimes called "port authorities," sometimes "toll commissions," sometimes "regional boards," but all of which are capable of being described generically as "area-development authorities." He submits that these instrumentalities, while offering a unique and efficient means of performing many of the special functions which local governments in our times are called upon to undertake, have been allowed to grow away from the sound principles which must be adhered to if the form of government which our country has is to remain healthy.

The writer is a partisan in that he would judge the propriety of these instrumentalities according to certain principles which should not be compromised. Specifically, he believes that power to affect vitally the public welfare inevitably carries with it the responsibility to consider the public welfare in commensurate degree. Where special functions are undertaken, government should move cautiously. Particularly in encouraging expansion of industrial or commercial development of a local area, governments should not hastily move in to do what private enterprise is unwilling to do for itself, or to circumvent the existing structure of government by the creation of *ad hoc* units. And finally, in the matter of allocating the financial burdens of providing for services and facilities of a special character, he believes that direct beneficiaries should, insofar as possible, carry the burden of paying for them. These principles are, of course, as old as the history of our struggle to solve the problems of urbanization, and, in recent years, the influence of the federal government, through federal-aid and various other programs, upon the establishment of local special function agencies has been very great.[1] Yet it is submitted that these principles

* Lecturer, Washington College of Law of The American University; Legislative Counsel, American Automobile Association, Washington, D.C.

1. Regarding the present numbers of "special function units," Dean Fordham has pointed out that statistics are difficult to evaluate because of the concealment of many agencies within the formal organization of the parent government, and the complexity of classification of such units. Yet, he writes, "there is ample basis for the observation that the *ad hoc* unit is still enjoying its heyday" despite genuine effort to reduce the numbers of these units and simplify the structure of government. FORDHAM, LOCAL GOVERNMENT, 25 (1949). See also Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 YALE L.J. 14, 15-17 (1937).

One notes with interest that certain non-political agencies of the Federal Government maintain a cautious attitude on this question even under the

are basic and require that we be partisan to them even when attacking problems of such magnitude as the future of our cities hold. As we have lived by them for past generations, so we now must find a way to utilize the great, constructive capabilities of these new instrumentalities of government within the limits of such principles.

I. *The Evolving Form of Public Authorities in Our Times*

The history of special function units of local government devoted to expansion of industrial and commercial development of metropolitan areas may be dated from the creation of the Port of New York Authority in 1921. At this time the essential elements of a new idea in local government were combined and found expression in the interstate compact between New York and New Jersey.[2] Postponing for the moment a detailed description of the anatomy of the Port Authority, suffice it to say that by their action the States of New York and New Jersey created a "corporate municipal instrumentality," administered by a 12-man commission which was entrusted with management of Authority affairs, empowered to borrow money outside the constitutional limitations applicable to state and municipal debts, and rendered self-supporting through the power to collect charges for services furnished to the public. Its avowed purpose was to "deal with the planning and development of terminal and transportation facilities and to improve the commerce of the port district." The often-recounted background of the interstate compact included many years of unsuccessful struggle to achieve cooperative development of the New York and New Jersey waterfront area by private enterprise and local governmental action.[3] In these early years the crying need was to solve the problems of railroad transportation and maritime terminal facilities for the New York-New Jersey waterfronts. However, within the first decade of its life there was delivered into the hands of the Port Authority the means of creating far greater power than its begin-

duress of urgent need for extraordinary action. On March 28, 1955, Comptroller General Campbell testified before the Roads Subcommittee of the Senate Public Works Committee in hearings on S. 1160 (84th Cong., 1st Sess.), providing for creation of a Federal Highway Corporation for financing construction of the National System of Interstate Highways. He stated therein: "We are opposed to the creation of new Government corporations, unless for the most compelling reasons of overriding public necessity. The corporate form of government is objectionable because, for the most part, it is free from the normal safeguards set up by Congress to maintain adequate control over the conduct of public business and the expenditure of public funds."

2. New York Sess. Laws 1921, c. 203; New Jersey Sess. Laws 1921, c. 152. Congressional consent to this compact given in 67th Cong., 1st Sess., Public Res. 17, S.J. Res. 88, 42 STAT. 174 (1921).

3. For a description of the pre-history of the Port of New York Authority, see BARD, THE PORT OF NEW YORK AUTHORITY cc. 1, 2 (1942). See also New York v. New Jersey, 256 U.S. 296 (1922); and NEW YORK AND NEW JERSEY PORT & HARBOR DEVELOPMENT COMMISSION, JOINT REPORT, WITH COMPREHENSIVE PLAN AND RECOMMENDATIONS 41-42 (1920).

nings had foretold. As the age of motor vehicle travel came, it was perceived that the operation of vehicular river crossings could become a principal and highly successful activity of the Port Authority. For this purpose, the Port Authority in 1926 sold its first issue of bonds in the amount of $14,000,000 secured by liens on the net revenues of two toll bridges connecting Staten Island with New Jersey. Its second bond issue, sold only months later, was for $20,000,000 to commence construction of the George Washington Bridge and was similarly secured. These issues were followed in 1928 by an issue of $12,000,000 for another bridge between Staten Island and Bayonne, New Jersey, and an added issue of $30,000,000 in 1929 to complete construction of the George Washington Bridge. Meanwhile, the Holland Tunnel had been completed by state commissions, and in 1931 was sold to the Port Authority in a transaction financed by a $50,000,000 bond issue. Simultaneously, $16,000,000 worth of Port Authority bonds were sold to finance construction of the Inland Terminal No. 1 (known as the Port Authority Commerce Building), designed to facilitate the handling of freight in the metropolitan district. Altogether, within a space of 5 years, the Port Authority had successfully marketed a grand total of $142,000,000 in bonds secured solely by the toll revenues of its bridges, tunnels and terminal building property!

In retrospect, however, the significant point to be seen in this decade of activity is not the unprecedented magnitude of the borrowing of Port Authority, but the combination of powers that it concentrated in itself. Its original endowment had rendered it almost entirely autonomous as far as administration of its own affairs was concerned, and its geographical boundaries had given it control over the waterfront of the world's greatest port. To these sources of strength it now added a new type of revenue bond project — the toll bridge and toll tunnel— from which it foresaw the accrual of revenues sufficient to carry out every phase of comprehensive port-area development and promotion that was to be conceived. The final legal step in creating this power came when the New York and New Jersey legislatures, by concurrent resolutions, unified control of all vehicular river crossings in the Port Authority and provided for the pooling of surplus revenues from all its facilities for the support of all bond obligations of the Port Authority.[4] In justification of this step, the concurring States declared that:

> "the vehicular traffic moving across the interstate waters within the Port of New York constitutes a general movement of traffic which follows the most accessible and practicable routes, and that the users of each bridge or tunnel over or under the said waters benefit by the existence of every other bridge or tunnel since all such bridges and tunnels as a group facilitate the movement of such traffic and relieve congestion at each of the several bridges and tunnels."[5]

4. New Jersey Sess. Laws 1931, cc. 4, 5; New York Sess. Laws, 1931, cc. 47, 48.
5. *Ibid.*

Accordingly, the states agreed that "the construction, maintenance, operation and control of all such bridges and tunnels heretofore or hereafter authorized by the two States shall be unified under the Port of New York Authority, to the end that the tolls and other revenues therefrom shall be applied so far as practicable to the . . . said bridges and tunnels as a group . . . it being the policy of the two States that such bridges and tunnels shall as a group be in all respects self-sustaining."[6]

With its financial machinery thus consolidated, the Port Authority had only to wait for its power to grow. For a picture of this growth, a glance at the most recent decade is revealing.[7] At the end of 1954 a list of the facilities of the Port Authority was as follows:

Holland Tunnel	Central Maintenance Shops
Lincoln Tunnel	Port Newark
George Washington Bridge	Hoboken-Port Authority Piers
Bayonne Bridge	Grain Terminal, Columbia St. Pier
Goethals Bridge	La Guardia Airport
Outerbridge Crossing	Newark Airport
Port Authority Building	New York International Airport
Port Authority Bus Terminal	Teterboro Airport
New York Truck Terminal	Heliports
Newark Truck Terminal	

The total investment in these facilities at the end of 1954 was $519,198,351 — slightly more than double the amount shown on the Port Authority's financial statement 10 years earlier. Along with this, the amounts necessary for debt service had risen from $7 million in 1945 to $29.1 million in 1954 and the ratio of operating expenses to gross revenue had risen from roughly one-third to one-half. But, in the overall view, there was no sign that the holders of the Port Authority's $246 million funded debt had cause for concern about their debtor's financial condition.

It would thus appear that those who have said that the Port of New York Authority inaugurated a new era of toll bridges in this country, fell short of the truth, for in reality the Port Authority marks the beginning of wide scale area development financed by toll bridge surpluses.[8]

Following the example of the Port of New York Authority, other metropolitan areas were quick to consider the possibility of employing

6. *Ibid.*

7. PORT OF NEW YORK AUTHORITY, ANNUAL REPORT, 1954, 68-69. Legislation to permit the Port of New York to establish parking lot facilities was passed by New York (S. Int. No. 2335) and New Jersey (S. No. 147).

8. See FOWLER, REVENUE BONDS 24-27 (1938), and compare with BIRD, A STUDY OF THE PORT OF NEW YORK AUTHORITY 65 (1942) who points out that "in the past the bulk of the Port Authority's operating revenues have been derived from tolls charged for the six vehicular water crossings." In 1946, tolls made up 91.8% of operating revenues; in 1947, 88.6%.

similar devices to expand developmental and promotional activities. Pennsylvania's first Authority Act came in 1933.[9] In 1951, Pennsylvania compacted with New Jersey to create the Delaware River Port Authority, of which more will be said hereinafter.[10] In 1949, Missouri and Illinois created the Bi-State Development Authority in the metropolitan area of St. Louis.[11] Recent federal legislation relating to the development of the St. Lawrence Seaway aroused keen interest in potential deepsea ports such as Buffalo, Chicago, Cleveland and Toledo and turned them to planning for port development and promotion through the mechanism of Authorities.[12]

In 1953 two new compacts affecting interstate border areas were consummated. Pennsylvania and New Jersey enlarged the powers of the Delaware River Joint Toll Bridge Commission for the purpose of encouraging development of the entire Delaware River Valley north of Philadelphia.[13] In addition to its original jurisdiction over bridges, the new commission embraced port and terminal facilities with the power to combine for financial purposes any port and terminal facilities with bridges and collect tolls for the use of the facilities. The second and perhaps most striking compact of recent years was the Waterfront Commission Compact between New York and New Jersey.[14] Arising out of unsuccessful efforts to improve waterfront labor practices and suppress crime, the Waterfront Commission was vested with power to license stevedores and longshoremen and police the conditions of employment in the port area. Its activities are entirely regulatory and have significance because they represent the first use of "municipal corporate instrumentalities" for regulatory activities outside the field of conservation. With boundaries identical with those of the Port of

9. Act of December 27, 1933, Pennsylvania, Pamphlet Laws 114. For a review of the development of the use of Authorities in Pennsylvania, see address of George P. Appel, at meeting of Municipal Law Section, American Bar Association, August 17, 1954.

10. Laws, Pennsylvania, 1951, Act No. 274; New Jersey Sess. Laws 1951, c. 287. Congressional consent given in Pub. L. No. 573, 82d Cong., 2d Sess. (July 17, 1952).

11. Laws, Illinois, 1949, pp. 448, 449; Laws, Missouri, 1949, p. 558.

12. Vicker, *Seaway Fever: Great Lakes Cities Break Out With Rash Of New Harbor Projects*, Wall Street Journal, March 8, 1955, p. 1; Toledo City Journal, March 19, 1955, pp. 1-2; N. Y. Times, June 26, 1955, report of plans for Boston authority. Legislation to create a Niagara Frontier Port Authority was passed by the New York State legislature in April 1955 (Senate Int. 2975).

13. The original agency was created in 1934 to administer state owned bridges across the Delaware River. Pa. Pamp. L. 1352 (1931); N. J. Sess. Laws 1934, c. 215; consented to by Congress in Pub. L. No. 411, 74th Cong., 1st Sess., 49 STAT. 1058 (1935). In 1953, concurrent supplementary legislation by the two states transformed it into an area-development authority, Pa. Pamp. L. 369 (1953); N. J. Sess. Laws 1953, c. 297. Congressional consent was unsuccessfully sought in the 82d Congress, 2d Session (H.R. 9820, S. 3718) and is pending in the 84th Cong., 1st Sess. (S. 889). See in this connection remarks in opposition by Rep. Alfred Sieminski, 100 CONG. REC. A-5053 (July 13, 1954).

14. New York Sess. Laws 1953, cc 882, 883; New Jersey Sess. Laws 1953, cc. 202, 203; consented to by Congress in Pub. L. No. 252, 83d Cong., 1st Sess., 67 STAT. 540 (1953).

New York Authority, the Waterfront Commission would seem to represent a further fragmentation of the governmental powers of the municipalities in the area concerned, and would seem to suggest a query as to what further steps may be necessary in the future if difficulties arise in the matter of coordinating administration and policy among several such "bodies corporate and politic."[15]

Thus the evolution of the Public Authority as an instrument of government is not yet complete; perhaps it is even too early to predict with confidence what its ultimate form will be. Yet the examples of the past thirty years attest the hasty pace with which we are experimenting with Public Authorities as replacements for organized political subdivisions of the states in the performance of many functions. The conception of an autonomous appointed commission, free to function as private enterprises do, and endowed with a profitable monopoly of power over vital public services or segments of the economy, was the first bold step in this evolutionary process. The next step, equally as bold as it was vital to the success of the Public Authority concept, was in utilizing an already familiar financial tool — the revenue bond — on a mass scale to attract private capital into Authority projects.[16] Next, came the device of pooling revenues and combining projects, freeing the Authority from the necessity of segregating its revenues and permitting the surpluses from profitable operations to be diverted into the marginal or deficit projects. And finally, has come the assignment of regulatory powers, presently constituted in separate autonomous commissions, but significantly with conterminous geographical jurisdiction with other non-regulatory Authorities. That this is a process involving fragmentation of established municipal powers has been remarked before.[17] But it is also constructive in its way, for, by adding powers unknown to conventional municipal corporations, such Public Authorities now appear capable of growth far beyond their initial expectations.

II. *The Anatomy of Area-Development Authorities*

While it must be confessed that the ultimate evolutionary development of what are called "Area-Development Authorities" cannot be described at the present time, it is possible to see what some of their vital organs are and how they are constructed. With apologies to the

15. See Zimmerman, F. L. and Wendell, M., in THE BOOK OF THE STATES, 1954-1955, 16-17.

16. Actually the revenue bond was utilized to make possible the expansion of inland waterways in the 1850's, and, as Dean Fordham has pointed out, the "present revenue bond era" began in the 1890's. Fordham, *Revenue Bond Sanctions,* 42 COL. L. REV. 395, 400-405 (1942). See also FOWLER, *op. cit. supra* note 8, *passim.*

17. Virtue, *The Public Use of Private Capital: A Discussion Relating to Municipal Bond Financing,* 35 VA. L. REV. 285, 294-5 (1949).

medical profession for possible loose use of its technical terms in the analogy, one may suggest that the Authority's "brain" is its board of commissioners.

Mention has already been made of the appointed commissioners comprising the "corporate municipal instrumentality." Uniformly such commissioners are appointed by the governors of the parent states. Individual terms of office overlap and there is a tendency to reappoint the same commissioners.[18] Once appointed, the commissioners' responsibility to the parent states becomes a mixture of formality and practical business tactics. The Compact of the Port of New York Authority, for example, provides that "each State provide by law for the exercise of a veto power by the Governors thereof over any action of the Commission."[19] Both states enacted such laws in 1927, but their effect and scope has never been sketched in by judicial interpretation. The single instance in which a veto was interposed was subsequently rescinded after adjustment of the difficulties which prompted it.[20] Further, the common practice of the Port Authority to obtain informal understandings through consultation prior to taking action makes it unlikely that the courts will develop any extensive doctrine on this question. Against this background the other provisions for responsibility to the state governors (*i.e.*, provision for "immediate" transmittal of certified copies of the minutes of the commission's meetings, removal of commissioners for cause after hearing, and power of reappointment) become more formal than actual as checks and balances on the Port Authority. In the case of the Delaware River Port Authority, the compact provides for reports to the governors and specifically calls for returning to the states for approval of new projects not already within the Port Authority's power by the terms of its organic legislation and approval of plans for certain projects specifically mentioned in that legislation.[21] The Bi-State Development Authority is prohibited from taking any action which will affect the finances of any governmental subdivision, but contains no special procedure for guaranteeing this precaution in the actual administration of its operations.[22]

Basically, of course, there remains in the parent states power to modify the undertakings of their original compacts through subsequent concurrent legislation. However, subsequent restrictive legislation cannot easily be reconciled with the mutual covenants of the states with each other and their bondholders not to do anything "to diminish or impair the power of the Commission" so as to affect the security of the outstanding obligations. To date no such attempt at dimunition of

18. See BIRD, A STUDY OF THE PORT OF NEW YORK AUTHORITY 34 (1949).
19. Port of New York Authority Compact, Art. XVI.
20. BIRD, op. *cit. supra*, note 18, at 38.
21. Delaware River Port Authority Compact, Art. XI, XII.
22. See Kinsey, "The Bi-State Development Agency," in THE BOOK OF THE STATES, 1954-1955, pp. 34-35.

Authority powers has been attempted following the commencement of operations by an Authority.[23]

Similarly, Congress may also, in theory, withdraw its consent to an interstate compact. Yet practical considerations deny the likelihood that Congress will maintain any continuing scrutiny of Authorities created by interstate compact or be moved to rescind its consent once given.[24]

With such devices as these constituting the chief limitations on the power of decision residing in the governing group of an Authority, the full significance of the great degree of autonomy enjoyed by these bodies begins to be realized. Practically, however, the real control of affairs is still further removed from any responsibility to the public. The real balance of power in the affairs of the Area-Development Authorities — as with any other public authority which is predominantly dependent upon private capital — lies with the investment bankers. Consider here the plan of the Delaware River Port Authority to operate a rapid-transit system serving population within a 35-mile radius from the Camden-Philadelphia area: Prior experience showed that such a system would be too much of a marginal operation to attract private enterprise. However, if integrated with other profitable Port Authority projects, the system could be operated. In this setting a policy decision must be made. How such decisions are reached is suggested in the report of the Port Authority.

> "Whatever the various elements of the solution may be, there will come a time when the engineers finally can say to themselves: 'Well, that's it. It is economically desirable, (which means that the area needs a system for its economic health and future expansion), it is technically sound, (which means that there are no insoluble construction or operating problems), and it makes sense. Now let's take it to the bankers and see what they make of it.'
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> . . . .
>
> To put it more bluntly, the engineers must obtain the answer from qualified banking sources as to whether the plan is one on which those sources will lend money at reasonable rates of interest. The only way a Port Authority or any similar agency could finance such a system would be through borrowing, securing the loan with revenue bonds whose interest and debt service would be paid in accordance with very rigid conditions.
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> . . . .
>
> It is possible, of course, that the bankers themselves might have recommendations which would require the engineers to restudy the plan.

23. However, prior to obtaining Congressional consent to the compact efforts are sometimes made to modify the terms of the agreement. See, for example, legislation pending in Pennsylvania (S. 173) and New Jersey (S. 83) during 1955 legislative sessions.

24. See, for example, the legislative history of House Joint Resolution 375, 82d Cong., 2d Sess., in *Hearings before House Judiciary Committee*, Subcommittee No. 5 (May 14, 1952).

> Construction stages might be altered to effect a more favorable financing picture, or other changes suggested. *In this interplay of engineering and financial adjustment, the Port Authority will not participate.* (Italics supplied)[25]

Here, perhaps more than at any other point of comparison, is seen the great difference between the processes of those who are directly responsible to the public and those who are not.

Turn now from the "brain" of the Area-Development Authority, to a description of its "heart."

The heart of the Area-Development Authority is the revenue bond, by means of which the life-blood is induced to flow into the Authority's projects. By the standards of the specialists who annually examine these hearts, they are strong. Following the lead of the Port of New York Authority, others have sought to secure exclusive power to operate toll bridges and tunnels, the revenues from which may be used as security for payment of bonds. By grouping the toll crossings with other projects for financing purposes, the profitable ventures carry the unprofitable ones. In this way, the George Washington Bridge, although its own construction cost has been paid for twice by tolls collected since it was opened, continues to support the other port development and port promotional activities; and the Holland Tunnel, now having paid for itself four times, serves the same purpose.[26] At one time, spokesmen for the Port of New York Authority referred to its toll bridge operation as "self-liquidating" — implying that the policy of charging tolls was merely for the purpose of retiring the bonded debt incurred for construction.[27] More recently, however, this phrase has been replaced by the term "self-supporting," with no attempt to conceal the financial assistance obtained from toll bridge and tunnel revenues for non-paying projects.[28] Perpetuation of tolls poses no legal problem since, under the practice of grouping projects, the Authority may renew its power to continue collecting tolls merely by

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25. DELAWARE RIVER PORT AUTHORITY, THE SOUTHERN NEW JERSEY MASS TRANSPORTATION SURVEY AND REPORT 21-22 (Sept. 1954).

26. See PORT OF NEW YORK AUTHORITY, ANNUAL REPORTS.

On the other hand, Port Newark and Newark Airport were heavily in debt when taken over by the Port of New York Authority so that the Port Authority in 1947 had to commit itself to invest $23 million in the following five years as part of the transaction acquiring the property. See statement of Austin J. Tobin, Executive Director for the Port of New York Authority before Joint Legislative Committee of the Senate and House of the State of New Jersey, February 26, 1952, pp. 38-40.

For discussion of factors affecting the toll levels see PORT OF NEW YORK AUTHORITY, REPORT SUBMITTED TO THE NEW JERSEY JOINT LEGISLATIVE COMMITTEE APPOINTED PURSUANT TO SENATE CONCURRENT RESOLUTION INTRODUCED MARCH 11, 1940 (June 1940).

27. Cohen, J. H., "The Port of New York Authority, The Evolution of the Authority Plan in American Admimistrative Law," a lecture delivered at New York University School of Law, March 13, 1940, pp. 29-30.

28. BIRD, *op. cit. supra,* note 11 at 68.

commencing construction of a new project which requires revenue bond capital. Tolls may then continue until the last bonds of the last projects are retired.[29]

The mechanism of revenue-bond financing is further strengthened by the bond covenants. Consider the example of the Delaware River Authority: Mention has already been made of the states' covenant not to impair the powers of the Authority during the life of any of the bonds. Additionally, the states also covenanted not to permit any other persons or bodies to construct or operate any other vehicular bridge or tunnel within 10 miles in either direction from the Authority's Camden-Philadelphia bridge. And the Port Authority covenanted with the bondholders "at all times to maintain and collect such tolls, rentals and other charges . . . as shall be required" to service and retire the bonds secured thereby.[30] Such covenants, which now must be regarded as customary for the protection of toll crossing revenue bonds, carry with them the further protection of bondholders' judicial remedies,[31] the whole of which, viewed altogether, constitute an almost impregnable barrier to outside opposition once the Authority's financial plan has been set in operation.

Continuing to describe the anatomy of Area-Development Authorities, one turns finally to the various types of projects and services that are undertaken. In terms of the analogy which has been begun, these may be called the "hands and feet." By reference to these, the terms "port development" and "port promotion" obtain a clearer meaning. A list of the facilities already operated by the Port of New York Authority has already been made; so also have been mentioned the Delaware River Port Authority's toll bridges and rapid transit system.

29. At this point one recalls the question of Rep. Fallon addressed to Daniel Goldberg, Asst. General Counsel, Port of New York Authority, appearing in support of the Delaware River Port Authority Compact. The subject was diversion of revenue surpluses into marginal projects of the Authority:

"*Rep. Fallon:* . . . In the beginning these projects will probably not be financed on their own basis of revenue income at the time, so that each new project will be financed from the one that is already in operation, and you will have a balance of revenue over your costs of operation.

Mr. Goldberg: The hope is that you will not have to use the old facilities' revenue to support the new one; but the necessity of pledging the revenue of the existing facility does exist if you are going to have any hope of getting the new one.

Rep. Fallon: Can you not see in the future when you build up reserves from existing facilities that you are going to look around for other public improvements that you might be able to make and use this revenue on?

Mr. Goldberg: If there is a public demand and necessity for the new facility I am not shocked by the suggestion.

Rep. Fallon: I often see where there is a demand, but sometimes if the money is not there the demand subsides. The temptation will always be there."

(82d Cong., 2d Sess., *House Hearings on Delaware River Port Authority Compact*, H.R. 8315, 8316, pp. 65-66.)

30. DELAWARE RIVER PORT AUTHORITY, GENERAL BOND RESOLUTION, MAY 8, 1953 AND FIRST SERIES SUPPLEMENTAL RESOLUTION, MAY 20, 1953, p. 55.

31. For discussion of these remedies see Fordham, *Revenue Bond Sanctions, supra*, note 16 and FOWLER, *op. cit. supra*, note 8.

However, these lists indicate only the first steps taken toward the eventual goal of comprehensive area development. Consider, for example, the projects and facilities which the Delaware River Port Authority may acquire, construct, operate and maintain in the effectuation of its port development purpose:[32]

Railroads
Railways, tracks, tunnels, subways, elevated structures, poles, wires, conduits, powerhouses, substations, transmission lines, car barns, shops, yards, sidings, turnouts, switches, stations, cars and motive equipment.

Terminals
Marine, railroad, motor truck, air, coal, grain, lumber and other terminals for transportation of passengers and freight.

Transportation Facilities
Railroads, rapid transit lines, motor trucks, tunnels, bridges, airports, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows, harbor craft of all kinds, aircraft: equipment, material and supplies therefor.

Terminal Facilities
Wharves, piers, ships, ferries, docks, dry docks, ship repair yards, bulkheads, dock walls, basins warehouses, cold storage, overhead appliances, coal bunkers, oil and water stations, dredging equipment, markets, radio stations.

This list does not, of course, indicate the business promotional activities in which the Authority may engage. At present these involve maintenance of offices in the various cities in the United States and foreign countries, and promotion of business through various publicity activities.

In brief, then, these are the three vital parts of the anatomy of Area-Development Authorities—a broad range of activities covering many phases of area development and business promotion, a profitable monopoly of vital transportation facilities capable of attracting sufficient private capital through revenue bonds, and a small group of key men operating within a corporate form or organization according to the methods and morals of the business world.

III. *The Philosophy of Area-Development Authorities*

Mention of manners and morals leads to consideration of the philosophy which has been adopted by Area-Development Authorities regarding their responsibilities in providing public services and operating public facilities. Having broad powers of discretion and an assured monopoly of vital public facilities, what do the Authorities conceive

32. Delaware River Port Authority Compact, Art. I, XIII.

to be their public responsibilities in exercising their power? In large measure, this becomes a question of whose dollars should be spent for whose benefit? At the heart of the matter is the principle that where special services or facilities are provided they should be paid for by the beneficiaries thereof.

The Congressional hearings relating to the Delaware River Port Authority compact provided a forum for the opposing views on this issue. The case for the Port Authority was stated thus:

> "Let us put this in capsule form — the States wish to set up an authority to undertake various improvements in the port district, to make charges for the use of these improvements and with the proceeds to undertake additional projects. The authority will be self-supporting, borrowing money entirely on its own credit and the revenues of the enterprises it undertakes. The primary source of revenue must be the tolls from the present crossing. There is no legal limitation on the length of toll collection on the present bridge and we are asking that if a new bridge is built, similar freedom shall be accorded. . . . An exemption from the General Bridge Act [of 1946] should be granted for bridges in metropolitan areas such as ours."[33]

If Congress had accepted this proposal without qualification the Authority would have been permitted to depart from the requirements of the General Bridge Act of 1946 in the following respects: (1) It would have been able to combine any or all of its revenue-producing projects into one unit for financing, with the necessary result of perpetuating the collection of tolls on its bridges indefinitely beyond the time when those were paid for in order to build up sinking funds to amortize the debts incurred on any other of the Authority projects. (2) It would have been able to fix bridge toll rates at levels sufficient to provide *a fair return on the combined costs of all facilities,* instead of merely the costs of the bridges producing such tolls. (3) It would have been free to use its surplus for use in projects from which the toll payers received no benefit.

The case against the philosophy espoused by the Authority was expressed by the Bureau of Public Roads:

> "The propriety of combining for financing purposes highway bridges and tunnels with non-highway facilities of various types not directly related to such highway-crossing facilities . . . and thus make it possible to subject the highway bridges to perpetual tolls to support such non-highway facilities is open to serious question. Highway bridges

33. *Hearings before Senate Public Works Committee on S. 2187, 2188* (Delaware River Port Authority, Supplemental Compact) 36, 82d Cong., 2d Sess. (1952). For an earlier expression of this philosophy as it attempted to justify the policy of "grouping," see statement of John E. Ramsey, Chief Executive Officer of Port of New York Authority, before Joint Conference Committee of New York and New Jersey Special Committees on Interstate Transportation Facilities, March 6, 1930, p. 1-2.

> and tunnels, like the public highways of which they form a part, are designed primarily for free use for business, pleasure and all other daily activities of life by all members of the general public with their privately owned vehicles, for which privilege they pay license fees on the vehicles used and taxes on the gasoline consumed, the revenues derived from such sources usually being applied to public highway construction and maintenance. . . . Highway bridges and tunnels, therefore, might justifiably be combined with each other for financing purposes under the circumstances here involved and be subject to tolls until the cost of the facilities so combined has been amortized, but they should not be combined with or required to assist in financing other facilities of an entirely different character. . . . The various and sundry non-highway port-development facilities . . . are to be distinguished from highway bridges and tunnels in that they would be used primarily by private commercial concerns in the conduct of their business enterprises and should be self-supporting as such or combined with other facilities of like nature, but should not be combined for financing purposes with highway bridges and tunnels."[34]

Opposing this established federal policy, witnesses for the Authority contended that:

> "pooling of revenues and continuance of tolls is essential for the sound development and financing of any plan for supplying the needed facilities even though, in the final event, the new facilities will quite possibly support themselves, and little, if any, of the bridge revenues actually will be expended on them."[35]

And, they argued that:

> "it is entirely equitable to take from a willing user of a toll bridge the money necessary to improve the great port area served by the bridge which, in the overwhelming majority of cases, is contributing directly or indirectly to the prosperity of the individual who pays the tolls."[36]

The issue drawn here is basic, for it involves the relationship of those who wield power to those who are subject to that power. The "equity" of taking from a willing user of a toll bridge has a certain and defined limit for governmental officials who are directly responsible to the public for their decisions. Suffice to say that those who control the policy decisions of Area-Development Authorities have an entirely different concept of this equity. And, one may suggest, this difference is due in large measure to the lack of necessity for them to account to the public for their decisions and the lack of practical means of bringing them to account through conventional methods of legal process for this purpose.

34. *Report of House Public Works Committee to accompany HR 8315* (Delaware River Port Authority, Supplemental Compact) 10, 82d Cong., 2d Sess. (1952).
35. *Hearings before Senate Public Works Committee, supra.* note 32, at 113.
36. *Hearings before House Public Works Committee, supra.* note 29 at 26.

IV. *The Problem to be Solved*

From what has been said, it would seem that the problem to be solved is one of restoring to Area-Development Authorities the moral philosophy which prevails in other species of local government in our country — to instill, if you will, political morality in activities which are essentially political in character although cast in the form of business transactions.

At the outset it is difficult to perceive how this can come about since the machinery of democratic responsibility is almost entirely lacking. The parent states have bound themselves not to exercise the means of regulation in the public interest which are generally applicable to public agencies. The taxpayer-voter is completely out of the play. Not only are his civic functions paralyzed when he is cast in the role of the consumer of services rendered by the Authority and financed through revenue bonds, but even when he has a chance to vote or sue, he lacks coherent information on the basis of which to make up his mind.[37] The Authority is dependent upon the continued willingness of the investment bankers to market its securities and makes no pretense about the predominance of this factor in its policy considerations. The interest of the public in the most efficient use of bonds and the way in which services are administered is not the responsibility of the creditor to consider or promote.[38]

It is sometimes said that the public must be satisfied with the methods and policies of Public Authorities because one hears so few complaints. Yet under the circumstances, lacking information and practical remedies, this argument becomes as hollow as the equally frequent assertion that the activities of the Authority are a blessing because "they cost the taxpayer nothing."

The implications of this issue were noted in 1938 on the occasion of a re-examination of local government by the New York State Constitutional Convention Committee, and summarized as follows in its report:

> "It is well to consider the underlying possibilities of authorities and their place in the future governmental scheme. They bring sharply to the fore two types of problems. . . .

37. Consider the problem of "finding out where the money goes" in the light of testimony by counsel for the Port of New York Authority in House Hearings on the Delaware River Port Authority, *supra.* note 29 at 63-64.

"The pooled revenues constitute the base for the pledging of the bonds group projects. Then you start getting into refunding operations and lose all track of what goes where for a while. I do not think the George Washington Bridge amortized its cost yet, but I think it would be very difficult to establish that exactly from the records. . . . We have facilities that are financed out of surpluses of bridges and tunnels and other facilities which are in the black. . . . The ones which are being at present supported by the group which is producing surplus revenues would include our airports, our bus terminals, and our truck terminals, I think those are all."

38. Virtue, *supra* note 17 at 301-02.

> The first problem deals with popular responsibility. Heretofore there has been an invariable and close tie between local government and the voter. But the lines of popular control which lead to the authority are said by some to be so indirect as to be almost non-existent. The directors of an authority are usually appointed by a popularly elected executive, as are most other administrative officials. But unlike ordinary administrative officials, for whose actions the appointing officer is personally responsible, the authority attains, by its very creation, a separate and powerful personality whose acts, insofar, at least, as they relate to the creation of debt, are irrevocable. By its unique power to create debt, too, the activities of a single authority may sometimes transcend in financial scope the activities of a whole village or city. But the legislative body of a city or village is popularly elected, while the directorate of an authority is not. The question which must be decided is whether or not the authority is dangerous, and if dangerous, whether it is to be prohibited or continued perhaps with certain restrictions."[39]

V. *The Solution to the Problem*

It is, of course, presumptuous to suggest that there is short answer to the problem of adjusting the methods of Area-Development Authorities to the principles by which local governments must live. The best that one may hope for is to suggest a set of controls that will permit change to take place with the full benefit of careful consideration of what is best for all concerned.

Thus, it is no answer to say that Area-Development Authorities should not be permitted. The metropolitanization of certain regions demands that under many circumstances legislatures should provide the necessary statutory sanction of such authorities. However, part of the responsibility for protecting the public in these situations rests with the legislature in its initial decision as to whether localities should be allowed to resort to extraordinary devices or should be compelled to work out their problems within the conventional political subdivisions of the state. Serious consideration must be given to differentiating between the truly self-supporting services, which public authorities may properly administer, and those services which are not self-supporting.[40] In the case of the latter, a second question must be asked: should they be undertaken at all by public subsidy and administration? The answer to this question should be searchingly explored, for though the government acts in the clothing of a corporate entity and charges which it collects are called "tolls" instead of "taxes," the facts of the matter are not changed. The facts are that when a public corporation is endowed with a profitable monopoly of vital

39. 11 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, REPORTS, *Local Government and Home Rule*" 244 (1938).

40. See comments in Nehemkis, *supra.* note 1 at 33; Cohen, *supra.* note 27 at 29-30.

transportation services which conventional government would otherwise provide, such corporate entity is acting in the capacity of a government. Admittedly many projects having great popularity and benefit to the industrial and commercial interests of a community cannot justify themselves under close scrutiny based on the premises which state and municipal legislatures must adopt. Yet, who can be the loser by adopting such a policy of caution in the creation of public authorities?

A second area in which constructive regulation should be sought deals with the provision of standards by which to measure the propriety of actions by public authorities and remedies for the public. At the present time, the most striking examples of the growth of Area-Development Authorities are in areas where vital toll bridge and tunnel facilities are available to provide sources of revenue for the Authority's projects. Most of these have been created through interstate compacts, to which Congress has given its consent. Almost invariably they involve navigable waters. These considerations suggest that federal legislation might appropriately undertake the task of outlining the policy which will apply to the activities of Area-Development Authorities and provide remedies and procedures suitable to implement such policy. Admittedly the wide range of area development and business promotion activities which is involved makes it difficult to conceive of general legislation by Congress regulating the entire list of projects now undertaken by Authorities in fields appropriate for federal regulation. But such wide scope would not be necessary since at the present time the most urgent need for control is in connection with toll bridges and tunnels. These are the projects whose surpluses carry those activities of the Authority which are not self-supporting. Hence, regulation of bridge and tunnel tolls would be sufficient to correct the evils that now exist.

Historically Congress has consistently shown great concern lest the power to demand tolls become an unreasonable burden on the users of toll bridges. Early examples of legislation authorizing construction and operation of toll bridges show that regulatory power was variously assigned to the federal courts,[41] the Secretary of War,[42] and sometimes was retained by Congress itself.[43] In order to simplify and standardize the handling of bridge bills, the General Bridge Act of 1906 was enacted. As to tolls, this Act provided:

41. Act of July 20, 1868, 15 STAT. 2120, c. 179; Act of June 30, 1870, 16 STAT. 173, c. 176; Canada Southern RR Co. v. International Bridge Co., 8 Fed. 190 (D.N.Y. 1881).

42. H. REP. 182, 59th Cong., 1st Sess., 1 (1929).

43. Act of July 27, 1868, 15 STAT. 232, c. 261; Act of August 15, 1876, 19 STAT. 205, c. 303.

> "Sec. 4. . . . If tolls shall be charged for the transit over any bridge constructed under the provisions of this act, of engines, cars, streetcars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit."[44]

Although the standard of "reasonable and just" was not further explained in the Act of 1906, it is suggested that the phrase was selected because of its recent use by the courts in cases dealing with toll road and railroad rates.[45] During the forty years that followed, Congress showed a continuing concern over the possibility that the proprietors of publicly owned toll bridges might abuse their discretion.[46] In a further effort to simplify legislative procedure for authorizing construction of bridges over navigable waters, the General Bridge Act of 1946 was passed.[47] At this time it was apparently felt that state regulatory agencies were sufficiently well developed to oversee the problem of protecting the public against unreasonable tolls on bridges wholly within state boundaries, so no federal regulatory powers were reserved. However, with respect to interstate bridges, the provisions of Section 4 of the General Bridge Act of 1906 were repeated.[48]

Clearly this regulatory machinery is unable adequately to deal with the Area-Development Authorities of the present day. For one thing it deals only with toll bridges and does not reach vehicular toll tunnels. For another, it attempts to delegate the complex task of rate regulation to an agency completely unequipped to deal with and, one may venture to guess, largely uninterested in the problem of toll rates. But, proceeding from the historic policy of the Federal Government in favor of free highways and bridges, one may offer the following suggestion for legislation which could provide appropriate regulation of the toll rate problem so as to permit the creation of self-supporting bridge and tunnel projects where necessary without the danger of abuse of power by their proprietors.[49]

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44. Act of March 23, 1906, 34 STAT. 85, c. 1130.

45. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896); and Smyth v. Ames, 169 U.S. 466, 544-45 (1898).

46. *Hearings before House Interstate Commerce Committee on S. 4787* (Delaware River Bridge) 66th Cong., 3d Sess., 13-16 (1921); *Hearings before House Interstate Commerce Committee on S.J. Res. 41*, 72d Cong., 1st Sess. 11 (1932); Act of August 21, 1935, 49 STAT. 670, c. 597, #1.

47. Act of August 2, 1946, 60 STAT. 847, c. 753, Title V, #502. See 92 CONG. REC. 6370 (79th Cong., 2d Sess.).

48. *Ibid.*, #503, It was also provided that tolls on publicly owned bridges should be adjusted to pay for their costs within a thirty year period at the end of which the bridges would become free, #506.

49. Although no specific recommendation was contained in his statement, President Truman urged consideration of regulatory legislation at the time when the Delaware River Port Authority was created. In a statement accompanying his approval of these bills, he said:

Preceding the substantive provisions it would seem appropriate to declare that it is the policy of Congress that: (1) the free flow of vehicular traffic over an efficient interstate highway system is essential to the national defense and to the peacetime economy of the nation; (2) the charging of unnecessary, unreasonable or discriminatory tolls for passage or transit over bridges or through tunnels crossing the navigable waters of the United States, where such bridges or tunnels are used in interstate or foreign commerce, is detrimental to the free flow of vehicular traffic and the efficiency of the highways; and (3) it is the policy of Congress to promote, encourage, and develop the public ownership of such highway bridges and tunnels; to fix the rates of toll charged for the use thereof at the minimum reasonably necessary, under economical management, to provide for amortization of cost as soon as possible, and to foster and promote the operation of such bridges and tunnels free from tolls.

In its regulatory provisions, such legislation should be applied to any bridge or tunnel crossing the navigable water of the United States, if such bridge or tunnel is used for purposes of travel or transportation in interstate or foreign commerce. And it should provide that tolls shall be just and reasonable, with authority delegated to an administrative agency to determine and by order prescribe what will be the just and reasonable toll. Suggestions have already been made that the Interstate Commerce Commission is the most logical of all present federal agencies to undertake this task because it is best equipped to deal with rate-making problems.[50] As to standards for the guidance of the regulatory agency, the term "just and reasonable" must draw its meaning from that portion of the declaration of policy dealing with transformation of toll bridges and tunnels into free public facilities as soon as their construction costs are amortized. The practice of grouping non-highway projects with bridges and tunnels should not be permitted, at least insofar as it would allow proprietors of bridges and tunnels to use the aggregate bonded debt of the entire group of facilities as the rate base for promulgating their schedule of bridge and tunnel tolls. However, the standard should be flexible enough to allow administrative discretion to determine whether more than one bridge or tunnel are so closely related as to

"I have therefore given my approval to these measures despite the grave doubts which I entertain concerning one provision they include. . . .

The use of toll charges to support other facilities could create substantial barriers to the free flow of interstate commerce, if the local development authorities operating interstate bridges and tunnels resorted to high toll charges and thus compelled interstate travelers to subsidize other local projects. . . . I therefore urge the Congress, at its earliest opportunity, to examine the rights reserved to it by this legislation with a view to taking action which will protect the interstate motorist from toll charges which are higher than necessary to finance the bridges and tunnels he uses." (White House Press Release, July 17, 1952).

50. See H.R. 1611, 84th Cong., 1st Sess., introduced January 6, 1955.

constitute a necessary group of highway facilities for purposes of financing, and hence for purposes of determining the rate base of their tolls.

In its procedural provisions, such legislation should authorize the regulatory agency to conduct hearings upon complaint or upon its own initiative. Determinations and orders as to toll rate schedules should be made upon a record after opportunity for notice and hearing, and the provisions of the Administrative Procedure Act should apply. Authorization to appoint examiners, to hold hearings, and subpoena witnesses and records should be included. Judicial review of administrative orders should be provided for in the United States Court of Appeals, with certiorari to the United States Supreme Court.

VI. *In Conclusion*

Thirty years is a relatively short time within which to perfect an instrument of government. Yet within this span of time the Area-Development Authority has become recognized as a useful and promising unit of local government, capable of undertaking the challenging problems of regional planning, performing many functions and servicies of a special nature, and attracting private capital in amounts heretofore unobtainable by municipalities through conventional methods of public finance. This has been possible because the constitution of such public authorities has made them administratively autonomous "bodies corporate and politic," and because they have been able to resort to large scale revenue bond financing on the strength of a profitable monopoly of vital public transportation facilities. Their methods have been patterned after the ways of private business rather than the traditions of government; their policy decisions have been controlled by their profit and loss statement rather than the allocation of public funds.

They have produced impressive results in the direction of increasing the value of the properties they have built or bought. Yet they are equally impressive in their insulation from responsibility to the public who are the rate payers and consumers of their services. With no direct voice in the making of policy decisions and no practical judicial or legislative remedies, the public has become subject to a new form of government by proclamation. In the philosophy of the Area-Development Authorities, the principle that special services should be paid for by the direct beneficiaries thereof is abandoned, and the users of vehicular bridges and tunnels pay for a wide range of non-highway facilities of benefit to local commerce and industry according to the decisions of the Authority.

The problem of restoring some degree of political responsibility to the activities of Public Authorities must, therefore, be faced. Part of

the responsibility for protecting the public lies with the legislatures of the parent states and Congress. In defining the proper scope of the Public Authority's activities, those projects which can be carried on as self-liquidating governmental services should be distinguished from those which cannot, and a legislature should not empower an Authority to do what it would not undertake itself as a responsible political unit of government. In moments of self-appraisal, spokesmen for Area-Development Authorities have recognized this fact and warned against the dangers of failing to understand their natural limitations.

A second obligation of the legislators is to provide a statutory declaration of policy regarding the public's interest in the vital transportation facilities which have been turned over to the control of Public Authorities. In supplying standards and procedures for making this policy effective, ample latitude could be provided for the continued use of Area-Development Authorities along the lines that were originally conceived for them. But the practice of grouping highway and non-highway projects should be drastically curtailed because of its inconsistency with the principle that special facilities and services should be paid for by direct beneficiaries thereof. Through its administrative procedures, such legislation should also provide some practical way for the public to compel Area-Development Authorities to account for their activities and justify the policies they proclaim.

Responsibility for providing these minimum safeguards to the public interest cannot be ignored by either the states or the Federal Government. Both have areas of responsibility under the Constitution for protection of this interest. The mere fact that the past role of Congress has been largely limited to giving its consent to compacts between the states should not be accepted as an excuse for Congress to continue to rubber-stamp what the states are persuaded to enact. There is a sufficiently great federal interest in the effect of Area-Development Authorities on interstate and foreign commerce and the use of navigable waters to require federal action. Based on this precept, many states may also recognize the need for examining their own laws and past actions for the purpose of similarly protecting the public in the case of state-created Public Authorities.