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## The Liability of Public Corporations in England and America

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## THE LIABILITY OF PUBLIC CORPORATIONS IN ENGLAND AND AMERICA

The public corporation is a common device to carry on governmental activities in the British Commonwealth, Europe and the United States.<sup>1</sup> It has been the uniformly favored instrument of nationalization policies.<sup>2</sup> The reason for the use of such a public body is "unquestionably due to the realization that it offers the most convenient though by no means the only method for a successful application in public enterprise of principles of business efficiency developed in the private field."<sup>3</sup> The necessarily extensive dealings of private citizens with such corporations force the courts to face promptly the problem of the legal status of such bodies. The problem is raised at this time not only because of the general interest in the events taking place in England but also because of the contrasting viewpoints shown in the English and American solutions of the same problems. Furthermore, some recent statutory developments in the United States indicate a movement toward a more uniform control over public agencies and have apparently resulted in some contraction of the amenability to suit of government corporations. This note will be devoted to a study of the legal liability of public corporations in England and the United States as determined by various criteria, and an analysis of the results of the application of these criteria in protecting private citizens in their dealings with the steadily increasing numbers of such public instrumentalities.

The first consideration must be whether or not these public bodies have an identity with the sovereign which permits them to partake of the sovereign's immunity. Under English law, the King can do no wrong; unless the Crown is mentioned in a statute it is understood that the statute does not include the

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1. See Sellar, *Government Corporations*, 24 CAN. B. REV. 393, 489 (1946); Mitchell, *Australian Aspects of Government Corporations*, 24 CAN. B. REV. 793 (1946); the digest of *Australian National Airways Pty. Ltd. v. Commonwealth* in 20 AUSTR. L. J. 76 (1946); GORDON, THE PUBLIC CORPORATION IN GREAT BRITAIN (1938). For bibliography on government corporations in the United States see *infra* note 53.

2. Pinkney, *Nationalization of Key Industries and Credit in France After the Liberation*, 62 POL. SCI. Q. 368 (1947); Friedmann, *The New Public Corporations and the Law*, 10 MOD. L. REV. 233, 377 (1947); Robson, *The Administration of Nationalized Industries in Britain*, 7 PUB. ADMIN. REV. 161 (1947); Plummer, *The London Passenger Transport Act of 1933: A New Socialization*, 48 Q. J. ECON. 181 (1933); O'BRIEN, BRITISH EXPERIMENTS IN GOVERNMENT OWNERSHIP AND CONTROL (1937).

3. Lilienthal & Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 HARV. L. REV. 545, 559 (1941). "It is of the very essence of the conception of a public corporation, in both the British and American legal systems, that it should have its own funds and be autonomous for purposes of management, efficiency, auditing and accounting, but that it should be responsible to Parliament as its 'shareholder' representing the nation." Friedmann, *Legal Status of Incorporated Public Authorities*, 22 AUSTR. L. J. 7, 11 (1948). "[A]n important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States." Mr. Justice Brandeis, in *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 8, 48 Sup. Ct. 12, 72 L. Ed. 131 (1927).

Crown in its coverage. In addition, the Crown is not to be subjected to legal process without its permission.<sup>4</sup>

This idea of "The Shield of the Crown" was transplanted to America<sup>5</sup> so far as its application was concerned, but the rationalizing of the concept created some difficulty. The maxim to the effect that the King can do no wrong was declared to be inapplicable to the American constitutional system.<sup>6</sup> It was no degradation for the government to appear in court<sup>7</sup> nor could it be maintained that the government's liability to legal process might undermine its security and efficiency.<sup>8</sup> Mr. Justice Holmes found the answer to lie on the simple ground that a sovereign is exempt from suit, "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."<sup>9</sup> As a previous court had pointed out, it was not likely that the creator of the courts had intended that it would have to defend itself from assaults in these very courts.<sup>10</sup>

That the doctrine of governmental immunity is on the wane has been evident, but only in the last few years has its complete abolition been foreseeable.<sup>11</sup> Statutory enactments such as the Crown Proceedings Act of 1947<sup>12</sup> and the Federal Tort Claims Act<sup>13</sup> represent the present status of the law.<sup>14</sup> Recent state statutes similarly show this trend.<sup>15</sup> Such acts are not decisive as to the legal status of any particular public corporation but are indicative of the general attitude adopted by the government in respect to its own amenability to legal process.

#### THE PUBLIC CORPORATION IN ENGLAND

The use of public corporations in England to carry out the nationaliza-

4. For a detailed study of the exemptions and special protections that have been accorded to Crown servants from as early as Saxon times see Churchill, *The Crown and Its Servants*, 42 L. Q. REV. 81, 212, 382 (1926).

5. See *The Pesaro*, 277 Fed. 473, 474-79 (S. D. N. Y. 1921).

6. *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010 (1880); *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171 (1882).

7. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171 (1882).

8. *Ibid.* But see dissent by Mr. Justice Gray, 106 U. S. at 223, 226.

9. *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 27 Sup. Ct. 526, 51 L. Ed. 834 (1907).

10. *United States v. Lee*, 106 U. S. 196, 206, 27 L. Ed. 171 (1882).

11. For a historical study of the gradual withdrawal from absolute immunity see Holdsworth, *The History of Remedies Against the Crown*, 38 L. Q. REV. 141, 280 (1922). Holdsworth urged extension of liability to cover tortious acts on the ground that such a move would be in accord with the "principle which has guided the development of the subject's remedies against the Crown throughout their history—the principle that their competence should, so far as possible, be coextensive with the remedies available to one subject against another." *Id.* at 296. See also Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919). An early attack on the theory in America was by Mr. Justice Story in *United States v. Wilder*, 28 Fed. Cas. 601, No. 16,694 (C. C. D. Mass. 1838).

12. 10 & 11 GEO. VI, c. 44.

13. 60 STAT. 842 (1946), 28 U. S. C. A. § 921 (Supp. 1948).

14. The limitations of these two acts are indicated *infra* notes 47, 48, and 87 *et seq.*

15. See Borchard, *Government Liability in Tort*, 26 CAN. B. REV. 399 (1948).

tion policies of the Labor Government has very sharply raised the problem of the legal status of these bodies. At the present time, the coal industry is in the hands of the National Coal Board,<sup>16</sup> all the railroad and canal undertakings have vested in the British Transport Commission,<sup>17</sup> and the assets of all generators and suppliers of electricity have been transferred to the British Electricity Authority or to one of its subordinate area boards.<sup>18</sup> Overseas airlines are in the hands of three public corporations.<sup>19</sup> The shares of the Bank of England have been turned over to the Treasury but the corporate existence of the Bank continues as before.<sup>20</sup> Many of the new social services are being administered through such public bodies.<sup>21</sup> The very great powers given the government under the Town and Country Planning Act are being exercised by incorporated bodies.<sup>22</sup>

The attitude of the judiciary in England towards public corporations has in the past, with some variations in rationale, been consistent and apparently will continue to be so by virtue of being stated with some precision in the enabling statutes under the nationalization program. In general, a public corporation in England is a complete juristic personality liable to sue and be sued as though it were a private individual. The exception to this approach is when the corporation is fulfilling a traditional function of government. And if such a function is being carried on, the Crown Proceedings Act of 1947<sup>23</sup> makes such public authorities liable as though they were private individuals. This apparently complete amenability does not remove the necessity of resolving this problem. Corporations found to be agents of the Crown are not subject to taxation, and litigants faced with such corporations must contend with the limitations of the Crown Proceedings Act.

The starting point, as indicated above, is the "Shield of the Crown." The King is immune from suit. This immunity extends to his agents who are acting as his representatives in the performance of royal functions. Such agents have been distinguished by considering them as emanations of the Crown.<sup>24</sup> Are public corporations such agents or emanations? The basis for an

16. Coal Industry Nationalisation Act, 1946, 9 & 10 GEO. VI, c. 59.

17. Transport Act, 1947, 10 & 11 GEO. VI, c. 49. See Walker, *The Transport Act, 1947*, 58 *Econ. J.* 11 (1948).

18. Electricity Act, 1947, 10 & 11 GEO. VI, c. 27.

19. Civil Aviation Act, 1946, 9 & 10 GEO. VI, c. 70.

20. Bank of England Act, 1946, 9 & 10 GEO. VI, c. 27.

21. The Regional Hospital Boards created in the National Health Service Act, 1946, 9 & 10 GEO. VI, c. 81, § 11(1); the Agricultural Land Commission created under the Agriculture Act, 1947, 10 & 11 GEO. VI, c. 48, § 68(1).

22. Town and Country Planning Act, 1947, 10 & 11 GEO. VI, c. 51.

23. See note 12 *supra*.

24. "All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals." *Gilbert v. Corporation of Trinity House*, 17 Q. B. D. 795, 801 (1886). "[I]t would avoid obscurity in the future if the words agent or servant were used in preference to the inappropriate and undefined word 'emanation.'" *International Ry. Co. v. Niagara Parks Commission*, [1941] A. C. 328, 343 (P. C.).

answer to this question is found in the limited view formerly taken in English political theory of the proper sphere of government. "When it passes beyond the obvious duties of a constitutional government as the preserver of order and the administrator of justice, and embarks upon enterprises having for their object the material, moral or intellectual welfare of the community, the agencies upon which it casts these functions, though exercising them for national purposes, have readily been regarded as independent persons with the ordinary legal attributes."<sup>25</sup> The mere fact of public purpose is immaterial in determining the legal liability of these corporations. Other factors have at one time or another been decisive in determining the presence or absence of liability.

The Mersey Docks Trust in Liverpool was a public corporation that was one of the major testing grounds for many of the problems that arose in connection with the legal status of these public bodies. In 1864 it was made subject to the poor rates because the corporate property was not occupied for "purposes of the country."<sup>26</sup> Two years later, it was made clear that any public corporation organized for a trading or other profitable purpose was to be subject to liability to the extent of its corporate funds just as though it were a private individual in the same type of undertaking.<sup>27</sup> The reasoning was that such a public corporation was a substitute for private enterprise and that the Parliamentary intent was never to grant immunity to such bodies under these circumstances.<sup>28</sup> This proposed test never was adequate. The Postmaster-General is incorporated.<sup>29</sup> He performs functions that are a substitute for private enterprise, he may or may not make a profit, and yet liability was reached only by statute last year under the Crown Proceedings Act. The National Coal Board is not a substitute for private enterprise because further private enterprise in the field is forbidden,<sup>30</sup> and yet, by the enabling

25. Moore, *Liability for Acts of Public Servants*, 23 L. Q. REV. 12, 21 (1907).

26. *Mersey Docks v. Cameron*, 11 H. L. Cas. 443, 11 Eng. Rep. 1405 (1864-65). The Commissioner of Works and Buildings was not liable for poor rates on bridge built with public money. The property was occupied by the Crown. *The Queen v. McCann*, L. R. 3 Q. B. 677 (1868). "The true ground of exemption was ascertained . . . in the *Mersey Dock Case*; . . . the poor laws did not include the Crown, the Crown not being named in the statute . . . therefore . . . Crown property, and property occupied for purposes of the administration of the government of the country, became exempt from liability to poor-rate." Therefore, because the functions of the University of Edinburgh were not governmental, the property of the University was liable for the tax. *Greig v. University of Edinburgh*, L. R. 1 H. L. Sc. 348, 354 (1868). Property used by justices of county court was not subject to income tax. *Coomber v. The Justices*, 9 App. Cas. 61 (1883).

27. *Mersey Docks v. Gibbs*, 11 H. L. Cas. 86, 11 Eng. Rep. 1500 (1866).

28. "In England the test really is: Could the activity be performed by private enterprise? Whenever an affirmative answer can be given, the public corporation, in order to secure any special privilege of the Crown, has to establish that the privilege is confirmed by some statute." Sellar, *Government Corporations*, 24 CAN. B. REV. 393, 489, 506 (1946).

29. The Postmaster-General was made a body corporate for the purpose of conveying lands to his successors. 3 & 4 VICT., c. 96, § 67 (1840).

30. The National Coal Board is charged with the duty of "working and getting the coal in Great Britain, to the exclusion . . . of any other person." Coal Industry Nationalisation Act, 1946, 9 & 10 GEO. VI, c. 59, §1(1)(a).

statute, liability is complete. Further the Board has a statutory duty to make a profit.<sup>31</sup> Thus substitution for private enterprise and the making of a profit are not, and apparently never have been, decisive factors in determining liability.

The suggestion has been made that incorporation itself should raise a presumption of no immunity.<sup>32</sup> There are some judicial expressions in accord with this.<sup>33</sup> But as a definitive test, it was not usable because some of the great departments of state were incorporated simply as a matter of administrative convenience.<sup>34</sup>

When a basis for liability was found, these corporations became fully liable to process. They were successfully sued in tort<sup>35</sup> and in contract.<sup>36</sup> They gained no immunity from any sort of taxation.<sup>37</sup> Further, if suit were allowed against the corporation, the procedure would be much less difficult than it would be in a similar suit against a corporation found to be an agent of the Crown.<sup>38</sup> Therefore, it became of prime importance to determine the exact

31. *Id.* §§ 1(1)(c), 4(c).

32. Friedmann, *Legal Status of Incorporated Public Authorities*, 22 *Aust. L. J.* 7, 10 (1948).

33. *Mackenzie-Kennedy v. Air Council*, [1927] 2 *K. B.* 517 (action of tort did not lie against the Air Council which is a department of state). Atkin L. J. suggests that if the Council were a corporation, different considerations might apply. *Id.* at 532.

34. See Moore, *Liability for Acts of Public Servants*, 23 *L. Q. Rev.* 12, 16-17 (1907).

35. *Mersey Docks v. Gibbs*, 11 *H. L. Cas.* 86, 11 *Eng. Rep.* 1500 (1866); *Gilbert v. Corporation of Trinity House*, 17 *Q. B. D.* 795 (1886).

36. In *Graham v. Commissioners of Public Works*, [1901] 2 *K. B.* 781, suit against commissioners was allowed because although the "Crown is the real entity pursued, . . . for facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable for the proper conduct of business that persons who contract with the Crown for business purposes should have the same power of appealing to His Majesty's Courts of Justice against a misconstruction of the contract by the head of a department as any subject might have against his fellow subject." *Id.* at 790. For this reason suit is allowed in order to get a declaratory judgment, no execution being possible. On this precedent these commissioners can be sued in contract but not in tort. *Roper v. Commissioners of Public Works*, [1915] 1 *K. B.* 45.

37. Liable for income tax in *Mersey Docks v. Lucas*, 8 *App. Cas.* 891 (1883); for excess profits tax in *Port of London Authority v. Inland Revenue Commissioners*, [1920] 2 *K. B.* 612 (C. A.).

38. "A petition of right is the process by which property of any kind (including money or damages) is recovered from the Crown, whether the basis of the claimant's title be legal or equitable." 9 *HALSBURY'S LAWS OF ENGLAND* 688 (2d ed., Hailsham, 1933). The petition did not lie for recovery in tort. The procedure for bringing such petition is set forth in *HALSBURY, op. cit.*, 693 *et seq.* Before bringing the petition the fiat of the Crown or permission from the Attorney-General had to be obtained. "[E]verybody knows that that fiat is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous." *In re Nathan*, 12 *Q. B. D.* 461, 479 (C. A. 1884). "I personally feel that the whole subject of proceedings against Government departments is in a very unsatisfactory state. . . . I hope that the committee which is now considering the question of proceedings against the Crown will be able to give the subject more effective remedies against Government departments than he has at present." Scrutton L. J. in *Marshall Shipping Co. v. Board of Trade*, [1923] 2 *K. B.* 343, 352 (C. A.). "[I]f a body, whether incorporated or not, is in fact acting in any particular matter as agents of the Crown, they are to be treated as such agents, and from that it follows that the Statute of

legal status of each corporation. The unrolling of the case law made these determinations. It would appear that the basic factor in each case was the precise nature of the function being performed by the incorporated body. If a governmental function is being performed, the property being used for such purposes is occupied for purposes of the country and is not taxable.<sup>39</sup> The Postmaster-General is not liable for the tortious acts of other persons working in the Post Office.<sup>40</sup> Under such circumstances all are employees of the Government and there is no master-servant relationship.<sup>41</sup> The Secretary of State for India is not liable on a pension claim.<sup>42</sup> An incorporated board with no discretionary powers and with exact duties has none of the autonomy to be expected in a separate entity.<sup>43</sup> The measure of control exercised over the instrumentality by the sovereign is clearly an important factor in determining the propriety of granting the immunity of the sovereign to the public body.<sup>44</sup>

With a limited view of what properly constituted a governmental function, successive decisions finally segregated the two types of public corporations. But the distinction between governmental and proprietary functions breaks down completely with a policy of nationalizing the nation's basic industries. This public activity is a substitute for private enterprise, but it is also clear that it is designed to be a permanent substitute and therefore, a governmental function. The extent of transactions involved, however, makes the substitu-

Limitations does not apply to them." *Commissioners of Public Works v. Pontypridd Masonic Hall Co.*, [1920] 2 K. B. 233, 234-5.

39. See note 26 *supra*.

40. *Bainbridge v. The Postmaster-General*, [1906] 1 K. B. 178 (C. A.). The telegraph companies of Great Britain were taken over by the Government and the Postmaster-General was empowered to work them in connection with the administration of the Post Office. 31 & 32 *VICT.*, c. 110, § 4 (1868). Suit arose over the negligence of a wire-layer and the Postmaster-General was made a party. On motion of the Postmaster-General that there was no cause of action against him, the court struck his name from the complaint.

41. Two other reasons were also advanced in the *Bainbridge* case for immunity: (1) There was no legislative provision for funds with which to pay damages incurred by the Postmaster-General in his official capacity. The revenue of the Government cannot be reached in this fashion. *Id.* at 190. (2) The Postmaster-General was not liable in tort before the Post Office took over the telegraph companies and there is no reason why this immunity should not continue afterwards. *Id.* at 193.

42. *Kinlock v. Secretary of State for India*, 15 Ch. D. 1 (C. A. 1880).

43. *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400 (P. C. 1890). "[T]he Government . . . remains in reality the principal, the Commissioners being merely a body through whom its administration may be conveniently carried on." It was not "the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability." *Id.* at 413. In *Fox v. Government of Newfoundland*, [1898] A. C. 667 (P. C.), the Government claimed that it was a preferred creditor as to monies owed education boards by an insolvent bank. This claim was rejected on the ground that the boards were not mere agents of the Government but had powers of discretion to be exercised independently of the Government. In *International Ry. Co. v. Niagara Parks Commission*, [1941] A. C. 328 (P. C.), words in a contract "on their behalf" were held to indicate a power to contract and a consequent liability that was independent of the Government.

44. "In practice, . . . the question of immunity depends in substance on control. . . . The question is whether the central government exercises such a general direction and control over the body in relation to its functions as to deprive it of any will of its own, and to make it the mere instrument of the collective will of the state." Moore, *Liability for Acts of Public Servants*, 23 L. Q. Rev. 12, 24 (1907).

tion of the liability of the sovereign under the Crown Proceedings Act undesirable because of the few remaining areas of immunity retained under the Act. No rationale will be satisfying other than a clear statement of intent to impose liability on such boards as though they were still in private hands.<sup>45</sup> This is the modern result although it was arrived at rather deviously.

The almost complete solution in England of the problem of suing government agencies came with the Crown Proceedings Act of 1947.<sup>46</sup> The barriers to suit in contract are almost completely gone.<sup>47</sup> A few areas of immunity in tort still remain.<sup>48</sup> Under the enabling statutes which introduced the nationalization program, the new corporations are specifically given no immunity from any sort of tax.<sup>49</sup> In short, save for the immunity of the King himself,<sup>50</sup> every individual and public body or agent in England has practically an equal standing in the courts. This should result in full protection for the individual and public advantage by providing rigorous legal accountability on the part of public servants.<sup>51</sup>

#### THE GOVERNMENT CORPORATION IN AMERICA

Since 1791, government corporations have been instruments of national activity in the United States.<sup>52</sup> Today such public authorities have extended their influence over great areas of activity within our economy and deal directly with great numbers of private individuals daily. That the future will bring more of these public bodies seems inevitable. The Missouri Valley

45. "I believe it to be an unquestionable principle of legal policy in a modern democratic society in which public and private enterprise operate side by side that if the State directly or indirectly engages in activities which may, through contract, torts, or in other ways interfere with the life and security of the private citizen, it should as far as possible be made legally responsible to the same extent as private legal persons." Friedmann, *Legal Status of Incorporated Public Authorities*, 22 *Aust. L. J.* 7, 8 (1948).

46. 10 & 11 *Geo. VI*, c. 44.

47. The Act removes the need for securing a petition of right by permitting suit against the Crown in all cases in which such a petition was formerly necessary. Since this was the only method available for recovery against the Crown, the limitations on its use, except as otherwise provided for in this Act, remain in effect. Street, *Crown Proceedings Act, 1947*, 11 *Mon. L. Rev.* 129, 130-2 (1948), lists four situations in which there is still no recovery: (1) Neither a member of the armed forces nor a civil servant may sue the Crown for any breach of contract of employment nor for arrears of pay, (2) all contracts made by the Crown are subject to an implied condition that the necessary funds are granted by Parliament, (3) the Crown cannot hamper its future executive action, (4) quasi-contract. In 9 *HALSBURY'S LAWS OF ENGLAND* 691-2 (2d ed., Hailsham, 1933), other situations are cited.

48. The tort aspects of the Act are discussed in Barnes, *The Crown Proceedings Act, 1947*, 26 *CAN. B. REV.* 387 (1948); Sweet, *Crown Proceedings Act, 1947*, 11 *Mon. L. Rev.* 129 (1948). The major omission commented upon by these writers is the continuing immunity for breach of a statutory duty which is binding only upon the Crown.

49. Nothing in the Act "shall be deemed to exempt the Board from liability for any tax, duty, rate, levy, or other charge whatsoever, whether general or local." Coal Industry Nationalisation Act, 1946, 9 & 10 *Geo. VI*, c. 59, § 47; Transport Act, 1947, 10 & 11 *Geo. VI*, c. 49, § 10; Electricity Act, 1947, 10 & 11 *Geo. VI*, c. 54, § 11 (1); Civil Aviation Act, 1946, 9 & 10 *Geo. VI*, c. 70, § 6(1).

50. 10 & 11 *Geo. VI*, c. 44, § 40(1).

51. See notes 3 and 11 *supra*.

52. The Bank of the United States was incorporated in 1791. 1 *STAT.* 191 (1791).



Authority is in the blueprint stage. The nationalization of some of our basic industries is always a possibility. If atomic energy, the production and distribution of which is now a government monopoly, is made available for extensive civilian use, such activities will be probably best handled through the agency of a government corporation. But the present extent of corporate activity is sufficient to merit consideration of the legal standing of these public bodies.<sup>53</sup> The successful use of these instruments during the first World War encouraged an extraordinary extension of their use in the New Deal efforts to combat the depression. This expansion of corporate activity was not only extensive, but also disorderly. A leading case arose over the legal status of government corporations created by a government corporation.<sup>54</sup> Corporations were created by executive order in other states or in the District of Columbia. In addition, Congress also created some. This lack of uniformity in creation produced a great variety of legal problems, such as questions of jurisdiction and removal.

In 1945 Congress passed the Government Corporation Control Act.<sup>55</sup> This enactment brought all government corporations under the close scrutiny of Congress, required an annual budget in prescribed form and provided for an annual audit by the General Accounting Office. A further provision required that all existing government corporations created under the laws of any state or territory or of the District of Columbia were to be dissolved and were to be reincorporated by Congress.<sup>56</sup> An early reaction to the Act was that "American experience with autonomous corporations is substantially at an end."<sup>57</sup> Time will determine the accuracy of this conclusion. What does appear certain is that Congress has imposed upon the incorporated instrumentalities of the federal government a uniformity of control. If carried much further this would substantially weaken any judicial assertion that, in the absence of statute, the congressional intent was to create a legal entity whose standing in the courts would be the same as any private individual. In the absence of

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53. The pioneer work in the bibliography of this field is VAN DORN, *GOVERNMENT OWNED CORPORATIONS* (1926). A later work is that of THURSTON, *GOVERNMENT PROPRIETARY CORPORATIONS IN THE ENGLISH-SPEAKING COUNTRIES* (1937). See also Culp, *Creation of Government Corporations by the National Government*, 33 MICH. L. REV. 473 (1935); Thurston, *Government Proprietary Corporations*, 21 VA. L. REV. 351, 465 (1935); Schnell, *Federally Owned Corporations and Their Legal Problems*, 14 N. C. L. REV. 238, 337 (1936); McIntire, *Government Corporations as Administrative Agencies: An Approach*, 4 GEO. WASH. L. REV. 161 (1936); Pinney, *The Legal Status of Federal Government Corporations*, 27 CAL. L. REV. 712 (1939); also Notes in 27 MICH. L. REV. 786 (1929); 83 U. OF PA. L. REV. 346 (1935). The only article on the legal status of these corporations since the passage of the Government Corporation Control Act in 1945 appears to be Coffman, *Legal Status of Government Corporations*, 7 FED. B. J. 389 (1946).

54. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 59 Sup. Ct. 516, 83 L. Ed. 784 (1939).

55. 59 STAT. 597 (1945), 31 U. S. C. A. § 841 (Supp. 1948). See Pritchett, *The Government Corporation Control Act of 1945*, 40 AMER. POL. SCI. REV. 495 (1946); also H. R. REP. NO. 853, 79th Cong., 1st Sess. (1945).

56. 59 STAT. 602 (1945), 31 U. S. C. A. § 869 (Supp. 1948).

57. Pritchett, *supra* note 55 at 509.

statute, amenability to legal process is most easily found by pointing to autonomy in fact of the public agency concerned.

The judicial attitude towards government corporations has always been colored by the fact that they are and can only be appropriate means to carry out the enumerated powers of Congress. Congress can create such agencies for no other purpose. In this sense, these corporations are always performing governmental functions. As such they have been consistently protected from any attempt by the individual states of the Union to tax or regulate them.<sup>58</sup> But in regard to other problems, such as liability, the status of these corporations has created many difficulties. Great judges have differed in successive opinions.<sup>59</sup>

The idea of the immunity of the sovereign was early found in judicial opinion in America, as has been indicated above.<sup>60</sup> But the gradual withdrawal from governmental "legal irresponsibility"<sup>61</sup> has been continuous. Was a public corporation to share this immunity or was it to be liable to process for acts arising out of transactions with private citizens? If the question is reduced to when and why is liability allowed, the answer is that four theories, at least, have received judicial sanction as forming a basis for finding liability. The courts have held at various times that a corporation is liable (1) when it is a trading company, (2) when it is an agent of the government, (3) when it is a separate entity from the government and (4) when Congress expresses an intent that it shall be so liable. These theories will be discussed in order.

(1) Chief Justice Marshall first presented the idea that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."<sup>62</sup> As a test for all varieties of such public

58. For denial of right to regulate see *Johnson v. Maryland*, 254 U. S. 51, 41 Sup. Ct. 16, 65 L. Ed. 126 (1920). "Notwithstanding the corporate entity and its subjection to suit, the Authority is plainly a governmental agency of the United States, and except as Congress may otherwise consent, is free from state regulation or control"; therefore TVA's employees are not covered by Alabama's Workmen's Compensation laws. *Posey v. Tennessee Valley Authority*, 93 F. 2d 726, 727 (C. C. A. 5th 1937). The leading case denying the right of state to tax such corporations is *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (U. S. 1819). Home Owners' Loan Corporation not subject to state recording tax on mortgages. *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 60 Sup. Ct. 15, 84 L. Ed. 11 (1939). Employees of HOLC are subject to a non-discriminatory state income tax. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. Ed. 927 (1939). See Stoke, *State Taxation and the New Federal Instrumentalities*, 22 IOWA L. REV. 39 (1936).

59. Compare the opinions of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (U. S. 1819) and in *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244 (U. S. 1824). Also compare the approaches of Mr. Justice Holmes in *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U. S. 549, 42 Sup. Ct. 386, 66 L. Ed. 762 (1922); *United States Grain Corp. v. Phillips*, 261 U. S. 106, 43 Sup. Ct. 283, 67 L. Ed. 552 (1923); and in *Clallam County v. United States*, 263 U. S. 341, 44 Sup. Ct. 121, 68 L. Ed. 328 (1923).

60. See *supra* note 5.

61. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 388, 59 Sup. Ct. 516, 83 L. Ed. 784 (1939).

62. *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 907, 6 L. Ed. 244 (U. S. 1824). Georgia was one of the incorporators of the Planters' Bank.

agencies, the criterion presents obvious limitations, and has been seldom used except when in combination with one or more of the criteria to be considered below.<sup>63</sup>

(2) The leading statement on the liability of the government corporation when it is an agent of the sovereign was made in *Sloan Shipyards v. Emergency Fleet Corporation*.<sup>64</sup> Mr. Justice Holmes pointed out that from far back in the common law, it had been the rule that whatever the immunity of the sovereign might be, none of it accrued to the agent to preserve that agent from the consequences of his tortious acts. He also found that it was not possible to universalize this doctrine into a consistent conception of the government corporation in our society. A year later he found that the funds of the United States Grain Corporation were in fact funds of the United States. He distinguished the *Sloan* case by saying that "imponderables have weight."<sup>65</sup> About the same time he refused to permit a county to tax an instrumentality of the United States—the United States Spruce Corporation.<sup>66</sup>

Treatment of the corporation as the agent of the government has produced apparently irreconcilable results. The agent does not have the immunity of the sovereign principal;<sup>67</sup> but the sovereign, as a disclosed principal, may sue on the contracts of his agent;<sup>68</sup> the agent is not, as disclosed agent, liable on contracts made by it for the sovereign,<sup>69</sup> but then again, such an agent may be liable if such contracts are executed in the agent's own name.<sup>70</sup> The agency theory of these corporations had, at best, an *ad hoc* usefulness, but clearly produced no consistency so long as the courts felt impelled to protect the government from its citizens.

(3) The agency rationale in the *Sloan* case does not raise any necessary

63. *Salas v. United States*, 234 Fed. 842, 844 (C. C. A. 2d 1916); *The No. 34*, 11 F. 2d 287 (D. Mass. 1925); *United States v. Skinner & Eddy Corp.*, 28 F. 2d 373 (W. D. Wash. 1928).

64. 258 U. S. 549, 42 Sup. Ct. 386, 66 L. Ed. 762 (1922).

65. *United States Grain Corp. v. Phillips*, 261 U. S. 106, 43 Sup. Ct. 283, 67 L. Ed. 552 (1923).

66. *Clallam County v. United States*, 263 U. S. 341, 44 Sup. Ct. 121, 68 L. Ed. 328 (1923).

67. An agent in a private capacity is not immune; an agent in a governmental capacity is. Cases in which the corporation was immune are *Ballaine v. Alaska Northern Ry. Co.*, 259 Fed. 183 (C. C. A. 9th 1919) (tort action); *Keeley v. Kerr*, 270 Fed. 874 (D. Ore. 1921) (probably overruled by *Sloan* case); *Clallam County v. United States*, 263 U. S. 341, 44 Sup. Ct. 121, 68 L. Ed. 328 (1923) (corporation an agent but solely for war purposes and therefore not taxable); *Southern Bridge Co. v. Emergency Fleet Corp.*, 266 Fed. 747 (S. D. Ala. 1920) (probably overruled by *Sloan* case).

68. *Tanner-Gross & Co. v. Elwell & Co.*, 2 F. 2d 396 (S. D. N. Y. 1924); *United States v. Czarnikow-Rionda Co.*, 40 F. 2d 214 (C. C. A. 2d 1930), *cert. denied*, 282 U. S. 844 (1930). If contract is under seal, no party not signing may sue on it and therefore even though the corporation signed as representing the United States, the United States not being a signatory could not sue on it. *United States v. New Amsterdam Casualty Co.*, 52 F. 2d 148 (S. D. N. Y. 1931). *Contra*: *Crane v. United States*, 55 F. 2d 734 (Ct. Cl. 1932), *cert. denied*, 287 U. S. 601 (1932).

69. *United States v. Skinner & Eddy Corp.*, 28 F. 2d 373 (W. D. Wash. 1928).

70. *Merchant Fleet Corp. v. Harwood*, 281 U. S. 519, 50 Sup. Ct. 372, 74 L. Ed. 1011 (1930).

inference of immunity. The Secretary of State is as much an agent<sup>71</sup> or instrumentality of the government as is the Emergency Fleet Corporation. For this reason, many courts made liability turn upon the nature of the agent, in particular, an agent who was clearly a separate entity from the government. When a public body was incorporated in a state, a presumption was raised that an entity distinct from the sovereign was intended<sup>72</sup> and that such an entity was not to share in the immunities of the sovereign. Incorporation, wherever it took place, created a separate entity distinct from the stockholders, even though the sole stockholder might be the government.<sup>73</sup> Under this theory, whatever the immunities of the stockholders, none accrued to the corporation.

These approaches to the problem are today on an insecure foundation in the light of the Government Corporation Control Act and the spreading attack upon the entity theory of the corporation. Congress is manifesting no clear-cut intent to create agencies very far divorced from it, and these corporations are now chartered only by Congress. Further, the courts have often disregarded the corporate entity to protect government interests when the occasion demanded.<sup>74</sup> The occasions upon which this process has taken place have been such as to permit an inference that the government has been favored almost exclusively. One observer of these varying judicial attitudes has referred to the "chameleonic quasi-private, quasi-public corporate form,"<sup>75</sup>

71. *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171 (1882) (while the United States cannot be sued without its consent, this does not preclude suit against an agent of the United States wrongfully holding property, even though such holding is in the name of the United States).

72. The difference in status is sometimes indicated by contrasting "private" and "public." *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U. S. 81, 61 Sup. Ct. 485, 85 L. Ed. 595 (1941); *Panama R. Co. v. Curran*, 256 Fed. 768 (C. C. A. 5th 1919) (rejects agency theory but also adopts corporate entity theory); *Cohn v. United States Shipping Board*, 20 F. 2d 56 (C. C. A. 6th 1927); or by simply speaking of the separate entity. *United States v. Strang*, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. 368 (1921). *Manufacturers' Land & Improvement Co. v. Emergency Fleet Corp.*, 284 Fed. 231, 234 (C. C. A. 3d 1922), *aff'd*, 264 U. S. 250, 44 Sup. Ct. 314, 68 L. Ed. 664 (1924) ("The meaning of incorporation is that the corporate entity is a person, and as such is subject to the general rules of law"); *Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 294 Fed. 641 (C. C. A. 2d 1923), *cert. denied*, 264 U. S. 586 (1924); *Emergency Fleet Corp. v. Tabas*, 22 F. 2d 398 (C. C. A. 3d 1927). At other times the difference was indicated by saying that such a corporation was "meant to be a legal person without immunity quite as much as any other corporation." *Gould Coupler Co. v. Emergency Fleet Corp.*, 261 Fed. 716 (S. D. N. Y. 1919); *Pope v. Emergency Fleet Corp.*, 269 Fed. 319 (S. D. Fla. 1920); *Traylor Engineering & Mfg. Co. v. Emergency Fleet Corp.*, 277 Fed. 248 (E. D. Pa. 1922); *Emergency Fleet Corp. v. South Atl. Dry Dock Co.*, 300 Fed. 56 (C. C. A. 5th 1924).

73. Liability imposed whether government is part owner as in *United States v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244 (U. S. 1824); or sole owner as in *Emergency Fleet Corp. v. Tabas*, 22 F. 2d 398 (C. C. A. 3d 1927).

74. See *North Dakota-Montana Wheat Growers' Ass'n v. United States*, 66 F. 2d 573 (C. C. A. 8th 1933), *cert. denied*, 291 U. S. 672 (1933), where the defendants were confronted with the United States trying to foreclose a mortgage held by the unincorporated Federal Farm Board. No counterclaim was permitted against the government and the court advised suit against the Board as their only recourse. Query as to whether suit against the Board would have been allowed initially.

75. THURSTON, *GOVERNMENT PROPRIETARY CORPORATIONS IN THE ENGLISH-SPEAKING COUNTRIES* 41 (1937).

which is but another mode of indicating the uncertainties arising out of the dual role played by these bodies.

(4) The currently favored rationale is that of Congressional intent.<sup>76</sup> In the creation of its agent, did Congress contemplate making it amenable to the law as are other private corporations? If the statute is not clear, the courts search into the purposes of the legislation for implications of such intent.<sup>77</sup> The admission was frankly made that such implications are more easily found for, say, amenability to judicial process than to liability for taxes.<sup>78</sup> The scope of judicial inquiry when Congress is silent is obvious. If the decisive factor in determining the judicial attitude to be adopted towards a government corporation is the clarity with which Congress has indicated the status of such a body, the problem may reduce itself to one of statutory draftsmanship. Congress must carefully spell out the relationships that such corporations are to bear to individuals and to the state governments. The problem still remains, however, of the most desirable relationships to be created.

This discussion of the present judicial opinion towards government corporations should indicate the confusion existent in the field. Prediction from past cases is not always possible because of the overhanging thought that "imponderables have weight."<sup>79</sup> But recent pronouncements of the Supreme Court have indicated an intention to limit the immunity of the sovereign and its agents as much as possible.<sup>80</sup>

The present status of these corporations can perhaps be more clearly indicated by setting forth their legal problems in terms of the factual situations, such as torts or crimes, in which these bodies have been involved as litigants.

(1) *Torts*. Recovery for the torts of these bodies has been granted and denied on the various bases indicated above. Corporations have been liable

76. *Federal Housing Administration v. Burr*, 309 U. S. 242, 60 Sup. Ct. 488, 84 L. Ed. 724 (1940); *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 60 Sup. Ct. 15, 84 L. Ed. 11 (1939); *Federal Land Bank v. Priddy*, 295 U. S. 229, 55 Sup. Ct. 705, 79 L. Ed. 1408 (1935); *United States v. Strang*, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. 368 (1921).

77. "If the answer is not made plain by the words of the statute, it is necessary to ascertain by examination of the purposes and organization of the federal farm loan system, whether immunity from attachment is granted by implication." *Federal Land Bank v. Priddy*, 295 U. S. 229, 231-32, 55 Sup. Ct. 705, 79 L. Ed. 1408 (1935).

78. *Id.* at 237.

79. See *supra* note 65.

80. "In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. . . . [S]uch a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope." *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 390-91, 59 Sup. Ct. 516, 83 L. Ed. 784 (1939). "[W]e start from the premise that . . . waivers by Congress of governmental immunity in case of . . . federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned." *Federal Housing Administration v. Burr*, 309 U. S. 242, 245, 60 Sup. Ct. 488, 84 L. Ed. 724 (1940).

as agents which could not claim the immunity of the sovereign and immune as instrumentalities of the sovereign.<sup>81</sup> Because of recent Supreme Court decisions, it was supposed that the climate of opinion had so changed that a statement such as that of David Lilienthal that "Few would dispute the proposition that when the Government enters the business field it should be subject, equally with any other business enterprise, to liability for its torts,"<sup>82</sup> merely stated a truism. But a recent development under the Federal Tort Claims Act<sup>83</sup> raises some doubt as to the accuracy of that statement. This Act provides the exclusive remedy for any tortious act of a federal agency.<sup>84</sup> In the definition of federal agency is found included all government corporations "whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names."<sup>85</sup> If this latter clause does not have any limiting meaning as to the type of corporation involved, it adds nothing to the sentence. If this clause defining the kinds of agencies liable does not limit suit in tort against government corporations to special situations, then the only other meaning it has is to preclude all further suit in tort against all government corporations. The only judicial decision in the federal courts on this point to date has reached this latter result in an action against the Inland Waterways Corporation.<sup>86</sup> It is submitted that this result is neither desirable nor necessary.

81. Corporations were held liable in tort in *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U. S. 549, 42 Sup. Ct. 386, 66 L. Ed. 762 (1922); *Panama R. Co. v. Curran*, 256 Fed. 768 (C. C. A. 5th 1919); *Panama R. Co. v. Minnix*, 282 Fed. 47 (C. C. A. 5th 1922). Corporations held not liable in tort in *Ballaine v. Alaska Northern Ry. Co.*, 259 Fed. 183 (C. C. A. 9th 1919); *Keeley v. Kerr*, 270 Fed. 874 (D. Ore. 1921). The authority of the *Sloan* case would be greater if Mr. Justice Holmes had not also written two other opinions on the same subject. In *Clallam County v. United States*, 263 U. S. 341, 44 Sup. Ct. 121, 68 L. Ed. 328 (1923), he denied the county the right to tax the United States Spruce Corporation on the ground that this was an "agent created . . . for the sole purpose of producing a weapon for the war. This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Id.* at 345. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (U. S. 1819), indicates that this profit motive is immaterial in that a majority of the Bank's stock was privately owned and Maryland still could not tax it. The other case in which Mr. Justice Holmes protected a corporation was in *United States Grain Corp. v. Phillips*, 261 U. S. 106, 43 Sup. Ct. 283, 67 L. Ed. 552 (1923), *supra* note 65.

82. Lilienthal & Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 HARV. L. REV. 545, 567 (1941).

83. 60 STAT. 843 (1946), 28 U. S. C. A. § 921 (Supp. 1948). For critical consideration of the Act, see Gellhorn and Schenck, *Tort Actions Against The Federal Government*, 47 COL. L. REV. 722 (1947); Note, *The Federal Tort Claims Act*, 56 YALE L. J. 534 (1947).

84. Sec. 423 of the Act.

85. *Id.* § 402(a). Sec. 421(1) excludes from the provisions of the Act "any claim arising from the activities of the Tennessee Valley Authority."

86. *Wickman v. Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn. 1948). Since there was no case authority on the point, the court cited two law review articles in support of its position. The first article, Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1, 10, 62 (1946), clearly supports the position that suits against the corporation are now ruled out. In accord with this position are a Note, *The Federal Tort Claims Act*, 42 ILL. L. REV. 344, 348-9 (1947), and a speech by District Judge Hulen reprinted in 7 F. R. D. 689, 697 (1948). The second article cited by the court, Anderson, *Recovery from the United States under the Federal Tort Claims*

It is not necessary because the very purpose of the Federal Tort Claims Act was to extend the amenability of public servants to legal process for their tortious acts. It is not likely that the urge for uniformity was so great as to produce a contraction in the liability of government corporations. The language of the Act touching on government corporations should be considered in the light of the general purpose for which the Act was passed. It should not be construed to restrict the scope of liability when enacted for the very purpose of extending it. Certainly the Inland Waterways Corporation is the very type of public body that under any theory of liability has always been held unequivocally to have a standing in the courts that was the exact equivalent of the ordinary private citizen.

The result was not desirable because now the liability of these corporations is contracted within the limits imposed by the Act itself. Suit against these bodies must follow the procedure set forth in the Act. Suit is before a District Judge, sitting without a jury.<sup>87</sup> The statute of limitations is reduced to one year on all claims.<sup>88</sup> The United States is not liable for interest prior to judgment nor for punitive damages.<sup>89</sup> Under heavy penalties, all attorney's fees are restricted to 20% of the recovery.<sup>90</sup> Costs will be allowed against the government, but such costs will not include attorney's fees.<sup>91</sup> Perhaps the most important limitation is that a large number of torts are specifically excluded from the coverage of the Act.<sup>92</sup>

(2) *Contracts*. In respect to contract claims, the United States has permitted suit against itself on claims "not sounding in tort" since 1887.<sup>93</sup> This granted a measure of protection to one dealing with these public bodies regardless of the theory assumed by the court as to their status. But a suit against a separate entity has important differences when contrasted with suits against the sovereign that again call for clarification by Congress. The differences are indicated in the varying effects of the "sue and be sued" clause

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*Act*, 31 MINN. L. REV. 456, 460-1 (1947), leaves some doubt as to its precise position. Other articles that find that government corporations under some circumstances may not be acting as government instrumentalities are Baer, *Suing Uncle Sam in Tort*, 26 N. C. L. REV. 119, 122 (1948); Note, *The Federal Tort Claims Act*, 56 YALE L. J. 534, 538-9 (1947). Apparently *contra* to the *Wickman* case is *Wagner v. Panama R. Co.*, 81 N. Y. S. 2d 546 (Sup. Ct. 1948) (plaintiff suing for damages for personal injuries under Jones Act; motion to dismiss because exclusive remedy was under Federal Tort Claims Act denied; special act will not be repealed by implication).

87. Sec. 410(a).

88. Sec. 420(a).

89. Sec. 410(a).

90. Sec. 422. For reaction of New York Bar to this clause, see Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722, 734-5 (1947).

91. Sec. 410(a).

92. Sec. 421(a) forbids suit on claim arising out of act or omission performed with due care or omission to act, arising out of the statutory duty of the federal agency. Sec. 411(b) forbids suit on any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

93. The Tucker Act, 24 STAT. 505 (1887), 28 U. S. C. A. § 250(1) (1928).

that has been uniformly included in the enabling acts of these corporations since the establishment of the first Bank of the United States in 1791.<sup>94</sup>

Questions arose as to the content of this clause. Was it to be strictly construed as simply another power given by the sovereign to its instrumentality or was there an implication that the corporation was thereby to be in the eyes of the court only another litigant? Only recently was it decided that the clause "embraces all civil process incident to the commencement or continuance of legal proceedings."<sup>95</sup> A corporation may therefore be garnisheed for the wages of an employee.<sup>96</sup> If it does not appear to interfere with the performance of its duties, such body may have its property attached as a normal incident of bringing suit against it.<sup>97</sup> If the corporation loses its suit and judgment is given against it, the judgment will be paid with the normal interest,<sup>98</sup> and the court costs proper to any other litigant will also be paid.<sup>99</sup> The fact that the Federal Tort Claims Act<sup>100</sup> is not so liberal as this serves to emphasize the statement that suit against the sovereign is not a satisfactory substitute for suit against the corporation.

(3) *Crimes*. When crimes are the matter in issue, the United States has acted to protect its interests. For example, the question must arise as to whether a statute protecting the United States from fraud, includes government corporations within its coverage. Once again the question is when is an instrumentality of the United States an agent. The test has been made clear, if not its application. This test is "bottomed on the broad ground that the fraud which interferes with the successful operation of the Government is within the statute."<sup>101</sup> It is certain that the judicial interpretations of what

94. 1 STAT. 192 (1791). This was a valid grant of power. *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204 (U. S. 1824).

95. *Federal Housing Administration v. Burr*, 309 U. S. 242, 245, 60 Sup. Ct. 488, 84 L. Ed. 724 (1940).

96. *Ibid. Accord*, *Commonwealth Finance Corp. v. Landis*, 261 Fed. 440 (E. D. Pa. 1919) (*Emergency Fleet Corp.*). The *Burr* case must be taken to override *McCarthy v. Merchant Fleet Corp.*, 53 F. 2d 923 (App. D. C. 1931), *cert. denied*, 285 U. S. 547 (1931), which distinguished the power to sue or be sued from garnishment on the basis that such power is related to the corporation's own duties or liabilities whereas garnishment is not. But a disbursing agent of the government may not be garnisheed. *Buchanan v. Alexander*, 4 How. 20, 11 L. Ed. 857 (U. S. 1845) (purser on a naval vessel).

97. *Federal Land Bank v. Priddy*, 295 U. S. 229, 55 Sup. Ct. 705, 79 L. Ed. 1408 (1935).

98. *National Home for Disabled Volunteer Soldiers v. Parrish*, 229 U. S. 494, 33 Sup. Ct. 944, 57 L. Ed. 1296 (1913).

99. *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U. S. 81, 61 Sup. Ct. 485, 85 L. Ed. 595 (1941).

100. 60 STAT. 846 (1946), 28 U. S. C. A. § 943 (Supp. 1948).

101. *Pierce v. United States*, 314 U. S. 306, 62 Sup. Ct. 226, 86 L. Ed. 241 (1941) (impersonation of officer of TVA not within criminal statute against impersonating officer of the United States). For purposes of criminal law forbidding agent of United States from being an officer in any corporation with which he was instrumental in having business relations with government, an inspector of *Emergency Fleet Corporation* was not an agent of the United States. *United States v. Strang*, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. 368 (1921). Conspiracy to defraud *Emergency Fleet Corporation* is conspiracy to defraud the United States and punishable as such. *United States v. Union Timber*



interferes with the successful operation of the Government will be many. The underlying premise is, in fact, just one step beyond this and may be quickly spelled out by a court's statement that the fraud in question "if successful would have resulted in a pecuniary loss to the United States" and, almost as an afterthought, "and even more immediately would have impaired the efficiency of its very important instrument."<sup>102</sup>

(4) *Public Funds*. There has never been any doubt on the part of the judiciary when it was a question of an immediate loss of public funds. If the Emergency Fleet Corporation made an overpayment, the United States could sue for its recovery.<sup>103</sup> The Inland Waterways Corporation's bank deposits are public funds that a national bank may pledge its assets to secure.<sup>104</sup> When the FHA had an assigned claim upon which the statute of limitations had run, suit was permitted because it was acting for the United States in a governmental capacity.<sup>105</sup>

#### CONCLUSION

Such is the status of the government corporations in the United States and in England. The attempt has been made to show the varying attitudes that courts have adopted towards them. Clarification in the American approach is needed. For guidance, the example of England has been pointed out. In Great Britain great numbers of new public bodies, mostly incorporated, are being created by the government and all of them seem to be without any special privileges and are required to make their way through the English courts as though

Products Co., 259 Fed. 907 (W. D. Wash. 1919); *United States v. Carlin*, 259 Fed. 904 (E. D. Pa. 1917).

102. *United States v. Walter*, 263 U. S. 15, 18, 44 Sup. Ct. 10, 68 L. Ed. 137 (1923).

103. *Russell Wheel & Foundry Co. v. United States*, 31 F. 2d 826 (C. C. A. 6th 1929).

104. *Inland Waterways Corp. v. Young*, 309 U. S. 517, 60 Sup. Ct. 646, 84 L. Ed. 901 (1940).

105. *United States v. Summerlin*, 310 U. S. 414, 60 Sup. Ct. 1019, 84 L. Ed. 1283 (1940). Claims against the United States which are assigned are void; claims against Emergency Fleet Corporation are freely transferable because corporation is a separate entity. *Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 3 F. 2d 154 (E. D. N. Y. 1924), *cert. denied*, 264 U. S. 586 (1924) (also holds that unliquidated claims against corporation are not claims against the United States). Action on a wrongful death statute against the corporation was not action against the United States so that the former action pending against the United States did not expand the statutory period for bringing the action. *Lindgren v. Merchant Fleet Corp.*, 55 F. 2d 117 (C. C. A. 4th 1932), *cert. denied*, 286 U. S. 542 (1931). The status of these corporations in bankruptcies and equity receiverships is confused. Emergency Fleet Corporation had no priority in bankruptcy because as agent it had not such right which accrued only to sovereign. *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U. S. 549, 42 Sup. Ct. 386, 66 L. Ed. 762 (1922) (Taft, C. J., concurred in result but on grounds that such priorities extended only to tax claims; *id.* at 574). United States filing a claim on behalf of FHA in state equity receivership had priority. *United States v. Emory*, 314 U. S. 423, 62 Sup. Ct. 317, 86 L. Ed. 315 (1941) (dissent thought *Sloan* case should apply; *id.* at 437 n. 12). *Contra* as to Emergency Fleet Corporation: *West Virginia Rail Co. v. Jewett Bigelow & Brooks Coal Co.*, 26 F. 2d 503 (E. D. Ky. 1928). See Rogge, *The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships*, 43 HARV. L. REV. 251 (1929); Note, *Priority of the "United States" against Insolvent Debtors*, 47 COL. L. REV. 485 (1947).

they were private litigants. It is submitted that this attitude is not only in accord with our principles of justice but is also necessary to protect the civil liberties of private citizens from the pressures of increasing numbers of public bodies dealing with the ordinary affairs of the citizenry. "We may conclude with a paradox: In the law of proprietary corporations, the public interest is best served by regarding them as private."<sup>106</sup>

106. THURSTON, GOVERNMENT PROPRIETARY CORPORATIONS IN THE ENGLISH-SPEAKING COUNTRIES 103 (1937).

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