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Comments: The Constitutionality of the Tennessee Valley Authority

upon a formula is a slumber that, prolonged, means death."[133] The added security and certainty afforded the operations of government commend the advisory opinion as an integral instrument of effective administration.

THE CONSTITUTIONALITY OF THE TENNESSEE VALLEY AUTHORITY.—The constitutionality of the elaborate and extensive power development program of the federal government[1] will be tested in the Supreme Court during the present term in so far as this program is embodied in the Tennessee Valley project. While the movement for developing the Tennessee River is not of recent origin,[2] the whole project as now conceived is a colossal experiment in regional planning,[3] particularly identified with the present administration and as characteristically "New Deal" as the N.I.R.A. Will it meet the same fate?[4]

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as, and if the advisory opinion is introduced into federal jurisprudence. It is of primary importance that a reasonable time be allowed for a thorough disposition of the questions submitted. Also, some precaution will have to be taken against overwhelming the Court with minor and insignificant matters. These are problems of legislative draftsmanship, and there is no cause for believing that they cannot be properly and adequately handled in a carefully drawn amendment. The objection that in all events the work of the already overburdened Court will be greatly increased is more specious than substantial. It seems a logical assumption that the advisory opinion will prevent considerable litigation which now engages the attention of the Court by minimizing the number of unconstitutional laws, and that this curtailment of litigation will at least balance the added volume of advisory duties.

133. HOLMES, COLLECTED LEGAL PAPERS (1920) 306.

1. "Four great power areas are projected: (1) the Tennessee Valley in the southeast; (2) the Boulder Dam on the Colorado River in the southwest; (3) the Columbia River in the northwest; and (4) the St. Lawrence River in the northeast, the development of which requires a treaty between the federal government and the Dominion of Canada." Albertsworth, *Constitutional Issues of the Federal Power Program* (1935) 29 ILL. L. REV. 833, 841.

2. "Representative John R. Mitchell of Tennessee . . . during the debate on the Tennessee Valley Authority Act, pointed out that plans for controlling the flow of the Mississippi dated as far back as 1824, when the Secretary of War, John C. Calhoun, recommended a survey in the interest of what was then a matter of great national importance—inland waterway commerce. [77 CONG. REC. 2256 (1933)] . . . the matter was not seriously revived until the outbreak of the World War in 1914 . . . [when] the Federal government, as well as private munition makers in America, began to feel the pressure for the production of nitrates. . . . President Wilson secured the enactment by Congress . . . of the National Defense Act [39 STAT. 215 (1916), 50 U. S. C. A. § 79 (1926)]. The purpose of course, was primarily for the manufacture of synthetic nitrates [*i.e.*, artificial extraction of nitrates from the atmosphere] in the interest of national defense . . . over $100,000,000 was spent for the construction of Wilson Dam at Muscle Shoals, Ala., together with two subsidiary nitrate plants and minor incidental projects. . . . The War ended, however, before the project could be carried out. After a curtailment of the construction work on the Wilson Dam in 1921, it was decided to proceed with its completion, but no decision was reached as to the method of utilizing the power that would be developed until the passage of the Tennessee Valley Authority Act in 1933." Welch, *Constitutionality of the Tennessee Valley Project* (1935) 23 GEO. L. J. 389, 391.

3. One of its primary purposes is to conduct a large-scale experiment in regional economic and social planning. See Morgan, *Planning in the Tennessee Valley* (1933) 38 CUR. HIST. 663; Brown, *The Tennessee Valley Idea* (1934) 40 *id.* at 410; Morgan, *The Tennessee Valley Authority* (1934) 38 SCI. MO. 64.

4. The N.I.R.A. was declared unconstitutional, although on grounds which are not simi-

In the *Tennessee Valley Authority* (TVA)[5] *Case,* preferred stockholders[6] of the Alabama Power Company attacked the validity of contracts, entered into by the company and the TVA, for the sale of corporate properties to the Authority.[7] The District Court for the Northern District of Alabama upheld the contention of the stockholders that the contracts were void on the ground that the TVA had exceeded the authority granted to it by Congress and enjoined further performance of the contracts.[8] This decree was reversed by the Circuit Court of Appeals for the Fifth Circuit[9] on the ground that, in the exercise by Congress of the war and commerce powers conferred upon it by the Constitution, the TVA, as an agency of the United States, has the constitutional right and the statutory authority to dispose of all the electric power that the Wilson Dam, operated to its full capacity, can be made to produce.[10]

The original question in the case concerned the validity of a particular contract, dated January 4, 1935, by which the Alabama Power Company agreed to sell such of its transmission lines, as extend from the Wilson Dam at the Muscle Shoals plant in Alabama, to the TVA.[11] If this contract was void

larly involved in the TVA problem. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

5. The Tennessee Valley Authority, of which the United States is the sole stockholder, was created May 18, 1933, by the TVA Act. 48 STAT. 58, 16 U. S. C. A. § 831 (1933). For a detailed discussion of the Act, see Welch, *loc. cit. supra* note 2.

6. Preferred stockholders brought suit after they had formally but unsuccessfully demanded that the Alabama Power Company itself institute suit to rescind these contracts. The right of the stockholders to bring such a suit was conceded but the question was not considered further inasmuch as they were entitled to assert only the rights of the Alabama Power Company. Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578, 581 (C. C. A. 5th, 1935). This, in itself, is a new idea. Comment (1935) 48 HARV. L. REV. 806, n. 1.

7. The stockholders also attacked the right of the Authority to sell electric energy to municipalities.

8. Ashwander v. Tennessee Valley Authority, 8 F. Supp. 893 (N. D. Ala. 1934) (motion to dismiss the bill for want of equity denied); 9 F. Supp. 800 (N. D. Ala. 1935) (motion to dissolve the restraining order denied); 9 F. Supp. 965 (N. D. Ala. 1935) (decree granted). The district court did not pass on the constitutionality of the Act creating the TVA, either on the question of whether there was undue delegation of legislative authority or whether Congress had exceeded its constitutional power in authorizing the TVA to conduct such a proprietary business. The court confined itself to the interpretation of the Act and held that a fair construction of that Act limited the right of the TVA to sell any energy that was not surplus energy, legitimately created in the exercise of a *bona fide* effort to produce only such power as was needed for purposes of national defense or navigation.

9. Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578 (C. C. A. 5th, 1935).

10. It should be noted that, while a decision of the Supreme Court adverse to the government would be fatal to the TVA experiment, a decision favorable to the government would not necessarily constitute judicial approval of the program in all its aspects. The Court might affirm the decision of the circuit court in so far as it involves the sale of electricity produced at Wilson Dam in excess of that needed for war and navigation purposes without extending its approval to the energy generated at new dams. Groettum, *New Deal Laws Face Court Test,* N. Y. Times, Sept. 1, 1935, § E at 7.

11. "The Alabama Power Company further agreed that it would offer its distribution systems within . . . [this] territory . . . for sale to the respective municipalities in which such systems are located at prices which it was willing to accept; and that it would cooperate with the Electric Home and Farm Authority (EHFA), a government cor-

as to the TVA, it was void as to the Alabama Power Company and all the dependent contracts were also void.[12] Since it was not contended that the contract was void for any inherent infirmity, such as fraud, duress or inadequate consideration, it could be found void as to the TVA only if, for any reason, the TVA or its proprietary operations were illegal. To establish such illegality, the chief grounds of attack were: That the Act of Congress, creating the TVA, was unconstitutional on the ground that Congress had no express or implied constitutional power to authorize a governmental instrumentality to engage in a proprietary business such as the TVA is conducting for the government;[13] or, conceding the constitutionality of the Act, that, in any event, the TVA was, in fact, exceeding the authority granted to it under the Act.

Constitutionality of the Act

The power of Congress, under the Constitution, to legislate with reference to national defense,[14] navigation[15] and interstate commerce[16] is now so well

porate agency [with the same directors as the TVA] created to finance sales of electrical appliances, in the sale of such appliances. The TVA, after waiting three months for the negotiation and consummation of sales of the urban distribution systems, was to have the right to furnish electric power to any and all such systems regardless of whether the Alabama Power Company had sold them to the municipalities. On May 21, 1934, the Alabama Power Company entered into an agreement with EHFA to act as the latter's agent in the collection of installments due on the purchase price of electrical appliances sold by retailers to individual customers. On August 9, 1934, the Alabama Power Company, not having sold any of its distribution systems to the municipalities, granted to TVA an option to purchase them; but on January 25, 1935 . . . TVA gave notice that it had elected not to exercise that option." Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578, 579 (C. C. A. 5th, 1935).

12. The circuit court agreed with the district court on this proposition.

13. The constitutionality of the Act was also attacked on the ground that it purports to delegate powers beyond what is constitutionally permissible. It was urged that Congress, since no recommendation was made for high-type dams or for their location, did not provide specifically enough for the location and type of the Norris, Wheeler and Pickwick Dams. The circuit court held this objection immaterial because Wilson Dam alone has a surplus after serving the transmission lines to be purchased from the Alabama Power Company; and besides, the company had no standing to object even though these additional dams had not been properly authorized by Congress. Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578, 583 (C. C. A. 5th, 1935). *Cf.* Frothingham v. Mellon, 262 U. S. 447 (1923).

14. U. S. CONST. Art. I, § 8, cl. 12, 13, 14, 16.

15. U. S. CONST. Art. III, § 2 provides that the federal judicial power shall extend "to all cases of admiralty and maritime jurisdiction." In early cases, the authority of Congress to legislate with reference to matters of maritime interest was derived from its control of commerce which includes navigation between the states and between the United States and foreign states. Gibbons v. Ogden, 22 U. S. 1 (1824); The Lottawanna Case, 88 U. S. 558 (1874). "But in later cases, Congress was explicitly recognized to have a legislative power flowing directly from the grant to the federal courts of admiralty and maritime jurisdiction. *Ex parte* Garnett, 141 U. S. 1 (1891)." 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 1347.

16. U. S. CONST. Art. 1, § 8, cl. 3. "Interstate Commerce embraces water navigation but admiralty jurisdiction is wider than the commerce powers." 2 WILLOUGHBY, *op. cit. supra* note 15, at 734.

established that no one questions it. It is conceded that these are necessarily broad powers, nowhere clearly defined, but the very recognition of this fact has tremendously enhanced the difficulties inherent in their interpretation. Under a liberal construction of these powers, the present national administration has sought to justify numerous experiments of admittedly doubtful constitutionality in the interest of a "more abundant life" for more or less neglected portions of the citizenry. Due to their peculiar vulnerability to political attack, the electric power utilities are popular targets for public criticism. Possibly because of this or, more probably, because of the considerable under-development of potential power sites and the utopian possibilities of cheap and abundant electrical energy, the present federal power program has found congressional, legislative support for its constitutionally uncharted policies.[17] Granting that there are evils to be corrected in the light and power industry and regardless of whether or not one approves of the policies of the administration, the question remains whether this is a function within the powers of the federal government; and if so, whether the government is accomplishing its objective by constitutional means.

The Roosevelt administration did not originate the view that the development and the conservation of hydro-electric power were within the scope of federal responsibility.[18] Since the passage by Congress of the Federal Water Power Act in 1920,[19] introducing new concepts of federal activity in the electric power field, the activities of the Federal Power Commission under that Act, as well as the Act itself, have been frequently challenged in the courts but have survived substantially unimpaired.[20] Hence, federal regulation of the major water power projects is assured; but construction and operation thereof are approved only by *dictum* and within the uncertain limits of incidental activity.[21] In *Alabama Power Co. v. Gulf Power Co.*, the court said that "an Act of Congress, which could be reduced to the isolated proposition that the federal government could dam up streams for the sole purpose of generating and selling hydro-electricity, would be obnoxious to the organic law and palpably in excess of the powers granted to Congress by the Constitution."[22] Is the Tennesee Valley Authority Act such an act of Congress? In creating the TVA, Congress made a bold advance on the hitherto accepted limitations of its constitutional power. Has it gone too far or will the constitutional purposes recited in that

17. In pursuing its power policy, the present administration has followed four main avenues: (1) Direct federal competition with privately owned utilities; (2) Making loans to municipalities to build power plants; (3) Federal regulation or prohibition of utility holding companies; (4) Advocacy of so-called "yardsticks" of rates. Albertsworth, *loc. cit. supra* note 1, at 835.

18. For a discussion on the development of federal control in this field, see *National Aspects of Water Power Development* (1930) 87-99, issued by the National Resources Production Department of the United States Chamber of Commerce, Washington, D. C.

19. 41 STAT. 1063 (1920), 16 U. S. C. A. § 791 (1927), amended by PUBLIC UTILITY ACT tit. 2, P. L. No. 333, 74th Cong., 1st Sess. (1935).

20. For example: New Jersey v. Sargent, 269 U. S. 328 (1926); Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U. S. 369 (1930); Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 (D. Ala. 1922); Appalachian Elec. Power Co. v. Smith, 4 F. Supp. 6 (W. D. Va. 1933).

21. See Clothier, *The Federal Water Power Program* (1935) 84 U. OF PA. L. REV. 1, 5.

22. 283 Fed. 606, 613 (D. Ala. 1922).

Act, the improvement of national defense and navigation, protect possible constitutional defects and excuse an activity which, for all practical purposes, seems reducible to just such an isolated proposition? It has been said that our whole philosophy of government is at issue in the power program of the present administration[23] and that the TVA is the only genuinely socialistic experiment in the New Deal.[24]

Wilson Dam was lawfully acquired by the United States. It was constructed for the constitutional purposes of supplying water power for the production of war munitions and improving navigation on the Tennessee River. Therefore, it is contended that it is within the province of Congress, in the exercise of the war and navigation powers, to authorize the TVA to adopt means, whether of lease or sale, for the disposal of surplus power. The right of Congress to erect and maintain the dam in the exercise of these powers is conceded. A river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for future transportation, even though it is not at present used for such commerce.[25] It is also established that, as an incident to the improvement of the navigability of streams, Congress may create and use or lease water power.[26] But it was indicated in *Kansas v. Colorado*[27] that, except in cases in which the United States has riparian rights by reason of ownership of the lands through which waters flow,[28] Congress has no authority under the Constitution to construct plants on streams, whether navigable or not, for the primary purpose of collecting and distributing water power.

The Act, creating the TVA, purports to confer on the TVA the authority to sell the surplus power produced in excess of governmental needs. That raises the question: what is surplus power? The district court interpreted it to mean any surplus incidentally and unintentionally created in the exercise of a *bona fide* effort to make only such power as was needed for constitutional purposes. On the other hand, the circuit court construed it to mean all excess or surplus energy, even though intentionally created for disposal, that may be produced. In support of this interpretation, the circuit court cites[29] *United States v. Chandler-Dunbar Water Power Co.*,[30] seemingly as authority for the proposition that, since the government is the lawful owner of Wilson Dam and of the water power created by the dam, Congress may dispose of that water power as freely as it may of any other government property.[31] It is submitted that this statement requires limitation. In that case, with respect to the constitutionality of

23. Albertsworth, *loc. cit. supra* note 1, at 833.

24. THOMAS, THE CHOICE BEFORE US (1934) 92.

25. Economy Light & Power Co. v. United States, 256 U. S. 113 (1921).

26. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913).

27. 206 U. S. 46 (1907).

28. The United States may gain such rights by grant from a state. Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58 (1898).

29. Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578, 581, 582 (C. C. A. 5th, 1935).

30. 229 U. S. 53 (1913).

31. U. S. CONST. Art. IV, § 3, cl. 2, gives Congress the power to dispose of federal property. Camfield v. United States, 220 U. S. 523 (1911). Water power is property *sui generis*; but as to whether the federal government or the state owns the by-product of

the Act of 1909[32] which had authorized the Secretary of War to lease any excess of water power, it was said that if the primary purpose is legitimate, for example the improvement of navigation, there is no sound objection to leasing any excess of power over the needs of the government. Citing *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*,[33] it was further said that the practice is not unusual in respect to similar public works constructed by state governments. This reference to the practice of the states seems hardly calculated to support a similar practice on the part of the federal government since the states are not compelled, as is the national government, to trace the source for the exercise of a power to some specific power constitutionally vested in them. At best, however, the case is authority for the developing and leasing of water power by the federal government when this is but incidental to structures erected for the primary purpose of conserving or improving the navigability of the streams in which such structures are placed.[34]

In further support of its holding, the circuit court cites *Arizona v. California*,[35] in which the constitutionality of the Boulder Canyon Project Act[36] was unanimously upheld as a lawful federal enterprise for the improvement of navigation, although there was much to indicate that power development was the primary purpose. The language used by Mr. Justice Brandeis in that case, lifted from the context, would seem to indicate a willingness to abandon the incidental surplus limitation.[37] In the opinion, however, from the treatment of the questions involved and from the citation of *United States v. River Rouge Improvement Co.*,[38]—which in turn relies on *United States v. Chandler-Dunbar Power Co.*,[39] the case that stands for the incidental surplus doctrine—it appears that

hydro-electric power, not needed for the legitimate purposes of irrigation, navigation or interstate commerce, that is generated by falling waters of a dam constructed in navigable waters, *cf.* Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254 (1891); Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58 (1898); Little Falls Fibre Co. v. Ford & Son, 249 N. Y. 495, 164 N. E. 558 (1928). Stronger claims can be advanced for federal ownership where the federal government owns the site itself, as at Muscle Shoals.

32. 35 STAT. 815 (1909).

33. 142 U. S. 254 (1891).

34. See 2 WILLOUGHBY, *op. cit. supra* note 15, at 957.

35. 283 U. S. 423 (1931).

36. 45 STAT. 1057, 43 U. S. C. A. § 617 (1928).

37. The Court said: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress [citing United States v. River Rouge Improvement Co., 269 U. S. 411, 419 (1926)] . . . and the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power." Arizona v. California, 283 U. S. 423, 455, 456 (1931). Both of these passages are quoted substantially, as authority, by the circuit court in the TVA case, Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578, 582, 583 (C. C. A. 5th, 1935). *Cf.* Veazie Bank v. Fenno, 75 U. S. 533 (1869); Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254 (1891); *In re* Kollock, 165 U. S. 526 (1897); Weber v. Freed, 239 U. S. 325 (1915); United States v. Doremus, 249 U. S. 86 (1919).

38. 269 U. S. 411 (1926), cited in Arizona v. California, 283 U. S. 423, 455 (1931).

39. 229 U. S. 53 (1913), cited in United States v. River Rouge Improvement Co., 269 U. S. 411, 419 (1926).

the Supreme Court was not unmindful of that limitation, but found it unnecessary to apply the doctrine. It was urged that the recital in the Act, declaring the purpose to be the improvement of navigation, was a "mere subterfuge and false pretense" since the effect of the project would be to take out of the river, then non-navigable through lack of water, the last half of its remaining average flow. But the Court called attention to the fact that substantially all of the stored water, consisting largely of flood waters, would be available for the improvement of navigation unless and until it was consumed in new irrigation projects or in domestic use.[40] The Court indicated nothing as to what its holding would be if that consumption were an accomplished fact,[41] and pointed out that, viewing possibilities that may arise, the Supreme Court cannot issue declaratory decrees.[42] Obviously, the Boulder Canyon project differs widely from the activities of the TVA. No extensive program for the production, distribution and sale of electricity or of social and economic improvement of the area was contemplated. The dominating question was the invasion of states' rights—a question not similarly involved in the TVA case. In background, objective and accomplishment, the TVA presents an entirely different problem. It is submitted that, on the question of the constitutional disposal of surplus power, *Arizona v. California* would seem to be inconclusive. It certainly is doubtful authority for the right of the federal government to engage in the power business as such.[43]

It may well be argued that when the construction of Wilson Dam was first authorized by Congress the primary purpose of the legislation was concerned with the production of munitions of war and the improvement of navigation on the Tennessee River; that the production of surplus water power was incidental thereto; and hence, that Congress acted within its constitutional powers. But the very language of the Act, creating the TVA, while ostensibly manifesting a studied compliance with constitutional powers, negatives any such primary purpose. True, the purposes of national defense and navigation are served but they are clearly incidental to the operation of a gigantic electric power business—a permanent[44] proprietary business for the production and disposal of hydro-electric power in direct competition with private enterprise.[45] That Congress in-

40. See Arizona v. California, 283 U. S. 423, 457 (1931).

41. *Id.* at 464. The Court said: "The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same."

42. See Texas v. Interstate Commerce Comm., 258 U. S. 158, 162 (1922); Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 74 (1927); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 289, 290 (1928). But see, 48 STAT. 955, 28 U. S. C. A. § 400 (1934) (declaratory judgments authorized).

43. See Shields, *The Federal Power Act* (1925) 73 U. OF PA. L. REV. 142, 155, 156; Rose, *Control of Super-Power* (1931) 80 U. OF PA. L. REV. 153, 169.

44. There are cases apparently permitting the federal government to engage temporarily in business in order to carry federal functions to a successful conclusion. *Cf.* California v. Central Pacific R. Co., 127 U. S. 1 (1888); Cherokee Nation v. Southern Kansas Ry., 135 U. S. 641 (1890); The Spruce Corp. Case, 263 U. S. 341 (1923); Emergency Fleet Corp. v. Western Union Tel. Co., 275 U. S. 415 (1928). But *cf.* Luxton v. North River Bridge Co., 153 U. S. 525 (1894).

45. It is established that an agency of the federal government, properly authorized, may

tended the production of a surplus of power, far in excess of any possible governmental needs for national defense and navigation, even in time of war,[46] is strongly evidenced by the provision for additional dams,[47] since Wilson Dam alone is capable of producing a substantial surplus.[48] Without external evidence of the proprietary policies and operations of the TVA, the intention of Congress to authorize the conduct of a proprietary business would seem reasonably clear from the Act itself. Whatever the desirability of the undertaking as an economic and social measure, it is submitted that the project finds no support in constitutional sanction. Only an extremely liberal interpretation of both the Act creating the TVA, and the constitutional powers of Congress could establish this business as a lawful governmental function, in any real sense, under the war, commerce or navigation powers. If Congress intended to accomplish an illegal objective, the Supreme Court, in the exercise of its time-honored function as a constitutional check on Congress, should not permit the expressed purposes of the legislation to disguise the true purpose, readily ascertainable from the Act itself.

Statutory Authority Exceeded

Assuming, however, that Congress did not intend to sanction a proprietary business and authorized the TVA to sell surplus power merely as an incident to the larger program for the improvement of flood control, navigation and national defense, a further fatal objection is found in the fact that the TVA is operating in excess of its statutory authority. In interpreting authority, under the Act, to dispose of surplus power, it is elementary that the constitutional limitations on the power of Congress are equally controlling on the TVA and its directors. Nevertheless, they make no pretense of confining either policies or operations within the prescribed limits of lawful, competitive, governmental enterprise. Actually, the TVA makes no claim that it is disposing of merely incidental surplus power. It is a matter of common knowledge that the TVA

engage in lawful competition with a private utility. Frost v. Corporation Comm. of Okla., 278 U. S. 515 (1929); City of Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560 (C. C. A. 8th, 1932).

46. The Tennessee Valley Authority Act reserved the right to the government, in case of war or national emergency declared by Congress, to take possession of all or any part of the property described or referred to in the Act "for the purpose of manufacturing explosives or for other war purposes." 48 STAT. 58, 16 U. S. C. A. § 831 (1933).

47. Norris, Wheeler and Pickwick Dams. See note 13, *supra*.

48. The following were found as facts in the TVA case: "Wilson Dam unaided by other power development, with its eight hydro-electric generators installed by the War Department, is capable of producing 50,000 kilowatts continuously, except during low stages of water; and the steam plant has a continuous capacity of 60,000 kilowatts. In 1934, 68 per cent of the power generated at Wilson Dam was used for governmental purposes. Other dams under construction, which like Wilson are of the high-dam type, are, upstream, the Norris and the Wheeler; and, downstream, the Pickwick. The release of waters from Norris Dam will increase the continuous capacity of Wilson Dam by 40,000 kilowatts, and Norris Dam itself, if generators are installed, is capable of producing 73,000 kilowatts. If the Wheeler and the Pickwick Dams are used only as reservoirs, according to present plans, the total continuous capacity of Wilson and Norris Dams in combination, without the aid of the steam plant, will be 202,000 kilowatts." See Tennessee Valley Authority v. Ashwander, 78 F. (2d) 578, 580 (C. C. A. 5th, 1935).

is conducting a novel "New Deal" experiment and is operating, as an integral part thereof, a huge, independent utility system, permanent in character, with extensive plans for expansion. The circuit court quotes the following findings of fact of the district court, and points out that they may safely be assumed to be correct since none of them were challenged: "It is not the purpose of TVA to limit the production of electric power to that needed by the government in manufacturing war materials and providing for navigation, but its declared policy is to utilize to the fullest extent possible all the electric energy which the Wilson and other dams are capable of producing, by supplying first governmental needs, and then by selling the surplus to users of electricity, in competition with public utility corporations engaged in the manufacture, transmission and distribution of electricity. In disposing of surplus power TVA intends to obtain revenue, but at the same time to undersell its private competitors in order to establish a 'power yardstick' and to demonstrate the advantages of public over private ownership of electric light plants."[49] It is surprising that the circuit court can quote this finding, on which the lower court based its conclusion that the TVA had exceeded its granted authority; and at the same time, apparently, disregard the implications of these facts, which on their face would seem to rebut conclusively any claim to constitutional sanction. By its reversal under all the circumstances, the circuit court held, in effect, that, since national defense and navigation would benefit incidentally, the program of the TVA for the large-scale production and disposal of surplus electric power is a lawful governmental function. The TVA, acting for the government, is thus enabled to conduct a proprietary business in a manner that would be illegal under the Constitution if authorized expressly by congressional legislation. It is submitted that this is a *reductio ad absurdum.*

Conclusion

There are other important questions involved in the case, a detailed consideration of which space does not permit in this discussion. For example, the circuit court dismisses the motives of the TVA as immaterial. In a concurring opinion, Judge Sibley comments on the established fact that the TVA board has very far-reaching plans for social experimentation which the district court thought beyond the constitutional limits of the federal power but holds that the case is not to be decided on the basis of the purposes and plans of the board. Admittedly, it is well settled that, having once established that Congress has a specific power, its motives in exercising such power are not to be inquired into by the courts.[50] Regardless of whether or not the motives of the TVA are similarly immaterial, it would seem that in this case it is not a question of motives but rather of external, physical acts carried into execution under a doubtful exercise of constitutional power and based on the nebulous authority of the

49. *Id.* at 581, 582.

50. For example: McCray v. United States, 195 U. S. 27, 57-59 (1904) (artificially colored oleomargarine); Weber v. Freed, 239 U. S. 325, 329-330 (1915) (prize-fight films); United States v. Doremus, 249 U. S. 86, 93-94 (1919) (narcotics); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 161 (1919) (wartime prohibition); Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 210 (1921) (federal land banks); Arizona v. California, 283 U. S. 423, 455-456 (1931) (Boulder Canyon Project Act).

powers of national defense and navigation.[51] The legality of PWA loans and grants to prospective municipal customers of the TVA presents another difficult and controversial question. Whether or not the TVA is found to be engaging lawfully or unlawfully in the electrical power business may determine whether or not the PWA, in cooperation with the TVA, can be restrained from making loans to municipal corporations to construct distributing plants.[52] Moreover, there are important constitutional objections as well as possible constitutional sanctions that were neither suggested nor considered in this particular controversy.[53] The general welfare clause of the Constitution[54]—generally regarded as a grant of taxing power and previously avoided with studied consistency by the Supreme Court in questions of this character—with its apparently broad implications, would seem to offer a possible approach to the problem. But it is unlikely that it will be given a strained and hitherto, impliedly, rejected construction as a distinct grant of power to engage in this proprietary activity.[55]

The absence of conclusive authority,[56] warranting the right of the federal government to engage directly in business not substantially connected with the furtherance of some power granted by the Constitution, is strong evidence that the Supreme Court will not approve permanent proprietary undertakings by the national government in competition with citizens.[57] While the Court has frequently asserted that it will not look beyond the recited purposes of legis-

51. See Albertsworth, *loc. cit. supra* note 1, at 843.

52. This was the view of the district court and may be followed by the Supreme Court if it should overrule the circuit court. See Ashwander v. Tennessee Valley Authority, 9 F. Supp. 800 (N. D. Ala. 1935). It is a well established principle of construction of federal governmental power that the government cannot do indirectly, through a loan or grant of its moneys, what it cannot do directly. See Washington Power Co. v. City of Coeur D'Alene, 9 F. Supp. 263, 270 (D. Idaho 1934); Duke Power Co. v. Greenwood County, 10 F. Supp. 854, 869 (W. D. S. C. 1935); *cf.* Missouri Public Service Co. v. City of Concordia, 8 F. Supp. 1 (W. D. Mo. 1934). For a discussion of the legality of PWA loans and grants as a part of the water power program, see Clothier, *The Federal Water Power Program* (1935) 84 U. OF PA. L. REV. 1, 24-28. *Cf.* Foley, *Some Recent Developments in the Law Relating to Municipal Financing of Public Works* (1935) 4 FORDHAM L. REV. 13.

53. *Cf.* Comment (1934) 43 YALE L. J. 815.

54. U. S. CONST. Art. 1, § 8, cl. 1.

55. See Nicholson, *The Federal Spending Power* (1934) 9 TEMPLE L. Q. 3, 8, 14; Comment (1934) 48 HARV. L. REV. 89, 94. See also United States v. Boyer, 85 Fed. 425 (W. D. Mo. 1898); Missouri Utilities Co. v. City of California, 8 F. Supp. 454 (W. D. Mo. 1934); Washington Power Co. v. City of Coeur D'Alene, 9 F. Supp. 263 (D. Idaho 1934); Duke Power Co. v. Greenwood County, 10 F. Supp. 854 (W. D. S. C. 1935). See Clothier, *loc. cit. supra* note 52, at 21, for a recent thorough treatment of the general welfare clause in relation to the federal power program. For a discussion of the problems of taxation in this connection, see Comment (1934) 44 YALE L. J. 326.

56. That Supreme Court decisions on the subject are relatively few, is shown by the present controversy between the federal government and the privately owned light and power utilities. There are inferior federal court decisions opposed to the federal government engaging in the power business. Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 (D. Ala. 1922); Missouri v. Union Elec. Light & Power Co., 42 F. (2d) 692 (W. D. Mo. 1930).

57. See Albertsworth, *loc. cit. supra* note 1, at 839.

lation,[58] there are decisions indicating that this is little more than a convenient formula whereby the Court may approve or reject a borderline statute.[59] In the last analysis, whether the TVA is found constitutional or not depends on the views of a majority of the judges as to whether the Act and the activities thereunder offend the fundamental principles of our system of government. From a strict and conservative point of view, it is this underlying element in the TVA that makes its constitutionality so doubtful.[60] The very ambitiousness of the program practically requires a national willingness to turn the electric light and power industry over to the federal government. On the other hand, a liberal and intelligent interpretation of the Constitution requires a sincere effort to find constitutional sanction for measures adopted by Congress to meet modern social and economic conditions, unknown when that historic document was adopted.[61] There are unusual factors in the TVA project which may influence the Court in its final choice, necessarily made on non-legalistic bases, and between conflicting legal theories.[62] The necessity for large-scale development, in order to accomplish so vast an undertaking efficiently; the likelihood of wasted power if the program were limited to incidental activity; and the inability of the states to develop fully the natural resources of the region,[63] all suggest either the introduction by the Court of a new concept of constitutional power to support the project in its entirety; or, since the sections of the Act are expressly declared to be separable so that the unconstitutionality of one section need not affect any other, the imposition of restrictions on the TVA. It has been suggested that, since the Court will find itself confronted in large part with a *fait accompli*, this fact may lead to limitation of the scope of the undertaking rather than to its total invalidation.[64]

58. See note 50, *supra*.

59. *Cf.* Hammer v. Dagenhart, 247 U. S. 251 (1918); Child Labor Tax Case, 259 U. S. 20 (1922); Hill v. Wallace, 259 U. S. 44 (1922); see Linder v. United States, 268 U. S. 5, 17 (1925).

60. See Clothier, *loc. cit. supra* note 52, at 29.

61. See Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 9 (1877). For a discussion of the expansion of the commerce clause of the Constitution along these lines, see Comment (1935) 4 FORDHAM L. REV. 457, 460.

62. *Cf.* CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934); Albertsworth, *The Mirage of Constitutionalism* (1935) 29 ILL. L. REV. 608.

63. The defect of power created by a similar inability on the part of the federal government, because of constitutional limitations, may influence the Supreme Court to imply the necessary power within the Constitution. *Cf.* Dickinson, *Defect of Power in Constitutional Law* (1935) 9 TEMPLE L. Q. 388.

64. See Comment (1935) 48 HARV. L. REV. 806, 808.