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THE TVA CASES: A QUARTER CENTURY LATER

GEORGE D. HAIMBAUGH, JR.†

I. THE TVA CASES

On August 15, 1939 in a bank office high above Wall Street the chairman of the Tennessee Valley Authority, David E. Lilienthal, handed the president of Commonwealth & Southern, Wendell L. Willkie, a check for $44,728,300 in partial payment of the $78,000,000 price agreed upon for the C & S properties in the Tennessee Valley area. Accepting, Willkie said, "Thanks, Dave. This is a lot of money for a couple of Indiana boys to be kicking around." The scene followed four and a half years of legal battling and was the climax of a struggle which has been described as "the leading politico-financial melodrama of the New Deal epoch." As a result, the Authority was given a green light to proceed with its power program and C & S was able to negotiate a price for its southeastern properties almost double that which it had been offered originally—which is why the litigation is sometimes called Willkie's "thirty million dollar yell."†

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1. Joseph Barnes has compared the backgrounds of the two protagonists: "Both men had been born in Indiana, both were first-generation Americans of German-speaking ancestry, both were inheritors of the old immigrant search for freedom and the richer life. A good deal has been made out of the fact that Lilienthal, who went to Harvard and came from a Republican family, was on the New Deal side, while Willkie, son of a maverick Bryan-Wilson Democrat and graduate of Indiana, was on the side of private enterprise. But this was a paradox which in reality carried little meaning." Barnes, Willkie 142-43 (1952).

2. Flanner, Profile: Rushville’s Renowned Son-in-Law, The New Yorker October 12, 1940 pp. 27, 30. In his biography of Roosevelt, Tugwell wrote: "But the row with the bankers began first, and among such devices it certainly ranks next to that with the power interests, which had been so dramatic during his governorship and would go on through TVA, through quarrels over utility-holding-company legislation (involving the marvelously apt “death sentence”), to dramatic battles with the utilities’ champion, Wendell Willkie, and, as well, to the wonderful prospects opened up by Bonneville, Grand Coulee, Passamaquoddy, and the other publicly owned sources of hydroelectric power. The utility fight did not stop, but for long periods was obscured by the epic battles with the bankers and the judges. These were hammer-and-tongs affairs capable of raising the temperature of the most lethargic voter. Taken as a whole and in political terms, the performance was magnificent.” Tugwell, The Democratic Roosevelt 366 (1957).

3. For detailed accounts of the Willkie strategy, see Barnes, Willkie ch. 5 (The New Deal), ch. 6 (The Death-Sentence Act), and ch. 7 (TVA and the Supreme Court) (1952); Dillon, Wendell Willkie, ch. III (The Attack on Government Monopoly), ch. IV (The Death Sentence), and ch. V (Wings Over the Supreme Court) (1953); Johnson, The Republican Party and Wendell Willkie 54-61 (1960); Fortune, May 1937 p. 83, 89; Rukeyser, One Life, pt. 2 (1957).
Although there were other relevant law suits, 4 *Ashwander v. TVA,* 5 *Alabama Power Company v. Ickes* 6 and *Tennessee Electric Power Company v. TVA* 7 were the key cases in the power companies' stand against federal competition. Those cases are summarized here.

*Ashwander v. Tennessee Valley Authority.* In September, 1934, George Ashwander and thirteen other preferred stockholders in the Alabama Power Company, a subsidiary of Commonwealth & Southern, sought to enjoin performance of contractual agreements between the Company and the Authority which provided for the sale of transmission lines, surplus power, the interchange of hydro-electric power and a temporary division of territories to be served by these two parties to the contract. In the United States District Court for the Northern District of Alabama, 8 the plaintiffs were successful in having Alabama Power enjoined from transferring their transmission lines and auxiliary properties to the TVA and in having seventeen municipal defendants enjoined from accepting or expending federal funds for the construction of municipal electric power plants or from purchasing power from TVA. The District Judge based his decision on the ground that the TVA program for the manufacture and disposal of surplus electric power bore no substantial relation to any lawful governmental function and that TVA was therefore engaged in illegal competition with the Alabama Power Company.

The Circuit Court of Appeals and the United States Supreme Court limited their attention to the consideration of the constitutional authority for the construction of Wilson Dam (the source of the hydro-electric power in question) and for the disposition of the electric energy there created. Both courts decided that the decree of the District Court was erroneous. Dividing five to four on the question of standing to sue and eight to one on the merits, the Supreme Court in February, 1936 reversed the District Court decree. In the words of Chief Justice Hughes, "the Wilson Dam had been constructed in the exercise of the war and com-

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merce powers of the Congress and the electric energy there available was the property of the United States and subject to its disposition." Expressing agreement with the conclusion of the trial court, Mr. Justice McReynolds wrote in a dissenting opinion that, "If under the mask of disposing of property the United States can enter the business of generating, transmitting and selling power as, when and wherever some board may specify, with the definite design to accomplish ends wholly beyond the sphere marked out for them by the Constitution, an easy way has been found for breaking down the limitations heretofore supposed to guarantee protection against aggression."9

*Alabama Power Company v. Ickes.* The Alabama Power Company sought to enjoin the Federal Emergency Administrator of Public Works from making loans and grants for the construction of municipally owned electric power systems in four Alabama municipalities. Although the District Court for the District of Columbia dismissed on the merits, both the Court of Appeals and the United States Supreme Court10 found it unnecessary to consider the validity of the loans as they affirmed the decree of the District Court on the ground that a privately owned power company operating without an exclusive franchise had no right to be free from competition from municipalities and that resulting damage to the company would be *damnum absque injuria.*

*Tennessee Electric Power Company v. TVA.* In May, 1936, nineteen public utility companies with non-exclusive franchises which were selling power wholesale in direct competition with the TVA sued to enjoin the execution of the power program of the TVA—except for its Wilson Dam activities which had been held legal in Ashwander—as being unconstitutional and contrary to their rights under the fifth, ninth and tenth amendments. Finding no fraud, duress or misrepresentation in the securing of customers and rejecting the contention that the TVA program was a guise for the national government’s entry into the power business, a three-judge federal district court dismissed the bill.11 The


10. 91 F.2d 303 (D.C. Cir. 1937) and 302 U.S. 464, 475 (1938); counsel included Newton D. Baker and Dean Acheson for the Company and Attorney General Homer Cummings and Paul Freund for the Administrator. The decision in Alabama Power governed Duke Power Company v. Greenwood County, 302 U.S. 485 (1938), a case which was decided the same day as Alabama Power and which presented the same question decided in that case.

11. The complainants had obtained a temporary injunction from Judge John J. Gore of the Federal District Court for the Eastern District of Tennessee on December 22, 1936. In the meantime, on August 24, 1937, Congress passed an Act [Sec. 3, 50 Stat. 751, 752 (1937)] forbidding the issuance of injunctions by District Courts suspending
TVA project is, instead, said Judge Florence Allen, "reasonably adapted to use for combined flood control, navigation, power and national defense, and . . . in actual operation the creation of energy is subordinated to the needs navigation and flood control. . . . Since the United States has acquired these dam sites and constructed these dams legally, the water power, the right to convert it into electric energy, and the energy produced constitute property belonging to the United States. . . . This electric power may be rightfully disposed of."12

Again avoiding the broad constitutional issue, the United States Supreme Court, dividing five to two, affirmed the dismissal on the ground that the complainants had no right to be free from competition and therefore had no standing to maintain the suit. Writing for the Court, Mr. Justice Roberts cited Alabama Power and Duke Power in answer to the complainants' argument "that even if invasion of their franchise rights does not given them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition." "The contention is foreclosed," the Justice concluded, "by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances dannum absque injuria, and will not support a cause of action or a right to sue."13

The dissenting justices (Butler and McReynolds) described the defendant TVA directors and the PWA Administrator as acting, with full knowledge of the noncompensatory and confiscatory character of the "yardstick" rates, to conduct a systematic campaign of misrepresentation and coercion for the purpose of disrupting the complainants' established business relations. They found the public utilities to be more than able to fill the needs of their territories at reasonable, regulated rates and ready to supply such additional facilities as might be needed in the future. The complainants were, therefore, entitled to standing since, in the words of Mr. Justice Butler, they were "not asserting a right held, or complaining of an injury sustained, in common with the general public."14

In 1943, the tenth anniversary of the passage of the Tennessee Valley Authority Act, David E. Lilienthal who had been on the TVA Board of Directors since its inception wrote TVA: Democracy on the March. In that volume, he stated that "the TVA experiment has been carried on under the existing rules of the game of American life. It required no

14. Id. at 152 (citing Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) and Frost v. Corporation Commission, 278 U.S. 515, 521 (1929)).
change in the Constitution of the United States. Property rights and social institutions have undergone no drastic amendment. In short, the Valley's change has gone forward under typical and traditional American conditions, rather than under non-existent 'ideal' conditions that would not or could not be duplicated." Mr. Lilienthal's provocative claims on behalf of the constitutional and political orthodoxy of the TVA call for examination and, at the same time, provide a frame of reference for the balance of this article.

II. CONSTITUTIONALITY

The pith of the TVA cases was a challenge to the national government's constitutional power to compete with private enterprise. The Supreme Court which had not faced that problem directly before did not answer it in those cases. It avoided passing on the validity of the valley-wide competition in which Congress had authorized the TVA to engage by denying the utilities' standing to sue.

A. Standing.

The TVA cases offer, in Brandeis' concurrence in Ashwander, the best known formulation of the proposition that "The Court has developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." So, it may be argued that the decisions in Alabama Power and Tennessee Electric which turned on lack of standing were not constitutional determinations but instances of judicial discretion. The more widespread view, however, would seem to be that Tennessee Electric Power, at least, has amounted to a constitutional development and perhaps was a case in which the Court, to paraphrase Mr. Justice Jackson, should have tried to lay inevitable constitutional controversies to early rest.

Legal writers of the time pointed out the following constitutional developments implicit in the Alabama Power and Tennessee Electric decisions:

1. *Alabama Power* definitely establishes one point not previously settled: the mere fact that official action is directly responsible for substantial economic injury does not of itself give the injured party a sufficient interest to contest its legality.

15. LILIENTHAL, TVA: DEMOCRACY ON THE MARCH 7-8 (1944).
17. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 305-06 (1941).
2. The Court in *Tennessee Electric* relies chiefly on its decision in *Alabama Power* but apparently overlooks the fact that the competition by the municipalities in that case was concededly lawful.19

3. The decision in *Tennessee Electric* goes even further than that in *Alabama Power* and decides that the non-exclusive franchise offers no protection against direct federal competition which is illegal only because it violates the Federal Constitution.20

4. The restriction of the term “interested parties” to the states affected by the distribution of power by the TVA seems to be an unwarranted extension of the rule laid down in *Massachusetts v. Mellon.*21

5. In *Tennessee Electric* a consideration on the merits is not precluded by any previous decision.22 It would seem the Court has strained a point to avoid ruling upon the constitutionality of the government’s power project.23

These early views are confirmed in a recent appraisal by Kenneth Culp Davis.24

6. The catch in *Tennessee Electric* lies in the two words “otherwise lawful.” The plaintiffs were asserting that the competition was unlawful, and the Court was denying them an op-

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20. 52 Harv. L. Rev. 686 (1939). *Frost Corporation v. Commission*, 278 U.S. 515 (1929), held that the holder of a non-exclusive cotton-ginning franchise is entitled to attack the constitutionality of a statute under which his competitor was licensed. The Court in *Tennessee Electric* apparently distinguished *Frost* on the theory that it stood only for the proposition that a licensed company will be protected only from a competitor lacking required authorization from the government which granted the licensed company its authority to do business. See 87 U. Pa. L. Rev. 610, 611 (1939).
21. 6 Geo. Wash. L. Rev. 378, 381 (1938). In developing its concept of interest from an analogy to private litigation, the Court relied upon *Railroad Company v. Ellerman*, 105 U.S. 166, 172 (1881), a case which laid down the proposition that a commercial rival of a corporation is not entitled to complain of competition resulting from *ultra vires* activity, but that only the state or the shareholder may take advantage of the terms of the charter. See Note, 51 Harv. L. Rev. 897, 903-04 (1938) and *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 132 (1939). *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) stated, “The party who invokes the power [to annul legislation on the grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained some direct injury as the result of its enforcement . . .”
23. 23 Minn. L. Rev. 967 (1939). See also, Note, 45 W. Va. L.Q. 266, 268-69 (1939): “The majority opinion of Mr. Justice Roberts, and the minority opinion of Mr. Justice Butler, when read together convey a feeling that the Court here strained a point to avoid consideration for the Constitutional questions presented.”
portunity to show the unlawfulness. The question was not whether the plaintiffs had standing to challenge lawful competition but whether they had standing to challenge competition the lawfulness of which was at issue. The Court laid down the palpably false proposition that one threatened with direct injury by governmental action may not challenge that action “unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.” If this proposition were the law, then no one could challenge a statute outlawing the Baptist Church, or prohibiting Republican speeches, or denying criminal defendants a jury trial, or authorizing unlawful searches, or compelling witnesses to testify against themselves. The Court should have said that the plaintiffs were asserting “a legal right—one arising out of the Constitution.” . . . No legal right in addition to a constitutional right is normally required for a challenge of the constitutionality of governmental action.

A year after deciding Tennessee Electric, the Supreme Court held in FCC v. Sanders Brothers Radio Station\(^{25}\) that an existing station had standing to contest the grant by the FCC of a permit for the construction of a rival station—a doctrine further developed in Scripps-Howard Radio v. FCC,\(^{26}\) and FCC v. NBC (KOA).\(^{27}\) So far as the problem of standing is concerned, the only apparent difference between the Tennessee Electric and Sanders cases was the availability to the complainant in Sanders of the provision in the Federal Communications Act for judicial review by an applicant or by “any other person aggrieved or whose interests are adversely affected.”\(^{28}\) The logical conclusion to be drawn from these cases, therefore, would seem to be that either the decision in Tennessee Electric is unsound or the broadcasting companies were accorded a “remedy without a right.”\(^{29}\)

\(^{25}\) 309 U.S. 470 (1940).
\(^{26}\) 316 U.S. 4 (1942).
\(^{27}\) 319 U.S. 239 (1943).
\(^{28}\) No. 402(b)(2) of the Federal Communications Act of 1934.
\(^{29}\) See Davis, ADMINISTRATIVE LAW TEXT 403 (1959). The effect of Section 10(a) of the Federal Administrative Procedure Act of 1946 on the question of standing to sue has yet to be determined by the Supreme Court. The text of that provision reads:

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) Right of review. Any person suffering legal wrong because of any agency action, or adversely
The Supreme Court's denial of standing to the utilities has been well described as a pragmatic way of handling the delicate and dangerous task of passing on the constitutionality of legislation in such a way as to preserve its prestige and independence and to give its less frequent constitutional decisions a more commanding significance. It may be added that such a denial to the substantially and directly affected utilities of an opportunity to seek a definition of the scope of the national government's power to compete with them is a strain on, if not a change in, the Constitution.

B. Competition.

The Supreme Court's refusal to grant standing to the complainants in Alabama Power and Tennessee Electric left unanswered the question of competition by the Federal Government beyond that in which it was engaged at Wilson Dam. The Court in Ashwander had found the production of electricity to be a necessary incident to the making of munitions of war or the operation of works for navigation purposes, and the sale of such power to be a reasonable disposition of the property thus come by. The Ashwander opinion suggests that a determination of the validity of federal competition with private utilities as presented in the later TVA cases would have entailed definitions of (1) the relationship of such activity to the exercise by the Federal Government of enumerated powers, and (2) the scope of its property power.

Had the Supreme Court granted standing, it might have resolved the relationship problem on the basis of an examination of the evidence as did the lower court in Tennessee Electric or, perhaps, have avoided affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

In the lower federal courts, a shipper was granted standing to challenge the grant of a subsidy to a competitor in American President Lines v. Federal Maritime Board, 112 F. Supp. 346 (D.D.C. 1953), but a utility was denied an opportunity to question the validity of a federally-supported power program in Kansas City Power & Light Company v. McKay, 225 F. 2d 924 (D.C. Cir. 1955). The District Court in American President Lines held that the APA extends the right to standing to all persons aggrieved under that act, but the Circuit Court in Power & Light Company interpreted the language of § 10(a) as "terms of art." "As the Attorney General's Manual on the Administrative Procedure Act points out," Judge Washington wrote for the latter court, "The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, 'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review. 'Adversely affected or aggrieved; has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.'" See also, JAFFE AND NATHANSON, ADMINISTRATIVE LAW 856 (1961); DAVIS, ADMINISTRATIVE LAW 424-26 (1965); GELLORN AND BYSE, ADMINISTRATIVE LAW 240-42 (1954).

30. See 51 HARV. L. REV. 897, 906 (1938); see also the opinion of Mr. Justice Frankfurter in Poe v. Ullman, 367 U.S. 497, 503-07 (1961).
31. 78 F. 2d 887 (9th Cir. 1938).
it by refusing to look behind the face of the challenged act. Alternative approaches to the determination of the scope of the property power are described in the majority opinion in *Ashwander*.

Arguing for a limited interpretation of the property power, spokesmen for the stockholders invoked Dean Story and his warning that a government of independent means would become overweening and formidable to the people. "The improvident alienation of the Crown lands in England," he recalled, "has been considered as a circumstance extremely favorable to the liberty of the nation, by rendering the government less independent of the people." The TVA's case for broad interpretation harked back to the Old West and a supposition that "if the Government had undertaken to operate a silver mine on its domain, it could have acquired the mules or horses and equipment to carry its silver to market. And the transmission lines for electric energy," it was explained, "are but a facility for conveying to market that particular sort of property."

Neither argument was backed up by compelling case law. The complainants' cases dealt, with little relevance, with the right of certain states to their tidelands and to water from lakes shared with other states. Some of the defendant's cases are more pertinent but serve mainly to demonstrate that the contracts for the sale by TVA to the Alabama Power Company of electric energy at the dam—an arrangement not unacceptable to Willkie—was a time-honored method of disposing of government property. *United States v. Gratiot*, TVA's anchor case, approved a situation in which the United States was leasing mineral lands to private

32. See 86 U. P.A. L. REV. 667, 669 (1938): "Precedence for judicial disregard of the basic purpose of an act can be found in Arizona v. California [283 U.S. 423 (1931)] where Mr. Justice Brandeis stated: 'Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not enquire.' Nevertheless, it should be realized that either the disregard of the real purpose of an act or the use of weighted findings of fact is merely a judicial device for evading what is sincerely felt to be an outmoded constitutional restriction. The effect of either rationalization is to decide that the federal government is authorized to produce and market electricity." But see Note, 48 HARv. L. REV. 806 (1935): "And scant reliance can be placed upon the Court's frequent assertions that it will not look beyond the recited purposes of legislation. Several decisions, and notably *Hammer v. Dagenhart*, 247 U.S. 251 (1918), indicate that this is little more than a formula whereby the Court may express its willingness to approve a borderline statute, and that if a majority of the judges feel strongly that the effect of a particular act will be to exceed the proper sphere of the national government they may invalidate it on that basis."

33. 297 U.S. 288, 331 (1936); II STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 229 (1858).


36. 14 Pet. 526, 10 L. Ed. 573 (1840).
party—again the type of property disposition which the utilities would accept, but which a majority of the TVA board had determined to go beyond. *Greenbay & Mississippi Canal Company v. Pattern Paper Company,*37 *Light v. United States*38 and *Ruddy v. Rossi*39 approved analogous arrangements whereby private parties might contract with the United States to use water from its navigation projects, grazing lands in its forest reservations and to obtain homesteads from its public lands. *Morton v. Nebraska,*40 *Montello Salt Co. v. Utah*41 and *United States v. Sweet*42 decided that the national government owned certain salt springs and mineral lands in Nebraska and Utah. *United States v. Chandler-Dunbar Water Power Co.*43 and *International Paper Company v. United States*44 held that the national government had the power to condemn riparian property in the interest of improving navigation and to requisition electrical power in war time, subject to the private owner's right to be compensated. Neither *Kaukauna Water Power Company v. Greenbay & Mississippi Canal Company*45 nor *Ohio Oil Company v. Indiana*46 deals with powers of the national government. They respectively approved an arrangement whereby Wisconsin let out to private parties water from a state irrigation reservoir and an Indiana conservation measure which restricted the taking of oil and gas.

The holding in *Ashwander* was expressly limited by the Court's opinion which concluded with these words of Chief Justice Hughes:

... The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. As we have said, these transmission lines lead directly from the dam, which has been lawfully constructed, and the question of the constitutional right of the Government to acquire or operate local or urban distribution

37. 172 U.S. 58 (1893).
38. 220 U.S. 523 (1911).
40. 21 Wall. 660, 22 L. Ed. 639 (1875).
41. 221 U. S. 452 (1911). The customary granting of salt springs to newly organized states was noted in the Morton and Montello Salt Company cases.
42. 245 U.S. 563 (1918).
43. 229 U.S. 53 (1913).
44. 282 U.S. 399 (1931).
45. 142 U. S. 254 (1891).
46. 177 U.S. 190 (1900).
systems is not involved. We express no opinion as to the validity of such an effort, as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of the Authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Company.\textsuperscript{47}

Both the utility companies and the administration in Washington reacted to the narrowness of the decision. The companies felt encouraged to file new test suits including the Alabama Power and Tennessee Electric cases. On February 5, 1937, President Roosevelt urged Congress to authorize a reorganization of the Supreme Court which would permit him to nominate additional justices and thus "vitalize" that body with "young blood."\textsuperscript{49} A few weeks later the President declared in an address at a Democratic Victory Dinner:

But I defy anyone to read the opinions in the T.V.A. case, the Duke Power case and the A.A.A. case and tell us exactly what we can do as a National Government in this session of the Congress to control flood and drought and generate cheap power with any reasonable certainty that what we do will not be nullified as unconstitutional.\textsuperscript{49}

The President's dissatisfaction with the Court was at the time re-echoing across the nation on the stages of theaters operated by the Works Progress Administration. \textit{Power}, a WPA production\textsuperscript{50} which opened on February 23, 1937, offered a finale, the action of which centered about the TVA cases. The scene is the Supreme Court chambers where the voice of "Chief Justice Hughes" is heard from behind one of nine scowling masks suspended above the bench. He reads passages from his opinion in \textit{Ashwander} which deal mainly with the property power. A shout that

\textsuperscript{47} 297 U.S. 288, 340 (1936). For a description of the legal strategy of the Ashwander case from the viewpoint of one of the lawyers for the TVA, see FREUND, \textit{ON UNDERSTANDING THE SUPREME COURT} 92-99 (1950).


\textsuperscript{49} \textit{Id.} at 113, 120. "If We Would Make Democracy Succeed, I Say We Must Act—NOW!" The President Continues the Court Fight. \textit{Address at the Democratic Victory Dinner}. Washington, D. C., March 4, 1937.

\textsuperscript{50} ARENT, \textit{Power: A Living Newspaper, FEDERAL THEATER PLAYS} (1938).
“TVA has won!” launches a streamers and confetti celebration. A general carnival spirit prevails until the loudspeaker announces the filing of another suit against the TVA by Tennessee Electric and the granting of a temporary restraining order by District Judge Gore. There is a call for Judge Gore’s impeachment, a vow by TVA “Solicitor James Lawrence Fly” to appeal the decision and a charge of judicial abuse from “Representative John E. Rankin of Mississippi.” Then

(The lights dim down to one-fourth. The scrim comes in, and movies of TVA activity are shown.)

LOUDSPEAKER: Again the question marches toward ultimate decision by the Supreme Court . . . (Rear traveler curtains open and lights come up on Supreme Court) . . . of the United States. The fundamental constitutionality of TVA will be decided. Upon it will rest the social and economic welfare of the people of the Tennessee Valley . . . (Red, yellow, blue and amber side-lights come on to half, covering the entire group standing down stage in front of platform . . . All people on stage take one step forward.)

ENSEMBLE: What will the Supreme Court do?

(A huge question mark is projected on to the scrim as the Curtain falls.)

(The question mark remains on house curtain until house lights are brought up.)

Finis

The prediction in Power that the fundamental constitutionality of TVA will be decided by the Supreme Court has not yet come to pass.

51. "(A crowd of people comes on from all entrances as red, blue, yellow and amber side-lights light up entire stage. [curtains have been drawn across the bench] An impromptu parade is started.)" Id. at 88.
52. At this point "Governor Bibb Graves" of Alabama, "Senator George W. Norris" and "Governor Hill McAlister" of Tennessee speak in turn from a platform to express their gratification with the decision. Ibid.
53. "(The paraders, who have come to a stop, regard each other in consternation. Lights slowly dim to half light, and blue side-lights come on from left and right." Various members of the crowd say—Water power—the right to convert it into electric energy and the electric energy thus produced—constitute property belonging to the United States! Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress. Section Three, Article Four of the Constitution of the United States!" Id. at 89.
54. "(The people brush the confetti from their clothes, and start walking around slowly, dejectedly. During this action, all lights except the blue side-lights dim slowly out.)" Id. at 90. See note 11 supra.
55. Id. at 90.
56. Id. at 91. See, FLANAGAN, ARENA: HISTORY OF THE FEDERAL THEATER 183-185, 301, 306-07 (1940).
There are those who contend that the "substantive constitutional questions raised in the Tennessee Electric Company case were squarely decided by the Supreme Court in United States v. Appalachian Electric Power Company and Oklahoma v. Atkinson Company." The latter two cases, however, involve not the scope of the power of the Federal Government to compete with private utilities, but, primarily, the extent of the federal commerce power vis-a-vis the powers of the States.

In Appalachian, a case in which forty-one states joined Virginia and the power company as amici curiae, the Supreme Court upheld licensing conditions required by the Federal Power Commission for the construction by a privately owned utility of a hydro-electric dam on a once navigable river despite the fact that Virginia, the state in which the dam site was located, had already authorized the project. The power company had complained of the acquisition clause of the FPC license which permitted the United States, upon expiration of the fifty-year license, to take over and operate the dam project by paying the licensee's "net investment." The company argued that such a regulation of a dam on a non-navigable river deprived it of property and Virginia of local authority in violation of the fifth and tenth amendments. The question of federal power in the matter is begged in the Court's fulsome statement that the authority of the Government over the stream "is as broad as the needs of commerce." The manner and extent to which such a dam, if ever seized by the Federal Government, would be used in competition with the States or private utilities chartered by them was a remote possibility to which the Court's determination did not relate. In expressly limiting its holding, the Court said, "To predetermine, even in the limited

57. Swidler and Marquis, TVA in Court: A Study of TVA's Constitutional Litigation, 32 Iowa L. Rev. 296, 318-20 (1947). See also, Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 883 at 893-901 (1946). Mr. Stern concludes that "The Atkinson and Appalachian cases together establish the complete authority of the Federal Government over the watersheds of navigable streams. So long as a program has the improvement of navigation or the prevention of floods—at any point and not merely at the point of construction—as one of its goals, it may extend to all of the interrelated aspects of the watershed development, including the control of water power." Id. at 900-01. The Stern article is reprinted in Selected Essays on Constitutional Law 1938-1962 at 218 (1963).
58. 311 U.S. 377 (1940).
59. 313 U.S. 508 (1941).
60. "When once found to be navigable, a waterway remains so... The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." 311 U.S. 377 at 408 (1940).
61. Id. at 426. "The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.'" (citing Gibbons v. Ogden, 9 Wheat. 1, 196 (1824)). Id. at 423.
field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.\textsuperscript{3}

In Atkinson, the Supreme Court held that Oklahoma could not prevent the United States from constructing within that state, at a point above navigation as part of a flood control project, a 185 foot hydroelectric dam when a 165 foot dam would have been adequate for flood control purposes. The Court's declaration that the fact that "flood control may be relatively of lesser importance [than other ends] does not invalidate the exercises of the authority conferred by the Congress,"\textsuperscript{4} is relegated to the category of dicta by the Court's announced finding that the project in question was "basically one of flood control."\textsuperscript{5} As in Appalachian, the manner and extent of possible competition by the Federal Government with privately-owned utilities was a matter to be determined by the political branches of the government in the future and so could not have been judged by the Court in these cases.\textsuperscript{6}

But even if one assumes that Appalachian and Atkinson answer the substantive issue of the 1939 Tennessee Electric case in favor of TVA, \textsuperscript{62} id. at 423.\textsuperscript{63} 313 U.S. 508, 534 (1941). Citing Arizona v. California, 283 U.S. 423, 456 (1931), Mr. Justice Douglas wrote, "As repeatedly recognized by this Court from M'Culloch v. Maryland, 4 Wheat. 316 (1819), to United States v. Darby, 312 U.S. 100 (1941), the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce." Id. at 526.

64. Id. at 529.

65. The bill of equity filed by the State of Oklahoma incorporated House Document Number 541, 75th Congress, 3d Session (1938) which contained various government reports concerning investigations of Denison Reservoir on the Red River in Texas made with a view to flood control and hydroelectric power development. Facts from these reports were relied upon by the Court in reaching its determination that the proposed dam was part of a project which was basically one of flood control. The report of the Board of Engineers for Rivers and Harbors [third endorsement] of February 8, 1938 states on pp. 11-12:

Should the federal Government exercise general supervision over all withdrawals from the reservoir, which in the best interests of the general public it should do, there are several practicable alternatives as to procedure to be considered:

(a) Construction of the dam and reservoir by the United States and the issuance of a license by the Federal Power Commission to a qualified applicant for the construction, operation, and maintenance of a waterpower plant to utilize its available power.

(b) Construction of the project by the United States and its subsequent operation and maintenance by a State agency or joint State agency to be created therefor, which shall reimburse the United States for excess expenditure made on account of power.

(c) Construction of the project by the United States and its operation and maintenance as is now being done at Bonneville.

At no point in the 94 pages of reports is the TVA suggested as a model for power policies at the Denison Dam.
this does not necessarily imply the constitutionality of the present-day TVA power operation which, since 1942, has been transformed from one utilizing falling water into one depending mainly on steam. With the use of its steam plants and by requiring its regular customers to take their entire supply of electricity from its facilities, the TVA has attained an electrical power producing monopoly in an area more than twice the size of the Tennessee River basin. Although it is stated in both the *Appalachian* and *Atkinson* opinions that "Flood protection, watershed development [and] recovery of the cost of improvement through utilization of power are . . . part of commerce control," no power other than that generated at the disputed dams was under consideration in either case and there is no reason to think that either Reed or Douglas, the Justices who wrote for the Court in those cases, was referring to any other kind. The tenth amendment requires that a line be drawn somewhere between federal and non-federal business activity. There is nothing in the Constitution or the decisions of the Supreme Court to prevent such a line from being drawn so as to place electric power activities of a certain type and magnitude outside the scope of powers delegated to the national government. Activities, for example, such as the steam plant operations of TVA which have been developed to the point where they account for three-quarters of the power produced by TVA and make TVA the largest single buyer of coal in the nation.

As the cases stand today, no one can be sure whether the issue of


66. 311 U.S. 377, 426 (1940) and 313 U.S. 508, 525 (1941).

67. U. S. Const. amend. X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

68. In the recent case of FPC v. Union Electric Company, 381 U.S. 90 (1965), the Supreme Court held that Congress could and had authorized the FPC to require a license as a condition precedent to the construction on a non-navigable stream of a hydroelectric project to generate energy for an interstate power system. Writing for the Court, Mr. Justice White stated, "There is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress . . . Electric Bond & Share Co. v. Securities & Exchange Comm'n, 303 U.S. 419 (1938), . . . Nor is there any doubt today that projects generating energy for such transmission, such as Taum Sauk, affect commerce among the States and therefore are within the purview of the commerce power, quite without regard to the federal control of tributary streams and navigation. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 40-41 (1937), . . . Katzenbach v. McClung, 379 U.S. 294, 301-04 (1965)." But here as in Appalachian, the case involves regulation of—not participation in—the business of hydroelectric power.


TVA competition in electricity is basically one of federal power or Congressional policy, and therefore a turn from constitutional to political history would seem to be in order.

III. SOME POLITICAL CONSIDERATIONS

Politically as well as judicially, the most controversial aspect of the TVA project was the Authority's competition with the power companies. The TVA Act carries the following statement of purpose:

AN ACT To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes. 71

For the navigation and conservation features of the TVA Act there were well-established legislative precedents which had been supported by both major parties. 72 "Other purposes" covered the novel federal experiment in hydroelectricity which has evolved into the largest single electric power system in the world. 73 Under what conditions—"typical and traditional American conditions," Mr. Lilienthal called them—did this change in the valley go forward? What political climate obtained when President Franklin D. Roosevelt called upon the Congress to (1) enact the TVA Act in 1933, (2) strengthen it in 1935, and (3) lay the groundwork for the creation of six similar valley authorities in other


72. President Theodore Roosevelt, for example, created the Inland Waterways Commission for the purpose of co-ordinating recommendations for increasing the usefulness of navigable waterways. Members of the original commission included John H. Bankhead, Gifford Pinchot and Senator F. G. Newlands of Nevada. The latter had sponsored the Newlands Act of 1902 for the irrigation and conservation of Western lands. A Democrat, Newlands had the active assistance of Republican Senator Robert LaFollette of Wisconsin and of the President. Other random examples of early conservation legislation include the setting aside of the Yellowstone National Park Timber Reserve by President Benjamin Harrison in 1891 and the setting aside of twenty-one million more acres in forest reserve by President Cleveland a few years later. The Appalachian Forest Reserve Act "to protect the navigability of streams" was signed by President Taft in 1911. See Hart, Crisis, Community and Consent, 22 Law & Contemp. Prob. 512 at 516 (1957) for graph depicting flood control acts passed between 1902 and 1948 [reprinted from Hoyt and Langbein, Floods (1955)].

parts of the country in 1937?\textsuperscript{74}

The dominant fact of political life in 1933 was the Depression—the most severe in the nation's history. The Depression—which due to the regional freight rate differential\textsuperscript{75} and other factors was even more severe in the area in which the Tennessee Valley is located—created a climate of doubt about the political-economic theories of the Twenties.\textsuperscript{76} The Depression brought down the utilities holding company pyramid erected by Samuel Insull and the abuses thereby revealed were widely used to discredit the entire utilities industry.\textsuperscript{77} The Depression brought to an end the long stalemate in the political branches of the federal government between the proponents of private and public power at Muscle Shoals. Twice, in 1928 and 1931, congressional action in favor of Government operation of the Wilson Dam was vetoed by Presidents Coolidge and Hoover.\textsuperscript{78} Action by the Congress in favor of private construction and operation of power facilities at Muscle Shoals was vetoed by President Theodore Roosevelt\textsuperscript{79} in 1903 and House action in favor of accept-

\begin{footnotes}
\footnote{74. \textit{The Public Papers and Addresses of Franklin D. Roosevelt: 1937 Volume, The Constitution Prevails}, "The President Recommends Legislation for National Planning and Development of Natural Resources Through Seven Regional Authorities, June 3, 1937" 252 (1941).}
\footnote{75. See Lilienthal, \textit{The Journals of David E. Lilienthal: The TVA Years} 151-52 (1964). See also Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) and Arnall, \textit{The Shore Dimly Seen}, ch. 11, "Our Colonial Regions" (1946).}
\footnote{76. Hoestadter, \textit{The Age of Reform} 307-08 (1955). See generally, Bird, \textit{The Invisible Scar} (1965), and Vector, \textit{The Age of the Great Depression} 81-82, 91 (1948).}
\footnote{77. George W. Norris declared on the floor of the Senate that the electric utilities holding company "constitutes the greatest evil of the civilized age." Arent, \textit{op. cit. supra} note 50, at 37. Fortune quotes "utility hating" Senator Burton K. Wheeler of Montana as saying to Wendell Willkie after interrogating him for a whole day at a committee hearing, "I am frank to say to you that probably if there had not been any more abuses in some companies than there have been in yours with reference to some of these matters, you probably would not have been faced with some of the provisions you are faced with." \textit{Commonwealth & Southern, Fortune} May, 1937 p. 83. The use by Wendell Willkie before the same committee of the term "better utilities" triggered the following exchange between him and Senator Bone of Washington:

"You included the word 'better.'"
"That takes in 85 per cent."
"Fifteen per cent of bad apples in a barrel is a lot."
"Well," replied Willkie, "Two of the Apostles went wrong—maybe three—out of twelve."

Barnes, \textit{Willkie} 145 (1952). Talking with Harry Hopkins after Willkie's nomination for the Presidency, Lilienthal said, "[T]he Insull stuff doesn't go against this man [Willkie]." Lilienthal, \textit{op. cit. supra} note 75, at 194, 203.}
\footnote{79. In his veto message, President Roosevelt wrote that ". . . the ultimate effect of granting privileges of this kind . . . should be considered in a comprehensive way and . . . a general policy appropriate to the new conditions caused by the advance of electrical science should be adopted under which these valuable rights will not be}

\end{footnotes}
ing an offer by Henry Ford to lease and operate the Wilson Dam was “vetoed” by Chairman George W. Norris who locked the plan up in his Senate Agriculture Committee. The Hoover veto message and Norris’ autobiography afford classic formulations of philosophies which clashed at Muscle Shoals. Norris wrote:

Every stream in the United States which flows from the mountains through the meadows to the sea has the possibility of producing electricity for cheap power and cheap lighting, to be carried into the homes and businesses and industry of the American people. This natural resource was given by an all-wise Creator to his people and not to organizations of greed. No man and no organization of men ought to be allowed to make a financial profit out of it. Every drop of water that falls from the heavens to the earth beneath should perform its proper share of preserving the blessings God intends to bestow upon his people. . . .

I became a storm center because it seemed to me that the development and conservation of these resources ought always to be under public control, public ownership, and public operation.

And Hoover wrote:

I am firmly opposed to the Government entering into any business the major purpose of which is competition with our citizens. There are national emergencies which require that the Government should temporarily enter the field of business, but practically given away, but will be disposed of with full competition in such a way as will best substantiate the public interest.” See Pringle, Theodore Roosevelt: A Biography 430-31 (1931).

80. Nevins and Hill, Ford: Expansion and Challenge 309 (1957). “Indeed, it seems for a time that acceptance might be swept through Congress on a flood of favorable farmer-labor sentiment and Southern enthusiasm. But the opposition was equally vocal and determined, and it included two powerful fighters, Gifford Pinchot and Senator George W. Norris. ‘The Ford plan,’ declared Pinchot, ‘is seven parts waterpower, one part fertilizer.’” Id. at 308. When the Nebraska legislature passed resolutions asking Norris to change his stand, he simply became more adamant.” Id. at 311.

81. Norris, Fighting Liberal: The Autobiography of George W. Norris 161, (1945). See Wengert, The Politics of River Basin Development, 22 Law & Contemp. Prob. 258 at 274 (1957). Wengert writes: “Since its beginnings over fifty years ago, the conservation movement has portrayed basic policy issues as important, but essentially simple, choices between good and evil, between the public interest and greed and personal gain. This conspiratorial approach has characterized much of the discussion of river basin politics, too. As Richard Hofstadter has suggested, this was the mood of the Progressive Era, in which the political struggle over resource policies and programs first became self-conscious. And it continues to color much of the discussion of resource questions today.” See also Acheson, Morning and Noon 108 (1965).
they must be emergency actions and in matters where the cost of the project is secondary to much higher considerations. There are many localities where the Federal Government is justified in the construction of great dams and reservoirs, where navigation, flood control, reclamation or stream regulation are of dominant importance, and where they are beyond the capacity or purpose of private or local government capital to construct. In these cases power is often a by-product and should be disposed of by contract or lease. But for the Federal Government deliberately to go out to build up and expand such an occasion to the major purpose of a power and manufacturing business is to break down the initiative and enterprise of the American people; it is destructive of equality of opportunity amongst our people; it is the negation of the ideals upon which our civilization has been based.\(^2\)

The Depression also had given Roosevelt a commanding popular mandate which he was able to translate, during the enthusiasm of the first hundred days of his first term, into a sweeping legislative program which included the original Tennessee Valley Authority Act.

The Depression and public approval of Roosevelt’s response to it formed the centerpiece of American politics at the time of the 1934 elections. Unusual off-year Democratic gains in Congress and the attempt by Huey Long and Father Coughlin to outbid the New Deal with their “Share the Wealth” and “Social Justice” programs led to the second “Hundred Days” during which the President obtained amendments to the TVA Act which strengthened the Authority’s powers with regard to dam construction, and power house and transmission line acquisition.\(^3\)

\(^2\) I MEYERS, THE STATE PAPERS AND OTHER PUBLIC WRITINGS OF HERBERT Hoover, “Message to the Senate, March 3, 1931. Veto of the Muscle Shoals Joint Resolution” 526-27 (1934). See BEARD, op. cit. supra note 78, at 42, “When the goblin of ‘public power’ reappeared, the President immediately bent his efforts to promoting the private ownership and operation of the government’s property in the Tennessee Valley . . . direct government action . . . the President insisted, would imprint the bar sinister of socialism upon the emblazoned escutcheon of American politics.”

\(^3\) 49 Stat. 1075-81; 16 U.S.C. 831 (1959). Lines from the WPA-produced play, Power, ARENT, op. cit. supra note 50, at 60, suggest congressional attitudes of the time:

[Mississippi Congressman John] Rankin: We have formed a bloc in the House of Representatives to save for the American people, now and for all time to come, the hydroelectric power of the nation.

Second Congressman: We are opposed to pooling public facilities with private interests.

Third Congressman: We are opposed to selling public power wholesale to private power companies.

Rankin: We favor the municipalities owning their own distribution systems.
Speaking in November, 1934, at ceremonies marking Tupelo, Mississippi, as the first city to sign a contract with TVA, President Roosevelt declared that what “is being done here will be duplicated in all the States of the Union before we get through.” In June 1937, he urged Congress to create six regional authorities in addition to that already established in the Tennessee Valley. The agency requested for the Columbia Valley was to have less authority than the TVA but considerably more than the other five whose work “at least in their early years,” the President specified, “would consist chiefly in developing integrated plans to conserve and safeguard the prudent use of waters, water power, soils forests and other resources of the areas entrusted to their charge.” The failure of this legislation was related to the decline in the late thirties in the appeal of both the President and the TVA idea.

Perhaps the most obvious of the factors which militated against passage of the so-called “7 TVA’s” bill was public and congressional reaction to the Court fight which was in progress at the time it was introduced. In succeeding months as the President’s strength waxed with the Court it waned to some extent with Congress and the voters. The attack he had launched against the Supreme Court in February 1937 brought a harvest of pro-New Deal decisions commencing that same spring and including in 1938 and 1939 the Alabama Power and Tennessee Electric cases. But as the high tribunal became a Roosevelt Court, Congress reproved the President for trying to pack the Court and the voters repulsed his attempt to purge selected Democratic members from


85. The case of NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, which upheld the National Labor Relations Act, was decided on April 12, 1937. The Ashwander case of 1936 may be viewed as a harbinger of the “switch in time that saved nine.” See MASON, HARLAN Fiske STONE: PILLAR OF THE LAW, Chapters 28-30 (“Showdown 1936-1937,” “Old Wine in New Bottles 1937-1938,” and “The Shifting Battle Line 1938-1940”) (1955). Stone quotes Ickes as writing in January 1936, “There isn’t any doubt at all, “that the President is really hoping the Supreme Court will make a clean sweep of all New Deal legislation, throwing out the TVA Act, the Securities Act, the Railroad Retirement Act, the Social Security Act, the Guffey Coal Act, and others. He thinks the country is beginning to sense this issue but that enough people have not yet been affected by adverse decisions so as to make a sufficient feeling on a Supreme Court issue.” Id. at 412-13.

86. President Roosevelt appointed to the Supreme Court Justices Black (1937), Reed (1938), Frankfurter (1939), Douglas (1939), Murphy (1940), Byrnes (1941), Jackson (1941) and Rutledge (1943) and elevated Chief Justice Stone (1941).

87. See PUSEY, 2 CHARLES EVANS HUGHES, ch. 70, “The Court-Packing Fight” (1951); PEARSON AND ALLEN, THE NINE OLD MEN (1937); and ALSOP AND CATLEDGE, 168 DAYS (1938).
Prospects for the "7 TVA's" bill were further dimmed by intra-Authority and intra-Governmental rivalries. The Tennessee Valley Authority was organized under the direction of a board, the chairman of which was Dr. Arthur E. Morgan, who had been president of Antioch College and the engineer responsible for the Miami Conservancy network of flood control dams in Ohio. President Harcourt A. Morgan of the University of Tennessee and former dean of its agriculture school and David E. Lilienthal of the Wisconsin Public Service Commission were chosen as the other two directors. The following account of the first meeting of the board is found in Lilienthal's journal:

On Friday, June 16, in the afternoon, we had our first meeting with the board of directors of the Authority. . . . A matter of particular interest arose out of the receipt from Wendell Willkie, president of Commonwealth & Southern Corporation, the holding company controlling most of the large utility operations in the Southeast. Willkie asked the chairman of the board to meet with him to discuss problems common to the Authority and to his corporation. Then followed a considerable discussion as to what attitude the board should take toward the private utilities, etc. While fundamentally we may be in agreement, there was some difference of opinion as to tactics and strategy expressed as between myself and Chairman Morgan, with Harcourt Morgan acting as a mediator. This will require a good deal of working out.

Lilienthal had sensed the beginning of what Schlesinger has described as "a quiet, protracted, and increasingly bitter civil war in the heart of the great experiment in unified development." Chairman A. E. Morgan stated that he "was not going to fight the power companies" as he

88. Except in the case of Roosevelt's law partner's brother, Congressman John O'Connor of New York, the voters re-nominated and re-elected all Democratic members of Congress which Roosevelt asked them to defeat.
89. Chairman Morgan was given charge of dam construction, education and rural living; Dr. H. A. Morgan of fertilizer production and agricultural policy; and Mr. Lilienthal of power policy. In August 1933 Lilienthal and H. A. Morgan voted themselves autonomy for their own operations. SCHLESINGER, THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 331 (1959). See also, BIDDLE, IN BRIEF AUTHORITY 55 (1962).
90. LILIENTHAL, op. cit. supra note 75, at 39. Francis Biddle was told "that H. A. Morgan was alive to the constitutional doubt as to whether the federal government could undertake broad-scale agricultural experiments that had nothing to do with control of navigable streams. BIDDLE, IN BRIEF AUTHORITY 55 (1962).
91. SCHLESINGER, op. cit. supra note 89, at 331.
believed that they would develop "a sense of trusteeship."

Director Lilienthal, on the other hand, felt that a fight with the utilities was un

avoidable. The territorial limitation on the TVA's authority to market power urged by Morgan was characterized by Lilienthal as a "Chinese wall" provision.

The "loose ways" in which Lilienthal used the term "yardstick" differed from Morgan's advocacy of the setting up of a "true yardstick to test the relative merits of public and private power ownership." During the negotiations for the purchase of the C & S properties, Morgan favored a "valuation" formula developed by Bonneville Dam Administrator J. D. Ross while Lilienthal advocated a price determined on a "cost-minus depreciation" formula. Policy differences were accompanied by mutual recrimination and a progressive deterioration in the personal relationship between the two men. In March 1938, President Roosevelt fired Chairman Morgan for "contumacy" declaring that he was "temperamentally unfitted to exercise a divided authority." There followed a lengthy Joint Congressional investigation of the TVA which spotlighted and republicized the directors' dispute and which finally resulted in a majority report favorable to Lilien-
thal and H. A. Morgan and a minority report embodying A. E. Morgan's recommendation that the TVA's activities in agriculture be transferred to the Department of Agriculture and in flood control to the War Department.

The failure of the "7 TVA's" bill is also partially to be explained by intra-Administration rivalries—such as that between the heads of the TVA and the Department of Interior. The flavor of this conflict is suggested in the diaries of TVA Director and later Chairman Lilienthal and Secretary of the Interior Ickes. Ickes wrote:

[Lilienthal] pretended to me that the only reason he was opposing the President's proposal [that TVA clear through the Secretary of Interior] was because of the jealousy between the established departments and the fact that TVA had to deal with all of them.

I also told George [Norris] that Lilienthal seemed to have forgotten that the successful outcome of his negotiations with Wendell Willkie were due in large part to the allocations that PWA had made for local power projects. . . . As a matter of fact, without this help I believe that Lilienthal's negotiations would have failed.

At heart Lilienthal is a coward, but he will fight when he has a selfish interest. He tried to pussyfoot on the proposition that he had been stirring up feeling against the Reclamation Bureau in the Far West and was trying to line up sentiment in favor of three-man independent authorities for the management of power projects that lie within my Department. . . . [TVA] is a one-man authority because Lilienthal completely controls his two colleagues. He did not deny this. . . . Of course I do not trust Lilienthal. I have no illusions that he will not continue to make matters difficult for me.

I told [Director of the Budget] Smith that some of us were not fooled by Lilienthal; he is the type that wants his own

100. Joint Congressional Committee on the Investigation of the Tennessee Valley Authority, op. cit. supra note 98, at 51-52, 197-98. For minority view, see pp. 273-75.
101. Id. at 275-77.
103. Id. at 26 [entry for September 30, 1939]. Ickes diary entry for December 21, 1940, read: "Norris seems to have the idea that by tucking all of these independent agencies [including TVA] under the wing of the President himself, even if he were opposed to public power, he will not know that they are there so that they will fare better than if they are under a man who, other things being equal, is bound to fight for them because they are in his Department." Id. at 400.
104. Id. at 416. [entry for January 26, 1941].
little stick of candy to suck in the corner without anyone's being allowed to go anywhere near him. His concern is his own stick of candy.¹⁰⁵

And Lilienthal wrote:

I told [Norris] the story of my being instructed to draw up the regional bills and then having Ickes raise Ned, with the note that threw the whole thing into confusion.¹⁰⁶

[NRA general counsel Don Richberg] seems . . . amazed at [Roosevelt's] thoughtfulness, his willingness to fight on an issue between the Government and outsiders (although not so where several Government departments are battling each other.) [Don] says Ickes is in a very bad way physically, having overloaded himself, and having a thirst for power.¹⁰⁷

Thanksgiving Day. I have just returned from the White House, where in the beautiful East Room I attended a Thanksgiving worship . . . . Ickes and his young wife, he looking as sour as ever, and both of us taking pains not to have to speak . . . . He has certainly got about the most ill-wishers of any man in the whole show. Leon Henderson, for example . . . . And even the men who are directly responsible to him in important ways: The Governor of Alaska, Ernest Gruening, whom I met on Pennsylvania Avenue yesterday. "[Ickes] is the most prehensile and acquisitive man in Washington. There is no part of the Government that he doesn't want to get his hands on. . . ."¹⁰⁸

Numerous entries in Lilienthal's journal deal with the Ickes-Corcoran-Cohen proposal to put all power activities (including TVA, FPC, REA, etc.) in or under the Interior Department. One reference to Ickes' activities on behalf of the plan concludes with:

Good God! No issue of fundamental policy whatever—Just a man mad for power.¹⁰⁹

¹⁰⁵. Id. at 42. [entry for October 20, 1939].
¹⁰⁶. LIIENTHAL, op. cit. supra note 75, at 286. [entry for February 11, 1941].
¹⁰⁷. Id. at 42. [entry for May 19, 1934].
¹⁰⁸. Id. at 562, 564. [journal entry for November 26, 1942].
¹⁰⁹. Id. at 158. [entry for February 23, 1940]. Another entry read: "The political power of such agencies, in the West, as the Bureau fo Reclamation of the Department of the Interior, or the AAA in the Department of Agriculture, or the Corps of Engineers in the War Department, is simply astounding. There are large blocs of votes which they control, just as much as the railroad used to control votes, and by some, though not all, of the same methods. The money they use is not expended to line the pockets of Congressmen. But it is public money which they hold out as bait or withhold as
Charges and boasts that the TVA was socialistic helped to forestall the plans to establish similar authorities elsewhere. A few days before the original TVA bill was sent to Congress, an apprehensive Senator Norris asked the President, "What are you going to say when they ask you the political philosophy behind TVA?" Roosevelt replied, "I'll tell them it's neither fish nor fowl, but whatever it is, it will taste awfully good to the people of the Tennessee Valley."110 During the Congressional debates the project was likened by Republicans to a "Soviet dream"111 and a "Russian idea."112 More damaging than such charges by the President's political opponents was the enthusiastic approval of some of the TVA's admirers in the Government113 and out. Norman Thomas, for example, called the TVA "the only genuinely socialist product of the New Deal. It is a beautiful flower in a garden of weeds."114

punishment in the way of expenditures in a particular Congressional district. This is done boldly and without any apologies whatever. Some of the New Deal politicos in administrative jobs are just as barefaced about the matter of seizing political power through administration of these so-called New Deal laws as the old-line bureaucrats are or as old-time political hack Tammany alderman could possibly be." Id. at 493. [Journal entry for May 30, 1942].

110. BURNS, ROOSEVELT: THE LION AND THE FOX 179 (1956); see also Id. at 242-43.

111. Congressman Joseph W. Martin of Massachusetts. SCHLESINGER, op. cit. supra, note 89, at 326.

112. Congressman Charles A. Eaton of New Jersey. Ibid. See also DILLON, WENDELL WILLIE 46, 52 (1952).

113. See ARENT, op. cit. supra note 50, at 39. The following is a scene from Power which was presented at WPA Theaters in 1937:

SCENE EIGHT
(Childish Questions)

GIRL: What would happen if the company wouldn't give us any electricity?
FATHER: We'd be in a hell of a fix.
GIRL: Then why doesn't the Government give us electricity?
FATHER: Because it would be competing with private business, and besides, everybody knows that the Government wouldn't be run efficiently.
GIRL: (Pauses, apparently thinking): Daddy, who runs the Post Office?
FATHER: The Government runs the Post Office.
GIRL: Why does the Government run the Post Office?
FATHER: Because it's too important to us to permit anybody else to run it.
GIRL: Well, Daddy, don't you think electricity is important? You said we'd be in a hell of a fix if the company quit giving it to us.
FATHER: Watch your language, young lady!
GIRL: It was what you said, Daddy.
FATHER: The Post Office and electric lights are different.
GIRL: Daddy, who is the Government?
FATHER: The Government is you and me, I guess—the people.
GIRL: Do all the people need electricity?
FATHER: Yes.
GIRL: And does the company own what all the people need?
FATHER: That's right!
GIRL: Gee, Daddy; the people are awfully dumb.

114. BARNES, WILLKIE 115 (1952). More recently, President Kennedy's suggestion
The forceful personality and advocacy of Wendell Willkie redounded to the benefit of those opposing more TVA's. Roscoe Drummond has described Willkie as "the most influential American never to hold national office." Many believed him to be the only rival of Roosevelt who had anything like the President's "deadly charm" and leadership capacity. Willkie had asked the courts to decide the constitutionality of the TVA's power program. He asked the people to decide its wisdom. Using the platform, the press and the air, he developed the theme which is, perhaps, best expressed in the Foundation Day address which he delivered in 1938 at Indiana University:

The cause of liberalism today . . . has changed. In the pre-war years, we fought against domination of the people by Big Business. We now face the domination of the people by Big Government. I am not speaking of the United States alone, but of the trend which is apparent throughout the world. The

in 1961 that the TVA "study ways the lessons learned in the Tennessee Valley may be exported abroad" drew an editorial observation that actually delegations from all over the world seeking ideas on engineering, management and finance visit our private power plants—which supply over 80 per cent of our power—as well as TVA and that they "may wonder why the 'capitalistic' United States should attempt to educate them in the virtues of socialism." Socialism Would Be a Strong Export for the USA, Saturday Evening Post, March 25, 1961, p. 10.


116. LILIENTHAL, op. cit. supra note 106, at 190: [Don Richberg] said something quite interesting about Willkie: "Willkie has many of the same defects as FDR—'arrogant,' 'cocksure,' 'terrific talker,' and 'that deadly charm.'" [entry for July 10, 1940]. PERKINS, THE ROOSEVELT I KNEW 116, 119 (1946): "Wendell Willkie, I think, was more disturbing to Roosevelt as a rival than anyone who ran against him . . . Willkie's was a mind Roosevelt understood. He had some of the same characteristics himself."

TUOWELL, THE DEMOCRATIC ROOSEVELT 296, 538 (1937): "Presidential success . . . is wholly mysterious . . . Franklin used to size up his rival candidates with it in view. Of all of them, only one, to the end, would seem to have the gift—that would be Willkie, some way yet in the future . . . Willkie was very American and very democratic—more so, if you think about it, than Franklin himself. Indiana had no Dutchess County." BARNES, WILKIE 11 (1952): Booth Tarkington met Willkie in 1940 and reported that he was "a man wholly natural in manner . . . in a word, a man as American as the courthouse yard in the square of an Indiana county seat." FELIX FRANKFURTER REMINISCES 6 (1960): "The atmospheric phenomena of Bryan has to be recreated. If you recall the kind of excitement that tousled-hair Wendell Willkie stirred, suddenly somebody emerged, William Jennings Bryan emerged that way for me."

117. Magazine articles by Willkie included The Faith That is America, Reader's Digest, December 1939; Idle Money—Idle Men, Saturday Evening Post, June 17, 1939; Brace Up, America! Atlantic Monthly, June 1939; Political Power: The Tennessee Valley Authority, Atlantic Monthly, August 1937; We the People: A Petition, Fortune, April 1940.

liberal who fought against one kind of domination thirty-five years ago should find himself fighting against this new kind of domination today.¹¹⁹

A measure of the impact of these efforts² is the nomination of Willkie—a recent Democrat,²¹ a stranger to public office and the head of a utilities holding company—for the Presidency by the Republican Party in 1940.

Finally, the coming of the war to Europe and later to America diverted interest from the “7 TVA’s” proposal as well as from the President’s domestic program generally. When Wendell Willkie accepted the Republican Presidential nomination in his native town of Elwood, Indiana, France had recently fallen to the Nazis and Willkie applied the theme which he had developed during his contest with the TVA to current developments declaring:

It is from weakness that people reach for dictators and concentrated government power. Only the strong can be free.

And only the productive can be strong.¹²²

¹¹⁹. *Willkie, This Is Wendell Willkie: A Collection of Speeches and Writings on Present-Day Issues*, “An Address at the University of Indiana on Foundation Day, May 4, 1938” 157, 165 (1940). Compare with statement of Thomas Edison which Willkie often quoted: “There is far more danger in public monopoly than there is in private monopoly, for when the government goes into business it can always shift its losses to the taxpayers. If it goes into the power business it can pretend to sell cheap power and then cover up its losses. The government never really goes into business, for it never makes ends meet, and that is the first requisite of business. It just mixes a little business with a lot of politics and no one ever gets a chance to find out what is actually going on.” Fortune May 1937, p. 206.

¹²⁰. See, Lilienthal, op. cit. supra note 106, at 184: It was my fight with Willkie that gave him a national audience and a national reputation, neither of which he would have had without TVA, or if I had been less stubborn, in insisting on a certain kind of relationship with him. To have the man we made, as it were, then nominated as a candidate for the Presidency . . . [entry for June 28, 1940].

¹²¹. In 1935, Willkie was elected to the New York County Democratic Committee together with James A. Farley, Bernard M. Baruch, Frank C. Walker and Mrs. Willkie. Willkie regarded himself as a Democrat as late as December 1938. See *Farley, Jim Farley’s Story: The Roosevelt Years* 157 (1948); and *Barnes, Willkie* 152 (1952). *Willkie, op. cit. supra*, note 119 at 273-74.

¹²². For comment on other than political reasons, see Kraenzel, *The Social Consequences of the River Basin Development*, 22 Law & Contemp. Prob. 220 (1957). “In the larger western basins, however, such as the Missouri River where the milieu is considerably different, the same social consequences have not followed upon developmental activity. These basins are considerably larger than that of the Tennessee River and contain a greater diversity of resources and social phenomena. They also have fewer indigenous metropolitan centers . . . Furthermore, in the West, there is a need for basic institutional adaptations to the facts of semiaridity and aridity.” *Id.* at 235-36. But see *Baumhoff, The Dammed Missouri Valley: One Sixth of Our Nation*, Chapter XIII (1951). “One persistent argument has been that TVA may be all very well for the compact, homogeneous countryside of the Tennessee Valley, but never could work in the far-flung, heterogeneous Missouri Valley. This argument does not hold much water: management principles could be applied regardless of the
The war effort brought Business and Government into closer cooperation and President Roosevelt announced that he was giving up his role as "Dr. New Deal" to become "Dr. Win-the-War."

For various reasons including those discussed above—and under conditions no less "typical and traditional" than those existing at the time the TVA was established—the "7 TVA's" bill which Roosevelt sent to Congress in 1937 bogged down in committee. A similar plan introduced in 1945 was no more successful causing an advocate of more river authorities to suggest that the chances for such legislation might be improved if it were labeled an "Anti-authority Authority" bill. In its own vicinity, however, the TVA enjoyed widespread support. A poll taken by the St. Louis Post-Dispatch in 1944 revealed unanimous support for the Authority among the governors of the seven Tennessee Valley states. Indeed, Solicitor General Francis Biddle, after serving as counsel for the Joint Congressional Committee which investigated the TVA, congratulated Chairman Lilienthal on the way the TVA board was able to work with the local agencies and "make them eat out of your hands." Despite charges of carpetbagging and complaints about strip-mining to geographical variations within a region." Id. at 260. See also Huggman, Irrigation Development and Public Water Policy 167 (1953). "The Tennessee Valley Authority, as the only regional organization of its kind, has been the subject of much praise and censure. . . . The viewpoint, however, that the TVA type of organization can be transplanted intact to other river basins is just as dangerous and unrealistic as the attitude that TVA is a socialistic endeavor not worthy of consideration in formulating administrative organizations for other river basins." Ibid. For discussion of problems peculiar to development of arid or semiarid areas, see Fuller, Irrigation and Tyranny, 17 STAN. L. REV. 1021 (1965).

123. See Lilienthal, op. cit. supra note 106, at 493-94.
125. Lilienthal, op. cit. supra note 106, at 203-04. [entry for August 15, 1940]. "[Biddle] spent a good many months working on the Congressional investigation, and regards the report as one of the best things he ever did. And I suppose he is not unconscious of the fact that it was the TVA investigation that really put him in line for the series of great steps he has since taken, to a place at the President's Cabinet table." Id. at 429. [entry for January 10, 1942 at which time Biddle was Attorney General.]

126. "In the end [the TVA-built town of] Norris, I think, may do more to make enemies for planned economy than all the Republican speeches and power company briefs in the world. . . . Too many of us will prefer a sloppy South to a South planned in perfection by outlanders. We know out of our past that the worst carpetbaggers were the ones who came down to improve us." DANIELS, A SOUTHERNER DISCOVERS THE SOUTH 57 (1938); SCHLESINGER, op. cit. supra note 89, at 330.

127. See New York Times, July 4, 1965: "Yesterday, Gov. Edward T. Breathitt of Kentucky added a bitterly critical comment to the mounting uproar in Kentucky against the rapid growth of strip mining in the mountainous eastern part of his state. An indigenous uprising against 'the ravaging of our land' has sprung up there in recent weeks. Outraged mountain citizens have formed a new organization, the Appalachian Group to Save the Land and the People, and the Governor is supporting them with state legal assistance. . . . In a statement at his office in Frankfort, Governor Breathitt took sardonic note yesterday of TVA's nearly $53 million 'dividend' in the
fuel its steam plants, the TVA has maintained its popularity. President Eisenhower realized this when he exclaimed at a Cabinet meeting: "By God, if ever we could do it, before we leave here, I'd like to see us sell the whole thing, but I suppose we can't go that far." And Senator Barry Goldwater demonstrated it in 1964 when his suggestion that the TVA electric power complex be purchased by the states of the region and by members of the public inspired bumper stickers reading "Sell TVA? Hell, we'd rather sell Arizona!"

But at the same time the traditional national regard for competitive free enterprise weathered the Depression to enjoy a renewed popularity fiscal year 1965. . . . 'The people of Kentucky are grateful for the contribution which TVA has made to their state, but I believe the people of Kentucky take a dim view of the TVA's returning such a handsome 'profit' to the Federal Treasury at the expense of ruined hillside, poisoned streams, dead woodlands and devastated farms, a breeding ground of mosquitoes and eradicated wild life.'"

The following January the Kentucky Legislature passed by an overwhelming vote a law placing strict controls on strip miners. House Bill No. 36, Regular Session, Kentucky General Assembly, 1966. Time, February 4, 1966.


129. New York Times, January 25, 1964, p. 9. See Wehringer, The Tennessee Valley Authority and the Volkswagon Sale, XX Bus. Law 795 (1965). "The [sale of the] German contemporary giant offers guidelines. The relative sizes, in any dimension, when related to the locale of each, might show TVA is not as big a task to transfer as was Volkswagen. Using the German model, there are several ideas for consideration:

1. Minority government control. This could be federal and the 7 states serviced by TVA.
2. Limitation on the number of shares each family can buy. (Comsat followed this thought.)
3. A free share of stock for each TVA employee, with special provisions as to additional purchases.
4. Orderly transfer of voting rights by government control with a time limitation." Id. at 800.

Lufthansa-German Airlines (approximately four-fifths of the stock of which is owned by the West German government) is presently seeking parliamentary approval for the sale of more than ten million dollars worth of stock to the public. Wall Street Journal, January 26, 1966. Other examples are to be found in the procedures governing the sale to the public of U.S. government-held stock in the Communications Satellite Corporation and the General Aniline & Film Corporation. XVIII Bus. Law. 175-80 (1962); Business Week, March 9, 1963, p. 29; Wall Street Journal, April 16, 1964.


131. Proponents of regulated private power development contend that new conditions make their position sounder than ever. They point out that the greatly increased demand for electricity has made lower rates possible, that new competition with natural gas and oil has sharpened the electric companies' efficiency, that the immense tax yield from private enterprise becomes more important as government requires more revenue, and that the capacity and instrumentalities of regulation have developed to a point at which fairness is assured to investors and consumers alike. See Moley, The Statist Mentality, Newsweek, April 19, 1965.
of its own.132 David E. Lilienthal realized this when he said to his secretary as they awaited the decision in Ashwander, "... if we win, we must be very careful not to be, at least in public, exultant and not to ride the horse too hard."133 And Interior Secretary Stewart Udall demonstrated it in 1965 when his opposition134 to the Duke Power Company's application for an FPC license to commence construction of a $700 million dollar hydro and steam electric power complex in northwestern South Carolina stirred that state's governor,135 its entire Congressional delegation136 and various state organizations including the South Carolina Electric Cooperatives to the defense of the Duke project.137

This virtual stalemate is reflected in the platforms adopted by the two major parties in the eight presidential campaigns since work commenced on the TVA in 1933. Competitive free enterprise has been con-

132. LILIENTHAL, op. cit. supra note 106, at 59. Lilienthal added, "You can win a lawsuit and lose a war just as you can lose a lawsuit and win the war... ." [journal entry for February 17, 1936].
133. In the intervention filed by Secretary Udall with the FPC on June 21, 1965 in opposition to the Duke project which is known as Keowee-Toxaway, it was contended that the "applicant has no need for the hydro power that would be produced by the project in 1971," and that "Applicant's asserted needs can be met from Trotter Shoals" and from additional steam plant facilities which the company could build. Trotter Shoals is a proposed federal hydroelectric project on the Savannah River for which the Secretary is seeking congressional authorization and financing. The [Columbia, S.C.] State, July 11, 1965; Wall Street Journal July 16, 1965.
134. In a letter to Secretary Udall urging him to withdraw his opposition to the Keowee-Toxaway project, Governor Robert E. McNair of South Carolina wrote: "This project would not only mean some $18 million dollars in state and local taxes and some $24 million annually in federal taxes but it will supply the electricity to a market which already exists and which is expected to grow at a rapid rate in the coming years. Another factor is that it will provide a much needed recreational area in South Carolina." The South Carolina General Assembly had already passed concurrent resolutions (H.R. Con. Res. 1199, February 4, 1965 and S. Con. Res. 111, February 10, 1965) memorializing the Congress "to authorize the construction of a dam across the Savannah River and Duke Power Company to construct an electric generating plant on the river."
137. The Republican platform of 1956, for example, opened with a Declaration of Faith which contained the following:

On its Centennial, the Republican Party again calls to the minds of all Americans the great truth first spoken by Abraham Lincoln: "The legitimate object of Government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do, for themselves in their separate and individual capacities. But in all that people can individually do as well for themselves, Government ought not to interfere."

sistently championed by the Republicans and, of course, never dis-owned by the Democrats. The tone of the latter party’s platforms, however, has fluctuated from the patronizing in 1936

The American businessman has been returned to the road to freedom and prosperity. We will keep him on that road, to the flattering in 1964

The American free-enterprise system is one of the greatest achievements of the human mind and spirit.

And although in their platforms the Republicans have not seen fit to condemn the TVA by name, neither have the Democrats ventured to name it as the model for any of the multi-purpose river projects being developed elsewhere in the country.

Thus, while the attitude of the Supreme Court toward the manner of competition practiced by the TVA is one of toleration without acceptance, the policy of Congress toward those practices has been a dual one of acceptance and containment. The popularity in America of both TVA and competitive free enterprise is a seeming paradox the solution to which may lie in a possibly illuminating analogy between that attitude and the feeling of Thomas Corcoran toward fellow New Dealer Rexford Tugwell as revealed in a discussion in which Corcoran tempered criticism of Tugwell with, “Not that he doesn’t serve a useful function. He is sort of a catfish to keep the herrings from getting sluggish when the fishermen take them back in tanks to port. But the Skipper shouldn’t get the idea that he is an edible fish.”

138. Id. at 362. The Republican platform for the same year contained a section entitled “Constitutional Government and Free Enterprise.” Id. at 366.


140. For discussions of the Eisenhower Administration’s “partnership policy” which emphasized the joint participation of public agencies and private enterprise in the development of the nation’s resources, see Huffman, The Role of Private Enterprise in Water Resources Development, 22 LAW & CONTEMP. PROB. 433, 439-41 (1957), and Fox, National Water Resources Policy Issues, 22 LAW & CONTEMP. PROB. 472, 490-93 (1957). “[T]he ‘partnership policy’ of the preference clause” which favors public and cooperative distributors of federally generated power. Id. at 491.


142. MOLEY, AFTER SEVEN YEARS 355 (1939). According to a recent poll by Louis Harris & Associates, 96% of Americans believe that “free enterprise has made this country great,” while 88% think that “monopolies are still a real danger.” What Americans Really Think of Business, Newsweek, May 2, 1966, p. 84.