UTILIZATION OF STATE COMMISSIONERS IN THE ADMINISTRATION OF THE FEDERAL MOTOR CARRIER ACT

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THE problem of securing effective governmental regulation of economic interests that overlap state boundary lines, while at the same time curbing the growth of a centralized bureaucracy and preventing the disintegration of local government, becomes daily more disturbing.¹ For this reason the passage of the Motor Carrier Act ² in the closing days of the 74th Congress and its approval by the President on August 9, 1935, was an event of singular importance for students of American governmental administration. Important as the legislation is in its substantive aspects, ³ it is equally noteworthy because of its administrative provisions. The striking feature of the procedural technique prescribed by the act is the plan for the utilization of state administrative machinery in effectuating federal regulatory power. This plan merits detailed study.

I

Administrative Features of Motor Carrier Act

The Motor Carrier Act in its administrative provisions declares that it shall be the duty of the Interstate Commerce Commission to regulate

¹ "There has come to be a problem of how to reconcile the needs of an era of economic unification with the regime of local self-government and with a federal as distinguished from a centralized national government." Roscoe Pound, "Cooperation in Enforcement of Law," 17 A. B. A. J. 9 (1931).

² Public Act No. 255, 74th Cong. [S. 1629]. The Interstate Commerce Act was amended by adding the Motor Carrier Act as Part II thereof.

³ For the more important substantive features of the Motor Carrier Act and the constitutional questions raised thereby, see the writer's article, "Federal Regulation of Motor Carriers," 33 Mich. L. Rev. 1 at 13 et seq. (1934), where the writer discussed the so-called Rayburn Bill (H. R. 6836, 73rd Cong., 2d Sess.) which was reintroduced in the 74th Congress and which without substantial modification was enacted into law as the Motor Carrier Act.
interstate motor carriers and brokers. 4 Certain of the controversies arising under the act are to be heard and decided by the Commission itself (which may refer them to a member or examiner of the Commission for hearing and recommendation of an appropriate order 5). All controversies in which the interstate operations involve not more than three states must be referred by the Commission to “joint boards” for hearing and recommendations or appropriate order thereon, if any of the following matters are involved: applications for the issuance of certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers and acquisitions of control or operating contracts; complaints as to violations by carriers of the requirements established by the Commission with respect to continuous and adequate service, etc.; complaints as to the violations of the Commission’s rules by brokers; and complaints as to rates, fares, and charges of motor carriers. 6 The Commission in its discretion may refer to joint boards any of the foregoing matters when more than three states are involved, and it may refer to such boards any investigation and suspension proceeding or other matter not specifically mentioned above. 7

The “joint board” provided by the act is a board composed of one member from each state involved in the particular interstate motor carrier or brokerage operation in controversy at the time. 8 The member from any state is to be nominated by the regulatory commission of the state from its own membership or otherwise. 9 If there is no commission in any state charged with the regulation of motor carriers, or if the commission of the state fails to make a nomination when requested by the Commission, then the governor of the state is authorized to nominate the state’s representative on the joint board. 10 The Commission is then authorized to appoint as a member upon the joint board any nominee approved by it. 11 If both the state commission and the governor fail to nominate a joint board member when requested to do so by the Commission, then the joint board is to be constituted without a member from such state, provided that members from two or more other states have been nominated. 12 If the commission for any state from which a member of a joint board is entitled to be appointed waives action on any matter referred to such joint board, or if any joint board fails or refuses to act or is unable to agree upon any matter submitted to it within forty-

4 Sec. 204 (a).
5 Sec. 205 (a).
6 Sec. 205 (b).
7 Sec. 205 (b).
8 Sec. 205 (c).
9 Sec. 205 (c).
10 Sec. 205 (c).
11 Sec. 205 (c).
12 Sec. 205 (c).
five days after the matter is referred to it or such other period as the Commission may require, or if a member shall not be nominated by more than one state, then the matter is to be heard and decided by the Commission itself without the assistance of a joint board.\(^\text{13}\) A joint board once constituted is to continue in existence for the consideration of matters referred to it by the Commission until such time as its existence will be terminated by the Commission.\(^\text{14}\)

Hearings by any joint board upon any matter referred to it are to be held at such places within the United States as are convenient to the parties and as the Commission may direct.\(^\text{15}\)

In acting upon matters referred to them, joint boards are to be vested with the same rights, duties, powers and jurisdiction as are vested by the terms of the act in members or examiners of the Commission.\(^\text{16}\) Thus such joint boards are empowered to administer oaths, to require the attendance and testimony of witnesses and the production of books, papers, etc., by subpœna, and to take depositions.\(^\text{17}\)

All decisions and recommendations by a joint board are to be by majority vote.\(^\text{18}\) Any order recommended by a board will be in the same category as an order recommended by a member of the Commission or by an examiner of the Commission and will be subject to the same rules as such recommendations.\(^\text{19}\) It is to be accompanied by a statement of reasons and is to be filed with the Commission.\(^\text{20}\) If no exceptions are filed within twenty days after service of process upon the parties to the record, the recommended order will become the order of the Commission, unless within such period the order is stayed or postponed by the Commission.\(^\text{21}\) If exceptions are filed, the Commission will be under a duty to consider the same, and if sufficient reason appears therefor, to grant such a review or make such orders or hold or authorize such further hearing or proceedings as may be necessary to carry out the provisions of the act. The Commission is also authorized to review any controversy on its motion.\(^\text{22}\)

The explanation of the unusual administrative set-up created by the Motor Carrier Act, as briefly sketched above, is to be found in a combination of economic facts, political forces and historical precedent.

\(^{13}\) Sec. 205 (c).
\(^{14}\) Sec. 205 (c).
\(^{15}\) Sec. 205 (d).
\(^{16}\) Sec. 205 (b).
\(^{17}\) Sec. 205 (e).
\(^{18}\) Sec. 205 (c).
\(^{19}\) Sec. 205 (b).
\(^{20}\) Sec. 205 (a).
\(^{21}\) Sec. 205 (a).
\(^{22}\) Sec. 205 (a).
II

BACKGROUND, ORIGIN AND HISTORY OF PLAN FOR UTILIZING SERVICES OF STATE COMMISSIONS

1. Background of Economic Facts

The plan for utilizing the services of state administrative officials under a system of federal regulation of interstate motor carriers would not have been feasible and could scarcely have commended itself to congressional approval had not the plan been solidly grounded on vital facts peculiar to the motor carrier industry. In the first place, interstate motor carrier operations are a relatively small part of all motor carrier operations. The number of busses used in interstate operations is about 19 per cent of the total number of busses used in all intercity operations; and interstate bus operations, in terms of passenger-miles, are estimated to constitute from 20 to 25 per cent of all intercity bus operations. According to surveys made by the United States Bureau of Public Roads about 38 per cent of all the trucks used for contract carrier service are employed in interstate operations, and about 20 per cent of all trucks used in common carrier service are so employed. According to the Interstate Commerce Commission about 25 per cent of all common carrier and contract carrier freight operations in terms of ton-miles is interstate. Roughly speaking then only about 25 per cent of all

23 This figure is derived from data for the year 1932, found in Bus Facts for 1933, p. 9 (1933); 20,342 busses were employed in intercity intrastate operations in 1932, and 4,680 in interstate operations.

24 This is the Interstate Commerce Commission's estimate based on figures for 1929-1930. Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 278, 406 (1932).

25 A traffic survey conducted in 1929-1930 by the Bureau of Public Roads showed that 8.7 per cent of all trucks were employed in contract carrier operations, and 5.5 per cent in common carrier operations; 3.3 per cent of all the trucks were used in interstate contract carrier operations, and 1.1 per cent in interstate common carrier operations. See U. S. Public Roads Bureau, Report of a Survey of Traffic on the Federal-Aid Highway Systems of Eleven Western States—1930, p. 29 (1932); statement by Mr. Thomas H. MacDonald, Chief of the Bureau of Public Roads, before the Senate Committee on Interstate Commerce in Hearings on S. 2793, 72d Cong., 1st Sess., p. 209 (1932); also charts based on the Western Traffic Survey, submitted by Mr. T. R. Dahl before the same committee, ibid., pp. 65-66.

26 A chart prepared by the Commission shows that common carrier truck operations constitute 20 per cent of all truck operations, and that interstate common carrier truck operations constitute 5 per cent of all truck operations; likewise that contract carrier truck operations constitute 30 per cent of all truck operations, and that interstate contract carrier truck operations constitute 71/2 per cent of all truck operations. Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 275 (1932).
motor carrier operations, in terms either of passenger-miles or of ton-miles, is interstate.

In the second place, the bulk of motor carrier operations that are interstate in their scope do not involve extensive and far flung operations through a number of states. This is true with respect to both bus and truck operations. Long haul bus service — including transcontinental service — is available. Indeed one well known bus organization — the Greyhound Lines — furnishes what is virtually a nation-wide service. 27 But most motor bus companies operate over comparatively short routes, 28 and most of the bus business is short haul business. 29 Bus companies engaged in interstate service operate over routes that average less than 250 miles. 30 The average trip for each interstate bus passenger is probably less than 50 miles, although precise figures are not available. 31 More data concerning the length of haul is available with respect to trucking operations. The Interstate Commerce Commission has found that the average haul of livestock by truck is not much over 60 miles, "with a practical maximum haul under most conditions of 150 miles,

27 A map showing the routes operated and the corporate set-up of the Greyhound Lines system is found in 11 Bus Transportation 226 (1932). See also Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 408 (1932).

28 In 1932 a total of 3869 common carrier bus companies were engaged in intercity operations over routes that aggregated 363,576 miles. Bus Facts for 1933, pp. 8-9 (1933). This gives an average figure of about 94 route miles for each bus company engaged in intercity operations. See also statement of Representative Lea in 72 Cong. Rec. 5119, respecting the average length of bus lines.

29 In 1932 the total number of intercity bus passengers was 357,000,000. The total gross revenue from intercity operations for the year was $185,000,000. The average revenue derived from each intercity passenger was therefore about 51 cents. Intercity passenger miles for the year totaled 6,300,000,000. The total number of intercity passenger miles divided by the intercity gross revenues gives the average revenue per passenger-mile, which was about 3 cents. By dividing the average revenue from each intercity passenger, previously calculated to be 51 cents, by the average revenue per passenger-mile, we get 17 miles as the average intercity bus trip in 1932. The figures here relied upon are found in 13 Bus Transportation 42 (1934).

30 In 1932, 490 bus companies were engaged in interstate operations over 115,927 route miles. Bus Facts for 1933, p. 9 (1933). On the basis of these figures each interstate bus company during 1932 operated over an average of 236 route miles.

31 It was pointed out in note 29, supra, that in 1932 the average interstate bus passenger trip was about 17 miles. In note 28, supra, it was pointed out that in this same year, each bus company engaged in intercity service operated over an average of about 94 route miles. In note 30, supra, it was pointed out that each bus company engaged in interstate service operated over an average of about 236 route miles. If we may assume that the average interstate passenger trip in terms of miles is in the same ratio to the average intercity passenger trip in terms of miles as the average number of route miles per interstate company is to the average number of route miles per intercity company, we arrive at 40.5 miles as the average interstate passenger trip.
and only occasional or unusual movements for greater distances."  

In the trucking of fruits and vegetables the common maximum is about 200 miles.  
The bulk of the cotton trucking movement is for distances not exceeding 175 miles.  
Coal is trucked for distances ranging from 20 to 100 miles.  
Of the less-than-carload traffic hauled by truck, 48 per cent moves for distances under 50 miles; 41 per cent, for distances between 50 and 250 miles; and 11 per cent, for distances in excess of 250 miles.  

In the third place, the motor carrier industry is primarily a "little man" industry, that is to say it represents a number of small operating units. There are, to be sure, a few large units in the bus industry. At the end of 1931, 24 companies engaged in intercity service operated 100 or more busses each.  
But the medium-sized and small units predominate.  
This is indicated by the fact that the 490 bus companies which were engaged in interstate service in 1932 operated 4680 busses.  
This averaged 9.5 busses for each company engaged in interstate operation. The average number of seats per interstate bus in 26.2.  

See reported address of Railroad Coordinator Joseph B. Eastman before annual meeting of Associated Traffic Clubs of America in RAILROAD DATA, Oct. 27, 1933, p. 93.  
Also Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 284 (1932).  
The Greyhound Line system is the largest single unit in the bus industry. It consists of a number of affiliated operating companies and a holding company, the Greyhound Corporation, which owns either the controlling share or a large percentage of the stock of the operating companies. See 11 Bus TRANSPORTATION 226 (1932) and Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 408 (1932).  
See Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 278-279 (1932). In note 9 the Commission refers to the fact that of the 234 holders of certificates for motor bus operations in Ohio in 1929, only 38 or 16.2 per cent had operating revenues in excess of $100,000, 78 or 33.3 per cent had revenues of from $10,000 to $50,000, and 91 or 38.9 per cent had revenues of less than $10,000. In this same note the Commission points out that of the 46 operators holding permits from the State of Oregon in 1930, 8 or 17.4 per cent were reported to have carried 1,000 or fewer passengers during the year, 19 or 41.3 per cent from 1000 to 5000, 10 or 21.7 per cent from 5000 to 50,000, and 9 or 19.6 per cent over 50,000.  
Bus Facts for 1933, p. 9 (1933).
means, therefore, that if the average interstate bus company had all of its vehicles operating simultaneously and filled to capacity, it would be transporting about 2,50 passengers.

No adequate body of statistical data with respect to the average size of motor trucking units is available. It is common knowledge, however, that in many instances a single individual is operating a single truck as a common or contract carrier. According to the Interstate Commerce Commission,

"Highway trucking is organized on the basis of a large proportion of small and medium-sized operators and a small number of large ones. There are none of a size or territorial extent comparable with that of the largest bus operators. . . . The tendency toward consolidation is far less noticeable in the case of truck than of bus lines." 42

The relation of the foregoing facts to the plan of federal regulation of interstate motor carriers through utilization of state administrative machinery is evident. Since only a small percentage of motor carrier operations are interstate in their scope, it seems reasonable that the Federal Government, instead of going to the expense of setting up exclusively federal administrative machinery to regulate interstate motor carrier operations, should utilize the state commissions which already have jurisdiction to regulate the larger part of motor carrier operations and which have gained considerable experience during the last fifteen years in the technique of motor carrier regulation. Since the bulk of interstate motor carrier operations involves hauls over comparatively short distances, it may be said that the motor carrier problem is not truly a national problem but rather is primarily a local one, and that the state administrative authorities are competent to handle the problem. The fact that the motor carrier industry is composed for the most part of small operating units is significant in two respects. To cen-

41 Of the 1355 truck operators reporting in the state of Ohio in 1929, 66 per cent transported less than 1000 tons each, 25.5 per cent from 1000 to 5000 tons each, 7 per cent from 5000 to 20,000, and 1.5 per cent over 20,000 tons; in this last group were two carrying over 50,000 tons, and four carrying over 75,000 tons. In Oregon the average size was greater, but only 4.2 per cent of the permit holders carried over 20,000 tons in 1930, including one carrying in excess of 75,000 tons. In Oregon in 1930 only four carriers by truck operated over 50 vehicles, while in Ohio four had 30 or more vehicles, two had 40 or more, one 75 or more, and three 100 or more. See Docket No. 23,400, "Coordination of Motor Transportation," 182 I. C. C. 263 at 276, note 6 (1932).

tralize the regulation of interstate motor carriers at Washington and to require motor carrier operators to appear there in order to answer complaints or themselves seek redress would place an almost intolerable economic burden upon many small operators. Still more important is the difficult problem of enforcement that would be faced by the federal government if it were to attempt to regulate interstate motor carriers without securing the assistance or cooperation of state administrative and enforcement officials. Even though interstate motor carrier operations are only a small part of all motor carrier operations, they still involve hundreds of bus operators and thousands of truck operators. The states are better equipped to administer and enforce motor carrier regulations than is the Federal Government. Consequently, it is argued, the Federal Government should utilize state machinery in regulating motor carriers in interstate commerce.

Apart from the facts peculiar to the motor carrier industry that have invited the kind of plan embodied in the Motor Carrier Act is the additional fact that the Interstate Commerce Commission is very heavily burdened at the present time. In 1928 the Commission reported that the continual growth in variety and volume of the work devolved upon it had caused it to lag in the performance of its duties. In its report for 1928 the Commission made the following recommendation:

“For the more prompt disposition of matters entrusted to us there should be express statutory authority for the commission to delegate to individual commissioners and employees of the commission the power to perform specified duties, and to consider and determine specified matters and subjects, subject to the general control and supervision of the commission, and the exercise by it of appropriate powers of review either through the commission or a division thereof.”

In subsequent reports the Commission has continued to make recommendations of this kind. Attempts have been made to secure federal legislation of the kind suggested in the Commission’s recommenda-
It is apparent that a plan for utilizing state commissioners in the administration of federal regulations for interstate motor carriers is in harmony with the attempt that is being made to relieve the Interstate Commerce Commission of some of its work so that it can perform its duties with greater expedition and efficiency.

2. Influence of State Commissioners

But while the facts suggested such a plan and lent sinew to it, it is doubtful whether it would have been adopted without the aid of vigorous and persistent political forces. In speaking of political forces (and the term is here employed in no derogatory sense), the writer has reference to the efforts made and influence exerted by the National Association of Railroad and Utility Commissioners—an organization composed of members of the various state public utility commissions. The Supreme Court's decision in *Buck v. Kuykendall*, holding that a state could not require a certificate of convenience and necessity of an interstate motor carrier, placed the state commissions in a dilemma. In general it has been the Association's policy to oppose any further extension of federal regulation. They have seen the Interstate Commerce Commission, acting on the authority of the *Shreveport* case, the principle of which was later embodied in the National Transportation Act of 1920, set aside intrastate rail rates that were found to burden interstate commerce. Consequently they were reluctant to see the Federal Government occupy other fields of regulation for fear that federal regulation would again encroach upon the jurisdiction of the state commissioners over intrastate matters. But despite this general aversion

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46 See H. R. 11363, 71st Cong., 2d Sess.
48 See the statement of Mr. Ivan Bowen, then a member of the Minnesota Railroad & Warehouse Commission, in 37 Proc. Nat. Assn. R. R. & Util. Comrs. 313 (1925).
51 At its 1930 meeting the Association adopted the following resolution:
“Resolved, that this Association is unalterably opposed to any form of Federal Legislation which proposes the enlargement of Federal authority by the creation of new agencies, or the extension of the authority of present agencies, whereby the regulatory authority of the State Commissions would be interfered with in fields in which they are now adequately functioning.” 42 Proc. Nat. Assn. R. R. & Util. Comrs. 250.

See also the state commissioners' opposition to Senator Couzens' Communications
to any further extension of federal control, the state commissioners were willing to concede that the decision in the *Buck* case rendered imperative some kind of federal legislation with respect to interstate motor carriers. The problem then was to minimize the degree of federal control.

3. *Historical Precedents*

Thus the state commissioners faced the problem of reconciling the necessity of a national legislative policy with the desirability of preserving their own power and jurisdiction as far as possible. Precedent and practice offered a possible solution. Since the founding of our national government it has been a common practice for state enforcement and administrative officials to exercise authority for and on behalf of the Federal Government in the administration and enforcement of federal policies. It is indeed surprising to learn how widespread this practice has been and continues to be. The Federal Government has


53 In the extradition act of 1793, 1 Stat. 302, Congress not only authorized but also attempted to make it the duty of the governor of a state, at the request of a governor of another state, to cause a fugitive from justice to be arrested and turned over to the demanding state. See Kentucky v. Dennison, 65 U. S. 66 (1860). With only minor changes the provisions of this act were incorporated in the Revised Statutes and are in effect at the present time. 18 U. S. C., § 662.

Under the Fugitive Slave Act of 1850, 9 Stat. 462, local peace officers acting under warrants issued by local magistrates were authorized to apprehend fugitive slaves and return them to their masters.

frequently authorized the executive officers and peace officers of the states to assist in the policing of federal criminal laws. \(^{53}\) During times of war the national government has depended upon the machinery of state and local government for vital assistance. \(^{54}\) State officials perform numerous inspection and certification functions for the Federal Government. \(^{55}\) The judicial and quasi-judicial officers of the states are clothed

Treasury Department, 1930), for number of such arrests made during the years 1925-1928. See also the opinion of the Court in Gambino v. United States, 275 U. S. 310 at 315, 48 S. Ct. 137 (1927).

The Migratory Bird Conservation Act, 16 U. S. C., § 715p, provided that when any state should by suitable legislation make provision adequately to enforce the provisions of the act and the regulations promulgated thereunder, the Secretary of Agriculture might so certify and thereafter such state might cooperate in the enforcement of the act and the regulations thereunder. This cooperation has assumed a very concrete form. State game wardens have been commissioned as United States Deputy Game Wardens with authority to make arrests for violation of the federal laws and regulations. See Cameron, The Bureau of Biological Survey 186-188 (1929); Beard, “Government by Special Consent,” 25 Am. Pol. Sci. Rev. 61 at 65 (1931). According to a communication received in 1933 from the Bureau of Biological Survey there were at that time 1105 state wardens who held commissions as United States Deputy Game Wardens. The writer is indebted to W. C. Henderson, Acting Chief of the Bureau, for the helpful information contained in the communication cited.

Comparable to the use of state peace officers to make arrests for the violation of federal laws is the utilization of state militia for federal purposes. The Constitution itself makes federal agencies out of the state militia since it provides that the militia can be called forth, as provided for by Congress, to execute the laws of the Union, suppress insurrection, and repel invasion. Art. I, § 8 (15). For a discussion of the status of the militia when called out by the Federal Government, see Houston v. Moore, 5 Wheat. (18 U. S.) 1 (1820); 22 Opin. Atty.-Gen. 225 (1898); Rosensohn, “Legal Aspects of Federal Compulsory Service of State Militia,” 6 Proc. Acad. Pol. Sci. 244 (1916).

During the Civil War the governors of the states and county commissioners and assessors became federal officials for the purpose of executing the regulations prescribed by the President, under authority of Congress [12 Stat. 597 (1862)], for calling forth the militia. See Matter of Spangler, 11 Mich. 298 (1863), for the President’s order of August 4, 1862, the order of the Adjutant-General of the United States of August 9, 1862, and the proclamation of the Governor of the State of Michigan on August 25, 1862, in response to these orders. The case also discusses the status of the governor in executing the orders of the President and Adjutant-General.

The World War furnishes a similar illustration. The Selective Draft Act expressly authorized the President to utilize the services of any or all departments and officers and agents of the several states in execution of the act, and granted to all such officers and agents full authority for all acts done by them in the execution of the act under the direction of the President. 40 Stat. 76. The administration of the act was placed in the hands of local and district draft boards composed of state officials. See U. S. Provost Marshall’s Office, Selective Service Regulations (1917); First and Second Reports of the Provost Marshall General to the Secretary of War on the Operations of the Selective Service System (1918 and 1919); Palmer, Newton D. Baker 212-217 (1931); Holcombe, “The States as Agents of the Nation,” 1 Southwestern Pol. Sci. Q. 307 at 308 (1921).

The state health authorities greatly assist the Public Health Service in administer-
with important federal powers. Not least important is the kind of function performed by state officials under authority of the Federal

See Schmeckebier, *The Public Health Service* 99-105 (1923). For instance, lepers and persons afflicted with venereal diseases are required to secure permits from local health officers before engaging in interstate travel. See *Interstate Quarantine Regulations of the United States*, §§ 5 (a), 8 (a, b).

State sanitary engineers assist with the inspection of water supplies used by interstate carriers [Public Health Service, *Interstate Quarantine Regulations of the United States*, rev. ed., § 19 (c) (1921)], and are commissioned by the Public Health Service as collaborating sanitary engineers. Likewise officials of state health departments collect and forward reports of diseases to the Service and are commissioned by it as collaborating epidemiologists.

The Pure Food and Drug Act, enacted in 1906, made it the duty of federal district attorneys to prosecute any violation of the act upon presentment of satisfactory evidence by the health or food or drug officers or agents of any state. 21 U. S. C., § 12.

This provision furnished the authorization for the present practice of utilizing state authorities to assist in the administration of the act. The Secretary of Agriculture grants commissions to state officials authorizing them to collect samples of foods and drugs in interstate shipments for purposes of examination; at the request of these commissioned state officials, inspectors and agents under their direction are appointed by the Secretary of Agriculture as official agents of his department for the purpose of collecting samples. Likewise state chemists are appointed as agents of the department to analyze samples of foods and drugs in interstate shipments. According to a communication received from the Food and Drug Administration in 1933, there were at that time about 250 state officials who held commissions or appointments from the Secretary of Agriculture authorizing them to enforce the federal food and drug laws. For a statement of cooperative efforts by federal and state officials in the enforcement of federal and state food and drug laws, see Frisbie, "Federal and State Agencies Unite in Enforcing Food and Drug Acts," *U. S. Daily*, Oct. 18, 1929, Index pp. 1987; Beard, "Government by Special Consent," 25 Am. Pol. Sci. Rev. 61 at 64 et seq. (1931); Weber, *The Food, Drug, and Insecticide Administration* at 22, 26, and 45 (1928).

Under the Plant Quarantine Act which authorizes the use of state officials to assist in the enforcement of its provisions [7 U. S. C., c. 8, § 156 (1912)], state horticultural officials are appointed collaborators and thereby clothed with legal authority to enforce the federal plant quarantine regulations issued under authority of the act. According to a communication received from the Bureau of Plant Quarantine in 1933, there were at that time 76 collaborators receiving salaries varying from $60 to $360 per annum, as well as about 200 without compensation. The writer is indebted to Mr. R. C. Althouse, Administrative Officer of the Bureau, for the helpful information contained in the communication referred to above. See also Weber, *The Plant Quarantine and Control Administration* 23 and 125 (1930).

Similarly to the assistance rendered the federal government by state officials in enforcing health, food and drug, and plant quarantine regulations was the assistance given by California state officials during the epidemic of the foot-and-mouth disease in that state; the State Director of Agriculture and his assistants were appointed federal officers at $1 per year to carry on the work of exterminating the disease. See statement of Representative Swing in course of argument over validity of the President’s Executive Order of May 21, 1926, on prohibition enforcement, in 67 Cong. Rec. 10103.

56 State judges and chief magistrates of municipalities are authorized to take depositions which are admissible as evidence in federal courts. 28 U. S. C., § 639. State
Government involving the exercise of a wide discretionary power which may be called legislative in character. The cooperation of state officials with the Interstate Commerce Commission under the National Transportation Act of 1920 is an effective illustration of this kind of cooperative effort. This act contained the following provision:

"The commission is ... authorized to avail itself of the cooperation, services, records, and facilities of ... State authorities in the enforcement of any provision of this chapter." 67

The Interstate Commerce Commission has exercised the authority thus conferred upon it to utilize the services of state commissions in the administration of federal railroad policies. In a number of cases involving the application of rail carriers for certificates authorizing the construction of new lines or the abandonment of old lines, the Commission has authorized the respective state commissions to conduct a preliminary hearing or inquiry on the application and make a recommendation to the Commission on the basis of the evidence taken at the hearing. 68

judges, city mayors and recorders, and justices of the peace may issue subpoenas on the application of any contestant or returned member in case of a contested congressional election. 2 U. S. C., §§ 206, 208. A state judge, mayor of a city, justice of the peace, or any other state magistrate has authority to issue a warrant for the arrest of an offender against federal laws and to conduct a preliminary hearing to determine whether the alleged offender should be imprisoned until trial in the federal court or released on bail. 18 U. S. C., § 591. The fugitive slave acts of 1793 and 1850 authorized local magistrates to grant certificates of rights of removal to non-resident slave-owners who had captured their escaped slaves. 1 Stat. 302 (1793); 9 Stat. 462 (1850). The latter act also provided that slave owners could procure a warrant from state courts for the apprehension of their escaped slaves. See Prigg v. Pennsylvania, 41 U. S. 536 (1842). Another early statute authorized justices of the peace to apprehend deserting seamen and hold them for return to their vessel. 1 Stat. 131; see Robertson v. Baldwin, 165 U. S. 275, 17 S. Ct. 326 (1896). The Espionage Act of 1917 authorized the issuance of search warrants in accordance with its provisions by judges of state courts of record. Act of June 15, 1917, c. 30, 40 Stat. 217. Congress has required Indian heirs of certain tribes to secure the approval of state probate courts as a condition precedent to alienation of their lands. Act of May 27, 1908, c. 199, 35 Stat. 312; see Parker v. Richard, 250 U. S. 235 at 239, 39 S. Ct. 442 (1919). State courts and tribunals have been utilized in federal condemnation proceedings under the authority of federal statutes providing that such proceedings should be in accord with the law of the state where the land was located. See United States v. Jones, 109 U. S. 513 (1883). Finally, since the very inception of our government, state courts of record have been granted jurisdiction to naturalize aliens as citizens of the United States. 8 U. S. C., § 357; see Holmgren v. United States, 217 U. S. 509, 30 S. Ct. 588 (1910).

67 49 U. S. C., § 13, par. 3.
68 See Lindahl, "Cooperation Between the Interstate Commerce Commission and the State Commissions in Railroad Regulation," 33 Mich. L. Rev. 338 at 357-368 (1935). In the ten-year period following the adoption of the Transportation Act in 1920, the state commissions held hearings for the Interstate Commerce Commission in 330 extension and abandonment cases. Ibid., p. 359.
4. Genesis and Legislative Evolution of Plan

The provision of the National Transportation Act referred to above left it in the Commission’s discretion to determine whether or not it would avail itself of the services of state commissions as federal agencies and what recognition it would give to their work once it had authorized them to act in a federal capacity. Addressing the National Association of Railroad and Utility Commissioners at its 1920 convention, Judge George W. Anderson criticized the cooperation provision of the National Transportation Act as too indefinite and inadequate, and advocated instead a plan whereby the state commissions by express authority of Congress would exercise original jurisdiction as federal agencies in the administration of federal railroad legislation. 69 The following statement taken from his address gives the essence of his plan:

“What is needed, now that the railroads are recognized as being essentially national in nature and function, is that there shall be a delegation by the Nation to the State officials of national power, together with a guarded but adequate right of review by the central national tribunal if and when the state commission really disregards national right and interests.” 60

Judge Anderson’s proposal took root. It was seized by the state commissions as the solution to their problem of securing federal regulation of motor carriers and plugging the hole created by the Buck case 61 while at the same time suffering no material diminution of their own powers. Shortly after the decision in Buck v. Kuykendall, 62 the president of the National Association of Railroad and Utility Commissioners appointed a special committee on motor vehicle legislation with authority to draft a bill which would provide for federal regulation of interstate motor transportation, but which would authorize state commissions, as far as possible, to administer and enforce the federal regulations. 63 At the Association’s annual convention in 1925, this special committee made its report and presented a bill. 64

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64 For the committee’s report and discussion of the draft bill, see 37 Proc. NAT. Assn. of R. R. & Util. Comrs. 282-295 (1925).

After debate on the draft bill, the Association voted to continue the special committee with directions to continue its study of the bill “and to make revision thereof as it may be directed to by this convention, or in the light of such discussion or action
The bill provided for a limited degree of federal regulation of interstate motor carriers — sufficient to cover the deficiency in the power of the states to regulate these carriers — and further provided for the administration and enforcement of these regulations by means of state commissions, in accordance with Judge Anderson’s suggestion. It contained the following provision which stated the general plan of administration:

“The Board of any State in which any part of a transportation service in interstate commerce is performed or is to be performed is hereby constituted a Federal agency, and shall have authority, to administer, within that State, or, in cases authorized under this act, in co-operation with the Boards of other States, the provisions of this Act.”

In all matters except rate hearings the state commissions in administering the proposed act were privileged to act separately. But in conducting rate hearings, the commissions of the various States through which the interstate motor carrier in question operated were required by the bill to hold joint hearings and issue a joint order. In all other matters, the state commissions could at their option hold joint hearings. In case a state commission refused to exercise the jurisdiction over interstate motor carriers vested in it by the proposed act, the Interstate Commerce Commission was to assume original jurisdiction with respect to operations in that particular state. Any party dissatisfied with the decision of a state board, or of a joint board where several state boards held a joint hearing and issued a joint order, was given a right of appeal to the Interstate Commerce Commission which was vested with appellate jurisdiction. In exercising this appellate jurisdiction the Commission could conduct a hearing on the record made before the state board or joint board of several states and finally determine the question.

as may be taken here,” and that the study be continued in conjunction with the Committee on Legislation which was directed to present to Congress the necessity of legislation upon this subject. Ibid., 328-329.

For an account of the Association’s activities in its efforts to procure federal legislation of the kind proposed by the draft bill, see the annual committee reports made at the Association’s annual meetings in succeeding years. These committee reports are found in the published reports of the proceedings.


Sec. 3 (a) (at p. 296).
Sec. 10.
Sec. 9 (f).
Sec. 12.
Sec. 3 (b).
Sec. 14.
Sec. 14.
Such was the Association's bill, the general administrative features of which were embodied in bills introduced by Senator Cummins and Representative Parker in the 1st Session of the 69th Congress. Several bills subsequently introduced retained these same administrative features. In the hearings on one of the bills by the House Committee, its general administrative features were subjected to telling criticism. Specifically, the objection was made that if state commissions could act separately on all matters affecting interstate motor carriers except rates, a motor carrier desiring to engage in interstate operations would be obliged to make applications for a certificate to as many different commissions as there were states through which he proposed to operate, instead of being able to apply to a single central body. It was also objected that even if the state commissions did act jointly in such a matter, the procedure would be too clumsy because of the participation

73 S. 1734
74 H. R. 8266.

At this same session of Congress an attempt was made to take care of two local problems created by motor carrier operations. The Holland vehicular traffic tunnel constructed under the Hudson River between New York City and Jersey City, and the new bridge across the Delaware River between Philadelphia and Camden were about to be completed and thrown open to the public. Heavy motor vehicle traffic in the tunnel and over the bridge were anticipated, and it was feared that the public enjoyment of these new thoroughfares would be impaired by excessive and unregulated motor bus operations. A bill was introduced by Senator Reed of Pennsylvania authorizing the New Jersey and New York commissions, through joint or concurrent action, to regulate motor busses operating through the Holland tunnel and to limit the number of busses to so many as the public convenience and necessity might require; a similar grant of authority was given to the Pennsylvania and New Jersey commissions with respect to interstate motor busses operating over the Delaware River bridge, 69th Cong., 1st Sess., S. 3894. Hearings were held on the bill, and the bill as amended was reported back by the committee with the recommendation that it pass. S. REP. 645, 69th Cong., 1st Sess. The bill was debated in the Senate, amended, and finally passed by that body. 67 Cong. Rec. 9074-9077. But nothing further came of the bill after it was referred to the House. The interesting thing about the bill is that it also embodied the plan of utilizing state commissions to administer federal legislation for the regulation of interstate commerce as a means of solving an interstate problem that was peculiarly local in its scope.

76 H. R. 12380, 70th Cong., 1st Sess.
77 See statement of Mr. LaRue Brown in Hearing before House Committee on Interstate and Foreign Commerce on H. R. 12380, 70th Cong., 1st Sess., 104 at 113-118, 120-125. Mr. Brown, General Counsel for the National Automobile Chamber of Commerce, appeared as representative for this organization.
78 See statement of Mr. LaRue Brown in Hearing before House Committee on Interstate and Foreign Commerce on H. R. 12380, 70th Cong., 1st Sess., 104 at 113-114.
of the full commissions of the several states involved. The proposal was made, therefore, that original jurisdiction be vested in the Inter­state Commerce Commission, but that it be authorized to refer matters to joint boards consisting of representatives of the commissions of the several states involved in the interstate operation.

This criticism and the constructive proposal that accompanied it were reflected in the bills introduced in the 2nd Session of the 70th Congress and in the 1st and 2nd Sessions of the 71st Congress. These bills stated that it was the duty of the Interstate Commerce Commission and joint state boards consisting of representatives of the several state commissions to administer the regulatory provisions contained therein. No state commission in enforcing federal regulation was to act in its separate capacity. All original jurisdiction was vested in the Interstate Commerce Commission. It was given power to adopt uniform rules and regulations for the enforcement of the act. But on petitions or complaints filed with the Commission, except where certain specified matters were involved, the Commission was to refer everything to joint boards, consisting of representatives of the commissions of the respective states through which the interstate motor carrier in question conducted its operations. The joint board then was to conduct a hearing on the matter referred to it, render a decision and file it with the Interstate Commerce Commission, which would then issue an order in accordance with the decision of the joint board. If a joint board failed to act, the Commission itself was authorized to hear and determine the matter. Any party to the record could appeal a joint board's decision. On

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80 See statement of Mr. LaRue Brown in Hearing before House Committee on Interstate and Foreign Commerce on H. R. 12380, 70th Cong., 1st Sess., 104 at 122.
81 See statement of Mr. LaRue Brown in Hearing before House Committee on Interstate and Foreign Commerce on H. R. 12380, 70th Cong., 1st Sess., 104 at 117-118, 124-125.
83 71st Cong., 2d Sess., H. R. 7954, § 2 (a). All the bills referred to in note 82, supra, were substantially alike. In order to avoid multiple citations to the section numbers of these various bills, the writer has chosen to use H. R. 7954 for purposes of reference and citation, in connection with the analysis in the text of the administrative provisions common to these bills.
84 71st Cong., 2d Sess., H. R. 7954, § 2 (a).
85 71st Cong., 2d Sess., H. R. 7954, § 2 (a).
86 71st Cong., 2d Sess., H. R. 7954, § 2 (c).
87 71st Cong., 2d Sess., H. R. 7954, § 2 (d).
89 71st Cong., 2d Sess., H. R. 7954, § 10.
appeal the Commission was to decide the case on the record made before
the joint board.\textsuperscript{90} It could either affirm the decision, or set it aside, or
order a rehearing, or make such other order as the public interest might
require.\textsuperscript{91}

It is plain that the state commissioners occupied a less exalted posi­
tion in this administrative set-up than they did under the earlier bills.
Their status under these later bills was more like that of examiners
employed by the Interstate Commerce Commission. The state com­
missioners of course were opposed to these departures from their origi­
al plan, but realizing that their plan had been deemed too impractical
for successful operation, they eventually gave their support to the later
proposals.\textsuperscript{92}

\textsuperscript{90} 71st Cong., 2d Sess., H. R. 7954, § 10.
\textsuperscript{91} 71st Cong., 2d Sess., H. R. 7954, § 10.
\textsuperscript{92} Mr. LaRue Brown, General Counsel for the National Automobile Chamber of
Commerce, who appeared on behalf of that organization before the House Committee
on Interstate and Foreign Commerce on April 12, 1928, in its hearing on H. R. 12380,
and there subjected the administrative features of the bill to the criticism referred to in
the text, and who supported the plan of having the Interstate Commerce Commission
refer matters to joint boards composed of representatives of the respective state com­
missions, delivered an address before the annual convention of the National Association
R. R. & Util. Comrs. 292 (1928). In the course of his address he explained his criti­
cism of the administrative features of the old Parker bill (H. R. 12380) and his proposal
of substituting therefor a system in which the Interstate Commerce Commission would
have original jurisdiction but would refer all matters to joint boards consisting of repre­
sentatives of the state commissions. Ibid., 292 at 296-299. Members of the Association
strongly objected to his proposal. Mr. Webster, of Iowa, said: “I think we might as well
turn the whole thing over to the Interstate Commerce Commission as to have that plan.”
Ibid., 301. Mr. Ellis, of Indiana, in speaking of Mr. Brown’s proposal, was still more
emphatic when he said:

“He proposes that in the place of the Parker bill [H. R. 12380] we should set up
a machinery whereby there would be members of State commissions who would act
as examiners for the Interstate Commerce Commission, file a report with the Inter­
state Commerce Commission, which would mean nothing, which would be turned
down after it had been examined, not by the Commission itself but by some other
examiner for the Interstate Commerce Commission, and thereby the only function
that the State commissions would have in this proposition would be to hear the
evidence and to take the time to do it and save the time of the Interstate Commerce
Commission. Such a proposal leaves absolutely no power or no authority in the
hands of the State commissions. He is proposing a bitter pill with a sugar coating.
The pill is absolute Federal control; the sugar coating is to let a few State commis­
ioners get together and hear the evidence and have no part whatever in making
the decision. As far as I am concerned, I want it understood that I am opposed to
any such proposition.” Ibid., 326-327.

The Association without committing itself on Mr. Brown’s proposal adopted a motion
to the effect that its Special Committee on Motor Vehicle Legislation, acting with its
However, the process of paring down the powers that the state commissions would exercise in the regulation of interstate motor carriers had not yet been exhausted. The majority of the House Committee on Interstate and Foreign Commerce were of the opinion that even the plan of giving the Interstate Commerce Commission original jurisdiction and authorizing it to refer certain matters to joint boards consisting of representatives of the state commissions would be cumbersome and unworkable, at least insofar as it would be unrestricted in its scope.

The committee was willing to preserve this plan where the interstate operations did not involve more than two states, since it gave promise of being a practical and useful means of regulating interstate carriers operating between border cities in a single metropolitan area, and since a concession of some kind to the minority members and to the state Legislative Committee, use its best endeavors to promote passage of the Parker bill (H. R. 12380) as it then stood or as the same might be amended. Ibid., 327.

Subsequent to the convention a conference of representatives of groups interested in bus legislation was held for the purpose of considering certain proposed modifications of the Parker bill (H. R. 12380), to be made for the purpose of meeting opposition of the National Automobile Chamber of Commerce (as expressed through Mr. LaRue Brown, its General Counsel and its representative at the hearings on H. R. 12380) and others. Members of the Association's Special Committee on Motor Vehicle Legislation and the Committee on Legislation attended this conference. The result of this conference was a revised bill which embodied Mr. LaRue Brown's suggested plan of having the Interstate Commerce Commission refer matters to joint boards consisting of representatives of the state commissions. Report of the Special Committee on Motor Vehicle Legislation, 41 Proc. Nat. Assn. of R. R. & Util. Comrs., 414-415 (1929). This revised bill was introduced in the House as H. R. 15621, on Dec. 20, 1928, and in the Senate as S. 5085, the following day. The administrative plan embodied in these bills was retained also in S. 1351 and H. R. 3822, introduced in the following session of Congress, and in H. R. 7954, introduced the second session thereafter. See notes 82 and 83, supra. The Association's representatives at the conference, which drafted the bills (H. R. 15621 and S. 5085) embodying the new plan of administration, gave their approval. The Special Committee at its 1919 convention made its report and asked the Association for an expression of its attitude on the Couzens bill (S. 1351), one of the bills that embodied the new administrative set-up. Ibid., 416. After some debate the Association adopted a resolution indorsing the Couzens bill and urging its early enactment. Ibid., 423-440. Thus the Association lent its support to the new method of regulation. Undoubtedly the attitude of many members was expressed by Mr. Webster, who had earlier opposed the new plan, as pointed out, supra. He spoke in support of the resolution and said that he saw no way in which regulation could be obtained unless it was "along this line." Ibid., 440.

The attitude of the majority was reflected in the statements made by Representative Parker, Chairman of the Committee (72 Cong. Rec. 5118, 5555), and by Representatives Lea (ibid., 5118), Denison (ibid., 5132), Rayburn (ibid., 5220-5221), Nelson (ibid., 5553), Merritt (ibid., 5554), all members of the Committee, in the course of the debate on H. R. 10288, 71st Cong., 2d Sess. See also the interrogation of Mr. Wakelee by Representative Hoch, also a member of the Committee in Hearing on H. R. 7954, 71st Cong., 2d Sess., 73-77.
commissions seemed inevitable. The committee's plan was embodied in H. R. 10288, which it reported back in the 2nd Session of the 71st Congress. According to this bill it was the duty of the Interstate Commerce Commission to supervise and regulate interstate motor carriers, as provided by the act, to prescribe rules and regulations for the proper administration of the act, and to decide matters arising under the act, except that in certain cases, where no more than two states were involved in the interstate operation, the Commission was to refer the matter to joint boards consisting of representatives of the commissions of the two states involved in the operation.

This was the first bill to reach the floor of Congress for debate. The administrative provisions were the subject of considerable discussion. Spurred on by the state commissioners who were alarmed over the proposal that the joint board system be limited to cases involving

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94 In answer to an inquiry why the Committee in reporting back H. R. 10288, 71st Cong., 2d Sess., had limited the joint-board system to interstate operations involving not more than two states, Chairman Parker said:

"I am perfectly frank about it. It was a matter of compromise entirely. I pointed out to the House the big cities that are adjacent to State lines where the traffic, while interstate, is local in character. It seems to me that two States would practically take care of all of that. Some members of the committee did not want to leave anything to the State boards at all, but they did agree on account of conditions that I have just laid down to leave it to two States and support the bill." 72 CONG. REC. 5118.

Later in the course of debate on this same bill, Mr. Parker said:

"There was a school of thought in the committee which believed that the regulation should be entirely in the hands of the Interstate Commerce Commission. There were those who believed it should be left to the State commissions...

"Now, there would be no particular discussion of this particular amendment [to extend the joint-board system to operations involving not more than three States] if it were not for the activities of the State commissions, and I do not mean that in an offensive way. It is perfectly natural that men wish to retain all the power they have and it is perfectly natural that the State commissions wish to retain all the power they have."


95 H. R. 10288 was substantially the same as H. R. 10202, introduced a few days earlier in the same session.


97 Sec. 2 (a) (1, 2).

98 Sec. 2 (a) (3).

99 Sec. 3.

100 See the writer's article, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 at 11, n. 41 (1934).

101 See 72 CONG. REC. 5112-5138, 5219-5249, 5330-5339, 5549-5556, 5766-5779, 5856-5887, passim.
interstate operations in no more than two states, the minority members of the committee succeeded in amending the bill so as to make it mandatory upon the Interstate Commerce Commission to refer a given class of matters to joint boards when the interstate operations involved no more than three states, and to permit the Commission, in the exercise of its discretion, to refer such matters to joint boards when more than three states were involved in the interstate operation.

The plan of utilizing the state commissions in the administration of federal legislation for the regulation of interstate motor carriers as embodied in H. R. 10288, and as amended on the floor of the House, was retained in subsequent bills without substantial modification and was finally enacted into law with the passage of the Motor Carrier Act, the general administrative features of which were outlined at the beginning of this article.

III

APPRAISAL OF PLAN

In any appraisal of the merits of the administrative set-up under the Motor Carrier Act, it should be noted at the outset that in spite of the use of local joint boards, there is no reason to suppose that reasonable uniformity will not be attained in motor carrier regulation. The policies underlying the proposed act are federal policies and as such will govern in all interstate situations. Furthermore, a centralized

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102 The Committee on Legislation and the Special Committee on Motor Vehicle Legislation of the National Association of Railroad & Utilities Commissioners voiced protest against the House Committee's plan of limiting the use of joint boards to cases where not more than two states were involved. Communications were sent by the chairmen of the Association's two committees to all the state commissions urging them to recommend to their respective representatives in Congress support of amendments to the House Committee's bill which would provide for a less restricted use of the joint boards. See Report of the Special Committee on Motor Vehicle Legislation, 42 Proc. Nat. Assn. R. R. & Util. Comrs. 287 at 288 (1930).

103 Minority members only in the sense that they were in favor of a more extensive use of joint boards than was provided for in the House Committee's bill. Their views were expressed in H. Rep. 783, 71st Cong., 2d Sess. 15. See also the statements of Representative Mapes (72 Cong. Rec. 5226-5229) and Representative Garber (ibid., 5549-5551) in course of debate on H. R. 10288.

104 For discussion and votes on these amendments which were introduced by Representative Mapes, see 72 Cong. Rec. 5226-5249, 5330-5339, 5549-5556, 5767.


106 There are some critics of the proposals for utilizing state commissions in the administration of federal legislation for the regulation of interstate economic develop-
federal commission—the Interstate Commerce Commission—is charged with the general administration of the act. It has the power to formulate a uniform administrative policy with respect to such matters as continuous and adequate service, maximum hours of employees, and safety of operation and equipment. Finally, uniformity in application of the legislative and administrative policies is assured by giving to the Interstate Commerce Commission ample power of review over the findings and recommendations of the joint boards before they become effective as orders of the Commission. This high degree of centralization of administrative control is inevitable if the interstate problem is to be handled in a satisfactory manner. If the act had made the findings and recommended orders of the joint boards conclusive so as to cut off any power of review in the Commission, it would have led to an almost intolerable lack of uniformity in the application of the general legislative and administrative policies.

But although the act assures federal policies and standards such as we must have for the solution of interstate problems, it does, on the other hand, within the framework of a system that calls for centralization of administrative control, and subject to limitations imposed by

\[\text{\textsuperscript{107}}\] The ultimate power residing in the Interstate Commerce Commission under the Motor Carrier Act, whereby it can reject or modify recommended orders of the joint boards in order to preserve a uniformity of policy and decision, is lost sight of by those who object to the joint board mechanism on the ground that there will be a lack of uniformity in decisions. See, for instance, statements of Representatives Hoch and Merritt, in 72 Cong. Rec. 5774 and 5554, respectively, in the course of the debate on H. R. 10288, 71st Cong., 2d Sess.

\[\text{\textsuperscript{108}}\] But proposals for making the action of the state commissioners, whether acting separately as under the earlier plan, or acting as joint boards under the later plan, conclusive without the right of an appeal to, or review by, the Interstate Commerce Commission, have not been lacking. See note in 40 Harv. L. Rev. 882 at 885 (1927); statement of Representative Rankin in course of debate on H. R. 10288, 71st Cong., 2d Sess., 72 Cong. Rec. 5554; amendment to H. R. 10288, proposed by Representative Hastings, ibid., 5769-5770.
considerations of practicality, aim to capitalize upon the experience of state commissions in the administration of its provisions.\(^{100}\) In the words of a member of the House, this seems "rational and proper."\(^{110}\) Furthermore, the use of state commissions to administer federal regulations should be a persuasive force pointing toward coordination of interstate and intrastate motor carrier policies.\(^{111}\) This conclusion is justified by the experience in the field of railroad rate regulation by means of cooperative efforts under the National Transportation Act of 1920.\(^{112}\) The importance of such a result cannot be overemphasized. A harmonious readjustment and integration of interstate and intrastate regulatory policies on the part of the federal and state governments, respectively, will prevent such disparity as may possibly create a demand for the assertion of federal control over intrastate motor carrier operations in order to prevent discrimination against interstate commerce. Thus there will be no need of another Shreveport case.\(^{113}\)

The act in achieving its purpose of committing the solution of local interstate problems to state officials who are intimate with local conditions and of facilitating the coordination of interstate and intrastate policies will lend greater vitality to the processes of local government,

\(^{100}\) In reporting back H. R. 10288, 71st Cong., 2d Sess., the House Committee explained and justified the joint board feature of the administrative machinery provided for by the proposed act in a statement here quoted as follows:

"In providing for the administration of this legislation, the committee has had a keen appreciation of the fact that, in almost every State, boards and commissions have for years been administering laws regulating public utilities of various kinds, including motor carriers performing transportation service similar to that here covered. The committee has felt that if use could be made of the experience and ability of the members of such State boards and commissions, an important step would be taken toward securing efficient administration. The committee has further had in mind the fact that a very large proportion of interstate motor carrier operations are comparatively local in character, for the reason that they involve only two States..." H. Rep. 783, pp. 2-3, 71st Cong., 2d Sess.

It is because of the "predominantly local character" of motor transportation that the Interstate Commerce Commission has also given its support to proposals to utilize the services of the state commissions in the administration of federal legislation for the regulation of interstate motor carriers. "Motor Bus and Motor Truck Operation," 140 I. C. C. 685 at 744 (1928).

\(^{110}\) Representative Wolverton in course of debate on H. R. 10288, 71st Cong., 2d Sess., 72 Cong. Rec. 5137.

\(^{111}\) See statement of Representative Wolverton in course of debate on H. R. 10288, 71st Cong., 2d Sess., 72 Cong. Rec. 5137.


\(^{113}\) See notes 49 and 50, supra.
enhance the position of state officials, and check the expansion of federal personnel that would otherwise take place. This feature of the plan was pointed out in precise terms by Representative Mapes in the course of the debate on H. R. 10288, when he said,

“State rights and the tendency to centralize governmental authority here in Washington are popular subjects for academic discussion and debate. Here is an opportunity for those who sincerely believe in State rights and who feel that the tendency to centralized authority in the Federal Government should be resisted as much as possible to put their views into practical operation.”

IV

CRITICISMS OF PLAN

1. That Plan Does Not Go Far Enough

(a) Decentralization Feature Too Limited

It remains to consider criticisms directed against the joint board plan of the Motor Carrier Act. First are the objections voiced by those who feel that it does not go far enough and who prefer the plan embodied in the bill first drafted in 1925 by the Special Committee on Motor Vehicle Legislation of the National Association of Railroad and Utilities Commissioners.

However, it is clear that this original plan would have been unsatisfactory in a number of respects. It would have permitted the state com-

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114 72 Cong. Rec. 5229.
missions to act separately (except where rate cases were involved) in administering the federal legislation. This would have presented an almost insufferable situation from the viewpoint of the carriers, and would have subjected them to a burden that could not possibly have been justified. It well deserved the criticism it received.\textsuperscript{117} Even in cases where joint action of state commissions was provided, it involved the entire personnel of the commissions of the several states concerned. The unwieldiness of such joint bodies can well be imagined. The plan merited the somewhat exaggerated criticism that the joint-assembly of the several state commissions would "resemble a town meeting."\textsuperscript{118} On the other hand, the joint board plan provided by the Motor Carrier Act, whereby interstate problems will be handled by boards consisting of a single representative from each of the respective commissions, is a mechanism that is reasonably simple to administer.

(b) Plan Too Restricted in Scope

A more serious restriction is the limitation on the mandatory use of the state commissions to cases involving interstate operations in not more than three states. The earlier proposals recognized no such limitation and in an appropriate case would have made mandatory upon the Interstate Commerce Commission the convening of a joint board consisting of representatives of commissions of a belt of states extending through to New York from California.\textsuperscript{119} Not only the practical difficulties of calling a convention of representatives of the commissions of all the states involved, where an interstate operation extended through a large number of states, but also the difficulty of securing expeditious administrative action, would require a limitation on the use of joint boards. The very reason for advocating the use of state commissions, namely, that they would be conversant with local conditions, could not be urged in such cases. Limiting the use of joint boards to interstate operations involving not more than three states was an unavoidable concession.\textsuperscript{120} If operations extending through more than three states

\textsuperscript{117} See statement of Mr. LaRue Brown in Hearing before House Committee on H. R. 12380, 70th Cong., 1st Sess., 104 at 113-118, 120-125.
\textsuperscript{118} See statement of Mr. LaRue Brown in Hearing before House Committee on H. R. 12380, 70th Cong., 1st Sess., 104 at 122.
\textsuperscript{119} See remarks of Representative Rayburn in course of debate on H. R. 10288, 71st Cong., 2d Sess., 72 Cong. Rec. 5220.
\textsuperscript{120} When the National Association of Railroad & Utilities Commissioners at its 1925 convention was considering the bill drawn by its Special Committee whereby the state commissions would have been empowered to administer federal regulations for interstate motor carriers, it was suggested already at that time by Mr. Barber, Secretary
are still essentially local in character, the Interstate Commerce Commission may in its discretion refer problems arising from such operations to a joint board.

(c) *State Commissioners Occupy Inferior Position*

Objection has been made that under an administrative set-up like that provided by the Motor Carrier Act the joint boards are reduced to the category of examiners employed by the Interstate Commerce Commission. It has been said that such a plan "leaves absolutely no power or no authority in the hands of the State commissions," that it is "a bitter pill with a sugar coating. The pill is absolute Federal control; the sugar coating is to let a few State commissions get together and hear the evidence and have no part whatever in making the decision."\(^{121}\)

Such a statement does scant justice to the plan. The fact that joint boards are placed in the same category as the Commission's examiners in respect to their powers and the effect given their findings and recommendations does not in itself prove very much. In the first place, the Motor Carrier Act vests the Commission's examiners with considerably more power than they possess under the Interstate Commerce Act.\(^{122}\) In the second place, any discussion of the merits of the joint board plan should not be clouded by arguments concerning the relative rank the


\(^{121}\) Statement of Mr. Ellis, 40 Proc. Nat. Assn. R. R. & Util. Comrs. 326-327 (1928). See note 92, supra. The same position was taken by H. E. West of the Maryland Commission in his article "The Menace of the Couzens Bill," 6 Pub. Util. Fort. 579 (1930). In speaking of the joint board mechanism provided for in the Couzens bill to regulate interstate power transmission, he said at p. 585:

"The states have no real authority under this plan. The Federal authority simply permits them to play with the situation as a man may let his child put its hands on the steering wheel of a car. This pleases the child and gives it a sense of importance. But it is the old man who drives."

See also statement of Representative Cox, 72 Cong. Rec. 5551, and Stecher, "Proposed Federal Regulation of Interstate Carriers by Motor Vehicle," 17 Minn. L. Rev. 1 at 8 (1932).

\(^{122}\) As pointed out earlier in the text, the Interstate Commerce Commission has repeatedly recommended that it be given the power to authorize individual members of the Commission or examiners employed by it to hear and determine certain matters subject to review by the Commission. See notes 44 and 45, supra. A bill to amend the Interstate Commerce Act so as to give the Commission this power was introduced by Representative Parker in 1930 (H. R. 11363, 71st Cong., 2d Sess.) but it was not enacted into law. The provision of the Motor Carrier Act giving to the Commission the power to authorize individual members and examiners to conduct hearings and recommend appropriate orders approximately meets the Commission's recommendations.
state commissioners will hold under the plan. The real problem is whether or not the plan preserves the processes and functions of local government in a measurable degree and at the same time gives promise of practical usefulness in meeting the problems of interstate regulation.

It is true that the findings and recommendations of the joint boards are not conclusive, and that the Interstate Commerce Commission has broad and extensive power to review and modify the recommended orders or to set them aside or to order new hearings. But certainly the necessity of some kind of appellate review must be conceded, primarily because some form of review is essential in order to secure uniformity in the administration of the act. Even the original bill drafted by the Special Committee of the state commissioners' national organization provided for a right of appeal to the Interstate Commerce Commission from the action of the state commissions, whether acting separately or jointly.123 That the Commission will not lightly disregard the findings and recommendations of the joint boards may safely be predicted in light of the fact that it has in most cases accepted the recommendations of state commissions with respect to applications for certificates in extension and abandonment proceedings under the National Transportation Act of 1920.124

2. That Plan Is Fundamentally Unsound and Impractical

Now to consider criticisms coming from those who think that the fundamental plan of joint boards consisting of representatives of state commissions to assist in the administration of federal motor carrier regulations is objectionable.125 Their objections are predicated on practical considerations.

Possibility that State Commissioners Will Not Cooperate

In the first place, it is said, there is no assurance that the joint boards will function. A state commission may be apathetic or recalcitrant about the whole plan and refuse to nominate one of its members to the joint board. The governor of the state may be inoculated with the same germ of apathy or recalcitrance and likewise refuse to make a nomination to the joint board. If in a given case the commissions and governors of two states are disposed to be indifferent or hostile, the joint board plan will be nipped in the bud, and the Interstate Commerce Commission will have to handle the matter entirely by itself.

We may question whether this objection is well taken. Assuming that a state commission may be disinclined to cooperate under the joint board plan, it certainly is competent for the state legislature to compel it to cooperate. The fact that, when proposals for the utilization of state commissions in the administration of federal legislation for the regulation of interstate motor carriers were first advanced, legislatures of several states were sufficiently interested and aroused to grant express authorization to their commissions to cooperate in case such proposals were actually translated into law may be some indication of the attitude the state legislatures will take.

But apart from the action of state legislatures in compelling their commission to cooperate, it seems reasonably certain that the state commissions will of their own volition be ready to go more than half-way with the Federal Government in the attempt to make a success of this experiment in cooperation. This conclusion is supported by a study of the numerous cooperative efforts whereby state officials have been authorized to act on behalf of the Federal Government in the execution and administration of federal laws. This study leads to the belief that the ready cooperation of state officials can generally be expected unless the Federal Government's policy which the state officials are called upon to enforce and administer is at variance with some fundamental local policy. Where there has been no fundamental inconsistency between

126 N. J. LAWS, 1927, c. 85, p. 158; W. VA. ACTS, 1927, c. 49, p. 137; VA. ACTS of ASSEMBLY, 1928, c. 474, p. 1231.
127 See notes 53-58, supra.
128 Peace officers and magistrates of the northern states did not assist in the enforcement of the fugitive slave acts, although authorized to do so by Congress, since the policy underlying these acts ran counter to local sentiments against slavery. State governors have refused in a number of instances to order the return to a sister state of fugitives from justice notwithstanding the federal extradition act, either because the law which the
federal and local policies, state officials have cooperated in a wholehearted way in performing federal functions. State game wardens commissioned as United States Deputy Game Wardens have been of great assistance in helping to enforce the Migratory Bird Conservation Act.\textsuperscript{129} State health, food and drug, and horticultural officials cooperate with the Federal Government in a conspicuous way in helping to enforce the Interstate Quarantine Regulations,\textsuperscript{130} the Pure Food and Drug Act,\textsuperscript{131} and the Plant Quarantine Act,\textsuperscript{132} respectively. State courts since earliest times have conducted naturalization proceedings under the federal statute.\textsuperscript{133}

Particularly is it true that state officials are ready and willing to cooperate in the administration of federal laws, when the states have a special interest at stake in the cooperative effort. California and Florida employ full time collaborators at their own expense to enforce federal plant quarantine regulations because the matter of preventing introduction of plant diseases is of particular concern to these two great citrus-fruit producing states.\textsuperscript{134} Equally persuasive has been the cooperation of the state commissions with the Interstate Commerce Commission in the regulation of railroads under the National Transportation Act. The state commissions have on the whole displayed interest in these cooperative efforts and have lent the government much able

fugitive was alleged to have violated was deemed to be inconsistent with some fundamental local policy or because the type of punishment to which he would have been subjected on return to the demanding state was considered cruel and inhuman. During the time of the Know-Nothing movement, directed against foreigners, the State of Massachusetts forbade its courts to naturalize aliens, thus negativing the authority given by Congress to all courts of record, federal and state alike, to conduct naturalization proceedings under the federal statute. See Holcombe, "The States as Agents of the Nation," \textit{1 Southwestern Pol. Sci. Q.} 307 (1921); Anderson, "State Commissions as Regional Federal Commissions," \textit{32 Proc. Nat. Assn. R. R. & Util. Comrs.} 32 at 39-40 (1920).

\textsuperscript{129} See note 53, supra. According to the communication received from the Bureau of Biological Survey, referred to in the earlier note here cited, the state deputies "are able to render considerable aid in seeing that the Federal regulations are observed."

\textsuperscript{130} See note 55, supra. According to a communication received from the United States Public Health Service, it "receives assistance from the State health authorities in practically all enforcement undertaken in connection with the U. S. Interstate Quarantine Regulations."

\textsuperscript{131} See note 55, supra.

\textsuperscript{132} See note 55, supra.

\textsuperscript{133} In note 128, supra, reference was made to the fact that at the time of the Know-Nothing movement Massachusetts forbade its courts to naturalize aliens.

\textsuperscript{134} Letter from Bureau of Plant Quarantine. See note 55, supra.
A large percentage of the hearings in extension and abandonment cases have been held by the state commissions.\footnote{See Lindahl, “Cooperation Between the Interstate Commerce Commission and the State Commissions in Railroad Regulation,” 33 Mich. L. Rev. 338 at 359, 368-369 (1935).} The state authorities have had a special interest in cooperating with the Interstate Commerce Commission in the railroad cases, because such procedure has made it possible for them to readjust their intrastate rate schedules to interstate rates so as to prevent “freezing” of the intrastate rates by order of the Commission, and also because it has given them the satisfaction of exercising some voice or power in the administration of federal policies. These same motives should impel the state commissions to serve on the joint boards under the Motor Carrier Act. They will be in a better position to prevent extension of federal control over intrastate motor carrier operations and they will be exercising federal powers of consequence and thereby enhancing their own power. The alternative to non-cooperation will be a system of thoroughgoing federal control asserted by the Interstate Commerce Commission through its own examiners, and this certainly would not be agreeable to the state commissions. Finally, it must be remembered that the state commissions have been the driving force behind the proposals for utilizing state commissions in the administration of federal laws for the regulation of interstate motor carriers. It is not probable that they will display a stepmother’s affection for their own child.\footnote{It is true that the state commissioners will not wield as much power under the Motor Carrier Act as they would have under the bill which was drafted by their Special Committee in 1925. But their National Association has successively indorsed subsequent legislative proposals which have eaten away at the powers which the state commissioners would have exercised under their Special Committee’s bill. At its 1929 convention the Association adopted a resolution indorsing the Couzens bill (S. 1351, 71st Cong., 1st Sess.) which authorized the Interstate Commerce Commission to refer matters to joint boards, instead of giving the several state commissions separate jurisdiction in the first instance, as the Association’s original bill had provided. 41 Proc. Nat. Assn. R. R. & Util. Comrs. 423-440 (1929). At its 1930 convention the Association adopted a resolution indorsing the Parker-Couzens bill (H. R. 10288, 71st Cong., 2d Sess., as amended in the House) which made still further inroads upon the powers of the state commissions, since it limited the mandatory use of joint boards to interstate operations involving not more than three states. 42 Proc. Nat. Assn. R. R. & Util. Comrs. 286 (1930). At its 1931 convention the Association again adopted a resolution in support of the Parker-Couzens bill. If we may judge by the official action of the Association, at least a majority of state commissioners favor the joint board system as it is embodied at the present time in the Motor Carrier Act.}
(b) *State Commissioners Inexperienced in Handling Interstate Problems*

Another argument voiced against the joint board plan is that state commissions will not have the larger viewpoint necessary to the wise decision of an interstate problem. They will be dominated by provincial viewpoints and considerations, it is contended. But the very purpose underlying the proposal for joint boards is to take care of interstate problems that may be called local in their character because of the restricted scope of the operation. For that reason the joint board mechanism, insofar as its use is mandatory, is limited to operations involving not more than three states. Of course, it is conceded that even though the interstate problem be essentially a local one, the fact that it is interstate cannot be ignored, and that members of joint boards must be able to see beyond the boundaries and interests of their respective states. It may be reasonably supposed, however, that state commissioners have a general knowledge of conditions in immediately adjoining states respecting motor carrier operations. Furthermore, the purpose of having joint boards consisting of representatives of the several commissions is to develop the necessary interstate approach in the solution of such local problems. Finally, it must be remembered that if a joint board evinces traits of localism or provincialism in its decisions, the Interstate Commerce Commission can remedy the situation on review.

(c) *Financial Considerations*

Another objection to the plan is based on the added expense it will occasion. The Motor Carrier Act provides for payment by the Federal Government of the traveling expenses of state commissioners while serving on joint boards. It is doubtful whether this expense item will mean any appreciable net increase in the operating expenses of the Interstate Commerce Commission. If there were no joint boards to which to refer matters arising from interstate operations between three states, the Commission would have to employ added examiners for such cases or else authorize its own members to conduct hearings and recommend orders. This would mean added salary expenses for the Federal Government, at least insofar as additional examiners would be required by the Commission, and additional traveling expenses too. In cases involving motor carrier operations on the Pacific Coast, the travel-

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189 Sec. 205 (c).
ing expenses of commissioners from three states will probably be less than would be those of an examiner sent out from Washington by the Commission.

(d) *Unwieldiness of Procedure*

The final objection and the one carrying the greatest force is that the plan of joint boards, however salutary in purpose and excellent in theory it may be, is an ineffective method of procedure because of its unwieldiness.\(^{140}\) It must be conceded that this objection is not merely fanciful. In each case arising under the Motor Carrier Act where the Interstate Commerce Commission refers a matter to a joint board it will be necessary to secure nominations of representatives by the respective state commissions. The Commission will then have to approve. After that it will have to designate a place and time of hearing and give notice to all members of the joint board. The members of the joint board will then have to leave their regular work at the time set for the hearing and there will be the lack of dispatch in conducting its proceedings that usually characterizes a newly created tribunal or board. By comparison, the plan of having the Commission send its own examiner to conduct a hearing would appear to be much simpler and more effective.

Whether the joint board plan will be as awkward in practice as it appears on paper remains to be seen. It is not inappropriate to point out, however, that some of the delay that may attend the operations of the joint board system in the first place will disappear after the Commission and the several state commissions have gained practice and acquired facility in this new method of procedure. Every new system has its birth pains.

It should be remembered, too, that the system will not require the creation of a new joint board every time a matter arises that is properly referable to such a board. There will probably be a permanent joint board for interstate operations between the same three states. Furthermore, it will not be necessary for this joint board to convene every time a matter arises for its consideration. Instead there will probably be a fairly definite date each month when the board will meet and consider all the matters coming within its jurisdiction.\(^{141}\)


\(^{141}\) The procedure here suggested would answer the argument made in the House in the course of debate on H. R. 10288, 71st Cong., 2d Sess., that it would be ridiculous
So while it is probable that the joint board mechanism will not be as formidable in practice as it seems on paper, it appears certain that it will not be as expeditious or convenient as the plan of having the Interstate Commerce Commission employ its own examiners to conduct hearings. The question then is whether this loss of efficiency in governmental administration is a price worth paying for the benefits anticipated from the operation of the plan, namely, preservation of local autonomy with a corresponding check on the extension of personnel in the federal service, utilization of administrative officers particularly competent to deal with local motor carrier problems, and coordination of interstate and intrastate motor carrier policies. The benefits to be gained from the joint board mechanism seem substantial. They appear to be worth the cost, at least as an experiment in governmental procedure. The fact that the plan has received wide indorsement and that it is being urged in other fields of legislation lends support to this view. 142

to have to call a joint board together to attend to such a perfunctory matter as approval of a surety bond for an interstate carrier. See statements of Representatives Lea and Rayburn, 72 Cong. Rec. 5768. A number of such perfunctory matters could be disposed of by a joint board at a single session along with other more important matters. 142 Proposals to have the state commissions assist in the administration of federal laws for the regulation of interstate motor carriers have been approved by the Interstate Commerce Commission. See "Motor Bus and Motor Truck Operation," 140 I. C. C. 685 at 742 (1928); "Coordination of Motor Transportation," 182 I. C. C. 263 at 385 (1932).

For other expressions of approval of the plan to utilize the state commissions under a system of federal regulation of interstate motor carriers, see Hunter, "The Taxation of Commercial Motor Transportation," 21 Proc. Nat. Tax Assn. 182 at 204 (1928); note in 40 Harv. L. Rev. 882 at 885 (1927).

For approval of the plan of constituting the state commissions federal agencies for the regulation of interstate utility developments either in its general features or as applied to a particular utility other than motor carrier service, see Presidential Address of J. F. Shaughnessy, 39 Proc. Nat. Assn. R. R. & Util. Comrs. 12 at 20 (1927); Gray, "The Dilemma of Giant Power Regulation," 129 Annals 110 (1927); Merrill, "Federal Versus State Jurisdiction Over Power Development and Its Supervision," ibid., 132 at 136; 8th Ann. Rep. of Fed. Power Comm. 13 et seq. (1928); Crawford and Mosher, "Federal Control of Interstate Utilities," 9 Pub. Util. Fort. 80 at 88 (1932); Elsbree, Interstate Transmission of Electric Power 191 et seq. (1931); Reynolds, The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States 384-391, 412 (1928). In his annual message to Congress on December 3, 1929, President Hoover, in speaking of the problem of electrical power regulation and the interstate cases that the states were powerless to deal with, said:

"To meet these cases it would be most desirable if a method could be worked out by which initial action may be taken between the commissions of the States whose joint action should be made effective by the Federal Power Commission with a reserve to act on its own motion in case of disagreement or nonaction by the States."

72 Cong. Rec. 21 at 25.

Senator Couzens' bill, S. 3869, 71st Cong., 2d Sess., for the regulation of interstate power transmission, provided for utilization of the state commissions as federal
LEGAL QUESTIONS

Any discussion of the administrative set-up provided by the Motor Carrier Act would be incomplete without a discussion of the constitutional and other legal questions presented thereby. 143

I. Legal Status of State Commissioners under Plan

It is plain that the state commissioners will be administering the federal laws, not in their capacity as state officers and by virtue of the authority conferred upon them by their respective state governments, but rather in a federal capacity and by virtue of authority conferred upon them by the Federal Government. 144 Consequently their position will be that of agents of the Federal Government. 145


The Public Utility Act of 1935 [Public 333, 74th Cong. (S. 2796)], in section 209 (a) of Part II of the Federal Power Act as amended thereby, borrows from the Motor Carrier Act in that it authorizes the Federal Power Commission to refer matters arising thereunder to joint boards composed of members from the states affected by such matters.


144 In re Loney, 134 U. S. 372, 10 S. Ct. 584 (1890), where it was held that persons giving testimony in deposition proceedings, authorized under a federal statute, before a state commissioned notary public, in a contested congressional election case, were not liable to perjury prosecution in a state court, the Supreme Court said at p. 374:

"Any one of the officers designated by Congress to take the depositions of such witnesses, (whether he is appointed by the United States, such as a judge of a Federal court or a register in bankruptcy, or by the State, such as a judge of one of its courts of record, a mayor or recorder of a city, or a notary public,) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress, and in a matter concerning the government of the United States."

145 In Parker v. Richard, 250 U. S. 235, 39 S. Ct. 442 (1919), a case involving the federal statute requiring the approval of a state probate court as a condition precedent to the valid conveyance of lands by a restricted Indian heir, the Court said at p. 239:
2. Constitutionality of Plan

(a) Supreme Court Decisions

The Supreme Court has never considered or discussed in any thoroughgoing way the constitutionality of the Federal Government's prac-

"That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency... Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes."

In Marcy v. Board of Comrs. of Seminole County, 45 Okla. 1 at 7, 144 P. 611 (1914), in a case arising under this same federal statute, the court said: "The county courts of this state are agencies designated by Congress to supervise and control all such conveyances."

In a case arising under the federal naturalization statute, the court said in Eldredge v. Salt Lake County, 37 Utah 188 at 193, 106 P. 939 (1910): "The question as to whether the state courts continue or cease to be state courts while acting in naturalization cases, while interesting, is not material. It is enough for the present to know that in so doing such courts are merely agencies of the national government." And in In re Hullen, (Cal. App. 1932) 12 P. (2d) 487, the court said (p. 488), "In entertaining jurisdiction of an application for naturalization, the state courts act merely as the agents of the federal government."

See also Matter of Spangler, 11 Mich. 298 (1863), with respect to the status as federal officers of county draft commissioners appointed by the governor of Michigan during the Civil War in accordance with the President's proclamation.

That state officers in administering and executing federal laws are federal agents is further emphasized by the cases in which it has been held that state officers when performing federal functions are subject to the limitations imposed by the Constitution of the United States upon the Federal Government. Thus state police in making arrests for federal offenses and judges of state courts in issuing search warrants in connection with alleged federal offenses are bound by the limitations imposed by the Fourth and Fifth Amendments respecting searches and seizure and the issuance of search warrants. Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137 (1927); Byars v. United States, 273 U. S. 28, 47 S. Ct. 248 (1927). Conversely a state officer making an arrest for the commission of a federal offense enjoys the same immunity that any officer does in making an arrest under proper authorization. Thus it was held in Allen v. Colby, 47 N. H. 544 (1867), that a sheriff who was acting under authority of the federal draft law during the Civil War and who had sequestered the plaintiff's clothing in an attempt to capture the plaintiff (who was fleeing to Canada in order to escape the draft law) had a good defense to an action of trespass for the taking of the plaintiff's clothes. Similarly it was held that a county draft commissioner who was appointed by the governor of Michigan during the Civil War in accordance with the President's proclamation was a federal officer, and, therefore, a state court could not issue a writ of habeas corpus against him to compel release of a citizen drafted under his authority, according to the doctrine of Ableman v. Booth, 21 How. (62 U. S.) 506 (1858). Matter of Spangler, 11 Mich. 298 (1863). See also Druecker v. Salomon, 21 Wis. 621 (1867).

In point also are the cases holding that federal and not state statutes govern with respect to collateral matters arising out of or affected by the performance of federal functions by state officials. Thus the giving of false testimony before state officers in deposition proceedings authorized by the Federal Government is a federal offense,
tice of constituting state officers its agents for the administration and enforcement of federal laws. The question has arisen in a number of cases, and in all of them the Court has either contented itself with the simple statement to the effect that the National Government might properly clothe state officers with federal authority, or it has unquestioningly assumed that to be the case. It seems clear from these cases

United States v. Bailey, 34 U. S. 238 (1835); In re Loney, 134 U. S. 372, 10 S. Ct. 584 (1890). In the latter case, where the Court held that in such a proceeding there could be no violation of the state laws against perjury but only a violation of the federal laws, it said (at p. 375): "But the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had." Because of the decision in the Loney case it may be somewhat difficult to justify the California court's decision in Harris v. Superior Court, (Cal. App. 1921) 196 P. 895, noted in 21 Col. L. Rev. 715 (1921), where it was held that a local police officer who was authorized to make arrests for violation of the federal prohibition law and who had agreed to accept a bribe in consideration of making no arrests in violation of the federal law, was guilty of violating the California law against bribe-taking by public officers. This case, however, can be reconciled with the Loney case, since there the officer himself was guilty of the wrongful act, and the fact that it concerned federal functions which he was authorized to perform did not make it any less an offense against the state, inasmuch as he continued at all times to be a state officer.

Similar to the deposition cases are the cases in which it has been held that federal and not state statutes govern with respect to the disposition of and accounting for proceeds from fees charged by the clerk of a state court in connection with naturalization proceedings. See Eldredge v. Salt Lake County, 37 Utah 188, 106 P. 939 (1910); State ex rel. Newman v. Libby, 47 Wash. 481, 92 P. 350 (1907).


In Wayman v. Southard, 10 Wheat. (23 U. S.) 1 at 39-40 (1825) (opinion of Chief Justice Marshall), and in Prigg v. Pennsylvania, 41 U. S. 539 (1842) (opinions by Justice Story and Chief Justice Taney at pp. 621 and 630, respectively), the Court assumed that it was proper for the Federal Government to constitute state officers its agents, and it went on to express its opinion on the further question whether state officers could be compelled to perform federal duties.

In Kentucky v. Dennison, 65 U. S. 66 at 108 (1860), involving the federal extradition statute and the duty of a state governor to comply therewith, Chief Justice
that the Supreme Court considers the question well settled in favor of the constitutionality of the practice. Undoubtedly the Court has

Taney said: "It is true that Congress may authorize a particular State officer to perform a particular duty. . . ."

In United States v. Jones, 109 U. S. 513, 3 S. Ct. 346 (1883), the Court held that the Federal Government in exercising its power of eminent domain could employ a state tribunal to determine the value of the property taken and the compensation to be paid. The following is taken from Mr. Justice Field's opinion at p. 519:

"Yet from the time of its establishment that [namely, the federal] government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense."

In Robertson v. Baldwin, 165 U. S. 275, 17 S. Ct. 326 (1897), the federal statute authorizing justices of the peace of the several states to apprehend deserting seamen and return them to their vessels was held valid by the Supreme Court. Note the following language from Mr. Justice Brown's opinion at p. 280:

"We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel . . . may be lawfully conferred upon state officers. That the authority is a most convenient one to entrust to such officers cannot be denied, as seamen frequently leave their vessels in small places, where there are no Federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the state laws."

In a statement not necessary to the decision in the case, Mr. Justice Peckham, speaking for the Court in Dallemagne v. Moisan, 197 U. S. 169 at 174, 25 S. Ct. 422 (1905), said that the Federal Government could by treaty authorize local police officers to make arrests at the instance of the representative of a foreign government. Note his language:

"It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the State."

In Holmgren v. United States, 217 U. S. 509 at 517, 30 S. Ct. 588 (1910), the Court held that Congress could validly authorize state courts to conduct naturalization proceedings. The Court's discussion of the question was brief and perfunctory. A more illuminating discussion in support of the federal statute authorizing naturalization proceedings by state courts is found in Levin v. United States, (C. C. A. 8th, 1904) 128 F. 826.

When the Selective Draft Law cases came before the Court, 245 U. S. 366 at 389, 38 S. Ct. 159 (1918), it briskly dismissed the contention that the draft act was invalid as a delegation of federal power to state officials because of some of its administrative features as "too wanting in merit to require further notice."

The latest case in which the Supreme Court has referred to this question is Parker v. Richard, 250 U. S. 235 at 239, 39 S. Ct. 442 (1919), involving the federal statute requiring the approval of state probate courts as a condition precedent to the validity of conveyances by restricted Indian heirs. In the brief statement quoted in note 145, supra, Mr. Justice Van Devanter said that it was immaterial that the agent chosen to approve the conveyance was a state court.

In accord with the Supreme Court's decisions and utterances are the following cases in which state courts have upheld the exercise of federal functions by state officers.
been influenced by the fact that this practice dates back to the very foundations of our government and in itself constitutes a practical interpretation of the Constitution not lacking in persuasive appeal.\(^{149}\)

However, the Court has also made clear that the Federal Government cannot compel state officers to perform federal functions.\(^{150}\) A

under the authorization of federal statutes: Ex parte Rhodes, (Super. Ct. N. Y. 1816) 2 Wheel. Crim. Cas. 559 (commitment for federal offense by state magistrate); Ex parte Gist, 26 Ala. 156 (1855) (arrest and commitment for federal offense under warrant issued by justice of peace); Matter of Spangler, 11 Mich. 298 (1863) (execution of federal draft law during Civil War by governor of state and county commissioners and township assessors); Drucecker v. Salomon, 21 Wis. 621 (1867) (same); In re Conner, 39 Cal. 98 (1870) (naturalization proceedings in state courts); State ex rel. Newman v. Libby, 47 Wash. 481, 92 P. 350 (1907) (same); Eldredge v. Salt Lake County, 37 Utah 188, 106 P. 939 (1910) (same); Marcy v. Bd. of Comrs. of Seminole County, 45 Okla. 1 at 7, 144 P. 611 (1914) (approval of conveyances of restricted Indian heirs by state probate courts); Harris v. Superior Court, (Cal. App. 1921) 196 P. 895, noted in 21 Col. L. Rev. 715 (1921) (enforcement of National Prohibition Act by local police officer); Goulis v. Stone, 246 Mass. 1, 140 N. E. 294 (1923), noted in 33 Yale L. J. 636 (1924) (warrant of arrest and preliminary hearing by state magistrate for offense against National Prohibition Act).

In United States v. Almeida, (Baltimore County Ct., circa 1810) 2 Wheel. Crim. Cas. (N. Y.) 576, it was held that Congress could not authorize state magistrates to initiate criminal prosecutions by commitment for violation of federal laws.

\(^{149}\) "At this late day, however, after the courts of the states have for more than a century, with the uniform acquiescence and consent of all the departments of the national government and of the state governments, exercised this authority to naturalize aliens granted to them by the acts of Congress, there is one answer which is equally fatal to both the propositions which counsel for the plaintiff in error here presents. It is that the contemporaneous interpretation of the provisions of the Constitution relative to this subject by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine their meaning and effect, and place them beyond the realm of doubt or question. . . . It is too late to question the constitutionality of the devolution of this authority upon the courts of the states, or their jurisdiction to exercise it. Those issues have been settled by prescription and practice, and they are no longer open to debate or question." Sanborn, Circ. J., in Levin v. United States, (C. C. A. 8th, 1904) 128 F. 826 at 828-829.

\(^{150}\) In Wayman v. Southard, 10 Wheat. (23 U. S.) 1 at 39-40 (1825), where he was discussing the question whether the early conformity statute required officers of state courts to serve in proceedings in federal courts, Chief Justice Marshall said, "The laws of the Union may permit such agency, but it is by no means clear that they can compel it." The attitude of doubt here expressed again found expression in Justice Story's opinion in the great case of Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 539 (1842), involving the federal statute which authorized state magistrates to enforce the provisions of the Fugitive Slave Act of 1793. The learned justice said, at p. 621, that no doubt was entertained by the Court that state magistrates could if they chose exercise the authority conferred on them by the federal act, but he conceded that "a difference of opinion" had existed and possibly still existed on the point whether state magistrates were bound to exercise this authority. But Chief Justice Taney who also wrote an opinion in this case
good statement of the Court's position is found in the following excerpt from Chief Justice Taney's opinion in the celebrated case of *Kentucky v. Dennison*:

"And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

had no doubts at all about this matter, as is evident from the following statement taken from his opinion at p. 630:

"The state officers mentioned in the law are not bound to execute the duties imposed upon them by congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them."

Fourteen years after the Prigg case was decided, the Supreme Judicial Court of Massachusetts held that it had no jurisdiction to entertain the application of an alien in naturalization proceedings, notwithstanding the federal statute authorizing state courts to naturalize aliens, since the state legislature had enacted a statute making it unlawful for any courts of the state to entertain jurisdiction in such cases. Stephens, Petitioner, 70 Mass. 559 (1855). See note 128, supra. Chief Justice Shaw, in referring to the authority given to state courts to naturalize aliens, said (p. 562): "These powers given to state courts are therefore naked powers, which impose no legal obligation on courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States."

The view expressed by Chief Justice Taney in the Prigg case became an established principle of constitutional law by virtue of the Court's decision in *Kentucky v. Dennison*, 65 U. S. 66 (1860). This case involved the extradition statute of 1793. 1 STAT. 302. The Court held that despite the mandatory language of the statute, mandamus would not lie to compel the governor of a state to order the return of a fugitive from justice to the demanding state. In that portion of the opinion which is quoted in the text, Chief Justice Taney, speaking for a unanimous court, said that the Federal Government could not compel a state officer to perform a federal duty.

Since the decision in the Dennison case the rule has gone on unchallenged that state officers are under no duty to the Federal Government to perform federal functions. See Dallemagne v. Moisan, 197 U. S. 169 at 174, 25 S. Ct. 422 (1905); Holmgren v. United States, 217 U. S. 509 at 517, 30 S. Ct. 588 (1910). The Selective Service Act of 1917 made it mandatory upon state officers to assist the Federal Government in the administration and enforcement of the draft act. See Barnett, "Coöperation Between the Federal and State Governments," 17 NAT. MUN. REV. 283 at 290 (1928). But in the actual administration of the act, the President, instead of giving orders to state officers, "sought and obtained the consent of every governor to co-operate, and then he left it to the governor to give the orders." Wigmore, "The President, the Senate, the Constitution, and the Executive Order of May 8, 1926," 21 ILL. L. REV. 142 at 144 (1926).

See note 15, supra. 150 65 U. S. 66 (1860).
"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal." 152

(b) Power of Congress to Appoint Agents

In principle there should be no difficulty in sustaining the power of Congress to constitute state officers federal agents for the administration of federal laws. It is elementary that Congress may delegate the execution and application of legislative policies to administrative bodies, provided of course Congress sets up adequate standards. 153 So far as the power of Congress is concerned, it should be immaterial who the persons are to whom it delegates such administrative functions. It should be as free to choose persons who are already state officers as to choose persons who will give all their time to the Federal Government alone.

(c) Whether Principle of Dual Sovereignty Violated

It may be objected that a statute authorizing state officers to perform federal functions is invalid because it violates the principle of dual sovereignty in our system of government. By virtue of such authorization the same persons are agents for both the nation and the state. On the one hand the fear is expressed that by virtue of such a scheme the principle of nationality is subordinated to the idea of state sovereignty. This fear was expressed by a member of the House whose criticism was flavored with Biblical lore when he said:

"These joint boards are composed of representatives of the State boards, but the selection of the representatives of the States is required by law, so while constitutionally this is a Federal board, in fact and substance it is a State board. It is a case where it is the hand of Esau but the voice of Jacob." 154

On the other hand the view is expressed that the principle of local autonomy will be subordinated to the idea of thoroughgoing nationalism. Thus the statement has been made that "the state commission acting as agent of the Federal Government would be no longer responsible to the immediate locality which it served, but to a remote

Both of these arguments indicate a solicitous regard for the principle of dual sovereignty. But we may well question whether the apprehension they reveal is justified. The national principle will not suffer under a plan for utilizing the services of state officers in the performance of federal functions, since it is the Federal Government that prescribes the legislative policies and standards. Nor does the principle of local autonomy lose ground under such a plan, since the state officers continue responsible to their own states. Indeed the principle of local autonomy is strengthened, for otherwise regular federal employees would be utilized to regulate interstate motor carrier traffic. Finally, it should be remembered that the basic idea of cooperation is not incompatible with the idea of federalism. Those who drafted the Constitution anticipated the utilization of state officers by the Federal Government. So did the commentators who wrote for the Federalist. They envisaged a scheme of government in which the nation and the states working together would achieve a common end. The plan of cooperation which they anticipated has been achieved in practice, and to this practice the Supreme Court has given its sanction. As that Court has said:

"In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution."

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155 Donovan, "A Plea for State Regulation," 159 ANNALS 76 at 82 et seq. (1932).
156 See Holcombe, "The States as Agents of the Nation," 1 SOUTHWESTERN POL. SCI. Q. 307 at 308-310 (1921).
157 See THE FEDERALIST, Nos. 44, 45.
159 "Evils calling for legislative redress, recognized subjects of administrative control, governmental promotion of social ends, have throughout our history divided men into two hostile camps, those seeking relief through State action and those appealing for national intervention. As a result legal inventiveness has been curbed and its resources largely confined to an untrue antithesis. The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action. Until very recently these potentialities have been left largely unexplored. Political energy has been expended on sterile controversy over supposedly exclusive alternatives instead of utilized for fashioning new instruments adapted to new situations. Our rapid industrialization is generating an insistent variety of interaction in the affairs of the several States. The exclusiveness of the traditional choice of governmental intervention is becoming
It may be urged that the selection of state officers to serve in a federal capacity violates the constitutional provision respecting the manner of appointing federal officers. The Constitution provides that the President with the advice and consent of the Senate shall nominate and appoint all officers of the United States, whose appointments are not otherwise expressly provided for in the Constitution; but that Congress may by law vest the appointment of such inferior officers, as it thinks proper, in the President alone, in the courts of law, or in the heads of departments.\textsuperscript{160} The methods here prescribed by the Constitution for appointing officers of the United States are exclusive.\textsuperscript{161} Plainly, then, if the state commissioners constituting the joint boards under the Motor Carrier Act are federal officers, the method of appointment is unconstitutional, for the members of the joint boards will not be appointed by the President, or by the courts of law, or by the head of any department. The Act provides that the state commissions, or in case of their failure to act, the governors of the several states, shall make nominations for the joint boards, and the Interstate Commerce Commission shall then appoint as a member upon the joint board any such nominee approved by it. In other words state officials nominate candidates for the joint boards and the Commission makes the appointment. The Interstate Commerce Commission is not a "department," within the meaning of the constitutional provision relating to appointments of officers by the heads of departments, since the word department has been construed to refer to those branches of the executive power represented by the members of the President's cabinet.\textsuperscript{162} And even if the Interstate Commerce Commission were a department, the method of appointment prescribed by the Motor Carrier Act might still be unconstitutional, assuming that members of the joint boards will be federal officers, since Congress might be deemed to have gone too far in prescribing qualifications for correspondingly inadequate. Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests." [P. 688.]

"The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths 'States-Rights' and 'National Supremacy.' We must not deny ourselves new or unfamiliar modes in realizing national ideals." [P. 729.]


\textsuperscript{160} Art. II, § 2, par. 2.

\textsuperscript{161} Eku v. United States, 142 U. S. 651 at 663 (1892).

\textsuperscript{162} United States v. Germaine, 99 U. S. 508 at 510-511 (1879).
the Commission's appointees by requiring them to be nominees of the
state commissions or of the governors of the states.\footnote{163}

But it may be said with reasonable certainty that the members of
the joint boards will not be held to be federal officers within the meaning
of the provision relating to manner of appointment. Under the Motor
Carrier Act, it will be remembered, the joint boards will have virtually
the same status as examiners of the Interstate Commerce Commission.\footnote{164}
And the act makes explicit the intention of the drafters that examiners
shall be regarded as agents or employees of the Commission and of the
Federal Government, rather than officers of the United States. It
authorizes the Commission "to employ, and to fix the compensation of,
such experts, assistants, special agents, examiners, attorneys, and other
employees as in its judgment may be necessary or advisable for the con­
venience of the public and for the effective administration of this
part."\footnote{165} Congress, of course, cannot by fiat declare a person to be
merely an employee or agent of the Federal Government so that the
method of appointing him does not come within the constitutional pro­
vision respecting officers, if the nature of his position is such that it
brings him within the Supreme Court's definition of what constitutes
an officer of the United States.\footnote{166} The Court has said that the "term
office embraces the ideas of tenure, duration, emolument, and duties."\footnote{167}
Since examiners under the Motor Carrier Act will have no tenure of
office and since their positions are not fixed so as to meet the require­
ments of duration, they will not be officers of the United States accord­
ing to the Supreme Court’s definition.

Once it is conceded that examiners under the Act will not be officers
of the United States, the same conclusion must be drawn with respect
to the status of joint boards composed of representatives from the States,
since they will exercise the same powers. Though these boards will
have the same status as examiners employed by the Commission, insofar

\footnote{163} Congress can prescribe qualifications for appointees to federal office even though
Congress cannot itself make the appointments. Thus Congress can probably prescribe
civil service tests for such appointees. See Civil-Service Commission, 13 Opin. Atty.-
Gen. 516 at 524 (1871); 3 Willoughby, Constitutional Law of the United
States, 2d ed., §§ 992-993 (1929). But conceding this, it would still seem that Con­
gress would be going too far in requiring an appointee to a federal office to be the nomi­
née of a state commission or of the governor of a state, since this would be circumscribing
too greatly the power of appointment.

\footnote{164} Sec. 205 (b), (c).
\footnote{165} Sec. 205 (k).
\footnote{166} See Appointment of Assistant Assessors of Internal Revenue, 11 Opin. Atty.-
Gen. 209 at 211-212 (1865).
\footnote{167} United States v. Hartwell, 73 U. S. 385 at 393 (1867).
as the nature of their powers may be concerned, there will still be important differences. In the first place, it will be still more difficult to speak of tenure or duration with respect to the positions of those sitting on the joint boards than in the case of examiners. The Act provides that a “joint board shall continue in existence for the consideration of matters referred to it by the Commission until such time as its existence may be terminated by the Commission.” 168 Whereas examiners employed by the Commission will have at least a continuous position, the joint boards by contrast will come into existence only whenever the Commission refers new matters to them, and they will pass out of existence again after they have considered these matters and the Commission has officially declared their existence terminated. 169 The joint boards therefore will be bodies exercising the powers of examiners but not enjoying the same tenure as examiners. 170

The matter of emolument will also be significant. Members of the joint boards will receive no salary from the Federal Government. Since the Supreme Court has defined an officer of the United States as one who receives an emolument, members of the joint boards cannot possibly come within the constitutional provision prescribing the manner in which such officers shall be appointed. 171

168 Sec. 205 (c).
169 This does not conflict with the statement previously made in the text that in practice the same joint boards will probably be kept to pass upon a number of matters involving interstate operations in the states represented by the joint board. There the writer was discussing some of the practical problems that will arise in connection with the appointment of joint boards. Though legally a new joint board will come into existence after the Commission had terminated the existence of the old board, in practice the Commission will probably reappoint the state's standing nominees.

170 In Ex parte Rhodes, (Super. Ct. N. Y. 1816) 2 Wheel. Crim. Cas. 559 at 565-566, where the court held that authorization given by Congress to state magistrates to commit prisoners for violation of federal laws was not unconstitutional on the ground that it resulted in the appointment of state officers as federal officers without complying with the constitutional provisions respecting appointment of federal officers, Judge Langdon Cheeves said (p. 566): “This is not the case of an appointment. The magistrates of the state are not by the act of congress, constituted officers of the United States. They are merely authorized to do a certain act.” See 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, 2d ed., § 991 (1929).

171 In Ex parte Gist, 26 Ala. 156 at 164-165 (1855), where the court upheld the federal statute authorizing state magistrates to arrest and commit for violation of federal laws, it emphasized the voluntary character of the service performed by the state officers in refuting the contention that Congress by virtue of this authorization had appointed the state magistrates as federal officers contrary to the manner of appointment provided for by the Constitution.

The doctrine that state officers are not constitutionally obliged to perform federal functions (see note 150, supra), may be given as another reason why state commissioners
3. Legal Questions under State Constitutions and Laws

It remains to consider whether state commissioners serving as representatives on the joint boards provided for by the Motor Carrier Act will be violating any provisions of the constitutions or the laws of their respective states. Many states have provisions in their constitutions that no person can hold at the same time a state office and an office of trust or profit under the United States. Under such a constitutional provision, if a state officer accepts an office of profit or trust under the United States he automatically forfeits his position as a state officer. Of course a state cannot keep a person from accepting a federal appointment, but it can keep a person who accepts a federal appointment from holding a state office at the same time. Consequently, if a representative from a state commission serving on a joint board under the Motor Carrier Act is held by the court of a particular state, in interpreting a constitutional provision of the kind mentioned, to be holding an office of profit or trust under the United States, he will automatically lose his position as state commissioner. Naturally no state commissioner will forsake a position for which he receives a salary in favor of a position that will pay him no salary.

But will state courts hold that a state commissioner serving on a joint board under the Motor Carrier Act is holding an office of profit or trust under the United States? Not if they adopt the Supreme Court’s view of what is an office under the United States. It has been seen that under the Supreme Court’s definition state commissioners when sitting on joint boards would appear not to be federal officers, since the factors of tenure, duration, and emolument are not present. It seems quite certain that the state courts will acquiesce in the Supreme Court’s definition of federal office, so that the type of state constitutional provision here in question should cause no real concern.

serving on joint boards under the Motor Carrier Act should not be deemed to be federal officers, since the Supreme Court, in the statement quoted in part in the text above, has said that the term “office” embraces the idea of “duties,” as well as tenure, duration and emolument. See United States v. Hartwell, 73 U.S. 385 at 393 (1867), cited in note 167, supra.

172 See INDEX DIGEST OF STATE CONSTITUTIONS (Columbia University Legislative Drafting Research Fund) 1144-1145 (1915).
174 See note 167, supra.
175 In 5 OPIN. ATTY. GEN. OF WISCONSIN 886 (1916), the opinion was expressed that under a provision of the Wisconsin Constitution providing that no person holding any office of profit or trust under the United States should be eligible to any office of
Akin to state constitutional provisions of this kind is the doctrine of the common law respecting incompatibility of office. According to this doctrine no person can occupy more than one public office at the same time if there is an inconsistency in the functions of the several offices. Plurality of office holding is not in itself prohibited by this doctrine but only such plurality as requires the performance of inconsistent functions. In a case where a court holds that a situation of incompatibility has arisen because of acceptance of a second office, the effect is to work an immediate vacancy of the office first held. Consequently if a state commissioner in accepting an appointment to a joint board under the Motor Carrier Act should be deemed to be violating the rule against incompatibility, he would lose his position as state commissioner. It seems, however, that the common law doctrine respecting incompatibility of office should have no more application with respect to the appointment of state commissioners to joint boards than the constitutional provisions forbidding state and federal office holding at the same time. In the first place, an appointee to a joint board will not be holding a federal office, a point that has previously received emphasis. In the second place, even if he is considered a federal officer, there will be no inconsistency of function between the federal and state office. The regulation of interstate motor carrier operations and the regulation of intrastate motor carrier operations, far from being inconsistent functions, rather dovetail into each other. In fact one of the purposes behind the trust, profit or honor in the state, it was permissible for a federal deputy internal revenue collector to be a member of a county board of supervisors. The position was taken that a deputy revenue collector was not an officer of the United States, for the reason among others that his tenure was entirely at the will of the collector.

State food and drug officials are commissioned as federal inspectors to assist in the enforcement of the federal food and drug laws even in those states that have constitutional provisions prohibiting persons from holding state and federal offices at the same time. The position is taken that since the state officials receive no salary from the Federal Government, they are not federal officers within the meaning of the constitutional provisions. But state game wardens are not commissioned deputy United States game wardens in states with constitutional provisions of this kind, since the Federal Government pays a per diem salary to these state deputies, so that they are considered federal officers. See Beard, "Government by Special Consent," 25 AM. POL. SCI. REV. 61 at 65 (1931).


See the sources cited in note 176, supra.

Annotation in L. R. A. 1917A 216 at 225. This results from a presumption of election as evidenced by acceptance and incumbency of the second office.
joint board plan is to secure a consistency of policy with respect to policies governing the regulation of interstate and intrastate carriers. The last legal question to be considered with respect to the administrative organization under the Motor Carrier Act is whether or not the state commissions will be required to secure the authorization of their respective legislatures before performing their federal functions as appointees to joint boards. The rule stated by Justice Story in *Prigg v. Pennsylvania* affords a ready answer to this question. He said that state officers could, if they chose, exercise authority conferred on them by the federal government “unless prohibited by state legislation.” This has come to be considered the correct rule in the matter. Consequently under the Motor Carrier Act state commissioners should be free to accept appointments to joint boards without express authorization by their legislatures, unless there is legislation forbidding them to do so. A question arises whether state commissions are thus forbidden by virtue of provisions in state statutes for the regulation of motor carriers which deny the regulatory commission any jurisdiction over interstate operations. This is doubtful. Such a provision in a state statute simply means that the state commission shall not overreach its jurisdiction as a state commission and attempt to subject interstate commerce to state laws. Such a limitation would be imposed by the commerce clause of the United States Constitution anyhow. But such a provision should not be construed as expressing a legislative intent that the state commissioners shall not serve as federal appointees to assist in the regulation of interstate motor carrier operations under federal laws. It would be the part of wisdom, however, for state legislatures to remove any doubt on this matter, as several states have already done, by expressly authorizing their commissions to exercise any power or authority that may be conferred upon them by the Federal Government with respect to the regulation of interstate motor carriers.

179 41 U. S. 539 (1842).
182 See note 126, supra.
183 Such express legislative authorization would have the added virtue of dispelling any questions that might arise in the absence of such legislation because of the common law doctrine of incompatibility of office. Insofar as the doctrine is an obstacle it would be superseded by legislation. Of course legislation would not affect constitutional provisions respecting duality of office.
CONCLUSIONS

The striking feature of the administrative machinery provided for in the Motor Carrier Act is the plan of utilizing the services of the state commissions. The moving force behind proposals of this kind has been the National Association of Railroad and Utilities Commissioners. But the Association's proposals, motivated by a desire to preserve the powers of the state commissions and to limit as much as possible any further centralization of control in the Interstate Commerce Commission, would not have met with a favorable reception, had not the facts relating to motor carrier transportation in its interstate aspects favored a plan of regulation featuring the administration of federal policies by the state commissions. The plan of utilizing state officers in the administration and enforcement of federal laws, far from being a novel scheme, represents a method of cooperation between the federal and state governments which has been employed for innumerable purposes ever since the Constitution was adopted. Under the Motor Carrier Act representatives of the state commissions will serve as joint boards in cases referred to them by the Interstate Commerce Commission. These joint boards will have much the same status as that of examiners employed by the Commission. Though this plan is subject to criticism on the ground that it will be cumbersome in operation, it offers promising results of such a character as to warrant the experiment. There appear to be no constitutional obstacles in the way of the plan. The Supreme Court has always assumed that it is proper for the Federal Government to authorize state officials to perform federal functions. The plan cannot be seriously attacked on the ground that it violates the duality principle of our federal system of government, or that it results in the appointment of federal officers in a manner contrary to that provided for by the Constitution. Nor should state constitutional provisions prohibiting plurality of office-holding or the common law doctrine respecting incompatibility be deemed to prevent the state commissioners from functioning as federal agents under the act.