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THE relation of the judiciary to the executive branch of the Government is a perplexing one. According to the Constitution, the government of the United States is threefold in character, legislative, executive and judicial. Each of these is supposed to be independent of the others. One cannot usurp the function of any one of the others. At the same time, this is a "Government of laws and not of men." It is equally true that this is a government of laws and not of political subdivisions or of the subdivisions of governmental mechanisms. Legislators, executives and judiciary must abide by the laws as they exist. The judicial branch of the government interprets and applies the law. It, therefore, has the power to review all matters of law which concern the executive and the legislative branches of the government and even their own functionings. It has never been doubted that within certain undefined limits the judiciary does have the power to review the acts of the executives and legislators of the government. The difficulty has been, and still is, in finding and demarking the limits within which the courts may legally review the acts of the legislators or the executives. The problem is a threefold one. It concerns the exercise of discretion by the executive officers, the determination of policies to be pursued by the executive or the legislative bodies, the extent to which executives and legislators are amenable to the civil or criminal law when they step outside the bounds within which they may legally function. It is the purpose of this discussion to confine itself simply to the relation existing between judicial power of review over the activities of executive officers of the government and the criminal liability of executive officers for their activities when such activities are legally outside of the scope of their authority.

An executive officer may act because of the authority conferred upon him by one of two things: (a) The mere fact that he is in a given office, (b) The existence of a statute which authorizes him to act.

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An officer is empowered to act according to the needs of the thing for which the office was created. Whatever is reasonably necessary and proper to be done in order that the function of the office may be fulfilled, the incumbent of the office is permitted to do, without fear of any evil consequences coming to him because of his actions. This is necessarily so because otherwise there would be no possibility of meeting the needs of the community. It would be very detrimental to the community to put a person into an office and then have to prescribe most minutely everything which he has to do. A great deal of the ordinary detail of running his office must necessarily be left to the incumbent.[1] It is only when some specific thing, either of omission or commission, is called for that statutes are passed. These statutes have binding force. They delimit the powers of the executive.

It is, of course, obvious that no executive officer can act in a capricious, arbitrary or unreasonable manner.[2] His official position

[1]United States v. McDaniel, 7 Peters 1. In this case the court said: "It is insisted, that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the government. A practical knowledge of the action of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provisions for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." (p. 13-14).

[2]Garfield v. Goldsby, 211 U. S. 249; Ballinger v. Frost, 216 U. S. 240; Lane v. Mickadiet, 241 U. S. 201; Knight v. Lane, 228 U. S. 6.

is determined by the needs of the community. His office was created by the community for a specific purpose. The carrying out of that purpose marks the duty of the official. If he does that which is in conformity with his duty, there can be no review of his activities. If, however, he does that which does not conform to the reasonable, necessary carrying out of his duty, he is subject to control by the courts. The criterion in such a case is this, Do the existing facts justify the action as taken? If so, there can be no power of review exerted by the courts. The point to note is that the courts in determining the validity or invalidity of executive action where the limits of power are simply implied by the function of the office, will look to the surrounding circumstances to see if the official could reasonably have acted as he did. They need not come to the same conclusion on the facts that he did. They may believe that his action was so different from what their own would have been that they themselves would not possibly have acted the same way he did. All this, however, would be immaterial. If the official had some reasonable grounds for doing what he did, his action will not be disturbed.

When the question before the court, however, grows out of the existence of a statute, the courts will consider not only the reasonableness of the activity as such, but must necessarily also consider whether or not the executive was acting within the scope of his authority as delimited by the statute. Where the official is specifically ordered to do or to leave undone certain things, he cannot at all defend his failure to do or not to do on the ground that he is the responsible official. The activities of every government officer, from the President down to the humblest employee, are necessarily determined by the laws under which the activities occur.[3] No man is a law unto himself. No one can flout the existing legislation. No one can act in violation of the statute and then defend simply on the ground that he is an executive. This matter has been definitively settled by such a long line of decisions from the time of *Marbury v. Madison,* that it would be invidious to make further comment upon it. The entire matter depends upon the examination and interpretation of existing statutes. The question is this, How much discre-

[3]Marbury v. Madison, 5 U. S. 137, p. 165-166.

tion is given to an official by the specific statutes under which he purports to act?

It is obvious that there are three types of statutes: (a) Statutes which give the official no discretion whatever. These are purely mandatory. (b) Statutes which give the official absolute discretion. These are non-mandatory. (c) Statutes which combine mandatory and non-mandatory provisions.

By discretion is meant the authority and power to decide what should or should not be done in a given situation, at a given time, in a given place, for a definite object or purpose.[4] By a mandate is

[4]It is, of course, obvious that executive discretion may be limited in an infinite number of ways by statutory enactments. It is impossible in a discussion like the present one to call attention to many of the limitations. A few are here presented.

(1) Discretion may be limited by a simple condition. Example:—"Transfer of ammunition to other departments.—That the Secretary of War be, and he is hereby, authorized to turn over on request from other executive departments of the Government, in his discretion, from time to time, without charge therefor, such ammunition, explosives, and other ammunition components as may prove to be or shall become surplus or unsuitable for the purposes of the War Department and as shall be suitable for use in the proper activities of other executive departments." (Acts July 11, 1919, c. 8, par. 1, subchapter IV.) (Barnes' Federal Code (1921 Supp.), p. 2-3, par. 212a.)

In this case discretion must wait upon a request from another executive department.

(2) Discretion may be limited as to time. Example:—"Transfer of war records.—That except as otherwise provided by law the President is authorized to transfer to the custody and care of such of the departments or independent establishments as he may determine the files and records of the agencies created for the period of the war upon the discontinuance of such activities." (Act July 19, 1919, c. 24, par. 4.) (Barnes' Federal Code, (1921 Supp.), p. 3, par. 212c.)

Here the time when discretion can begin to operate is fixed by the discontinuance of activities of the indicated agencies.

(3) Discretion may be limited to activities done in a prescribed way. Example:—"Sale of surplus dental outfits.—The Secretary of War is hereby authorized and directed to sell at public or private sale, under such rules and regulations as he may prescribe, all dental outfits in excess of the needs of the Government, preferentially to persons who served in the Army, Navy, Marine Corps, Coast Guard, or the American Red Cross of the United States during the recent war and who are at the time of such sale licensed to practice dentistry; but not more than one set of dental supplies shall be sold at private sale to any one person." (Res. No. 38, April 17, 1920, c. 150.) (Barnes' Federal Code (1921 Supp.), p. 35, par. 1515a.)

meant a specific instruction which cannot be deviated from in any way, at any time or for any purpose.

A. The purely mandatory type of statute leaves no room for the exercise of discretion. It indicates specifically what is to be done. Questions as to when, where, how, purpose, etc., are definitely decided by the terms of the statute themselves. The functions of the officer are purely ministerial. He must do exactly as he is told.

Here the Secretary of War must sell at either a public or private sale. There is a further limitation as to whom sales shall be made.

(4) Discretion may be limited by external circumstances. Example:—"Sale of War Materials to States or foreign governments.—The Secretary of War be, and he is, hereby authorized in his discretion, to sell to any State or foreign government with which the United States is at peace at the time of the passage of this Act, upon such terms as he may deem expedient, any material, supplies or equipment pertaining to the military establishment, except food stuffs, as, or may be hereafter found to be surplus, which are not needed for military purposes and for which there is no adequate domestic market." (Act, June 5, 1920, c. 240.) (Barnes' Federal Code (Supp. 1921), par. 260c.)

In this case the Secretary of War can determine by reference to his own department whether there is a surplus or not. But he must necessarily go out into the open market to find out if an adequate domestic market exists or not. That is a question of fact which necessarily calls for reference to the general commercial situation.

(5) Discretion in the expenditure of funds may be limited as to the amount to be expended. Example:—"Rewards for detection of crime.—For payment of rewards for the detection, arrest, and conviction of post-office burglars, robbers, and highway mail robbers: Provided, That rewards may be paid, in the discretion of the Postmaster General, when an offender of the class mentioned was killed in the act of committing the crime or in resisting lawful arrest: And provided further, That of the amount herein appropriated not to exceed $5,000 may be expended, in the discretion of the Postmaster General, for the purpose of securing information concerning violations of the postal laws and for services and information looking toward the apprehension of criminals, $25,000." (Acts July 28, 1916, c. 261, par. 1, 39 Stat. 413; March 3, 1917, c. 162, par. 1, 39 Stat. 1059; July 2, 1918, c. 117, par. 1, 40 Stat. 742; Feb. 28, 1919, c. 69, par. 1; April 24, 1920, c. 161, par. 1.) (Barnes' Federal Code (1921 Supp.) p. 8, par. 455.)

Here also there is a limitation as to purpose of payments.

(6) Discretion may be limited as to object. Example: "Application of moneys appropriated.—All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others." (R. S. Sec. 3678; Acts of March

Of this type of statute an example is found in the Act of June 5, 1920, c. 253. The act provides that: "Report as to cost of mail under frank.—Hereafter the Postmaster General shall in his annual report submit a detailed statement of the cost to the postal establishment of the matter mailed under frank by each department and independent establishment of the Government and the revenue which would be derived therefrom if carried at the ordinary rates of postage."[5]

This statute does not permit the official to exercise his judgment in any way whatever. He is bound to perform the duties laid upon him by the statute. He is purely an instrumentality for carrying out the will of the legislators in the exact way that that will has expressed itself. The mandate may be negative as well as positive. It may prohibit a thing from being done. An example is the Act of June 5, 1920, c. 250, par. 15, which provides: "Hire of vessels by War Department. The board shall not require payment from the War Department for the charter hire of vessels owned by the United States Government furnished by the board from July 1, 1918, to June 30, 1919, inclusive, for the use of such department."[6]

3, 1809, c. 28, Sec. 1, 2 Stat. 535; Feb. 12, 1868, c. 8, Sec. 2, 15 Stat. 36.) (Barnes' Federal Code (1919), par. 6040.)

(7) Discretion may be cut off by a time limit. Example:—"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preëmption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him." (Sec. 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099.) Lane v. Hoglund (244 U. S. 174 (1917)).

Here the act becomes mandatory at the end of two years.

(8) Discretion may be limited as to recovering a *quid pro quo*. Example:—"Transfer of explosives to Interior Department.—The Secretary of War is authorized to transfer, without charge, to the Secretary of the Interior for use of the Interior Department, explosives and explosive material for which the War Department has no further use." (Act July 19, 1919, c. 24, par. 1.) (Barnes' Federal Code (1921 Supp.), p. 6, par. 260a.)

Here no charge can be made for explosives which are transferred to the Interior Department.

Every Statute must be closely examined before it can be definitely stated whether or not an executive officer was permitted to use his discretion in acting under it. (Lane v. Hoglund, 244 U. S. 174 (1917)).

[5]BARNES' FEDERAL CODE (Supp. 1921), p. 8, par. 478a.

[6]*Idem.*, p. 296, par. 7516 1.

Mandatory statutes impose upon the executive officer the doing of that which the courts have held to be "ministerial acts." It is a commonplace of the law that ministerial acts are not discretionary in any way.[7] The courts will enforce ministerial acts by writ of mandamus.[8]

B. The second type of statute gives the executive official absolute discretion. He is not hampered in any way in carrying out the duties which are laid upon him. An example of this type of statute is found in the Constitution of the United States, Article II, Section 2, Clause 2, where it is provided that the President shall have the power to nominate "all other officers of the United States whose appointments are not herein otherwise provided for." According to this statute the President may, within the limit of the powers given to him, exercise those powers or not, as he sees fit. He is not compelled to nominate any person for public office. He is not compelled not to nominate any person for public office. The matter lies entirely within his own judgment. He is not compelled to nominate a specific person, nor is he compelled to nominate only such persons as have certain defined qualifications, qualities or capacities. He could, under this Constitutional provision, nominate anyone for any office which exists.

Where an executive officer acts under the authority given to him by such an all-empowering statute, the courts will not review his action. His powers are absolutely discretionary. He is the sole judge of his own conduct. The rightness or wrongness, the justice or injustice, the expediency or inexpediency of his acts are beyond the determination of the judiciary. This holds true of all acts done under all statutes which are non-mandatory.

C. The third type of statute combines some of the characteristics of the first and the second types of statutes. According to the provisions of these statutes the executive officer may be given the power

[7]Kendall v. U. S. 37 U. S. (12 Pet.) 523; U. S. v. Schurz, 102 U. S. 378; Lane v. Hoglund, 244 U. S. 174; Roberts v. U. S. 176 U. S. 221; Noble v. Union River Logging R. R. Co. 147 U. S. 165; Garfield v. Goldsby, 211 U. S. 249.

[8]Ballinger v. Frost, 216 U. S. 240; Kendall v. U. S. 37 U. S. (12 Pet.) 523; U. S. v. Schurz, 102 U. S. 378; Lane v. Hoglund, 244 U. S. 174; Roberts v. U. S. 176 U. S. 221; Noble v. Union River Logging R. R. Co. 147 U. S. 165; Garfield v. Goldsby, 211 U. S. 249; Marbury v. Madison, 5 U. S. 137.

to exercise his own judgment within certain degrees and be compelled to act without the exercise of his judgment to certain other degrees. Certain principles of law are now definitely established which indicate to what extents the courts are permitted to review the activities of executive officers who purport to act under the type of statute which is both mandatory in part and discretionary in part.

The primary principle is that the activities of executive officials must be authorized by some statute.[9] This is true even though the executive officers are appointed by, and are subject to, the control of the President himself. The duties which are imposed upon such executive officers by statutes are subject to the control of the law[10] and not simply to the control and direction of the President.[11] It follows from this that the courts can take and possess jurisdiction over the unauthorized acts of executive officials,[12] and that illegal actions by executive officers will be set aside by the courts.[13] The power of the courts to review the legality of the act performed by the executive officer must always depend upon the nature of the act.[14] If the executive officer has not exceeded the powers given to him by the statute under which he is acting, the courts will not assume to review the act.[15] Where, however, the officer is acting beyond the scope of his authority the courts will issue an injunction to prevent the act, or the continuance of the act, on the part of the executive officer.[16]

It follows from this, of course, that the courts must necessarily have the authority to inquire into the nature of the act which the executive officer has performed or is about to perform, and to determine whether or not that act comes within or without the scope of the statute under which the act is to occur.[17]

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[9]School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

[10]Kendall v. U. S. 37 U. S. (12 Pet.) 523; Marbury v. Madison, 5 U. S. 137; Garfield v. Goldsby, 211 U. S. 249.

[11]Kendall v. U. S. 37 U. S. (12 Pet.) 523; Marbury v. Madison, 5 U. S. 137.

[12]School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

[13]Knight v. Lane, 228 U. S. 6.

[14]Marbury v. Madison, 5 U. S. 137.

[15]French v. Weeks, 259 U. S. 326; New Orleans v. Paine, 147 U. S. 261.

[16]Garfield v. Goldsby, 211 U. S. 249; Noble v. Union River Logging R. R. Co. 147 U. S. 165; New Orleans v. Paine, 147 U. S. 261.

[17]Ballinger v. Frost, 216 U. S. 240.

This is true even though the duty of the executive officer calls upon him to construe the statute under which he is acting. The existence of this duty will not preclude the courts from enforcing the performance of any mandatory act or of enjoining the commission of the act if the executive officer has violated the provisions of the statute.[18] And it has been definitely established that the imposition of a duty upon an executive officer to construe a statute under which he is authorized to act does not make the positive acts commanded by the statute into discretionary acts.[19]

The discretionary activities of the executive officer are further limited. His power of discretion is not arbitrary. He cannot do altogether as he pleases.[20] The courts (although they will not interfere with executive officers who are acting within their discretionary powers,[21] and will not assume to interfere with the administrative duties of an executive officer,[22] and will not review executive activities

[18]Lane v. Hoglund, 244 U. S. 174.

[19]Roberts v. U. S. 176 U. S. 221.

The discretionary power of an executive officer to construe a statute and to declare what the law is under that statute is not absolute. His discretion is limited to the evident purposes of the act and to what is known as authority and legal discretion. He is excluded from all arbitrary, capricious, inquisitorial and oppressive proceedings. U. S. v. Doherty, 27 Fed. Rep. 730. Attention is especially called to the English cases cited by the court on pages 732 to 734.

[20]Ballinger v. Frost, 216 U. S. 240; Garfield v. Goldsby, 211 U. S. 249.

[21]Riverside Oil Co. v. Hitchcock, 190 U. S. 316, Knight v. Lane, 228 U. S. 6; Marbury v. Madison, 5 U. S. 137; Noble v. Union River Logging R. R. Co. 147 U. S. 165; New Orleans v. Paine, 147 U. S. 261; Garfield v. Goldsby, 211 U. S. 249.

[22]Lane v. Mickadiet, 241 U. S. 201; Roberts v. U. S. 176 U. S. 221.

In the case of Tyner v. U. S. 23 App. D. C. 324, which is an indictment for conspiring to defraud the United States and to commit an offense against the United States, the facts were as follows:—"Tyner and others were post office officials who were ordered to investigate and report upon fraudulent misuse of the mails. They conspired to suppress a report. Indicted under R. S. 5440. Demurrer to indictment. Demurrer overruled. Appeal affirmed. Trial followed and defendants were acquitted. And the court, in dealing with the question of the relation of duty to discretion, used the following language: "The duty was to report the conclusion, with the evidence upon which it was founded, for consideration of the postmaster general and final action by him. The duty existed without regard to the fact whether the scheme reported was in fact lawful or unlawful. In either case the duty ex-

which are not arbitrary or capricious,[23] will set aside any arbitrary action by an executive official[24] and will correct any abuse of discretion which they find to exist.[25] As already stated, the discretion may be completely shut out by the direct and positive command of the statute under which the executive officer assumes to act.[26] Another limitation is placed on his discretion by the nature of the subject matter with which the activity is connected. If a definite course of proceeding is prescribed by statute, the discretion of the executive officer ends when the method of procedure is over. If the discretion is connected with a definite subject matter, the discretionary power of the executive officer ends when the subject matter is departed from.[27] Until the subject matter is departed from or the procedure prescribed by statute is completed, the courts will not inquire into the validity or invalidity of the executive officer's activities.[28]

An illustration of this will make the situation clear. The Postmaster General has the authority to issue "fraud orders" which prevent the use of the mails by any person who is utilizing the mail service for the commission or perpetration of a fraud. The statute under which the Postmaster General acts gives him rather broad powers.[29] But it has been definitely established that the discretion

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isted and its faithful performance was required. The discretion reposed in him in respect of the conclusion that he might reach upon an examination, ended when that conclusion, whether a sound or unsound one, had been attained. Having in the exercise of his discretion attained a conclusion, the simple imperative duty arose of reporting it to the postmaster general in obedience to his orders or to the settled practice of the office." (p. 357).

[23]Knight v. Lane, 228 U. S. 6.

[24]*Ibid.*

[25]Lane v. Mickadiet, 241 U. S. 201; Garfield v. Goldsby, 211 U. S. 249.

[26]Kendall v. U. S. 37 U. S. (12 Pet.) 523; U. S. v. Schurz, 102 U. S. 378; Marbury v. Madison, 5 U. S. 137; Lane v. Hoglund, 244 U. S. 174; Roberts v. U. S. 176 U. S. 221; Garfield v. Goldsby, 211 U. S. 249.

[27]Ballinger v. Frost, 216 U. S. 240; Riverside Oil Co. v. Hitchcock, 190 U. S. 316; Knight v. Lane, 228 U. S. 6; Marbury v. Madison, 5 U. S. 137.

[28]Johnson v. Payne, 253 U. S. 209; Kirk v. Olson, 245 U. S. 225; New Orleans v. Paine, 147 U. S. 261.

[29]"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind

of the Postmaster General does not extend to matters outside the purview of the statute.[30] Nor can he pass upon matters which are matters of opinion or are subjects of controversy.[31] He can only pass upon matters of fact connected with the existence of the fraud,[32] and even then only in cases of fraud which exist in fact.[33] The fraud order statute to which we have referred does not cover what the Postmaster might believe to be false opinions or ideas, and he is not authorized to issue a fraud order and exclude from the use of the mails simply because he believes that the claims made by the person against whom the fraud order is issued may be false in fact.[34]

Where the executive officer has the authority to determine questions of fact, the determination by him must be based upon evidence.[35] If the fact question has been determined by the executive officer upon evidence, the courts will not ordinarily review his ac-

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through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

2. The powers conferred upon the Postmaster General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matter sent by mail." (Sec. 485, Postal Laws and Regulations, 1913).

[30]School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

[31]*Ibid.*

[32]*Ibid.*

[33]*Ibid.*

[34]*Ibid.*

[35]*Ibid.*

tion.[36] The courts, however, will look at the evidence in order to determine whether or not the executive officer has made a mistake of law in connection with his determination of the fact question.[37] It may very well be that the facts upon which he has passed are not those which are contemplated by the statute under which he is purporting to act, or it may be that the statute calls for a certain amount of evidence before action by the executive officer can begin and the evidence is not legally sufficient for the executive officer to pass upon the question of fact. If the evidence passed on by the executive officer fails to come within the purview of the statute, the executive officer has made a mistake of law.[38] Such a mistake of law is subject to judicial review.[39] Where such a mistake of law is found to exist upon judicial review, the courts will issue an injunction to prevent the continuance of any activities by an executive officer when such activities are based upon the mistake of law.[40] Sometimes mistakes of law committed by an executive officer are not evident until his activities are entirely at an end. This, however, does not preclude judicial review. If errors of law are apparent when the activities are at an end, the courts are authorized to end or correct such errors.[41]

Another limitation upon executive action arises out of the creation of vested rights. It is not within the discretionary power of an executive officer to divest a person of his vested rights.[42] And where an executive officer attempts to injure a vested right in any way, the courts will not hesitate to protect these vested rights nor to prevent the activities which may hurt such rights.[43]

Summarizing the above, we find that the courts have the power to review executive acts in order to determine whether or not the statute under which the executive has assumed to act has really been carried out. If it is found that he has not conformed to any of the

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[36]*Ibid.*

[37]*Ibid.*

[38]*Ibid.*

[39]*Ibid.*

[40]*Ibid.*

[41]Lane v. Mickadiet, 241 U. S. 201.

[42]Ballinger v. Frost, 216 U. S. 240; Noble v. Union River Logging R. R. Co. 147 U. S. 165; Garfield v. Goldsby, 211 U. S. 249.

[43]*Ibid.*

mandatory provisions of the statute, his actions will in that far be declared to be illegal. If it is found that he has exceeded the reasonable bounds of his discretionary activity, his action will be declared to be illegal. But if it is ascertained that the executive has conformed to all the mandatory provisions of the statute under which he assumes to act, and if he has not exceeded the reasonable bounds of his discretionary authority, the courts will not undertake in any way either to question his authority to act or declare his actions to have been illegal.

The same principles apply when a demand is made upon the court to enforce action by an executive official. Where the action is purely ministerial the courts will use their power to force the official to act. It is his duty to act and they will see to it that he does his duty. If the failure to act is bottomed upon a valid exercise of his judgment, the failure to act cannot be used as a basis for enforcing court action against the official. If the failure to act is connected with any given statute, the courts will inquire first whether the official has the authority to fail to act or not. If they find he has, they will keep from exercising their power to enforce action. Indeed, it might be said that they have no power to enforce any action on his part. If, however, they find that he has exceeded or violated mandatory provisions within the statute, they will exercise their power, (and they have the power to exercise against him) to compel him to act within the limits of the mandatory provisions of the statute.

It is generally stated that the courts will not presume to pass upon matters of policy. It is difficult to determine just what is meant by matters of policy. It is, of course, obvious that legislators can determine what ideas and principles of government they wish to embody in the statutes which they pass. It is not the function of the courts to pass upon the rightness or wrongness of these ideas and principles.[44] By public policy is meant that which a statute, constitutionally passed, may declare.[45] The courts will not presume to question such declaration, even though prior existing judicial utterances may have been against that declaration.[46]

Executive officers, however, are not in quite the same category as

[44]U. S. v. Rodgers, 191 Fed. 970, 112 C. C. A. 382.
[45]U. S. v. Trans-Mo. Freight Assn. 166 U. S. 290.
[46]*Ibid.*

legislators. They do not compose the policy-determining branch of the law. Their function is to carry out the law. So far as matters of policy are concerned they must execute the policies which are declared for them unless they receive specific authority from statutory enactment to declare the policies which they are to execute or unless an inherent characteristic of the office which is filled by an executive officer gives him the authority to declare the policy which will best work out the function of his office.

For example, if the President of the United States under the powers which are given to him by the Constitution, decides to pardon all offenders against the laws of the United States who have blue eyes and club feet, the Supreme Court of the United States will not undertake to say that that policy is against the best interests of the people and therefore refuse to sanction such pardons. The same is probably true in respect to the activities of subordinate officers of the government, and it is probably true that if statutes exist which allow an administrative official to determine the policy of his department, the courts will not presume to question the wisdom or expediency or hurtfulness of those policies. It seems as though the matter of policy is like the matter of discretion. If there are no limitations upon the powers of an executive officer to declare what policy shall be in effect, the courts will not even discuss those policies. If the statutes definitely define the policies imposed upon the executive officers, the courts will probably inquire into the matter as to whether or not the executive has actually in his activities conformed to the designated policy. If the statutes make certain policies mandatory within certain created limits, and leave it to the judgment of the administrative officer, within certain other prescribed limits, to carry or not to carry out these policies, the courts will look to see whether the prescribed limits have or have not been overstepped. If they find no infringement of the prescribed limits, they will not exercise their powers against the official. If they find, however, that the official has gone beyond the limits within which he should legally have functioned, they will probably exercise their powers against him and declare his activities invalid to the extent that they find he has departed from the policies which have been prescribed for him. The matter, therefore, seems to be one which is concerned purely with the interpretation of statutes under which the executive officer is assuming to act. It is not quite true that the courts will not assume

to pass upon matters of policy. They will probably examine policies to determine whether or not those policies are or are not authorized by a statute. The determination of this question seems to be purely a matter of law and will be decided by reference to an examination of the policies which are under discussion.

It is when the executive officer has acted in derogation of the limits which have been placed upon him by law that the question of criminal responsibility of the officer for his acts emerges. It has been established from the earliest times of the common law that no officer can violate a criminal statute and escape punishment simply on the grounds that he is an official.[47] Officials who violate the law are as amenable to its punishment as are private individuals. The principle is succinctly stated by Bishop in his treatise on criminal law, as follows: "If an officer wilfully or corruptly neglects or declines any official duty he is indictable at the common law."[48]

An interesting question arises at this point: If an executive official has been guilty of misconduct or of criminal violation of any law, can he justify his action by showing that his acts were done in obedience to the orders of his superior officers? There is very little law on this point and such as there is would answer the question in the negative. No official can escape responsibility for his criminal acts by claiming that he has simply followed and obeyed the orders of his superior officers.[49]

A principle is usually tested by an extreme application. In the present state of civilization, no nation can really exist without an

[47]Rex v. Bembridge, 3 Douglas 327, (defrauding the government of money); Rex v. Surrey, 1 Chitty 650, (treasurer of county refused to pay expenses of a witness in a case of felony). See also South v. St. of Maryland, 18 How. 396; State v. Walbridge, (Mo.) 24 S. W. 457; Wilson v. New York, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; 40 A. S. R. 712; State v. Powers, 75 N. C. 281; State v. Leach, 60 Maine 58; State v. Wedge, 24 Minn. 150; People v. Newsom, (Ill.) 125 N. E. 735; People v. Herlihy, 72 N. Y. S. 389, 73 N. Y. S. 236, 170 N. Y. 584.

[48]1 BISHOP'S CRIMINAL LAW, 8th ed. sec. 468a.

[49]AM. & ENG. ENCYC. OF LAW, p. 347, U. S. v. Carr, 1 Woods (C. Ct. R.) 480, (homicide by soldier while on guard duty); State v. Sparks, 27 Tex. 627 (taking prisoners from control of sheriff); Com. v. Blodgett, 12 Metcalf (Mass.) 56 (members of the army imprison citizens) *Cf.* State v. Burton (R. I.) 103 Atl. 962 (ambulance driver broke speed laws obeying *lawful* orders. Held: justified).

army, ready and willing to fight in its defense. No army can be efficient without having all of its members subject to a very rigid and strict discipline. Obedience to orders is the first duty of a soldier. He must do as he is told, when and where he is told. If he is permitted to exercise his judgment as to what is to be done, where, when and how, he may interfere with the general safety of the nation. Conversely, of course, he is given a great deal of protection which normally he would not have. He is not liable generally for injuries which he may cause through obedience to the orders given to him by his superior officers. He is also protected from any violation of the law which he may commit if his duties are such that he is compelled to violate the law. For example, a sentry who is guarding a military prisoner has the authority to shoot, and shoot to kill, any prisoner who attempts to escape. If there is an attempted escape, and the sentry kills the escaping prisoner as the last resort to prevent the escape, a court martial will acquit him of any charge of murder, and no civil court will try him thereafter for that offense. If a civil court should take jurisdiction over the offense before the military authorities do so, they, too, will acquit the prisoner of any charge of murder.[50] The reason given for the acquittal is that the needs of the nation in the maintenance of discipline of the army outweigh the sanctity of the individual life of any particular citizen. It is the necessity of preserving the government, which always has the authority to sacrifice some individuals if necessary to conserve the whole, which outweighs the individual's right to his life. But the element of necessity is the only element which *does* outweigh the duty of the government to protect its citizens and to maintain the integrity and sanctity of its laws. Where this necessity does not exist, the soldier cannot claim immunity from responsibility for his criminal acts because he obeyed the orders of his superior officers.

If the order which he has received is illegal upon the face of it, or if his knowledge of the existing situation, which knowledge may be actual or constructive, is such that he is apprized of the fact that the order is illegal, he need not obey that order, and he will not be punished for such disobedience.[51] For example, if in the course of operations against the enemy, a village in enemy territory is occupied

[50]United States v. Carr, 1 Woods (C. C. R.) 480. This is the leading case. *Cf.* State v. Burton, (R. I.) 103 Atl. 962.

[51]See cases cited in notes 49 and 50.

and the soldier's superior officer gives orders that he is to rape or murder all women he encounters, the soldier is not under any duty to obey that order. It is not reasonably necessary for the occupation of enemy territory or for the defeat of the enemy's forces that innocent women should be violated. The same holds true of any offenses against the criminal code which it is unnecessary to commit. If the soldier obeys such an order he must accept the punishment which any other individual not a soldier would have suffered.[52]

If, therefore, in so extreme a case as that of army discipline, etc., the element of necessity is the only element which will actually excuse one who is guilty of breaking the criminal laws, and if obedience to the orders of a superior in the army cannot be used as a defense, it follows, *a fortiori,* that where there is no necessity growing out of the needs of self-preservation of the nation, that no officer or subordinate in the civil branches of the government can violate the criminal law and then claim immunity because of the fact that he obeyed the orders of his superiors. The law is so established.

It would seem, therefore, that the following propositions are legally sound:

1. Where the government officer has absolute authority to enunciate policies and to carry out the duties of his office as he in his wisdom sees fit, the courts will not presume to review his activities nor question his policies.

2. Where the executive officer has the policies of his office and his duties within that office expressly prescribed by statute in such a way that he cannot deviate from them at all, the courts will scrutinize his policies and his activities and determine whether or not they are valid. If they find them to be invalid, they will exercise their powers to protect those who may be injured because of such invalidity.

3. If the policies of an executive officer and his acitvities in carrying them out are prescribed in part by statute and left in part to his own good judgment, the courts will scrutinize his activities and his policies to determine whether or not they come within his discretionary powers or within his ministerial powers. If it is found that they come within his discretionary powers, the courts will not attempt in any way to modify or to question them. If it is found that they

[52] *Ibid.*

come within his ministerial powers, the courts will exercise their power and see that these ministerial powers have not been exceeded. They will also protect all those who may have been hurt by the illegal actions of the executive officer in exceeding his ministerial authority or in deviating from it.

4. No executive officer or subordinate, working under that executive officer, can claim immunity from the operations of the criminal law simply upon the ground that he has obeyed the orders of his superior. The courts will always inquire into the facts to determine whether or not there were existing at the time of the activity of the person charged with offending against the criminal law, a set of circumstances which made it very clear that the absolute safety of the government depended upon the action which was taken by the accused. If they find such necessity existing, they will look upon the necessity as a justification or excuse for the action. If they find such a necessity did not exist, they will impose the penalty of law upon the accused. They will further inquire whether or not the subordinate was aware, or could reasonably have been aware, of the illegality of the act which he was ordered to perform by his superior officers. If they find that he did know or should have known that that which he was called upon to do was criminal, he will not be permitted to justify his action simply on the ground that he was obeying the orders of his superior officers.

It seems, therefore, that no court would be justified in refusing to examine the activities of executive officers simply on the ground that they were the acts of executive officers. The courts are privileged to inquire into the character of the acts performed by the executive officer, the function of the office which the officer is filling, the statutes which govern the activities of that office, and to determine from an examination of all these things whether or not a specific act which is being questioned in a prosecution or civil case is or is not within the discretionary power or the policy-making power of the official who performed that act. Indeed, it would seem that the courts are under the duty so to inquire and are precluded from refusing to make such an inquiry. The questions of law concerning judicial review of executive acts are dependent upon an examination of the specific questions of fact which grow out of the activities performed by the executive officers of whose activities judicial review is asked.