A Study in Administrative Law: The Conservancy Act of Ohio

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The expansion of government in the field of administration became the subject of special comment at the beginning of the present century.[1] That the development of the administrative function has been an outstanding trend of our era has been repeatedly remarked by political scientists, lawyers, and judges.[2] Even the politicians and business men, who have generally denounced it, have not hesitated to further the development whenever it served their particular ends. Those who have deplored the encroachment of government upon the private concerns of life, have nevertheless cried out for governmental regulation of banks, stock exchanges, public utilities, and many other agencies that seemed to them to need subjection to the commonweal. Those who have complained against the ever increasing expense of government, have nevertheless recommended the establishment of one department after another for the doing of things which could not be intrusted to private hands, such as the construction of highways, the control of waterways, the regulation of radio broadcasting. Those who have deprecated the arbitrary rule of bureaucracy, have nevertheless consented again and again to the delegation of legislative and judicial authority to executive agencies in order to meet the needs of modern technological society, relieve the pressure upon the time of legislatures, permit experiments, and provide for the emergencies occasioned by sudden changes.

Whether we like it or not this development in administration seems to be an essential part of our social evolution. The

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[1] Goodnow: "Principles of the Administrative Law of the United States." (1905) Preface, and pp. 1, 155.

[2] Frankfurter and Davison: "Cases on Administrative Law," Preface to the first edition.

complexity of modern life, the congestion of society, the facility of travel and communication, make it absolutely necessary for government to be more attentive to the general welfare. It can no longer confine its efforts to the maintenance of peace and the redress of individual grievances; individual interests diminish in number and importance. Government must be primarily interested in public policies and their administration. In order to administer such policies efficiently, in order indeed to give effective expression to the vital will of the state, it has been found necessary to have some overlapping of the functions of the fundamental divisions of government. It has been impossible to confine the work of the legislative, the executive, and the judicial departments in hair-line divisions.[3] The necessary harmony between the expression and the execution of state policies can be obtained only by the subordination of some of the functions of each department to the others and the coordination of all. Some authorities have added to Montesquieu's trinity a fourth division of government, viz., the administrative department.[4]

Whereas at first the study of the administrative function and the powers and duties of administrative officers was the exclusive field of political scientists, more recently the legal faculties have been offering courses in administrative law, even though the teachers admit that there are hardly as yet any principles well enough established to be classified as law. Case books have been made and texts have been written in an attempt to systematize the decisions and analyze the tentative principles. While the teachers admit that they are dealing with new juristic forces, and that all effort is mere groping, still they hope that their attempts at systematization may prove of assist-

[3] "It is a commonplace that the exigencies of effective administration permit little more than lip service to the classic notion that all government activity should be chopped into blocks and handed out, like Gaul, to three separate custodians." Charles S. Hyneman, Vol. LI, Political Science Quarterly, No. 3, p. 383.

See also James Madison: The Federalist, No. XLVII.

[4] Goodnow: "Principles of the Administrative Law of the U. S.," p. 131.

ance to administrators, lawyers, and judges in the evolution of a body of administrative law.

Lawyers generally complain of the chaotic conditions of the practice before administrative boards, bureaus, and agents, and a committee of the American Bar Association has recently recommended the creation of a federal administrative court with the hope that some guiding precedents might be established, some uniformity of practice outlined, and an opportunity afforded for judicial review of administrative orders. A bill[5] has been introduced in Congress providing for such an administrative tribunal, uniting under its jurisdiction the work of numerous courts, boards, and agencies now exercising, each in its own way, judicial authority over administrative affairs. The object is to bring our administrative development under the *rule of law*, in order that the efficiency of government may be increased without loss of the essential rights of person and property. It is an indication of the extent and urgency of the problem that Harvard Law School this year celebrated the tercentenary of the University by calling a conference of English, Irish, Canadian, and American jurists to discuss the future of the common law as faced by this administrative advance.

We have shown an unbounded faith in legislation as a cure for economic evils and as an inhibition against waste of natural and social resources. We have then very generously bestowed administrative power in order to make such legislation effective. It is now the important problem of our time to work out an adequate technique of administrative procedure and judicial review. It is futile merely to denounce the extension of administrative control. We must study its purposes, the proper phases and qualifications of its operation, and try to devise a mechanism and system for its proper operation. As one of the authorities in this field has pointed out, if we cannot offer a solution for every problem we may nevertheless render some

[5]Logan Bill, S. 1835, 73d Cong. First Sess. For general discussion see Advance Program Committee Reports, 59th Annual Meeting, American Bar Association, August 24-28, 1936, at page 209.

assistance if we can indicate why some problems are as yet unsolved.[6]

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The Conservancy Act of Ohio[7] is an interesting instance of administrative development and affords a study of a notable attempt to solve some of the most perplexing administrative problems. It was passed by the legislature under the general authority of Section 36 of Article II of the Constitution of Ohio, adopted as an amendment in 1912.[8] We are indebted for that provision of the Constitution to the conservation pioneers of that day.[9] Since the Conservancy Act deals mainly with the control of water and incidentally with other natural resources, it embraces a field which has always been recognized as a proper if not the exclusive sphere of governmental action. It was a striking extension of administrative action in this country but the advance was in a field over which governments of Europe had exercised jurisdiction from earliest times.

The inciting cause of the enactment was the devastating flood of the spring of 1913. The effects of the flood were so terrible in Dayton, Ohio, and the entire Miami valley that civic leaders and the population in general were moved to heroic efforts against a recurrence of the disaster. Several millions of dollars were raised by subscription for the purpose of making a survey of the watershed and of existing provisions of law in order to determine the physical and legal possibilities. That survey revealed the necessity of new law for the new need. The necessary protective work would be so local in character that no state agency was authorized to do it. On the other

[6] Ernst Freund: "The Growth of American Administrative Law," p. 41.

[7] Sections 6828-1 to 6828-79, inclusive, of the General Code. For a general analysis of the Conservancy Act with citation of authorities, see 8 Ohio Jur. 15.

[8] *Miami County* v. *Dayton*, 92 Ohio St. 215: The opinion indicates that the general police power of the legislature would have been sufficient without special constitutional grant.

[9] Men like David C. Warner of Columbus were at that time the voice of nature crying in man's industrial wilderness.

hand, it would be so extensive that it was found to be beyond the jurisdiction of any city or any county. It was evident that a new law would have to be enacted which would create a new subdivision of government, the jurisdiction of which would extend to the limits of the watershed, or as far as necessary to control floods of the territory. Well-recognized engineering and legal authorities were drawn into collaboration for the creation of such law.[10]

The developments in the Miami valley afford a striking example of the manner in which increase of population and its attendant civilization require an increase in the administrative action of government. In pioneer days floods had been looked upon as acts of Divine Providence beyond the control of man. At the time of storms individuals did what they could for self-preservation and accepted the results with resignation. The gradual influx of people, however, together with the construction of homes, schools, churches, industries, and public buildings and utilities, increased the sense of community need and thus brought about community effort. When it became apparent that there were things which could and should be done for the protection of the community, it also became apparent that some governmental agency should do it. It could not be intrusted to private enterprise. The things to be done made it quite apparent that the agency charged with the doing of them would need broad administrative powers, including some authority of a legislative character and some authority of a judicial character.[11]

The Act provides that the common pleas court of any county, upon petition of the required number of freeholders, may, after notice, hearing, and a finding that requisite facts exist, order the creation of a conservancy district which shall be "a

[10] Dr. Arthur E. Morgan, at present Chairman of the Board of the Tennessee Valley Authority, was chief engineer, and Mr. John A. McMahon of Dayton, in consultation with Judge Oren Britt Brown of Dayton, and Judge John F. Dillon of New York, acted as chief legal counsel. Hon. James M. Cox of Dayton was at that time Governor of Ohio and gave political and executive support of the greatest value.

[11] *Miami County* v. *Dayton*, 92 Ohio St. 215, Syl. 9.

political subdivision of the State of Ohio, a body corporate with all the powers of a corporation," and "the right of eminent domain and of taxation and assessment." While such authority is vested in the existing common pleas court the law provides that a court composed of one common pleas judge from each of the counties having land in the district shall sit in the court-house where the original petition was filed and make the findings required by the Act, a majority of judges being necessary to render a decision.[12]

When such court finds the necessary conditions to exist and orders the creation of a district, then it is required to appoint a board of directors, who are given general authority to carry into execution the purposes of the district. Such board is first required to prepare an official plan for the improvements for which the district was created. That plan must then be submitted to the court, notice published, and a time set for the hearing of objections, if any. Such plan may be approved, amended, or rejected by the court. If approved, the court shall then appoint three appraisers to value the lands and other property to be acquired and appraise all benefits and damages accruing to lands by reason of the execution of the plan. Upon the filing of the report of such appraisers, and after publishing notice, the court must hear all objections or exceptions. The court may return the report for further consideration and amendment, or if it appears to the satisfaction of the court that the estimated cost of constructing the improvement is less than the benefits appraised, then the court must approve and confirm the report. The board of directors is authorized, subject to the approval of the court, to levy assessments based upon the benefits so appraised; and the board is also given limited power to levy a general tax.

The provisions of law requiring that a court order the creation of the district, appoint the directors, and approve the fundamental acts of the directors, have been criticized. Some political scientists and public officers have expressed the opinion

[12] *Snyder, et al.*, v. *Deeds, et al.*, 91 Ohio St. 407.

that it would be better to vest such authority to create, appoint, and approve in some state executive or administrative agency. They feel that courts of law should be preserved for litigious business only, that is, for the determination of such controversies as have customarily been disposed of in courts of law. They insist that the reference of such administrative matters to such judicial tribunals has a tendency to involve the court in matters for which it is not well equipped, to embroil the court in political issues, and to subject the court to corrupting influences or the suspicion of corruption. They affirm or imply that such obligations as the Conservancy Act imposes are extraneous to the essential purposes and character of a court of justice.

It would seem that none of such objections are well founded.[13] It is a very salutary provision to require whenever possible that some independent court, after due notice to all parties in interest and full hearing of all objections, shall make a finding that the necessary conditions exist before the administrative authority delegated by the legislature is exercised.[14] Such a provision tends to prevent arbitrary action and silence the general criticism against bureaucratic authority. There is, moreover, ample precedent for the exercise of such authority by courts of law. There was originally no distinction between officers who administered justice and officers who administered government. In the ordinary monarchy all powers were delegated by the crown. The Roman praetor, the chief judicial officer under the republic, exercised both *imperium* and *jurisdictio*.[15] The Norman political system made no distinction between civil and judicial authorities. For a long time after the

[13] *Miami County* v. *Dayton*, 92 Ohio St. 215, 110 N.E. 726.
Hawthorne v. *Troy*, 102 Ohio St. 689.
Silvey v. *Miami Conservancy District*, 102 Ohio St. 690.
Ambrose v. *Miami Conservancy District*, 104 Ohio St. 615.
Silvey v. *Montgomery County* (D.C.) 273 Fed. 202.
Orr v. *Allen*, 16 Ohio L. Rep. 457, 63 Law. Ed. U. S. Sup. Ct. Rep. 109.

[14] Goodnow: "Principles of the Administrative Law of the U. S.," pp. 378, 380, *et seq.*

[15] Hunter: "Roman Law," 2nd Edition, p. 41.

differentiation of the legislative authority there was still no legal distinction between judicial and executive officers.[16] Later in England justices of the peace bearing both an administrative and judicial character acted as licensing authorities and issued administrative orders in the form of judicial decisions. In colonial times in this country the administrative as well as the judicial business of the counties was under the general direction of the justices of the peace.[17] Representation in the governmental functions was thus distributed, as it is in the Conservancy Act. The county court, as successor to the justices of the peace and otherwise, exercised many administrative functions.[18]

It has been quite customary down to the present time to vest in courts the administrative power to grant licenses, to incorporate companies, to appoint building commissioners, to appoint election officers, determine the necessity for elections, and the expediency of other public action. As to corruption, the temptation is no greater in administrative than other affairs of the court. In those instances where corruption has been found in connection with the performance of administrative duties, it can be shown that the corruption was occasioned more directly by the method of electing the judges and by their indefinite tenure than by the nature of the business of the court.[19]

The finding of a court as to the necessity and propriety of administrative action before the action is taken operates in prospect and obviates the necessity of later and more vexatious litigation. Such findings are in the nature of declaratory judgments and serve the same good ends. Carrying Dr. Goodnow's simile a little further, if constitutional law deals with the anat-

[16] Goodnow: "Principles of the Administrative Law of the U. S.," p. 420.

[17] Freund: "Administrative Powers over Persons and Property," p. 10.
Goodnow: "Principles of the Administrative Law of the U. S," pp. 180, 184, 205, 424.

[18] Goodnow: "Principles of the Administrative Law of the U. S," pp. 190, 200.

[19] Edward M. Martin: "The Role of the Bar in Electing the Bench in Chicago," pp. 255, 273.

omy of government while administrative law deals with the functions or physiology of government, we might say that the development of such prospective judgments is like the modern practice of preventive medicine.[20] The evolution of government seems to be away from the business of determining punishment for past crimes and damages for past injuries and toward the process of establishing principles by which crimes against society and injury to individuals may be avoided or by which assured compensation may be granted without contest where injury is unavoidable. Less and less are judges required to be mere referees at trials by battle (battles of brain if not of brawn) and more and more the administration of justice tends to administration.[21]

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The Act grants very broad administrative powers to the Board of Directors. As already stated the Board prepares the plans for the work of the district and is given full power to execute such plans. It selects all other officers, engineers, attorneys, and agents. Its agents may enter upon lands to make surveys and examinations. It has power to clean out, straighten, widen, deepen, alter, divert, or fill up any water course; to

[20] Goodnow: "The Principles of the Administrative Law of the U. S.," p. 3.

[21] Illus.: The inadequacy of the common-law action for damages as a means of compensating injured workmen led to public insurance and the Industrial Commission (Ohio); the inability of the action for fraud and deceit to protect the public against unscrupulous promoters and stock-jobbers called for the creation of the Securities (Blue Sky) Department; the futility of legal action against unfair competition produced the Federal Trade Commission; and now the procedure of all such agencies calls for some such systematization as had been worked out for courts and our courts are called upon to protect fundamental common-law principles of justice.

Goodnow: "The Principles of the Administrative Law of the U. S.," p. 427. Other instances in Ohio law of the beneficial effect of "concurrent adjudication" upon the administrative function are found in the statutes governing liquidation of building and loan associations (Ohio G.C. 687-1 *et seq.*) and banks (Ohio G.C. 710-90, *et seq.*), and in the statutes directing the assessment of inheritance taxes (Ohio G.C. 5340, *et seq.*). Certain evils and inconveniences of practice before other administrative agencies such as the Utilities Commission and the Industrial Commission might be relieved by provisions for preliminary or concurrent judgments of the courts.

construct canals, levees, dams, reservoirs, ditches, and other structures; to build, elevate or change streets, roadways, and bridges. It is given a dominant right of eminent domain over such right of railroad, telegraph, telephone, gas, water-power, and other companies, and over that of townships, villages, counties, and cities. It may remove villages and cemeteries. For the purposes of the district its powers supersede all others, individual, corporate, and public. It may make regulations to protect its property and works; to control the use of water; and may police the works and compel assistance. Necessarily its powers had to be somewhat commensurate with the forces of nature which it was created to control.[22]

But the Act does not disregard any constitutional rights.[23] It was carefully drawn to meet the requirements of due process of law and uniformity of operation.[24] Full provision is made at every stage of the development of a district for the assertion of any and all rights by those affected by the Act. Every person in interest is given his "day in court."[25] In accordance with approved practice the Act generally provides that a person who considers himself aggrieved by any order of the administrative authority must first appeal to the highest authority of the district before he appeals to the ordinary court of law, and provision is made against unnecessary delay of the work.[26] But the Act expressly recognizes the right of property owners to remain in possession of their property until they have accepted the compensation awarded by the appraisers or until the amount of compensation has been determined by a jury of the county where the property is located. An appeal to a jury may be taken also from the appraisal of benefits.[27] In

[22] Ohio G.C. 6828-18, -19, -20, -24, -25, -65. 1 Ops. Atty. Gen., pp. 105, 220, 222, 248.

[23] *Miami County* v. *Dayton*, 92 Ohio St. 215, 110 N.E. 726.
Silvey v. *Commissioners*, 273 Fed. 202.
Orr v. *Allen*, 16 Ohio L.Rep. 457.

[24] *Ibid.*

[25] *Ibid.*

[26] Goodnow: "Principles of the Administrative Law of the U. S," p. 147. Ohio G.C. 6828-32, also G.C. 6828-34, -38, -62.

[27] Ohio G.C. 6828-34.

case a jury trial is demanded in order to determine compensation for property taken the proceedings must be in accordance with the usual procedure in appropriation actions;[28] but the orders of the court creating the district and adopting the official plan are generally considered a judicial determination of the public necessity of the work. It has been held that a judge is not disqualified to preside at an appropriation proceeding because he has sat as a member of the District Court.[29]

The provisions of the Act for appropriation of land and easements, when no exceptions are filed or jury trials demanded, are extremely expeditious.[30] That private property may be taken by administrative order with no more notice than general publication and without explicit description of the property to be taken, is somewhat shocking to the legal sensibilities of the ordinary lawyer.[31] The law has been upheld, however, the appraisal and publication being construed as an offer, and acquiescence as an acceptance.[32] This could be done because the right to object and demand a jury trial is expressly safeguarded.[33] The actual procedure under the law has shown the need of more express provisions as to manner of paying for land so taken and of obtaining good record title.

It has been the practice of districts to appropriate flood easements on land above dams and to pay at once in full for the right to cause periodic overflow in the future. It would seem to be more in harmony with the general purpose of the Act and more consistent with sound public policy to provide for the present payment of only a nominal price but to give with it a

[28] *Ibid.*

[29] *State, ex rel., Sparta Ceramic Co.* v. *Lindsay*, 130 Ohio St. 461.

[30] Ohio G.C. 6828-30 to 37.

[31] Such authority approximates military power, although it has long been recognized as belonging to civil authorities in case of public exigencies. Ordinance of 1787, Art. 2. Constitution of Ohio, Art. I, Sec. 19. Ohio G.C. 436. *Giesy* v. *C. W. & Z. R. R.*, 4 Ohio St. 308.

[32] *Conservancy District* v. *Bowers*, 100 Ohio St. 317, 319. See also *Cupp* v. *Seneca* Co., 19 Ohio St. 173; *Portage Co.* v. *Gates*, 83 Ohio St. 19, 93 N.E. 255.

[33] *Conservancy District* v. *Bowers*, 100 Ohio St. 317, 319; *Orr* v. *Allen*, 16 Ohio L.Rep. 457.

guaranty to indemnify future occupants of the land against loss of normal crops. Under such plan there would be less hazard in fixing the present price and future payments would go to the persons who must suffer loss from the operation of the dam. The district would become a kind of insurer against flood damage and would have to be empowered to create a fund for such purpose. But such a plan would seem to be a natural extension of the operation and benefit of the administrative function.

The Act vests in the board ample powers regarding the financial administration of the district. The directors are authorized to receive advancements from the counties in the district for preliminary expenses. They are authorized to levy a general tax[34] upon the property of the district, and also to levy special assessments based upon appraised benefits. Repeated assessments may be levied so long as the total amount levied does not exceed the benefits, and bonds may be issued in anticipation of the collection of assessments. The directors are at liberty to do anything in connection with the issuance of bonds of the district which they may consider convenient and adapted to the end for which the bonds are authorized to be issued and which is not in violation of any express constitutional or statutory limitations.[35] The liberal provisions of the law regarding the issuance of bonds have caused a favorable market for the obligations of conservancy districts. Such delegated power to tax, assess, and issue bonds has been upheld.[36] It is generally considered within the power of the legislature to determine in what manner the funds shall be raised to defray the costs of public work.

The financial resources of the district are directed into three funds: the preliminary fund, bond fund, and maintenance

[34] "Local tax in the nature of an assessment," applicable to real estate. *Miami Co.* v. *Dayton*, 92 Ohio St. 229, 230.

[35] 1 Ops. Atty. Gen., p. 705.

[36] *Miami Co.* v. *Dayton*, 92 Ohio St. 230, citing *County of Mobile* v. *Kimball*, 102 U. S. 691, and *Houck* v. *Little River Drainage District*, 248 Mo. 373, (affirmed 239 U. S. 254).

fund.[37] At least once a year, and oftener if the court shall so order, the directors must make a report of their proceedings and of their receipts and expenditures. The Bureau of Inspection and Supervision of Public Offices is required to inspect and supervise the accounts and reports of the district.[38] Thus one administrative agency is made a check against another.

The flood control project of the Miami Conservancy District was successfully developed and administered under the provisions of the Act. When in 1933 the public works program of the Federal Government was developed, the Conservancy Act of Ohio afforded the way by which a much broader conservation project could be developed. Although the lower portions of the Muskingum valley in eastern Ohio had also suffered severe flood losses in 1913, and at various times thereafter, a project involving only flood control could not be developed in that immediate territory as it had been in the Miami valley because of the different topography of the country. A unified district in the Muskingum watershed would necessarily embrace sixteen or eighteen counties. The highland counties were not interested in a flood-control project. After the drought of 1930, however, such counties became interested in water conservation. But the cost of the project was too much for the district to bear alone. When the Federal Government announced its intention to sponsor the control of floods in the Ohio valley as a part of its public works program, it became apparent to residents of the Muskingum valley that if the efforts of the district and the United States Government could be united, something might be accomplished which would control floods in the Ohio and the Muskingum valleys, and also afford some water conservation for the highland counties. It was also apparent that the State of Ohio would be interested because of the protection which such project would afford state highways, bridges, and other property. Fortunately the Conservancy Act provided that the directors should have the right

[37] Ohio G.C. 6828-42.
[38] Ohio G.C. 6828-57.

and authority to enter into contracts or other arrangements with the United States Government or any department thereof, and with the state government and other public corporations, for cooperation or assistance in constructing, maintaining, and operating the works of the district.[39]

This led to the creation of the Muskingum Watershed Conservancy District and the contract, March 29, 1934, between such District and the United States of America through the Public Works Administrator, and also the contract, July 18, 1934, between the District and the State of Ohio through the Director of Highways. The District became the principal administrative agency and agreed to furnish the land and easements necessary for the project. The United States Government agreed to construct fourteen dams through the Corps of United States Engineers and defray the expense of relocation of utilities. The State of Ohio, in addition to a general grant from the legislature, agreed to relocate all highways which had to be changed because of the work of the District.

The Muskingum District was a pioneer in such cooperative effort. It affords an interesting example of what can be done by administrative agencies to bridge the gap between powers wholly within states' rights and the authority of the Federal Government under the Constitution.[40] It is somewhat in line with recent attempts to overcome by treaty the barriers to certain police regulations which the courts had said neither the federal nor the state governments had authority to make. It tends to decrease the area of the constitutional "no man's land."[41] Ap-

[39] Ohio G.C. 6828-23.

[40] "Complete independence of the federal and state governments was neither contemplated by the Fathers nor carried out in actual administrative practice by their successors. Government has surged forward ruthlessly, blurring the line of cleavage between the two opposing views concerning federal centralization and local autonomy. This surge has often merged centralization with decentralization. There is therefore need for examination of administrative arrangements midway between the extremes of centralization and localization." Jane Perry Clark, Vol. LI, Political Science Quarterly, No. 2, p. 230.

[41] Lloyd K. Garrison: "The Constitution and the Future," Vol. LXXXV, The New Republic, No. 1104, p. 328. See also Bernard Kilgore: "The No Man's Land Provisions," Vol. 42, Case & Comment, No. 2, p. 4.

prehension was expressed at the time of making such contracts that jealousy and attendant friction between the various agencies would prevent successful cooperation. The developments, however, have completely dispelled such apprehensions. All differences between the operating agents of the various divisions of government have been settled without appeal to higher administrative or judicial authority, and certain advantages have developed from the harmonious coordination of the various agencies.

The Muskingum District project was begun largely as a relief measure against the business depression, and it has progressed with record-making dispatch. In spite of the haste required, no instance of mismanagement or corruption has been discovered. The work has been praised by army and executive officers of Washington and by representatives of foreign governments.[42] These accomplishments have been due in large part to the greater selectivity in the process of choosing officers and agents by the administrative function than by the ordinary political method. This process must be developed and maintained if liberalism is to be able to meet the competition of the various forms of absolutism in the world today.[43] As stated above our problem is to develop the efficiency of the administrative function while we jealously preserve the legal principles and judicial processes which have made our republic "a government of law and not of men."

[42] See Annual Report of the Chief of Staff of Army Engineers for year 1935, and press reports of comments by representatives to World Power Conference (1936). Zanesville Times Recorder, Sept. 2, 1936.

[43] Sir Willmott Lewis: "Interplay and Equilibrium of Governmental Powers," The Annals of The American Academy of Political and Social Science, March, 1935, p. 36.