Personal Liability of Directors of Federal Government Corporations

Dianne Hobbs

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol30/iss4/6

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
PERSONAL LIABILITY OF DIRECTORS OF FEDERAL GOVERNMENT CORPORATIONS

Unlike the liability which attaches to directors of private corporations, the nature and extent of personal liability of directors of government corporations is unclear. This Note examines legal, practical, and theoretical advantages and disadvantages of various structures of personal liability in the governmental board of directors in light of the private corporate analogue and the problems peculiar to litigation involving the government. The author concludes that holding directors personally liable is desirable especially when the government corporation in question operates like a profit-oriented private corporation, but that a sweeping structure of liability would not work as well for government corporations not functioning within a profit-maximization framework.

INTRODUCTION

A GOVERNMENT CORPORATION offers arguably the best form of organization for the public operation of an industry. Moreover, it has been almost universal practice to entrust the management of government corporations to a board of directors, whereas government departments are controlled by an individual. The discussion of the question of the personal liability of these directors requires some background information about the nature of government corporations.

Although created to engage in a variety of enterprises and to attain diverse ends, government corporations share certain characteristics. A government corporation is generally created by, or pursuant to, legislation defining its powers, duties, and immunities and describing its form of management and its relation to established departments and agencies. Unlike a government department, a government corporation is a separate entity for legal

2. Id. at 149-50. A notable exception to this practice was the Inland Waterways Corporation, which was originally headed by the Secretary of War and thus directly controlled by an executive officer of the government. This system did not work satisfactorily. Following a reorganization of the corporation in 1935, the Secretary of War appointed a board of five managers who, subject to the direction of the Secretary, administered the corporation. Id.
3. See notes 4-38 infra and accompanying text.
5. The statutory provisions are necessarily vague, affording the corporation the opportunity to adapt to changing conditions. It is the function of the board of directors to

733
purposes. It can sue and be sued, enter into contracts, and acquire property in its own name, generally with greater freedom than government departments.⁶

A government corporation may be wholly owned by the government, as are the Corporation for Public Broadcasting⁷ and the Tennessee Valley Authority (TVA);⁸ ownership may be mixed government and private, as is that of the National Railroad Passenger Corporation (Amtrak);⁹ or ownership may be private, but only as authorized by Congress, as is the case with the Communications Satellite Corporation (Comsat).¹⁰ A government corporation is usually independently financed, except for appropriations to provide capital or cover losses. It obtains funds by borrowing from the Treasury or the public, and by selling goods or services.¹¹ A government corporation is generally exempt from many regulatory statutes applicable to the expenditure of public funds and from many of the procedures applicable to noncorporate agencies.¹²

---

⁶formulate policies to guide management in effectuating the purposes of such provisions. E.g., the Tennessee Valley Authority Act of 1933 provides:

This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare.


⁶. E.g., the corporation's greater freedom in making purchases is one of the most convincing reasons for choosing this type of organization for commercial undertakings of the government. It is not always desirable to accept the lowest bid, as the government department must. On the other hand, it is frequently advantageous to have an increase and decrease clause written into a contract when dealing with certain classes of commodities. Again, the rule that no government contract can be modified except in the interest of the government and with the approval of the Controller-General sometimes works a hardship. . . . The public corporation must be responsive to consumer demands and the competition of the market place, and hence its operations, including finance and purchasing, need to be elastic.

M. Dimock, Government-Operated Enterprises in the Panama Canal Zone 207 (1934).

¹¹. See, e.g., 16 U.S.C. §§ 831h-1, n to n-4 (1976) for statutory provisions regarding the financing of TVA.
¹². The advantages enjoyed by the government corporation in the conduct of its financial affairs have been summarized as:

The ability to raise capital funds, the right to expand the business, the necessity of earning money before it can be spent, the assurance that income depends upon economic factors rather than upon the benevolence of the legislature, the right to borrow money on the corporation's credit, the freedom to build up reserves for
The corporate form provides a governmental enterprise with greater freedom from close political control and greater flexibility to respond to changing business conditions. The corporate form, however,
is sometimes employed as a mere convenience—a way to escape the "civil service mentality", salary limitations and personnel ceilings, statutory and constitutional limits on public borrowing, and central audit and management controls; to reduce the size of the budget and to finance government programs outside the budget by earmarking taxes and mortgaging future revenues; and to minimize interference by the responsible political authorities.13

Given the potential for such tactics, the Government Corporation Control Act of 1945 (the 1945 Act)14 was passed in an effort to impose a modicum of uniformity on and control over the financial autonomy of government corporations.15 Under the 1945 Act wholly government-owned corporations must submit a business-type budget to Congress for review16 and must be audited at least once every three years by the General Accounting Office.17 Mixed-ownership corporations must be similarly audited18 and are subject to Presidential recommendation for the return of government capital to the Treasury.19

Commentators differ with regard to the effects of the 1945 Act. Some say that it has "reduced greatly the attractiveness of either

M. Dimock, supra note 6, at 203-04.
15. For example, the Senate Committee on Banking and Currency said in a report prior to the passage of the 1945 Act that "there has been increasing recognition in both the legislative and executive branches that some means, adapted to the special needs of the situation, must be found to coordinate the financial programs of the corporations with that of the Government as a whole." S. Rep. No. 694, 79th Cong., 1st Sess. 2, reprinted in [1945] U.S. CODE CONG. & AD. NEWS 887, 889. The report stated, "The purpose of the bill is to provide annual scrutiny and current financial control by the Congress of the financial transactions and operations of the Government corporations through the regular fiscal agencies of the government." Id., U.S. CODE CONG. & AD. NEWS AT 890.
17. Id. § 850.
18. Id. § 857.
19. Id. § 859.
wholly-owned or mixed-ownership government corporations as a device for 'beating the system' and escaping government controls." Conversely, others say that government corporations still have great financial independence because they "almost entirely escape effective budget control by the appropriations committees of Congress, the only groups in Congress which review all government activities each year in the light of the budget and economic trends." Additional governmental fiscal control may well have been intended by congressional adoption in 1969 of a unified budget which included the expenditures of wholly-owned government corporations. The utility of the unified budget as a control measure, however, has been severely reduced by piecemeal legislative exceptions to the unified budget, authorizing "off-budget" outlays for various government corporations.

The corporate form has traditionally been favored as a useful means of solving practical problems, particularly in times of crisis such as the Great Depression. One commentator has said that the corporations resulting from this period "do not represent the results of deliberate policy long thought out but rather emergency institutions hastily organized." This foundation in emergency has not encouraged consistency: tailoring corporations to fit crises on an ad hoc basis has given government corporations varying functions, financing arrangements, and governmental control.

The creation of government corporations may thus be precipitated by an atmosphere of crisis, by an attempt to escape the strictures of close political control, or simply because the corporate

20. Seidman, supra note 13, at 92.
24. J. Thurston, supra note 1, at 6. World War I also led to hastily organized corporations: e.g., the Shipping Act of Sept. 7, 1916, ch. 451, § 1, 39 Stat. 728 (codified at 46 U.S.C. § 801 (1976)), established the United States Shipping Board, which was empowered to form the Emergency Fleet Corporation for the purchase, construction, and operation of merchant vessels, the corporation to be dissolved five years after the "present European war" was concluded. 39 Stat. 728, 732.
form is well suited to the public operation of an enterprise. In addition, such corporations may have a mixture of charitable, regulatory, governmental, and commercial objectives. Their activities vary widely; although largely related to banking and insurance, they also encompass broadcasting, power production and distribution, and investment and legal services.

Originally, government corporations were restricted mainly to commercial enterprises. The corporate form of organization was for government programs "which are predominantly . . . revenue-producing, are at least potentially self-sustaining, and involve a large number of business-type transactions with the public." One example of such a commercial government corporation, which was established to construct, operate, and maintain deepwater navigation works in sections of the Saint Lawrence River, is the Saint Lawrence Seaway Development Corporation. Another example, the Communications Satellite Corporation (Comsat), was authorized to plan, initiate, construct, own, manage, and operate a commercial communications satellite system; to furnish, for hire, channels of communication to authorized foreign and domestic entities; and to own and operate satellite terminal stations.

At the other end of the spectrum are enterprises created to further more conventional governmental, as opposed to commercial, purposes (such as aiming to subsidize a particular economic group or to stimulate economic activity). Such enterprises tend to be government institutions, like agencies or departments, serving a public purpose and functioning within the government structure. An example of such a corporation is the Federal Housing Administration (FHA), which was established "to stimulate the build-

---


30. President Harry S. Truman, 1948 Budget Message.


ing trades and to increase employment." It has since become part of the Department of Housing and Urban Development.\textsuperscript{34} This Note first examines the duties and liabilities of the directors who control government corporations.\textsuperscript{35} The Note then considers whether the mechanisms designed to monitor and control government corporations render the imposition of personal liability on directors unnecessary.\textsuperscript{36} Next, if it can be shown that directors ought to be personally liable for failing to comply with constitutional or statutory demands, the Note discusses the availability of official immunity for them.\textsuperscript{37} Finally, even if personal liability is necessary or desirable to ensure accountability and suit is not precluded by a director's immunity, the Note considers potential plaintiffs' access to the courts.\textsuperscript{38} The Note concludes that existing control mechanisms are not altogether effective in maintaining director accountability, indicating that the threat of personal liability may well be necessary. Suit against directors of government corporations is probably not precluded by official immunity. Nevertheless, access to the courts for potential plaintiffs is likely to be severely restricted, in derogation of any need for or possibility of personal liability suits against directors of government corporations.

I. DETERMINING THE DUTIES AND FUNCTIONS OF DIRECTORS OF GOVERNMENT CORPORATIONS

To determine the liability of a corporate director, one must first determine the duties and functions attendant on the position. It is instructive to examine the duties and functions of directors of both private business and nonprofit corporations, and to consider how these duties and functions might be modified to suit the special case of government corporation directors. There are essential

\textsuperscript{34} This was the Supreme Court's interpretation of the enabling legislation in United States v. Emory, 314 U.S. 423, 430 (1941).


The position of any given government corporation on this spectrum cannot be determined with any exactitude. It has been said that Amtrak, for example, operates somewhere in the middle range: "The dominance of Amtrak's public attributes makes it difficult to resist the conclusion that although ostensibly a private public utility, Amtrak is, for all intents and purposes, an instrument of national policy." Adams, \textit{The National Railroad Passenger Corporation - A Modern Hybrid Corporation Neither Private nor Public}, 31 Bus. Law. 601, 606 (1976).

\textsuperscript{36} See notes 40-78 infra and accompanying text.

\textsuperscript{37} See notes 79-131 infra and accompanying text.

\textsuperscript{38} See notes 132-61 infra and accompanying text.

\textsuperscript{39} See notes 162-204 infra and accompanying text.
differences in the objectives and motivations of business, non-profit, and government corporations, and therefore in the criteria by which their respective directors must be evaluated.

The central objective of the business corporation is profit maximization; the nonprofit corporation is motivated by a mixture of social and economic policies. Depending on the nature of the enterprise, a government corporation may be more analogous to a business or to a nonprofit corporation. Commercially oriented government corporations are guided at least in part by a profit motive since they are self-financing and must satisfy their shareholders. Other types of government corporations are guided primarily by considerations of social policy. Yet all directors of government corporations are, to a greater or lesser extent, subject to the vagaries of political directives and social considerations, which must be taken into account in determining the duties and functions of the directors and in evaluating director performance.

A. Duties Owed to the Corporation

The directors of a business corporation owe three basic duties to the corporation that they serve: obedience, diligence, and loyalty. The duty of obedience requires directors to avoid ultra vires corporate activities—to act within the powers conferred upon the corporation by its charter and within the authority conferred upon them by the articles of incorporation. Directors are liable to the corporation for willful violation, and usually for negligent disobedience, of this precept. The duty of diligence requires directors to discharge the duties of their positions with that degree of diligence, care, and skill which ordinarily prudent persons would exercise under similar circumstances in like posi-

---


41. Id. at 11.

42. See, e.g., Gottfried v. Gottfried Baking Co., 1 A.D. 2d 994, 151 N.Y.S.2d 583 (1956). The court found that some contracts for the sale of substantial property holdings of the corporation that were made without shareholder approval were void. It further held that subsequent shareholder approval would be sufficient to authorize the performance of subsequent contracts — but not to ratify the contracts originally made without their approval. "Presenting stockholders with the opportunity of ratification of a fait accompli is not the same as giving them the opportunity of advance consideration and determination. . . . Officers and directors undertaking to act without proper approval are answerable for any damages resulting to the corporation from unauthorized action." Id. at 994, 151 N.Y.S.2d at 584–85.
The duty of loyalty requires that directors refrain from using their directorships to make secret or private profits and that they give to the corporation the benefit of any advantages that they obtain owing to their official positions. In addition, directors are said to occupy a fiduciary relationship with respect to both the corporation and the shareholders, involving responsibility and accountability like that of a trustee.

It would appear that the duties of obedience, diligence, and loyalty should likewise be imposed on directors of government corporations. The concept of a fiduciary relationship like that of a trustee seems particularly apt: a number of the statutes establishing government corporations provide that directors should not have interests which may be regarded as incompatible with the exercise of their duties.

One commentator has called directors of government corporations "trustees of the public interest" who should "weigh the claims of different groups and take such action as will prove of the greatest benefit to the country as a whole." It may, however, be

43. See, e.g., Briggs v. Spaulding, 141 U.S. 132 (1891). The Supreme Court expressed the standard of care required of directors of a bank as that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact to be determined under all the circumstances.

44. See, e.g., Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969), in which the court said:

[A] corporate fiduciary, who is entrusted with potentially valuable information, may not appropriate that asset for his own use even though, in so doing, he causes no injury to the corporation. The primary concern, in a case such as this, is not to determine whether the corporation has been damaged but to decide as between the corporation and the defendants, who has a higher claim to the proceeds derived from the exploitation of the information.

45. W. KNEPPER, supra note 40, at 12.

46. For example, the Tennessee Valley Authority Act of 1933 provides:

No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.


47. J. THURSTON, supra note 1, at 160.
less than accurate to say that all directors of government corporations are representatives of the public interest. Rather, this role seems to fall to the directors appointed by the President. For example, the articles of incorporation of Comsat provide that each director shall have the same fiduciary duty to the corporation.\footnote{Adams, supra note 35, at 608.}

The legislative history of the act establishing the corporation, however, demonstrates that somehow the Presidential appointees are to be the special guardians of the "broad public interest" although they account for only three of the fifteen directors.\footnote{One Senator said of the individuals to be appointed by the President to the board of directors of Comsat: "[T]he whole framework of this reported bill suggests that he not select representatives of the carriers for his appointees; that is, representatives should be named to represent the broad public interest and [be] able, distinguished people from the public generally." Communications Satellite Legislation: Hearings on S. 2814 and S. 2814, Amendment, Before the Comm. on Commerce, 87th Cong., 2d Sess. 38 (1962) (statement of Senator Case).} Presidential appointees have two special roles: first, to use their presence and voting power to influence the making of decisions affecting the public interest, and second, to serve as a "window" for the President and government agencies, keeping them informed of the corporation's activities, and communicating the President's views.\footnote{Schwartz, Governmentally Appointed Directors in a Private Corporation — The Communications Satellite Act of 1962, 79 Harv. L. Rev. 350, 353-54 (1965). This dichotomy in the board can cause divisive suspicion and hostility; see notes 93–94 infra and accompanying text.}

By way of comparison, nine of the thirteen members of the Amtrak board of directors are appointed by the President, three of whom are expressly described as "consumer representatives."\footnote{45 U.S.C. § 543a(4) (1976). See notes 103–05 infra and accompanying text. When preferred stock is issued, since the holders of such stock are entitled to elect 4 directors, the board will then be comprised of 17 directors.} By designating a special role for three directors Congress has arrayed potentially conflicting functions:

Clearly, the "consumer representative" directors of Amtrak are faced with a conflict between their common law duties as corporate directors and their implied but totally undefined obligation under the Act to serve as a conduit through which the voice of the consumer may be heard in the boardroom. Are they to be merely the echo of the consumer's voice, or are they to serve as the consumer's advocate? And, if the latter, where does advocacy end and harrassment of the other members of the board begin?\footnote{Adams, supra note 35, at 612–13.}
there is no potential for the sort of dissension created when different duties are imposed on them because they reached the board by different means, as is the case with the Comsat and Amtrak boards. Nevertheless, there have been several proposals to enlarge the board of TVA. One proposal would provide for the appointment of directors to champion the interests of one state against those of another. Another method would have the selection process give consideration to potential board members' expertise or their affiliation with certain organized groups. Such diversification of a board of directors, while being potentially divisive, would seem to pay dividends in reduced arbitrariness and greater expertise.

Some state and federal statutes prescribe specific duties for directors and impose liability for their breach. An example is the District of Columbia Business Corporation Act, which makes a director liable for assenting to the unlawful distribution of assets, dividends, or loans to corporate officers or directors. The provisions of the District of Columbia Business Corporation Act are particularly relevant to government corporations because the enabling legislation often specifies that the corporation is to be subject to the provisions of that Act.

---

54. Id. at 611.
55. The Hoover Commission's task force on independent regulatory commissions noted that, like action by a corporation's board of directors, commission action requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best, each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience. . . . Despite the cost of the method of consultation and deliberation, we are convinced that it is a valuable process for arriving at wise policies and decisions in areas allowing so wide a choice. It is one of the major contributions of the commission form to sound regulation. U.S. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS REPORT 21–22 (1949). One commentator suggests, however, that "these advantages result primarily from the complementary contribution of the various staff experts in an institutional process." Redford, *The Arguments For and Against the Commission System*, in THE POLITICS OF REGULATION 122, 124 (S. Krislov & L. Musolf eds. 1964).
B. Functions Performed by Directors

Not only do the directors of a business corporation owe certain duties to the corporation, but they are also expected to perform certain functions for it. Some of the essential activities generally carried out by the board of directors are: 1) authorizing major corporate actions; 2) giving advice and counseling to the corporation's management; 3) providing sound accounting policies and effective auditing procedures; 4) providing access to corporate decisionmaking for nonmanagement personnel; 5) reviewing the corporation's investments at regular intervals; and 6) setting objectives for management and monitoring management's performance, measuring results against objectives. 58

While directors of government corporations may perform all these functions, board activity depends on the nature of the enterprise and the extent to which board action is supplemented or controlled by other government bodies. 59 Probably the most important functions of directors of government corporations are formulating policy, setting objectives, and monitoring management. When the directors' decisions are deemed, by substantially independent judicial interpretation of the statute establishing the corporation, to be within the authority given to them and in furtherance of the purposes of the statute, they will be judicially upheld. 60 Yet, it may be difficult to determine more than the general


59. This control is likely to be greater when the corporation's expenditures and revenues have a substantial influence on or are an important component of the government's overall economic plan, and when corporation activities overlap those of ordinary departments and agencies. The government corporation, therefore, has "been brought within the governmental framework and in varying degrees and by different methods made subject to central direction and control." U.N. REPORT, supra note 4, at 11. Regarding wholly-owned government corporations, "there is no longer serious doubt that they are government institutions serving a public purpose and functioning within the government structure." Id.

60. See, e.g., Ferguson v. Electric Power Bd. of Chattanooga, 378 F. Supp. 787 (E.D. Tenn. 1974). The Supreme Court has also addressed the issue of deferring to administrative interpretations of statutes. In Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Court discussed the congressional creation of an Administrator with power to bring injunctive actions to restrain violations of the Fair Labor Standards Act. To perform this function it was necessary for the Administrator to interpret the Act even though that power was not specifically conferred. The Court said, We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration,
purposes of the enabling act—and therefore the objectives of the corporation—when the statutory language is vague. As one commentator observes:

Despite numerous scholarly condemnations of the vagaries of existing statutory guides to administrators, Congress goes right on functioning as a political body seeking to bypass storm centers of controversy through deliberate utilization of vagueness. The avoidance of overt conflict through vagueness, especially where strong policy arguments and strong political pulls may be exerted from both sides, can speed adoption of statutes even though it delays our understanding of them.61

This statutory vagueness may make more difficult the directors' function of formulating policy and setting objectives for management. At the same time, it renders that function even more important, because management cannot rely solely on the profit maximization objective of a business corporation.

Viewed positively, this lack of specificity in the enabling legislation gives the corporation the flexibility to meet changing conditions. For example, TVA was established in 1933 to maintain and operate designated government-owned property "in the interest of the National defense and for agricultural and industrial development."62 Originally it was inferred that this meant, among other things, selling electricity cheaply, which was possible only by encouraging people to use as much of it as possible.63 Today, TVA emphasizes energy conservation.64 This much is clear: directors of government corporations should be judged by how well they guide the enterprise in meeting changed conditions and expectations within the statutory guidelines.65

---

63. Tate, Ambivalent TVA Roles in Energy and Conservation, 10 SMITHSONIAN 94, 100 (Jan. 1980).
64. Id. at 101.
65. As S. David Freeman, the present chairman of TVA, said, Most agencies do their best work in their early years because they have a fresh mandate for solving a problem that apparently was important enough to create them. As the years go by, they tend to lose their vigor and become captured by their past. . . . We can bring TVA back to its experimental, innovative begin-
C. Evaluation of Director Performance and Imposition of Liability

In addition to the lack of specific criteria by which to judge director activity, evaluating performance is made even less predictable by two additional factors: the "business judgment" approach to the duty of care standard, and the greater latitude generally allowed to outside directors.\(^6\)

Under the business judgment rule, deference is usually given to a director whose activities appear to be the result of performance of duties in good faith, in a manner which the director reasonably believes to be in the best interests of the corporation, and in an exercise of independent discretion and judgment.\(^6\) This deferential approach to the evaluation of directors' decisionmaking is founded on the recognition that directors often make difficult choices in the face of myriad possibilities, and to penalize them simply because hindsight indicates that they might have made better choices is inequitable.

The second factor affecting the evaluation of director performance is the special position of outside directors, which has been justified as follows:

While state corporation laws do not distinguish between inside and outside directors, courts and commentators are beginning to look at them differently from the standpoint of liability. If . . . officers are expected to assume responsibilities commensurate with their familiarity with the corporation's affairs, the same rule should apply to inside directors who are officers or employees of the corporation [and who] are more deeply involved in the corporation's affairs and usually have better access to information than other board members.\(^6\)

---

\(^6\) Outside, as opposed to inside, directors, are not full-time employees of the corporation. See generally DUTIES AND RESPONSIBILITIES OF OUTSIDE DIRECTORS (A. Cohen & R. Loeb eds. 1978).

\(^6\) H. HENN, CORPORATIONS 482 (2d ed. 1970). For example, in Conviser v. Simpson, 122 F. Supp. 205 (D. Md. 1954), the directors of an investment company retained capital gain rather than distributing it to the shareholders along with investment income. This resulted in a federal tax liability of $3,500,000 for the corporation, but the directors were held not liable under the business judgment rule. Id. at 209–10.

\(^6\) W. KNEPPER, supra note 40, at 25. There is some feeling that outside directors should not be given too much latitude. For example, the report by the Securities and Exchange Commission (SEC) on the directors of Stirling Homex revealed the Commission's opinion that the outside directors did not have a sufficiently firm grasp of the company's
Outside directors are thus expected to scrutinize corporate activities but not to manage them. They must delegate authority to officers and others. Once they have delegated this authority, however, they may have sacrificed the familiarity with the corporation which would allow them to be held to a higher level of accountability. Although outside directors must have independent knowledge of the corporation's business, they "have placed management in a position of trust and are entitled to rely on its information about the day-to-day conduct of the business." Thus, the "due diligence" test imposes less stringent requirements on outside directors than on inside directors and officers whose participation in the transaction may make it impossible for them to prove either that they are not responsible for it or that they are ignorant of it.

Most directors of government corporations can be compared business "to enable them to make an informed judgment of its more important affairs or the abilities and integrity of its officers" and that the directors "did not provide the shareholders with any significant protection in fact, nor did their presence on the Board have the impact upon the company's operations which shareholders and others might reasonably have expected." Investigation of Stirling Homex Corporation Relating to Activities of the Board of Directors of Stirling Homex Corporation, [1975-76] FED. SEC. L. REP. (CCH) ¶ 80,219 at 85,462-63.

With respect to delegation and liability, one commentator has said, "Directors of large corporations cannot effectively 'manage' the corporation, but can only, at best, monitor its activities. It is not clear under present law whether a director who diligently attempts to monitor has performed adequately to protect himself from liability." Cohen, Philosophy of Board Activity and Responsibility, in DUTIES AND RESPONSIBILITIES OF OUTSIDE DIRECTORS 367, 374 (A. Cohen & R. Loeb eds. 1978).

This differential is by no means uniform, and its application also varies. In Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973), the court said:

We conclude that a director in his capacity as a director (a non-participant in the transaction) owes no duty to insure that all material, adverse information is conveyed to prospective purchasers of the stock of the corporation on whose board he sits. A director's liability to prospective purchasers under Rule 10b-5 [promulgated pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)] can thus only be secondary, such as that of an aider and abettor, a conspirator, or a substantial participant in fraud perpetrated by others.

The Lanza case has been a source of great comfort to the corporate bar and their director clients. I would respectfully suggest that perhaps it is not as strong a reed to lean upon as many think. And I would suggest that subsequent developments may very well find the better rule—a duty of inquiry if nothing more—in Judge Hays' dissent.

to outside directors of business corporations. Largely independent of the daily management of the corporation, such directors would seem to be held to a lower level of accountability. Presidential appointees, in particular, seem traditionally to have been chosen because of their prominence in various areas of public or private life, and not because of their expertise in the corporation's sphere of activity. But to allow this justification to absolve directors from liability may have pernicious results: it is a disincentive to appoint directors who are more familiar with the corporation's activity and who thus might be better able to set objectives for management—an especially important function in the government corporation context since the only other guidelines are skeletal statutory provisions.

In determining the duties, functions, and liability of directors of government corporations, an analogy may be made to directors of nonprofit organizations. Both government and nonprofit corporations are distinguishable from business corporations whose overriding aim is profit maximization. The analogy to nonprofit organizations is best for those government corporations that most resemble government agencies or departments, at least with regard to the extent to which the objectives of good business management are coloured with larger social and economic purposes. . . . [R]arely are public undertakings completely independent of other aspects of public policy. Governments earn profits in some enterprises because certain monopolistic elements make it possible. . . . [But a] conscious program of incurring governmental losses may be exercised in the pursuit of public policy.

Government corporations which function as agencies operate largely to maximize the welfare of the people affected by their operations. On the other hand, commercially oriented government corporations are less likely to sacrifice profit maximization to purely social concerns.

One difficulty with the nonprofit organization analogy is the existing uncertainty concerning the duties and functions of directors of such organizations. There is, indeed, "a paucity of legislation as well as of judicial decisions dealing with the special characteristics of non-profit organizations. . . ." For example,

72. See note 89 infra and accompanying text.
73. See notes 61-65 supra and accompanying text.
74. See notes 33-35 supra and accompanying text.
75. U.N. REPORT, supra note 4, at 29.
76. W. Knepper, supra note 40, at 226.
there is some question whether, in determining negligence, the standard of diligence for directors of nonprofit corporations (and by analogy, of those government corporations that function like government agencies) is lower or simply more difficult to define. As one commentator has said of the factors that should foster accountability:

Most courts, in applying the standard of the "reasonably prudent man," consider it proper to take into account the relevant circumstances, such as whether the director... is part-time or full-time, whether he is compensated, whether he resides at the corporation's principal place of business, whether he has a special background, and so on, as well as the nature of the business. If these factors are important in the case of a business corporation, they are apt to be even more significant in the case of a non-profit corporation.77

The same commentator has also said of the business judgment rule that "[t]here is no reason why it should not be applicable to all operations and affairs of a non-profit corporation."78 The result would be that the good-faith exercise of independent discretion and reasonable, informed judgment would largely preclude liability.

Thus by analogy to business and nonprofit corporations, director liability in government corporations appears to be subject to the mitigating factors of the business judgment approach to the standard of due care. This approach probably insulates directors of government corporations to a greater extent than it does directors of business corporations. The former face a wider, more complex set of managerial goals and are concomitantly faced with a wider range of acceptable possibilities.

Also apparently applicable to all directors of government corporations is the lower standard of accountability applied to outside directors of business corporations. In all likelihood this approach also insulates the former to a greater extent because even outside directors of business corporations are expected to maximize profits. The justification for applying a lower standard of accountability appears to be that outside directors are neither well informed of nor regularly involved in the corporation's activities. Yet in order to fulfill the duties and perform the functions of the office properly, the director of a government corporation should be sufficiently knowledgeable to be held accountable.

78. Id. at 624.
Otherwise, lack of expertise and knowledge are encouraged by this lesser standard of liability.

The duties and functions of directors of government corporations thus appear similar to the requirements imposed on the directors of business corporations. To the extent that the corporation's activities are like those of a nonprofit corporation and are therefore guided by objectives other than profit maximization, the government corporation directors' objective-setting function is more important to the enterprise than is the case for business corporations. The vague guidelines in most enabling statutes make the objective-setting and management-monitoring functions crucial ones. To the extent that directors are in a position analogous to that of outside directors of business corporations, they may have been traditionally held to a lower level of accountability. In view of the importance of their decisionmaking, however, they should not be excused from full participation. In fact, there is good justification for applying the business judgment approach to the standard of care required by directors in this context. In a government corporation the decisionmaking takes into account a wider array of factors—thus permitting a greater number of acceptable decisions—than is the case for a business corporation.

II. CONTROL MECHANISMS AFFECTING THE ACCOUNTABILITY OF DIRECTORS OF GOVERNMENT CORPORATIONS

Various mechanisms are designed to monitor and control government corporations and their directors. These include: (1) Presidential appointment of at least some members of the board of directors, (2) annual reports and legislative overview, (3) budget and audit requirements, and (4) statutes. In theory, any of these factors could render directors accountable; in practice, however, even their cumulative effect as control devices is incomplete.

A. Presidential Appointment

The appointing authority determines the type of persons who will run the enterprise, and, "as the power to appoint generally

79. See notes 83–94 infra and accompanying text.
80. See notes 95–110 infra and accompanying text.
81. See notes 111–19 infra and accompanying text.
82. See notes 120–31 infra and accompanying text.
carries with it the power to remove, has some general control over
the policies to be followed by the managers of the corporation’s
affairs.”\textsuperscript{83} The Presidential appointment of directors, therefore,
impacts upon the potential for and timing of their removal and on
their expertise, and carries with it the potential for debilitating
conflict within the board.

Since all or at least some of the government corporation’s
board members are appointed by the President, his power to re-
move them if their performance is unsatisfactory probably exists,
notwithstanding the fact that many of the statutes establishing
government corporations do not expressly sanction the removal of
Presidential appointees.\textsuperscript{84} Such power has been exercised in the
case of TVA, where the board of three Presidentially appointed
directors was held to be predominantly an administrative arm of
the executive branch of government and therefore removable by
the President.\textsuperscript{85} This characterization applied to the entire board
of TVA because all its members are Presidential appointees. Pre-
sumably this rationale would extend the threat of removal to all
Presidential appointees, even to the directors of commercially ori-
ented government enterprises.\textsuperscript{86}

Even if the potential for removal is present, the power may not
be readily exercised. An analogy may be made to commissioners,
who are also appointed by the President. A former chairman of
the SEC has said regarding the removal of commissioners that
“there is no express limitation on the power of the President. . . .
However, doubts as to the legal power, coupled with the political
inadvisability of such a traumatic step, reduce the efficacy of this
form of Presidential control.”\textsuperscript{87}

\textsuperscript{83} J. Thurston, \textit{supra} note 1, at 151.

\textsuperscript{84} An exception is the Legal Services Corporation, created by the Legal Services Cor-
are Presidential appointees, and a member “may be removed by a vote of seven members
for malfeasance in office or for persistent neglect of or inability to discharge duties, or for
offenses involving moral turpitude, and for no other cause.” \textit{Id.} § 2996c.

\textsuperscript{85} See \textit{Morgan v. TVA}, 115 F.2d 990 (6th Cir. 1940).

\textsuperscript{86} Not all the directors of all government corporations are appointed, however, so
the description of “administrative arm of the executive branch” probably would apply only
to the Presidential appointees. Where directors are chosen by shareholders, the electors
presumably have the customary power of removal. \textit{See, e.g.}, the \textit{Model Business Corpo-
ration Act} (1979): “Any director or the entire board of directors may be removed, with
or without cause, by the vote of the holders of a majority of the shares then entitled to vote
at an election of the directors.” \textit{Id.} § 39.

\textsuperscript{87} W. Cary, \textit{Politics and the Regulatory Agencies} 10 (1967). For a discussion
of the role of the President in controlling administrative agencies, \textit{see, e.g.}, W. Gellhorn,
Although the mechanism of Presidential appointment has a positive control effect on directors if they regard themselves threatened with removal, the mechanism also has potentially negative effects. Appointees are, in general, relatively inexperienced in the technical aspects of the corporation's field of endeavor.\(^8\) To compensate, they may resort to reliance on management or other directors in derogation of their independence. Moreover, the provision of more than one Presidential appointee on the board may deter their acquisition of expertise with respect to the corporation's affairs. It has been suggested that for these very reasons, in the case of Comsat, placing three government-appointed directors on the board, instead of just one, provided much less protection for the public interest:

An official government observer is likely to be, or to become, an expert in communications satellite matters, and to consider himself solely responsible to the President. The government appointed directors, on the other hand, are not intended to be men from either the communications or space fields, or from government, but are to be citizens of prominence in various areas of private life.\(^8\)

This sounds like an apology for a lower level of participation by, and therefore less accountability for, government appointees. It is not, however, acceptable as such. Technical expertise in the corporation's field of endeavor is not a prerequisite for a director:

[A] director must be familiar with the management of complex organizations, knowledgeable about corporate business and finances, and sensitive to the concerns of social policy. Second, a director must be able to raise unpleasant questions without losing the respect of other board members and management. Third, a director must be willing to spend the time needed to do the job.\(^9\)

---


88. See note 72 supra and accompanying text.

89. Schwartz, supra note 50, at 355. The first three Presidential appointees to the board of directors of Comsat were Clark Kerr, President of the University of California; George Meany, President of the AFL-CIO; and Frederick G. Donner, Chairman of the Board of General Motors. None of these is known to have had any extensive experience in either the space or communications industry.

90. Solomon, Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise, 76 Mich. L. Rev. 581, 603 (1978). Other commentators agree:

In general, it seems preferable not to require in the act creating the corporation that the directors possess certain specified qualifications, other than that they are to be persons of broad administrative ability capable of managing the corporation efficiently. It is hardly possible to say in advance just what experience a person must have had to be able to act satisfactorily as director of a government corporation . . .
It has been suggested that, in some fields at least, lack of technical expertise could and should be overcome by mandatory training for board members. This would seem to be a good idea, especially if, as one commentator suggests, well educated appointees can pass through unproductive initiation periods with facility and speed, as they are able to absorb specialized information faster than those without previous training. In addition, Congress might require minimum qualifications and attendance at meetings by directors to ensure fuller participation. All these requirements might, on the other hand, become unnecessary with the imposition of personal liability, because prospective directors would find it in their best interests either to be sufficiently knowledgeable or to decline the appointment.

Another potentially negative effect of the Presidential appointment of some, but not all, directors is conflict within the board, which may lead to the appointees playing a more passive role than the elected directors. The potential for hostility has on occasion become a reality, with necessarily detrimental effects on board performance. It may well be, therefore, that the "combination of the other directors' hostility and their own inexperience is likely to discourage government directors from diverting much time and energy from the many urgent professional and other obligations that appointees with the desired prominence will almost certainly have." While it may be that Presidential appointment of some

J. THURSTON, supra note 1, at 159-60. The wisdom of this approach has been vividly demonstrated by those corporations whose activities have changed over the years to meet new conditions. TVA, for example, began life building dams for navigation and flood control, setting up soil conservation and reforestation projects, and developing fertilizers. Surplus power produced by the dams was sold. Today TVA is the largest electric power producer in the country, emphasizing energy conservation and developing nuclear power and fuel cells. See generally Tate, supra note 63.


93. For example, the Union Pacific Railroad had an unhappy history regarding its board of twenty, of whom five were government appointees, as of 1864. The corporation achieved few of its goals, and some of the failures have been attributed to the divisiveness within the board: [The government directors] claimed that they were treated as spies and antagonists, and were kept in the dark about many things. Often they were not invited to directors' and committee meetings; and they were rarely heeded or consulted with respect to pending or even past actions, including such major policy decisions as mergers, dividend declarations, and debt refunding. Schwartz, supra note 50, at 359-60.

94. Id. at 357.
of the directors operates to the detriment of board performance, it should not make directors less accountable. Directors, whether appointed or elected, must be required to be sufficiently knowledgeable—or be held accountable for their insufficiency.

B. Legislative Overview

Both the legislative and appropriations committees of Congress are responsible, to a certain extent, for the programs carried out by government corporations. These responsibilities do not end with recommending and passing the enabling legislation that creates new corporations, but extend to continuing evaluation of current policies and operations. This is accomplished in part by studying the annual report, covering operations for the previous fiscal year, that a government corporation is generally required to submit to the legislature. The scope and content of the report, however, is ordinarily determined by management, not the board, and comments on the report may be of limited usefulness since they are made more than a year after the events covered in the report took place.95

Congressional review may entail hearings and legislation.96 Congress, for example, may amend the statute creating the corporation to alter the course of its activity. Although many government corporations are subject to the provisions of the District of Columbia Business Corporation Act—which provides that the business and affairs of the corporation shall be managed by a board of directors97—it has been said that this mandate to directors to control the destiny of their corporation may be exercised “only on Congressional sufferance.”98 As one commentator says of congressional review of the operations of Comsat, “The controversy surrounding enactment of the statute, and the continuing importance of the subject matter with which it deals, assure that congressional scrutiny will be intensive.”99

The incentive effect on director performance of possible statutory amendments and the intensity of congressional scrutiny of all corporations over a period of years may, however, be overstated. The task of the directors is to set objectives and monitor manage-

95. U.N. REPORT, supra note 4, at 27.
96. See, e.g., notes 49 supra and 102 infra.
98. Adams, supra note 35, at 609.
ment performance to effectuate the purpose of the enabling legislation; potential for changed purpose through statutory amendment is merely potential for changed objectives. Further, it may be that congressional scrutiny is far from intense:

The theory is that the members of the Board act as trustees for the national interest; Congress merely keeps a general surveillance over the corporation's activities and interferes only when a given course of action conflicts with other interests of the United States. The corporation is thus freed from "politics" and the vicissitudes of party fortune. In the day-to-day conduct of its affairs it is left alone by Congress.¹⁰⁰

In addition, congressional review either comes too late to preclude improper director activity, or is directed to the activity of the corporation as a whole and not to the directors.¹⁰¹ This is true even of congressional review of government agency activity, which might otherwise be more pervasive than review of government corporations:

Legislative oversight is not continuous. It is activated by specific concerns, some programmatic, most political. Its incidence is uneven and often unpredictable. To be sure, dramatic instances of negligence on the part of administrative officials may inspire legislative interest in the workings of the bureaucracy. But even then legislative concern is not focused on particular officials, unless they are agency heads or bureau chiefs. It is instead directed at the bureaus themselves.¹⁰²

Congress may act directly to affect the membership of boards of directors. The Amtrak Improvement Act of 1973,¹⁰³ for example, almost entirely reconstituted the board, apparently because of

¹⁰⁰. M. Dimock, supra note 6, at 33.
¹⁰¹. See generally THE TAX FOUNDATION, INC., supra note 21, at 29–38.
congressional dissatisfaction with the loyalty demonstrated by the directors who represented the railroads.\textsuperscript{104} The reconstitution gave an even stronger majority to the government appointees.\textsuperscript{105} Another example is the amendment to the Communications Satellite Act of 1962,\textsuperscript{106} which provided that the common carriers were to be represented on the board according to the percentage of stock that they owned.\textsuperscript{107} This action did not affect the relative or absolute position of appointed directors vis-a-vis the directors representing shareholders; the alteration in board composition took place only within the latter group.

In contrast to the indirect control that Congress has through its oversight functions, there are two ways by which Congress exercises direct control over the directors of government corporations. First, the Senate has the power to confirm Presidential appointments, and its consent is not automatic.\textsuperscript{108} Confirmation, how-

\begin{footnotesize}
\begin{itemize}
\item[104.] The Joint Explanatory Statement of the Committee of Conference for the Amtrak Improvement Act of 1973 said:

\begin{quote}
The committee of conference is concerned that representatives of the common stockholders serving on the board are not always able to divorce themselves from their railroad responsibilities when serving on the board. If the commitment of the railroad representatives on the board to the success of Amtrak remains in doubt, members of the committee of conference will seek a legislative solution to the problem.
\end{quote}


\item[105.] The Act increased the number of appointed directors from eight to nine (plus one ex officio director) and introduced the requirement that not more than five of the appointees could be from the same political party. The number of “consumer representative” directors was increased from one to three of the nine appointees. Act of Nov. 3, 1973, Pub. L. No. 93–146, 87 Stat. 548 (codified at 45 U.S.C. § 541 (1976)).


\item[107.] This action followed in the wake of the carriers selling part of their Comsat shares. Originally, half of the Comsat shares were purchased by communications carriers, more than 45% of the total issue being held by the four largest carrier stockholders: AT&T, IT&T, General Telephone and Electronics Corporation, and RCA Communications, Inc. The board of directors was comprised of six public shareholder designees, six communications common carrier representatives, and the three presidential appointees. Compare 47 U.S.C. § 733 (1976) with 47 U.S.C. § 733(a) (1970). See Note, The Communications Satellite Corporation: Toward a Workable Telecommunications Policy, 27 HASTINGS L.J. 721, 737–38 (1976).

\item[108.] For example, a TVA director’s seat was vacated in May, 1975. In June, 1975, President Ford nominated James Hooper of Mississippi, but the Senate Public Works Committee voted to “postpone indefinitely” further consideration of that nomination. The President withdrew the nomination in June, 1976. The Committee subsequently rejected President Ford’s second nominee, Thomas Longshore of Alabama, in August, 1976. President Carter nominated S. David Freeman in July, 1977, and the Senate confirmed the nomination in August, 1977—more than two years after the seat was vacated. Letter from Herbert S. Sanger, Jr., General Counsel, TVA, to Dianne Hobbs (Feb. 26, 1980).
\end{itemize}
\end{footnotesize}
ever, operates only prospectively, and its effect is limited since it is used as a preventive measure. Second, but only in the case of TVA, Congress has been given the unusual power to remove directors by a concurrent resolution of both houses without the President's consent. There is, however, no such provision for any other government corporation, and it is doubtful whether removal by Congress except by impeachment is constitutional.

C. Budgetary Restraints

Budgetary restraints, exercised by both the executive and legislative branches, are another mechanism for controlling the directors of government corporations. The 1945 Act and the unified budget adopted in 1969 both provide budget and audit requirements. Government corporations generally are able to raise funds by selling bonds and notes to the public or the federal Treasury. The Treasury controls such borrowing by means established in the 1945 Act:

When corporations have nearly exhausted their borrowing authority, they turn to Congress for an increase. This is usually granted either through an increase in statutory borrowing authority or through cancellation of its obligations to the Treasury. Note cancellation may also be employed, as may appropriations, to restore capital impaired by recurring deficits. Barring the possibility of profitable operation, the only alternative to appropriations, note cancellations, or increases in borrowing authority is a change in substantive law, decreasing the functions of the corporation or ending its life.

A corporation which functions like an agency and is motivated primarily by public policy rather than by commercial considerations is susceptible to a higher level of budgetary regulation. A

110. In Myers v. United States, 272 U.S. 52 (1926), the Court held that certain postmasters selected by the President could be removed by him without Senate consent; otherwise, Presidential control over executive personnel would be unduly restricted. The Court said that it was a reasonable implication that "as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." Id. at 117.
Nine years later, in Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), the Court held that the President could not remove a member of an independent regulatory agency (in that case, the FTC) in defiance of statutory restrictions. Because the Commission was found to be in part quasi-legislative and in part quasi-judicial, Congress could limit the President's power of removal. For a discussion of removal by the legislature which does not consider the decision in Humphrey's Ex'r, see J. THURSTON, supra note 1, at 163-65.
111. See notes 14-23 supra and accompanying text.
112. See note 11 supra.
113. THE TAX FOUNDATION, INC., supra note 21, at 7.
former chairman of the SEC said of regulatory agencies, "On a
day-to-day basis [the Bureau of the Budget] is the Cerberus at the
gate of any program. Every item has to pass through it, and no
request for funds can be made without its blessing. Thus this
agency is one of the most pivotal institutions in the govern-
ment."114

In addition, political considerations may affect the degree of
budgetary control exerted, especially "when a non-profit corpo-
arion is controlled by directors and staff at political odds with the
incumbent Administration. . . . Under these circumstances, a
non-profit corporation is at a considerable disadvantage in the
competition for scarce budgetary resources."115 Government ap-
propriations become less important to those corporations which
are more commercially oriented, since such corporations can prof-
itably sell goods or services, or rely on shareholders in the private
sector to raise capital.116

While government corporations may not be defined as agen-
cies and instrumentalities of the United States government,117
"Congress increasingly has tended to treat them as government
agencies in appropriating money and in establishing limitations
on salaries and other controls. The approach has been piecemeal,
however, with the result that no uniform system of controls has
been developed."118 One such control mechanism that has
evolved is the audit required by the 1945 Act:

114. W. CARY, supra note 87, at 12. In 1970 the Bureau of the Budget was transformed
into the Office of Management and Budget (OMB). Reorganization Plan No. 2 of 1970, 35
F.R. 7959, 84 Stat. 2085 (codified at 5 U.S.C. app. § 824 (1976)). The power of OMB to
coordinate budgetary requests remains strong. It is, perhaps, "particularly necessary since
there is no coherent legislative approach to the total budget." W. GELLHORN & C. BYSE,
ADMINISTRATIVE LAW: CASES AND COMMENTS 135 (6th ed. 1974). See also note 119 infra
and accompanying text.

115. Seidman, supra note 13, at 96.

116. Even so, Congress can alter the financing of a government corporation by amend-
ing the enabling legislation. For example, the 1959 amendments to the Act creating TVA
made four major changes in TVA financing. Act of Aug. 6, 1959, Pub. L. No. 86–157, 73
Stat. 280 (codified at 16 U.S.C. § 831n (1976)). First, it raised TVA's debt ceiling and au-
thorized TVA to finance the expansion of its power program by selling power and by sell-
ing bonds on TVA's credit alone, with no guarantee of payment from the Treasury. Id.
§ 831n–4(a)–(c). Second, it rescheduled TVA's payments to the Treasury to require that
over time TVA would repay $1 billion of the $1.2 billion in appropriations previously in-
vested in power facilities. Id. § 831n–4(e). Third, it required TVA to recover through its
power sales all costs of operating the power system. Id. § 831n–4(f). Fourth, it put an end
to appropriations as a major source of capital for the power program. Id. § 831n–4(h).

117. See Seidman, supra note 13, at 100. See also notes 132-49 infra and accompani-
ing text.

118. Seidman, supra note 13, at 100.
The plain fact is, the Comptroller-General and the General Accounting Office have never confined themselves to standard auditing operations. . . . The tradition as developed by them has been not that of verifying but of approving accounts, of reviewing expenditures or commitments to determine whether they are authorized in the light of the interpretation of the statute deemed proper by the Comptroller-General.¹¹⁹

D. Statutory Controls

The problem of whether government corporations are government agencies also has repercussions for another constraint on directors—statutory controls operating on agencies and corporations. For example, some statutes applicable to federal agencies have been held applicable to TVA:¹²⁰ the Freedom of Information Act,¹²¹ the Federal Advisory Committee Act,¹²² and the National Environmental Policy Act.¹²³ Some statutes apply to both government agencies and corporations, such as the Endangered Species Act of 1973,¹²⁴ the Clear Air Act,¹²⁵ and the Federal Water Pollution Control Act.¹²⁶ In addition, some statutes applicable to corporations generally also control government corporations, such as the Federal Civil Rights Act¹²⁷ and the federal securities acts.¹²⁸


¹²⁰. For a discussion of instances where TVA has been asked to meet, or sued for not meeting, the requirements of these acts, see Wirtz, supra note 53, at 602–05.

¹²¹. 5 U.S.C. § 552 (1976). TVA has not disputed that this Act applies to it and has published regulations under it. See, e.g., 18 C.F.R. § 301.1 (1976).


¹²³. 42 U.S.C. § 4321 (1976). TVA has filed environmental impact statements on the Tellico Dam and Reservoir Project, its coal procurement and uranium leasing programs, and several projects for the construction of nuclear power plants.

¹²⁴. Pub. L. No. 93-205, 87 Stat. 884 (codified in scattered sections of 7 U.S.C. and 16 U.S.C. (1976)). The construction of TVA's Tellico Dam, which threatened to destroy a species of fish, was delayed for several years when the courts decided that the Act was applicable to TVA.


¹²⁷. 42 U.S.C. § 1981 (1976). In Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975), the directors of a nonprofit swimming club, which had been found not to be a private club and therefore not entitled to discriminate under the exception to the Civil Rights Act, 42 U.S.C. § 2000a(e) (1976), were found personally liable for violating sections 1981 and 1982 of the Act. The violation was held to be an intentional tort, for which due diligence was not a defense. 517 F.2d at 1145–46.


For a discussion of business corporation directors' personal liability for violation of the federal securities acts, see Shaneyfelt, supra note 70, at 698–707.
On the other hand, some statutory controls on business corporations do not apply to government corporations, most notably the federal antitrust laws.\textsuperscript{129} It must be remembered, however, that governmentally created monopolies may be altered by legislation,\textsuperscript{130} just as statutory provision may be made to exempt government corporations from traditional regulation.\textsuperscript{131}

In conclusion, it appears that the above control mechanisms operating on directors of government corporations do not guarantee accountability and full performance, and may even have negative effects on board activity. Although Presidential appointment of directors carries with it the threat of removal, this power is rarely invoked. In addition, appointment may even encourage greater passivity on the part of government appointees. The legislative overview mechanism has great potential for control, but it must rely on reports of past activity and cannot closely scrutinize day-to-day activity. Moreover, such scrutiny, if it were exercised, would blur the distinction between government corporations and departments. The budget and audit requirements do control the scope and nature of corporate endeavors, but they have the most effect on those corporations which function as agencies, since commercially oriented corporations can get capital by selling goods and services at a profit or by selling shares to private shareholders. The statutory controls affect director decisionmaking in much the same way as they affect decisionmaking in business cor-

\textsuperscript{129} See, e.g., Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939). See also the enabling legislation for Amtrak, which allows third parties entering into contracts and agreements with Amtrak for the joint operation or use of equipment and facilities necessary for the provision of rail passenger service to ignore the restrictions of existing law, including antitrust laws, to the extent necessary to achieve the desired agreement. 45 U.S.C. § 546(e) (1976).

\textsuperscript{130} For example, the FCC determined in 1972 that AT&T was directly competing with Comsat in the field of domestic satellites. The FCC ordered AT&T, which had once owned 14.5% of Comsat stock, to divest itself of all of its Comsat holdings. The FCC said that the underlying considerations which motivated Congress to encourage AT&T's ownership in Comsat when the corporation was established no longer controlled; because AT&T was now competing with Comsat, each needed maximum independence from the other. Note, \textit{supra} note 107, at 738.

\textsuperscript{131} For example, although Amtrak's enabling legislation provides that its interstate activities are governed by the Interstate Commerce Act, the statute expressly excludes matters relating to fares, rates, and charges; abandonment or extension of operation over such lines; regulation of routes and services; and, except as otherwise provided in the Act, the discontinuance or change of passenger train operations. 45 U.S.C. § 546(a) (1976). In short, the essential elements of interstate rail passenger service were withdrawn from ICC regulation. In addition, regarding intrastate service the Act provides that Amtrak shall not be subject to any state or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service. \textit{Id.} § 546(c).
porations, unless the corporation is exempted by its enabling legislation or deemed to be an agency and subject to other statutory controls.

III. IMMUNITY

Assuming that the duties and functions of directors of government corporations can be defined, and that the existing alternatives to personal liability may not provide sufficient guaranties of accountability, the next issue is whether a director's office provides the director with official government immunity, thereby precluding a personal liability suit. Under the immunity doctrine, instrumentalities of the federal government are generally immune from suit because the United States, as sovereign, is generally immune from suit.132 According to Judge Learned Hand, the rationale underlying immunity for government officials is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.133

A. The "Discretionary Function" Exception

The Federal Tort Claims Act134 is a sweeping waiver of governmental immunity, but even that Act specifically declines to extend the waiver to actions by officials carrying out discretionary functions.135 One commentator has said regarding the allowance of official immunity, "The exception for discretionary acts in the Federal Tort Claims Act constitutes recognition of the inappropri-

132. The doctrine of sovereign immunity, an elaboration of the homily "The king can do no wrong," was explained by Mr. Justice Holmes as follows: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). The sovereign may, however, consent to suit, thus waiving the immunity.


135. Id. § 2680. One commentator has observed that "a two-way reversal took place: an opening of access of [sic] the U.S. Treasury and a closing of access to individual officers." Baxter, Discussion, Civil Liability of Government Officials, 42 Law & Contemp. Prob. 80, 85 (1978).
ateness of judicial tribunals as second-guessers of policy decisions
for which primary responsibility has been lodged elsewhere in
government, presumably in more competent hands." 136 The result
of the “discretionary function” exception is that the government
does not accept liability for certain acts of its officials, and the
officials are protected by their personal official immunity. Fur-
ther, the application of this exception differs in result from the
application of the business judgment rule. 137 In the latter case the
corporation is still liable for the acts of its directors, so injured
third parties may be compensated for their losses.

_Dalehite v. United States_ 138 seems to integrate the discretionary
function exception and the business judgment rule. In _Dalehite_,
the Court said that a discretionary function is one that “includes
more than the initiation of programs and activities. It also in-
cludes determinations made by executives or administrators in es-

tablishing plans, specifications or schedules of operations. Where
there is room for policy judgment and decision there is discre-

136. Baxter, _Enterprise Liability, Public and Private_, 42 LAW & CONTEMP. PROB. 45, 50
(1978).

137. The business judgment rule gives deference to directors’ activities that appear to
be the result of good faith and independent discretion. _See_ text accompanying note 67
supra.

138. 346 U.S. 15 (1953). The Government had control of the bagging and handling of
fertilizer that was being shipped to France as part of a plan to aid European agriculture.
Some ships carrying the fertilizer exploded, demolishing the port of Texas City. The Court
held, in a 4-3 decision, that the allegedly negligent handling of the fertilizer which led to
the explosions did not subject the Government to liability. “The decisions held culpable
were all responsibly made at a planning rather than operational level and involved consid-
erations more or less important to the practicability of the Government’s fertilizer pro-
gram.” _Id._ at 42.

The dissenters protested that because the activity was not regulatory or governmental in
nature but involved actions more like those of a private manufacturer, contractor or ship-
ner, the Government should be liable:

_In this area, there is no good reason to stretch the legislative text to immunize the
Government or its officers from responsibility for their acts, if done without ap-
propriate care for the safety of others. Many official decisions even in this area
may involve a nice balancing of various considerations, but this is the same kind
of balancing which citizens do at their peril and we think it is not within the
exception of the statute._

_Id._ at 60 (Jackson, J., dissenting). As a postscript to the case, the survivors of the disaster,
which caused an estimated $200 million of damage, were compensated by statute, recovery
being limited to $25,000 per death or per injury to property or person. _Texas City Disaster

139. 346 U.S. at 35–36.
Specifically allow the corporation to sue and be sued. If this operates as a waiver of the immunity of a government instrumentality, and if the discretionary function exception is applicable, the corporation is not liable for the acts of the directors, and the directors themselves may have personal official immunity. If, on the other hand, allowing the corporation to sue and be sued is the equivalent of a statement that the corporation itself is not protected by government immunity, then the directors' liability is precluded only because of the business judgment rule.

It may be that the area of nonliability resulting from the "discretionary function" exception is too broad:

The dichotomy between "ministerial" and "discretionary" is at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result. One may also believe that it has become a convenient device for extending the area of nonliability without making the reasons explicit. Certainly the official has discretion in all but a few areas in which damage to the citizen may result.

Such fears, however, would seem to conflict with the Supreme Court's interpretation of congressional policy regarding immunity and government corporations, as set forth in *FHA v. Burr*:

[W]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied.

The apparent conflict about the applicability of the immunity doctrine to government corporations and their directors may be resolved by a determination that government corporations are not instrumentalities of the United States, and that their directors are

---

140. For example, the statute governing the Saint Lawrence Seaway Development Corporation provides that "the Corporation may sue and be sued in its corporate name." Saint Lawrence Seaway Act of 1954, 33 U.S.C. § 984(a)(3) (1976).
142. 309 U.S. 242 (1939).
143. *Id.* at 245. The decision was reached while the FHA was still a separate corporation. It became part of the Housing and Home Finance Agency in 1947, before being transferred to HUD in 1965. See notes 33-35 supra and accompanying text.
not officials of the United States. The Supreme Court has said that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. . . . The Congressional will must be divined . . . [by] the ascertainment of policy immanent . . . in a series of statutes utilizing corporations for governmental purposes. . . ." 144 Courts have looked to the nature of the activity carried out by the corporation, and they have held that some corporations engaged in governmental, rather than commercial, functions were government instrumentalities. 145

One commentator has suggested that in determining congressional policy, one factor to be considered is "the belief that the legislature would not seek to abrogate completely a doctrine which protects public funds and legislative authority." 146 This suggestion has more validity when applied to government corporations which operate in a manner similar to agencies, since commercially oriented corporations are less dependent on public funds. In addition, the proposition is countered by the notion that an enterprise should reflect its true costs, particularly when the corporation is engaged in commercial endeavors. The suggestion also defeats one advantage which the corporate form has over the department form in conducting a business enterprise: the corporation can more effectively and economically deal with private business organizations, since the latter know that their rights against the corporation can be enforced in the courts. 147

B. Directors as Government Officials

The immunity doctrine is applicable only to those directors of government corporations who are regarded as government officials. That classification seems most likely for directors of those

---

145. J. THURSTON, supra note 1, at 88. See, e.g., Langer v. United States, 76 F.2d 817 (8th Cir. 1935) (interference with the Reconstruction Finance Corporation held to be an impediment to the exercise of a federal government function); United States v. Carlin, 259 F. 904 (D.C. Cir. 1917) (fraud against the Emergency Fleet Corporation, which was executing powers delegated to it by the President, held to be fraud against the United States). But see Salas v. United States, 234 F. 842 (2d Cir. 1916) (fraud against the Panama Canal Railroad Company held not to be a fraud against the United States).
147. Certain legal attributes of corporations "have arisen out of necessity during the growth of the law in modern times for the purpose of regularizing business conduct and defining responsibilities to the end that those who deal with one another may know and enforce their rights and obligations." J. THURSTON, supra note 1, at 265.
corporations that function like agencies. Such corporations are more concerned with implementing government policies than producing revenue, and thus are more likely to be closely tied to the existing government structure. Indeed, some government corporations are specifically established as agencies of the United States government.\textsuperscript{148} It is likely that their directors then qualify for immunity as government officers.\textsuperscript{149}

Directors of commercially oriented corporations like Comsat are least likely to be government officials. In 1962, Attorney General Robert Kennedy determined that the three Presidentially appointed and the elected directors of Comsat held private office.\textsuperscript{150} He examined the meager legislative history and found that three appointees had been preferable to only one, for the very reason that a single appointee impliedly was the representative of the President and spokesman for the government. "Thus there appears to have been no intention on the part of the originators of the legislation to create directors who would be officers of the Government, but rather an intention to dissociate the Government from the directors."\textsuperscript{151}

Amtrak, which is representative of corporations which function more like government agencies,\textsuperscript{152} also has both elected and appointed directors. The elected directors appear to be expected to fulfill the common law duties of obedience, diligence, and loyalty solely to the corporation.\textsuperscript{153} Further, it is arguable that even Amtrak's appointed directors should not be granted immunity:

An indispensable element of public office is that the duties of

\textsuperscript{148} The Export-Import Bank is an example. Export-Import Bank Act of 1945, 12 U.S.C. § 635 (1976). Government employees, as the term is used in the Federal Tort Claims Act, includes officers or employees of a federal agency, and persons acting on behalf of a federal agency. Federal agencies are defined to include corporations primarily acting as instrumentalities of the United States. 28 U.S.C. § 2671 (1976). Courts have construed the Federal Tort Claims Act to mean that "all suits for damages on account of torts committed by employees of the Government must be directed against the United States and not against the Federal agency whose employees may have committed the tort." Wickman v. Inland Waterways Corp., 78 F. Supp. 284, 286 (D. Minn. 1948).

\textsuperscript{149} For example, the Overseas Private Investment Corporation was established as an agency of the United States. Act of Sept. 4, 1961, Pub. L. No. 87-195, pt. 1, 75 Stat. 432 (codified at 22 U.S.C. § 2191 (1976)). The statute specifically provides that although the six Presidentially appointed directors are not officials of the government, the other directors are government officials "designated by and serving at the pleasure of the President of the United States." Id. § 2193(b). See notes 84–86 supra and accompanying text.


\textsuperscript{151} Id. at 171.

\textsuperscript{152} See note 35 supra.

\textsuperscript{153} See notes 40–45 supra and accompanying text; see note 104 supra.
an incumbent shall involve the exercise of some portion of the sovereign power. No such power has been delegated in this case, neither have any public duties been prescribed. Other indicia of public office are also lacking. . . . No oath or bond is required and no compensation is provided other than a common director's fee. . . . Furthermore, since the Act expressly provides that Amtrak is not an agency or establishment of the United States Government, it seems that Congress intended to avoid the creation of public office. Where there is no public office there can be no public officers.  

Thus, it may be that even directors of corporations which operate like agencies are not to be treated as government officials, and therefore are not entitled to personal official immunity—unless the enabling legislation specifically determines that the corporation is an agency or instrumentality of the United States.

Some practical considerations support this position. First, to deem directors public officers would bring them within the scope of article II, section 4 of the Constitution which makes “all civil Officers of the United States” subject to impeachment. Speaking of the directors of Comsat, former Attorney General Kennedy said, “I believe it most unlikely that in authorizing the establishment of the . . . corporation, Congress, without affirmatively labelling these . . . directors as Government officials, intended that they be subject to impeachment.” In fact, Presidential appointees are generally subject to removal by the appointing authority “by virtue of the principle that the power of appointment carries with it the power of removal.” Only the statute which established TVA provides that Congress may remove its directors without Presidential consent.

Second, it is not certain whether the imposition of personal liability would act as a behavior modifier, and even if it did, whether the behavior of directors would be positively or negatively altered. Discussing potential liability of public officials, one commentator has predicted that civil liability would engender official overcautiousness—characterized perhaps by the already too common “bureaucratic faults of rigidity, technicality, excessive demands for information, and buck-passing.”

156. J. THURSTON, supra note 1, at 164. See also notes 84–86 supra and accompanying text.
157. See notes 109–10 supra and accompanying text.
158. Mashaw, supra note 102, at 26–27. This reflects the traditional rationale behind official immunity. See text accompanying note 135 supra.
This possibility becomes stronger when liability cannot be deflected to the government either because of sovereign immunity or because the corporation is deemed not to be an instrumentality of the government. Thus, insurance or indemnification by the government or the corporation could negate the behavior-modification effects of the imposition of personal liability on directors. On the other hand, "the usual effects of enterprise liability might be expected; civil suits would provide both important information about where negligence occurs and incentives for internal policing that do not currently obtain." 159

Third, potential personal liability might deter able persons from participating as directors, particularly if the rewards offered are not comparable to those offered by the private sector. Regarding the payment of directors, one commentator has said, "To be sure, a prospective appointee who would be influenced unduly by the prospect of compensation is patently not the man to appoint; but a good workman is worthy of his hire." 160

The imposition of liability introduces a potential cost to the director, thus reducing the effective pay rate if the latter is not raised accordingly. It would be analogous to imposing liability on government officials: "there would be a general reduction in the value of government employment, and workers who now command lesser rates of pay than the current crop of government officials would gradually replace them." 161 This decrease in real income by the imposition of liability could be overcome, however, by the provision of insurance or indemnification.

Thus, official immunity would probably not preclude a suit against the directors of a government corporation unless the enterprise operates at the agency end of the activity spectrum. This may be because the enabling legislation expressly labels the corporation as an instrumentality of the United States government. In that case, if the director was carrying out a discretionary function, the federal government is not liable because of the exception

159. Id. at 27.
160. M. Dimock, supra note 6, at 39. Others put it more strongly: "Clearly, sufficient must be offered to attract the best man available, and . . . much more may have to be paid than is customary in the public sector." Garner, Public Corporations in the United Kingdom, in Government Enterprise: A Comparative Study 6, 13 (W. Friedmann and J. Garner eds. 1970). Cf. J. Thurston, supra note 1, at 171: "On the whole compensation of part-time directors should not be very great, for that would lessen their independence and make them less ready to resign if the government should require them to take action which they deemed unwise."
161. Mashaw, supra note 102, at 27.
to the Federal Tort Claims Act, and the director is protected by official immunity. If the director's act was not discretionary, the federal government is liable. In either event the director is not personally liable.

IV. POTENTIAL PLAINTIFFS' ACCESS TO THE COURTS

Assuming that the devices which monitor and control government corporations are not sufficient to ensure director accountability, and that official immunity does not preclude the personal liability of directors, the next issue to be considered is who might bring a suit against a director. Of particular interest in this context are some of the many strands that are interwoven in the fabric of justiciability, such as the standing of potential plaintiffs, the recognition of a right of action, an injury which affords a basis for legal remedy, and the willingness of the courts to intervene. These factors may be combined in an analysis which considers whether the plaintiff has a right to bring suit after being injured, and whether the defendant has committed a wrong of which the courts are cognizant. The former consideration determines a plaintiff's standing, and the latter determines the courts' willingness to provide a forum for the controversy.

A. Judicial Requirements for Standing

The Supreme Court has often discussed the issues that are pivotal in determining standing. The inquiry that has evolved has two prongs: whether the plaintiff has suffered an "injury in fact" and "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."\textsuperscript{162} The Court has also required that the inference of a private cause of action must effectuate the legislative purposes intended to be served by the Act.\textsuperscript{163}

\textsuperscript{162} Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970). Although the requirements for standing have been developed in the context of suits brought under the Administrative Procedure Act (APA), the Supreme Court has applied them without comment in a suit which was not grounded on the APA. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978). It appears that the Court would apply the same requirements in a suit concerning a government corporation. In the case of government corporations, the statutes to be taken into consideration are presumably the enabling legislation for the corporation and the statutory controls on it. See generally notes 120-31 supra and accompanying text.

For persons to have standing to challenge the actions of a director, they must be eligible, by reason of interests that they possess, to contest the validity of the action on grounds that they are entitled to present. In determining standing, the focus is on the interest presented, but that interest must be considered in relation to the injury suffered—which must be both specific and legally cognizable. Standing in federal courts is conditioned on the minimum constitutional requirement that the potential litigant allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues." This is accomplished in part by narrowing the field of prospective plaintiffs to those alleging a specific injury.

B. The Availability of Judicial Review

In addition, judicial policy limitations effectively operate to bar the use of federal courts as a forum for the airing of generalized grievances about the conduct of government. One commentator has suggested that although widely quoted dicta from establishing Amtrak not to create a private cause of action, thereby preventing a private party from enforcing obligations of the Act concerning the discontinuance of passenger train service. This action was taken notwithstanding the fact that the Act conferred jurisdiction on federal courts to grant equitable relief upon petition by the Attorney General. The Court said, "Congress clearly did not intend to replace the delays often inherent in ... administrative proceedings ... with the probably even greater delays inherent in multiple federal court proceedings." Id. at 464. The Court thought that the Attorney General's power to police the Amtrak system was sufficient: "In light of the substantial scrutiny to which Amtrak operations are subject by both Congress and the Executive, Congress could quite rationally suppose that this remedy will effectively prevent and correct any Amtrak breaches of obligations under the Act." Id. The recognition of a private right of action is thus a preliminary consideration in determining standing, "for it is only if such a right of action exists that [the court] need consider whether the [plaintiff] has standing to bring the action and whether the District Court had jurisdiction to entertain it." Id. at 456. See also Cort v. Ash, 422 U.S. 66 (1975), rev'd 496 F.2d 416 (3d Cir. 1974). See generally, Leedes, Understanding Judicial Review of Federal Agency Action: Kafkasque and Langdelian, 12 U. Rich. L. Rev. 469 (1978); Note, Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine, 18 WM. & MARY L. REV. 429 (1976).


166. See, e.g., Warth v. Seldin, 422 U.S. 490, 500 (1975); United States v. Richardson, 418 U.S. 166, 176-77 (1974). One commentator has concluded, "The present federal tests for standing contemplate eliminating the largest possible number of people from access to the courtroom rather than encouraging all citizens to use the judicial system to have their grievances resolved." Bjorge, Standing to Sue in the Public Interest: The Requirements to Challenge Statutes and Acts of Administrative Agencies in the State of Washington, 14 GONZ. L. REV. 141, 142 (1978).
judicial decisions imply the presumption of judicial reviewability of administrative agency actions, when actual cases arise, the courts seem ready to find grounds to deny review:

Whether or not the agency finds "law to apply," courts generally follow the presumption of reviewability unless (a) congressional intent, whether or not clear and whether or not explicitly stated, is discernible to cut off review, (b) the issues are for some reason deemed inappropriate to judicial determination, or (c) the courts find some other reason they deem sufficient for denying review.167

Courts may also be unwilling to intervene because they are concerned about both undue strain on the judicial system and unhelpful judicial intrusion into agency action.168

These problems would also confront the courts in the context of suits against government corporation directors. As with the doctrine of official immunity, even if judicial review of directors' actions is theoretically available, it can be effectively withdrawn by judicial interpretation of the enabling legislation and the propriety of judicial review, considering the legislative control mechanisms in force169 and the discretionary nature of directors' activities.170

167. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, SUPPLEMENTING ADMINISTRATIVE LAW TREATISE 641 (1976). The Supreme Court has stated that the law of reviewability is this: The courts should allow judicial review except when there is a showing of clear and convincing evidence of a contrary legislative intent. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).


168. Fuchs, supra note 164, at 980.

169. See notes 79–131 supra and accompanying text.

170. Nevertheless, standing may also be granted to challenge an abuse of discretion. Justice Brennan's concurrence in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), suggested such a possibility: "I would leave open the question whether a private suit for mandamus under 28 U.S.C. § 1361 might be maintained against the Attorney General if his refusal to act under [the Amtrak Act]—even though within the letter of his authority—went 'beyond any rational exercise of discretion.'" Id. at 465 (Brennan, J., concurring) (quoting Schonbrun v. Commanding Officer, Armed Forces, 403 F.2d 371, 374 (2d Cir. 1968)).

Applying this rationale to directors of government corporations, if their actions consti-
While only some government corporations are defined as government agencies—and the activities of even their directors are different from those of heads of administrative agencies—a comparison of the two is instructive, if only to indicate which factors are considered in allowing judicial intervention. In discussing judicial reviewability of administrative agency action, the Administrative Procedure Act (APA) provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” Under the APA courts may set aside agency action for many reasons, two of which are that the action was “an abuse of discretion” or that it was “not in accordance with law.” These criteria are similar to the grounds for challenging the actions of either business or government corporations: an abuse of “business judgment” or a failure to fulfill the imposed duties or perform the required functions.

There is no statutory right of review regarding actions of government corporations comparable to that which the APA provides for administrative agencies. Although the corporation may itself constituted an abuse of discretion, a suit for mandamus might be maintained against them. It is possible, however, that directors of most government corporations would not come within the scope of mandamus, since 28 U.S.C. § 1361 (1976) provides: “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and “Non-statutory” Judicial Review of Federal Administrative Action, 81 HARV. L. REV. 308 (1967).

171. In Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971), where tenants challenged FHA-approved rent increases in a federally assisted housing project, the court identified the factors “tending in the direction of nonreviewability”: the managerial nature of the responsibilities confided to the FHA; the need for expedition to achieve the congressional objectives in establishing FHA—promoting the construction of housing by private enterprise—which would be impeded if rent increases were subject to the expense and delay necessarily incident to a full-fledged public utility rate proceeding; and the quantity of appeals that would result if FHA authorizations to increase rents were held reviewable. Id. at 303.

The discretionary nature of FHA decisionmaking was emphasized in another case in which tenants challenged rent increases. In Grace Towers Tenants Ass’n v. Grace Housing Dev. Fund Co., 538 F.2d 491 (2d Cir. 1976), the court said that the plaintiffs’ interest in low-cost housing did not give rise to a legitimate expectation without congressionally prescribed restrictions on FHA’s actions. Id. at 494. See also note 185 supra.


174. Id. § 702.


176. See notes 40–46, 67, 78 supra and accompanying text.
sue and be sued, there are no statutory guidelines for potential plaintiffs similar to those found in the APA. Because much is left to judicial discretion in finding an implied private right of action, granting standing, and sanctioning judicial intervention, the court's position is unpredictable, which may deter potential plaintiffs.

C. Public Versus Private Rights

It has been suggested that the question of standing may be considered in the context of "public" and "private" suits. The plaintiff in asserting a "public right" may be a person who is affected no differently from any other person. This would be the broadest possible category of potential plaintiffs. A shade narrower is the category of "citizen"; and the category of "taxpayer" will include some who are and some who are not "citizens." Yet an action by any of these can properly be thought of and evaluated as a public action. As the class grows smaller, a member of it will be more particularly affected; quite apart from the availability of a public action, he may be able to bring himself within the class of persons entitled to protest an interference with their "rights" or "interests."

1. Public Suits

Standing has traditionally not been conferred on a group or person claiming a generalized injury to the public. As the Supreme Court said in Sierra Club v. Morton, "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient in itself to render the organization 'adversely affected' or aggrieved . . . ." The Court has, however, conferred standing on a group challenging administrative agency action that allegedly jeopardized the interests sought to be protected by the National Environmental Policy Act. The Court found that the group's complaint that Interstate Commerce Commission action would directly harm its members' use of the natural resources of a particular region of the country was a sufficient alle-

177. See note 140 supra.
180. Id. at 739.
181. In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973), the Court conferred standing on an environmental group where the alleged injuries, shared by many, were mainly recreational and aesthetic.
gation of a specific and perceptible harm, distinguishing the plaintiff group from other citizens who had not used the natural resources that were claimed to be affected. Standing to sue was held to exist. 182

This liberal approach to standing has not been consistently followed. 183 Most courts require a rather specific and personalized injury before they recognize standing. 184 This may be an obstacle to potential plaintiffs attempting to represent the public interest in bringing suit against directors of government corporations. 185

A second category of public suits has been called “citizen suits,” described as a group of decisions [that] has founded standing to challenge agency action on the interest shared by all persons as members of society, if not simply as individual human beings, in the maintenance of prescribed governmental processes for effective participation in decisionmaking or for access to officials who engage in making decisions, on the part of all persons who wish to assert themselves. 186

Courts may, however, be reluctant to grant standing on this basis because it could lead to judicial intrusion and general supervisory

182. Id. at 689-90. Under SCRAP the actual personal interest which will suffice may be slight and only remotely affected by the action challenged in the suit.


184. See, e.g., Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976), where the Court denied standing to indigents and organizations with indigent members to challenge an Internal Revenue Ruling granting tax benefits to hospitals that denied services to indigents. As in the concurring opinion of Justice Stewart, a majority of the Court found that no plaintiff had asserted any personal interest or membership right that was sufficiently concrete or nonspeculative to form the basis for judicial relief. Id. at 46. See also O'Shea v. Littleton, 414 U.S. 488 (1974), where the Court stated flatly, “Abstract injury is not enough.” Id. at 494.

185. For example, in a suit against the Panama Canal Company, a wholly-owned government corporation, the Court held that although the company could sue and be sued, plaintiff shipping companies could not maintain a suit against the Company to compel it to reduce the tolls that it collected for the use of the canal or to refund excessive tolls previously collected. Because the Company had power to fix the tolls, the Court inferred that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision. . . . The [Company], as agent of the President, is given questions of judgment requiring close analysis and nice choices. . . . [T]he question is so wide open and at large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for courts to intrude. Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318-19 (1958).

control over otherwise political decisionmaking.\textsuperscript{187}

The political process is probably most effective in monitoring and controlling those government corporations which, like government agencies, are particularly subject to financial control.\textsuperscript{188} Judicial intervention may well be unwarranted under these circumstances.\textsuperscript{189} Directors of corporations which are more commercially oriented, however, are less likely to be engaged in government-type decisionmaking. While judicial intervention may seem more appropriate in the activities of such corporations, because the activities are less political in nature, the justification for citizen suits is weakened.

A third category of public suits is taxpayers' suits. It has traditionally been argued that taxpayers' suits are both unnecessary and inappropriate on even the state and municipal levels because of the potential they possess to harass public officials, obstruct public projects; and perhaps even encourage government immobility.\textsuperscript{190} On the federal level, the Supreme Court has long held that federal taxpayers have no standing to bring suits challenging the acts or omissions of federal officials.\textsuperscript{191} The Court has departed from this position only when the taxpayer can meet a stringent two-part test. First, a taxpayer is a proper party to allege only the unconstitutional exercise of congressional power under the taxing and spending clause of article I, section 8 of the Constitution. Second, the taxpayer must show that the challenged enactment exceeds a specific constitutional limitation (such as the establishment clause of the first amendment).\textsuperscript{192} Further, a plain-

\begin{itemize}
  \item[187.] Warth v. Seldin, 422 U.S. 490, 500 (1975). See also Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), where the Court denied standing to a group challenging the continued right of a member of Congress to hold a commission in the Armed Forces Reserve. They could not bring suit as citizens because their challenge implicated only the generalized interest of all citizens in constitutional governance and was thus only an abstract injury rather than the required concrete injury. \textit{Id.} at 217. As Chief Justice Burger said, "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." \textit{Id.} at 227. See note 194 \textit{infra}.
  \item[188.] See notes 111–19 \textit{supra} and accompanying text.
  \item[189.] See note 163 \textit{supra}. The courts have held that TVA is not liable for damages arising from the development and maintenance of rivers and lakes for purposes of navigation and flood control. The reason is not that TVA is protected by immunity, but rather that holding TVA liable would be inconsistent with sound public policy. See Atchley v. TVA, 69 F. Supp. 952, 954 (N.D. Ala. 1947); Grant v. TVA, 49 F. Supp. 564, 566 (E.D. Tenn. 1942).
  \item[191.] \textit{E.g.}, Frothingham v. Mellon, 262 U.S. 447 (1923).
\end{itemize}
tiff has standing as a taxpayer only if there is a "logical nexus" between the status as a taxpayer and the claim to be adjudicated.193 Standing will not be conferred if, for example, the complaint fails to allege that appropriated funds are being spent in violation of a constitutional limitation on the taxing and spending power.194

When applied to government corporations, this test would presumably preclude suit against the corporation as a whole and the directors personally. To the extent the corporation is self-financing, it is independent of tax support and therefore free from taxpayers' complaints. Wholly-owned government corporations tied to appropriations are most dependent on tax funds, yet their directors can spend only the money allocated to them. If corporate activity, authorized by Congress, is outside the spending power of Congress, the taxpayer cannot hold the directors personally liable for carrying out the congressional mandate. In addition, unless they are specifically designated as government officials, directors probably should not be considered as government officials, against whom taxpayers' suits must be brought.195 If a taxpayers' suit were viewed as an appropriate device to control government corporations, it would diminish the freedom from immediate political control that makes a corporation more suitable than a government department for the public operation of an enterprise.196

A fourth category of public suit might be brought against government corporation directors. For this the pool of potential plaintiffs would be the particular members of society who might be said to be the objects of congressional solicitude in the estab-

193. Id. at 102.

194. See, e.g., United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). In Schlesinger the plaintiffs challenged the permissibility of a member of Congress to hold a commission in the Armed Forces Reserve. The Court held that the plaintiffs had no standing to sue as taxpayers because they did not challenge an enactment under the taxing and spending clause of the Constitution, but rather the action of the executive branch in permitting members of Congress to maintain their reserve status. Id. at 228.

195. See notes 144–56 supra and accompanying text.

196. See, e.g., note 16 supra. The notion that taxpayers' suits will provide accountability because of their political nature is undercut when applied to directors of government corporations by the statutory requirement of some corporations that the appointed directors represent both political parties and that they serve for a fixed term. See note 105 supra. For a discussion of the removal of Presidential appointees, see notes 84–87 and 109–10 supra and accompanying text. Moreover, even Presidential appointees tend not to be primarily political personalities, but rather eminent private individuals. They are probably less susceptible to the scrutiny of politically motivated watchdogs than are elected officials.
lishment of the corporation. Since this would probably be a smaller class of potential plaintiffs than the three previously considered classes, such a category would further the policy of narrowing the field of potential plaintiffs. This group is analogous to the shareholders of a business corporation for whose benefit the management of the corporation has been entrusted to the directors. In contrast to the shareholders of a business corporation, however, this group's wealth maximization is derived from other than monetary factors—creating more grounds for injury, but at the same time giving rise to claims that are possibly more speculative or abstract. Plaintiffs would have to show that the directors’ activities injured them, and the injury would have to be legally redressable. Given the discretionary nature of directors’ activities, it might be difficult to allege a wrong for which the courts would allow judicial intervention.

It would seem, then, that the opportunity for potential plaintiffs to bring public suits—as members of the public, citizens, taxpayers, or beneficiaries of the establishment of the corporation—against the directors of a government corporation is at best uncertain. There is, however, the possibility that access to the courts might be given to potential plaintiffs to bring private suits, two examples of which are competitors’ and shareholders’ suits.

2. Private Suits

One commentator suggests that the test for conferring standing on a plaintiff who is a competitor of the corporate defendants is whether the protection of the competitive position of the plaintiff has been statutorily anticipated and accommodated.\(^\text{197}\) The Supreme Court has applied this test outside the context of government corporations. In *Association of Data Processing Service Organizations, Inc. v. Camp*\(^\text{198}\) the Court held that increased competition satisfied the requirement of injury in fact, while the competitive interests were arguably within the zone of interests to be protected by the relevant statutes. Since that decision, the “zone of interests” portion of the test for standing seems to have waned, leaving injury in fact as the important criterion for deter-

---


198. 397 U.S. 150 (1970). The Court granted standing on the basis of increased competition to the computer service industry resulting from national banks being allowed to provide data processing services to their customers.
mining standing. 199

Nevertheless, whatever tests that may be developed regarding judicial review of administrative agencies are subject to modification in the context of government corporations, since the functions and purposes of the two are different. In the case of a corporation, the court might be inclined to inquire more closely into the injury to the legal right of a competitor resulting from increased competition. 200 Since review of government corporations is not provided for in anything like the structured mechanism of the APA, the

199. One commentator doubts that the zone of interests test is the law because “the test is contrary to the APA, the Supreme Court itself has not followed it, the test seems unsatisfactory, only two cases [as of 1976] have denied standing on the basis of the test to one who is injured in fact, and all federal courts have generally found ways to escape from applying it.” K. Davis, supra note 167, at 515. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972), where the Court ignored the test in upholding the standing of the promoter of a product to assert the constitutional rights of users of the product, although the promoter’s interests were not within the zone of protected interests.

200. See, e.g., Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939), where the Court addressed the notion of competitors’ interests. Regarding the plaintiff power companies’ complaint about the competition from TVA’s activities, it said:

[N]either their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state’s subsequently authorizing another to enter and operate in the same field.

Id. at 139. The Court also indicated that competitors would not have standing to sue TVA even if it were acting contrary to the laws of the states in which it was functioning: “The Authority’s action in these states is consonant with state law, but, as has been shown, if the fact were otherwise, the appellants would have no standing to restrain its continuance.” Id. at 142. But see FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), where the Court granted standing to an existing broadcasting station which would be economically injured by competition to challenge the FCC’s grant of a permit for a new station. The Court recognized the principle of free competition and said the FCC Act was not intended to protect the licensee against competition but to protect the public. Id. at 474–75. Nevertheless,

Congress . . . may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

Id. at 477. This doctrine was developed in Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942) and then refined in FCC v. NBC (KOA), 319 U.S. 239 (1943), resulting in the principle that standing will be granted though the only interest that the plaintiff has in attacking the administrative action is to avoid new or increased competition.

These cases may be distinguished from Tennessee Electric on two grounds. First, statutory provisions similar to the APA applied to the FCC cases, but not to Tennessee Electric, thus providing in the former cases for judicial review at the instance of a person adversely affected or aggrieved. See, e.g., § 402 of the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C. (1976)). Second, the FCC cases were concerned with important questions of public interests and convenience, as well as with private interests. It was anticipated that a grant of standing to those representing private interests
zone of interests portion of the standing test might be applicable in cases against corporations, even if it is no longer so in suits against administrative agencies under the current interpretation of the APA.

Many government corporations are, in addition, free from some of the statutory controls on business corporations. Their freedom from the restraints imposed by the federal antitrust laws, for example, suggests that the continued well-being of competitors is not a major concern of the enabling legislation. Moreover, to the extent that the mandate of the statute establishing the corporation is being carried out, the director can hardly be held personally liable for thereby threatening the competitor's position. On the other hand, to the extent that the directors have contravened the statute by misinterpreting or ignoring its mandate in setting corporate objectives, perhaps a competitor could hold them liable. Since Congress establishes corporations for a special purpose and uses various mechanisms to implement congressional control, the courts might see in this an implied private right of action to reinforce congressional control.

A second type of private suit which might be brought against the director of a government corporation is a shareholders' suit. Those corporations which are financed at least in part by the sale of shares to the public or to authorized buyers should be accountable to their shareholders. If government corporations are to compete with other investment opportunities, investors must be entitled to the usual safeguards available to corporate shareholders, including derivative actions. This basis for standing affects only those corporations that sell shares, and thus would not be available for challenging directors of wholly government-owned corporations.

would allow the public interests to be raised as well. These distinguishing factors may make *Tennessee Electric* still relevant in challenges to government corporations.

201. See notes 129–31 *supra* and accompanying text.

202. See notes 79–131 *supra* and accompanying text.

203. The courts would, of course, have to balance the costs and benefits of allowing such suits in a manner similar to that used in determining whether directors should have official immunity. See notes 158–61 *supra* and accompanying text.

204. For example, the enabling legislation for Comsat provided that half of the corporation's shares were reserved for purchase by specifically authorized communications common carriers. Communications Satellite Act of 1962, 47 U.S.C. § 734(b)(2) (1976). Likewise, the enabling legislation for Amtrak provided that common shares were to be issued only to railroads, but when preferred stock was issued it could not be held by a railroad or a person controlling a railroad. Rail Passenger Service Act of 1970, 45 U.S.C. § 544(a) (1976).
The matter of potential plaintiffs gaining access to the courts seems to pose the greatest obstacles to the imposition of personal liability on directors of government corporations. It appears unlikely that courts will allow access to plaintiffs attempting to bring a public suit. As to directors of corporations which act like government agencies, courts are probably hesitant to intrude—just as their interpretation of the APA has effectively diminished the scope of judicial review of administrative agency actions. Regarding directors of more commercially oriented corporations, the basis for standing as citizen or taxpayer has decreasing validity as the corporation is increasingly self-financing and thus less identifiable as part of the government.

Considering private suits, competitors' interests do not seem to have been protected by the enabling legislation—which waives even the protection of the antitrust laws. Unlike agencies within the ambit of the APA, government corporations are not subject to a statutory directive regarding judicial reviewability. On the other hand, since courts are willing to recognize economic injury as a basis for standing in suits against agencies, they might allow suits against a government corporation on similar grounds. When the corporation's acts are ultra vires, the injured competitor might have standing to sue the directors for injury caused by such acts. Shareholders probably have standing to bring suit, but against only directors of the corporation whose shares they own. Regarding wholly government-owned corporations, it would seem that only a public suit would be available to members of the group for whose benefit the corporation was established. Plaintiffs might have difficulty both alleging an injury that was more than abstract or speculative and also contending with general judicial reluctance to intervene in discretionary activity.

**CONCLUSION**

It may be ill-advised to prescribe a single policy of director liability applicable to government corporations, considering the broad spectrum of activity in which they are engaged. However, the duties and functions of such directors can be defined, especially insofar as they differ from the duties and functions of business corporation directors. These differences are most likely to be found in corporations which function in a manner similar to agencies, where the directors are motivated by nonbusiness considerations.
Perhaps the required duties and functions could be more precisely defined in the enabling legislation, in order to facilitate cogent review of directors' performance. Directors should probably be held to a higher level of accountability than is traditionally applied to outside directors of business corporations. Because the enabling legislation is of necessity written in general terms, and because government corporations must work within the constraints of a complex set of goals, the role of directors in setting policy and management objectives is more crucial to the efficient operation of the corporation than is the case for business corporations.

Available monitoring devices do not seem to be uniformly effective with respect to all government corporations, especially those that are more commercially oriented. Personal liability of directors might therefore be useful to ensure their accountability. Moreover, a suit against a director would probably not be precluded by immunity, either of the corporation as an instrument of the government or of the director as a government official.

The matter of gaining access to the courts to bring suit, however, appears to pose greater potential problems. It does appear that it would be difficult to bring a public suit. As to private suits, it seems likely that a competitor could sue if the courts found the matter suitable for judicial intervention and if they determined that an economic injury was sufficient. In such a case, the zone of interests protected by the statute establishing the corporation might not extend to the continued well-being of competitors. However, the courts may not reach this decision, in view of the lack of a statutory directive such as that governing administrative agencies. The directors could possibly be sued if the corporation did not comply with statutory or constitutional demands, but only if their action constituted an abuse of discretion. Also, shareholders could probably bring suit, although this would affect only directors of government corporations which sell shares to the public or authorized buyers.

Dianne Hobbs