By What Authority

POCLAD

A Publication of the Program on Corporations, Law & Democracy

Vol. 1, No. 1 • Fall 1998

The POCLAD Story in Brief

What is the proper role of giant corporations in a democracy?

This question is not on the lips of our elected officials. The role and nature of global corporations were not even a minor issue in this fall's elections.

Why not? For centuries, people whose labor and lives have been shaped by corporations have asked how mere creations of statute got to be so dominant; why corporate claims to authority over people and property are so vigorously enforced by courts, police and armies.

Over the past few decades, thousands of civic groups in community after community have formed to resist corporate assaults — just as they did in the final decades of the 19th Century. And like in those lively Populist days, anger and debate, resistance and hope, are once again percolating through our communities.

People are coming to grips with the fact that corporate assaults upon life, liberty, property, happiness and democracy are increasingly treated by our criminal justice system as legal; that repeated corporate harms are regarded by pillars of our society as acceptable...even inevitable. People are seeing that justice cannot be found through regulatory laws and their alphabet agencies; by asking corporate CEOs to be socially responsible; by electing a charismatic leader.

People are learning why and how our courts and legislatures denied fundamental rights to corporate organizations of workers, farmers, minorities, students, scholars, voters, while granting special privileges galore — including the constitutional rights of persons — to corporate organizations of bankers, manufacturers, resource extractors, polluters, publishers, TV networks, insurers, service providers, and *their* political parties.

After spending several yea researching histories of people movements, corporations and corpo rate law, and talking with hundred of people in Rethinking th Corporation/Rethinking Democrac meetings around the country, we cr ated the Program on Corporation Law and Democracy (POCLAD) i 1995. We are now looking at ho struggles for democracy by the man have been diverted and destroyed vi corporations controlled by the few.

By What Authority is English for *quo warranto*. It refers to a mechanism for compelling public officials to obey the law and give people access to justice. A Latinization of a word evolved from several old European tongues, *quo warranto* has a rich history as a people's remedy against the powerful.

In England of old, where the monarch claimed all legal and political authority, *quo warranto* was an order kings used to keep both appointed office holders and corporate creations subservient. The American Revolution freed people to rule (at least in theory, fable and song) in these United States. Here, We the People are the source of all legal and political authority. We are sovereign. *Quo warranto* orders can compel state officials to revoke charters of corporations which have defied the law and public trust by seizing powers which properly belong to the people.

Like other extraordinary writs—such as *habeas corpus* and *mandamus*—*quo warranto* is our tool for ending violations of people's rights. When we pursue a quo warranto action, or demand that our attorneys general pursue such an action, we are requiring corporations—along with attorneys general, governors, legislators, and judges—to be accountable to the law by terminating continued exercise of authority unlawfully asserted.

By What Authority is such a hallowed challenge to public officials who aid and abet corporate usurpations of power that we chose it as the name of POCLAD's new publication.

By What Authority is such a hallowed challenge to public officials who aid and abet corporate usurpations of power that we chose it as the name of POCLAD's new publication.

From the Field

Oregon Conference Promotes Citizen Power

AN ESTIMATED 700 PEOPLE participated in a May conference held in Portland, Oregon, "to end corporate dominance over ecosystems and communities." This was a groundbreaking event for regional activists in establishing a cross-movement alliance representing environmental, labor, animal rights, Zapatista, Socialist, Pacific Party, feminist and other activists.

Conference organizers reframed issues within a larger democratic framework, seeing strategies as means toward dismantling corporate rule. Participants wrestled with redefining the fundamental values of "equality" and "private property," challenging corporate claims to personhood, reclaiming public space, forming a regional All People's Congress, and building grassroots and economic democracy.

For information on the May 1999 End Corporate Dominance conference or tips on organizing a similar alliance-building event in your area, write: End Corporate Dominance Alliance, 2 NW 3rd, Portland, OR 97209 or call Karen Coulter or Asante Riverwind at (541) 468-2028.

By What Authority

A publication of the Program on Corporations, Law and Democracy.

POCLAD is a project of the nonprofit Council on International and Public Affairs.

POCLAD
P.O. Box 246
So. Yarmouth, MA 02664-0246

Phone: (508) 398-1145
FAX: (508) 398-1552
E-mail: people@poclad.org
Website: www.poclad.org

POCLAD in Brief

continued from page 1

We have learned that if people are to define what corporations are — if we are to be the ones who determine corporations' legal personality and legal capacity — we need to think differently about ourselves as We the People. This starts with uncovering and telling people's histories, in the language of human rights, democracy and sovereignty. And it requires that we not concede any privilege and power to corporations.

The number of people who are part of these investigations and conversations is increasing. They are bringing their anger, debate, resistance and hope into village squares, schools, legislatures, mayors' and governors' offices, and courts; into civic clubs and service societies, professional associations and labor unions.

We look forward to the escalating of these efforts, which is happening as activists and their organizations choose goals and forge strategies which challenge corporations' claims to constitutional authority, and which confront public officials who are complicit in these and other corporate usurpations.

Such fundamental changes in thinking, speaking, planning and organizing do not take place over night. There are no short-cuts. There is only the day to day work by thousands of people one day, perhaps, by millions of people building democracy and in the process destroying the corporate insurgency.

It is to honor and accelerate this work that we inaugurate our quarterly publication, *By What Authority.*

("The POCLAD Story: Lessons Learned, Future Directions," can be ordered through our Distribution Center, PO Box 337, Croton-on Hudson, NY 10520; email: cipany@igc.apc.org; tel/fax: 1-800-316-2739.)

"I have not learned the doctrine that cheapness is the only thing in the world we are to go for. I do not believe that the great object of life is to make everything cheap."

—Senator Teller, during the debate on The Sherman Act.
Cong. Rec. 2561 (1890)

sheep in wolf's clothing

By Jane Anne Morris

IF YOU'RE HAVING TROUBLE getting to sleep, you can count sheep, or read a book about the history of regulatory agencies. It may turn out to be the same thing.

The nation's first federal regulatory agency, the Interstate Commerce Commission (ICC), was established in 1887. Concerned citizens, having failed to solve their difficulties in more traditional ways, sought the intervention and assistance of the federal government. Over the next three decades, these mavericks worked to defend the ICC's existence and increase its powers to regulate the railroad corporations.

Who were these pioneers who dared to go where no one had gone before, to urge the formation of and expand the powers of the first federal regulatory agency?

Prominent among them were the Director and General Counsel for several of Vanderbilt's railroad corporations, including the New York Central Railroad Company, Chauncey M. Depew; the President of the Union Pacific Railroad Company and former chairman of the Massachusetts Railroad Commission, Charles F. Adams; the President of the Minnesota and Northwestern Railroad Company, and President and Chairman of the Board of the Chicago and Great Western Railway Company, A. B. Stickney; the Vice President, General Manager, Director, and President of the Chicago, Burlington & Quincy Railroad Company and later, President of the Burlington & Missouri River Railroad Company, Charles E. Perkins; the Vice President, General Manager, Director, and President of the Pennsylvania Railroad Company, Alexander J. Cassatt; Andrew Carnegie (Man of Steel); the prominent J. P. Morgan, banker, associated with the rise of the International Harvester Company and U.S. Steel Corporation; and 1912 chairman of the national executive committee of the Progressive Party, George W. Perkins.

The role of these and other railroad corporation men has been explored by historians whose research into primary materials led them to things you'll never read on the back of a cereal box. One such historian, Gabriel Kolko, made use of letters, speeches, testimony before Congressional committees, and trade journal articles in his efforts to piece together the story of what amounts to a regulatory revolution in the U.S.

That such a revolution occurred is historical fact. After a slow start, an alphabet soup of regulatory agencies proliferated like lawyers on the national scene. But that the midwives of this revolution were railroad men and other corporate executives is a reality less widely appreciated, and at odds with current regulatory agency creation myths.

THIS FOUR-PAGE INSERT will be a frequent feature of the publication addressing a single issue or question important to our understanding of the appropriate relationship between "We the People" and our corporate creations. You are encouraged to duplicate and distribute it, and, of course, to grapple with its content.

continued on p. 4

Late nineteenth century railroad companies were troubled by too much competition: waves of fierce rate cutting and rate wars, the use of discriminatory rebates (a form of discount — actually a bribe — used by rival companies to steal each other's customers), and major bankruptcies. This is hardly the scenario that would have existed had the railroad companies succeeded in fixing prices, establishing monopolies, and controlling the market. But they tried.

Corporate mergers, trusts, pools, and trade associations were all methods through which corporations sought to eliminate competition. Each ran into glitches, however.

Until the late 1880s, many mergers were effectively illegal because most states had laws prohibiting a corporation from owning stock in other corporations. Trusts, an effort to finesse this prohibition, were made technically illegal by the 1890 Sherman Antitrust Act (subject to spotty enforcement and soon rendered nearly useless by judicial monkeywrenching). Pools — sometimes illegal, sometimes not — ultimately failed to maintain price levels for their members because they lacked enforcement powers (to sanction a member that broke ranks and cut prices, for instance.) Trade associations tried to control the market by means of informal price agreements, standards, and licenses, but as with pools, such agreements lacked the force of law.

So, throughout the late nineteenth and early twentieth centuries, mergers, trusts, pools, and trade associations all failed to meet the needs of large corporations eager to crush competition in order to maintain price levels.

Railroad companies wanted to fix rates among themselves, and then enforce these rates. (That is, they wanted legally enforceable price-fixing). They wanted a shield against a tide of public activism that was showing itself in the form of tough state laws, increased populism, calls for government ownership of railroads and other public utilities, and a resurgence of socialist movements.

They wanted the public to pay the costs of coordinating an industry and maintaining quality control (standards, inspection, enforcement), while guaranteeing the railroad corporations a basic (and profitable) rate of return. Despite all of this government investment, however, profits were to go to corporate coffers and stockholder wallets.

That such a revolution occurred is historical fact. After a slow start, an alphabet soup of regulatory agencies proliferated like lawyers on the national scene. But that the midwives of this revolution were railroad men and other corporate executives is a reality less widely appreciated, and at odds with current regulatory agency creation myths.

Railroad executives wanted the ICC to enforce rates. But enforcing rates did not mean capping rates in order to protect the public. Enforcing rates meant prohibiting upstart companies from offering lower rates and thus undercutting the profits of the established railroad companies. Enforcing rates was a means of protecting large corporations from what John D. Rockefeller called "ruinous competition."

A. B. Stickney (Chicago & Great Western Railway Co.) explained about rates: "Let the law name the rates, and let the law maintain and protect their integrity." The Railroad Gazette expressed a hope that the ICC would "go ahead and catch every law-breaking rate-cutter in the country."

The 1906 Hepburn Act (augmenting ICC powers) has frequently been cited as a victory for "reformers." However, *Railway World* stated, "...we can see nothing in the measure threatening the interests of the railroads." In *Railway and Engineering Review*, G. J. Grammar of the New York Central Railroad Company concurred: "The enforcement of the new rate law will, I believe, be of the greatest benefit to all the railroads."

One such benefit was protection from what historian Lawrence Goodwyn called "the largest democratic mass movement in American history." A railroad man wrote to the ICC in 1897, "Oh Lord pity us in Nebraska and preserve us from the results of a populist legislature and State government." Richard Olney, President Cleveland's Attorney General, explained to railroad corporation executives that the ICC was to be "a sort of barrier between the railroad corporations and the people..."

From the early days of the ICC, Charles F. Adams (later President of the Union Pacific Railroad Co.) saw what was needed to solve the railroad corporations' problems. "What is desired..." Adams wrote, "is something having a good sound, but quite harmless, which will impress the popular mind with the idea that a great deal is being done, when, in reality, very little is intended to be done."

The public was to be pacified with laws that sounded tough but placed much discretion in the hands of regulators. As Charles E. Perkins

(Chicago, Burlington & Quincy Railroad Company) said succinctly in 1888, "Let us ask the [ICC] Commissioners to enforce the law when its violation by others hurts us."

In this context, federal regulatory agencies emerged like the Promised Land from a wilderness torn by rate wars, strewn with the carcasses of bankrupt corporations, clouded over with competition and uncertainty, and ringed by the howls of an outraged public.

Regulatory agencies like the ICC transformed activities once illegal (such as price-fixing and market control) into practices that were now not only legal but mandatory — with the government doing the enforcing and taxpayers bearing the infrastructure costs, while business corporations, investors and speculators reaped the profits.

By 1920 railroad corporations pretty much had it all, courtesy of the U.S. government and the ICC. The Transportation Act of 1920 gave the railroads what they had dreamed of since the 1890s if not before: legalized pooling (i.e., price-fixing), guaranteed prices, exemption from antitrust laws and an assured rate of return.

Thus emerged the ICC over its first decades as coordinator and guarantor of a government-enforced, regulated monopoly. The ICC had been exceedingly flexible in using its discretionary powers; its commissioners had been exceedingly sensitive to the views of railroad corporation officials. In short, it had been a good sheep, in wolf's clothing. Its actions had become so vital to railroad corporations' well-being that others could not help but notice. And so — you guessed it — this sheep was cloned. The ICC, considered to be a successful model commission, became a template for the next dozen or so regulatory agencies, effectively establishing the U.S. regulatory system pattern.

The argument will be made that the ICC is only one regulatory agency, that the railroad industry is different from other industries, and that the railroads are, well, a special case. With due respect to the railroads (which went into decline because corporation executives decided they could make more money from steel, rubber, and oil transformed into the polluting profit-makers known as automobiles), and to the ICC (abolished by an act of Congress in 1995), all industries are "special."

Kolko describes how regulation came to corporations in a host of industries in the decades around the turn of the century—including insurance, meat packing, food, banking, and communications (telephone and telegraph). The parallels to the railroad industry are striking. The big corporate players in various industries sought an escape from the rigors of competition through control of markets, government-borne costs of infrastructure and quality control, and direct or indirect price maintenance or guaranteed rates of return. Special, indeed.

No sooner had a flock of regulatory agencies been established than critiques began to appear. Every generation or so, there arises a great hue and cry about how corrupt and/or ineffective they are. Soon after World War II one wave of criticism receded and left behind the Administrative Procedures Act (1946), which outlined measures that would supposedly make regulatory agencies less arbitrary by making them more like courts. Marver Bernstein followed up in 1955 with a classic critique that concluded, "Because [the regulatory agency idea] is based upon a mistaken concept of the political process which undermines the political theory of democracy, [it] has significant anti-democratic implications." In 1960 James Landis, a regulatory agency veteran, made a report on regulatory agencies to President-elect John F. Kennedy. Landis, a supporter of the regulatory agency concept, nevertheless conceded that regulatory agencies were mired in "Alice in Wonderland" procedures; the costs were "staggering;" the delays "inordinate;" and the failures sometimes "spectacular." Then in 1975, Christopher D. Stone's *Where the Law Ends* delivered an updated and still devastating analysis, this one encompassing the newer 1970s crop of regulatory agencies, many of them concerned with the environment.

It is difficult to say which is more discouraging: that the criticisms have changed very little over time, or, that the suggested changes are clearly unequal to the task.

We have heard the howl of the regulatory agencies: a resounding "Baa-a-a, baa-a-a."

We've had a century to watch them fail to work for the public interest. Corporate lawyers might as well have put up billboards: "Do people think your factory stinks? Hire an expert to prove they're wrong!" "State legislature too democratic? Escape to a federal regulatory agency. And then to the courts!"

Some of the recurring criticisms re that 1) regulatory agencies have oo much discretionary authority, vhich is almost invariably abused;) they combine legislative, execu- ive, and judicial power in one lace; 3) their personnel and outlook effect the views of the corporations hey are supposed to be regulating;) since individuals and small busi- esses can't afford the time and xpense to fully participate, large orporations dominate; and 5) pro- edural considerations are so intri- ate and demanding that matters of airness, justice, and overall policy uestions, not to mention common ense, are ruled irrelevant if they ome up at all.

Any one of these five would pre- ent a serious obstacle to democratic ontrol. Together, they are so formi- dably antidemocratic that it's a won- er we can keep a straight face while laiming that by tinkering with reg- latory agencies, we might "reform" hem. There is nothing new about hese problems, of course: they are why federal regulatory agencies were established.

Regulatory agencies are the cor- orations' response to people's calls for democracy and self-governance. Corporate officials who once hired Pinkerton's goons to do their dirty work and protect them from an activist public can now rest assured that much of that burden has been assumed by regulatory agencies. They work as the barriers they were designed to be.

Over the last century the regulato- ry regime did something else, some- thing that receives too little of our attention. It replaced, and seemingly erased from memory, a myriad of imperfect but promising democratic measures that defined the corpora- tion at the outset as a subordinate entity chartered to serve the public good. Many of these measures were straightforward, effective, and even clever, and did not require arcane administrative structures for their implementation and enforcement.

In contrast, our current system heaps huge helpings of powers, priv- ileges, property protections, grants, exemptions, subsidies, and favors upon the corporate form, and then, as if in an afterthought, adds: And, by the way, now we'll go through the motions of regulating you.

And what great targets these regu- latory agencies make. Corporate public relations teams blame them for economic ills, and the public blames them for "not doing their jobs." Attention is deflected away from corporations as the source of problems, and toward efforts to "reform" regulatory agencies. *The idea that the concept of the regula- tory agency is inherently flawed doesn't even make it onto the table.*

Moving this idea to the center of our debates opens up new strategies, more democratic goals, and opportu- nities for activism that have long been obscured by regulatory minutiae.

What would it take for us to dis- cuss this possibility openly?

We have heard the howl of the regulatory agencies: a resounding "Baa-a-a, baa-a-a."

We've had a century to watch them fail to work for the public interest. Corporate lawyers might as well have put up billboards: "Do people think your factory stinks? Hire an expert to prove they're wrong!" "State legislature too democratic? Escape to a federal reg- ulatory agency. And then to the courts!"

Why is so much of today's activism confined to what *Harper's* editor Lewis Lapham calls "clean and well-lit regulatory agencies"? What lies outside the regulatory realm?

Some of what lies beyond that realm can be found in the lore of labor struggles and the nineteenth century populist movement. Some is between the lines in the convoluted prose of state corporation laws. Much lies dormant but frustrated, drowned out by the clanking machinery of our current democracy theme park. But we won't see or use any of it until we step out of the glare of the "Alice in Wonderland" regulatory realm, and let our eyes adjust to the unfamiliar light of democratic conversations and actions.

A sheep is a sheep is a sheep. Pulling the wool over our eyes won't change that.

BIBLIOGRAPHIC NOTE. The bulk of background materials for this arti- cle, including quotations, can be found in Gabriel Kolko's excellent books, *Railroads and Regulation*, and *The Triumph of Conservatism*. Both are readable and widely avail- able. Lawrence Goodwyn's *The Populist Moment* and R. Jeffrey Lustig's *Corporate Liberalism* are also indispensable in providing background on this critical period of U.S. history. The Bernstein, Landis, and Stone critiques are all classics in the regulatory agency genre.

The interested reader can obtain a complete bibliography and list of ref- erences by sending a self-addressed, stamped envelope to the Program on Corporations, Law and Democracy, P.O. Box 246, South Yarmouth, MA 02664; (508) 398-1145.

CHANGE IN RELATIONSHIP TO CORPORATIONS URGED BY COMMON CAUSE AWARD RECIPIENT

The following is an excerpt from an address given by Greg Coleridge upon receiving a Public Service Achievement Award by Common Cause, June 19, 1998.

THERE IS A PROJECT THAT I HAVE been trying to shift greater emphasis toward over the past two years and in which there may be in the future some common ground with Common Cause. It is at the moment an educational effort among 100 or so Ohioans who are researching and teaching one another about the historic and current relationship between citizens and corporations. We are learning that the power that corporations possess today to determine in large part everything from the food we eat, to the news we see, to the people we elect, to the public policies we have, to the natural world we have left is not how it always was or what was meant to be. We in Ohio are learning, as are people in other states, about the early defining laws that sovereign citizens placed on corporations through state legislatures, constitutions and Supreme Courts when they were licensed or chartered.

We are trying to internalize in Ohio what a previous Common Cause Public Service Achievement Award winner, Supreme Court Justice Thurgood Marshall, said in a dissenting opinion in First National Bank v Bellotti in 1978:

"Corporations are artificial entities created by law... It has long been recognized... that the special status of corporations has placed them in a position to control vast amounts of economic power which may... dominate not only the economy but also the very heart of our democracy... The State need not permit its own creation to consume it."

Trying to end corporate welfare, seeking corporate codes of conduct, limiting corporate campaign contributions and organizing corporate boycotts are all extremely important efforts (we are involved in and support many of them). But they all take as a given that corporations have the same inherent rights as breathing human beings.

This is in no way a call to end campaigns that challenge one corporate law, permit or abuse at a time. It is a call, however, to strategically rethink our fundamental relationship to corporations and act accordingly to look at ourselves less as consumers, workers or taxpayers and more as citizens. Citizens instruct and define their creations. They don't treat them as their equals or become, as Justice Marshall said, consumed by them.

"Hey...NO reading on the job."

The ultimate struggle for us all in the years ahead may be less to reverse laws like the 1872 General Mining Law (a blatant example of corporate welfare to be sure) than to educate and organize to reverse Supreme court decisions like the one that came 14 years later—the 1886 *Santa Clara v Southern Pacific Railroad* decision which in fundamental ways first declared that corporations were persons. Or the *Buckley v Valeo* decision in 1976 which equated money, including corporate contributions, with free speech.

These and other actions will certainly not be easy—to create a mindset, a culture, a movement challenging corporate personhood and rulemaking. None of our work, however, is easy. Yet few tasks may be more humane, nurturing and sustaining than struggling for the rights and needs of all breathing human beings and for the natural world. Few ideas may be more relevant to the problems of our time than the one suggested by the New York State Supreme Court in the last century when its justices stated on revoking a corporate charter, that "the life of a corporation is, indeed, less than that of the most humblest citizen." The increasing corporatization of our society is not inevitable or irreversible.

Is all of this too far-fetched and unrealistic? Maybe so. Then again, hoping that public actions will yield progressive and sustainable change without fundamentally challenging corporate rights to govern may be even more far-fetched and unrealistic.

—Greg Coleridge is Director of the Economic Justice and Empowerment Program, Northeast Ohio Office, American Friends Service Committee, Humanity House, 513 Exchange St., Akron, OH 44302; 330-253-7151. He is active with the Ohio Committee on Corporations, Law and Democracy.