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Constitutional Law--Separation of Powers--Delegation to President of Power to Declare Embargo (The United States of America v. Curtiss-Wright Export Corp., et al., 57 S. Ct. 216 (1936))

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that tribunal promises to be of great interest in view of the conflicting opinions on the subject in the lower courts.

E. F. A.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—DELEGATION TO PRESIDENT OF POWER TO DECLARE EMBARGO.—Pursuant to the authority vested in him on May 28, 1934, by a Joint Resolution of Congress,[1] the President issued a proclamation [2] prohibiting the sale of munitions in the United States or its territories, to any of the countries engaged in armed conflict in the Chaco. To an indictment charging defendants with conspiracy to sell machine guns to one of the belligerents, defendants demurred on the ground that the Joint Resolution is unconstitutional, inasmuch as it effects an invalid delegation of legislative power to the executive. On appeal from a judgment sustaining the demurrer,[3] *held,* judgment reversed. The legislation was aimed at regulating foreign relations and not domestic affairs, and as such it is not repugnant to the Federal Constitution.[4] *The United States of America* v. *Curtiss-Wright Export Corp., et al.,* — U. S. —, 57 Sup. Ct. 216 (1936).

Perhaps no other phase of Constitutional Law has aroused greater national controversy during the present administration than the question of the delegation of legislative power to the Executive. On two momentous occasions [5] the Supreme Court struck a lethal blow at the very vitals of the President's "New Deal Program". It reiterated in no uncertain terms the principle enunciated in the maxim *"Delegata potestas non potest delegari"*—delegated powers may not be delegated. The instant case, however, differs from its antecedents in that it

[1] "Resolved * * * that if the President finds that the prohibition of sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and * * * if he makes proclamation to that effect, it shall be unlawful to sell * * * any arms or munitions of war * * * until otherwise ordered by the President or Congress." 48 STAT. 811 (1934).

[2] 48 STAT. 1744 (1934).

[3] United States v. Curtiss-Wright Export., 14 F. Supp. 230 (S. D. N. Y. 1936).

[4] Art. I, § 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article I, § 8, par. 18 provides that Congress shall have the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or office thereof."

[5] Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241 (1935) A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 Sup. Ct. 837 (1935). Of course in these decisions another vital issue played a great part—the question whether the codes themselves would be constitutional, had they been formulated by Congress itself, leaving the President to fill in the details.

presents the novel question whether the challenged delegation is vulnerable to attack even though it confines itself exclusively to external and foreign affairs. That there are fundamental differences between the two classes of powers, national and international, is a principle buttressed by precedent and reason. Precedent, because from the Administration of Washington to that of recent times, Presidents have issued proclamations and executive orders affecting the foreign policy of our nation, and these were without any stronger semblance of Constitutional sanction than the embargo herein assailed.[6] This has also the support of reason because the exercise of international powers is a necessary incident of sovereignty.[7] The two are inseparable, for there can be no nation without the attributes of nationality. To wage war, make peace, conclude treaties, and to otherwise participate in the activities of nations, are powers vested in the Federal Government independent of the Constitution.[8] In fact, the former preceded the latter.[9] No sooner were these powers relinquished by "His Britannic Majesty" than they were reinvested in the "United States of America" as the indispensable concomitants of sovereignty. This conceded, it then must follow as an inescapable conclusion that the President alone, as our Chief Executive, is the logical and best qualified representative to carry on the negotiations in matters pertaining to international relationships.[10] For, in a field replete with a multitude of intricate problems, the consequences of which are far-

[6] Ch. 41, 1 Stat. 372 (1794) was an act authorizing the President to lay, regulate, invoke embarges "whenever in his opinion the public safety shall so require". Of the same significance are also 1 STAT. 401 (1794); c. 53, 1 STAT. 444 (1795); c. 53, § 5, 1 STAT. 566 (1798); c. 2, 1 STAT. 615 (1799); c. 10, 2 STAT. 9 (1800); 30 STAT. 739 (1898); 37 STAT. 630 (1912); 42 STAT. 361 (1922) (the last two statutes pertained to the prohibition of the exportation of coal and other war materials). In all of these acts a wide latitude of discretion was granted to the President without restrictions of narrow and definite standards. For an exhaustive record of legislation, presented in a chronological order, see HART, THE ORDINANCE-MAKING POWER OF THE PRESIDENT (1925) 69 *et seq.;* COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927) 15.

[7] Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106 (1915); Burnet v. Brooks, 288 U. S. 378, 396, 53 Sup. Ct. 457 (1933).

[8] Had the Constitution not mentioned them they would have been implied as a matter of course. To acquire territory by discovery and occupation, to expel undesirable aliens, and to make such international agreements as do not constitute treaties in the Constitutional sense, are likewise powers not expressly granted to the Federal Government, but are, nevertheless, an inalienable part thereof. Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80 (1890); Fong Yue Ting v. United States, 149 U. S. 698, 705, *et seq.*, 13 Sup. Ct. 1016 (1893); Altman & Co. v. United States, 224 U. S. 583, 32 Sup. Ct. 593 (1911).

[9] Even before the adoption of the Declaration of Independence, the Continental Congress had already exercised powers of war and peace, and raised an army and created a navy. 1 WILSON, HISTORY OF THE AMERICAN PEOPLE (1902) 193–201.

[10] "The President is the sole organ of the nation in its external relations and its sole representative with foreign nations," statement by Marshall before the House of Representatives. ANNALS, 6TH CONG. COL. 613 (1800).

reaching and of the greatest magnitude, the utmost caution and secrecy must often be exercised.[11] On certain occasions, sudden decision and unfettered discretion are unequivocally essential. Neither Congress nor any of its working groups can cope with these significant problems as efficiently as the President with his corps of adroit and confidential advisers. Large bodies move slowly and cannot easily adapt themselves to rapidly changing conditions; nor can they possess the intimate knowledge of important developments possessed by the responsible individual negotiator. Hence, in foreign affairs, the Chief Executive must be given unmitigated freedom of action.[12] To hold otherwise would raise insuperable obstacles in the way of the proper exercise of government.

The fear is expressed by some [13] that if the principle of individual negotiation is applied broadly it might destroy Constitutionalism and popular sovereignty with a few strokes of the pen. However, this objection is groundless, if the said powers of negotiation are subordinated to the provisions of the Constitution applicable thereto. The President alone may negotiate a treaty, but the Constitution requires its ratification by the Senate. Without such ratification the treaty is of no effect. Likewise, the power to lay an embargo may be exercised by the President only after the requisite Congressional authority has been granted. Thus, the fear that such powers in the hands of the Executive are conducive to autocracy and dictatorship, is devoid of truth and reason. An unbroken line of precedents disproves this contention. An impressive array of kindred legislation has been enacted during the past century and a half without a sound of judicial protest.[14] Neither was our democratic system of government found to have been adversely affected thereby.

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[11] When Washington was requested to lay before the House of Representatives the documents relating to the negotiation of the Jay treaty, he expressed his refusal as follows: "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and * * * a full disclosure of all the measures, demands, or eventual concessions which have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations * * *. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members." 1 MESSAGES AND PAPERS OF THE PRESIDENT (1895) 194.

[12] Mr. Justice Cardozo, in his dissenting opinion, said: "There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee the developments of tomorrow in their nearly infinite variety. In the complex life of today, the business of government could not go on without the delegation in greater or lesser degree, of the power to adapt the rule to the swiftly moving facts". Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. 837 (1935).

[13] J. D. HILL, PRESENT PROBLEMS IN FOREIGN POLICY (1919) 163.

[14] The field of legislative delegation may be conveniently classified into four major groups: The period between 1789–1815 witnessed a limited grant of discretionary power except in connection with the problem of protecting the neutral commerce from French decrees and English orders in Council; from 1815 to the outbreak of the War of Secession in 1861, there were scattered but

While sustaining the Joint Resolution, the Court followed the line of least resistance by basing its decision on a principle which has never been questioned by judicial authority, namely, the plenary and exclusive power of the President in the negotiation of international affairs. But this overcaution was superfluous. It was held in *The Aurora* v. *United States*,[15] that it was competent for Congress to make the revival of a prior act dependent on the President's determination of certain facts which, when ascertained, he shall declare by proclamation.

In *Field* v. *Clark*,[16] the Court upheld a statute which made the suspension of an act contingent upon the finding of certain facts by the President. In its opinion the Court stated that the statute did not "in any real sense, invest the President with the power of legislation" for "he was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect".

In *Buttfield* v. *Stranahan*,[17] the Court also sustained a statute, which conferred upon the Secretary of the Treasury the power to establish, upon the recommendation of a board of experts "uniform standards of purity, quality, and fitness for consumption of all kinds of tea imported into the United States".

In another noteworthy case the Court sustained the authority given to the President by the Trading With the Enemy Act to dispose of enemy property "in the light of facts and conditions arising in the progress of war".[18] The same policy moved the Court to likewise uphold the act authorizing the Radio Commission to assign wave lengths to various stations "as public convenience, interest, or necessity requires".[19]

The foregoing decisions, each one an invaluable signpost on the road of progressive judicial construction,[20] afford adequate Constitutional sanction for the Joint Resolution attacked in the instant case. For it, too, lays down the general policy of Congress, the establish-

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not frequent delegations; during the period of the War and Reconstruction, from 1861 to 1875, rule-making powers of great importance were delegated to the President; from 1875 to 1917, there were delegations, but none centered around any central problem as in times of emergency; but the period of 1917–1918 witnessed an avalanche of delegated powers. From the above we may deduce that delegation loomed largest during periods of actual and commercial warfare. See HART, *loc. cit. supra* note 6.

[15] 7 Cranch 382, 388, 3 L. ed. 378 (U. S. 1813) (Non-Intercourse Act).

[16] 143 U. S. 649, 683, 12 Sup. Ct. 495, 501 (1892) (Reciprocal Trade Act).

[17] 192 U. S. 470, 496, 24 Sup. Ct. 349, 352 (1904).

[18] United States v. Chemical Foundation, 272 U. S. 1, 12, 47 Sup. Ct. 1, 5 (1926).

[19] Federal Radio Commission v. Nelson Brothers Co., 289 U. S. 266, 279, 53 Sup. Ct. 627 (1933).

[20] "The Constitution of the United States is not a mere lawyer's document; it is a vehicle of life, and its spirit is always the spirit of the age. As the life of the nation changes, so must the interpretation of the document which contains it change * * * to be determined not only by the original intention of those who drew the paper, but by the exigencies and new aspect of life itself". WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1921) 69.

ment of peace among those engaged in armed conflict in the Chaco, as a standard of guidance for the President in his ascertainment of fact and proclamation thereof. Hence, the act is also sustainable in accordance with the doctrine of *stare decisis*.

A. F.

CONTRACTS—IMPLIED CONDITION—ATTORNEY'S FEES.—Plaintiff rented a talking-picture machine to defendant for use in the latter's theatre for a period of ten years at a fixed rental, the entire sum to be paid during the first two years. No provision was made for the termination of liability for the agreed compensation in the event of the destruction of the theatre. The defendant could assign this contract, which in fact he did, provided he remained liable as a guarantor. The contract further provided for recovery of attorney's fees incurred by plaintiff in collection of rent. Approximately seven months after the start of the contract period a fire destroyed the premises but left uninjured the equipment. Upon the request of the defendant's assignees the plaintiff removed the machine from the theatre ruins and has held it for defendant's use. In an action for rent the plaintiff recovered the entire balance of the consideration for the ten-year period plus an arbitrary sum of five hundred dollars for attorney's fees. Defendant appealed on the ground that the continued existence of the theatre during the term of the agreement was an implied condition to his liability and that the destruction of the theatre and the voluntary removal and retention of the apparatus by the plaintiff ended all liability. *Held,* affirmed, in part. No condition will be implied where such a condition might have been provided against in the contract.[1] The value of attorney's fees, however, in absence of stated amount in contract, must be recovered on a *quantum meruit* basis, and the lower court was in error in granting an arbitrary figure. *General Talking Pictures Corporation* v. *Rinas,* 248 App. Div. 164, 288 N. Y. Supp. 266 (1st Dept. 1936).

Subsequent or intervening impossibility of performance, as a defense, should be clearly distinguished from impossibility arising at the time the contract is made, for in the latter instance the contract may be avoided in some cases on the ground of lack of consideration, if the consideration is obviously and on the face of the contract impossible or in other cases on the ground of mutual mistake of fact.[2] It is with the former problem that we are now concerned. The general rule is that a contracting party is bound by the unconditional promise he has made even though performance becomes impossible by reason

[1] Harmony v. Bingham, 12 N. Y. 99 (1854).
[2] 1916 F. L. R. A. 10; Beebe v. Johnson, 19 Wend. 500 (N. Y. 1838).