

Executive Powers

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EXECUTIVE POWERS.

The machinery enforcing the National Industrial Recovery Act has been stopped several times by federal courts ruling adversely in regard to the constitutionality of various provisions of the Act. A recent example is found in the case of *Panama Refining Co. v. Ryan*.¹ On its face, the suit purports to avoid restraint on transportation of oil; the essential problem, however, is neither regulation of interstate and foreign commerce nor conservation of natural resources, but resolves itself into the vital question of the nature of executive powers.

Generically, the *Panama* case is but another phase of the problem of sovereignty. Concepts of political sovereignty have altered profoundly with the passage of historic eras.² Whereas it is not at all difficult to envision a psychological and political coup in the infancy of this nation creating Washington George the First of America, we are nevertheless constrained to accept the facts of successive federalism, unionism and nationalism in our political life. The serial metamorphoses to which the American concept of sovereignty has been subject have in no manner worked a derogation of the principles that "sovereignty is divisible, but independence is not" and that "sovereignty resides in the community."

The entire scheme of evolving nationalism from 1793 to the present demonstrates the inescapable necessity of unified government for certain defined, administrative purposes. This is merely a cyclic repetition in history of the progress of sovereignty. It is likewise a matter of delegated powers, yielded primarily by the community to a state, and secondarily from the people and states to the national government. Delegation implies a right of control or resumption of authority. It is one thing to delegate powers; it is quite another to surrender powers. Surrender implies a total and absolute relinquishment—a consummated delivery of authority. Inherent in the Constitution is the fundamental separation of governmental powers that operates to check and prevent arbitrary usurpation of authority.

That delegation of powers and compulsion of conduct thereby is improper *per se* is reducible to an absurdity.³ However, on the basis of experience and reason, delegation of powers is justifiable only under well-defined conditions subject to express limitations, restraint and review. The current industrial and social revolution carries with it the implication that basic concepts of government may suffer assault;⁴ that social excitement and the stress of economic

¹— U. S. —, 55 Sup. Ct. 241 (1935).

²"The conceptions of sovereignty which we inherit are derived from the primitive system of personal allegiances. That is why the conception of sovereignty has become increasingly confused as modern civilization has become more complex." LIPPMANN, A PREFACE TO MORALS (1929) 265.

³ (1934) 8 ST. JOHN'S L. REV. 400.

⁴"The National Recovery Act and its Codes are advanced industrial legislation and may be viewed as a current on which the Ship of State rides between

circumstance may tend to obscure reason; and that emergency may lend a practical substantiality to the whim and caprice of expedience that overshadows theoretical considerations of law and constitutionality. The *Panama* case is an instance in which the vigilance of the Supreme Court has elevated principle above expedience.

The national executive derives his powers either from the Constitution⁵ or from acts of Congress. All executive action must be justified on one or the other ground. "It is not enough that the action in question is not forbidden by a Statute or by the Constitution."⁶ Congress may empower the executive to act and to make rules and regulations in furtherance of such conduct empowered by the Congress; but the executive must not alter, restrict or enlarge the act.⁷ A writ of injunction will not issue to restrain the President from carrying into execution an act of Congress alleged to be unconstitutional;⁸ nor will mandamus issue to compel him to perform a discretionary act.⁹ The President, however, has no law-making power. Delegation of power by the Congress to the executive must be specific and particular to be valid.

The nearest approach to arbitrary sovereign power sanctioned under our theory of government is found in the executive's right to issue proclamations. Such authority must evince some connection, however tenuous, with an act of Congress or "the duty to take care that the laws be faithfully executed." A proclamation is not an assumption of legislative power.¹⁰

There are certain ill-defined peculiarities of executive behavior, attributable to circumstance and personality, that may be glossed over on occasion. Thus, the President may derive implied authority from a course of long-continued conduct, known to and acquiesced in by Congress, to do an act without express statutory authorization.¹¹ In time of war, panic, social unrest and international adventure, the President may undertake to do certain acts that achieve sanction.

Under the Embargo Acts, President Jefferson issued a proclamation to local officers closing American ports to named classes of shipping. A federal court held the Embargo Act of April 25, 1808, to be unconstitutional.¹² Thereafter, President Jefferson issued to collectors of ports letters which, in substance and effect, commanded

the Scylla of imperial industrialism and the Charybdis of dictatorial communism." *Id.* at 416.

⁵ U. S. CONST. Art. II.

⁶ *United States v. Western Union Telegraph Co.*, 272 Fed. 311 (S. D. N. Y. 1921).

⁷ *In re Temtor Corn and Fruit Products Co.*, 299 Fed. 326 (E. D. Mo. 1924).

⁸ *Mississippi v. Johnson*, 4 Wall. 475 (U. S. 1867).

⁹ *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803).

¹⁰ *Sugar v. United States*, 252 Fed. 74 (C. C. A. 6th, 1918).

¹¹ *United States v. Midwest Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309 (1915).

¹² *Ex parte Gilchrist*, 5 Hughes 1 (1808).

such officers to ignore the ruling of the federal court.¹³ Moreover, Jefferson felt that the acquisition of the Louisiana Territory was unconstitutional and would require an amendment to validate the act of purchase. Adams had similar qualms in regard to Texas.

Theodore Roosevelt on occasion employed tactics verging on arbitrary imperialism. The Venezuela Affair¹⁴ is one example; the Panama Affair¹⁵ is another. Woodrow Wilson, after engaging in diplomatic encounters with European experts came home with a "League of Nations" that the country did not want.¹⁶

The Supreme Court in the *Panama* case indicates that the President may wield neither the Big Stick nor the Olive Branch without let or hindrance; it would seem that there must be a standard, a criterion, a specific, guiding policy under which the executive is required to make findings before manipulating the Stick or the Branch.

When the Congress declares a policy, it may delegate powers to executive officials to achieve the practical realization of affairs under such policy. The executive may not proceed by mere whim and license to attain the desirable end; and this is true regardless of high purpose and motive. The philosophy of Jefferson in enforcing the Embargo Acts must be interpreted with the knowledge that he lost one-half of his personal income from tobacco crops by such enforcement;¹⁷ the act was declaratory against his personal interest; but nobility of motive cannot displace the requirement of lawful authority. Where motive alone is the basis of executive action, such conduct becomes purely arbitrary and dictatorial under the Constitution.

Surely the National Industrial Recovery Act and its Codes were conceived in a high and beneficial purpose. The President has been delegated with powers¹⁸ to conserve a valuable natural resource¹⁹ and to regulate commerce in regard thereto under Section 9 (c).

¹³ 1 BEARD AND BEARD, *RISE OF AMERICAN CIVILIZATION* (1930) at 408; 1 WARREN, *SUPREME COURT IN UNITED STATES HISTORY* (1932) at 316 *et seq.*

¹⁴ 2 BEARD AND BEARD, *supra*, at 365.

¹⁵ "To make a long story short, with the connivance of Roosevelt a revolution was staged in Panama; the province seceded; American war vessels prevented Colombian troops from landing to quell it. We recognized the new nation of Panama almost overnight, and made a treaty with her by which we leased the 'Canal Zone' in perpetuity." ADAMS, *THE EPIC OF AMERICA* (1931) at 357.

¹⁶ 2 BEARD AND BEARD, *supra* note 13, at 654-658.

¹⁷ DODD, *STATESMEN OF THE OLD SOUTH* (1929) at 61-65.

¹⁸ "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this section shall be punishable by a fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both." N. I. R. A., Public. No. 67, 73d Cong., H. R. 5755, tit. I, 9 (c).

¹⁹ Ickes, *After the Oil Deluge, What Price Gasoline?* (1935) 207 SATURDAY EVENING POST 33, at 5.

The Supreme Court finds that motive rather than mode of enforcement is to guide the President under such section. He is given unfettered discretion to act in accordance with his belief concerning the best course. There is no express standard, no specific and particular criterion governing his determinations; there is no requirement of findings by the executive as a condition precedent to action; the guiding policy under which he is to act is vague and altogether too general in scope. The requisite that executive action within the pattern of a declared Congressional policy must be susceptible of judicial review is not met; no tangible or intangible framework of policy on which a court may operate is distinguishable.

"New Dealers," exercised over the curtailment of Presidential authority, might urge that the rule of expediency supersedes the rule of basic principle. The Supreme Court has held otherwise, Justice Cardozo dissenting. The problem of enforcement of the Recovery Act²⁰ resolves itself into Constitutional questions rather than into programs of expediency. The difficulty of enforcement has loomed as an obvious problem for solution; it will continue so to loom. There have been numerous obstacles in the path of such enforcement; some have been on a constitutional basis. The *Panama* case has raised and solved the important issue of executive powers delegated by the Congress. If, by subtle stages, governmental sovereignty may be converted into governmental tyranny and executive pronouncement into dictatorial and arbitrary manifesto, a return to fundamental concepts of American government is essential. The *Panama* case, therefore, cuts deeper into the core of American political theory than would appear at first blush.

EMIL F. KOCH.

JUDICIAL INTERPRETATION AND DETERMINATION OF SECTION 7A OF THE N. I. R. A.

Section 7 (a) of the N. I. R. A.¹ and code provisions relating to hours and wages, constitute the primary contributions of the Recovery Act to labor law. Prior to its enactment the labor unions were slowly but surely sinking into stagnation.² Its enactment was hailed by labor as its resurrection.³ It guaranteed labor free reign

²⁰ "President Roosevelt has said: 'All employers in each trade now band themselves faithfully in these modern guilds.' It will be interesting and instructive to note the construction which the courts will put (or be forced to put) on the words 'all' and 'faithfully' when applying them to powerful industrial units." (1934) 8 ST. JOHN'S L. REV. 406.

¹ 48 STAT. 198, 15 U. S. C. A. §707 A (1933).

² NEW REPUBLIC, Jan. 3, 1934, at 210, 211.

³ TODAY, Feb. 10, 1934, at 3.