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THE HOT OIL CASES

SIDNEY E. MCCLELLAN*

The well known maxim "Delegata Protestas non potest delegari" which emerged from the legal thoughts of Edward Coke has been no more profoundly enunciated than in a recent decision of the United States Supreme Court.

This decision, because it is the first to declare unconstitutional any provision of the so-called "New Deal" legislation, should be carefully analyzed so as to determine its true legal significance.

The Facts of the Case

Section 9 (c) of Title I of the National Industrial Recovery Act of June 16, 1933, provides as follows:

"Sec. 9. * * * *"

"(c) 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to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of a State.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 subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

On July 11, 1933, the President, by Executive Order, prohibited such transportation, basing his action on Section 9 (c). And by subsequent executive order authorized the Secretary of the Interior to exercise the powers vested in the President by virtue of said section. Thereupon, the Secretary of the Interior issued various regulations to carry out the President's orders.

In both suits, the plaintiffs, oil refiners and producers, sued to restrain the defendant Federal officials from enforcing the federal restrictions and regulations imposed upon the production and disposition of oil, attacking section 9 (c) as an unconstitutional delegation to the President of legislative power. On appeal to the Supreme Court of the United States, that Court by an eight to one decision, in an opinion written by Chief Justice Hughes, held that there was such an unconstitutional delegation of legislative power and remanded the causes to the district court with direction to grant a permanent injunction.

Is Delegation of Power Unconstitutional

Nowhere within the four corners of the Constitution of the United States is there to be found an express provision that delegation of legislative power by Congress is unconstitutional. Yet since the inauguration of that memorable document, the Supreme Court of the United States has read in such a prohibition. Such pronouncement by this court is a reiteration of that

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1 Of the Muncie Bar.
3 H. E. Willis, Introduction to Anglo-American Law, p. 158.
principle of law first promulgated by Lord Coke that a delegated power cannot be delegated. To a certain degree the prohibition of delegating delegated powers and the doctrine of separation of powers are synonymous. However the former is broader than the latter, as the doctrine of separation of powers is confined to a delegation by one department of government to another department, while the prohibition against delegating delegated power goes farther and prohibits not only delegation to another department but also to any person, board or commission.

In the instant cases, both prohibitions are involved and the Chief Justice acknowledges them when he says,\(^5\) "The Constitution provides that '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' (Art. I, sec. 1). And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers (art. I, sec. 8, par. 18). The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."

There is no such thing as a constitutional delegation of legislative power by Congress for, in fact, any delegation of power by that body is unconstitutional. However, the Supreme Court, not unmindful that certain legislation may necessitate a study of varied and complex facts, has upheld certain legislation which laid down general rules or established a standard, while leaving to select instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislation is to apply. In Interstate Commerce Commission v. Goodrich, the Court said,\(^6\) "The Congress may not delegate its purely legislative power to a commission, but having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

**Was a Standard Set Up**

This is the vital difference of opinion between the majority of the court and the dissenting judge, Justice Cardozo. For as Justice Cardozo says,\(^7\) "My point of difference with the majority of the court is narrow. I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed. * * * What the standard is becomes the pivotal inquiry."

To determine with any degree of accuracy whether or not this decision is in conformity with other decisions by this court, a review of similar cases is necessitated.

The first case to come before the Court was that of The Cargo of the Brig Aurora Burnsides, claimant v. the United States.\(^8\) The Cargo of the Aurora Burnsides had been condemned as having been imported from Great Britain in violation of the Non-intercourse Act of March 1, 1809.\(^9\) This act expired on May 1, 1810, when Congress passed another act\(^10\) which provided that if France or Great Britain "shall * * * so revoke or modify

\(^5\) 79 L. ed. 223, 232.
\(^6\) 224 U. S. 194, 214.
\(^7\) 79 L. ed. 223, 239.
\(^8\) (1813), 7 Cranch 382, 3 L. ed. 378.
\(^9\) 2 Stat. 528.
\(^10\) 2 Stat. 605, 606.
her edicts as they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nations shall not within 3 months thereafter so revoke or modify her edicts in like manner," then within 3 months from the proclamation, the act of 1809 "shall have full force and effect." The President issued his proclamation declaring France had so revoked or modified her edicts, and it was contended that the provisions of the act of 1809 had been revived. The Court held that it was competent for Congress to make the revival of an act depend upon the proclamation of the President showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified.

In Field v. Clark, the Court sustained Section 3 of the Act of October 1, 1890, which provided "that with a view to secure reciprocal trade with countries" producing certain articles, whenever and so often as the President shall be satisfied that the government of any country producing any of such articles, imposes duties and exactions upon these certain articles produced by the United States which, in view of the free list established by the act, the President shall deem to be unequal and unreasonable, he shall have the power and it shall be his duty to suspend the free introduction of these articles by proclamation and during that suspension the duties specified by the section shall be levied. The Court said that the legislative power was exercised when Congress declared that suspension should take effect upon a named contingency and the President was merely the agent of the law-making body to ascertain the event upon which the expressed will of Congress was to take effect.

In both the preceding cases, legislation upon a named contingency was involved rather than legislation setting up a standard, but the same principles of constitutional law are applicable.

In Buttfield v. Stranahan, section 3 of the Act of March 2, 1897, was upheld, which authorized the Secretary of the Treasury, upon the recommendation of a board of experts, to establish uniform standards of purity, quality, and fitness for the consumption of all kinds of tea imported into the United States. The Court said that Congress fixed a primary standard and committed to the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in section 1 of the Act which was "to exclude the lowest grades of tea whether demonstrable of inferior purity, or unfit for consumption, or presumably so because of their quality."

In Union Bridge Co. v. United States and Monongahela Bridge Co. v. United States, the Court upheld section 18 of the Act of March 3, 1899, which gave to the Secretary of War the authority to determine whether bridges and other structures constituted unreasonable obstructions to navigation and to remove such obstruction. The court said that Congress declared a general rule and imposed on the Secretary of War the duty of ascertaining what particular cases came within the rule.

In numerous decisions, the court has upheld the legislation creating the Interstate Commerce Commission and the authority vested in that body. The court has found the standard set up and the policy declared to be "the
enforcement of reasonable rates, the prevention of undue preferences and unjust discriminations, and the requirement of suitable facilities” for transportation in interstate commerce. As was said in J. W. Hampton, Jr. & Company v. United States,19 “One of the Great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates Congress may provide a Commission * * * to fix those rates * * * all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory.”

In Radio Commission v. Nelson Bros.20 the Radio Act of 192721 was upheld which declared that all the people of the various zones established by the act are entitled to equality of radio broadcasting service, both of transmission and reception and in order to provide such equality, authority was conferred upon the Federal Radio Commission to make a fair and equitable allocation of licenses, wave-lengths, time for operation, and station power to each of the States according to population and to grant or refuse licenses and change the hours and powers of the various stations whenever necessary or proper. The Court found the standard here to be one of “equality of radio broadcasting service both of transmission and reception.”

In J. W. Hampton, Jr. & Co. v. United States,22 the so-called “flexible tariff provision” of the Act of September 21, 1922,23 and the authority it conferred upon the President was upheld. Section 315 (a) of this act provided “That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended,” the President was empowered to increase or decrease traffic duties so as to equalize the differences between the costs of production at home and abroad, provided that the increase or decrease of such rates of duty did not exceed 60 per centum of the rates specified in title 1 of the act. In sustaining this legislation, the Court said,24 “It seems clear what Congress intended by section 315. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. Because of the difficulty in practically determining what the difference is * * * Congress adopted in section 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and make the adjustments necessary to conform the duties to the standard underlying that policy and plan.”

The failure of the Court to seize upon the Hampton Case as a judicial precedent for the present cases will be surprising to many law writers and commentators. For, many who have felt that the Supreme Court would hold

19 (1928), 72 L. ed. 624, 630.
20 (1933), 289 U. S. 266, 77 L. ed. 1166.
21 44 Stat. 1162, 1163.
22 (1928), 276 U. S. 394, 72 L. Ed. 624.
23 42 Stat. 858.
24 (1928), 72 L. ed. 624, 628.
that there was no delegation of legislative power to the President by the National Industrial Recovery Act found their support in this decision.

From a consideration of the judicial precedents as set down by this same court, it can readily be seen that the distinction between the present legislation and that which has been heretofore upheld, is very thin, if not negligible. Which causes this writer to conclude that the court could just as readily have declared Section 9 (c) constitutional, as not to do so.

However, the majority of the court, speaking through Chief Justice Hughes could not in any way find within the act a standard set up for the guidance of the President. The Chief Justice reasons as follows,25 "Section 9 (c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of State legislatures or State officers. It leaves to the States and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis, or extent, of the State's limitation of production. Section 9 (c) does not state whether, or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in Section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down as he may see fit."

While Justice Cardozo, writing a dissenting opinion thinks that he found a standard, for he says,26 "As to the nature of the act which the President is authorized to perform, there is no need for implication. That at least is definite beyond the possibility of challenge. He may 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 by any State law or valid regulation or order prescribed thereunder. He is not left to roam at will among all the possible subjects of interstate transportation, picking and choosing as he pleases. I am far from asserting now that delegation would be valid if accompanied by all that latitude of choice. In the laying of his interdict he is to confine himself to a particular commodity, and to that commodity when produced or withdrawn from storage in contravention of the policy and statutes of the States. He has choice, though within limits, as to the occasion, but none whatever as to the means. The means have been prescribed by Congress."

Motive Is Immaterial

The Chief Justice, speaking with diplomacy and tact befitting his public training, explicitly points out that the good motives and integrity of the President, as grantee of the delegated power, are not in issue. For in his opinion, he says,27 "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute. While

25 79 L. ed. 223, 229.
26 79 L. ed. 223, 239.
27 79 L. ed. 223, 231.
the present controversy relates to a delegation to the President, the basic question has a much wider application."

Warning, Perhaps

From a careful reading of the majority opinion, the writer is induced to believe that a fear of dictatorship lurking in the minds of the jurists, rather than the former expressions of the Court, was the primary motivation behind the result reached. To illustrate, in the majority opinion are the following statements, "If the Congress can make a grant of legislative authority of the sort attempted by Section 9 (c) we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. And if that legislative power may be given to the President or other grantee, it would seem to follow that such power may similarly be conferred with respect to the transportation of other commodities in interstate commerce with or without reference to State action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it as the person, or board or commission so chosen may think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. If section 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. Instead of performing its lawmaking function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

It is indeed gratifying to find eight men who in the face of an overwhelming public opinion to concentrate all power in the President, have the courage and the fortitude to declare that our present form of government shall exist.

Significance of the Case

It seems quite probable that this case will serve as a guide to the Supreme Court in passing upon the validity of other sections of the National Industrial Recovery Act giving to the President the control and regulation of other businesses. As these other sections are as void of standards, if not more so, than section 9 (c) it would seem a fair inference that the Court will align itself in the same manner as in the instant case.

Of particular significance is the failure of the Court to find any standard set up by Section 1 which is the declaration of policy of the act. Many

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28 79 L. ed. 223, 231.
29 79 L. ed. 223, 232.
30 79 L. ed. 223, 232.
31 79 L. ed. 223, 237.
32 79 L. ed. 223, 237.
33 "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove ob-
law writers and commentators have urged that in this section alone the Court would find a standard sufficient to support all of the act. But the Chief Justice quickly nullified this notion when he said, "The general policy declared is to remove obstructions to the free flow of interstate and foreign commerce." As to production, the section lays down no policy of limitation. It favors the fullest possible utilization of the present productive capacity of industries. It speaks, parenthetically, of a possible temporary restriction of production, but of what, or in what circumstances, it gives no suggestion. The section also speaks in general terms of the conservation of natural resources but it prescribes no policy for the achievement of that end. It is manifest that this broad outline is simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections."

It is indeed unfortunate if the entire National Industrial Recovery Act is to fall because of this one constitutional obstruction. For the act and the regulations thereunder have called forth many other and perhaps more important constitutional questions upon which all people would like to have the Supreme Court pass judgment. Modern business would like to know whether or not Congress can regulate the hours and wages of men and women working in private industry, whether or not Congress can invalidate "yellow dog" contracts, and whether or not Congress can fix and regulate the prices of private production and regulate child labor? Perhaps, the defect, brought to light in this case, can be done away with by Congress setting up a standard which will satisfy the scrutiny of the Supreme Court and yet not interfere with the practical workings of the President's regulations. If so, well and good, but that still leaves unanswered these more important questions.

Is the Result Justified

It is the opinion of the writer that in the light of judicial precedents, the result of this case is not justified, but that from a practical standpoint, the decision should not be questioned. Manifestly, the Supreme Court has considerably stretched its sound judgment in various cases where it has discovered within the body of an act a standard set up. For the writer believes that in those cases, the so-called standard was nothing more than a declaration by the Congress as to why it had delegated a certain power rather than a rule for the guidance of the grantee of the power. Justice Cardozo in the dissenting opinion says, "I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed," and yet he and the Court, in other cases, have resorted to implication and inferences to find this reasonably clear standard.

Our Federal Constitution divides the governmental power into three branches giving to each certain specified powers, and until the people of our nation deem it advisable to change that system of government, it would seem best, as far as practical, to maintain this division of powers.

34 79 L. ed. 223, 230.
35 79 L. ed. 223, 239.