AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers/Presidential Power to Execute the Law

*Conrad C.M. Arensberg*, **Official Opinion No. 78-15 on Duty to Defend** (PA 1978)[[1]](#footnote-1)

*In the spring of 1978, the Pennsylvania state legislature passed a bill that compensated for personal property losses for victims of the Johnstown flood of 1977 in which several dams failed and dozens of people were killed. The attorney general advised the legislature that the proposed legislation violated a provision of the state constitution that prohibited state appropriations for charitable purposes except in a set of specified circumstances. The governor declined to sign the bill, and it passed into law without his signature. The state attorney general then issued an opinion to the state secretary of public welfare stating that the law was unconstitutional and no state funds should be spent in pursuance of its terms. Moreover, the attorney general announced that he would not defend the law in court given its clear unconstitutionality. His opinion was superseded a year later when a new attorney general decided that the constitutionality of the statute should be resolved in the courts and that the state should disburse funds in compliance with the law until it was declared invalid by the courts. The Pennsylvania courts did not rule on the validity of the statute.*

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It is our opinion that the grant provided by Act 1978-51 clearly violates Article III, § 29 of the Pennsylvania Constitution as it has been interpreted by the courts of Pennsylvania. Recompensing individuals who have suffered a property loss in a flood is not one of the allowable purposes for which a charitable, educational or benevolent grant may be made under the Constitution. . . .

. . . . The Supreme Court has . . . been careful to emphasize that merely because a statute can be characterized as “humanitarian” or to the benefit of all persons, it does not necessarily satisfy the constitutional requirements of a public function or purpose. Rather, the decision in each case must rest upon the determination of whether the public receives or will receive a corresponding benefit from the payment of public funds.

Applying these principles to the Act of April 28, 1978 we find that the grant program does not meet the public benefits test of the cases construing Article III, § 29. The proposed program is benevolent because it is a recognition by the State of individual loss and an attempt at individual recompense. The program does not exclusively benefit the poor or unemployed; anyone, regardless of financial status, can receive a grant for property damaged. The expanding notion of public duty and function cannot justify a program that does not exclusively benefit the poor and unemployed. Accordingly, there is no corresponding public benefit to be derived from the payment of these funds. This program is strictly a pay-out from the State Treasury to an individual, and by no stretching of the cases on point can such an individual aid program be justified.

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After the great flood of June, 1972 . . . the Legislature, recognizing the extensive property damage suffered by many of the citizens of Pennsylvania, sought to compensate them through the payment of direct grants. Realizing the constitutional impediments to such a program, the Legislature resolved to submit a constitutional amendment to the electorate [authorizing payments to those affected by the “Great Storm or Flood of September, 1971 or of June, 1972”] . . . .

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Thus, we conclude that . . . the Legislature did not present to the voters the question of whether they wanted to continue and expand the state flood relief grants to include the Johnstown flood victims. Accordingly, Act 1978-51 does not escape invalidity under Article III, § 29. . . .

The final question is what effect is to be given to our conclusion that Act 1978-51 is not sanctioned by the Constitution. Both the Auditor General and State Treasurer have observed that only the judicial branch of government can declare a statute unconstitutional. Further concern is expressed in that the Attorney General has a duty to represent the departments of the Commonwealth, and that he must do his utmost to argue and sustain an enactment of the General Assembly. . . . Finally, it is pointed out that neither of the fiscal officers is bound to an opinion of the Attorney General regarding constitutionality.

We appreciate the thoughts and opinions of the fiscal officers. We are cognizant of the fact that only the judiciary can declare a statute unconstitutional. On the other hand, we are bound by our oath to support, obey and defend the Constitution of Pennsylvania and our duty to advise state agencies of their responsibilities under law. This is not antithetical to our duty to represent such agencies because we will represent them in any litigation arising from our opinions. This is a position which has been taken by Attorneys General goring back to the early days of our 1874 Constitution. . . . In *Commonwealth ex rel. Woodruff v. Lewis* (PA 1925), the court recognized the right of an officer of the Commonwealth not to follow a law he believed was unconstitutional so that a proper suit could be brought to determine its validity.

Even those Attorneys General who took a more conservative view, such as Attorney General Bell, advised his then-client, the Auditor General, that while he would not tell him that a statute was unconstitutional, if the Auditor General had “substantial doubt” of the constitutionality of the act in question, he should decline to comply with the act so that the matter could be litigated.

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. . . . In this particular case, the *only way* that the Attorney General can “cause to be initiated an action in the courts of the Commonwealth” is to advise the Department of Public Welfare that his conclusion precludes the Department from paying the grants. Those individuals who have claims and believe that the statute requires them to be paid will then have the right to commence actions against the Commonwealth to have them paid. The result of this opinion will be the fulfillment of the suggestion of the Commonwealth Court. . . . There is no action that we ourselves could initiate to test the case.

Our action in issuing this advice does not encroach on the judicial function, because it does not declare the statute to be unconstitutional. It rather acts as the catalyst to bring the issue before the courts when, in fulfilling our responsibilities under the Administrative Code, we conclude that a state agency should not administer a certain statute because it is unconstitutional. This view was perhaps best summarized by then Attorney General Packel in his brief to the Supreme Court of Pennsylvania in *Hetherington v. McHale* (1974):

The advice of unconstitutionality given to the official does not suspend or abrogate the statute. It tells the official that, unless otherwise ordered by a court he may disregard a statutory provision. Such an opinion is in no way binding upon the public. The law is still on the books. . . . [A]ny aggrieved person has a right to go to court to test the propriety of the official’s conduct. It si for this reason that the opinion of the Attorney General refers to the obligation of the public official to disregard a provision believed to be unconstitutional and does not make a bald declaration of unconstitutionality.

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1. Excerpt taken from Conrad C.M. Arensberg, “Official Opinion No. 78-15” *Op. A.G. Pa*. 45 (1978) [↑](#footnote-ref-1)