AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers

Panama Refining Co. et al. v. Ryan et al., 293 U.S. 388 (1935)

The National Industrial Recovery Act (NIRA) of 1933 was one of the earliest New Deal measures of the Roosevelt administration to respond to the Great Depression. Since "excess production," and thus depressed prices and economic losses, was seen by many to be a central cause of the immediate crisis and a long-term problem with corporate capitalism, the NIRA authorized the creation of industry boards, which were given wide discretion to regulate production, pricing, and other aspects of covered industries.

The production of oil was already heavily regulated by those states that produced it, putatively to protect the state's natural resources but significantly to keep oil prices high and benefit producers. The states were not always very effective in enforcing their production controls, and illegal sales benefited individual producers but drove down prices on oil. Section 9 of the NIRA authorized the president "to prohibit transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order." In July 1933, President Roosevelt issued an order providing for the reporting of oil production and shipment and the applicable state codes so as to enforce Section 9. He followed that up in September by promulgating a "Code of Fair Competition for the Petroleum Industry," which required a federal agency to identify an optimal level of national oil production and to direct that this "required production" was "equitably allocated" among the states, ultimately leading to a production quota to be assigned to each individual person or company engaged in the oil industry.

The Panama Refining Company and a group of oil and gas producers in Texas sued to prevent the government from enforcing the production codes. Among the complaints was the charge that Section 9 of the NIRA, as implemented by the administration, represented an unconstitutional delegation of legislative power to the president. The district court issued an injunction preventing the enforcement of the executive order, but upon appeal the federal circuit court reversed. In an 8-1 decision authored by Chief Justice Hughes, the Supreme Court reversed the circuit court and concluded that the NIRA violated the separation of powers by giving the executive branch legislative authority.

CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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Section 9 (c) is assailed upon the ground that it is an unconstitutional delegation of legislative power. The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose, without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

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 § 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. And disobedience to his order is made a crime punishable by fine and imprisonment.

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It is no answer to insist that deleterious consequences follow the transportation of "hot oil," -- oil exceeding state allowances. The Congress did not prohibit that transportation. The Congress did not undertake to say that the transportation of "hot oil" was injurious. The Congress did not say that transportation of that oil was "unfair competition." The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy. . . .

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. . . 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 the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 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. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess of what the State may allow. If legislative power may thus be vested in the President, or other grantee, as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the State's requirements. That reference simply defines the subject of the prohibition which the President is authorized to enact, or not to enact, as he pleases. 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 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, § 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, § 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. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we

should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

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. . . [A]uthorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, "to fill up the details" under the general provisions made by the legislature. *Wayman* v. *Southard* (1825). . . .

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The applicable considerations were reviewed in *Hampton & Co.* v. *United States*(1928), where the Court dealt with the so-called "flexible tariff provision" of the Act of September 21, 1922, and with the authority which it conferred upon the President. The Court applied the same principle that permitted the Congress to exercise its rate-making power in interstate commerce, and found that a similar provision was justified for the fixing of customs duties; that is, as the Court said, "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority." The Court sustained the provision upon the authority of *Field* v. *Clark* (1892), repeating with approval what was there said, -- that "What the President was required to do was merely in execution of the act of Congress."

Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

If § 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 law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose 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.

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We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, and the Regulations issued by the Secretary of the Interior thereunder, are without constitutional authority.

The decrees of the Circuit Court of Appeals are reversed and the causes are remanded to the District Court with direction to modify its decrees in conformity with this opinion so as to grant permanent injunctions, restraining the defendants from enforcing those orders and regulations.

JUSTICE CARDOZO, dissenting.

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. . . . 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. I deny that such a standard is lacking in respect of the prohibitions permitted by this section when the act with all its reasonable implications is considered as a whole. What the standard is

becomes the pivotal inquiry.

. . . . He has choice, though within limits, as to the occasion, but none whatever as to the means. The means have been prescribed by Congress. There has been no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases. His act being thus defined, what else must he ascertain in order to regulate his discretion and bring the power into play? The answer is not given if we look to § 9 (c) only, but it comes to us by implication from a view of other sections where the standards are defined. The prevailing opinion concedes that a standard will be as effective if imported into § 9 (c) by reasonable implication as if put there in so many words. If we look to the whole structure of the statute, the test is plainly this, that the President is to forbid the transportation of the oil when he believes, in the light of the conditions of the industry as disclosed from time to time, that the prohibition will tend to effectuate the declared policies of the act. . . .

Oil produced or transported in excess of a statutory quota is known in the industry as "hot oil," and the record is replete with evidence as to the effect of such production and transportation upon the economic situation and upon national recovery. A declared policy of Congress in the adoption of the act is "to eliminate unfair competitive practices." Beyond question an unfair competitive practice exists when "hot oil" is transported in interstate commerce with the result that law-abiding dealers must compete with lawbreakers. Here is one of the standards set up in the act to guide the President's discretion. Another declared policy of Congress is "to conserve natural resources." Beyond question the disregard of statutory quotas is wasting the oil fields in Texas and other states, and putting in jeopardy of exhaustion one of the treasures of the nation. All this is developed in the record and in the arguments of counsel for the government with a wealth of illustration. Here is a second standard. Another declared policy of Congress is to "promote the fullest possible utilization of the present productive capacity of industries," and "except as may be temporarily required" to "avoid undue restriction of production." Beyond question prevailing conditions in the oil industry have brought about the need for temporary restriction in order to promote in the long run the fullest productive capacity of business in all its many branches, for the effect of present practices is to diminish that capacity by demoralizing prices and thus increasing unemployment. The ascertainment of these facts at any time or place was a task too intricate and special to be performed by Congress itself through a general enactment in advance of the event. All that Congress could safely do was to declare the act to be done and the policies to be promoted, leaving to the delegate of its power the ascertainment of the shifting facts that would determine the relation between the doing of the act and the attainment of the stated ends. That is what it did. It said to the President in substance: You are to consider whether the transportation of oil in excess of the statutory quotas is offensive to one or more of the policies enumerated in § 1, whether the effect of such conduct is to promote unfair competition or to waste the natural resources or to demoralize prices or to increase unemployment or to reduce the purchasing power of the workers of the nation. If these standards or some of them have been flouted with the result of a substantial obstruction to industrial recovery, you may then by a prohibitory order eradicate the mischief.

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There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section. What can be done under cover of that permission is closely and clearly circumscribed both as to subject matter and occasion. The statute was framed in the shadow of a national disaster. A host of unforeseen contingencies would have to be faced from day to day, and faced with a fullness of understanding unattainable by any one except the man upon the scene. The President was chosen to meet the instant need.

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