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A.J. White Hutton

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## USURPATION OF POLITICAL POWER (An Analysis of the "Steel Seizure" Case)

By

A. J. WHITE HUTTON\*

The fathers declared in sonorous language that there were certain truths held by them "to be self evident," viz., "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Later in the federal Constitution, the preamble in stately language declares:

"We, The People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and to secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Referring to political power, Section 2 of Article I of the Pennsylvania Constitution declares, *inter alia*:

"All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."

Under our federal and state Constitutional systems this power like the Holy Trinity, and ancient Gaul, is divided into three parts. These parts as the repositories of power are in turn designated the legislative, the executive and the judiciary and so consecutively in order named. Fifty years ago, the above observations would have been deemed so obvious and trite as to lay one open to a charge of tediousness—a sort of legal fuddy-duddyism. But not so in these latter days when our State Department has mistaken Chinese Communists for agrarian reformers, and a military situation in a far-off country where our forces have suffered over 120,000 casualties, is classified officially as a "police action."

Moreover, the people of Pennsylvania were so apprehensive and so jealous concerning the delegation of the powers of government to the three branches, that there was inserted in the last section (the 26th) of the Declaration of Rights the following:

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\*A.B., Gettysburg; A.M., Gettysburg; LL.B., Harvard; LL.D., Gettysburg; Professor of Law, Dickinson School of Law, 1902-1951; now Professor Emeritus of Law, special lecturer, Dickinson School of Law; former member Pennsylvania House of Representatives; author of Hutton on Wills in Pennsylvania; member Pennsylvania and Franklin County Bar Associations; member of Advisory Committee, Law of Decedents' Estates and Trusts, Joint State Government Commission of the Commonwealth of Pennsylvania.

"To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and *shall forever remain inviolate.*" (Italics supplied)

These noteworthy stipulations had their origin in the first ten amendments to the federal Constitution. It will be recalled that at the time of the adoption by the states of the Constitution, questions were raised concerning the protection of minority interests and promises were made that such amendments would be presented by Congress to the states. Pennsylvania was so vocal along these lines that one historian has dubbed her as having been "cantankerously democratic." It may also be noted that the Constitution was adopted by a narrow margin in this Commonwealth. A reading of the Federalist Papers shows very plainly in the arguments presented by Hamilton, Jay and Madison that the paramount concern was the exaltation and extension of federal power. It would be interesting if a disobedient and distressed modern political Saul were impelled by his political sins to beseech the Witch of Endor to call up the shades of these political giants of the early days to furnish a forecast of the future.

Those who thumb the pages of the past will enjoy fully the nourishing mental pabulum afforded in the reading of an article published in the May number, 1906, of *The Forum* (predecessor of the *Dickinson Law Review*), entitled: "Declaring Statutes of Congress Void." The writer was Dean William Trickett. The learned dean also wrote a thesis on the same general topic, published in the *North American Review* and characteristically dubbed, "The Great Usurpation." The first two paragraphs of the former article are so pertinent today as to be worthy of quotation in full, as follows:

"Every modern State sets apart a body of men to make the 'laws' and relies for the execution of these laws, on another set of men. This circumstance secures to the latter the power of nullifying the law by refusing to perform the actions necessary to enforce it. The causes for this refusal might be various, e.g., want of sympathy with the ends contemplated by the law, or jealousy of the law-making body, or a belief that the law is inconsistent with the Constitution. If many executive officers were disposed to accept orders from the president or other chief executive officer an intimation from him, openly or secretly, that he did not want the law carried out, would reduce it to ineptitude. Certain executive acts, e.g., those of a marshal or sheriff in execution of the judgment of a court, are performed only in obedience to a court. The court's refusal to honor the act of congress by giving the necessary judgment and issuing the execution, would secure the refusal of these officers to lend assistance to it.

"Now, it is quite evident, that the constitution which separates the legislative from the executive power becomes unworkable if those who wield the latter are unwilling loyally to execute the legislation of the former. Law without enforcement is vain. In the United States, the executive officers, even the highest, have put forth no pretension that they may for any reason, refuse to carry out a statute. The person who is

president when a bill is passed, has a veto upon it, but when, in the forms of the constitution, it becomes law, neither he nor his successors claim the right to deny enforcement to it because, in their opinion, it exceeds the constitutional power of Congress."<sup>1</sup>

Although this acute writer, in his unerring logic of which he was a past master, outlined the matter of political powers so trenchantly yet he apparently did not foresee the possibility of executive authority bluntly refusing to administer a law which Congress had passed over the exercise of veto. It also is a probability that it did not occur to the learned writer that in the course of four and one-half decades executive authority should expand in importance as to maintain *sans* legislative fiat and *sans* the war powers, to have the right of seizure of private property under a plea of implied and inherent executive right as a part of executive constitutional powers. He did consider the hypothesis of the executive determining the constitutionality of a legislative act.

The postulate maintained by the Trickett position was that nowhere in the constitution was there express power conferred on the judiciary to declare an Act of Congress as void. "It is not pretended that the Constitution confers this power on the courts in explicit terms. It bestows on them judicial power, just as it bestows on the president and the various executive officers, high and low, the executive power."

In No. LXXVIII of The Federalist Papers, Alexander Hamilton presented the argument for the implied power of the judiciary to declare a Congressional act as void on the grounds that it violated the provisions of the Constitution. The following is an excerpt from the extended brief:

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon theme is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned

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<sup>1</sup> The Forum was the original legal publication of Dickinson School of Law and the name was changed to Dickinson Law Review beginning with Vol. XIII, the numbering being the continuation of The Forum series.

to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

As lawyers well know since the early case of *Marbury v. Madison*, wherein Marshall, C. J. followed the Hamiltonian doctrine of implied power in the courts on the matter of voiding legislation, this asserted power has been accepted practically without questioning throughout the years.<sup>2</sup>

However, the current interest in the Trickett reasoning lies in the contention against the implied power in the judiciary as that type of reasoning is applied conversely to the executive. In the recent case of *Youngstown Sheet and Tube Co., et al. v. Sawyer*,<sup>3</sup> it was contended for the executive by the Department of Justice that the presidential power to seize the steel mills "should be implied from the aggregate of the powers under Article II of the Constitution." Particular reliance is placed on the provisions which say that "the executive Power shall be vested in a President . . .; that he shall take care that the Laws be faithfully executed; and that he 'shall be Commander in Chief of the Army and Navy of the United States'."<sup>4</sup> The contention was rejected. The conclusion of the Court that the President had no such legal power under any congressional act existing nor under the Constitution was not unanimous and the opinions delivered were diverse and diffuse on both sides.

The opinion of the Court was delivered by Mr. Justice Black. It did not indulge in abstract theory but tersely applied the reasoning (1) there was an absence of any congressional authority, (2) there is no inherent power by virtue of the Constitution. The short opinion thus closes:

"The Founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand."

<sup>2</sup> But see the dissenting opinion of Gibson, J. in *Eakin v. Raub*, 12 S. & R. 330 (1825) which years later was recanted, "by very necessity."

<sup>3</sup> — U.S. — 73 S. Ct. p. 863 (decided June 2, 1952).

<sup>4</sup> Per Black, J.

Five justices concurring assigned various reasons, viz: Frankfurter, Jackson, Burton Clark, Douglas, J. J.

On the contrary Chief Justice Vinson filed a dissenting opinion joined in by Reed and Minton, J. J. The learned writer observes:

"Some members of the Court are of the view that the President is without power to act in time of crisis in the absence of express statutory authorization. Other members of the Court affirm on the basis of their reading of certain statutes. Because we cannot agree that affirmance is proper on any ground, and because of the transcending importance of the questions presented not only in this critical litigation but also to the powers the President and of future Presidents to act in time of crisis, we are compelled to register this dissent."

In the concluding section of the lengthy presentation the Chief Justice thus castigates the opinions in support of affirmation of the order of the district court:

"The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court."

But a study of all the opinions shows a discursive tendency to travel somewhat afield and to resort to the time honored device in the art of debate of setting up the straw men. However, these opinions are commended to the student of Constitutional law for the wealth of case law and historical discussion developed. Nevertheless, it is doubtful whether the principal case contributes the last word to the problem of executive implied powers. The essential fact is that the decision put an end to an arbitrary exercise of executive power in its effect upon property rights. Furthermore, as was sagely remarked by the late Mr. Dooley over a generation ago, the Supreme Court is not unaware of political implications and the election returns. Well nigh half a century ago Charles A. Beard<sup>5</sup> suggested the theory of economic determinism as an explanation of the development of law and constitutional interpretation and demonstrated with forceful plausibility its application to our federal Constitution. The instant case in its results apparently is an illustration of the theory.

Of the seven opinions on the question involved that of Justice Black for the Court is the least vulnerable. Briefly and compactly presented, it disposes of points tersely and with avoidance of protracted argument. In this respect, it is reminiscent of the Holmes' pontifications. It is likewise postulate in type.

Under the circumstances, it was the best suited for disposition of the delicate problem.

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<sup>5</sup> *An Economic Interpretation of the Constitution of the United States*. The MacMillan Company, New York (1913).

On the contrary the minority opinion written by the Chief Justice, concurred in by Justice Reed and Justice Minton, is under necessity an argument at length founded essentially upon the emergency and "extraordinary times." There are six sections of recited facts, precedents and reasoning. The epitome of the presentation appears in the last paragraph of the sixth section as follows:

"... Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court."

If the problem of division of political power was *res integra* and bearing in mind the Trickett reasoning the outcome of this case might have been different. The doctrine that the three powers of government are coordinate and co-equal is well known. But is it in reality true when the judicial branch maintains a right to declare invalid an act of the legislature, which might have been passed unanimously besides receiving executive approval? The Trickett observation was as follows:

"The courts, however, who are a part of the executive machinery of the country, have refused to cooperate in the execution of a law except under the condition that it is, in their opinion, consonant with the Constitution. They do not pretend that they may thus annul it, because they do not agree with Congress with respect to its wisdom or its justice. They say, however, that they are not concluded by the opinion of Congress as to its conformity with the Constitution and that forming their own judgment on this point, they may not merely decline to assist in, but may actually prohibit or penalize the execution of it, should that judgment be adverse."

The court thus becomes recalcitrant to the other coordinate branches of government. However, in the recent *Steel Case*, the majority court, in effect, charges the executive with recalcitrancy in refusing to invoke, at least, in the first instance the Taft-Hartley Act. The minority court, on the contrary, stoutly maintains that Taft-Hartley is irrelevant and that by precedent and authority the executive had inherent power to act, tracing carefully in recital the "extraordinary times" and the emergency involved. Thus the judiciary asserts its power over the executive, a situation not so clearly envisioned by the Trickett thesis. Furthermore, the result is attained, not by unanimity but by a majority vote.

Immediately, following the seizure of the mills, the President sent a special message to Congress apprising that body of what had been done. Likewise, upon the Supreme Court's decision, the mills were turned back to the owners by executive order.

Despite the tremendous agitation and political heat engendered by the steel controversy and the bitterness of speech upon all sides—capital, labor and even the executive, the Court preserved at least an outward calmness of mind and in the various opinions there is practically no evidence of this deep feeling in the whole body politic. With the issues determined by judicial action, the result was promptly accepted by all concerned. This phenomenon of the American way of adjusting legal and political controversies remains, and probably always will, a mystery to many on the continents of Europe and Asia.<sup>6</sup> It will be noted that the instant case does not involve directly the President but the injunctive process prayed for and granted by the District Court was against Secretary of Commerce Sawyer, who in turn was acting under direct executive order. However, the name of the Secretary throughout the seven opinions is conspicuously absent. The proceeding was actually and in stark reality against the executive head of the government. Suppose the executive had paid no attention to the judicial fiat? *Ex parte McCardle*,<sup>7</sup> of our Civil War aftermath, affords an interesting study of judicial caution or to use a writer's more blunt characterization, "flagrant case of timidity."<sup>8</sup>

In the instant case, the wonder is that the Court did not decline to assume jurisdiction.

Adjudged from the standpoint of the people, the decision was popular and received with general approval, probably reflecting the unpopularity of the executive and the stand of the labor leaders.

Again the decision may represent that the peak of executive aggression—the culmination of twenty years—had been reached, in the Court's opinion.

At all events, the power of the judiciary over the executive is asserted and established without debate.

However, in view of the divided Court on this delicate problem the suggestion of Dean Trickett concerning the voidance of statutes power might be adopted in both types of cases. Observed the Dean:<sup>9</sup>

"Another rule is suggested by Judge Cooley,<sup>1</sup> for the regulation of the conduct of the courts in deciding act of legislative bodies unconstitutional, namely, that they should insist on the presence of a full bench. This doubtless, is a sane rule. The largest court is small in com-

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<sup>6</sup> The recent elections afford another example. For interesting accounts of *Ex parte Merryman* and *Milligan's Case*, involving Taney and Lincoln, see Warren, *The Supreme Court*, Vol. 3, p. 90, et. seq. Little, Brown and Company (1923).

<sup>7</sup> 73 U.S. 318.

<sup>8</sup> 10 Dick. L. Rev. at p. 183.

<sup>9</sup> 10 Dick. L. Rev. at p. 188.

parison with the law-making bodies, and there is something approaching the grotesque in a small body of men overriding the work of a larger body, unless, as seldom happens, the intellectual and moral character of the several components of the former is greatly and perceptibly superior to that of the components of the latter. When a circuit court of three judges or the supreme court of nine, is going to annul a statute passed by Congress and the President, it is fit that all the judges should be present. However but little is gained by the presence of all the judges, if in the end, a statute is overthrown by a bare majority of one or two. The rule should be expanded so as to require that a court should never pronounce the opinion of the Congress and the President as embodied in legislation, erroneous, until all its members had agreed in the judgment. The result of this simple rule would be materially to lessen the number of condemned statutes, and to free the subjects of the government from much of the harrassing uncertainty respecting their rights and duties under the law, which now afflicts them, an object worthy of the anxious effort of statesman, and, jurist, business-man and scholar.

<sup>1</sup> Const. Lim. 230."

As will be recalled by those who knew him, Dean Trickett was an accomplished and skilled logician. His classroom discussions of the constitutional cases such as *Marbury v. Madison*, *McCullough v. Maryland*, *Dred Scott v. Sandford* and others were stimulating intellectually and inspiring to fresh endeavor. Professor Leon C. Prince, a scholar and gifted teacher in his own right, frequently declared that the inspiration of the Trickett methods of critical analysis of legal opinions had furnished him with the keynote to his own success.

It is to be noted, however, that another great legal scholar many years ago observed that the history of the law had not been logic but experience.<sup>10</sup> Whether a rule of unanimity of decision in constitutional cases would be advisable or practical is certainly open to doubt.<sup>11</sup>

As to cases involving the powers of the executive, the instant one is worthy of study on the unanimity of decision suggestion. To quote the words of Justice Jackson:<sup>12</sup>

"Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

<sup>10</sup> O. W. Holmes, Jr., *The Common Law*.

<sup>11</sup> See Congress, the Constitution and the Supreme Court, by Charles Warren, Little, Brown & Co., Boston (1925).

<sup>12</sup> — U.S. . . . 73 S. Ct. at p. 879.

"Moreover, rise of the party system has made a significant extra-constitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, 'If he rightly interpret the national thought and boldly insist upon it, he is irresistible. . . His office is anything he has the sagacity and force to make it.'<sup>25</sup> I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review<sup>26</sup> at the expense of Congress."

<sup>25</sup> Wilson, *Constitutional Government in the United States*, 68-69.

<sup>26</sup> Rossiter, *The Supreme Court and the Commander in Chief*, 126-132."

Justice Clark in the course of his concurring opinion in the judgment of the Court, remarked that the limits of Presidential power are obscure.

There have been criticisms from time to time that our constitutional system is too inflexible and evidently with this in mind Justice Frankfurter in his concurring opinion makes the following observation:

"A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions."<sup>13</sup>

The same justice apparently experiencing some qualms in the task of keeping the executive confined within judicial leading strings, makes the following quaint observation and with which this discussion is closed:

"It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world."<sup>14</sup>

<sup>13</sup> —U.S. — 73 S. Ct. at p. 879.

<sup>14</sup> — U.S. — 73 S. Ct. at p. 899.