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CONSTITUTIONAL LAW - EMERGENCY BANKING ACT - DELEGATION OF POWER

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CONSTITUTIONAL LAW — EMERGENCY BANKING ACT — DELEGATION OF POWER — Defendant was indicted in two counts: (1) for failure to file a return in respect to gold bullion held by him, and (2) for holding over \$200,000 in gold bullion without a license, in violation of the Presidential Order of August 28, 1933, issued by authority of the Emergency Banking Act of March 9, 1933.¹ This Act declared an emergency to exist, by Title I, sec. 2 amended the Trading with the Enemy Act² by authorizing the President "during time of war or during any other period of national emergency declared" by him to regulate or prohibit (*inter alia*) the "hoarding" of gold bullion, and by sec. 3 amended the Federal Reserve Act³ by authorizing the Secretary of the Treasury whenever in his judgment "necessary to protect the currency system of the United States" to require the surrender (*inter alia*) of all gold bullion in return for an equivalent amount of lawful money of the United States. The court overruled defendant's demurrer to the first count and sustained it as to the second count, *holding* that the Act was constitutional, that the portion of the executive order requiring the filing of returns was authorized, but that the portion of the order requiring the surrender of gold bullion was not thus authorized, since only the Secretary of the Treasury was given this power. *United States v. Campbell*, D. C. S. D. N. Y., November 16, 1933;⁴ U. S. LAW WEEK, November 21, 1933, index p. 198.

Assuming that the President's authority in the premises must be derived from the Banking Act,⁵ the case raises certain constitutional problems as well as the question whether the action taken was within the scope of the Act,⁶ which latter involves construction of the Act and will not be here considered. The broad plenary monetary powers granted to Congress by Article I of the Constitution seem ample to sustain regulation of the holding of gold bullion or its requisition under eminent domain proceedings.⁷ Gold bullion, by virtue of its relation to

¹ 48 Stat. 1 (1933), U. S. C. tit. 12, sec. 95a (1933 Cum. Supp.).

² 40 Stat. 415 (1917), U. S. C. tit. 50 appendix, sec. 5(b) (1926). See Culp, "Executive Power in Emergencies," 31 MICH. L. REV. 1066 at 1078, n. 54 (1933).

³ 38 Stat. 251 (1913), U. S. C. tit. 12, secs. 221 ff. (1926).

⁴ In 19 A. B. A. J. 737 (Dec. 1933) is reported a suit against the Secretary of the Treasury based on the latter's refusal, pursuant to a Presidential Order, to redeem a \$20 gold certificate. If the order was based on the Emergency Banking Act, the discussion herein as to the validity of said Act is applicable.

⁵ It is possible to argue that the President has sufficient power independent of this particular statute to sustain such action, either by implication from grants of power in the Constitution, or from other Congressional grants of authority. See Culp, "Executive Power in Emergencies," 31 MICH. L. REV. 1066 at 1077 ff. (1933).

⁶ The issues involved appear to be:

- (1) Whether Congress has power to regulate or requisition gold bullion, coin, etc.;
- (2) Whether the regulations employed violate due process;
- (3) Whether there was an improper delegation of power;
- (4) Whether the Presidential action taken was authorized by the Act;
- (5) Incidentally — whether such regulation is valid only so long as a condition exists which the President (or Secretary of the Treasury) might reasonably declare an emergency.

⁷ For cases showing the extent of this power see: *Legal Tender Cases*, 12 Wall. (79 U. S.) 457 (1871), holding Congress may issue legal tender notes; *Ling Su Fan*

credit and currency, is as the court says, more than a "mere commodity."⁸ Reasonable regulation, or requisition with just compensation will not violate "due process."⁹ Perhaps more serious is the question whether Congress attempted an invalid delegation of power to the executive department.¹⁰ This subject was discussed generally in an earlier issue of this Review.¹¹ It has been held that delegation is not improper where the enforcement of a statute is made to depend on an administrative finding,¹² or where the statute outlines the legislative policy and entrusts to an administrative officer the task of determining the details of its application.¹³ In the Banking Act Congress has declared the policy that there shall be regulation or requisition when there is an emergency and the President or Secretary of the Treasury, respectively, shall deem such procedure desirable. It is left to the particular executive (1) to determine when an emergency exists, (2) to exercise a broad discretion whether to invoke the powers granted, and (3) to fix the details of the regulation or requisition. There is little doubt that this statute, along with the NIRA and other recent emergency legislation, goes far toward the verge of permissible delegation.¹⁴ Realistically, if such legislation is valid, the doctrine of non-delegation might appear virtually to be abolished. But it may well be that periods of economic stress merely reveal the broad extent of latent legislative powers. As with this so with other constitutional limitations — our facile logic permits us so far as desirable to shape our concepts to meet felt needs. How far such adaptation is desirable is the ultimate question for the courts. In answering it they will probably be influenced, perhaps unconsciously, by the practical success of the challenged legislation.

R. A. S.

v. United States, 218 U. S. 302, 31 Sup. Ct. 21 (1910), concerning the control of silver coin.

Defendant argued that the Act was invalid if intended to authorize condemnation of bullion, for there was no specific provision for a judicial hearing as to the amount of compensation. The court implied a promise by the government to make "just compensation."

⁸ See 31 MICH. L. REV. 953 at 960 (1933).

⁹ 3 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES, 2d ed., sec. 1225 (1929).

¹⁰ In general see 3 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES, 2d ed., c. lxxxix (1929); 31 MICH. L. REV. 786 (1933); and 86 A. L. R. 1539 at 1555 (1933).

¹¹ 31 MICH. L. REV. 786 (1933).

¹² Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 (1892).

¹³ United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911). See also Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904), and J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 Sup. Ct. 348 (1928).

The Hampton case concerned the "flexible tariff" Act, 42 Stat. 941 at 942 (1922), U. S. C. tit. 19, sec. 154 (1926). See 31 MICH. L. REV. 786 at 795, n. 38 (1933), 75 UNIV. PA. L. REV. 176 (1926), 76 UNIV. PA. L. REV. 868 (1928) and 36 YALE L. J. 573 (1927).

¹⁴ See Dickinson, "The Major Issues Presented by the Industrial Recovery Act," 33 COL. L. REV. 1095 at 1100 (1933); and 47 HARV. L. REV. 85 at 93-95 (1933).