In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 260

AMAZON PETROLEUM CORPORATION ET AL.,
petitioners

v.

ARCHIE D. RYAN, S. D. BENNETT, AND PHIL E. BAER

No. 135

PANAMA REFINING COMPANY ET AL., PETITIONERS

v.

A. D. RYAN, S. D. BENNETT, AND J. HOWARD
Marshall

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

This supplemental memorandum is filed in response to certain questions asked by members of the Court at the argument of the above cause.

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I

The effect of the failure of section 9 (c) to require the President to state that he has made any finding prior to exercising the authority there conferred

The question was raised as to what defenses are open to a person who is prosecuted for having violated an order issued by the President under Section 9 (c). Respondents conceive that in such a prosecution the only defenses which would be open would be (1) that the section is unconstitutional and (2) that the defendant had not violated the President's order. If the prosecution was for violating a rule or regulation which had been prescribed under Section 10 (a) in order to carry out the purposes of Section 9 (c), the additional defense would be available that the rule or regulation was unconstitutional or not authorized by Section 10 (a).

The statute does not require the President to hold a hearing, to make formal findings, or to publish his reasons for exercising his discretion. In this respect Section 9c does not differ from the situation presented in *United States* v. *Grimand,* 220 U. S. 506, presently discussed.

At the argument, certain aspects of delegation of powers were discussed, and executive discretion was analyzed. Statutes were analyzed and the authority of the executive to determine (1) *whether* power was to be exercised, (2) *when* it was to be exercised, and (3) *what* was to be prescribed when it was exercised ~~were~~ was discussed. Mr. Justice Brandeis stated that Section 9 (c) authorized the

President to determine "whether" and "when" the statute should be put in operation. It was also suggested that the President must make certain "findings" prerequisite to exercise of authority, that these "findings" should be required by legislation delegating authority, and that these "findings" should be stated by the executive in exercising his authority.

As to *what* is to be done when delegated authority is exercised, it may be noted that in the ordinary statute delegating authority there is a discretion as to the substance of the executive mandate or prohibition. But Section 9 (c) allows no discretion as to what may be done, for the statute prescribes just what the President may do—he may only prohibit the transportation in interstate or foreign commerce of petroleum or its products produced or withdrawn from storage in excess of state law. Section 9 (c) is therefore much more strictly limited in this particular than the statutes sustained by this court in the decisions discussed presently.

Respondents submit that the validity or invalidity of a delegation of legislative power does not depend upon presence or absence of a statutory requirement that the President or other executive officer make a specified finding before exercising the authority delegated. A statute such as upheld in *United States* v. *Grimaud,* 220 U. S. 506, authorizing the Secretary of the Interior to make such rules and regulations as "will insure" certain spec-

ified objectives clearly does not require or contemplate that the Secretary shall make any finding prior to prescribing the rules and regulations authorized by the statute.

Section 9 (c) sets forth explicitly what may be prohibited. The only delegation under that Section is as to whether and when the prohibition shall be in effect. It would therefore seem that the only question of constitutionality arises from the failure expressly to state the standards to govern the President in making his determination in respect to the period the prohibition authorized by Congress shall be operative.

If Section 9 (c) had authorized the President to prohibit transportation of "hot oil" in interstate and foreign commerce whenever he shall deem such prohibition necessary to carry out the policy and purposes of Title I of the Act, the validity of this section would seem to be clear under the authorities (Respondent's brief, pp. 145–148). But the policy declared by Congress in Section 1 of Title I sets forth the standards which shall govern the administration and application of *all* the provisions of that title. It follows that the standards which govern the President's action under Section 9 (c) are found in the declaration of policy in Section 1, and that the tests which the President must apply in determining his action under Section 9 (c) is whether it will in his judgment serve to effectuate these policies. The President is as much under a

duty to conform his action to these standards as he would be if Section 9 (c) had expressly so stated.

Even if the foregoing interpretation of Section 9 (c) might otherwise be doubtful, it should be adopted if necessary to sustain the constitutionality of the section. In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, this Court said:

> It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.

Another possible interpretation of Section 9 (c) which, we believe, should be adopted if necessary to sustain constitutionality is that Congress therein declared it to be its policy to prohibit the interstate transportation of " hot oil " and imposed upon the President the duty to make that prohibition effective as soon as he could establish the necessary administrative machinery for the enforcement of the prohibition. A direct prohibition of transportation of "hot oil" prior to the organization of an administrative agency equipped to enforce it and prior to the formulation of rules and regulations for bringing this transportation under effective control would have resulted in confusion, violation of the law, and disrespect for its prohibition. It is true that Congress might have

postponed the effective date of Section 9 (c) for a specified period, but Congress could not accurately predict how much time would be required to build up enforcement machinery. It therefore left to the determination of the President the time when the prohibition should go into effect, with an implied mandate to make the prohibition operative as promptly as consistent with efficient enforcement. In fact, the President took action under the section within 25 days after the enactment of the statute.

There remain to be considered the leading decisions of this Court upon the question of delegation of legislative power. *Field* v. *Clark,* 143 U. S. 649, held that Section 3 of the Act of October 1, 1890, c. 1244, was not an unconstitutional delegation of legislative power. The material portion of that section reads as follows:

> That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as *the President shall be satisfied* that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States which, in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States, he *may deem*

> *to be reciprocally unequal and unreasonable,* he shall have the power, and it shall be his duty, to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, *for such time as he shall deem just.* (Italics ours.)

The circumstances under which the President might exercise his power under this Act were that he should be "satisfied" that the government of the country importing certain articles imposed duties on imports from the United States which the President "may deem" to be reciprocally unequal and unreasonable. Furthermore, the President was given the power to suspend the free list "for such time as he shall deem just." No finding of any kind was required, but the whole matter as to suspension was placed in the President's discretion.

In *Field* v. *Clark* the Court reviewed a number of prior statutes conferring wide legislative powers on the Executive. Prior to this review the Court said (p. 683):

> If we find that Congress has frequently, from the organization of the Government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by the third section of the act of October 1, 1890, that fact is entitled to great weight in determining the question before us.

Following its review of the statutes, the Court said (p. 691):

> * * *, the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land.

Among the statutes so reviewed and inferentially approved are the following:

The act of June 4, 1794, authorized the President, "whenever, in his opinion, the public safety shall so require", to lay an embargo on all ships and vessels in ports of the United States, and to continue or revoke this embargo "whenever he shall think proper."

The act of February 9, 1799, suspended commercial intercourse with France and its dependencies. The act provided that at any time after its passage "it shall be lawful" for the President, "if he shall deem it expedient and consistent with the interest of the United States", to limit and discontinue for the time being the restraints and prohibition of the act either with respect to the French Republic or any place belonging to that Republic "with which a commercial intercourse may safely be renewed"; and also to revoke such order "whenever, in his opinion, the interest of the United States shall require it."

The act of April 18, 1806, prohibited certain importations and the operation of this act was suspended by the act of December 19, 1806. The latter act authorized the President to suspend the operation of said act "if in his judgment the public interest should require it."

United States v. *Grimaud*, 220 U. S. 506, *supra*, sustained the validity of an indictment charging violation of rules and regulations prescribed by the Secretary of the Interior under the Act of April 23, 1897, c. 2, 30 Stat. 35, which provided:

> The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations, * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of the act or such rules and regulations shall be punished * * *.

Under this statute the Secretary could determine both when to make regulations and what should be in them, and there was no requirement of a preceding finding by the Secretary. The Secretary could determine when to make these regulations and what was to be in them, and the violation of these regulations was made a crime. There was no requirement that a finding be made. It is thus

broader than Section 9 (c) which only leaves to the President the putting of the statute into effect. It is true that the forest act does contain a standard as to what shall be specified in the regulations for the preservation of the forests, but in Section 9 (c) there is no standard necessary for the guidance of the executive in formulating the substance of the regulations because the statute itself is explicit as to the substantive prohibition.

The supposed vice in Section 9 (c) is that the President can put the prohibition into effect at will without being required by the statute to make any express findings. The *substance* of the prohibition is exactly defined. The question is whether it is valid to permit the President to put a law into effect whenever he desires to do so, without making or publishing a formal finding.

In the very nature of the office of President he is to act, and it may properly be assumed that he will act, "in the public interest" or in accordance with the principles and the policy of the particular legislation under which he does act. To require, as a condition to the validity of a statute, that the President make a specified finding such as that he finds a particular requirement "in the public interest" or "necessary and proper" is a mere formality. It is submitted that the actual exercise of the President's power under Section 9 (c) is and necessarily involves ~~the necessary~~ findings as fully as though he had stated some formal finding in the Executive Order putting 9 (c) into effect.

To summarize.—At the argument certain aspects of the question of delegation of powers were discussed. It was suggested that there were three phases: whether a thing should be done, when it should be done, and what should be done. As to what should be done, there is no question in this case. The statute strictly limits what the President can do.

As to whether a thing should be done, that is, the propriety of doing it, or, if that has been decided, when, that is, at what moment the power should be exercised, these are questions upon both of which the Congress might conceivably require (a) the making of findings by the Executive and (b) the stating of these findings.

Neither in the Grimaud case nor in the Embargo statutes is there any express requirement for the ~~making~~ stating of findings. If it be said that by the phrases in the public interest or insuring the protection of reservations there is a requirement that the Executive shall in his own mind, that is, as distinguished from expressly stating findings, make a finding, this is no different in substance than requiring him to act according to a standard. And if it be urged that the phrases in "the public interest" or "as will insure the objects of such reservations" is the setting up of a standard guiding the executive in the determination of whether the regulation or embargo shall go into effect, then it is to be answered that in the instant statute, if it be read as a whole and Section 9 (c) read with the

policy of the Act, there is also a standard. The act can be reasonably thus read as a whole, because the declaration of policy necessarily applies to the whole statute. It must be read as a whole because if the statute can reasonably be construed in a manner making it constitutional, that construction must be taken.

II

The nature of the error made in amending the Code of Fair Competition for the Petroleum Industry in the Executive Order of September 13, 1933

At the oral argument, the impression seemed to be that a new Code of Fair Competition for the Petroleum Industry was promulgated on September 13, 1933, omitting the final paragraph of Section 4 of Article III of the original Code. The facts are these: On September 13, 1933, the President, by Executive Order (a certified copy of which has been filed in this Court), amended the Code of Fair Competition for the Petroleum Industry. In amending Section 4 of Article III, it was stated: "Article III, Section 4, is amended to read as follows:" and the first paragraph of Section 4 as it appeared in the original Code was restated in full with certain minor changes. The second paragraph of Article III, Section 4, was not restated in the Executive Order. Had the Executive Order read that "*the first paragraph* of Article III of Section 4 is amended", there would be no difficulty. But since the Executive Order on its face purports to

restate the entire section, the Government has taken the position that the failure to restate the second paragraph of Section 4 is in effect an elimination of that paragraph from the Code.

Respondents believe that the error which arose through the amendment to Section 4, Article III, of the Petroleum Code by the Executive Order of September 13, 1933, was not altogether self-evident and that this circumstance partially accounts for the failure on the part of both parties to this cause to realize the effect of that amendment during the course of the proceedings in the lower courts. It is understandable that those concerned with administration of the code and the industry interpreted it as applying only to the *first paragraph* of Section 4, leaving the second paragraph intact and fully operative.

The Code provision here in question is involved in only No. 260. Mr. Saye, counsel for petitioners in No. 260, had written for and secured a certified copy of the Code and a certified copy of the Executive Order of September 13, 1933. (Certified copies of correspondence in which Mr. Saye requested this information and in which it was sent to him have been filed in this Court.)

In the course of preparation of the response to the application for writ of certiorari in this Court the documents were checked and the situation described ~~in the paragraph~~ above was discovered. Counsel for petitioners in both No. 135 and No. 260 were informed (by the Government) of the facts

and this Court was informed in the Memorandum for the Respondents in No. 260.

Counsel for petitioners telegraphed this Court requesting that the Court take jurisdiction of the questions involved under the section of the Code omitted by the operation of the Executive Order of September 13, 1933. Counsel for the Government in its Memorandum in No. 260 presented the facts to this Court and in a Supplemental Memorandum suggested that there was "sufficient basis for jurisdiction in Equity in this case to restrain the enforcement of the second paragraph of Section 4, if invalid, despite the fact that it has been operative only since September 25, 1934." The Government also stated that:

> Should this Court conclude that it may not in this case consider and determine the validity of Section 4 of Article III of the Code, as amended by the Executive Order of September 25, 1934, respondents respectfully submit that the writ of certiorari, if granted, should be limited to the questions relating to Section 9 (c) of the National Industrial Recovery Act and the Regulations promulgated by the Secretary of the Interior in aid of the enforcement of that section, since the other questions in this case, relating to Section 4 of Article III of the Code, would be moot, in view of the fact that the Government cannot and does not intend to prosecute petitioners for producing prior to September 25, 1934, in excess of their State quotas.

III

Accessibility to public and publication of Codes of Fair Competition and Executive orders pertaining thereto

At the argument counsel was asked how "official" copies or "publications" of the codes might be obtained. Also, counsel for petitioners indicated that the exact state of the law was unknown.

The administrative agencies have not been so negligent as to omit proper distribution of all codes, amendments, and orders. This has been done in three general ways: (1) By setting up a regular procedure for the distribution of certified copies of all documents, (2) by publication of the codes and amendments in bound volumes (as well as separately), and (3) by the systematic distribution of all materials to members and groups of the particular industries involved and to trade journals and commercial law services. The following is an outline of the several methods whereby the codes, amendments, and orders are distributed or may be secured:

The President has delegated authority to administer codes of fair competition approved under Section 3 (a) of the Recovery Act to the National Industrial Recovery Board (succeeding the Administrator for Industrial Recovery), the Secretary of Agriculture, the Secretary of the Interior and the Federal Alcohol Control Administration. Anyone can upon request obtain from each of these agencies copies of the codes administered by it,

copies of amendments to such codes and copies of all executive orders approving such codes or amendments. Certified copies of codes and code amendments can also be obtained from these agencies upon request. (Anyone desiring to receive all material in connection with the oil industry may upon request be placed upon the mailing list of the Petroleum Administrator to receive automatically all such documents and materials.) In addition, all codes under the jurisdiction of the Administrator for Industrial Recovery,[1] together with supplemental codes, amendments, and executive and administrative orders relating to these codes, have been published in sixteen bound volumes covering the period June 16, 1933, to September 15, 1934. There are 519 codes included in these sixteen volumes. Codes, amendments, and orders are also printed in at least two commercial services, Prentice-Hall and Commerce Clearing House (Federal Trade Regulations Service).

There seem to be no statutes governing the custody, attestation, and publication of Presidential proclamations and executive orders. As a matter of long practice, Presidential proclamations have been attested by the Secretary of State and have been published in the statutes at large, while execu-

[1] The Administrator for Industrial Recovery was succeeded by the National Industrial Recovery Board on September 27, 1934 (Executive Order No. 6859, September 27, 1934).

tive orders of the President have not been so attested or published.

Both President Hoover and President Roosevelt have issued executive orders for the purpose of supplying the statutory omissions as to the custody, publication, and distribution of proclamations and executive orders. Executive Order No. 5220, dated November 8, 1929, signed by the former, reads in part as follows:

> For the purpose of securing uniformity of style and form, and for the better safeguarding of the texts of Proclamations and Executive Orders, it is directed that:
>
> * * * * *
>
> 6. The signed original of each Executive Order, as well as Proclamation, must be deposited with the Department of State, which is responsible for its custody and also for proof reading and distribution.

The foregoing order was superseded by Executive Order No. 5658, signed by President Hoover on June 24, 1931, the last paragraph of which reads:

> 3. The Department of State shall have custody of the signed originals of all Executive orders and proclamations and shall supervise their publication.

Executive Order No. 6247, signed by President Roosevelt on August 10, 1933, provides in part as follows:

> In order to avoid misunderstanding and confusion, to secure greater uniformity in

> the form and style, and for the better safeguarding of the texts of Executive orders and proclamations, Executive Order No. 5658, dated June 24, 1931, is hereby rescinded and superseded by the following regulations:
>
> * * * * *
>
> 5. The Department of State shall have custody of the signed originals of all Executive orders and proclamations and shall supervise their publication and distribution.

Executive Order No. 6497, dated December 15, 1933, amended Executive Order No. ~~6427~~ 6247 in a manner immaterial in the present connection.

Upon payment of a small fee anyone can obtain a certified copy of an executive order from the State Department. An uncertified printed copy can be obtained from the State Department without charge, and when the supply of printed copies in the State Department is exhausted, the person requesting such copy is referred to the Superintendent of Documents, who will furnish a copy upon a nominal payment.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1934