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Due Process and the Wartime Draft of Manpower

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DUE PROCESS AND THE WARTIME DRAFT OF MANPOWER

THE fact that we are engaged in another war — a war in which it is imperative that we use to the full all available manpower not only on the military but on the production front as well — calls for a critical reexamination of *Ex parte Hudgins,*[1] the case in which our court held unconstitutional a war emergency statute passed during the last world war.

In substance the statute provided that during the war and for six months thereafter any able bodied male resident of the state, students excepted, who shall fail or refuse to work at least thirty-six hours a week, shall be guilty of a misdemeanor; and it was further provided that "In no case shall the claim by the accused of inability to obtain work or employment be a defense to a prosecution hereunder, unless it shall be proved that the accused promptly notified the proper representative of the state council of defense of his inability to obtain employment, and requested that work or employment be found for him, and that such employment was not furnished him."[2] Hudgins, the petitioner, had enlisted in the army, had seen extensive service in France, and had been discharged in May, 1919. After his return to this state and nearly a year and a half after the cessation of hostilities, and after the state council of defense had disbanded, he was indicted for failure to work during two weeks in April, 1920, was convicted and sentenced to imprisonment for thirty days. Upon petition for a writ of *habeas corpus,* he sought his discharge from custody on two grounds: first, that the statute had by its terms expired before the alleged violations occurred; and second, that in any event, the statute was unconstitutional. The court refused to pass on the first contention, but ordered the petitioner's discharge from custody on the broad ground that the statute was unconstitutional, being in arbitrary and unreasonable restraint of personal liberty. This decision is open to criticism on at least three counts.[3]

In the first place, by refusing to pass upon the contention that

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[1] 86 W. Va. 526, 103 S. E. 327, 9 A. L. R. 1361 (1920).

[2] W. Va. Acts 1917 (2d Ex. Sess.) c. 12, §2. Although the statute was framed in terms of vagrancy, no importance attaches to that fact. Since it applied to everyone without regard to whether he had other means of support, we shall here deal with it, as the court did, as a statute aimed at raising war production by compelling everyone to work.

[3] For a contemporary criticism, see Editorial Note (1921) 27 W. VA. L. Q. 171.

the statute had expired, the court violated an elementary principle of constitutional law — namely, that a court will not decide a constitutional question unless absolutely necessary to a decision of the case, and hence, as it was put by Mr. Justice Brandeis, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[4] This principle is a fundamental one, deep-rooted in our constitutional system. It is based upon the notion that the doctrine of separation of powers requires the judiciary to exercise with greatest caution its power to declare statutes unconstitutional, and thus nullify the action of a coordinate branch of government. Anything less than this is itself an unconstitutional encroachment by the judiciary on the province of the legislature. That our court is fully aware of this, is evidenced by the following statement:

> "The decision of a question involving the constitutionality of an act is one of the gravest and most delicate of the judicial functions, and while the court will meet the question with firmness where its decision is indispensable, it is the part of wisdom, and a just respect for the legislature renders it proper, to waive it if the case in which it arises can be decided on other points."[5]

Clear as this may be, instead of holding in the *Hudgins* case, as was obviously the intent of the legislature, that the war ended with the armistice, and hence that the statute expired six months thereafter, long before the alleged violations for which the accused was convicted, the court went out of its way to declare the statute void. In summarily disposing of the petitioner's first contention, the court said: "Whether the war had then ended within the provisions of this act, we need not decide, for we have reached the conclusion that the act is unconstitutional and ought to be so declared."[6] This, despite the fact that the court recognized that the primary purpose of the legislature was to bring the productive resources of the state "up to the highest standard for war purposes."[7] This purpose was to be accomplished by seeing to it that during the war no able bodied man within the state failed to do his share. Certain it is that the legislature never intended to penalize one like the petitioner who had done his full share in the military

[4] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936).
[5] Norris v. County Court, 111 W. Va. 692, 693, 163 S. E. 418 (1932).
[6] *Ex parte* Hudgins, 86 W. Va. 526, 529, 103 S. E. 327 (1920).
[7] *Id.* at 530.

service, and *a fortiori* that it never intended to punish him or anyone else for a failure to work nearly a year and a half after the war was over. Since this ground for discharging the petitioner is so clear, it is all the more surprising that the court insisted upon declaring the whole statute unconstitutional.

The second score on which the case should be criticized is found in the court's implication that even if the statute were otherwise unobjectionable, it would still be unconstitutional because of a lack of power in the state to pass such war legislation. After pointing out the limited scope of the state's war power, as expressly provided for in our Constitution, the court said: "While greater production during the period of the war might be desirable, is that a subject with which the state had the right to deal? We think not."[8] Though not stated in so many words, the idea seems to be that under the broad grant of war powers to the federal government, the subject matter of the statute lies in a field reserved exclusively for federal action, and hence, even in the absence of congressional action, the states have no power to deal with the matter.

That this proposition is unsound seems clear from the decision of the United States Supreme Court in *Gilbert v. Minnesota*.[9] It was there held, by the court which has the last say on questions involving conflicts of power between the states and the federal government, that even in a field where congress had exercised its war powers, the states had a reserved power to cooperate with the federal government, and consequently that state legislation would be upheld if it was in furtherance of, and not in conflict with, congressional action. As it was put by the court,

> ". . . The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. . . . Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all."[10]

[8] *Id.* at 530.
[9] 254 U. S. 325, 41 S. Ct. 125, 65 L. Ed. 287 (1920).
[10] *Id.* at 329.

The third and most severe criticism of the case is directed to the court's holding that the state may not constitutionally require its citizens to work during a period of national peril, when the continued existence of the national government and of the state itself may well depend on the mass production of war materials. Although neither the petitioner nor the court referred to the due process clauses of the state and federal constitutions, it seems clear that the claim of unconstitutionality boils down to the same question which would be raised under the due process clause.[11] The holding that the statute was not a proper exercise of the police power was in essence a holding that the statute constituted an arbitrary and unreasonable restraint on personal liberty, and therefore a deprivation of liberty without due process of law.

In the light of fundamental principles of constitutional law, such a holding is indefensible. Everyone recognizes that the guarantee of liberty in state and federal constitutions is not absolute, but is merely a protection against palpably unreasonable and arbitrary governmental interference. In order to meet the test of constitutionality on this score, a restraint on liberty need not affirmatively appear to be reasonable. So strong is the presumption of constitutionality, it is only necessary that the restraint not be clearly unreasonable under the circumstances. If the question of reasonableness is fairly debatable, a court may not properly declare the statute unconstitutional. To do so is again an unconstitutional encroachment by the court on the domain of the legislature. That this is true has long been recognized by our court. For example, in *State v. Peel Splint Coal Co.*,[12] involving liberty of contract, it was said that judicial power to declare legislative action void,

> ". . . must from the very nature of the case be limited and definitely restricted to such statutes as appear on their face, or from facts judicially known, so capricious, so unreasonable, as to be clearly and plainly in violation of the constitutional guaranties. 'Every possible presumption is in favor of the validity of the statute, and this continues until

[11] "The broad ground taken by petitioner and his counsel is that the statute sought to be enforced against him is an unjust and unreasonable restraint upon his personal liberty, guaranteed by the State and Federal Constitutions. What is personal liberty under the law? As definied by Blackstone, it 'consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' " *Ex parte* Hudgins, 86 W. Va. 526, 529, 103 S. E. 327 (1920).

[12] 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385 (1892).

> the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' "[13]

Certain it is, that the court lost sight of these principles in holding the statute in question unconstitutional. Note that implicit in the court's reasoning is the proposition that congress would also be prohibited from passing such a statute, because the liberty of the individual is by the due process clause of the Fifth Amendment afforded the same degree of protection against arbitrary action by congress. Yet no person could reasonably argue that congress, which has the unquestioned authority to require military service, involving not only a restraint on liberty but often a loss of life itself, may not with equal propriety require civilian service on the production line. And if congress may do so, then the states, in an effort to cooperate with the national government, may do likewise so long as the state regulations are in furtherance of, and not in conflict with, the action taken by congress.

Much might even be said for the reasonableness of a requirement in peace time that all be engaged in productive activity. The reasonableness of such a requirement in time of war is clear. And when it is remembered that the reasonableness of a regulation need not affirmatively appear, it is almost unbelievable that our court could ever have held that the statute in question was wholly unreasonable and arbitrary. Twelve other states passed similar statutes,[14] and in Delaware, the only other state in which the question was presented to the supreme court for decision, the constitutionality of the statute was upheld.[15]

It is to be hoped that, in its consideration of future war emergency legislation, our court will not only recognize that in the prosecution of the war there is a broad field for the exercise of state power in cooperation with the federal government, but will also employ more judicial self-restraint in passing upon the validity of legislative action than was apparent in the *Hudgins* case.

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[13] *Id.* at 837-838.

[14] For collection of statutes, see Hoague, Brown and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV. L. REV. 50, 59-61, particularly n. 49.

[15] State v. McClure, 30 Del. 265, 105 Atl. 712 (1919).