Volume 40 | Issue 2 Article 6

February 1934

Budget Control and Separation of Powers

Stanley E. Dadisman
West Virginia University College of Law

LEGISLATION

BUDGET CONTROL AND SEPARATION OF POWERS

Recent federal[1] and state[2] legislation, prompted by the exigencies of the times,[3] strikes a new chord on an old harp, the doctrine[4] of the separation of the legislative, executive, and judicial powers of government. Heralded from European countries at one time as a cornerstone of liberty[5] but recently termed a "legendary conception",[6] the theory of the separation of powers found root in the American federal[7] and state[8] constitutions only to become shorn, in later years, of its broader concepts and discredited as a workable governmental mechanism.[9] While the doc-

---

[1] 47 STAT. 1517 (1933), 5 U. S. C. SUPP. I, §§ 124-132 (1933).

[2] W. Va. Acts 1933 (First Extraordinary Session) c. 56; Va. Laws 1932, c. 147, § 30 (dealing with state budget control).

[3] The act of Congress, *supra* n. 1, states in its first sentence: "The Congress hereby declares that a serious emergency exists by reason of the general economic depression . . . ." See also Culp, *Executive Power in Emergencies* (1933) 31 MICH. L. REV. 1066, and a statement by Mr. Justice Brandeis in New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371 (1932): "The people of the United States are now confronted with an emergency more serious than war."

[4] GOODNOW, COMPATATIVE ADMINISTRATIVE LAW (Student's ed. 1893) 20; WILLIS, PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS (1933) 6.

[5] 1 STORY, CONSTITUTION (5th ed. 1891) 390, citing comments by Montesquieu and Blackstone. But see Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379, 384, where he says: "No one will assert at present that the separation of powers . . . . is essential to liberty . . . . it is a practical device existing for practical ends."

[6] Suzman, *Administrative Law in England* (1933) 18 IOWA L. REV. 160, 180, where he quotes Mr. W. A. Robson, lecturer in Industrial and Administrative Law at London School of Economics and Political Science, as saying: "The separation of powers is a legendary conception which has at no period of English history accurately described the actual division of authority between the various organs of government."

[7] U. S. Constitution art. 1, § 1; art. 2, § 1; art. 3, § 1.

[8] W. Va. Constitution art. 5, § 1. "The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature." See State v. South Penn. Oil Co., 42 W. Va. 80, 96, 24 S. E. 688 (1896) reviewing the history of the Virginia constitutions as to separation of powers.

[9] GOODNOW, *op. cit. supra* n. 4, at 20, where the author says: "Modern political science has, however, generally discredited this theory (separation of powers) both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization." See also Frankfurter, *Mr. Justice Brandies and the Constitution* (1392) 45 HARV. L. REV. 33, 97, citing excerpts from the jurist's opinions.

trine occupies a great space in our constitutional law today,[10] economic, social, and industrial complexities[11] have necessitated breaking through the strict separation idea with the result that a much more workable system with a mixture of powers is developing as in reality was contemplated by the early European writers.[12]

The immediate problem involves the delegation of legislative powers. The maxim[13] that legislative bodies cannot delegate their powers is drawn from our constitutions and reiterated by courts and text writers.[14] At the same time it must be conceded that many powers formerly exercised by legislatures are now being exercised by executive or administrative officers, administrative bodies, and commissions.[15] This concession may be explained on two theories:

1. Only administrative powers[16] of two general classifications have been delegated: (1) Wherein the legislature by general law has declared its policy and permits the administrative officer or body to fill in the details,[17] and (2) where the legislature has enacted a law to become operative when the executive or administrative officer or body finds certain facts exist.[18]

---

[10] A survey of law review articles and case materials reveal that an enormous consideration is being given various aspects of the doctrine. For one phase involving many cases see Note (1932) 18 VA. L. REV. 424.

[11] Note (1933) 31 MICH. L. REV. 786; Ellingwood, *The Legality of the National Bank Moratorium* (1933) 27 ILL. L. REV. 923. For a case citation see State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 510, 220 N. W. 929 (1928).

[12] 1 STORY, CONSTITUTION, *supra* n. 4, at 393, where it is pointed out that Montesquieu and Blackstone really contemplated a mixture of powers in order to obtain a workable government.

[13] 1 COOLEY, CONSTITUTION LIMITATIONS (8th ed. 1927) 224 *et. seq.*

[14] For a West Virginia opinion on the point see the emphatic language in State *ex. rel.* Miller v. Buchanan, 24 W. Va. 362, 379 (1884).

[15] Wickersham, *Delegation of Power to Legislate* (1925) 11 VA. L. REV. 183; Note, *op. cit. supra* n. 11; Note (1914) 28 HARV. L. REV. 95. See State v. Crosby, 92 Minn. 176, 99 N. W. 636 (1904).

[16] No distinct line separates administrative powers from others. At an early date Mr. Chief Justice Marshall said: "The precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." Wayman v. Southard, 10 Wheat. 1, 46, 6 L. Ed. 253 (1825). While the administrative law field was surveyed at that early date, the statement seems much like many modern statements of opinions.

[17] Brown, *The Executive Department's Exercise of Quasi-judicial and Quasi-legislative Powers in Wisconsin* (1926) 3 WIS. L. REV. 385, 406; Wayman v. Southard, *supra* n. 16, at 42, quoted as to the "power to fill up details" in United States v. Shreveport Grain and Elevator Co., 287 U. S. 77, 53 S. Ct. 43 (1932). See also Cheadle, *Delegation of Legislative Functions* (1918) 27 YALE L. J. 892, 899.

[18] This idea was early set forth by Judge Agnew in Locke's Appeal, 72 Pa. St. 491, 498 (1873); "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state

2. Only those powers have been delegated which could have been formerly exercised by executive or administrative agencies but which were commonly exercised by the legislature itself.[19]

With these theories in mind we turn to an act[20] of the West Virginia legislature directing the governor to maintain a balanced budget during the years of 1934 and 1935 "in accordance with the standards" set forth. A mandatory provision[21] directs that the governor survey the progress of revenue collections and determine quarterly the proportion the amount collected bears to the collections estimated for that period. If as a result of this survey the governor determines that appropriations to be expended out of the general revenue cannot be expended without creating an overdraft or increasing the deficit, he is given authority to "reduce equally and pro rata all appropriations out of general revenue in such a degree as may be necessary to prevent an overdraft in the general fund or an increase in the deficit."[22]

Does this delegation come under one or both of the classifications of administrative powers,[23] or, is it a delegation of delegable powers of the legislature which may be exercised by an executive or administrative officer or body?[24] While it may well be argued that the delegation falls under the latter theory, the West Virginia court in a very recent decision[25] endorses the former view as applicable to a somewhat similar situation. In that decision the court says it is well settled that an act may provide

"that it shall become operative only upon some certain act

of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government." See also Field v. Clark, 143 U. S. 649, 12 S. Ct. 495 (1892); COOLEY, *op. cit. supra* n. 13, at 228.

[19] Norweigan Nitrogen Products Co. v. United States, 288 U. S. 294, 53 S. Ct. 350, 354 (1933), where Mr. Justice Cardozo says: "What is done by the Tariff Commission and President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process." But see Williams v. United States, 289 U. S. 553, 53 S. Ct. 751, 760 (1933) to the effect that "A power definitely assigned by the constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency." See also Cheadle, *op. cit. supra* n. 17, at 893 relative to the non-delegability of powers assigned.

[20] W. Va. Acts 1933 (First Extraordinary Session) c. 56.

[21] *Id.* § 2.

[22] *Id.* §§ 3 and 4.

[23] See, as to the definition of this power, n. 16, *supra;* Note, *op. cit. supra* n. 11, at 789.

[24] See, as to one concept of this delegable power, n. 18, *supra.* For another expression of a similar idea, see Cincinnati, Wilmington and Zanesville R. R. Co. v. Commissioners, 1 Ohio St. 77, 88 (1852).

[25] Le Page v. Bailey, 170 S. E. 457 (W. Va. 1933).

or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act . . . . Whether the condition of the financial affairs of the state demanded a limitation of the activities of the mining department was a mere matter of accounting — essentially an administrative act. When that fact was determined by the Governor, then the actual limitation of the department was also an administrative, and not a legislative function."[26]

The act[27] of the West Virginia legislature upheld in the case cited as to this particular point made it the duty of the governor to limit certain activities "when in his opinion the financial affairs of the state government demand." The West Virginia court calls such a determination "essentially an administrative act."

Since Section 5[28] of the West Virginia statute under consideration is apparently original, having no parallel so far as it can be determined in any governmental system, and since it involves a new idea in the doctrine of the separation of powers, it may well be quoted as enacted:

"For the purpose of maintaining a balanced budget without impairing indispensable services, the legislature fixes and classifies the several objects of expenditures as follows:

Class one: Agencies collecting revenue and administering the fiscal operations of government, including the offices and departments of the tax commissioner, auditor, treasurer, and sinking fund commission.

Class two: Agencies vested with the supervision, control and direction of executive policy and law enforcement, including the governor's office, the attorney general's office, and the department of public safety.

Class three: State institutions, educational, charitable, and corrective.

Class four: Other departments and services of the state government.

Class five: Transfers from the general fund.

The legislature directs the governor in case he determines

[26] *Id.* at 458, construing W. Va. Acts 1933 (Regular Session) c. 1, § 1.

[27] It will be noted that in the opinion of Le Page v. Bailey, *supra* n. 25, the court expressly points out that it does not pass on the constitutionality of other delegated powers.

[28] W. Va. Acts 1933, *supra* n. 20, § 5.

that the pro rata reduction of appropriations from general revenue will dangerously impair the existence of those agencies most essential to the maintenance of government to reduce the amount to be expended for individual objects of appropriation as follows:

> The first class of appropriations to be reduced shall be class five, and the preceding classes shall follow in this order: class four, class three, class two and class one.
> All reduction shall be in multiples of five per cent, but a fixed relationship shall be maintained among the classes which shall be measured by a difference of five per cent in the rate of reduction. Class five shall not be reduced more than twenty-five per cent. The relationship thus to be maintained among the appropriations as classified shall be according to the table below:

Classes	Five	Four	Three	Two	One
(Per cent of	5%	.....	.....	.....	.....
reductions	10%	5%	.....	.....	.....
from total	15%	10%	5%	.....	.....
appropria-	20%	15%	10%	5%	.....
tions)	25%	20%	15%	10%	5%"

It will be observed that a survey,[29] as explained above, to determine the proportion which revenue collections bear to appropriations planned, is to be followed by a second determination, whether or not the equal and pro rata reductions will dangerously impair indispensable government agencies. If the governor determines that the pro rata reduction plan will dangerously impair governmental functions, he is directed to determine which of the five graduated rates of reduction set forth in the statute is to be applied. Does the fact that the legislature has fixed and classified the objects of expenditure in five classes and has expressly intended that the governor should administer the budget in accordance with the scheme, following his determination of the necessity for such, violate the requirement that matters of discretion which are purely legislative must be reserved for the legislature?

Undoubtedly the legislature has declared its policy and intent,[30] set forth in express language the principles and classifications[31] to be followed, and directs, not merely permits, the governor

[29] *Id.* § 2.
[30] The intent of the act, *supra* n. 20, may be ascertained from sections 1, 3, 5, and 6, and from the name of the statute, — "An act directing the governor to maintain a balanced budget."
[31] W. Va. Acts 1933, *supra* n. 20, section 5 involves the classifications with which this study is concerned.

to administer the state's fiscal affairs accordingly. Concretely to apply the act, let us suppose that a time arrives in the state's affairs when by "a mere matter of accounting — essentially an administrative act —" the governor determines that unless some reduction is made in appropriations an overdraft will result, and by another "mere matter of accounting"[82] he determines that a reduction in appropriations for the revenue collecting agencies and the executive and public safety departments of classes one and two, respectively, will seriously impair efficiency. Once such a determination is made, the governor is directed to reduce, in accordance with the express will of the legislature, class five appropriations fifteen per cent, class four appropriations ten per cent, and class three appropriations five per cent.

Again, suppose that three months have passed and, in accordance with the act,[83] the governor makes another determination, this time to the effect that financial conditions in the state's affairs have greatly improved, that situations demanding a high degree of efficiency in agencies of classes one and two have passed, and that a pro rata reduction of all appropriations, or even a return of appropriations to the original figures, is again practical.[84] It becomes his duty, not a discretionary right, to administer the fiscal affairs of the state as directed by the principles and policy of the legislature's expressed will.

While the statute may well be supported on the ground that it delegates to the governor delegable legislative powers which could have been formerly exercised by the legislative or executive departments, or upon the ground that the legislature has declared the policy of the law and fixed the standard and it is the administrative power of the governor which fills in the details, it seems more consonant with the terms of the statute to say that the legislature has enacted a law to become operative when the governor determines certain facts exist. In fact it may be said, as to the five graduated rates of reduction, that five laws have been endorsed by the legislature, each of which is a purely legislative creation, and that the governor by administrative acts of accountancy de-

[82] Le Page v. Bailey, *supra* n. 25, at 458.

[83] W. Va. Acts 1933, *supra* n. 20, § 2: "The governor shall examine and survey the progress of the collection of the revenue and shall determine quarterly the proportion which the amount actually collected bears to the collections estimated for that period."

[84] *Id.* § 3. Although it is evident that no express language is used directing the governor to resume former rates when financial conditions are normal again, certainly by the quarterly determinations provided for in the act the implication is strong that such is the intent.

termines which one to apply to administer the fiscal affairs of the state in accord with the policy of the enactment.

Pertinent here are statements by Professor John B. Cheadle:[35]

> "This administrative field includes all acts legislative in nature beyond the adoption of the broad policy, so that in this sense the legislature performs essentially administrative functions when it works out details in the application of the policy . . . . All details in the application of the policy may be delegated, though these details may involve the exercise of discretion and a choice between policies subordinate to the broad policy of the legislature."[36]

A Virginia statute,[37] the predecessor of the West Virginia law in the pro rata reduction principle, fails to take into consideration the dangerous impairment of the indispensable governmental services which will be prevented, to a great degree at least, by the five graduated rates of reduction for which the West Virginia act[38] provides. An act of Congress[39] has recently conferred on the President very broad powers in the reorganization of executive and administrative agencies. The President's order[40] under the act is not to become final and effective until after Congress has been in session for sixty days[41] during which time congressional disapproval may be made and a change in the order directed.[42] In view of the West Virginia biennial legislative sessions[43] and a possible court construction of such a provision that action thereunder is to be withheld until the legislature has been in session for a period of time, it is apparent that a provision in the West Virginia law similar to that of the federal statute would probably

[35] Professor of Law, University of Oklahoma.

[36] Cheadle, *op. cit. supra* n. 17, at 899.

[37] Va. Laws 1932, c. 147, § 30, at page 319: "The governor is hereby given full power and authority to examine and survey the progress of the collection of the revenue out of which such appropriations may be payable, and to declare and determine the amounts that can, during each quarter of each of the fiscal years of the biennium, be properly allocated to each respective appropriation . . . . The governor may reduce all of said appropriations pro rata when necessary to prevent an overdraft or a deficit for the fiscal period for which such appropriations are made." It will be noted that this statute as well as the West Virginia statute was enacted only for a period of two years.

[38] W. Va. Acts 1933, *supra* n. 20, § 5.

[39] The act of Congress is cited, *supra* n. 1.

[40] The President's first order under the law was issued June 10, 1933. See 5 U. S. C. SUPP. I (1933) following § 132.

[41] 5 U. S. C. SUPP. I § 130 (1933).

[42] See WILLIS, *op. cit. supra* n. 4, at 42, 116 *et. seq.*, and 169 for the English system of Parliamentary approval required for administrative orders.

[43] W. Va. Const. art. 6, § 18.

render the enactment ineffective for its purpose. Moreover, a glance at the Virginia act and at the federal statute will convince one that the West Virginia statute has been much more carefully drafted[44] in order to avoid the strict separation of powers limitations of the state constitution.

In looking to the future, one may ask: If this scheme of graduated rates be applied to expenditure of revenues, why may it not be applied to the receipt of revenues? A sales tax law, for example, may be drafted wherein the legislature declares its policy and sets forth standards or principles within which the governor or some administrative body might vary the rate of taxation depending on a determination of the necessity for such. A gasoline tax, the yield of which will depend largely upon rates imposed by surrounding states, might thus be varied within limits in order to yield a maximum potential revenue.[45] Similarly a tax on liquor sales which may be foreseen under the recent repeal amendment to the federal constitution[46] may be varied, following determinations of policies of control or regulation, so as to make effective an expressly declared purpose of the legislature. While in the sales tax situation it may be more difficult at times to spell out an intelligible principle than in the budget control or tariff situations,[47] and while taxation strikes more deeply into the sacred concepts of constitutional government than do other governmental powers, it seems that such a tax may well be effected in a most practical manner.

In conclusion it may be said that if the legislature declares clearly its policy or purpose,[48] sets forth an intelligible standard

---

[44] Attention is to be called to such expressive words as "standard", "equally and pro rata", "directs", and similar words which remove an idea of discretion. The saving features of the law in §§ 8, 9, 10, and 11, W. Va. Acts 1933, *supra* n. 20, are commendable.

[45] See H. B. No. 114, S. B. No. 38, a proposed act of the nature suggested which was defeated in the Extraordinary Session of the West Virginia legislature in 1933. Section 3 of the proposed act would have allowed the governor, depending on a determination therein explained, to vary the gasoline tax between three and six cents on each gallon sold.

[46] U. S. Const., Amendment 21.

[47] J. W. Hampton, Jr., and Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928) construes the tariff act found in 42 STAT. 858, § 315a, at page 941 (1922), 19 U. S. C. §§ 154, 156 (1927), which allows tariff duties to be varied on a determination by the executive. But *cf.* Fox River Butter Co. v. United States, 287 U. S. 628, 53 S. Ct. 83 (1933), where a memorandum decision is interpreted as meaning approval of a lower court decision (20 C. C. P. A. Cust. 38) in holding that Congress exceeded its powers in delegating to the President the power to classify.

[48] 1 COOLEY, *op. cit. supra* n. 13, at 228; J. W. Hampton, Jr., and Co. v. United States, 276 U. S. at 405, 48 S. Ct. at 350, cited in n. 47.

or principle,[49] and reserves to itself matters of wide discretion which are purely legislative,[50] other powers necessary to an administration of the law may be exercised by executive or administrative agencies. It is submitted that the West Virginia budget control law is a practical and workable device[51] of paramount importance in times of financial emergency; that careful drafting has made it consonant with modern judicial decisions and thought.[52]

—STANLEY E. DADISMAN.

---

[49] Mutual Film Co. v. Commission, 236 U. S. 230, 245, 35 S. Ct. 387 (1915); J. W. Hampton, Jr., and Co. v. United States, 276 U. S. 394, 409, 48 S. Ct. 348, 352; Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925). But see State v. Whitman, *supra* n. 11, where it is difficult to find a standard or principle. See, as to the standard of "reasonableness", Avent v. United States, 266 U. S. 127, 45 S. Ct. 34 (1924); Saratoga Springs v. Saratoga Gas Co., 191 N. Y. 123, 128, 83 N. E. 693 (1908). For pertinent language on the standard or principle required see Mahew v. Nelson, 346 Ill. 38, 178 N. E. 921 (1931).

[50] WICKERSHAM, *op. cit. supra* n. 13, at 195, where six rules are suggested as guides to a legislature in drafting a statute in delegating power which will withstand constitutional scrutiny. Much, the writer intimates, will depend on the court's own philosophy.

[51] J. W. Hampton, Jr., and Co. v. United States, *supra* n. 47, reveals the absolute necessity for such legislation under modern complexities.

[52] Wheeling Bridge, *etc.*, R. Co. v. Paull, 39 W. Va. 142, 144, 19 S. E. 551 (1894); State v. South Penn Oil Co., 42 W. Va. 80, 97, 24 S. E. 688 (1896). Also see Le Page v. Bailey, *supra* n. 25, at 458.