

## AN INQUIRY INTO THE EXERCISE OF NON-JUDICIAL POWERS BY JUDGES

It is an accepted principle in constitutional law that the courts are to perform only the powers which are strictly judicial in nature.<sup>1</sup> And by "judicial power," according to Mr. Justice Miller,<sup>2</sup> is meant the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. When judges, therefore, exercise powers which have nothing to do with the settlement of disputes which are presented for hearing before a duly constituted court according to the regular course of judicial procedure, they exercise non-judicial functions.

Of late there has appeared in this jurisdiction a noticeable tendency to assign non-judicial functions to judges. A judge of the Court of First Instance was once designated to investigate the trafficking in quotas of immigration applicants by members of Congress and high officials in the executive department. Another judge was assigned to look into irregularities in the Bureau of Internal Revenue, while yet a third was named to probe the circumstances which led to the burning of ballot boxes in a national election. Another judge has been assigned to Malacañang, to the neglect of the court over which he was supposed to preside. Justices of the Supreme Court are by the Constitution assigned to sit in electoral tribunals of both chambers of Congress.<sup>3</sup>

In other jurisdictions, the assignment of judges to non-judicial functions takes some other forms. In the state of Virginia, circuit courts can exercise the power to fix boundaries and determine the expediency of extending the corporate limits of cities and towns.<sup>4</sup>

In Connecticut, a statute provided that, if a street car company submitted its plans and specifications for laying tracks to the municipal officials and no action was taken thereon within a certain time, the county judge on application could exercise the same power over the company as the municipality possessed in locating the tracks and determining their general character.<sup>5</sup>

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<sup>1</sup> *Muskral v. U.S.*, 219 U.S. 346, 31 S.C. 250 (1910), at p. 253.

<sup>2</sup> MILLER, THE CONSTITUTION, 314, cited in *Muskral v. U.S.*, *supra*.

<sup>3</sup> Art. VI, Sec. 11.

<sup>4</sup> *Henrico County v. City of Richmond*, 106 Va. 282, 55 S.E. 683 (1906); *Winchester, etc., R. Co. v. Commonwealth*, 106 Va. 264, 55 S.E. 692 (1906); 6 Va. L. R. 441-444 (1920).

<sup>5</sup> *Norwalk St. R. Co.'s Appeal*, 69 Conn. 576, 37 A. 1060, 39 L.R.A. 794 (1897).

Legislatures in some states in the United States delegate to the judiciary the task of appointing commissioners of revenue<sup>6</sup> and other minor officials.<sup>7</sup> Sometimes judges are made to determine, subject to review by the Secretary of War, persons who are qualified to be on a pension list;<sup>8</sup> or, subject to review by the Secretary of the Treasury, those who can claim war damages resulting from army operations.<sup>9</sup> Sometimes Congress also gives courts the power to decide cases sent to them on appeal from boards of claims.<sup>10</sup>

A statute in force in Oklahoma provides that in a criminal case, where the death penalty has been assessed and no appeal has been taken, the Governor may ask the opinion of the Court as to the advisability of reprieve or pardon.<sup>11</sup> Another common way by which judges are assigned non-judicial functions is compelling them to render opinions on the constitutionality of a law or bill. This practice is still being carried on in the states of New Hampshire, Maine, Rhode Island, Florida, Colorado, Vermont, South Dakota, Missouri, and Alabama.<sup>12</sup>

All these examples cited above present one common denominator: that judges are made to exercise non-judicial functions. Whether or not this policy of assigning non-judicial functions to judges is desirable is the subject of this inquiry. A subsidiary question that has to be looked into is: Does such policy promote the development of a regime under the Constitution?

It is the main characteristic of constitutional governments for the executive, legislative and judicial powers to be distributed respectively among the executive, legislative and judicial departments. Each of these grand departments is co-ordinate, co-equal, co-important and as far as practicable independent of the others. This cardinal principle of separation of powers admits of a corollary proposition—that no department, except when authorized by the Constitution, can abdicate authority or escape responsibility by delegating any of its powers to another body.<sup>13</sup> Thus, it may be stated broadly that the legislative or executive departments cannot confer on the judiciary powers which are not judicial in character.

When the judiciary, therefore, accepts a commission to perform a non-judicial act, it exercises powers in excess of jurisdiction. Exercise of power in excess of jurisdiction amounts to an exercise of power where there is no jurisdiction. And when the court exercises power where

<sup>6</sup> *Barbour v. Grimsley*, 107 Va. 814, 61 S.E. 1135 (1907).

<sup>7</sup> *Ibid*; 6 Va. L. R. 441-444 (1920).

<sup>8</sup> *Haybarr's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792).

<sup>9</sup> *U.S. v. Ferreira*, 13 How. 40, 14 L.Ed. 42 (1851).

<sup>10</sup> *Gordon v. U.S.*, 117 U.S. 697, 2 Wall. 561 (1864); *Muskrae v. U.S.*, *supra*.

<sup>11</sup> *In re Opinion of Judges*, (Okla. 1921), 195 P. 149 (1921).

<sup>12</sup> 17 Am. and Eng. Encyc. 215 (1892).

<sup>13</sup> *Gov't v. Springer*, 50 Phil. 259, 273 (1927).

it has no jurisdiction, the judge of the court violates indirectly his duties under the law.

This objection to the exercise by courts of non-judicial powers was first amplified by the United States Supreme Court in the Hayburn's case.<sup>14</sup>

The case arose from an Act of Congress passed on March 23, 1792, which undertook to devolve upon the circuit court of the United States the duty of examining proofs, of determining what amount of the monthly pay would be equivalent to the disability ascertained, and to certify the same to the Secretary of War, who was to place the names of the applicants on the pension list of the United States in conformity thereto, unless he had cause to suspect imposition or mistake, in which event he might withhold the name of the applicant and report the same to Congress.

The circuit court for the district of Pennsylvania refused to proceed with the petition of Hayburn, and the case was sent to the Supreme Court on a motion for mandamus. Before the court could decide the question, however, Congress passed another act which provided, in another way, for the relief of the pensioners.

The court, nevertheless, indicated in its report of the case how it would have decided it: it incorporated in a note to the case the reasons cited by the judges of the circuit courts for the districts of New York, Pennsylvania, and North Carolina, in their communication to the President, for declining to execute the first Act of 1792.

The circuit court for the district of New York, composed of Chief Justice Jay, Justice Cushing and District Judge Duane, declared:

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the Legislative nor the Executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."

But in consideration of the meritorious and benevolent object of the law, they agreed to construe the power conferred upon them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and out of court.

The judges of the Pennsylvania Circuit, consisting of Justices Wilson and Blair and District Judge Peters, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a

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<sup>14</sup> *Supra*, note 8.

judicial power when subject to review by the Secretary of War and Congress.

The Circuit Court of North Carolina, composed of Justice Iredell and District Judge Sitgreaves, was of the opinion that the court could not execute it as a judicial power; and held it under advisement whether they might not construe the Act as an appointment of the judges personally as commissioners, and perform out of court, as had been agreed on by the judges of the New York circuit.

As will be noted, the communication to the President by the judges of the three circuit courts did not touch upon the point of whether or not it would be legal for the judges, not being able to act as a court under the Act of 1792, to act as commissioners. The doubts on this matter were cleared up in the case of *U.S. v. Todd*.<sup>15</sup> In that case, Todd received pension after he had been declared a qualified pensioner by the judge of the circuit court for the district of Connecticut, sitting not as a court but as commissioners. The United States tried to recover the pension paid under the Act of 1792 on the ground that it was awarded by the judges, acting not as a court but as commissioners. In ruling that the United States could recover the money paid to pensioner Todd, the Supreme Court unanimously held:

"1. That the power proposed to be conferred on the Circuit Court of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution and was, therefore, unconstitutional and could not lawfully be exercised by the courts.

"2. That as the Act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of Court in the character of commissioners."

The United States Supreme Court reiterated the rule against judges' performing non-judicial acts in the case of *U.S. v. Ferreira*.<sup>16</sup>

The case arose from an act of Congress, authorizing the district judge of the United States for the northern district of Florida to receive and adjudicate claims for losses for which the U.S. government was responsible under the treaty of 1819 between the United States and Spain; decisions in favor of claimants, together with evidence given in connection therewith, to be reported to the Secretary of the Treasury, who, being satisfied that the same were just and equitable and within the treaty was to pay the amount thereof.

Here the Supreme Court, through Chief Justice Taney, refused to act on an appeal from the decision of the district judge on the ground that

<sup>15</sup> *Supra*, note 9.

<sup>16</sup> Unreported, but inserted by Chief Justice Taney as a note after his decision in the case of *U.S. v. Ferreira*, *supra*, note 9. The Todd case was decided in the Supreme Court on Feb. 17, 1794, but as there was no official reporter at that time, the case was not printed.

the judge's act was not a judgment of a court, but was made in the judge's capacity as a commissioner.

The case of *Gordon v. U.S.*<sup>17</sup> also provided Chief Justice Taney another occasion to elucidate on the extent and nature of judicial power. In that case, an Act of Congress conferred jurisdiction on the court of claims, and thence by appeal to the Supreme Court, the judgment, however, not to be paid until an appropriation had been estimated therefor by the Secretary of the Treasury. Chief Justice Taney, in holding the act invalid, because it conferred on the court a non-judicial power by virtue of the fact that the court could not enforce its judgment by any process, since it was subject to the future action of the Secretary of the Treasury and Congress, declared:

"The Supreme Court does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the others in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."

Laws which compel judges to render opinions on the constitutionality of a bill pending action by Congress or laws already enacted provide other reasons holding the assignment of judges to non-judicial functions as objectionable.

The practice of compelling judges to render opinions when demanded by the executive or legislative departments existed in England in very early days and adopted in other jurisdictions in modern times.<sup>18</sup> In earlier cases, the kings asked for advice on points of law, but most of the recent requests have come from Parliament. The most conscientious objector to such interference with the judiciary was Lord Coke. On one occasion, when the King reproved the judges for refusing to give him an opinion before acting on a case, while the judges abjectly promised not to make such a mistake in the future, Coke replied. "When the case happens, I shall do that which be fit for a judge to do."<sup>19</sup>

This practice could be tolerated in England where there was no separation of the various governmental departments, but it is repugnant in jurisdictions, like the Philippines and the United States, where the theory of separation of powers is a cherished legal value.

The delegation to the judiciary of non-judicial powers by means

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<sup>17</sup> *Supra*, note 10. For objection to judges' acting as investigators, see *Richardson and Conolly v. Scudder*, 247 N.Y. 401, 160 N.E. 655 (1928).

<sup>18</sup> The most celebrated example is *M'Naghten's Case*, 10 Cl. & F. 200 (1843), in which the judges gave an advisory opinion on the proper test of insanity, 10 Va. L.R. 150-3 (1923).

<sup>19</sup> 1 CAMPBELL, *Lives of the Chief Justices*, 399, cited in 10 Va. L.A. 150-3 (1923).

of which the court is conferred the power to appoint minor officials is dangerous. Such a power would drag the court and the judges into the realm of pure politics. The foundation of every political machine is the number of favors it can bestow. To give the judiciary the power to make a number of appointments would tend to inject political considerations into the selection of judges. Respect for the position of a judge invariably diminishes where he must combine with his judicial duties the conferring of executive favors and has at his disposal a large patronage.<sup>20</sup> And when the courts become soiled by politics, gone would be the faith the people now have for that department. The courts, like Caesar's wife, should always be above suspicion.<sup>21</sup>

Another important factor which should militate against the assignment of judges to non-judicial functions is its impracticability. The judges are over-burdened as they are without giving them extra load on which they have no right to act.

Chief Justice Paras, speaking early last year in a convention of a federation of local bar associations, pointed out that the local administration of justice had been greatly hampered because court dockets were clogged. The dockets were clogged because the number of cases presented for decision was clearly in excess proportionally of the number of judges trying them. Congress probably took these observations of the Chief Justice into account when it amended the Judiciary Act of 1948 during its last session.<sup>22</sup> The amendment was instituted ostensibly in order to provide for the appointment of additional judges of Courts of First Instance.

Perhaps one of the most cogent arguments against judges' taking up of tasks which are outside the judicial field is the resulting anomalous situation that such tasks are likely to create.

This possibility was foreseen by our Supreme Court in the case of *Meralco v. Passay Transportation Company*.<sup>23</sup> In that case was presented before the court the question as to the legality of a law which would make the justices of the Supreme Court constitute themselves into a board of arbitrators to settle disputes arising from the exercise of public service franchises.

The high tribunal refused to allow its members to act as a board of arbitrators because the opinion so rendered by the judges when acting as such board would have no binding effect, inasmuch as it would not be a judicial act.

This is so because the original jurisdiction of the Supreme Court

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<sup>20</sup> 6 Va. L.R. 441-444 (1920).

<sup>21</sup> Hughes, R. M., Solicitor General Beck's Suggestion of a Congressional Quiz Class to be Operated as a Supreme Court Annex, 11 Va. L.R. 467-470 (1925).

<sup>22</sup> R.A. 1186, amending and repealing certain sections of R.A. 296.

<sup>23</sup> 57 Phil. 600 (1932).

springs directly from the Constitution and cannot be increased or diminished by congressional action. Any opinion given by the judges—as members of the board of arbitrators and not as judges—would at most be mere individual views and not the act of the Supreme Court as such.

The absurdity of the situation which would arise from such a set-up would become more apparent if the Supreme Court justices, sitting as a board of arbitrators, failed to settle the dispute. The case would then be taken to court. The opinion of the justices as a board would thus be passed upon by a judge of the Court of First Instance. Here then would arise an instance where an inferior court would be passing judgment on an act of the members of a superior court—an entirely anomalous situation indeed!

But let us pursue the example further by assuming that the decision of the trial court was appealed. There would come to pass then a situation where members of the Supreme Court, in their capacities as such, would be passing judgment on their own opinions which they had delivered earlier as members of a board of arbitrators. A more absurd case there can be none!

All this discussion serves to point out why a policy of assigning judges to non-judicial offices is a very undesirable thing. The saner policy which must be followed would be for members of the judiciary to wash their hands off entirely of matters which are not within the scope of their judicial authority.

That way the independence of the judiciary could be fully maintained, for then judges could avoid the possibility that they might turn subservient to members of the other branches of the government with which the judiciary is co-equal, co-ordinate, and co-important.

The judges must be as zealous as are the other citizens of the Republic in seeing to it that the judiciary is illumined by its own light, unsullied by factors which make for degradation of justice.

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