

BOOK REVIEWS

THE PRESIDENCY IN THE COURTS. By Glendon A. Schubert, Jr. Minneapolis: University of Minnesota Press, 1957. Pp. xi, 391. \$5.50.

This is a different kind of book about the Presidency. Unlike the treatises dealing with the President's total role and the responsibilities and powers it entails, Professor Schubert's study is an inquiry into the control exercised by the courts over the exercise of presidential authority. Putting the matter in another way, his book is a study of the scope and effectiveness of judicial review when the validity of the President's acts are challenged.

Institutional restrictions on power may assume various forms. In relation to the presidential office, the control exerted by Congress, the party system, precedent and tradition created by the office, public opinion and the electoral process are all important restraining factors. The courts, too, have their place in vindicating the rule of law in its applicability to the executive authority. Indeed, because of the pivotal place of judicial review in our constitutional theory and practice, it is probably a common-place assumption that chief reliance must be placed on our courts and the judicial process. Professor Schubert's scholarly study points to the ultimate query whether this reliance on the judicial power to curb presidential authority is justified by the record.

In making this study the author has attempted to uncover and deal with every reported case decided by an American court since the adoption of the Constitution, whether a federal or state court and whether a high court or inferior court, where in the course of the decision, the tribunal had occasion to consider the validity of presidential actions. A count of the citations in the Appendix shows that about 650 cases came under his scrutiny. The cases cut across important areas of executive power, and most of the principal facets of presidential authority emerge from their appraisal. Professor Schubert has done an excellent job in arranging and classifying his materials. He deals in successive chapters with the management of public personnel, management of the public domain, the conduct of foreign affairs, control of the tariff, control of military affairs and immigrant aliens, and the seizure power and emergency regulations.

It should not be inferred from the title that the book deals only with cases to which the President has been a party. If this had been the case, there would have been no occasion for writing a book, because of the traditional view that the President is personally immune to the judicial process. The validity of executive action may be challenged before the courts, however, in various types of proceedings where references to the executive action becomes relevant to the disposition of the case.

In defining the scope of his study the author has included decisions dealing with the legality of actions of the President's ministerial assistants, *i.e.*, he has identified with the executive power for the purposes of this study, the acts of ministerial officers who are responsible to the President.¹ Presumably then, all actions taken by persons and agencies acting within the apparent scope of the executive authority should come in for scrutiny to the extent that the courts have had occasion to deal with the validity of these actions. Whether the author has exhausted all the case material relevant to his study or whether he has discussed all the pertinent areas of executive authority are questions difficult to answer, since one must accept the frame of reference which the author has prescribed for himself. It would be surprising if he did not miss at least a few cases. One may note for instance the lack of any reference to *Hannegan v. Esquire*,² relating to the Postmaster's censorship power, or the failure to refer to some of the more recent decisions requiring the Attorney General to observe his own rules and procedures in dealing with deportation matters.³ At first blush it may appear surprising that the author does not deal extensively with the important area of executive responsibility arising from the President's duty to enforce the laws. The federal law-enforcing agencies, *i.e.*, the FBI and the police agencies associated with some of the other departments, are an important arm of the executive. A survey of the cases in which courts have invalidated arrests, searches and seizures by agents and officers within the executive departments would show a much more aggressive judicial intervention to curb executive power than indicated by the cases limited to the areas discussed by the author. But one should not quarrel seriously with the author over this omission. His concern is with judicial review in those areas where rights and obligations are affected by the legislative and adjudicative actions of the president and his principal ministerial officers in exercising authority derived from either constitutional or statutory sources.

Various legal grounds may be employed to attack the legality of presidential action: that it lacked constitutional or statutory authority, that it conflicted with an act of Congress, that it exceeded the authority granted by the statute on which it purported to rest, that it failed to observe procedures required by the Constitution or statute, or that it impinged upon the substantive rights of the citizen. Judicial review of executive action is really one phase of the larger problem of judicial review of administrative action and it opens up the same general range of inquiry with the exception that the President does not depend for all of his authority upon legislative

1. "Although many of the cases which follow are concerned with personal action on the part of the Chief Executive, in the majority of instances—notwithstanding the patent legal fiction to the contrary—the phrase 'the President' functions in fact as a legal vessel to hold the highly complex and multifarious administrative relationships characteristic of the functioning of the Executive Office of the President in contemporary practice." (p. 7).

2. 327 U.S. 146 (1946).

3. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

grant but may assert some areas of prerogative stemming directly from the Constitution.

It seems quite clear from Professor Schubert's study that despite the weapons available to them and the frequent opportunities presented for scrutiny of presidential action, the courts have on the whole been disposed to uphold the exercise of executive power. Although he examined a great number of cases, the author found only the thirty-eight listed in Appendix A where presidential action was declared invalid, and of these thirty-eight only fourteen were decided by the United States Supreme Court. Concededly, a quantitative statistical analysis of this kind does not prove very much. It would be absurd to suggest that judicial review is worthless unless presidential action is declared invalid in at least ten per cent of the cases. Certainly, as part of the whole picture we must take into account the imponderable and immeasurable restraining influence exerted on the Executive by the knowledge that citizens do have access to the courts, that the courts may intervene and that the Executive will have to be prepared to support the validity of his action.

Despite the limited significance of the bare statistics, it should be evident to the reader that this statistical analysis does mirror in an imperfect way a conclusion that is quite solidly fortified by the author's chapter-by-chapter analysis. Judged by the past performance of the courts, as reflected in the case law, the President may count upon a predisposition of the courts to uphold his actions. As a result of his detailed analysis the author concludes that the commonly accepted notion that Americans may rely on the courts as a bulwark against executive power is something of a myth, that in fact courts have in general shown a deferential attitude toward presidential action, and that it is well for citizens to realize that the principal controls over the executive must be found elsewhere. While Professor Schubert feels that the courts have an important and vital function to perform in enforcing the law against citizen and official alike, and that they should assert themselves more boldly to protect individual liberties in areas where the President and his ministerial officers are clothed with large measures of discretionary authority, he is not completely happy with the relatively few situations in which the courts have intervened. Thus his comments on the *Youngstown*⁴ case indicate that he sympathized with the dissent which would have upheld President Truman's seizure of the steel mills. (pp. 248-51).

That the exercise of presidential authority should go virtually unchallenged in some areas is understandable. The President does have large prerogative powers that enable him to determine important policies beyond the power of courts to challenge. For instance, in the field of foreign affairs, he must necessarily be conceded a very large discretionary and policy-making authority, even though it is unnecessary for the Supreme Court to exaggerate the power as it did in the cases upholding executive

4. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

agreements and placing them on a level with treaties.⁵ Likewise, with regard to military affairs in time of war, a large discretion must be conceded to the President. Indeed, as the courts learned by painful experience during the Civil War, they are quite weak and feeble to match their authority against that of the President in time of military emergency. But laying aside foreign and military affairs, the two most important areas where the President can claim direct authority from the Constitution, and turning to the areas where the presidential authority derives from legislative acts of Congress or at least is subject to its superior legislative control, it is properly a function of the courts to scrutinize and challenge executive acts on the ground either that the President acted in disregard of legislative policy or exceeded or abused the power delegated or acted in disregard of the rights of a citizen. In the determination of these issues it is not incumbent upon the Court to show the deference and self-restraint it displays in reviewing acts of Congress. The steel seizure case⁶ furnished a good illustration of the use of judicial power to invalidate a presidential assertion of seizure power in conflict with congressional policy. Professor Schubert, dissatisfied with that case, says that it will probably not have much significance for the future. (p. 251). What basis Professor Schubert has for this prediction is not clear. This reviewer feels that the case was rightly decided and that it stands for a principle that is important for our whole constitutional system, namely, that the responsibility for basic domestic policy lies with Congress and not the President and that the Court will throw its weight behind Congress and assert the supremacy of the legislative will in case of a conflict.

It is clear that the courts can do more to protect citizens against arbitrary action by the executive and his agents by insisting on the rudiments of due process and fair play where personal liberties are affected by a decisional process within the executive department. And perhaps we are now witnessing a period in which the court is moving toward a more vigilant review of executive action as it bears on personal liberties. The recent cases holding invalid the discharge of federal employees under the loyalty-security programs, although not based directly on constitutional grounds, are all significant as indicating that the courts are finding appropriate handles for dealing with executive action of this kind. In the *Cole*⁷ case the President's order extending the security program to employees in nonsensitive positions was found invalid as an improper exercise of statutory power delegated to the President. (It may be noted in this connection that congressional formulation of a standard enabled the court to reach this result, and it suggests that courts can perform a useful function by returning to their former insistence that Congress define some kind of a standard when it delegates large policy-making powers to the President.)

5. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). Cf. the extraordinary statements about the President's power in *United States v. Curtiss*, 299 U.S. 304 (1936).

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

7. *Cole v. Young*, 351 U.S. 536 (1956).

The decisions in the *Peters* and *Service* cases⁸ are particularly interesting, since they rest on the proposition that when the President or a Cabinet officer adopts a regulation, it is binding on the executive officer himself and the court will insist upon its observance. The recent lower court decisions⁹ imposing due process limitations on the Secretary of State's handling of passport applications mark another development designed to limit the arbitrary exercise of executive power. It appears to the writer that this kind of review, minimizing the opportunity for arbitrary executive action, offers much promise for the future.

Students of the subject are indebted to Professor Schubert for this scholarly, thoughtful and well-written book. His painstaking analysis of the case material is a solid contribution to the literature on the general subject. The later chapters of his book in which he discusses the legal sources of presidential power, due process in presidential law-making and the scope of judicial review, chapters in which he states his own conclusions in these matters, add a good deal of positive substantive content. The chapter on due process in presidential law-making is particularly helpful since very little attention has been given to the formal requisites that should be observed in the issuance of executive proclamations, orders and rules.

Professor Schubert has on the whole stated a good case in support of his general conclusion. The courts have shown a timidity and reluctance to challenge presidential action. It is useful to have it pointed out that the courts, even though they could do more, are by their very nature limited in their attempt to curb presidential power, that in many cases they cannot interfere, that in many situations they should not interfere, and that in the end the greatest reliance must be placed on political and legislative restraints, the force of public opinion, and a tradition of self-restraint generated and maintained by the office itself.

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PENNSYLVANIA FIDUCIARY GUIDE. A Handbook for Executors and Administrators. By George L. Haskins and M. Paul Smith. Boston, Toronto: Little, Brown and Company, 1957. Pp. xvi, 277. \$7.50.

In their Foreword to this excellent work the authors state: "The purpose of the book is three-fold: first, to provide a general description of the steps in the administration of a decedent's estate; second, to supply a compendium of the duties and responsibilities of the personal representative; third, through citations and other references, to indicate where further discussion of specific problems may be found. The book deals with practical as well as with legal problems, but for the most part it is con-

8. *Peters v. Hobby*, 349 U.S. 331 (1955); *Service v. Dulles*, 354 U.S. 363 (1957).

9. See, e.g., *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955).

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cerned with answers and not reasons." (p.v.). Their aim has been accurate. This volume provides a most useful addendum to the library of any lawyer, trust officer, law student or any person who may be an administrator or executor of the estate of a decedent. It is filled with useful information but its greatest value lies in its careful plotting of the subject of the administration of a decedent's estate. Answers are supplied to the questions of law which are posed. Citations and references are given to enable the reader to pursue the reasons for the principles of law which apply. The extensive work of research which has gone into the monthly articles which have appeared in the *Fiduciary Review* since 1934 is reflected in this book. There are numerous references to the *Fiduciary Review* which the reader may follow in his study of a particular question. An important value of this work is that it is the first of its kind to illustrate in a practical form the application of the provisions of the Fiduciaries Act of 1949 to the Pennsylvania system of administration of the estates of decedents.

The function of a work of this kind has been very adequately met. The entire subject of decedents' estates administration is reduced to a focus of two hundred and seventy-seven pages. There is little of the theoretical in this work. It was not intended by the authors that there should be. This is a practical book for practical users with accompanying references supplied which will enable any reader to follow any one of the treated subjects to its origins in decided cases, statutes and to authorities dealing with its general and broader aspects. The material presented is arranged as nearly as possible in the order in which problems usually occur in the administration of an estate. The character and the quality of the book are indicated in the first chapter where "Steps Preliminary to Probate and Grant of Letters" is treated. The matters discussed and the suggestions made as to what should be done by the prospective fiduciary of the estate and his lawyer before the time when their authority actually comes into being are the result of practical experience. It frequently occurs in practice that action must be taken immediately upon the death of the decedent to safeguard the assets of the estate. Heretofore there have been more shadows than light in this area.

The policy of the law of the Commonwealth of Pennsylvania is to provide a workable system for the distribution of small estates without the delay and formality which attend the administration of larger ones. This subject and the practice attending it in the Orphans' Court is well explained in Chapter II entitled "Disposition of Estates Independent of Letters." The subject is an important one. There is still pending the proposal to have the legislature increase the value of the estates which may be distributed on petition from \$1500 to \$2500. This will further increase the range of service of this wise legislative policy. This chapter also treats of the risks and difficulties which attend the settlement of an estate consisting entirely of personalty by agreement of the parties without the formality of an administration.

The chapters dealing with the subjects of "The Grant of Letters of Administration," "Probate of Wills" and "The Grant of Letters Testamentary" are a clear statement of practice in these fundamental steps in administration in the office of the Register of Wills and the Orphans' Court. The sub-titles of these chapters cover many subjects which have always presented puzzling questions to lawyers who practice in the Orphans' Court. Ancillary administration, the discharge of an administrator, actual or presumed death, whether or not a will should be probated, proof of lost or destroyed wills, venue of probate, domicile of the decedent, probate of after-discovered testamentary papers, and wills in a foreign language are some of the many subjects which are clearly explained.

The material in the chapters dealing with "Initial Duties Following Grant of Letters," "Family Exemption," "Administration of Real Estate," is inclusive of many questions which occur in practice. The duties of fiduciaries in respect to real estate, the procedure to be followed in selling, mortgaging and leasing, and the practice in the accounting and distribution of real property are clearly set forth.

The subjects of "Debts and Claims Against the Estate," "Survival, Abatement and Control of Actions" and "Inventory" follow those referred to above. The chapter dealing with debts and claims is especially well done. It covers a very extensive subject in a summary form but without omission of essentials.

Most Orphans' Court judges and lawyers who practice in this court believe that the time has come for a thorough study and revision of the inheritance tax laws of Pennsylvania. Before that occurs we must live with the present law and its numerous amendments. The application of these is very well explained in this book under the title "Pennsylvania Inheritance and Estates Taxes." This chapter and the one following it dealing with the "Federal Estate Tax," assemble a large fund of information and references which will help the reader to obtain the answers to a vast range of questions of both law and practice in these fields.

Two of the concluding chapters, "Accounting" and "Distribution," deal fully with these important branches of administration. The principles of law governing the duties of a fiduciary in these two essential functions are clearly stated. The treatment of the subject of distribution is very complete.

The volume concludes with a chapter on "Will Contests." While litigation over the validity of the will occurs in a small percentage of decedents' estates, the inclusion of this chapter serves a very useful purpose. It contains a full explanation of the legal procedure which must be followed in the contest of the will of a decedent as well as a brief statement of the principles of law which apply in these cases. Ample citations and references are given to enable the reader to make further study.

The profession will find the appendices to this book very useful. They consist of an "Attorneys' Check Sheet of Executors' Duties," "Estates

Settlement Time Table," "Check List—Deceased Veterans' Estates," and "Federal Estate Tax Deductions."

A complete table of cases and a well prepared, detailed index are included.

This book is a worthy complement to Hunter's *Pennsylvania Orphans' Court Commonplace Book*, Remick's *Pennsylvania Orphans' Court Practice* and Bregy's *Pennsylvania Intestate, Wills and Estates Acts of 1947*.

Because of the *Pennsylvania Fiduciary Guide* lawyers who practice in the Orphans' Court will be better informed and fiduciaries who administer estates of decedents will more clearly understand their duties. The authors have rendered a lasting service to their profession and to the public.

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