1918

Legal Theory of the Minnesota Safety Commission Act

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MINNESOTA LAW REVIEW

VOL. III DECEMBER, 1918 No. 1

THE LEGAL THEORY OF THE MINNESOTA "SAFETY COMMISSION" ACT[1]

HERE are two or three familiar episodes in American history:

(1) The Vallandigham episode. Clement L. Vallandigham was a democratic congressman from Ohio, at the outbreak of the Civil War. He made a nuisance of himself, criticising the government and talking about the constitution. He was defeated for re-election in 1862. On the 1st of May, 1863, he made a speech in Knox County, Ohio. In it he said, among other things, the following:

"The present war is a wicked, cruel and unnecessary war;" "a war not being waged for the preservation of the Union;" but "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" and "if the administration had so wished the war could have been honorably terminated months ago."[2]

Based upon an address delivered before the Minnesota State Bar Association at Faribault, Aug. 15, 1918.

[1] Laws of Minnesota 1917, Ch. 261. "An act providing for the Minnesota public safety commission, defining its powers and duties in event of war and otherwise, and appropriating money for carrying out the purposes thereof." The act creates a commission of seven members, including the governor and attorney general ex officio, gives the commission specific duties and broad general powers, and appropriates one million dollars for its use.

[2] Ex parte Vallandigham, 28 Fed. Cas. 874, (Case No. 16,816) decided May 16, 1863, where the arguments of counsel and the decision are given in full.

General Burnside was then in command of the military department of Ohio, with headquarters at Cincinnati. It was a peaceful district, free from the forces of the enemy and with the courts open and the regular civil authorities performing their usual functions. On the evening of May 4th, Captain Hutton, of General Burnside's staff, arrested Vallandigham, and on May 6th he was tried before a military commission for publicly expressing his sympathies for those in arms against the government of the United States in violation, not of any statute, but of an order of General Burnside's forbidding the expression of such sympathies. The next day he was found guilty and sentenced to close confinement in some fortress, during the continuance of the war. A writ of habeas corpus was denied by the United States circuit court on two grounds; 1st, because the conviction was legal, and 2nd, because the court was satisfied the military authorities would not obey the writ, if it issued.[3] The Supreme Court of the United States unanimously refused to review the sentence by certiorari for the reason that it had not jurisdiction to so review the proceedings of a military commission.[4] No one can read either decision without feeling that both courts thought General Burnside was acting within his powers.

The sentence was subject to the president's approval, and while Lincoln was considering the matter there were loud protests from all parts of the country, and mass meetings were held in many places. On May 16th a mass meeting was held at Albany, New York, at which was read a letter from Horatio Seymour, then governor of New York, and afterwards a candidate for the presidency, a part of which was as follows:

"I cannot attend the meeting at the Capitol this evening, but I wish to state my opinion in regard to the arrest of Mr. Vallandigham.

"It is an act which has brought dishonor upon our country; it is full of danger to our persons and to our homes; it bears upon its front a conscious violation of law and of justice. Acting upon the evidence of detailed informers, shrinking from the light of day, in the darkness of night, armed men violated the home of an American citizen, and furtively bore him away to a military trial conducted without those safeguards known in the proceedings of our judicial tribunals.

[3] Ibid.

[4] Ex parte Vallandigham, (December Term 1863) 1 Wall. 243, 17 L. Ed. 589.

"The transaction involved a series of offences against our most sacred rights. It interfered with the freedom of speech; it violated our rights to be secure in our homes against unreasonable searches and seizures; it pronounced sentence without a trial save one which was a mockery, which insulted as well as wronged. The perpetrators now seek to impose punishment, not for an offence against law, but for a disregard of an invalid order, put forth in an utter disregard of the principles of civil liberty. If this proceeding is approved by the government and sanctioned by the people, it is not merely a step towards revolution, it is revolution; it will not only lead to military despotism, it establishes military despotism. In this aspect it must be accepted, or in this aspect it must be rejected.

"If it is upheld, our liberties are overthrown. The safety of our persons, the security of our property, will hereafter depend upon the arbitrary wills of such military rulers as may be placed over us, while our constitutional guaranties will be broken down. . . . . It is a fearful thing to increase the danger which now overhangs us by treating the law, the judiciary and the authorities of States with contempt. . . .

"The action of the Administration will determine in the minds of more than one-half of the people of the loyal States whether this war is waged to put down rebellion at the South, or to destroy free institutions at the North. We look for its decision with the most solemn solicitude."

It was in answer to the resolutions adopted at this meeting that Lincoln wrote his famous letter of June 12, 1863.

This is one extract from the letter:

"The insurgents had been preparing for [the war] for more than thirty years, while the government had taken no steps to resist them. The former had carefully considered all the means which could be turned to their account. It undoubtedly was a well pondered reliance with them that, in their own unrestricted efforts to destroy Union, Constitution and law all together, the Government would, in a great degree, be restrained by the same Constitution and law from arresting their progress. . . . Under cover of 'liberty of speech,' 'liberty of the press,' and 'habeas corpus,' they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers, aiders and abettors of their cause in a thousand ways. . . . Thoroughly imbued with a reverence for the guaranteed rights of individuals, I was slow to adopt the strong measures which, by degrees, I have been forced to regard as being within the exceptions of the Constitution, and as indispensable to the public safety. Nothing is better known to history than that courts of justice are utterly incompetent to such

cases. Civil courts are organized chiefly for trials of individuals or, at most, a few individuals acting in concert, and this in quiet times, and on charges of crimes well defined in the law. Even in times of peace, bands of horse thieves and robbers frequently grow too numerous and powerful for the ordinary courts of justice. But what comparison in numbers have such bands ever borne to the insurgent sympathizers, even in many of the loyal states? Again, a jury too frequently has at least one member more ready to hang the panel than to hang the traitor. And yet again, he who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. Yet this discussion or inducement may be so conducted as to be no defined crime of which any civil court would take cognizance."

This is another extract:

"Long experience has shown that armies cannot be maintained unless desertion shall be punished by the severe penalty of death. The case requires and the law and the constitution sanction this punishment. Must I shoot a simple minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is nonetheless injurious when effected by getting a father or brother or friend into a public meeting and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked administration of a contemptible government, too weak to arrest and punish him if he shall desert. I think that in such a case to silence the agitator and save the boy is not only constitutional, but withal a great mercy."

This is another extract:

"I can no more be persuaded that the government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good for a well one. Nor am I quite able to appreciate the danger, apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury and habeas corpus, throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics, during temporary illness, as to persist in feeding upon them during the remainder of his healthful life."

President Lincoln approved the sentence, and Vallandigham was taken to Fort Warren in Boston Harbor. Afterwards his

punishment was modified to banishment and he was transported to Shelbyville, Tennessee, and turned loose inside the Confederate lines.

(2) The Benedict episode. This is told upon the authority of "The American Bastile," a copperhead book, published at the close of the war.

Rev. Judson D. Benedict was a Campbellite clergyman, pastor of a church at East Aurora, which is near Buffalo, New York. He was of intellectual appearance and sixty-one years old. On August 31st, 1862, he preached a sermon in which he said that the command of the New Testament was explicit that Christians should not engage in wars of any kind. He referred to the constitution of the state of New York, which granted military exemption to Quakers and said he saw no reason why his brethren should not obtain like immunity. On September 2nd, the United States marshal of the western district of New York arrested him, without a warrant and before breakfast, and put him in the county jail at Buffalo. On the 15th, his attorney got a writ of habeas corpus from Judge Hall of the U. S. district court addressed to the jailor and the marshal; three days later the jailor produced his body in court and, after a hearing, Judge Hall ordered him freed, filing an opinion replete with citations from Magna Charta, the Petition of Rights, the Bill of Rights and the Act of Settlement, and quotations from Hume, Hallam, Blackstone, Story, and other authors. As the reverend gentleman left the court room, thus discharged from custody, a deputy U. S. marshal approached him and advised him that he was again under arrest. He asked by whose orders he was seized this time. He was told, "We will show you the authority, when we get you where we want you." He was hurried to a carriage in waiting, driven forty miles to Lockport in Niagara County, put on a railroad train and conveyed to Washington, D. C., where he was incarcerated in the old capitol prison. The next day his attorney got another writ of habeas corpus from the same Judge Hall, this time addressed to the marshal alone, but the marshal returned that he could not produce Rev. Benedict's body because it was in Washington and not in his custody.

(3) The Milligan episode. Lambdin P. Milligan was an Indiana lawyer. He was prominent in a society organized to oppose the war. In 1863 and 1864 he made a number of public

speeches, in which he said that the purpose of the war was to break down the influence of the agricultural districts of the country and elevate the moneyed and manufacturing interests. He appears to have been a noisy agitator, posing as a friend of the farmers and active in stirring up social discontent and class hatred. In October, 1864, he was arrested by order of General Hovey, in command of the military district of Indiana, which included the city of Indianapolis, and where there was not, and never had been, any serious warfare. He was tried before a military commission, found guilty and *sentenced to be hanged.* On May 8, 1865, President Johnson approved the sentence and fixed May 19th as the date of execution, but afterwards commuted the punishment to life imprisonment. Milligan sued out a writ of habeas corpus and the case got to the Supreme Court of the United States, where it was argued and decided at the December, 1866, term.[5] In the interval between Milligan's conviction and the hearing in the Supreme Court, the Civil War had ended and the country was keen to forget it and to effect a restoration of the Union. The attention of the House of Representatives had been called to the large number of military prisoners confined in the old capitol prison at Washington and elsewhere, and at the initiative of James A. Garfield, a congressman from Ohio, the military committee was instructed to make an investigation. The committee found that during the period of the war more than thirty-seven thousand men and women had been arrested, without warrants or specific charges against them, and incarcerated in one prison or another, without trial or the benefit of counsel. Many of them were people of refinement and education, whose fate had broken them both in health and fortune. Milligan's case was in the hands of Jerry Black of Pennsylvania and David Dudley Field of New York, but Garfield's connection with the congressional inquiry got him a retainer in it also. He was about thirty-five years old at the time, and was a member of the bar, but had never tried a case. The Milligan case was his first court experience and the burden of the argument fell on him. The Supreme Court, which three years before could not hear Vallandigham, now held that Milligan's conviction was illegal and laid down the following principles:

[5] Ex parte Milligan, (1866) 4 Wall. 2, 18 L. Ed. 281.

"Military commissions, organized during the late Civil War in a state not invaded and not engaged in rebellion, in which the federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service. *And congress could not invest them with any such power.*[6]

"The guaranty of trial by jury contained in the constitution was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people at all times and under all circumstances."[7]

This is in substance a ruling that arbitrary arrests of civilians, under executive orders or the orders of military officers, are illegal except in times of actual warfare and even then are illegal except in districts where there are contemporary hostilities by contending armies and where the civil courts are not open and in operation. Vallandigham, Benedict, Milligan, and most of the other thirty-seven thousand were thus unjustly incarcerated.

In 1902 there was a strike in the Pennsylvania coal mines, accompanied by a riot, and the militia was called out to restore order. One of the soldiers shot and killed a rioter and was arrested for manslaughter. The court discharged him in response to a writ of habeas corpus.[8] There wasn't any war in Pennsylvania at the time and the courts were open. In the Milligan case, the Supreme Court of the United States had said:

"Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[9]

The Pennsylvania court did not agree with it. It said:

"Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends, for its extent, existence, and operation, on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens.[10]

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[6] Ibid. (Syllabus). Italics are the author's. [Ed.]

[7] Ibid. (Syllabus).

[8] Commonwealth v. Shortall. (1903) 206 Pa. St. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.

[9] Ex parte Milligan, (1866) 4 Wall. 2 (127), 18 L. Ed. 281.

[10] Commonwealth v. Shortall, (1903) 206 Pa. St. 165 (170) where the court refers to dissenting opinion of Chief Justice Chase in Ex parte Milligan, quoting Hare, American Constitutional Law, p. 930.

"Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. . . . The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

"It is not infrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which, though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it. . . When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force. . . .

"The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and then have them stand quiet and helpless while mob law overrides the civil authorities would be to make the government contemptible and destroy the purpose of its existence. The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful."

At about the same time, there was a riot in San Miguel County, Colorado. Governor Peabody ordered out the militia, who seized and incarcerated one Moyer. Moyer sued out a writ of habeas corpus and the adjutant general returned that he held him because he *apprehended*[11] that if he were released he would be a participant in the prevailing disorder. The supreme court of Colorado discharged the writ, and left him in military

[11] Italics are the author's. [Ed.]

custody.[12] Afterwards he sued the governor for damages, but the Supreme Court of the United States held against him, saying:

"Where the constitution and laws of a state give the governor power to suppress insurrection by the National Guard, as is the case in Colorado, he may also seize and imprison those resisting, and is the final judge of the necessity for such action; and when such an arrest is made in good faith he cannot be subjected to an action therefor. . . . Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment."[13]

In 1912, during the West Virginia coal strikes, Governor Glascock appointed a military commission to try and punish all offenders within the affected district, and the supreme court of the state sustained him and also held that he was not civilly liable in a suit for malicious trespass brought by the proprietor of a newspaper known as the "Socialist Labor Star" which the commission had summarily suppressed.[14]

These are fairly specimen cases, illustrating the law on the subject as it existed prior to the outbreak of the present war. The Milligan case, as modified by the later decisions, holds that in times and places of disorder, as well as of actual warfare, the military authority can be substituted for the civil, and that the administration of government, ordinarily performed by civil officers and courts, may, in the interest of public safety and welfare, be supplanted by the arbitrary and irresponsible activities of soldiers or extraordinary commissions, and that the test is not whether the courts are open, but whether the machinery they provide can adequately meet the situation. All this would seem to be elementary. Our institutions were born as much in a struggle for religious liberty as for governmental freedom. But the very provisions of our constitution, which secure a man the right to worship God according to the dictates of his own conscience, forbid his using this right as a cloak for licentiousness or as a justification for practices inconsistent with the peace or safety of the state. And in the same spirit, it would be an extraordinary

[12] Re Charles H. Moyer, (1905) 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N.S.) 979, 117 Am. St. Rep. 189.

[13] Moyer v. Peabody, (1909) 212 U. S. 78 (Syl.), 53 L. Ed. 410, 29 S. C. R. 235.

[14] Hatfield v. Graham, (1914) 73 W. Va. 759, 81 S. E. 533, L. R. A. 1915A 175, Ann. Cas. 1917C 1.

state of affairs if the other great constitutional guaranties, like freedom of speech and assembly, trial by jury and due process of law, could be invoked in the hour of danger to arrest the arm of the state uplifted for its own preservation. In order that we may have a constitution, we have got to have a state, and if the guaranties of the constitution can be used for the destruction of the state, they will be used by the same act for their own destruction.

But none of this gets us very far, for this reason: whether we turn to the Milligan case, or to the later cases, we find ourselves limited to this proposition: the state cannot have recourse to extraordinary procedure until there are extraordinary conditions to justify it. There must be either regular warfare, actually waging in the district affected, or there must be quasi warfare in the shape of riots or disorder. No court has as yet sustained the thirty-seven thousand arbitrary arrests and the banishment of Vallandigham, or the proposed execution of Milligan, after a trial by a military commission, operating in a community far removed from the scene of actual fighting. The only case in the Supreme Court of the United States on the subject seems to say that the government is powerless, by way of summary anticipatory action under such circumstances, and that its recourse is limited to the slow process of courts of law and the enforcement of existing statutes.

The Civil War was not fought alone by the soldiers at Gettysburg and in the Wilderness. It was fought also by the farmers in Ohio and Indiana, and by the factory hands in Indianapolis and Cincinnati, who produced the food the soldiers ate, the clothes they wore, and the arms with which they did battle. If a traitor tried to stir up a mutiny among the men in line, a drum head commission could condemn him to death and execute him in short order. Could Vallandigham stir up the factory hands at Cincinnati to strike, or Milligan breed discontent among the farmers of Indiana, or Benedict urge the boys in his parish not to enlist, and in the absence of an applicable statute, must the government submit to the demoralization of the industrial branch of its military service; or if there were an applicable statute, must it follow the painful course of indictments, demurrers, trials and appeals, while the enemy, hampered by none of these things, pressed joyously on it? *Ex parte Milligan* to the contrary not-

withstanding, I don't think so. I believe that in time of war the government of every state has inherent power to do all acts and things necessary or proper to defeat the enemy and that it is performing its full duty to the constitution when it exercises every form of activity to preserve the state, on the preservation of which the existence of the constitution itself depends. I believe Lincoln was right when he banished Vallandigham, that Johnson was right when he approved the execution of Milligan, and I believe that the Supreme Court of the United States would have said so, had the question been put up to it before the close of hostilities.

This is the legal basis of the safety commission act, if it has any legal basis. It provides for a body of seven men who, in the event of war,

". . . . shall have power to do all acts and things non-inconsistent with the constitution or laws of the state of Minnesota or of the United States, which are necessary or proper for the public safety and for the protection of life and . . . property . . . and shall do and perform all acts and things necessary or proper so that the military, civil, and industrial resources of the state may be most efficiently applied toward maintenance of the defense of the state and nation and toward the successful prosecution of such war."[15]

It assumes the admission of two facts already alluded to. The first is this: The constitution of Minnesota is not a grant of power, but a statement of limitations on power which, but for it, would be boundless. The United States government has no powers except such as are enumerated in the federal constitution. A state has every conceivable power, except such as have been taken away from it by the grant to the federal government, or by the express provisions of its own constitution.[16] And superior to the grants to the federal government and to the limitations imposed by its own constitution is its right to self preservation. The state has the right to live, and when its life is in danger no one can invoke the provisions of a paper constitution to thwart its work for self defence. The second proposition is this: It is as essential to winning the war, for example, that the street cars which carry workers to the munition factories in St. Paul and Minneapolis should operate uninterruptedly as it is that our ma-

[15] Laws of Minn. 1917, Ch. 261, Sec. 3.

[16] State ex rel. Simpson v. City of Mankato, (1912) 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N.S.) 111.

rines should fight in France, and it is as proper a function of a war board to see that they do operate uninterruptedly during war times as it is for the secretary of war to see that the marines get across the ocean, and any scheme of compulsion which can be used for the second purpose is also available for the first.

Historically the safety commission act is framed on the analogy of the health act, and the functions of the commission are like the functions of a health board. The state public health law of 1883[17] provided in substance that in the event of the prevalence of an epidemic or infectious disease, a local board of health "shall . . . do and provide all such acts, matters and things as may be necessary for mitigating or preventing the spread of any such disease."

Under this general provision, which makes no express reference to any specific disease or to the method of handling it, the supreme court, in the Zimmerman case[18] held that the St. Paul health department had power to make a rule that children should be vaccinated and to punish such as were not, by excluding them from the public schools. The court in its decision said, among other things:

"It will be noted that none of the provisions of the statutes . . . . just quoted expressly authorizes . . .health officers to require children to be vaccinated, as a condition precedent to their admission to the public schools; yet we have no hesitation in holding . . . that the legislature intended to confer such power on them. . . . It is very true that the statutes of our state provide that admission to the public schools shall be free to all persons of a defined age and residence. . . . But all these statutory provisions must be construed in connection with and subordinate to, the statutes on the subject of the preservation of the public health and the prevention of the spread of contagious diseases. The welfare of the many is superior to that of the few, and, as the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools."[19]

If, under a statute permitting a local health board to do all acts and things necessary to prevent the spread of disease in the event of an epidemic, a health board can compel vaccination and prescribe and enforce a penalty for the violation of its orders in

[17] Gen. Laws 1883 Ch. 132 Sec. 3.

[18] State ex rel. Freeman v. Zimmerman, (1902) 86 Minn. 353, 90 N. W. 783, 58 L. R. A. 78, 91 Am. St. Rep. 351.

[19] Ibid. p. 358.

this regard, why, in the event of war, cannot a board or commission, clothed with powers expressed in identical language, promulgate and enforce orders when, in its judgment, such are needed to preserve the public safety and to protect life and property, and are calculated to most efficiently apply the state's resources to the great job ahead of us, towit: "the winning of the war"? If a health board can be lawfully empowered to exercise arbitrary power in times of epidemic, in the interest of the public health, it would seem as though a safety commission, in times of war, could be given like authority, that the life of the state may be saved. If this can be and has been legally done, it surely is a considerable achievement. Martial law becomes unnecessary, because there is available the machinery to anticipate and prevent the physical disorder which, under the decisions, must exist before martial law can be proclaimed. The state is not confronted with the alternatives of waiting until the disloyal in Brown County take up arms against it, or of arresting the ringleaders without warrant of law, as Vallandigham and Milligan were arrested. Before the harm is done beyond repair, a commission authorized to do all acts and things necessary or proper to preserve the public safety and apply the state's resources to winning the war can handle the problem promptly and efficiently.

Most people have thought this was all right and have acquiesced in the commission's orders. But the situation has puzzled some lawyers a good deal. It has given them the pain of a new idea. I do not say this by way of criticism. The commission, as originally constituted, included among its seven members five lawyers and a law book publisher, and the commission itself was puzzled. The act, as introduced in the legislature, provided that disobedience of an order of the commission should constitute a felony. A penal provision appears in the South Dakota and Montana laws, which are modeled on ours, but it was stricken out of the Minnesota act before its passage. The commission wanted to know how its orders were to be enforced, if there was no penalty prescribed for their violation. On April 30, 1917, an employee of the attorney general's office gave it an opinion on this point, reading as follows:

"The most serious feature for consideration is the proper method of enforcing the commission's orders. Ordinarily when the legislature constitutes a board with prescribed authority, it makes violation of its lawful orders an offence with a stated

penalty, or provides that the board shall use the courts' civil process to make its orders effective. In the one case, obedience is compelled by inspiring fear of the penalty which will follow disobedience, and in the other case, by the use of writs like mandamus or injunction. But Chapter 261 contains no provisions for recourse to either method. The question thus arises as to whether the commission is powerless in this direction, or if not, how it should proceed. Suppose, for example, in the exercise of its judgment, the commission should undertake to draft certain men to labor in the state's agricultural or other industries, and they should resist, what would be the situation in the absence of a penal clause? I think as to this line of inquiry, the proper position for the commission to take is this: while the courts are ordinarily the law's agent for law enforcement, they are not under the constitution a necessary factor.[20] A statute can provide other machinery, if the legislature believes it will be more effective, and in the present instance has done so. Under the act the commission can not only make orders, but can itself summarily enforce them, not by inflicting punishment subsequent to their violation, but by original action on its part, or through agents of its selection. It may do 'all acts and things' which are necessary for the purposes of its creation, using all required agents, including the 'Home Guard' provided for in subdivision 7 to help it. It is not to be expected that the commission will take any action which will not be sustained by the best popular opinion. But if the discharge of its duties makes it desirable to compel obedience by the direct apprehension and incarceration of malefactors or resistants, the machinery to this end it has at hand."

I am afraid the lawyers and the law book publisher on the commission did not think much of this view. It seemed to eliminate the courts, and lawyers and law book publishers are apt to think that the earth cannot revolve on its axis except with the assistance of the judges. It will be noticed that the commission's earlier orders reflect this state of mind. In general, they direct municipal councils to enact certain ordinances. The theory here was that ordinances so enacted could prescribe penalties, even if the commission's orders could not, and that municipal councils could legislate under the commission's direction, even if the commission itself had not been empowered or could not be empowered to do so. This was the plan followed with the commission's vagrancy legislation, by all odds the most ingenious and effective of its measures. The commission itself did not order the incarceration of professional agitators as vagrants, but it required the

[20] Oceanic Steam Navigation Co. v. Stranahan, (1909) 214 U. S. 320, 53 L. Ed. 1013, 29 S. C. R. 671.

several cities and villages of the state by local ordinances to so define such persons and to provide for their suppression and punishment.

There have been two lawsuits only involving the commission's powers and functions, but they have both been enlightening, as well to the commission as to the public. The first was *Cook v. Burnquist*[21] tried before Judge Booth at St. Paul in the United States District Court in July, 1917. Cook was an alien saloonkeeper in Minneapolis who was jealous of the federal constitution and claimed that his sacred rights were being violated by Order No. 7, which required him to close his saloon at ten o'clock at night. His counsel said that the order was legislative in its character and that the legislature neither had delegated nor under the constitution could delegate legislative power to the commission. But in this instance, the device of a municipal ordinance had been employed, and inasmuch as the Minneapolis council had complied with the commission's instructions and had twice passed an ordinance embodying the terms of Order No. 7, once over the mayor's veto, the point was not strictly before the court. But in the general interest, Judge Booth went beyond the immediate requirements of the pending controversy and said in substance that he would non suit Cook, even had there been no ordinance; that in his opinion Order No. 7 was not legislative but administrative in nature; that the legislature had authority to create the commission, defining its functions as it had; and that the commission for the effectuating of these functions could make orders, rules and regulations, germane to the purposes of its creation, which would have the force of laws. There cannot be any doubt that he was right. The question had been before the courts in various shapes thousands of times. Rate making is a legislative function, which the earlier cases thought could not be delegated. The care of the public domain is under congressional control and the early acts covered the minutest detail of its management, and the officers and boards in direct charge had no room for the exercise of discretion and no duty except to administer the law. But unless the legislature is to be continuously in session, it is impossible to run a government under modern conditions by such a system, and the courts have gradually got to this position: The standard to be observed and the object to be attained, in any

[21] 242 Fed. 321.

department of governmental activity, must be prescribed by the legislature itself, and it cannot delegate this duty, because it is legislative in character. For example, in rate making it is for the legislature to say that the rates shall be fair both to the enterprise and to the consumer, or in health legislation it is for the legislature to say that the public health shall be preserved by proper procedure, or in war legislation that the state shall act so as to win the war, but the details of how all or any of this shall be done are not legislative but administrative functions, and can legally be left to the officer, board, or commission which the legislature selects or creates for the particular work.[22]

After the decision in *Cook v. Burnquist,* the commission gradually abandoned the municipal ordinance device and proceeded by direct order. It has covered the widest range of subjects. It has undertaken, for example, to fix the sales price of bread and milk, to compel every male person over sixteen years old to work, to forbid the transportation of liquor in automobiles, to require the destruction of noxious plants, to regulate public dance halls and pool rooms, to suppress strikes and lockouts. By Order No. 33, it has gone so far as to make disobedience of its orders a misdemeanor.[23] In general, its powers have not been challenged. Its orders, of course, have not been strictly obeyed, any more than any laws are. But most people have acquiesced, even when they questioned the wisdom or necessity of the commission's action. Before there were any laws or any machinery to enforce his regulations, Mr. Hoover reduced the consumption of wheat by one hundred millions bushels in a single year, simply by appealing to the country's patriotism. In the same spirit of patriotism, most lawyers and most judges, and most other people have stood back of the commission, in the hope that what it was trying to do would help to win the war.

The commission's other law suit was the Blooming Prairie case. This has had two phases, one in the Hennepin County district court, and the other in the supreme court. I am not going to tell its story, because it would take too long. But the outcome

[22] The subject of "The Delegation of Legislative Functions" is discussed with much learning and a full citation of authorities in an article by Professor Cheadle in the May, 1918, Yale Law Journal, Vol. XXVII p. 892.

[23] This is not so extraordinary as it seems at first glance. Vide United States v. Eaton, (1892) 144 U. S. 677, 36 L. Ed. 591, 12 S. C. R. 764; Oceanic, etc., Co. v. Stranahan, supra.

is interesting and significant in two particulars. The action in the district court turned on the validity of Order No. 17 and of Order No. 34.[24] The first order fixed the time within which liquor could be sold by licensed saloons at Blooming Prairie as the hours between nine a. m. and five p. m., and forbade its sale at all, except for consumption on the premises where sold. The second ordered that three saloons, which had disobeyed the first order, should be closed for the period of the war. Judge Hale of Minneapolis, before whom the case came on a motion for a preliminary injunction restraining the commission from enforcing the orders, held that they were valid, that the commission had power to make them and that the court would not inquire into the facts to learn whether it was justified in the course it had taken. If sustained on appeal, this would give the commission the vindication in the state courts which more than a year ago it had in the United States Court. The action in the supreme court arose in this way: the Blooming Prairie suit in which Judge Hale rendered his decision was begun in Ramsey County and got into Hennepin County by a change of venue. While it was still pending in Ramsey County, and on June 29th, 1918, on the application of the plaintiff saloon-keeper, Judge Dickson of St. Paul had issued an ex parte restraining order, by the terms of which the members of the commission, including the governor and the attorney general, together with the sheriff of Steele County and the president of the village of Blooming Prairie, were forbidden to interfere with the operation of the plaintiff's saloon or to arrest the plaintiff for the period of seventeen days and thereafter until the further order of the court. The commission, the sheriff, and the president of the village, out of respect for the constituted authorities, obeyed the order until it was vacated by Judge Hale. But on July 1, 1918, while it was still in force, the governor of the state, in his capacity as such, sent a detachment of soldiers to Blooming Prairie, and closed the saloon, which the court had said should not be molested. Conceiving that this constituted disobedience of the restraining order, in the afternoon of July 11, 1918, Judge Dickson cited the governor to appear before him and show cause why he should not be punished for contempt. The citation was returnable on July 13th at ten o'clock in the morning. Doubtless further time might have been had by stipulation of counsel or

[24] Carroll v. Burnquist, (1918) Hennepin County District Court Docket No. 166538.

by application to the court. But inasmuch as questions of jurisdiction were involved, it appeared unwise to ask for any continuance. There were thus available thirty-six hours only in which to prepare for a hearing on a great constitutional question, an adverse decision in which, perhaps, meant the physical incarceration of Minnesota's chief magistrate and the paralysis of the state's war arm. On the 12th of July, at eleven o'clock at night, Judge Holt of the supreme court signed an alternative writ of prohibition restraining Judge Dickson from proceeding further, and the writ has since been made absolute.[25]

The governor's position was that he had not been and could not be enjoined by any court, in the performance of his executive functions, that one of his functions under the constitution was to take care that the laws were faithfully executed, that the orders of the commission were laws, and that in the absence from the act of any other provision for their enforcement he had the right and it was his duty to have recourse, if necessary for the purpose, to the military forces under his command. In other words, in July, 1918, in practice he adopted the view advanced in April, 1917, already referred to, that the commission not only had the right to make orders, but it had itself the right to enforce the orders which it made, without employing the machinery of any court, unless it wanted to, and that it could select its own agents and follow its own methods to this end. The omission from the act of any penalty for disobedience of the commission's orders connoted the inevitable conclusion that there would be no disobedience to be punished, because the commission could and would compel obedience.

The supreme court has not in so many words said that this is right. Its opinion does not decide that the commission has power to make its orders, because the question was not before it. But Judge Booth and Judge Hale have said it has, and the supreme court has said that, if it has the power, the governor may enforce them by summary process, and no court has the right to restrain him.

A good many years ago Canon Kingsley wrote a pamphlet with the title "What then does Dr. Newman mean?" It wasn't a very learned or wise production, but it inspired Cardinal Newman to write his "Apologia" by way of defence of his convic-

[25] State ex rel. Burnquist v. District Court, (Minn. 1918) 168 N. W. 634.

tions. There is no finer specimen of sustained reasoning and coherent expression in the English language than Cardinal Newman's book, and Kingsley deserves the gratitude of all lovers of elevated literature, because, even if unintentionally, he induced its production. The Blooming Prairie litigation has many discreditable features. But it was worth while, in that it called forth Judge Holt's decision and has helped to settle the question that Minnesota has an effective governmental agency, through which, in the hour of danger, public safety can be preserved, life and property protected, and the resources of the state be effectually applied to the defence of the state and nation and the prosecution of the war.

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