The Supreme Court and the Commander in Chief (Clinton Rossiter, 1951)

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BOOK REVIEWS


The sweep and depth of this small book belie its physical size and make it a welcome addition to the thoughtful literature on the powers of the various branches of the Federal Government.

It is the author's thesis that these powers cannot be intelligently discussed except in terms of the actual operation of the three great independent branches of our government. One of the important points of contact between the branches arises by virtue of the interpretation and limitation by the Supreme Court of the war powers of the United States as exercised by the President. Congress has frequently determined it legally and practically necessary to support the President in his exercise of these powers; and hence the Court has by and large had presented to it for consideration, not the constitutionality of the act of the President alone, but also executive action based upon a Congressional mandate. It is these contacts which the author explores, and therefore this book encompasses the broad topic of the war powers of the United States.

Mr. Rossiter's realistic approach blends a discussion of the "law" of the principal cases in which the Court has heard the authority of the executive challenged with an analysis of the factual background out of which the cases arose. The author is compelled to the conclusion that the Court has been led to its decision in many instances by the realization that in fact it was powerless to enforce a decision which would deny power to the President. Thus in speaking of the cases presenting to the Court the question of the constitutionality of the use of military force to preserve the peace, the author states that "The common element in these opinions would seem to be a genuine judicial reluctance to speak in a situation in which the voice of the Court, even if heard, could not have any effect" (p. 16). Ex parte Milligan,1 which negatives this hardheaded analysis, is dismissed with the development of the idea that "As a restrain [sic] upon a President beset by martial crises it was then, and is now, of practically no value whatsoever" (p. 34). He arrives at this conclusion principally because the decision in Ex parte Milligan, as in Duncan v. Kahana-

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14 Wall. 2 (U.S. 1866).

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moku,² occurred after the cessation of hostilities. The cases thus stand as moral warnings and not as limits upon the unhindered sweep of the war powers. This conclusion can only be tested by subsequent cases, but the author's discussion as to the unlimited scope of the President's power of martial rule derived from the Court's opinions in the Japanese-American removal cases³ would seem to militate against such a test. Certainly there is no need to suspend the writ of habeas corpus if the Court will recognize the validity of executive orders which achieve the same end.

Under the heading "The Supreme Court's Lack of Power to Declare Peace" Mr. Rossiter points out that a state of "war" may exist both before and after the actual shooting. He considers the potentialities of this in extending the war powers beyond the period of fighting. Unfortunately the book was written prior to the decision of the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer;⁴ and consequently the author did not have the benefit of the opinion in that case. He accurately predicted, however, that at some point after the cessation of hostilities the Court would not accept an argument predicated upon the fiction of a continued state of war. Mr. Justice Jackson's thoughtful concurring opinion in the Steel Case⁵ might cause reanalysis by the author of his conclusion that the Court has had little success in preventing the precedents of war from becoming the precedents of peace (p. 129).

Other aspects of the war powers discussed in the book are the President's power to seize private industry; to compel his will through indirect sanctions, with the attendant unlimited possibilities; to wage defensive war; to exercise authority over courts-martial and military commissions; and, lastly, to govern conquered territory. Throughout this discussion runs the theme that the only restriction upon the President during a future war will be his own political and moral sense. This dominant theme is couched in terms so strong and buttressed by evidence which the author regards as so final that it is doubtful if the language of the Steel Case would alter it.

The author's conclusion that we have two Constitutions, a "fighting" Constitution⁶ and a Constitution-at-Peace, is a statement that

² 327 U.S. 304 (1946).
³ Ex parte Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
⁴ 72 Sup. Ct. 863 (1952).
⁵ Id. at 869 (1952).
judicial interference in the conduct of a war will be nonexistent. Mr. Rossiter avoids possible interminable discussion of the moral "ought" of that question by limiting himself to an able description of "what is."

Those people concerned with national self-preservation in the event of realization of the awful threat implicit in the possession of the atomic bomb by Russia will find comfort in Mr. Rossiter's book. The Supreme Court has recognized the force of Hamilton's contention that the war powers "ought to exist without limitation because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."

To those interested in the Supreme Court as an institution the book brings a realization that the Court may retard action, not irretrievably halt it; that it is but one manifestation of government; that as such a manifestation it may be ineffectual if it represents no will but its own.

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One of the difficult problems experienced by the estate planning advisor is the motivation of the client into taking affirmative action in the execution of the plan recommended. Despite the importance of a well-integrated estate plan, both to the client and to his beneficiaries, often there is reluctance to make the necessary changes whereby such an objective can be accomplished. Quite often the presentation of an intriguing procedure will stir the client into action. In this book Professor Bowe has developed many such procedures. By using factual situations he has illustrated the reasons for the various corrective procedures and the estate tax impact in each case, showing how the tax has been mitigated or offset. Many of the ideas are novel and, if properly presented, can be used by the advisor in motivating his client into action.

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