526 F.2d 560 (C.C.P.A. 1975)

United States
v.
Yoshida Intern., Inc.

MARKEY, Chief Judge.

This is an appeal from a judgment of the Customs Court, 73 Cust.Ct. 1, C.D. 4550, 378 F. Supp. 1155 (1974), granting Yoshida's motion for summary judgment, and declaring an import duty surcharge invalid. Presidential Proclamation 4074, because it imposed the surcharge, was held to have been beyond the President's delegated powers. The court stated that a delegation of sufficient breadth to encompass the proclamation would have been unconstitutional. We reverse.

Facts

Yoshida's merchandise (zippers) was imported from Japan and entered the port of New York on August 17, 25, and 26, 1971. The government levied, in addition to the standard duty under TSUS item 745.72, an import duty surcharge of 10% in accordance with item 948.00, which was added to the TSUS by Presidential Proclamation 4074. Yoshida challenges only the validity of Proclamation 4074.

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We, therefore, conclude that section 5(b)(1) of the Act contains such restrictive standards and guidelines as to meet the test of constitutionality, but which, in turn, precludes the President from laying the supplemental duties provided by Presidential Proclamation 4074.

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Issue

The sole issue before us is whether the Customs Court erred, as a matter of law, in holding that Proclamation 4074 was an ultra vires Presidential act. Resolution of the issue requires determination of whether the surcharge imposed by Presidential Proclamation 4074 was within the delegated authority to be found in either (1) the termination provisions of § 350(a)(6) of the Tariff Act of 1930, as amended (Tariff Act) (19 U.S.C. § 1351(a)(6)) and § 255(b) of the Trade Expansion Act of 1962 (TEA) (19 U.S.C. § 1885(b)), or (2) the emergency powers granted by § 5(b) of the Trading With the Enemy Act (TWEA), as

amended (50 U.S.C. App. § 5(b)), and if so, whether such a delegation of authority was constitutional.

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OPINION

The people of the new United States, in adopting the Constitution, granted the power to "lay and collect duties" and to "regulate commerce" to the Congress, not to the Executive. U.S. Constitution, Art. I, Sec. 8, clauses 1 and 3. Nonetheless, as the Customs Court recognized in the opinion below, and as other courts and commentators have noted, Congress, beginning as early as 1794 and continuing into 1974, has delegated the exercise of much of the power to regulate foreign commerce to the Executive. As perhaps an inevitable result, "few areas of American constitutional law [are] more burdened with conflicting decisions and scholarly disagreement." Recent Decisions, 15 Va.J.Int'l L. 649 (1975).

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Emergency Powers

We are presented, in this case, with the first reliance upon the TWEA as authority for a Presidential imposition of a temporary surcharge on imports. There being nothing in the TWEA or in its history which specifically either authorizes or prohibits the imposition of a surcharge, and no judicial precedent involving the same, we tread new ground.

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Power Delegated

Our duty is to effectuate the intent of Congress. In so doing, we look first to the literal meaning of the words employed. Flora v. United States, 357 U.S. 63, 65, 78 S.Ct. 1079, 2 L.Ed.2d 1165 (1958). Analysis of the statute and its wording provides the threshold determination of what was delegated by the Congress.

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Relationship to Other Statutes

Reliance by the Customs Court on Youngstown Sheet Tube, as quoted above, is misplaced. We do not have here, as was the case in Youngstown, what the Customs Court described as "legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought to be obtained" by a Presidential Proclamation. The surcharge did not run counter to any explicit legislation. We know of no act, other than the TWEA, "providing procedures" for dealing with a national emergency involving a balance of payments problem such as that which existed in 1971.

The mere incantation of "national emergency" cannot, of course, sound the death-knell of the Constitution. Nor can it repeal prior statutes or enlarge the delegation in § 5(b). The declaration of a national emergency is not a talisman enabling the President to rewrite the tariff schedules, as it was not in this case. We agree, also, with the statement of the court in Algonquin SNG, Inc. v. Federal Energy Administration, 518 F.2d 1051, 1062 (D.C. Cir. 1975), cert. granted, 423 U.S. 923, 96 S.Ct. 265, 46 L.Ed.2d 249 (1975) (No. 75-382), that: "Our laws were not established merely to be followed only when times are tranquil." The TWEA, which is among "our laws" and is designed specifically for non-tranquil times, was not before the court in Algonquin. As we have noted, if every law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate, prompt means for dealing with emergencies.

That court had before it only 19 U.S.C. § 1862(b), originally enacted as § 7 of the Trade Agreements Extension Act of 1955 (69 Stat. 162, 166) and now found in the Trade Expansion Act of 1962, as amended. Though § 1862(b) refers to threats to "national security" it is among the permanent trade laws applicable to non-emergency situations and does not involve use of the authority delegated in the TWEA upon declaration of national emergency.

The Executive does not here seek, nor would it receive, judicial approval of a wholesale delegation of legislative power. Nor do we find in § 5(b) the grant of the "unrestrained and unbridled" authority feared by the Customs Court. The courts continue to sit and remain prepared, as was the court in Real, supra note 29, to impede an unreasonable or ultra vires exercise of the power granted in § 5(b). We do not here sanction the exercise of an unlimited power, which, we agree with the Customs Court, would be to strike a blow to our Constitution. On the contrary, we find ourselves in agreement with this statement of the Court of Claims in South Puerto Rico Sugar Co. Trad. Corp. (334 F.2d at 632):

[W]hen Congress uses far-reaching words in delegating authority to the President in the area of foreign relations, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. In a statute dealing with foreign affairs, a grant to the President which is expansive to the reader's eye should not be hemmed in or "cabined, cribbed, confined" by anxious judicial blinders. [Footnote omitted.]

Conclusion

The broad and flexible construction given to § 5(b) by the courts which have considered it is consistent with the intent of Congress and with the broad purposes of the Act. As was said by the Supreme Court in discussing the President's power to define "banking institution" under an earlier version of § 5(b): "The power in peace and in war must be given generous scope to accomplish its purpose." Propper v. Clark, 337 U.S. 472, 481, 69 S.Ct. 1333, 1339, 93 L.Ed. 1480 (1949). Though such a broad grant may be considered unwise, or even dangerous, should it come into the hands of an unscrupulous, rampant

President, willing to declare an emergency when none exists, the wisdom of a congressional delegation is not for us to decide. As was said in Norman v. B. O.R. Co., 294 U.S. 240, 297, 55 S.Ct. 407, 411, 79 L.Ed. 885 (1935), with respect to "gold clause" measures: "We are not concerned with their wisdom. The question before the Court is one of power, not of policy."

The growth of power in the Executive has been phenomenal over the last 40 years. The risks inherent in a concentration of power in the Executive remain those feared by the Framers. The Federalist, Nos. 48-49 (Madison). Recent events have brought the question into wider public discourse. Whether Congress should devote more effort to defining, limiting or regaining powers previously delegated is not a matter within the jurisdiction of the courts. Whether the pendulum of power should now begin to swing further in the direction of the Congress is a matter of policy, reserved to the people and their elected representatives in the Congress. Absent a violation of the Constitution, or action contrary to statute, it is not grist for the mill of this court.

Congress, fully familiar with its own use of duties as a means of regulation, delegated to the President, in § 5(b) of the TWEA, the power to regulate importation during declared national emergencies by means appropriate to the emergency involved. Interpreted as having authorized the President's imposition of the specific surcharge in Proclamation 4074, as a reasonable response to the particular national emergency declared therein, the delegation in § 5(b) of the TWEA passes constitutional muster.

Accordingly, the President's action under review was within the power constitutionally delegated to him, and the judgment of the Customs Court that said action was ultra vires must be reversed.

Reversed.