
# LIBERTY TREE

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# Just *de facto*, ma'am.

*By Dick Greb*

**An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.**

***—Norton v. Shelby County*, 118 U.S. 425, 442 (1886)**

In last month's *Liberty Tree*, I discussed the principle laid out in the *Norton* case — that an unconstitutional act is "as inoperative as though it had never been passed" — and how the reality of such situations is usually a far cry from the idealized version espoused by the court. This month I want to take a closer look at a peculiar aspect of the decision.

The act in question in *Norton* was an attempt by the legislature of Tennessee to divest the powers of the constitutionally recognized county chancery court of Shelby County, and to vest them instead in a board of appointed commissioners. The act authorized these commissioners to issue bonds which would become an obligation of the county. The validity of such bonds were brought into question when one of the bondholders tried to receive payment. Tennessee's highest court ruled that the act was unconstitutional, making the bonds invalid, since they had not been issued by the only entity authorized to do so — the chancery court. Norton appealed to the U.S. Supreme Court, which accepted the Tennessee court's decision on the unconstitutionality of the act, but was called upon to decide whether the bonds were valid nonetheless, since the commissioners were operating as *de facto* (in fact) officers of the county.[1] It was in answering that question that the quote at the top of this article was made.

> The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law. *Norton*, 441. (underline added)

As you can see, the distinction made by the court is between *de facto officers* and *de facto offices*. The court holds to a doctrine deeming acts of *de facto* officers, whether they are *legally* in office or not, to be valid, while only allowing challenges to their right to hold the office "in some regular mode prescribed by law."[2]

The point being made by the court is that as long as the office lawfully exists, then even the acts of

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1. The U.S. Supreme Court found the bonds invalid, since they were issued by commissioners who had no legal office. And so, the bondholders were left holding the bag.
2. Of course, this presupposes that such a "regular mode prescribed by law" actually exists, and that those whose responsibility it is to "investigate and determine" a usurper's right to office will do so, which is by no means a certainty.

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usurpers must be obeyed, but since the offices of the commissioners in the *Norton* case did not lawfully exist (because "an unconstitutional act ... creates no office"), there was no office to usurp.

## The issue of eligibility

Now, this doctrine may be well and good for common errors or mistakes made in the course of appointments or elections. And the court's treatment of this issue more than a century ago may also give us some indication of how it would likely treat challenges to Obama's lawful eligibility to be president today (in the unlikely event it deigned to allow any of those challenges to proceed to decision). Yet, when it comes to these challenges of eligibility for the office of President of the United States of America, there is another critical factor that comes into play. According to the Constitution:

> The executive Power shall be vested in a President of the United State of America. ... No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. *U.S. Constitution*, Article 2, Section 1.

As you can see, the first sentence establishes the office of President and vests in that office "the executive Power" of the United States. But just as importantly, the second sentence establishes certain conditions concerning who can *receive* this executive power. These conditions, being established by the Constitution itself, cannot be swept away by legislation or by inattention, or by any other means, save through the amendment process laid out in Article 5.

Jack Webb, producer and star of the 1950s and 1960s radio and TV police shows "Dragnet," made the phrase, "Just the facts, ma'am" famous.

Thus, the issue of eligibility is an entirely different matter than such issues as voter fraud or miscounts or any other election misdeeds. As long as all candidates are eligible, then at least the executive power can be exercised by whichever one is proclaimed to be the winner (whether rightly or wrongly). But if a candidate is NOT eligible, then they cannot even *receive*, let alone *exercise* the executive power.

## Conditional power

While the Supreme Court may not have taken on any cases dealing with the executive power, it has heard cases on the judicial power. In an 1828 case challenging the legitimacy of territorial courts to hear an admiralty suit, the court said: "These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. **They are incapable of receiving it.**"[3] This case was quoted in the 1991 case, *Freytag v. Commission of Internal Revenue*,[4] which discussed the status of the Tax Court: "**Such tribunals**, like any other administrative board, **exercise the executive power, not the judicial power of the United States**. They are, in the words of the great Chief Justice, 'incapable of receiving [the judicial power]' – unless their members serve for life during good behavior and receive permanent salary." In both of these cases, the fact that the judges of the courts at issue served for a term of years, rather than for life,[5] made them incapable of receiving any of the judicial power of the United States. The territorial courts were exercising legislative power, and the Tax Court exercises executive power, but neither could exercise the judicial power.

Notice that the court is referring to the provision of Article 3, § 1, which establishes the conditions that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." These conditions on the office of judges is a determining factor in whether or not the judicial power can be exercised by them. Likewise, the conditions in Article 2, §1 impose non-negotiable limits on who may receive the executive power of the United States. If any or all of those conditions are not met, then such person is just as "incapable of receiving [the executive power]" as Tax Court judges are of receiving the judicial power.

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3. *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828).
4. 501 U.S. 868, 909 (1991).
5. Article 3, Section 1 states: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

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And since they cannot receive the executive power, then any actions which require the exercise of that power cannot constitutionally be performed by them. So, for example, where Article 1, § 7 requires: "Every bill which shall have passed the House of Representatives and the Senate, shall, **before it becomes a Law**, be presented to the President of the United States," the presentation to someone who exercises no part of the executive power cannot fulfill that obligation, and thus such a bill could never constitutionally "become a Law." Likewise, it would be impossible for the other executive powers, all of which are conferred on the office of President, including acting as Commander in Chief of the Army and Navy, and entering into treaties (with the consent of the Senate), to be lawfully executed.

Keep in mind that this goes way beyond the rather simple issue of whether or not a person legitimately obtained the office — that is, whether fraud, corruption, or even a mere mistake put the wrong man in office. There can be little doubt that the Supreme Court would stick to its doctrine concerning the acts of *de facto* officers in such a case. But what would they do with an actual constitutional disability to receive the executive power, especially in light of their past precedence with respect to the judicial power? Would they stand up for the Constitution and preserve the explicit protections against allowing the executive power of the United States of America to fall into the hands of youngsters, or non-residents, or even foreigners? Or would they become complicit in the overthrow of the Constitution, by refusing to allow the issue to be decided?

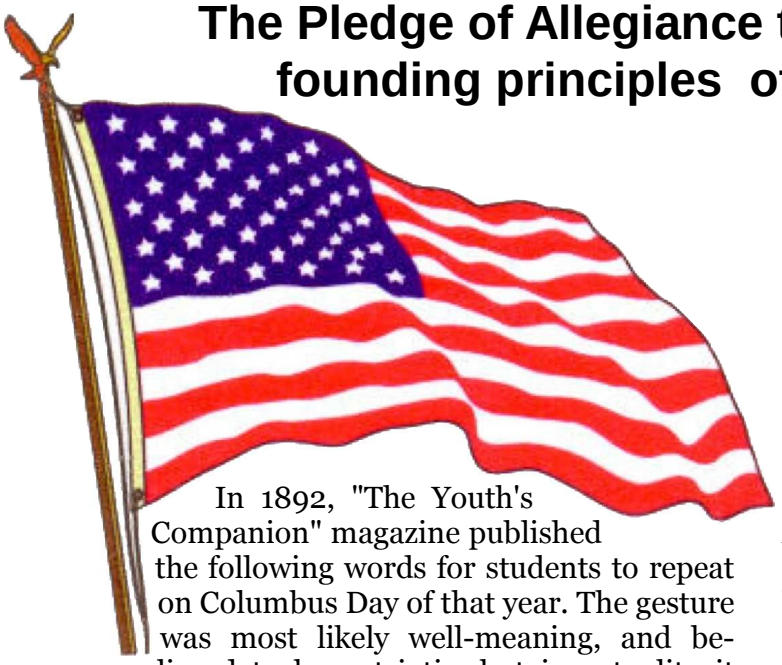
## The sooner the better

The issue gets back to the original discussion of the practical application of the principle that unconstitutional laws are void *ab initio*. Given the above scenario — that a bill cannot constitutionally become a law without being presented to the executive power — any bills enacted while the office of President is in the hands of someone who cannot exercise such power must be constitutionally invalid, and therefore "as inoperative as though they had never been passed." Thus, as with any unconstitutional exercise of power, the sooner such laws are declared invalid, the better chance there is to mitigate the effects. Conversely, the longer such declarations are in coming, the greater the accumulation of irreparable harm to those adversely affected, and naturally then, the less chance of any judicial declaration of unconstitutionality.

It is the magnitude of the remedy for unconstitutional enactments — that they be totally inoperative — that makes for such a compelling principle in theory. Yet it is that very magnitude that makes the principle almost non-existent in practice. So, in the end, rather than acting as a protection *against* unconstitutional laws, it instead acts as a protection *for* them, by virtually eliminating the chance of a judicial finding of unconstitutionality whenever the effects are great. But of course, that is the time it is needed most.

# The Pledge of Allegiance to the Flag is counter to the founding principles of our Constitutional Republic!!

*By John B. Kotmair, Jr.*



In 1892, "The Youth's Companion" magazine published the following words for students to repeat on Columbus Day of that year. The gesture was most likely well-meaning, and believed to be patriotic, but in actuality it perpetuated the myth about the national government advanced by the followers of Hamilton and Lincoln—(*i.e.* those who advance a strong central government, outside the lawful confines of the United States Constitution):

**I pledge allegiance to my Flag and the Republic for which it stands — one nation indivisible — with liberty and justice for all.**

Reciting this pledge became very popular, and it evolved into a general practice for children at the beginning of the school day. At the first National Flag Conference in Washington D.C., on June 14, 1923, the following changes were made to it:

**I pledge allegiance to the Flag of the United States and the Republic for which it stands — one nation indivisible — with liberty and justice for all.**

In 1942, the *New Deal* Congress officially recognized the above pledge, and in 1954, Congress added the words *under God*, which is its official wording today:

**I Pledge Allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.**

It would be naïve to believe the pledge of allegiance to the flag is harmless. This deep-rooted practice instills in our youth false and alien principles about our Constitutional Republic that stay with them the remainder of their lives. As written, it gives the insidious message that the federal government is superior to the State governments by using the term *one Nation*. And with the history of the "Civil" War, as written by the revisionists and taught in all the schools, it is generally believed that the union of States is *indivisible*, being merged into *one Nation*. As explained within my book, *Piercing the Illusion*, nothing could be further from the truth, as it cannot be found within the Constitution. And last, but not least, oaths of Allegiance are meaningless when pledged to an object such as a *flag*; this cannot be rectified by the addition of the word *Republic*. For the Republic is the type of government created by the Constitution, which in itself would not require an Oath of Allegiance. By law, all *Oaths of Allegiance* are to be made to the Constitution of the United States, and to the Constitution of the State in which the citizen resides. Wherefore, to correct this possibly innocent, but *seditious* error, I propose the use of the following pledge of allegiance:

**I Pledge Allegiance to the Constitution of the American States united, and to the Republic which it created, implementing God's governmental plan for man, and asking His blessing for its observance, which will provide Liberty and Justice for all.**

Failure to make such corrections only contributes to the misinformation and confusion that has facilitated the unlawful advancement of the centralization of government, at the cost of undermining the unalienable Rights of American citizens.