

JUSTICE JACKSON'S REPUBLIC AND OURS



Barry Sullivan

Over the past few decades it has been repeatedly said by lawyers and judges that the form of thought and expression we know as the judicial opinion has been changing in deep, disturbing, but obscure ways. Somehow the expectations that were once appropriate to the work of courts, especially the Supreme Court, are frustrated and blocked. What has in fact been happening? How has our conception of the law been changing? What can now be done about it?

In this essay, Barry Sullivan addresses these large questions by focusing on two opinions: first, the important opinion by Justice Jackson in the Steel Seizure Case, with an eye both to what that opinion originally meant, in the legal and political culture in which it was issued, and to its present-day reception and interpretation; second, the opinion of Justice O'Connor in the recent Hamdi case (the "enemy combatant" case). Sullivan is asking how opinions used to be written and read; how they are written and read today; and what this means about the changes in the nature of legal thought, argument, and judgment that both practitioners and teachers have noticed. Much is at stake here, including the fundamental nature of law as both an intellectual and a political activity.

In December 1950, President Truman declared a state of "national emergency" because of the undeclared war in Korea. In April 1952, while the war continued, the president authorized the secretary of commerce to seize most of the nation's steel mills to ensure the continued availability of steel. In *Youngstown Sheet & Tube Co. v. Sawyer*,¹ as every high school student used to know, the Supreme Court held that the president exceeded his authority when he issued that order. The vote was six to three. There were either seven or eight opinions in the case, depending on how one counts Justice Frankfurter's two submissions, but it is Justice Jackson's opinion that most of us remember. That in itself is curious because Justice Jackson did not

write the opinion for the Court, and no other justice expressly joined in Justice Jackson's opinion. Yet Justice Jackson's opinion is an extraordinary example of judicial opinion writing for several reasons: the strength of its reasoning, the felicity of its expression, the integrity of its voice, and the depth of its practical understanding of the intersection of law and politics. Paradoxically, it is also a very personal opinion, although it concerns the most profoundly public of subjects: the degree to which the courts, in our democratic society, can and should act to protect legislative authority and individual rights against claims of executive convenience or necessity.

What we usually remember about Justice Jackson's opinion is the three-part scheme that he used to illustrate his understanding of the complex constitutional relationships that exist among the three branches of government—a scheme that encompasses all three branches but focuses particularly on the degree of solidarity between the political branches.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power

at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.²

Fifty-five years later, Justice Jackson's three-part test is ubiquitous. As presidents have asserted increasingly broader authority, courts repeatedly have invoked Justice Jackson's test to measure the constitutionality of executive actions. For example, in the two most important decisions to emerge thus far from the "War on Terror"—*Hamdi v. Rumsfeld*³ and *Hamdan v. Rumsfeld*⁴—Justice Jackson's test was invoked countless times in a variety of opinions. Even when the Court did not specifically mention it, the test hovered ghostlike above the rhetoric of the opinions, implicitly framing the terms on which the issues were to be resolved. Does the Force Act⁵ authorize the president's classification of prisoners as "enemy combatants" subject to indefinite detention, without judicial review? Does the Force Act authorize the president's use of military tribunals to determine the guilt or innocence of persons so classified? To what extent, and with what degree of specificity, has Congress spoken?

At bottom, however, one wonders whether the Court's seemingly admiring use of Justice Jackson's test is truly consistent with the spirit and intent of his opinion. Justice Jackson's opinion haunts the Court's consideration of these questions, but the voice it projects is something of a distorted echo. After all, it is not the opinion as a whole that is analyzed and applied or implicitly relied upon. It is only the three-part test, in decontextualized form, which provides the template. And it is often a simplistic form of the test—one that exceeds Justice Jackson's intention by seeming to assume that nothing is forbidden to the president and Congress acting together, notwithstanding the care with which Justice Jackson reserved the point that some actions may lie beyond the power of the national government. Justice Jackson's test also represents only a small part of his own opinion—one that comes at the beginning and attempts to synthesize the Court's somewhat confusing and inconsistent precedents.⁶ Justice Jackson himself immediately characterized the test as oversimplified but helpful as a beginning. Most important, the opinion embodies a style of judging that is both foreign to current styles of adjudication and inconsistent with the use made of Justice Jackson's test in recent cases.

The Court in *Hamdan*, for example, recently held that the president was not authorized by existing law to try enemy combatants before special