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## Jackson: The Supreme Court in the American System of Government

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THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. By *Robert H. Jackson*. Cambridge: Harvard University Press. 1955. Pp. 92. \$2.

In the months before his death in October 1954, Justice Robert H. Jackson prepared the drafts for a series of three lectures which he was to deliver at Harvard University. Although the Justice had not completed the final revision at the time of his death, the work was in substantially completed form and only technical corrections were made by the Justice's son and by his law clerk in the publication of the intended lectures.

Justice Jackson's thesis is that the Supreme Court should adopt a more restricted role. He assails (p. 57) the "cult of libertarian judicial activists" who urge that the Court be the dominant factor in shaping the constitutional practice of the future. (These lectures undoubtedly represent an attack upon the leading exponents of the "cult" on the Court, Justices Black and Douglas.) His argument (p. 24) centers on alleged "grave jurisdictional, procedural, and political shortcomings of the court."

He lists in detail the limitations on the Court's power which are found in the Constitution. The dependence of the judiciary on the political, i.e., executive and legislative, branches of government is noted. Justices are nominated and confirmed by the political branches; the jurisdiction of the Court is largely under the control of Congress; and judges lack the power to enforce their mandates.<sup>1</sup> In addition, the courts have little or no control over certain vital acts of government which involve the war power, foreign affairs, or the money, taxing, and spending power. The requirement that there be a "case or controversy" has not only precluded advisory opinions but has also blocked judicial settlement of many political questions.<sup>2</sup>

<sup>1</sup> The recent school segregation cases illustrate this limitation of judicial power. *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753 (1955).

<sup>2</sup> Yet he later notes (p. 56) that "questions which have deeply agitated the people, found their way to the Supreme Court in guise of private controversies between litigating parties."

Non-constitutional, practical factors also impede the effectiveness of the Court. Because of the heavy work load, an average of only five minutes of group deliberation is spent on each item on the agenda during Saturday conferences. The pressure of time may create an attitude that discussion is futile. Such "working methods tend to cultivate a highly individualistic rather than a group viewpoint." (p. 16) As a result of the factor of delay in litigation, the damage may be done before the judicial remedy becomes available. Justice Jackson fails to note the self-imposed devices by which the Court circumscribes its potential power. For example, the Court often seeks a technical, non-constitutional basis for a decision in order to avoid a perplexing constitutional issue.<sup>3</sup>

The Justice contends that the judiciary lacks the constitutional power and the political support to maintain an equilibrium between the executive and legislative branches of government. Regardless of the opinions of the Court, the President will be a dominant force. And only public opinion, not judicial decision, can support the authority of Congress against encroachments by the executive branch. Congress remains primarily dependent on the respect of the people for the maintenance of its power.

Justice Jackson concludes (pp. 80-81) that the Court is helpless when faced with powerful political forces.

"... I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions. . . . In Germany . . . courts decreed both the Nazi and the Communist parties to be illegal under German law. Those judgments fell on deaf ears and became dead letters because the political forces at the time were against them. . . . It is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions."

Based upon this bleak picture of the effectiveness of the Court, Justice Jackson makes specific recommendations. Of particular interest is his suggestion that diversity of citizenship be abolished as a basis for federal jurisdiction. He notes that *Erie R. Co. v. Tompkins*<sup>4</sup> did not end the confusion, the conflict, or the shopping for forums. The decisions of lower state courts are controlling the judgments of federal district courts,

<sup>3</sup> E.g., *Peters v. Hobby*, 349 U.S. 331, 75 S.Ct. 790 (1955). After being twice cleared by his agency's loyalty board, Peters was dismissed from government service when the Civil Service Commission's Loyalty Review Board held there was reasonable doubt as to his loyalty. The vital constitutional issues raised by Peters involved the denial of any opportunity to confront and to cross examine his secret accusers. The Court based its decision on the narrow, technical grounds that, under the relevant Executive Order, the Loyalty Review Board had no authority to review rulings favorable to employees or to adjudicate individual cases on its own motion.

<sup>4</sup> 304 U.S. 64, 58 S.Ct. 817 (1938).

whereas such judgments might be overruled were they decided and appealed in the state system. Moreover, he deplors the use of the Fourteenth Amendment to set aside the acts of state courts, particularly in criminal matters. In his opinion, the danger of a centralized national police force and the transgressions of liberty by the all-powerful federal government are much more to be feared than the unconsidered judgments of state courts.

Justice Jackson's preoccupation with the shortcomings of the Supreme Court may be derived from his earlier experience as a New Deal critic of the Court during the time of the Roosevelt proposal to reorganize the judiciary. His service as United States Chief of Counsel at the Nuremberg trials probably colored his views concerning the insufficiency of a judiciary in the face of powerful political movements. Whatever the explanation, these lectures present an overstatement of the case for a passive Supreme Court. Despite enforcement limitations, the recent school segregation cases<sup>5</sup> indicate the powerful sociological influence which may be exerted by the judiciary. In an encounter with political forces generated by catastrophic events, the Justice's thesis as to the ineffectiveness of the judiciary may be correct. But in facing the danger of creeping authoritarianism, the role of the Supreme Court, sustained by a public opinion which esteems the Court as an institution, should not be minimized.

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<sup>5</sup> *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753 (1955).