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With the advent of terrorism and the need for the United States government to respond to its threat, the precedent of *Youngstown Sheet & Tube Co. v. Sawyer*[1] hovers temptingly in legal minds. But to what end? As I listened to my fellow panelists discuss the Steel Seizure case and thought about how it had been used by the courts since it was decided, I was struck, with even greater force than when I had written my book,[2] by the mixed message sent by *Youngstown*. If one were to read only Justice Black's opinion for the court, the doctrinal significance of the decision would be clear: under the Constitution's division of powers, the executive cannot exercise legislative power; only Congress could authorize seizing the steel mills to prevent a labor dispute from stopping production. According to Black, the separation of powers is fixed and exact. Dire emergencies, presumably, would not alter his constitutional scheme.[3] The concurring opinions of four other members of the majority—the vote was 6-3 against the seizure—immediately undercut the force of this holding, however. If the three dissenters are added to these four, seven justices envisioned occasions when the president might use inherent power. One is left with the conclusion that the importance of *Youngstown* lies in the Supreme Court's act of adjudicating the constitutional issues presented by the steel seizure and ruling against a coordinate branch of government rather than in the substance of the decision.

After 1952, the Supreme Court showed a much greater willingness to grapple with constitutional problems. The political question doctrine lost favor as a way to duck issues the Court did not wish to face.[4] New personnel undoubtedly contributed to the

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1. 343 U.S. 579 (1952).

2. Maeva Marcus, TRUMAN AND THE STEEL SEIZURE CASE; THE LIMITS OF PRESIDENTIAL POWER (1977; reprint ed., Durham, N.C.: 1994).

3. 343 U.S. 579, 582-89.

4. Baker v. Carr, 369 U.S. 186 (1962) and Powell v. McCormack, 395 U.S. 486 (1969) exemplify the Court's altered position. In challenges to the Vietnam War, however, the Court failed to apply its more liberal conception of political questions. The Court turned

Court's more activist stance, but the justices relied on *Youngstown* for the legal precedent necessary to support their change in attitude. The Court did not wholly abandon its traditional reluctance to decide constitutional questions; the justices simply overcame it more often.[5] But when the Court did decide separation-of-powers issues, its application of the substantive ruling in the Steel Seizure case was uneven. Two cases involving a citizen's right to a passport illustrate the Court's difficulty in interpreting its holding in *Youngstown* consistently. In *Kent v. Dulles*,[6] Justice William O. Douglas held for the Court that the secretary of state could not deny Kent a passport for a reason not established by Congress; the secretary was limited to the two grounds—lack of citizenship or criminal or unlawful conduct—that Congress had authorized for denial.[7] The Court retreated from that strict adherence to separation of powers, however, in *Zemel v. Rusk*,[8] where the Court validated travel restrictions to Cuba imposed by the secretary of state but not by Congress. Justice Black dissented, noting that all legislative power was lodged in Congress and rejected the government's argument that the president had inherent power to make regulations regarding the issuance of passports. He observed that the steel seizure precedent was exactly on point.[9]

Actions taken by President Richard Nixon, however, occasioned the most dramatic use of *Youngstown* by the Supreme Court. In the *Pentagon Papers* case,[10] the Court refused to issue an injunction, sought by the Nixon administration, against the publication of the papers, a history of American involvement in the Vietnam War, surreptitiously copied by Daniel Ellsberg and given to the *New York Times* to print. The government argued that publication should be enjoined on the ground that the president had inherent power to protect national security. For three of the justices in the majority, the Steel Seizure case was determinative. Where Congress had legislated in a certain field and had not authorized the action requested by the government, namely, prior restraint of publication, "It would . . . be utterly inconsistent with the concept

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away the many attempts to have the constitutionality of the war adjudicated. Massachusetts v. Laird, 400 U.S. 886 (1970) and DaCosta v. Laird, 405 U.S. 979 (1972) are among the cases in which the Court denied certiorari.

5. *See, for example*, Peters v. Hobby, 349 U.S. 331 (1955).
6. 357 U.S. 116 (1958).
7. *Id.* at 128.
8. 381 U.S. 1 (1965).
9. *Id.* at 20-21.
10. New York Times v. United States, 403 U.S. 713 (1971).

of separation of powers for this Court to use its power . . . to prevent behavior that Congress has specifically declined to prohibit."[11] In another attempt by the Nixon administration to use inherent power, this time to order wiretaps in internal security matters without approval of a court, the Supreme Court similarly rejected President Nixon's arguments.[12] Justice Lewis Powell, for the Court, noted that the source of the president's power in such a case had to be the Constitution, but Powell could find nothing in the Fourth Amendment that authorized the executive branch to be its own judge of when wiretapping was permissible.[13] Separation of powers and the division of functions among the three branches of government would best protect individual freedoms, Justice Powell wrote.[14] The president's duty to ensure domestic security would not be hindered, the Court asserted, by the requirements of prior judicial review.[15]

But it was in the litigation connected with the Watergate scandal that *Youngstown* achieved its greatest prominence. In a series of cases concerning the Watergate tapes, which were suspected of containing evidence of presidential wrongdoing, Nixon sought to escape the mandates of the courts by taking refuge in the separation-of-powers doctrine. Not only was the presidency an independent branch of government with specific powers and duties, he averred, but the president was also not subject to judicial review. Nixon therefore took personal possession of the Watergate tapes to keep them out of the hands of a grand jury investigating crimes connected with the break-in at the headquarters of the Democratic National Committee located in the Watergate office building. When the president refused to turn the tapes over to the grand jury, the special prosecutor subpoenaed him. John Sirica, chief judge of the federal district court in the District of Columbia who had handled all the criminal charges stemming from the Watergate burglary, ordered the president to show cause why he should

11. *Id.* at 742.

12. *United States v. U.S. District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972).

13. The protection of private speech from unreasonable surveillance had been brought under Fourth Amendment safeguards by a series of cases. *Id.* at 313.

14. *Id.* at 317.

15. *Id.* at 318-21. The *Youngstown* precedent supported challenges to other Nixon administration actions: the presidential impoundment of congressionally appropriated funds and the dismantling of the Office of Economic Opportunity, which Congress had voted to keep in business and to that end had appropriated funds. *See* Sioux Valley Empire Electric Association, Inc. v. Butz, 367 F. Supp. 686 (1973) and Local 2677, the American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (1973).

not be compelled to produce the tape recordings. The essence of Nixon's response was his theory of separation of powers. If the president were at the mercy of orders of a court, it "would effectively destroy the status of the Executive Branch as an equal and coordinate element of government." No instance could be found in the whole history of federal courts which would "justify or permit such a result." The president had absolute discretion to decide whether the confidentiality of executive branch conversations was more important than prosecuting a wrongdoer. And this decision could not be reviewed by the courts, because they lacked any means to force compliance by the president. Nixon was not above the law, the brief stated, but he could be held accountable only by impeachment, the method prescribed in the Constitution.[16]

The president's claim that he was not amenable to court order presented the Watergate Special Prosecution Force lawyers with a ticklish problem. How could they get around the fact that in no previous case had the president been cited personally? By chance, I happened to be writing my dissertation on the steel seizure as the Watergate scandal was unfolding and discussed with a friend on the Special Prosecution Force the relevance of *Youngstown*. Although the case was titled *Youngstown Sheet & Tube Co. v. Sawyer*, every brief filed and every oral argument in every court it came before talked about presidential power. No one mentioned the power of the secretary of commerce to seize the steel mills. All the Supreme Court opinions discuss the *president's* power to take that action. Thus the argument could be made—and was in fact made by the Watergate prosecutors—that courts had issued orders directed in substance at the president, even if his name did not appear in the title of the case.[17]

Judge Sirica rejected Nixon's claims and issued an order enforcing the subpoena. In his opinion, Sirica reviewed the reasons that led him to decide that the court had authority to compel the president's compliance with a grand jury subpoena. The Steel Seizure case, Sirica wrote, effectively invalidated the proposition that the president was not subject to the court's orders. To insist, after the *Youngstown* ruling, that the president could not be reached by court process, the judge observed, "would seem to exalt the form of

16. Brief in opposition, *In re Grand Jury Subpoena*, Misc. No. 47-73, U.S. District Court for the District of Columbia, pp. 3, 4, 7, 24, 29-30.

17. Memorandum in Support, In re Grand Jury Subpoena, pp. 25-26, n.11. Letter from Phillip A. Lacovara to Maeva Marcus, August 13, 1973 (in the author's possession).

the *Youngstown Sheet & Tube Co.* case over its substance. Though the court's order there went to the Secretary of Commerce, it was the direct order of President Truman that was reversed."[18] The United States Court of Appeals for the District of Columbia Circuit affirmed Judge Sirica's ruling. Using the same language as Sirica, the court of appeals opinion noted that while it had been the custom to address orders of the court to subordinate executive branch officials:

> To rule that this case [*Nixon v. Sirica*] turns on such a distinction would be to exalt the form of *Youngstown Sheet & Tube* over its substance. Justice Black, writing for the *Youngstown* majority, made it clear that the Court understood its affirmance effectively to restrain the President. There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party. If *Youngstown* still stands, it must stand for the case where the President has himself taken possession and control of the property unconstitutionally seized, and the injunction would be framed accordingly. The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own.[19]

And the Supreme Court put its imprimatur on this new principle in the case of *United States v. Nixon*.[20]

After the Watergate litigation, which gave *Youngstown* standing as a useful precedent in controlling presidential actions with regard to domestic issues, it remained to be seen whether the case would prove similarly effective in the field of foreign affairs. The prevailing model of executive power before *Youngstown* was taken from *United States v. Curtiss-Wright Export Corp.*[21] in which Justice George Sutherland distinguished between the president's authority in the domestic and foreign relations realms, asserting

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18. *In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1, 8 (1973).

19. 487 F. 2d 700, 709 (1973).

20. 418 U.S. 683 (1974). Because *Nixon v. Sirica* had never been appealed to the Supreme Court, it was not until the decision in *United States v. Nixon*, a case dealing with different tapes from *Nixon v. Sirica*, that the Court endorsed judicial review of presidential action directly.

21. 299 U.S. 304 (1936).

that in the latter area presidential power suffered none of the limitations imposed by the theory of enumerated powers that applied to the former. He believed that in the field of foreign affairs the president had broad discretion to operate without constitutional restrictions. The *Youngstown* decision, however, by invalidating the president's seizure of the steel mills at a time of military conflict, provided a different analysis that appeared to circumscribe severely the executive's inherent authority to take action in a time of international crisis. Since 1952, the two rulings have played a critical role in the debate over presidential power and foreign policy, essentially competing with each other to become the Supreme Court's precedent of choice in cases implicating the executive's power in foreign affairs.[22]

The relevance of this debate to the situation in which we find ourselves in the first decade of the twenty-first century is obvious. President George W. Bush has proclaimed a war on terrorism. To respond to this, his administration has promulgated policies that encroach on fundamental rights guaranteed by the Constitution to American citizens. As Anthony Lewis asked in a recent piece on the op-ed page of the *New York Times*, will the Supreme Court "subject those measures to real constitutional scrutiny, or give way to arguments of war emergency?"[23] Lewis pointed to "the arrest and indefinite detention of Americans without trial and without access to a lawyer" as one of the administration's more frightening measures, naming the cases of Yasser Hamdi and Jose Padilla, who are being held in solitary confinement, as examples of such a deprivation of liberty. President Bush "has claimed the power to thus seize and hold any American whom he designates an 'enemy combatant.' And the basis of the designation, administration lawyers argue, is not subject to effective review in any court," Lewis wrote.[24] As I read, I began to think that this sounded eerily familiar to me, and I picked up my book on the Steel Seizure case to find the reference of which I had been reminded. And there it was: the colloquy between Judge David Pine and Holmes Baldridge, the attorney representing President Truman in the oral argument in the district court.

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22. For further discussion of this point, see Louis Fisher's Foreword to Marcus, *Truman and the Steel Seizure Case* ix-xviii (reprint ed., Durham, N.C.: 1994). There are also references to this debate in several articles contained in "*Youngstown* at Fifty: A Symposium," 19 CONSTITUTIONAL COMMENTARY (Spring 2002).

23. NEW YORK TIMES, February 24, 2003.

24. *Id.*

Defending Truman's seizure order, Baldridge lost no time in revealing his thoughts on the president's authority: "our position is that there is no power in the Courts to restrain the President and . . . Secretary Sawyer is the alter ego of the President and not subject to injunctive order of the Court." If the president ordered Secretary Sawyer to put you in jail this minute and have you executed tomorrow, Pine queried the government lawyer, what would happen to you? Baldridge could think of no answer, so the judge provided one himself: "On the question of the deprivation of your rights you have the Fifth Amendment; that is what protects you."[25] But Pine's response appeared not to make much of an impression on Baldridge, who proceeded to argue that while the powers of Congress and the judiciary were enumerated in the Constitution, the President's powers were unlimited.[26] Newspapers trumpeted Baldridge's statements across the nation, and the groundswell of public opinion against such a dictatorial conception of the presidency undoubtedly encouraged Judge Pine, and later the Supreme Court, to strike down the seizure of the steel mills.[27] In this instance, the Truman Administration's claims of the grave emergency that would occur with any interruption in the flow of steel to Korea did not sway the courts. As Justice Robert H. Jackson stated in his opinion, "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[28]

Jackson's opinion has been profoundly influential—he alone among the justices provided a thoughtful and realistic analysis of the fluctuating basis of executive power that members of the Supreme Court have found useful in a variety of cases. But it is only one man's opinion. In the circumstances of the war on terrorism, will the Supreme Court find Jackson's point of view persuasive?[29] Or will the Court revert to its stance in *Korematsu v. United*

25. U.S. House, *The Steel Seizure Case*, H. Doc. 534, 82d Cong., 2d sess., 1952, p. 363.

26. *Id.* at 377. Truman repudiated Baldridge's view of executive power as soon as it was made known to him.

27. 103 F. Supp. 569 (1952); 343 U.S. 579 (1952).

28. 343 U.S. 579, 642-43.

29. Or will the Court, as it did in Dames & Moore v. Regan, 453 U.S. 654 (1981), simply use Jackson's framework for analyzing an assertion of executive power in order to uphold a presidential action?

States, where it approved, as a proper exercise of the war powers, the internment of Japanese-Americans living on the West Coast?[30] Will it draw upon the distinction between actions taken on the battlefield and those taken at home? President Truman pointed to the problem the Court faces, as Professor Gormley observed during the panel session. Truman wrote: "It is not really realistic for the Justices of the Supreme Court to say that comprehensive power shall be available to the President only when a war has been declared, or the country has been invaded. There are no longer sharp distinctions between military targets and the sanctuary of civilian areas, nor can we separate the economic facts from the problems of defense and security."[31]

Thus we return to where we started: what is the precedential value of *Youngstown*? Because of the great number of opinions written in that case—the opinion for the Court, five concurring opinions, and a dissent—it is safe to say only that it established the invalidity of the president's seizure of the steel mills in the specific context in which it took place. Beyond that, the Court left the president much room to maneuver. A lawyer in the Department of Justice Office of Legal Counsel once told me that *Youngstown* rarely affects the advice the office gives the president on the legality of contemplated actions. They know the decision exists, but it is not dispositive.[32] The president can take his chances before the Court, because the outcome of any given case depends so much on the way the Court classifies the executive action: will the justices analyze the contested action under the president's foreign affairs power, as a matter of national security, or as an ordinary domestic measure? *Youngstown*, with its multiplicity of opinions, allows the Court great leeway in interpretation. It has been invoked in support of presidential power as well as having been cited to defend striking down an executive action.

30. 323 U.S. 214 (1944). As Anthony Lewis noted in his op-ed piece, it is hardly likely that the Supreme Court today would uphold the internment of a particular ethnic group. But might it use the same considerations that justified that action in 1944 to validate some of the Bush Administration measures responding to the war on terrorism? Possibly.

31. *See* PRESIDENT TRUMAN AND THE STEEL SEIZURE CASE: TRANSCRIPT OF PROCEEDINGS, *supra* at 714.

32. Telephone interview with Leon Ulman, deputy assistant attorney general in the Office of Legal Counsel, October 16, 1974.

Will *Youngstown,* in this era of terrorism, become a forceful and frequently used precedent to rein in executive encroachments on civil rights and civil liberties or will it be ignored? Will we see a reaffirmation of the principle that the president—and his attorney general—are not above the law? The Court is still out.