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♦ TBA BRIEFINGS ♦

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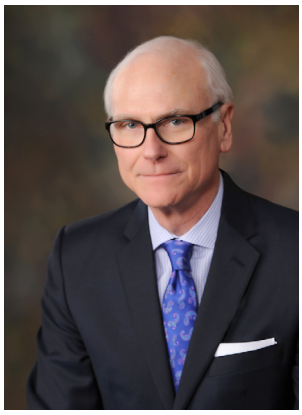

By Jim Rankin

President's Column

The political and literary world are much indebted to the invention of the new word IDEOLOGY. Our English words, Ideocy or Ideotism express not the force or meaning of it. It is presumed its proper definition is the science of Idiocy. And a very profound, abstruse, and mysterious science it is.

John Adams (commenting on the recently coined term "Ideology") December 1813.

Last month, I discussed *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), primarily to emphasize the Supreme Court's determination that religious liberty and other First Amendment liberties outweighed national unity concerns. *Barnette* was decided in the midst of World War II and after members of the Jehovah's Witness religious minority were attacked for their unconventional beliefs. Indeed, protection of religious conviction from government efforts to enforce speech in the interest of achieving uniform adherence to the established principles and goals for public piety was the principle point of Justice Jackson's majority opinion. There was, however, another equally important issue raised in the case and that is how to balance the interest of minorities and individuals protected in one way or another by the Bill of Rights and the Fourteenth Amendment against the power of a democratically elected legislature to pass laws deemed in the interest of the entire polity.

Mr. Justice Jackson's opinion offers the following:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

Id. at 638.

Later in his opinion, Justice Jackson states:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil, men. . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 640 – 641.

But should the court have endeavored so, to set Americans free from politics and democracy? Mr. Justice Frankfurter's dissent offers the opposing view:

> The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phrase of "liberty" than with another . . . Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. . . In no instance is this Court the primary protector of the particular liberty that is involved.

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Id. at 648 (Frankfurter, J., dissenting).

Justice Frankfurter also wrote:

> The reason why, from the beginning, even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process.

Id. at 650 (Frankfurter, J., dissenting).

Barnette involved a school board imposed flag salute regimen offensive to Jehovah's Witnesses. The state of West Virginia and the school board had effectively sought to impose speech on a minority. On Monday, January 11, 2016, the Supreme Court heard arguments in *Friedrichs v. California Teachers Association*, No. 14-915 (U.S. filed Jan. 26, 2015). *Friedrichs* raises the issue of whether California and 22 other states can compel public employees, including public school teachers, to pay union agency fees. Agency fees were upheld by the 1977 decision *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In *Abood*, the collective bargaining agreement between the teachers' union and the school board included a provision (agency shop clause) requiring every teacher in the district to pay a service fee equal to union dues even if the teacher was not a union member. The purpose of the fee was to prevent "free-riding" of non-union employees who benefited from wage, hour and benefit negotiations undertaken by the union without contributing to the cost of winning such concessions from management. Non-union teachers argued the union used the fees to support economic and political activities outside the scope of collective bargaining and that such uses violated the complainants' First and Fourteenth Amendment rights. The Abood Court ruled that the agency fees did not violate the Constitution, provided the fees were exclusively used to fund collective bargaining and other activities that the non-union employees found unobjectionable. However, citing *Barnette*, among other cases, the Court also held that collective bargaining agreement agency shop clauses were impermissible if they were used as a vehicle to compel ideological conformity among public employees.

Friedrichs raises these questions again but this time, at least five of the Supreme Court's justices seem inclined to favor the First and Fourteenth Amendment claims of non-union teachers over the position of the affected school districts, teachers' union, and state and federal authorities. This may be true in spite of the reasonable arguments advanced by the union and the state and federal governments regarding the need to negotiate with a single organization rather than individuals, problems created by free-riding and the labor peace doctrine.

The independent teachers in *Friedrichs* are, among other things, arguing the *Abood* precedent should be overturned since all *public* employee bargaining is inherently political. That is, public employee benefits, salaries and pensions are paid for by taxpayers. The more conservative justices' questions of counsel for Ms. Friedrichs were supportive of the First Amendment argument. However, the four more liberal justices focused much less on the Bill of Rights and emphasized *stare decisis* in claiming the *Abood* precedent should be affirmed because reversing *Abood* would affect thousands of public employees' bargaining agreements.[1]

How the Court will rule in *Friedrichs* is speculation, but the case offers an opportunity for a bit of historical fancy. What would Justices Jackson and Frankfurter do with *Friedrichs*? How would they rule on freedom of speech vs. enforced payments of union fees? Would the doctrine of labor peace and the favored position of labor organizations in American statutory law take precedence over "the vicissitudes of political controversy?" Would they argue for *stare decisis* in support of upholding *Abood*? Would the Court's interest in protecting the civil rights of minorities take precedence? It is, of course, impossible to know, but their own words suggest that if they were voting on *Freidrichs* they would be of different minds, just as they were in *Barnette*.

Both Justice Frankfurter and Justice Jackson were men of the left committed to Franklin Delano Roosevelt's New Deal. Both were nominated for seats on the Supreme Court by President Roosevelt. Further, though both men undoubtedly held strong personal views on policy and politics, it is hard to see social and political ideology strongly reflected in their opinions as Associate Justices. Both Justices appear to have stuck to long established legal principles and, as Justice Roberts later characterized appropriate procedural jurisprudence, simply called "balls and strikes."

In order to delve into the thinking of long dead justices on the subject of the First Amendment *vis a vis* judicial restraint—not to mention labor law—we must rely on opinions written decades ago. Also, knowledge of the history of the National Labor Relations Act of 1935 (the Wagner Act) and the Taft—Hartley Amendments of 1947 (declaring the right of workers to join or not join unions) is important. Unfortunately, a thorough discussion of American labor legislation and court decisions regarding those laws is a complicated subject, far beyond my skills to encapsulate. I must, therefore, simply "jump-in" to the labor law jurisprudence of these two justices without laying an adequate legal and historical foundation.

In *J.I. Case Company v. Labor Board*, 321 U.S. 332 (1944), the Court was faced with a National Labor Relations Board ruling that the employer had engaged in an unfair labor practice by refusing to bargain collectively after the union had won a certification election. The employer argued that preexisting *individual* work contracts took precedence over collective bargaining. Justice Jackson, writing for the Court, affirmed with modification the NLRB's ruling. This opinion, though unremarkable, makes clear that there is a duty to bargain collectively—if National Labor Relations laws are

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triggered by a successful union election campaign—in spite of individual freedom to contract. *J.I. Case Company* is, however, a bargaining case, not a dues or fee case, and the issue of freedom of speech or assembly on the part of workers uninterested in union bargaining was not advanced.

In three subsequent cases, implicating Justice Jackson's infamous feud with Justice Hugo Black, Justice Jackson, a confirmed New Dealer and certainly sympathetic to national labor relations laws, nevertheless wrote dissents in favor of employers. Justice Black wrote the majority opinion in two of these cases and Justice Frankfurter joined Justice Jackson in dissent in all three. Why would favorites of President Roosevelt argue for employers against unions and the National Labor Relations Board? Perhaps Justice Frankfurter appreciated Justice Jackson's sense of fair play and this alone caused Justice Frankfurter to sign Justice Jackson's dissent. The words of one of Justice Jackson's law clerks over 50 years after his judge's death guides our understanding. "[Justice Jackson] placed fairness as an overriding principle … [H] is sense of fairness took over when he confronted overzealous interpretations of [the national labor relations laws]."[2]

Wallace Corp. v. National Labor Review Board, 324 U.S. 585 (1944), was clearly a case where fundamental fairness was ignored by the Court's majority. *Wallace Corp.* involved an attempt to settle a labor dispute at a company plant. Wallace had signed an agreement with two unions with the approval and encouragement of the National Labor Relations Board. Pursuant to this agreement, an election was held to determine which union would be certified. An independent union won a majority of the votes cast over the competing Congress of Industrial Organizations (C.I.O.) union. Wallace signed a union shop contract with the independent union. The independent union then refused to admit certain C.I.O. workers to membership and those C.I.O. affiliated workers were discharged.

In a subsequent unfair labor practice proceeding, the Board found that Wallace had engaged in unfair labor practices. The NLRB ordered Wallace to disestablish the independent union and to cease and desist from giving effect to the union shop contract between it and the independent union and to reinstate 43 employees. Ultimately, the Supreme Court affirmed the Board's order, in spite of the fact the entire dispute resulted from NLRB prodding and manipulation. Justice Jackson could not tolerate this cynical treatment of the employer and manipulation of the certification election's outcome. His dissent concludes with these words:

> [I]t is the employer who is penalized here, and on shallow and superficial examination it may seem like another victory for labor. The employer must pay many thousands of dollars for hours unworked, because performed reluctantly but in good faith its closed-shop agreement made under authority of Congress and with knowledge and encouragement of the Board, and with the approval and instigation of the C.I.O. union whose members now gain back pay by its repudiation. We think this cannot be justified as an unfair labor practice. . . We can only view this as a very unfair construction of the statue to the employer and one not warranted by anything Congress has directed or authorized.

Id. at 323 (Jackson, J., dissenting).

In *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945), the practical argument turned on inclusion of underground travel time for union miners—even though this was not included in the terms of the collective bargaining agreement. The Court voted to accept a definition of the work week for coal miners including this travel time even though it had been rejected in arriving at collectively-bargained wage rates in many agreements. Justice Jackson concluded his dissenting opinion with these strong words:

> We doubt if one can find in the long time of criticized cases one in which the Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case. Power should answer to reason none the less because its fiat is beyond appeal.

Id. at 325 (Jackson, J., dissenting).

In *Hurt v. Crumboch*, 325 U.S. 821 (1945), Justice Jackson dissented from a majority opinion by Justice Black. As was the case in *Wallace* and *Jewell Ridge*, the employer had been unfairly overreached. In fact, in *Hunt*, the union had been shown to have conspired with merchandisers to put Hunt Motor Freight out of business. Here again, the spirit of fairness is raised through the pen of Justice Jackson:

> The working man has struggled long, the fight has been filled with hatred, and conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other rights as well, unemployment compensation, old-age benefits, and what is most important and the basis of all its gains, the recognition that the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive. This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man.

Id. at 830 – 831 (Justice Jackson dissenting).

Based upon the foregoing dissents authored by Justice Jackson and Justice Jackson's strong statements regarding free speech and the Bill of Rights in *Barnette, supra*, I would guess that Justice Jackson would vote in favor of the claims of the independent teachers in *Friedrichs*.[3] Justice Frankfurter, however, is a different matter. Even though Justice Frankfurter joined in Justice Jackson's dissents in the three labor law cases discussed here, Justice Frankfurter was less committed to an individualized sense of fairness and protection of individual liberties. Ten years

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after Justice Jackson's untimely death, Justice Frankfurter spoke directly to the issue of collectively imposed union dues in the case of *International Association of Machinists v. Street*, 367 U.S. 740 (1961). The Court's majority held that a decree requiring a railroad union to refund dues, fees, and assessments paid under protest by complaining employees in situations where the funds received are used by the union to promote political causes opposed by the employees should be upheld. In *Street*, the Georgia state court found that the payments were made by certain dissenting railroad workers only because they were compelled to join the union to save their jobs.

In response to the majority opinion, Justice Frankfurter wrote a lengthy dissent wherein he stated:

> No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.

Id. at 806 (Frankfurter, J., dissenting).

Justice Frankfurter's dissent concludes with these words:

> [W]e are asked by union members who oppose these expenditures to protect their right to free speech – although they are as free to speak as ever – against governmental action which has permitted a union elected by democratic process to bargain for a union shop and to expend the funds they thereby collected for purposes which are controlled by internal union choice. To do so would be to mutilate a scheme designed by Congress for the purpose of equitably sharing the cost of securing the benefits of union exertions…

Id. at 818 (Frankfurter, J., dissenting).

In *Street*, Justice Frankfurter remained faithful to the principle of deference to the laws conclusion he would side with those justices inclined to uphold state laws permitting governmental unions to charge anti-free-rider fees to workers, regardless of the First Amendment compelled speech claims of dissenting employees. As indicated above, during the oral arguments in the *Friedrichs* case, certain justices raised the doctrine of *stare decisis*. They argued that those seeking to overturn *Abood* faced a heavy burden. Nevertheless, the Supreme Court unwaveringly overturned the opinion in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). See, *West Virginia State Board of Education v. Barnette, supra*. The words of Justice Jackson speak from the grave to those sitting justices arguing the recedential power of *Abood*.

> [F]or over a century it has been settled doctrine of the Supreme Court that the principle of stare decisis has only limited application in constitutional cases. . . [T]he years brought about a doctrine that such [public law] decisions must be tentative and subject to judicial cancellation if experience fails to verify them. The result is that constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors.

Jackson, Robert H., Associate Justice, "The Task of Maintaining Our Liberties: The Role of the Judiciary" 39 A.B.A. J. 961 at 962 (1953)

A decision in *Friedrichs* is expected in late June.

[1] Leaving aside the fanciful aspects of this month's essay (that is my speculation about what Justices Frankfurter and Jackson might do in 2016 were they still on the Court), the background for Friedrichs can only be fully understood by reviewing *Knox v. SEIU,* Local 1000, 567 U.S. 310 (2012) and *Harris v. Quinn*, 573 U.S. ____ , 134 S. Ct. 2618 (2014). Both cases limited union power based upon First Amendment arguments.

[2] Phil C. Neal, Justice Jackson: A Law Clerk's Recollections A Tribute to Justice Robert A. Jackson, 68 ALB. L. REV. 549, 554 - 555 (2004).

[3] To my knowledge, Justice Jackson never wrote an opinion specifically addressing right to work laws or union dues and fees. However, in October of 1945, Justice Jackson apparently voted with the majority on the Court's landmark ruling upholding the constitutionality of state right to work laws. See Lincoln Federal Labor Union No. 19129 v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949). Justice Frankfurter concurred in Lincoln Federal stating:

> It is urged that the compromise which this legislation embodies is no compromise at all because fatal to the survival of organized labor. But can it be said that the legislators and the people of Arizona, Nebraska, and North Carolina could not in reason be skeptical or organized labor's insistence upon the necessity to its strength of power to compel rather than to persuade the allegiance of its reluctant members?

Id. at 540 (Frankfurter, J., concurring).

Memorials

Frank Morgan Rice

Date of Birth: December 29, 1931
Admitted to Kansas Bar: Feb. 10, 1960
Passed Away On: January 18, 2016