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HAMD MEETS YOUNGSTOWN: JUSTICE JACKSON'S WARTIME SECURITY JURISPRUDENCE AND THE DETENTION OF "ENEMY COMBATANTS"

*Sarah H. Cleveland**

More than any Justice who has sat on the United States Supreme Court, Associate Justice Robert H. Jackson explained how our Eighteenth Century Constitution—that “Eighteenth-Century sketch of a government hoped for”¹—struggles both to preserve fundamental liberties and to protect the nation against fundamental threats. Drawing upon his collective experience as a solo practitioner with only one year of formal legal education at Albany Law School; government tax and antitrust lawyer, Solicitor General, and Attorney General in the Roosevelt Administration; Associate Justice to the Supreme Court; and Representative and Chief of Counsel for the United States at Nuremberg, Justice Jackson sought to explain how the foreign affairs powers were distributed within the national government, how they related to constitutional civil liberties, and the appropriate role of the courts in achieving that balance.

Jackson was no dove; in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, he announced that he would “indulge the widest latitude of interpretation to sustain [the President’s]” power to command, “at least when turned against the outside world for the security of our society.”² But Jackson also understood that claims of national security were themselves one of the greatest threats to the fidelity of constitutional governance. By the time he reached the Court, he viewed the war powers as “the Achilles Heel of our constitutional system,”³ due to the claims of necessity and the

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¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

² *Id.* at 645 (Jackson, J., concurring).

³ Dennis J. Hutchinson, “*The Achilles Heel*” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 468, 480 (discussing Jackson’s unfiled

corresponding challenges to judicial protection of liberty that security crises bring. His powerful insights in his *Youngstown* concurrence into how a liberal democracy must reconcile the tension between security and liberty continue to dominate any reasoned analysis of national security questions.

This comment, offered in Jackson's honor on the fiftieth anniversary of his death, addresses the contribution of Justice Jackson's wartime security jurisprudence to contemporary questions of executive detention of "enemy combatants," and particularly to the recent decision in *Hamdi v. Rumsfeld*.⁴ *Hamdi*, of course, involved the executive's claimed authority to indefinitely detain a U.S. citizen accused of fighting with the Taliban in Afghanistan. This comment argues that Justice O'Connor's plurality opinion and Justice Thomas' dissent in that case missed a fundamental point of Justice Jackson's *Youngstown* analysis by failing to rigorously scrutinize claims that Congress had authorized such detentions. The Justices thus failed to appreciate the importance which Jackson placed on explicit participation by Congress in legitimizing deprivations of liberty in times of crisis. The *Hamdi* Court's ultimate conclusion that executive detention of a citizen could not occur absent basic procedural protections, however, was consistent with Justice Jackson's preference for legal process as the most effective defender of individual freedom.

YOUNGSTOWN AND CONGRESSIONAL AUTHORIZATION

It is impossible to exaggerate the significance of Justice Jackson's concurrence in *Youngstown* for U.S. foreign relations jurisprudence. My colleague at the University of Texas, Sandy Levinson, regards the concurrence as "the greatest single opinion ever written by a Supreme Court justice,"⁵ and I certainly will not disagree with him here. Although Justice Black's majority opinion in *Youngstown* dealt the fatal blow to President Truman's effort to seize the steel mills during the Korean War, it was Justice Jackson's concurrence that established the starting framework for analyzing all future foreign relations and individual liberties problems. Justice Jackson explained how the Constitution's cryptic and deeply ambiguous

opinions in *Hirabayashi* and *Korematsu*).

⁴ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

⁵ Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 242 n.2 (2000) (citing Sanford Levinson, *Introduction [to Favorite Case Symposium]: Why Select a Favorite Case?*, 74 TEX. L. REV. 1195, 1197-1200 (1996)).

division of authority between Congress and the President in wartime—the grant of the power to declare and regulate war to one and the Commander in Chief power to the other—should be elaborated in practice.

Jackson rejected Justice Black's formalistic view that the powers of Congress and the executive were hermetically sealed and instead envisioned the branches in a symbiotic relationship. The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity,"⁶ he wrote, and presidential powers accordingly "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁷ Jackson thus famously set forth a three-tiered continuum of presidential power. First, where the President acts "pursuant to an express or implied authorization of Congress," executive power is "at its maximum."⁸ In the second tier, where Congress has been silent, the President may act in the "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁹ Finally, where the President acts contrary to the "expressed or implied will of Congress, his power is at its lowest ebb."¹⁰

Jackson envisioned this continuum of executive authority as accompanied by an inverse role for the courts. Executive actions taken in the first category, with congressional authorization, "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."¹¹ In other words, where the executive and Congress acted together, the courts should largely defer. But actions taken in the third category, in the face of a statutory denial of authority, "must be scrutinized with caution."¹²

Although *Youngstown* is viewed as one of the bulwarks against executive excesses in times of emergency, individual liberties notably have little to do with Jackson's framework. The *Youngstown* concurrence instead offers a structural mechanism for identifying the existence of enumerated power and ensuring that the constitutional separation of powers is preserved. Neither Jackson nor the Court reached the Fifth Amendment due process

⁶ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

⁷ *Id.* (Jackson, J., concurring).

⁸ *Id.* (Jackson, J., concurring).

⁹ *Id.* at 637 (Jackson, J., concurring).

¹⁰ *Id.* (Jackson, J., concurring).

¹¹ *Id.* (Jackson, J., concurring).

¹² *Id.* at 638 (Jackson, J., concurring).

and just compensation claims raised by the plaintiffs. And the constitutional rights that Jackson mentioned—such as the Third Amendment's prohibition against quartering of soldiers,¹³ the Fifth Amendment's mandate of due process of law,¹⁴ and Article I's provision for the suspension of habeas corpus¹⁵—were deployed to underscore his view that Congress, rather than the executive, possessed the power to limit liberties in the face of security threats, not to suggest that the Constitution prohibited such actions altogether. Jackson's survey of other foreign practices likewise led him to conclude that "emergency powers are consistent with free government only when their control is lodged" in Congress.¹⁶ Indeed, he pointed to the ample emergency powers that Congress could grant the President as evidence that there was no need for the power to be exercised without a statute.¹⁷ Within the constitutional system, Jackson concluded, the President's command power "is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."¹⁸

Jackson and the other members of the *Youngstown* majority found that Congress had denied the claimed seizure power to the President. In other words, Truman was acting in Jackson's third category: the President had acted contrary to the express or implied will of Congress. But the conclusion was not necessarily obvious; one might plausibly place the seizure in either of Jackson's other two categories. Congress could have been deemed silent, since nothing in the text of the Taft-Hartley Act or other relevant statutes expressly prohibited other forms of seizure.¹⁹ One could even argue that Congress had impliedly approved the policy, either through the "mass of legislation" that Congress had enacted (as Chief Justice Vinson suggested in dissent)²⁰ or by taking no action after the

¹³ *Id.* at 644 (Jackson, J., concurring).

¹⁴ *Id.* at 646 (Jackson, J., concurring).

¹⁵ *Id.* at 650 (Jackson, J., concurring).

¹⁶ *Id.* at 652 (Jackson, J., concurring).

¹⁷ *Id.* at 653 (Jackson, J., concurring) ("In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute."). See also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 228 (1953) (Jackson, J., dissenting) (discussing Congress' "ample power to determine whom we will admit to our shores").

¹⁸ *Youngstown*, 343 U.S. at 645–46 (Jackson, J., concurring).

¹⁹ *E.g., id.* at 702–03 (Vinson, C.J., dissenting) (arguing that Congress' authorization of seizures in certain contexts did not reflect an intent to prohibit other types of seizures).

²⁰ *Id.* at 702 (Vinson, C.J., dissenting).

seizure.²¹ In short, one judge's "implied approval" by Congress could be another's "silence" and still another's "implied disapproval." Jackson's framework thus is not a prophylactic. It is not a substitute for the hard work of judging.

The critical lesson of Jackson's opinion in *Youngstown* was twofold: Jackson believed that the Constitution gave Congress, not the Commander in Chief, the authority to limit civil liberties in wartime, and he believed that courts must rigorously scrutinize congressional meaning before finding such authorization. A court must find real, specific evidence of congressional authorization to find that Congress has approved an executive action infringing on fundamental liberties. Jackson had been a proponent of broad executive powers as Roosevelt's pre-war Attorney General²² and early in his tenure on the Court had flirted with advocating that courts abstain from reviewing presidential exercises of the war powers.²³ But by *Youngstown*, he viewed both the congressional and judicial checks on the executive as vitally important. He also viewed his approach as fully consistent with the Court's broad constructions of executive power in other cases,²⁴ which involved explicit delegations of legislative power to the President.²⁵

If congressional authorization is to be the touchstone for protecting liberty in times of crisis, however, that authorization must be meaningful. The theme of requiring clear congressional authorization to legitimize deprivations of liberty runs through much of Jackson's jurisprudence. Jackson's opinions in *Korematsu*, *Knauff*, *Mezei*, and *Youngstown* all evidenced a reluctance to find congressional authorization where fundamental liberties were at stake. In *Korematsu v. United States*, Jackson rejected Justice Black's willingness to read ambiguous congressional language as authorization for the exclusion of individuals based solely on their

²¹ *Id.* at 677 (Vinson, C.J., dissenting) (noting the lack of congressional response to the seizure).

²² *E.g.*, Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940) (Opinion of Attorney General Robert H. Jackson).

²³ Jackson's unpublished opinions in both *Ex parte Quirin* and *Hirabayashi v. United States* advocated allowing the executive actions to stand as beyond the courts' power of review. See Hutchinson, *supra* note 3, at 458, 469–74. Thus, in *Quirin*, Jackson opined, "I think we are exceeding our powers in reviewing the legality of the President's Order and that experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front against a foreign foe." *Id.* at 458 (quoting Memorandum of Mr. Justice Jackson in *Ex parte Quirin*, Oct. 23, 1942, at 8, Box 124, Robert H. Jackson Papers, Library of Congress, Manuscript Division).

²⁴ *E.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (Jackson, J.); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

²⁵ See *Youngstown*, 343 U.S. at 635–36 n.2 (Jackson, J., concurring).

Japanese ancestry.²⁶ He pointedly noted that neither Congress nor the President had explicitly authorized a military exclusion policy based on race.²⁷ In dissenting from the exclusion of an alien war bride in *United States ex rel. Knauff v. Shaughnessy*, he wrote: "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized an administrative officer to break up the family of an American citizen."²⁸ And in protesting the government's indefinite detention of a returning resident alien on secret national security grounds in *Shaughnessy v. United States ex rel. Mezei*, Jackson refuted the government's contention that Mr. Mezei's "so-called detention [was] still merely a continuation of the exclusion which [was] specifically authorized by Congress."²⁹ Even if the alien's exclusion on secret evidence had been authorized by Congress, Jackson denied that his resulting detention on Ellis Island had been so authorized.

The implication in each of these cases was that congressional silence or ambiguity was insufficient to justify gross deprivations of human liberty by the executive. Jackson thus employed something akin to the rule applied by the Court in the Japanese detention case of *Ex parte Endo*—a presumption "that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."³⁰ Such deprivations of liberty, if constitutional at all, could only withstand scrutiny when clearly authorized by Congress.

In short, Jackson's was a legal process approach: The role of the courts in such circumstances was to protect rights by rigorously enforcing a bilateral institutional decision-making process between the President and Congress, rather than to make independent

²⁶ Neither the congressional statute nor the executive order on which the military exclusion policy rested explicitly authorized exclusion on the basis of ethnicity or race. The majority nevertheless concluded that the policy was congressionally authorized. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 217-18 ("[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.").

²⁷ *Id.* at 244 (Jackson, J., dissenting) ("[T]he 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt.").

²⁸ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551-52 (1950) (Jackson, J., dissenting).

²⁹ *Mezei*, 345 U.S. at 221 (Jackson, J., dissenting) (citation omitted).

³⁰ *Ex parte Endo*, 323 U.S. 283, 300 (1944). *Endo* was decided the same day as *Korematsu*. Having found the exclusion policy authorized by Congress in *Korematsu*, the *Endo* Court found that the legislation had not authorized the detention of loyal citizens of Japanese descent, and ordered *Endo's* release.

judgments about the substantive content of constitutional liberties in times of emergency.³¹ Jackson preferred not to resort to judicial enforcement of substantive individual rights as the primary defender of constitutional liberties in wartime, probably because he recognized the serious danger that in times of emergency, claims of right would always lose out in the balance against claims under the constitutional war powers. Jackson stressed in his writings both the distorting pressures imposed on courts in times of anxiety³² and the institutional incapacity of the courts to second-guess claims based on national security.³³ He urged, instead, for the protection of liberties to occur primarily through full political vetting and a clear statement from Congress. "With all its defects, delays and inconveniences," he wrote in *Youngstown*, "men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."³⁴

This is not to say that Jackson never raised individual liberties objections to governmental action based on claims of security.³⁵ But even here, his emphasis frequently was on process. Jackson viewed fair judicial process, like the vetting of executive claims of security needs through the bicameral institutions of Congress, as "the indispensable essence of liberty."³⁶ Procedural due process, Jackson

³¹ Cf. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004) (arguing that institutional process has been the courts' predominate approach in adjudicating security questions).

³² *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (In times of anxiety, "[t]he opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote"). See also Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 112 (1951) [hereinafter *Wartime Security*] ("In times of anxiety, the public demands haste and a show of zeal on the part of judges, whose real duty is neutrality and detachment.").

³³ *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 570 (1951) (Jackson, J., concurring) (emphasizing the judiciary's incapacity to evaluate the communist threat); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952) (same). In 1951, he wrote:

Measures violative of constitutional rights are claimed to be necessary to security, in the judgment of officials who are best in a position to know, but the necessity is not provable by ordinary evidence and the court is in no position to determine the necessity for itself. What does it do then?

Wartime Security, *supra* note 32, at 115.

³⁴ *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

³⁵ Jackson viewed the Japanese exclusion program in *Korematsu* as an unconstitutional race-based policy that courts should not be bound to enforce. *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting) ("I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority.").

³⁶ *Mezei*, 345 U.S. at 224 (Jackson, J., dissenting); see *id.* at 226 (Jackson, J., dissenting)

reasoned, was “more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment.”³⁷ Procedure instead lay within the peculiar expertise of the courts.³⁸

Both before and after being appointed Chief of Counsel for the United States at Nuremberg, Jackson demanded robust procedural protections for high-level Nazis, despite calls for their summary political execution from Winston Churchill and some within the U.S. executive branch.³⁹ The experience at Nuremberg only further instilled his faith in procedure. In *Mezei*, Jackson strenuously objected on the grounds that the detention based on secret evidence violated procedural due process.⁴⁰ And in a 1951 article he observed that “[a]n excited public opinion sometimes discredits [procedural protections] as ‘technicalities’ which irritate by causing delays and permitting escapes from what it regards as justice. But by and large, sober second thought sustains most of them as essential safeguards of fair law enforcement and worth whatever delays or escapes they cost.”⁴¹

Process was extremely important to Jackson as a mechanism both for legitimating government institutions and for ensuring against human error. Jackson viewed the likelihood of human error in times of anxiety—and hence the need for adherence to effective legal processes—as particularly acute. Thus, in *Mezei*, he observed that procedural due process “is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration.”⁴² And in *Knauff*, he chided:

I am sure the officials here have acted from a sense of duty, with full belief in their lawful power, and no doubt upon information which, if it stood the test of trial, would justify the order of exclusion. But not even they know whether it

(“differences in the process of administration make all the difference between a reign of terror and one of law”).

³⁷ *Id.* at 224 (Jackson, J., dissenting).

³⁸ *Id.* (Jackson, J., dissenting).

³⁹ See Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 493–503 (1955).

⁴⁰ *Mezei*, 345 U.S. at 224–28 (Jackson, J., dissenting). For Jackson, *Endo* likewise “presented the statutorily unauthorized and constitutionally repugnant specter of an American citizen—loyal ‘or no’—held without charge.” Hutchinson, *supra* note 3, at 484.

⁴¹ *Wartime Security*, *supra* note 32, at 105.

⁴² *Mezei*, 345 U.S. at 224–25 (Jackson, J., dissenting) (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)). See also *id.* at 225 (Jackson, J., dissenting) (noting that, in contrast to the Nazi system of protective custody, which afforded detainees no process, even the British form of preventive detention was “safeguarded with full rights to judicial hearings for the accused”).

would stand this test.⁴³

Jackson also believed that procedural protections did not vary with the status of the accused—whether alien or citizen, security threat or friend. “If the procedures used to judge this alien . . . would be unfair to citizens,” he wrote in *Mezei*, “we cannot defend the fairness of them when applied to the more helpless and handicapped alien.”⁴⁴

Thus for Jackson, the bulwark of liberty in the Constitution was *process*. Liberties may be compromised in wartime, but if they are to be compromised, Congress must do so explicitly, through the bicameral political process, and courts should ensure that both the bilateral institutional process between Congress and the executive and judicial procedural protections were respected.

The advantage of Jackson's institutional legal process approach is that it largely leaves to the wisdom of the collective political branches the determination of the nation's security needs and what inroads on personal freedom are required to keep the populace secure. Jackson assumed—probably correctly—that Congress and the President together were less likely to commit unnecessary violations of individual liberty than was the executive alone. The approach also avoids requiring courts to second-guess determinations of necessity, which Jackson viewed as an impossible task. The check on executive determinations instead is placed in Congress.

The downside of this approach is, of course, that it runs the risk of inviting Congress and the executive to collude in the violation of individual rights. Wartime hysteria has been known to infect Congress as well. If both Congress and the President explicitly embrace a wartime policy that infringes on civil liberties, other than ensuring that basic procedural requirements are respected, there appears little under Jackson's approach that courts would do to stop them. Indeed, in 1951 Jackson portrayed Congress' power to suspend habeas corpus as “sufficient to introduce emergency government with about all the freedom from judicial restraint that any dictator could ask.”⁴⁵

This dark underbelly of Jackson's preference for congressional authorization and procedural due process as the primary defenders of liberties likewise found expression in a number of his Cold War opinions. His *Mezei* dissent made clear that he believed that

⁴³ *Knauff*, 338 U.S. at 551 (Jackson, J., dissenting).

⁴⁴ *Mezei*, 345 U.S. at 225 (Jackson, J., dissenting).

⁴⁵ *Wartime Security*, *supra* note 32, at 108–09.

substantive due process would not prohibit Congress from ordering the detention of an enemy alien on credible national security grounds, if proper procedural protections were in place.⁴⁶ He stressed that the burden of protecting liberties cannot be carried by the judiciary alone and that “[s]ubstantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur.”⁴⁷ In *Dennis v. United States*, he rejected First Amendment objections to criminal prosecutions of Communists, where Congress had authorized such prosecutions and the defendants had received full criminal process.⁴⁸ He also found no First Amendment or substantive due process barriers to the deportation of legally resident aliens who had once been members in the Communist Party.⁴⁹ His opinion in *Harisiades v. Shaughnessy* stressed both Congress’ determination that the power was needed⁵⁰ and the Court’s relative incompetence to second-guess that determination. “[C]an we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense?”⁵¹ he queried. His devotion to procedural over substantive protections perhaps found its most extreme expression in his 1950 opinion for the Court in *Johnson v. Eisentrager*, which invoked principles of territoriality to deny even habeas corpus jurisdiction to enemy aliens overseas who had received full military process.⁵²

In sum, Justice Jackson’s national security framework resorted to institutional structure and process in order to protect constitutional liberty in the face of security crises. Jackson ultimately sought to invoke the vigorous democratic process itself as the most important guardian of liberty. His approach emphasized the responsibility of Congress to fully and transparently confront, vet, and authorize deprivations of liberty requested by the executive. But it also

⁴⁶ *Mezei*, 345 U.S. at 222–24 (Jackson, J., dissenting).

⁴⁷ *Id.* at 222 (Jackson, J., dissenting). See also *id.* (citing *Korematsu v. United States*, 323 U.S. 214 (1944)) (In contrast to procedural due process, substantive due process “tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means.”).

⁴⁸ *Dennis*, 341 U.S. at 572 (Jackson, J., concurring) (emphasizing that “[w]hat really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy”).

⁴⁹ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

⁵⁰ *Id.* at 590 (noting that Congress received evidence in adopting the law and that subsequent Congresses had strengthened and extended it).

⁵¹ *Id.*

⁵² *Johnson v. Eisentrager*, 339 U.S. 763, 766, 777, 780–81 (1950) (emphasizing the procedures afforded the applicants).

emphasized the responsibility of the courts to give searching scrutiny to claims of congressional authorization and to uphold procedural due process.

The requirement of rigorous scrutiny of congressional meaning is the critical element of Jackson's analysis that now is frequently forgotten. The Supreme Court thankfully has been reluctant to locate unilateral authority to limit liberties in wartime in the Commander in Chief. Like Jackson, the Court prefers to find that extraordinary measures taken in extraordinary times have received the sanction of both political branches of the national government.⁵³ But the Court is equally reluctant to second-guess the President's claimed security needs. Accordingly, in times of stress, modern courts often reach to find a fig leaf of congressional authorization to avoid having to uphold unilateral executive power.⁵⁴ In the 1942 case of *Ex parte Quirin*, the Court (including Justice Jackson, newly appointed from serving as Roosevelt's pre-war Attorney General) found that the mere mention of "military commissions" in the Articles of War⁵⁵ was sufficient to constitute congressional authorization for the military trial and execution of German saboteurs.⁵⁶ In *Korematsu*, the majority likewise read ambiguous congressional authorization as approving an exclusion policy targeting persons of Japanese descent.⁵⁷

Courts find comfort in this institutional approach, because reliance on a finding of congressional authorization leaves open the possibility that Congress might amend or withhold the power from the President in the future. It preserves flexibility. But if the power is attributed to the President's constitutional authority under Article II, the sword is permanently unsheathed.

⁵³ Issacharoff & Pildes, *supra* note 31, at 2 (concluding that "[w]hen courts find bilateral institutional endorsement, they have typically accepted the joint political judgment of how liberty and security tradeoffs ought to be made").

⁵⁴ This has not always been the case. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (invalidating the trial of civilians by military commission in Hawaii during World War II as unauthorized by Congress); *Ex parte Endo*, 323 U.S. 283 (1944) (finding detention of loyal Japanese during World War II unauthorized by Congress); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141 (1866) (plurality opinion) (rejecting military trial on the grounds that Congress "did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them"); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (finding executive order approving wartime seizure of ships unauthorized by Congress).

⁵⁵ See 10 U.S.C. § 821 (2000) ("Jurisdiction of courts-martial not exclusive") (formerly Article 15 of the Articles of War).

⁵⁶ *Ex parte Quirin*, 317 U.S. 1, 28 (1942) ("By the Articles of War, and especially Article 15, Congress has explicitly provided . . . that military tribunals shall have jurisdiction to try offenders or offenses against the law of war").

⁵⁷ *Korematsu*, 323 U.S. at 217-19.

If courts generally have agreed with Jackson in seeking congressional authorization for deprivations of liberty based on national security claims, courts have not always appreciated the equally important role of rigorous scrutiny of congressional action in Jackson's approach.⁵⁸ This is the trend in judicial analysis that Jackson found so threatening to liberty. It also is dangerous to Jackson's *Youngstown* test because, having placed the eggs of liberty in the congressional authorization basket, Jackson perceived that courts would largely defer to executive actions that Congress had, in fact, expressly or impliedly authorized. President Truman conceded the lack of statutory authorization in *Youngstown*⁵⁹—apparently his lawyers were not prescient enough to anticipate Jackson's typology. But no subsequent President's counsel has been so candid or, perhaps, so short-sighted. Presidents will now seek congressional authorization in a ham sandwich, and courts frequently have found it. Jackson's analysis was badly abused in *Dames & Moore v. Regan*, where the Court found that Congress, through acquiescence, had impliedly authorized the President's power to terminate the claims of U.S. nationals against Iran.⁶⁰ And last term, the analysis was again misapplied by the *Hamdi* Court.

HAMDI V. RUMSFELD

Justice O'Connor's plurality opinion in *Hamdi* (the judgment of which was joined by Justices Souter and Ginsburg) acknowledged the basic point of *Youngstown*—"that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."⁶¹ Both O'Connor's opinion and Justice Thomas' dissent, however, missed Jackson's more subtle lesson regarding the role of

⁵⁸ Cf. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988) ("[B]y treating all manner of ambiguous congressional action as 'approval' for a challenged presidential act, a court can manipulate almost any act out of the lower two Jackson categories, where it would be subject to challenge, into Jackson Category One, where the President's legal authority would be unassailable.").

⁵⁹ *Youngstown*, 343 U.S. at 648–49 (Jackson, J., concurring).

⁶⁰ *Dames & Moore v. Regan*, 453 U.S. 654, 677–88 (1981). Despite concluding that the International Emergency Economic Powers Act ("IEEPA") did not authorize the President to suspend claims against Iran in U.S. courts, the Court relied on a variety of ambiguous congressional action—the existence of general legislation in the area, the absence of express congressional disapproval, and a history of congressional non-intervention in the executive practice—to conclude that Congress had "implicitly approved" the action. *Id.* at 680. The Court thus transformed what was at best congressional silence under Jackson category two to approval in Jackson category one, where the President enjoys maximum power and judicial deference. See Koh, *supra* note 58, at 1310 & n.253.

⁶¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (citing *Youngstown*, 343 U.S. at 587).

explicit congressional authorization and judicial scrutiny in securing individual liberty.

In *Hamdi*, the President claimed the power to detain a citizen as an "enemy combatant" in the face of the Non-Detention Act, which provided flatly that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."⁶² Thus, the threshold question in *Hamdi* was whether any act of Congress had authorized Hamdi's detention within the meaning of the statute. *Korematsu*, of course, was the unacknowledged ghost looming low over the Court's review of the detention policy.

Both the O'Connor plurality and Justice Thomas found that Congress had approved such detentions through the Authorization for Use of Military Force ("AUMF")⁶³ adopted by Congress after the September 11th attacks. The AUMF had authorized the President "to use all necessary force" to retaliate against the attacks. O'Connor found that this authorization contemplated all ordinary powers of warmaking and that Congress thus had impliedly approved the detention of combatants—including citizens—during the course of the conflict.

O'Connor's preference for seeking congressional authorization for the power to detain, rather than deriving the authority from the President's constitutional powers under Article II, is facially consistent with Jackson's approach. Like many modern courts confronting formidable national security claims, however, O'Connor failed to demand the type of clear congressional authorization that Jackson would have required. Her conclusion that the Court should broadly *infer* congressional approval for the executive action was contrary to Jackson's actual application of his process-based taxonomy in *Youngstown* and other cases.

In finding implicit authorization in the AUMF, O'Connor's conclusion flouted both the plain language and the purpose of the Non-Detention Act. As Justice Souter argued in his separate opinion (which Justice Ginsburg joined), the Non-Detention Act on its face appears to require clear congressional authorization for citizen detentions.⁶⁴ Furthermore, Congress' stated purpose in

⁶² 18 U.S.C. § 4001(a) (2000).

⁶³ Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (2001). See discussion in *Hamdi*, 124 S. Ct. at 2639–40 (plurality opinion); *id.* at 2679 (Thomas, J., dissenting).

⁶⁴ *Hamdi*, 124 S. Ct. at 2654–55 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

adopting the Act was to avoid a repeat of the detention of American citizens that had occurred under the Japanese internment policy.⁶⁵ Congress, in short, had wanted to preclude reliance on vague congressional language as authorizing the detention of citizens.⁶⁶

Perhaps even more devastating to O'Connor's willingness to locate authorization in the AUMF was the fact that the Japanese internment policy had occurred during a declared war *and* the *Korematsu* Court had found that the internments had been separately authorized by Congress. By finding that the AUMF itself constituted sufficient authorization for the detention policy, the *Hamdi* plurality thus required even less congressional authorization than had been present in the Japanese internment cases. The equivalent would have been for the Court in *Korematsu* and *Endo* to find that Congress' December 8, 1941 Declaration of War⁶⁷ itself constituted sufficient statutory authorization for the exclusion and detention policy—something the World War II Court decidedly did not do.

Finally, as Justice Souter noted, thirty-eight days after adopting the Use of Force Resolution, Congress in the PATRIOT Act provided for the "detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings."⁶⁸ "It is very difficult to believe," Souter concluded, "that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado."⁶⁹ Accordingly, Justice Souter found that Congress had denied the power to detain citizens in the Non-Detention Act, that no subsequent authorization overrode that statutory policy, and that the President thus was acting in Jackson category three, where his power was at its "lowest ebb."⁷⁰ Given the rigor with

⁶⁵ *Id.* at 2654 (Souter, J., concurring).

⁶⁶ *See id.* (citing *Ex parte Endo*, 323 U.S. at 300–01) ("Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, the statute said nothing whatever about the detention of those who might be removed").

⁶⁷ The authorization for the President to use "all necessary force" in the AUMF does not differ materially from the December 8, 1941 declaration of war, which directed the President "to employ the entire naval and military forces of the United States and the resources of the Government" in the war against Japan. Pub. L. No. 77-328, 55 Stat. 795 (1941).

⁶⁸ *Hamdi*, 124 S. Ct. 2659 (Souter, J., concurring).

⁶⁹ *Id.* (Souter, J., concurring).

⁷⁰ *Id.* (Souter, J., concurring) (citing *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)) ("Presidential authority is 'at its lowest ebb' where the President acts contrary to congressional will"). Justice Scalia likewise would have ordered *Hamdi's* release, absent an explicit suspension of habeas corpus by Congress, and invoked Jackson's *Youngstown* opinion

which Jackson applied his requirement for congressional authorization in *Youngstown*, *Korematsu*, *Knauff*, and *Mezei*, it is highly improbable that he would have agreed with O'Connor's finding of authorization here.

It is ironic, but consistent with the courts' frequent misconstruction of Jackson's approach, that it was Justice Thomas who relied most heavily on Jackson's *Youngstown* concurrence. Justice O'Connor's conclusion that the AUMF had authorized the detentions placed her in the potentially difficult position of locating the President's action in Jackson's first category, which enjoys the greatest judicial deference. Justice Thomas exploited that difficulty in his dissent. Thomas agreed that the AUMF should be read as impliedly authorizing the detention of citizen enemy combatants. He then quoted Jackson's *Youngstown* concurrence for the proposition that, as an exercise of authority with full congressional support, the President's action was entitled to broad deference and a heavy presumption of constitutionality in the courts.⁷¹ In other words, Thomas' application of Jackson's *Youngstown* categories involved two levels of judicial deference: first, the Court would presume congressional authorization for the executive action and second, once congressional authorization was found, the Court would presume the action's constitutionality. On this basis, Thomas concluded that the executive's indefinite detention of a citizen without any process for testing the propriety of the detention did not violate due process.

Of course, even under Jackson's regimen, a finding of congressional authorization does not mean that an exercise of wartime powers is *per se* constitutional. As Justice Jackson noted in *Youngstown*, a finding of unconstitutionality in category one generally means that the national government as a whole lacks the power.⁷² Jackson's opinions indicate that he was particularly willing to find constitutional infirmity in category one where basic procedures to test the accuracy of government decisions had been denied. Fortunately the *Hamdi* plurality, together with Justices Souter and Ginsburg, likewise concluded that, even if Congress had authorized the detention of citizen enemy combatants,

for the proposition that the suspension of habeas corpus is the Constitution's only express provision for the exercise of emergency power. *Id.* at 2665 (Scalia, J., dissenting) (quoting *Youngstown*, 343 U.S. at 650 (Jackson, J., concurring)).

⁷¹ *Id.* at 2679 (Thomas, J., dissenting) (quoting *Dames & Moore*, 453 U.S. at 668, quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

⁷² *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring).

constitutional due process imposed some constraints on the exercise of this otherwise lawful power. This was the most important and remarkable aspect of the *Hamdi* opinion: Even though the President was acting with congressional approval and thus entitled to the greatest judicial deference, the Court nevertheless found that his conduct violated the Constitution.

Justice Jackson presumably would not have reached the procedural due process question addressed by the Court, since he would have been unlikely to infer congressional authorization for a denial of basic liberty from ambiguous congressional language in the AUMF. Jackson, like Justice Souter, would have found that the prohibition in the Non-Detention Act placed the detention in category three. Had he reached the due process issue, Jackson also likely would have required more robust procedures than were suggested by the *Hamdi* plurality.⁷³ But the *Hamdi* Court's ultimate conclusion that even if the detention was a proper exercise of substantive governmental authority, it must be subject to basic due process, was quintessential Jackson.

Justice Jackson's wartime security jurisprudence holds several important lessons for all of us. First, Jackson emphasized that the security threats confronted by each generation are not new. They are as old as human existence, and the problems they create for liberty are as old as democracy. Jackson was unimpressed by claims of new emergencies, warranting new powers. The Framers, he observed, "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."⁷⁴ And the Framers, he believed, had placed the power to address such emergencies primarily in Congress.

Jackson viewed the dangers to liberties created "among ourselves" from wartime hysteria as equal to, if not greater than, the outside threats that inspired them.⁷⁵ "Wartime psychology," he knew, "tends to break down any right which obstructs its path."⁷⁶ In words that he could equally have directed at the current detention of alleged terrorist enemy combatants, he wrote in 1952 that:

[t]he Communist conspiratorial technique of infiltration

⁷³ See *Hamdi*, 124 S. Ct. at 2649, 2651–52 (plurality opinion) (suggesting an evidentiary presumption in favor of the government and that appropriate process might be afforded by a military tribunal). *But see id.* at 2660 (Souter, J., concurring) (voicing disagreement with these procedural limits).

⁷⁴ *Youngstown*, 343 U.S. at 650 (Jackson, J., concurring).

⁷⁵ *Wartime Security*, *supra* note 32, at 104.

⁷⁶ *Id.* at 112.

poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.⁷⁷

Jackson tirelessly warned of the power of emergencies to warp and distort our carefully crafted institutions—of their “enduring consequences upon the balanced power structure of our Republic.”⁷⁸ It was the obligation of the courts to defend the constitutional system from such distortion. “Such [free] institutions may be destined to pass away,” he cautioned in *Youngstown*, “but it is the duty of the Court to be last, not first, to give them up.”⁷⁹ In particular, it was the duty of courts to avoid importing into the Constitution the abuses that invariably occur in wartime. Thus, Jackson famously objected to the *Korematsu* Court’s ratification of the Japanese exclusion policy.⁸⁰

Finally, Jackson spoke passionately and empathetically about the small victims, such as Yaser Hamdi, who became the temporary and unfortunate objects of broader national security fears. He portrayed Fred Korematsu as a meek and loyal American, “born on our soil.”⁸¹ In *Mezei*, Jackson empathized with a man who had “led a life of unrelieved insignificance,” now “proclaimed . . . a Samson who might pull down the pillars of our temple.”⁸² Jackson’s concerns about the effect of national emergencies both on our foundational institutions and on the people who become victims of this process were passionately summarized in his dissent in the *Knauff* war bride case:

Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl’s admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the

⁷⁷ *Mezei*, 345 U.S. at 227 (Jackson, J., dissenting).

⁷⁸ *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

⁷⁹ *Id.* at 655 (Jackson, J., concurring).

⁸⁰ *Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting) (“Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself.”).

⁸¹ *Id.* at 242 (Jackson, J., dissenting).

⁸² *Mezei*, 345 U.S. at 219–20 (Jackson, J., dissenting).

police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddling, and the corrupt to play the role of informer undetected and uncorrected.⁸³

It has taken time for the bench and bar to appreciate Justice Jackson's profound contribution to the security-liberty dilemma. The *Youngstown* concurrence received little attention at the time of his death in 1955,⁸⁴ and even today is often misapplied, as it was in *Hamdi*, by judges purporting to invoke it. But as we find ourselves again in an era where real and perceived security needs inspire calls for expansive unilateral executive authority and abandonment of traditional procedures, Robert Jackson's national security jurisprudence stands as a clarion warning to us all that both our liberty, and our security, lie in preserving our enduring democratic processes.

⁸³ *Knauff*, 338 U.S. at 551 (Jackson, J., dissenting).

⁸⁴ In a series of commemorative articles in the *Columbia Law Review* that year, the opinion was mentioned as an "interesting and useful discussion" by Charles Fairman and went essentially unacknowledged by the other writers. See Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445, 452 (1955).