

JUSTICE JACKSON'S DRAFT OPINIONS IN
THE STEEL SEIZURE CASES

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Mere moments into his introductory remarks at Judge Samuel Alito's Supreme Court confirmation hearings, after treading briefly across the familiar, weathered terrain of the abortion canon, Senate Judiciary Committee Chairman Arlen Specter turned his attention to a half-century-old concurring opinion signed by a single Justice.¹

Justice Robert H. Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*²—also known as *The Steel Seizure Cases*—is, of course, no ordinary lone concurrence. As the nation debates the Constitution's limits on executive action in the global war on terror, Justice Jackson's opinion has grown ubiquitous in legal discourse. Indeed, each time word of unilateral executive action makes headlines, legal commentators now greet it with a one-word

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Justice Jackson's collected papers have inspired a cottage industry specializing in the analysis of Jackson's draft opinions. See generally ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT (John Q. Barrett ed., 2003); Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003); Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455 (2002); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245 (1989); Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223 (2006); LOUIS FISHER, CRS REPORT FOR CONGRESS, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 30–31 (2002), available at <http://www.fas.org/irp/crs/RL31340.pdf>. This persistent interest in Justice Jackson's papers makes the absence of analysis of his *Youngstown* papers all the more surprising. Hopefully this paper does no violence to the maxim, "better late than never."

¹ See *Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Senator Arlen Specter, Chairman, S. Comm. on the Judiciary), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900755.html>.

² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592 (1952) (Jackson, J., concurring).

rebuttal: “*Youngstown*”—a word synonymous with the doctrine that the Constitution allows for unilateral Presidential action, even in a time of war, only on the rarest of occasions.³ Of course, *Youngstown* is not the first case to become unmistakably identified with a particular legal doctrine—see *Roe*, *Brown*, *Lochner*, *Marbury*—and surely it will not be the last. But just as surely, it is the only example of the public embracing a *lone concurrence* on a first-name basis.

When an opinion establishes itself in the canon by commanding a Supreme Court majority *ab initio*, its authoritative nature is largely self-evident. But when an opinion that initially garnered the signature of no other Justice⁴ comes to public prominence years after the fact, the font of its authority is not so easily found. Perhaps the legal community embraced Justice Jackson’s opinion because the author—Attorney General to President Roosevelt and Nuremburg Prosecutor—spoke with particular authority on the subject. Perhaps it was because Justice Jackson’s most decorated clerk, William H. Rehnquist, paid homage to Justice Jackson and to *Youngstown* in his own opinions,⁵ writings,⁶ and speeches.⁷ Or perhaps it was simply because the opinion sets forth as constitutional law a restatement of pure political pragmatism, easily recognized by all students of politics.

But all the more interesting is the question of how the opinion’s *author* came to embrace the ideas found in that opinion. Ironically, this question is perhaps easier to answer than was the last because Justice Jackson left behind a detailed paper trail.⁸ These papers

³ See, e.g., Stuart Taylor, Jr., *The Man Who Would be King: George W. Bush Threatens Creeping Autocracy Unless Congress and the Courts Act Jointly—and Forcefully—to Stop Him*, NEWSWEEK, Apr. 1, 2006, at 25.

⁴ Nor did Jackson’s opinion win immediate acclaim among legal scholars. The Harvard Law Review’s ninety-plus-page review of the 1951 Term (with a foreword by Professor Paul Freund, Justice Jackson’s friend and colleague) entitled *The Year of the Steel Case*, paid no particularized attention to the opinion. See generally *The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89 (1952).

⁵ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 661–662, 668–69 (1981) (referring to and quoting from Justice Jackson’s concurring opinion in *Youngstown* while explaining presidential authority).

⁶ See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* 3-20, 138-92 (Alfred A. Knopf, 2001) (1987).

⁷ See, e.g., Chief Justice William H. Rehnquist, Remarks at the Dedication of the Robert H. Jackson Center (May 16, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_05-16-03.html.

⁸ See generally *The Papers of Robert H. Jackson*, Library of Congress, Manuscript Division, Box 176 [hereinafter *Jackson Papers*] (containing detailed working drafts and other related papers pertaining to Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co.*).

offer a fascinating vantage point on the evolution of Justice Jackson's views in the few weeks that the case was before the Court. They recorded his changing views not only of the tripartite framework for which the opinion is famous, but also of the World War II legacy of FDR, the nature of the Constitution's limitations on the government in general, and even the propriety of the Justice's participation in adjudicating the case with which he would come to be most closely identified. And these papers appear to begin, at least in part, with a single handwritten note summarizing a district court case cited only twice in this century.

I. THE CHRONOLOGY

The case that would become the fulcrum of war-powers jurisprudence⁹ was the product of a drastically abbreviated schedule following the lower court proceedings. After brief stops at the district and circuit courts, the certiorari petitions were filed on May 2, 1952.¹⁰ The Court granted the petitions the next day¹¹ and scheduled arguments for a mere nine days later, May 12–13.¹² Briefs were filed on May 10.¹³ Justice Jackson did not waste time in committing ink to paper. His first typed drafts, preceded by undated handwritten outlines, are dated May 7 and May 8,¹⁴ followed by drafts dated May 22 and 29, with varying amounts of written amendment, and an edited June 2 galley proof. The bench memo, written not by then-new clerk William Rehnquist, but by his

⁹ See *Dames & Moore*, 453 U.S. at 661 (suggesting that Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area"); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1273–74 (2002) (describing Jackson's opinion as "perhaps the Court's most important attempt to fit the needs of executive branch decisionmaking at times of crisis within our constitutional tradition"); Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L. L. 641, 649 (2005) (focusing on Jackson's opinion when criticizing a Department of Justice memo regarding interrogation techniques, that "in a stunning failure of lawyerly craft, . . . nowhere even mention[ed] the landmark Supreme Court decision in [*Youngstown*], the controlling opinion on the limits of the President's claimed Commander-in-Chief powers").

¹⁰ See *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C. 1952); *Sawyer v. U.S. Steel Co.*, 197 F.2d 582 (D.C. Cir. 1952). The circuit court stayed the district court's injunction order a mere three days after the district court ruling. *U.S. Steel Co.*, 197 F.2d at 582.

¹¹ *Youngstown*, 343 U.S. 937 (1952).

¹² *Id.* at 937–38; see also REHNQUIST, *supra* note 6, at 167–68.

¹³ Charles E. Egan, *Rival Briefs Filed On Steel Seizure In Supreme Court*, N.Y. TIMES, May 11, 1952, at 1.

¹⁴ One draft of the tripartite framework, although dated May 8, appears to have been written before the May 7 draft. See *infra* note 37.

senior, experienced co-clerk, George Niebank, is dated May 8. According to Rehnquist's account, neither clerk was aware of Jackson's position when the Court heard oral arguments.¹⁵ Rehnquist's memory is confirmed by the drafts: all handwritten notes and edits, until the May 29 draft, are in Jackson's hand.

The May 7 "draft" is better described as a compilation of short drafts, each one dedicated to a particular subject and numbered separately. The May 8 draft more closely resembles a single document. Also dated May 8 is a separate discussion of what would come to be the tripartite framework for the evaluation of presidential action, although in a significantly abbreviated format.¹⁶

Jackson's next draft is a complicated cut-and-paste effort, the original version of which is dated May 22. A May 29 draft follows, and the June 2 draft closely resembles the final effort. No draft before May 29 contains more than a handful of citations, generally limited to New Deal Era cases like *Schechter Poultry*.¹⁷

II. THE INSPIRATION? (OR, "ALWAYS TO FOLLOW GUS"¹⁸)

Amidst the Jackson files is a slip of paper on which he wrote: "The President has no power, in absence of legislative authority[,] to prohibit landing of a submarine cable. Opinion of A. N. Hand[,] United States v. Western Union Telegraph Co[.], 272 Fed 311."¹⁹ This 1921 Augustus Hand opinion has been cited only twice in published opinions—in footnote two of Justice Jackson's opinion,²⁰ and in a 1927 New York appellate division case²¹—but it was cited in Youngstown Sheet & Tube Co.'s brief before the Court.²² Its

¹⁵ REHNQUIST, *supra* note 6, at 169.

¹⁶ Where I cite the other drafts as "Drafts," I will cite to this abbreviated note as the 5/8 "Short Draft."

¹⁷ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see generally* Jackson Papers, *supra* note 8.

¹⁸ "[I]f I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus." Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, *Why Learned and Augustus Hand Became Great*, Address before the New York County Lawyers' Association (Dec. 13, 1951), <http://www.roberthjackson.org/documents/Why%20Learned%20and%20Augustus%20Hand%20Became%20Great.pdf>.

¹⁹ Jackson Papers, *supra* note 8.

²⁰ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 n.2 (1952) (Jackson, J., concurring).

²¹ People ex rel. Mexican Tel. Co. v. State Tax Comm'n, 220 N.Y.S. 8, 13 (N.Y. App. Div. 1927).

²² Brief of Petitioner, *Youngstown Sheet & Tube Co.*, at 41, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (May 10, 1952) (No. 744), *available at* <http://steelseizure.stanford.edu/briefs/ystcv Sawyer-bplaintiff744745.pdf>. Both Youngstown et

analysis is quickly recognizable to those familiar with *Youngstown*.

Western Union involved the President's authority to prohibit the landing of international cables at the nation's coastline absent explicit congressional authority to do so.²³ Judge Hand explained that if the President had power to prohibit the landing of cables, that power "must be found expressly, or by implication, in the Constitution."²⁴ Hand declined to accept the argument that the President's power was coextensive with that of the federal government as a whole,²⁵ stating that "[c]ertainly many, if not most, executive powers flow from legislative enactments."²⁶ He rejected the notion that the vesting of executive power in the President included a substantive grant of inherent power, particularly with respect to war powers, for if the President were empowered to take action on these cables without Congressional authorization, then his power over the economy generally would be unbounded.²⁷ Because Congress regulates foreign commerce, Hand concluded, only Congress could regulate the cables in question.²⁸

What complicated matters in *Western Union* was that as far back as the Grant Administration, presidents had controlled the landing of cables without disagreement by Congress. Hand agreed with the government that Congress could authorize the President tacitly: "[u]nder such circumstances, unless congressional legislation regulating foreign telegraphic business can be invoked, it may be reasonably contended that Congress has acquiesced in the long-continued claims of the Executive."²⁹

Hand then explained the separation of powers in terms foreshadowing Justice Jackson's *Youngstown* opinion:

I have thought it most questionable whether the power of the President to regulate cable connection is expressed or implied in the Constitution, but if Congress, which has control over foreign commerce, has chosen to allow the President to prevent physical connection between the shores of this country and of foreign nations by cables, telephones,

al., and the Government petitioned for certiorari in this case. This citation is in reference to *Youngstown's* brief.

²³ *United States v. Western Union Tel. Co.*, 272 F. 311, 313 (S.D.N.Y. 1921), *aff'd*, 272 F. 893 (2d Cir. 1921), *rev'd*, 260 U.S. 754 (1922).

²⁴ *Id.*

²⁵ *Id.* at 313–15.

²⁶ *Id.* at 313.

²⁷ *Id.* at 315.

²⁸ *Id.* at 316.

²⁹ *Id.* at 317.

radio devices, or pipe lines, the occasion and mode of such executive action would seem . . . to be a political question, I should doubt whether the extent of the President's authority if based not upon an original prerogative but upon congressional acquiescence was a justiciable matter, and whether a court should interfere to define or support it; for the basis of the right would then depend on the interrelations and mutual accommodations of the Executive and Legislative Departments of the government, and not upon strict law.³⁰

In other words, where Congress and the President agree on the President's course of action, Judge Hand would defer to their arrangement. At the same time, because one of the company's three cables ran pursuant to a federal franchise granted in accordance with federal statutes, its connection was "an act within a field as to which Congress has generally legislated so as to free it from the executive control sought to be exercised."³¹ Thus, where Congress and the President disagreed, Hand would defer to Congress, not to the President. And, as noted above, where the President acted amidst congressional silence, Hand would inquire into the meaning of that silence.³²

Jackson's note referring to *Western Union* is undated, and the case is not cited in draft opinions until the May 29 draft,³³ and even there not written in Jackson's hand.³⁴ Nonetheless, Hand's opinion clearly evokes the themes explored by Jackson, or, perhaps more accurately, vice versa. The stark similarities between Hand's and Jackson's analyses, as well as Justice Jackson's public admiration of Judge Hand, and the Youngstown Sheet & Tube Co. brief's citing of the case, strongly suggest that Jackson went about drafting his opinion with Judge Hand in mind, from May 10, when briefs were filed, if not from his first outlines.

³⁰ *Id.* at 318–19 (citation omitted).

³¹ *Id.* at 323.

³² *See id.* at 317. Judge Hand's decision was affirmed by the Second Circuit. *See United States v. Western Union Tel. Co.*, 272 F. 893, 894 (2d Cir. 1921). The case reached the Supreme Court, but the parties settled the matter two months before the scheduled arguments. *See Western Union Miami Cable Case Referred Back to New York for Dismissal*, WALL ST. J., Oct. 24, 1922, at 2; *see also End Miami Cable Dispute*, N.Y. TIMES, Oct. 17, 1922, at 18.

³³ Then again, few cases were.

³⁴ Nor is it in the hand of Chief Justice Rehnquist either, according to one former Rehnquist clerk who has seen the drafts.

III. THE TRIPARTITE FRAMEWORK

Jackson's tripartite framework for evaluating executive action is the cornerstone of his *Youngstown* opinion. It merits reprinting in full:

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

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

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.³⁵

³⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J.,

Jackson first sketched out this framework in the briefest of outlines, which was given full embodiment in the short draft dated May 8.³⁶

1. When the President acts in accordance with congressional authority, I believe the Court should employ the widest permissible latitude of interpretation of power and should never strike down the result except upon the clearest grounds. In such case, no process of government has been by-passed and the combined judgment of the two political departments as to policy should be accorded the greatest respect.

2. If the President is acting contrary to the enacted policy of Congress, his power to do so should be scrutinized with great severity and require justification. In all parliamentary systems, the representative body is the source of the rules of law. The forefathers did not make George III the model for the presidency. He was not to govern without Congress nor to make rules as he proceeded. A series of individual actions will not take the place of a general rule enacted by Congress and we should hold the Executive to the general rules of law unless there is clear indication that he is within his province.

3. If, however, there is no rule or policy of Congress, it may be necessary to inquire into the meaning of its silence and inaction, the measure of the necessity for some prompt action and the rights affected by its exertion. It is quite clear that unauthorized action which affects the liberties of the people should not be sustained when unauthorized action that affected some functioning of government would be sustained.³⁷

concurring) (footnotes omitted).

³⁶ A brief word on sources: Jackson's drafts are precisely that—drafts. They include the usual scratch-outs, misspellings, omissions, abbreviations and the like. In translating those handwritten notes to the typed page, I correct his misspellings and complete his abbreviated words. All other changes will be marked with brackets and the like, unless otherwise noted. Quotations may include only the original typed text, or the typed text as amended by hand. Where the difference is material, I identify it as such.

³⁷ 5/8 Short Draft at 1–2. This draft is dated May 8, but its analysis is severely abbreviated, closely resembling Jackson's handwritten outline. The May 7 draft, by contrast, includes much more detail and more closely resembles the full May 8 draft. Therefore, it seems quite likely that this draft, despite its May 8 date, was written before the May 7 draft. Furthermore, the May 7, 8, and 22 drafts' pages often are numbered in a way making standard citation difficult. The May 7 and 8 drafts are written as collections of shorter essays, numbered individually. I cite to page numbers even though a particular draft may have as many as five pages sharing the same number. The sections are distinct enough that a

The differences between the first draft and final opinion are marked and material. Whereas in the final version Justice Jackson allowed for congressional authorization of presidential action to be either “express or implied,”³⁸ his first version looked only to whether Congress has actually *enacted* its policy—a bright-line rule that would seem to grant the President greater deference when acting amidst implied, yet unenacted, congressional policy.³⁹ Also noteworthy is the absence of the “zone of twilight” imagery present in later drafts and the final opinion.⁴⁰ Furthermore, Jackson’s first draft fails to acknowledge that the situation may arise where the President acts in the face of congressional silence when Congress *lacks* constitutional authority to act.⁴¹ On its face, the short draft presumes Congress’s plenary legislative authority—the President “was not to govern without Congress.”⁴²

The May 7 draft supplements that analysis. Jackson adds to category one the further explanation that when the Court strikes down congressionally authorized presidential action, it is because “the Nation itself”—drawing no distinctions between the President’s and Congress’s separate powers—“is lacking in the power.”⁴³ Jackson adds to the second category the suggestion that presidential action contrary to congressional policy “rarely occurs.”⁴⁴

researcher following my citations will have no trouble locating the relevant material. The May 22 draft includes a variety of inserts originally taped to pages; the tape has, in time, eroded such that the Jackson Papers include a jumble of short “clippings” amidst the May 22 draft’s main body. I am confident that, relying on the material contained in those clippings, along with such visual evidence as cut patterns and tape markings, I have arranged those clippings in the proper order.

³⁸ *Youngstown*, 343 U.S. at 635, 637.

³⁹ 5/8 Short Draft at 1.

⁴⁰ *Compare Youngstown*, 343 U.S. at 637, with 5/8 Short Draft, and 5/7 Draft.

⁴¹ Jackson’s final opinion at least twice raises the possibility that Congress may lack power in certain cases. *See Youngstown*, 343 U.S. at 637–38. The opinion first notes that “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain,” and later that

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

Id.; *see id.* at 638 n.4 (noting the President’s “exclusive power of removal in executive agencies, affirmed in *Myers v. United States*, 272 U.S. 52 [1926], continued to be asserted and maintained” throughout the 1930’s) (first emphasis added).

⁴² 5/8 Short Draft at 1.

⁴³ 5/7 Draft at 1.

⁴⁴ *Id.* at 2.

He quickly thought better of that statement, striking it from the draft.⁴⁵ But the May 7 draft added the notion, present in the final opinion, that where the President contradicts Congress, the power of Congress is “subtract[ed]” from the President’s.⁴⁶ This draft in various parts refers to “an *express* enactment or general policy of Congress,”⁴⁷ Congress’s “provi[sion of] no policy or procedure,”⁴⁸ “an express Act or a general policy of Congress,”⁴⁹ and, in handwritten edits, Congress’s “authorization or denial or indication of policy,”⁵⁰ showing that Justice Jackson distinguished between explicit authorization (category one) and implicit authorization (category three—congressional silence).

Furthermore, although the May 7 draft, like all subsequent drafts, did not *expressly* foreclose the President from prevailing in a conflict with the Congress, his marginalia suggested that Jackson’s allowance was a matter of form over substance: “If Cong + Pres sustain[,] *If contra no*[,] If absent maybe[.]”⁵¹

The May 8 draft largely tracks the May 7 analysis, although it does take into account Congress’s lack of plenary legislative power, noting that where the President contradicts Congress, his action survives scrutiny where he shows that Congress “has no control of the subject matter, but that the Executive on his own account does.”⁵²

However, at oral arguments on May 12th, Jackson sharply dismissed the notion that, to quote his first draft, the Court’s analysis should turn in part on “the meaning of [Congress’s] silence and inaction,”⁵³ telling Solicitor General Perlman, “I do not think we should be put in . . . the position of considering any inaction of the Congress. It is nothing that we should consider.”⁵⁴

Jackson’s shifting approach to congressional silence and inaction

⁴⁵ *Id.* (handwritten edits).

⁴⁶ *Id.* (“There he can only rely upon his own powers minus any powers of Congress.”).

⁴⁷ *Id.* at 1 (emphasis added).

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 1.

⁵⁰ *Id.* (handwritten edits).

⁵¹ *Id.* (handwritten edits) (emphasis added).

⁵² 5/8 Draft at 3.

⁵³ *Id.* at 2.

⁵⁴ Transcript of Oral Argument, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 744), available at <http://steelseizure.stanford.edu/arguments/transcript51252.pdf> [hereinafter Tr. of Oral Argument]. Justice Jackson later wrote, in a letter to his son, that at oral arguments Perlman seemed “struggling and confused.” John Q. Barrett, *Introduction to ROBERT H. JACKSON, THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* xxii (2003) (quoting Letter from Justice Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, to William Eldred Jackson (May 13, 1952)).

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further evolved in his May 22 draft, which no longer contains any interpretation of congressional silence. The draft dramatically reconstructs the tripartite framework such that it much more closely resembles that of the final opinion. Its category one allows for both “express” and “implied” congressional authorization.⁵⁵ Its category two consists of presidential action “in absence of either a congressional grant or denial of authority.”⁵⁶ This draft also contains the first suggestion that the President and Congress may have concurrent authority in a “twilight zone.”⁵⁷ Furthermore, its category three consists of presidential action “incompatible with” or “contrary to” Congress’s express or implied will—situations where the President’s power “is at its lowest ebb” such that the Courts will only sustain “exclusive Presidential control . . . by disabling the Congress to act upon the subject.”⁵⁸ The May 29 and June 2 drafts resolved the remaining differences between the May 22 draft and the final opinion.

IV. THE STRIKE, THE SEIZURE

As early as the May 7 draft, Justice Jackson concluded that Truman’s reaction to the steel strike constituted a category two event, that is, the President was acting contrary to the will of Congress. In the May 7 draft, Justice Jackson stated that, “I am compelled to conclude that it is one in which the President has acted contrary to the policies laid down by the Congress and, hence, that the strictest interpretation of his power i[s] appropriate.”⁵⁹ This conclusion was based on Jackson’s examination of three alternative recognized means by which Truman could have effected his seizure:

“[A] seizure statute which authorizes the placing of obligatory orders and the seizure of the plant which fails to comply . . . [,] the authority under the Taft-Hartley Act to obtain injunctions to prevent a labor shutdown for a period of eighty days pending adjustment . . .[, and] the broadest condemnation power [i.e., eminent domain] if property of any kind is needed for Government purposes.”⁶⁰

⁵⁵ *Id.* at 2. Jackson warns, furthermore, that congressional “inertia, indifference or quiescence” may, as a practical matter, “enable, if not invite,” independent presidential action. 5/22 Draft at 3 (handwritten edits).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* This was later reworded in handwritten edits to “zone of twilight.” *Id.*

⁵⁸ *Id.* (handwritten edits).

⁵⁹ 5/7 Draft at 1.

⁶⁰ *Id.*

Jackson saw these three means to be the *exclusive* means authorized by Congress. Truman's choice of an alternative course of action was, therefore, contrary to the will of Congress.⁶¹

Jackson's May 22 modification of the tripartite framework, however, complicated this analysis. As noted above, it was in this draft that Jackson moved *implicit* Congressional authorization of presidential action into category one,⁶² thereby granting the President heightened deference in such a situation. But, as Professor Matthew Franck has deftly noted, in Spring 1952 it was not at all clear that Congress *hadn't* implicitly authorized President Truman to seize the steel plant.⁶³ Such was the conclusion drawn by Chief Justice Vinson, writing for a three-Justice dissent: "there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will."⁶⁴ Solicitor General Perlman pressed this theory at oral arguments. When Justice Frankfurter stated, "[y]ou say that Congress did not do anything, although the President [sic] invited them to. I want to know what the legal significance of that non-action is in this case," Perlman responded, "I think it can be inferred from their failure to act that they were content to let the Presidential action stand."⁶⁵ Writing years after the fact, Truman seemed to agree that Congress's approval was tacit, recalling:

I said in this message [the day after the seizure] that I would be glad to carry out any policy which Congress might want to write with regard to the situation, even if it wanted to cancel what I had just done, and I added that unless there was congressional action I would naturally have to take the responsibility myself.⁶⁶

But Justice Jackson was rescued from having to defend his conclusion that Congress had not implicitly authorized President

⁶¹ *Id.* at 2. Jackson's May 8 draft expanded on the May 7 analysis of the three recognized alternatives to Truman's action. See 5/8 Draft at 1-3.

⁶² 5/22 Draft at 2.

⁶³ Matthew J. Franck, *The Last Justice Without a Theory: Fred M. Vinson*, in *SOBER AS A JUDGE* 149 (Richard G. Stevens & Matthew J. Franck eds., 1999).

⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 703 (1952) (Vinson, C.J., dissenting); see *id.* at 710 ("The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case.").

⁶⁵ Tr. of Oral Argument, *supra* note 54. Perlman argued in the alternative that the President had independent authority under the Constitution to take such action. *Id.*

⁶⁶ Franck, *supra* note 63, at 148 (quoting 2 HARRY TRUMAN, *YEARS OF TRIAL AND HOPE* 472 (1956)).

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Truman's seizure when, as he noted in his May 22 draft, "it [was] conceded that no congressional authorization exists for this seizure."⁶⁷ This statement survives through to Jackson's final opinion,⁶⁸ but in neither the drafts nor the final opinion does Jackson cite such a "conce[ssion]" with specificity. Solicitor General Perlman *did* concede that no statute *explicitly* authorized the seizure:

MR. JUSTICE BLACK: Aside from the powers of the President under the Constitution, is it contended that there is any Act of Congress that sustains what the President has done here, that supplies the power?

MR. PERLMAN: There is no statute that specifically gives it.

MR. JUSTICE BLACK: I did not say "specifically." Is there any statute on which the Government relies to grant the authority to the President to do what he has done, or must we look to the Constitution for that authority?

MR. PERLMAN: Your Honor, we think the power is in the Constitution. We think also that Congress, if Your Honors please, by the passage of two statutes that I will discuss later, has provided authority for this action which did not follow the Acts of Congress.⁶⁹

This appears to be the "conce[ssion]" to which Justice Jackson refers in excluding the steel seizure from category one. But Perlman's concession that no statute specifically or explicitly authorized the seizure should not have been taken to mean that in no way did Congress authorize the seizure. Instead, Perlman continued to press—albeit in "struggling and confused" terms⁷⁰—the argument as set forth in the government's brief: that Congress's various statutory authorizations of executive seizure of property in various situations reflected Congress's general, implicit acceptance that the President must in emergency circumstances seize property, the lack of specific statutory authorization notwithstanding:

We think the President's mandate from Congress is clear. An interruption or diminution in steel production means irreparable injury to the national defense, which the President has been solemnly charged to insure. It is true, as the steel companies have argued, that no statute specifically

⁶⁷ 5/22 Draft at 4.

⁶⁸ *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

⁶⁹ Tr. of Oral Arguments, *supra* note 54.

⁷⁰ Barrett, *supra* note 54, at 216 n.28.

prescribes the action the President found necessary in this case to maintain steel production. But it has never been supposed that the limits of the President's duties are marked by the literal terms of statutes. . . . In the present case, we submit, there was no less clear an implication of power to seize the steel companies from an array of statutes and treaties which commit the Nation by law to a program of self-preservation which could not fail to suffer from a loss of steel production.⁷¹

Doubtlessly, one can disagree with Solicitor General Perlman's interpretation of congressional silence, or of the existence of implied authorization amidst myriad specific authorizations. But Jackson, instead, appears to interpret Perlman's limited concession to broadly concede the entire argument that Congress authorized the seizure. In so doing, he avoided confronting the major danger of his May 22 revisions—that by allowing for “implicit” authorization of presidential action, Justice Jackson would now owe President Truman's seizure the greatest degree of deference.

V. THE PRESIDENT

Jackson was no formalist on matters of executive power: “It is futile and misleading,” he wrote in the May 7 draft, “to believe that we can ascertain the power of the President merely from reading the Executive Article of the Constitution.”⁷² This “futility” was demonstrated by his refusal to draw distinctions between proper and improper executive action. Take, for example, the President's “war powers”—Jackson flatly stated that “[n]o one, I assume, would question that inherent in the powers of the Commander-in-Chief is the power to seize . . . supplies immediately necessary for his troops and facilities for their housing [except as prohibited by the Third Amendment].”⁷³ But, Jackson continued, “[i]t does not follow because the President could requisition beef that he could also requisition farms and ranches.”⁷⁴ Jackson accepted that no bright line existed, and he did not venture to draw one.

⁷¹ Brief of Petitioner, *United States*, at 148, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 745), available at <http://steelseizure.stanford.edu/briefs/sawyer-bpetitioner0552.pdf> [hereinafter Government Brief]. As discussed *supra* note 22, both *Youngstown et al.*, and the Government petitioned for certiorari in this case. This citation is in reference to the Government's brief.

⁷² 5/7 Draft at 1.

⁷³ *Id.*

⁷⁴ *Id.* at 2.

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The May 8 draft criticized unflinchingly President Truman's assertion of inherent powers:

[The President] has chosen to ignore all [alternative avenues to seizure] and to rely upon a procedure of his own devising, sustainable only by resort to a doctrine of inherent powers which could not possibly be sustained without opening up to presidential action a vast and undefinable area of power over management and labor without any rules of law for its guidance, without any tribunal to determine its justification, and without any limit. If the Government had chosen a course which could only be sustained by a virtual destruction of the Constitution as we have known it, it could not have done better.⁷⁵

But Jackson's pragmatic approach to judicial decision-making was a knife that cut both ways. While in the May 8 draft he was loathe to agree that the President could assert "inherent authority,"⁷⁶ he was equally loathe to claim for the judiciary an unlimited power to limit the President. No portion of his drafts illustrates this so starkly as the final caveat appended to the May 22 draft, reprinted here with stricken text included:

And ~~while I should not as a judge approve~~ I am not ready to say that no occasion can arise ~~which~~ grave enough to warrant departure in particular instance from what I apprise to be the limitation of the Constitution. There may be occasion when preservation of our society will be more important than strict adherence to the Constitution. *Korematsu v. United States*, 323 U.S. 214. But nothing here justifies such extreme and dangerous experimentation.⁷⁷

⁷⁵ 5/8 Draft at 3-4.

⁷⁶ At oral arguments, Jackson appeared to firmly espouse a version of "inherent power" that could not be limited by Congress. Interjecting himself into an exchange between Justices Frankfurter and Reed and Harold C. Heiss, counsel for one of the unions, Jackson noted that if the President had "inherent" authority to conduct the search, then the case would be closed: "If he has the inherent power to seize, Congress cannot take it away from him; so the statute, or a discussion of the statute, does not help us. You could win your case on all the other points that you raise, and if the Court should say that the President has inherent power, than you have no victory." Tr. of Oral Arguments, *supra* note 54.

⁷⁷ 5/22 Draft at 28 (handwritten addendum). Jackson's suggestion that the particular facts of a case may justify judicial deference to extra-constitutional presidential action was a noteworthy exception to Jackson's repeatedly-stated position, in the course of the *Youngstown* litigation, that the Court should not undertake to evaluate the nature of the "emergency" confronting the President when deciding the degree of deference owed to him. See, e.g., Conference Notes of Justice Douglas, in *The Papers of William O. Douglas*, Library of Congress, Manuscript Division, Box 221.

This reference to *Korematsu*—an echo of Jackson’s 1949 warning against “convert[ing] the constitutional Bill of Rights into a suicide pact”⁷⁸—appears in no subsequent draft. But also in his May 22 draft, Justice Jackson added another curious caveat echoing his opinion in *Korematsu*: “I should suppose that history does not leave it open to question, *at least in the courts*, that . . . the Executive branch, possesses only delegated powers.”⁷⁹ In *Korematsu*, Jackson dissented from the Court’s affirmation of the constitutionality of Mr. Korematsu’s exclusion, but not without stressing that he would have preferred that the President not bring the matter into the courts to begin with:

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. . . . No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be.”⁸⁰

Youngstown offered Jackson the opportunity to once again warn that some matters should not be resolved by the courts of law; he flirted with seizing the opportunity, but ultimately declined to utilize it.

VI. THE CONGRESS

For obvious reasons, Jackson’s *Youngstown* opinion has long been favored by proponents of congressional authority. It is slightly ironic, then, that the final version of Jackson’s opinion closes with a pessimistic soliloquy doubting that Congress would change course and actively check the President’s unilateral action: “I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily,

⁷⁸ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

⁷⁹ 5/22 Draft at 6 (emphasis added).

⁸⁰ 323 U.S. 214, 244 (1944) (Jackson, J. dissenting); see also John Q. Barrett, *A Commander’s Power, A Civilian’s Reason: Justice Jackson’s Korematsu Dissent*, 68 *LAW & CONTEMP. PROBS.* 57, 60–64 (2005).

challenges Congress.”⁸¹

But even that warning pales in comparison to the excoriation he leveled against Congress in his earlier drafts, particularly that of May 22. There, reflecting upon the “disintegration of the Reichstag,”⁸² Jackson—the former Nuremberg War Crimes prosecutor—warned that,

[a]s crisis follows crisis, if Congress allows its attention to be diverted by trivia, its leadership of the Nation weakened by absorption in sectional tasks, its impact weakened by partisaned division, the weight of public opinion will surely shift effective power to a centralized Executive in spite of all the essays this Court can promulgate.⁸³

Apparently still not satisfied with the tone of that warning, he crossed the entire passage out. In its place, he hand-wrote the aforementioned “crisis that challenges” line, and followed that with a still more potent warning: “If [Congress] does not rise to its occasions, *if it is petty, partisan, or indecisive*[,] power will gravitate to the Executive by force of public opinion whether this Court affirms or not.”⁸⁴ This passage did not survive to the May 29 draft; instead, it was replaced by the relatively muted warnings that prevailed in the final opinion.⁸⁵

VII. THE NATURE OF THE SEIZURE

In Spring 2006, Professor Jack Goldsmith noted a seeming incongruity between Justice Jackson's deference to the President in *Ex Parte Quirin*,⁸⁶ regarding the legality of World War II military commissions, and his lack of deference in *Youngstown*. Goldsmith

⁸¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

⁸² 5/22 Draft at 28.

⁸³ *Id.*

⁸⁴ *Id.* (handwritten edits) (emphasis added). The sharp language Justice Jackson directed toward Congress's utter failure to take action against the steel strike was matched by the editors of *The New Republic*, who on May 12, 1952 ran an editorial entitled *First to Criticize, Last To Be Responsible*, noting that “the Congress continues to ignore its responsibility for enacting legislation designed to handle such emergencies in the future.” *First To Criticize, Last To Be Responsible*, NEW REPUBLIC, May 12, 1952. Three weeks earlier, the editors stated that, “President Truman would have been delinquent in his duty had he failed to seize the steel mills.” *Steel: What Next, Mr. President?*, NEW REPUBLIC, Apr. 21, 1952. Professor Matthew Franck has set forth a clear, effective summary of Congress's response to President Truman's repeated statements in the run-up to the steel plant seizure: “it must be said that the Congress did not distinguish itself in this episode.” Franck, *supra* note 63, at 148–49.

⁸⁵ See *Youngstown*, 343 U.S. at 654.

⁸⁶ 317 U.S. 1, 2 (1942).

ascribed this difference to Justice Jackson's apparent view of the nature of the presidential action in each case. In *Quirin*, Justice Jackson saw the commissions to be "an example of the Commander in Chief's exercise of an instrument of national force," but in *Youngstown* he saw the seizure to be "an interference in an economic struggle between industry and labor."⁸⁷ The former constituted the "external" functions of government; the latter, the "internal" functions of government.⁸⁸ Goldsmith draws this conclusion looking to a key passage in Jackson's *Youngstown* opinion:

I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of lawful economic struggle between industry and labor, it should have no indulgence.⁸⁹

Goldsmith's thesis is borne out in Jackson's drafts. Jackson saw the Truman steel plant seizure to be not an act of military leadership but rather one of pure economic regulation. Beginning in the May 7 draft, Jackson noted that the President's "use of the army for internal purposes is certainly subject to a large degree of control by the Congress."⁹⁰ In that draft, Jackson clearly assigned the seizure to the "internal" category, stating flatly that "here the seizure is designed to bypass the bargaining process and to impose a Government-fixed wage scale."⁹¹

In the May 8 draft, Jackson suggested that Truman had "utiliz[ed] the war machine to carry out domestic policy,"⁹² and he noted that the Constitution forbade "the President to use the army for general strike-breaking purposes."⁹³

⁸⁷ Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223, 229 (2006), available at www.greenbag.org/goldsmith%203-28-06.pdf.

⁸⁸ *Id.* at 228.

⁸⁹ *Id.* at 228–29 (quoting *Youngstown*, 343 U.S. at 645); see *Youngstown*, 343 U.S. at 649 n.17 ("The strike involved in the North American case was in violation of the union's collective agreement and the national labor leaders approved the seizure to end the strike. It was described as in the nature of an insurrection, a Communist-led political strike against the Government's lend-lease policy. Here we have only a loyal, lawful, but regrettable economic disagreement between management and labor.").

⁹⁰ 5/7 Draft at 3 (emphasis added) (noting limited authorization of the use of the army for domestic law enforcement purposes).

⁹¹ *Id.* at 2.

⁹² 5/8 Draft at 3.

⁹³ *Id.*

In the May 22 draft, Jackson, assigning the seizure to the “presidential disagreement with Congress” category of his tripartite framework, added the warning that the seizure could be sustained “only by holding that Congress has no power to control by law the seizure of strike-bound industries.”⁹⁴ This draft also added the statement, which survived in substantial form in the final version, that “any military powers implied by the office of Commander-in-Chief were not to supersede representative government of internal affairs.”⁹⁵

In a written addendum to the May 22 draft, Jackson added the language quoted by Goldsmith.⁹⁶ But this handwritten page also reveals what Jackson first wrote and later rejected. Whereas in the final version he distinguished command of the military “turned [outward]” from that “turned inward,”⁹⁷ in the May 22 draft he described the steel seizure as the national force “turned inward, *against our freedoms*.”⁹⁸ Jackson later crossed out the reference to “our freedoms.”⁹⁹ The May 22 draft also included Jackson’s distinctions between the “loyal, lawful” Youngstown strike and the “Communist-led political strike” at the North American Aviation plant.¹⁰⁰

Goldsmith also appears correct in noting that although Jackson relied on the “geographical” metaphors—“external” versus “internal”—in describing the different types of presidential action, Jackson did not purport to actually draw a bright-line rule between actions within the United States and actions without.¹⁰¹ Jackson distinguished Roosevelt’s seizure of the North American Aviation plant on grounds not of geography, but rather of Communist infiltration,¹⁰² a subject with which he was well-acquainted given his years of service as FDR’s Attorney General and his close contact with FBI Director J. Edgar Hoover.¹⁰³ Furthermore, almost a year to the day before the Court heard *Youngstown*, in an address

⁹⁴ 5/22 Draft at 4. This warning survived in substantially similar form in the final version. See *Youngstown*, 343 U.S. at 640.

⁹⁵ 5/22 Draft at 10; see *Youngstown*, 343 U.S. at 644.

⁹⁶ 5/22 Draft at 13-a.

⁹⁷ *Youngstown*, 343 U.S. at 645.

⁹⁸ 5/22 Draft at 13-a (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at unnumbered page.

¹⁰¹ See Goldsmith, *supra* note 87, at 228–29.

¹⁰² See *Youngstown*, 343 U.S. at 649 n.17; see also *infra* Part IX.A (discussing North American Aviation).

¹⁰³ See *infra* nn. 110–13 & accompanying text (recounting Jackson’s involvement in government action against Communist-led labor discontent).

delivered at Buffalo Law School, Justice Jackson noted that in the months following Japan's attack on Pearl Harbor, "the West Coast was then a proper theatre for military operations."¹⁰⁴ He apparently did not see the Midwest, in the Korean War, to be so proper a theatre.

VIII. "THE KOREAN ENTERPRISE"

Jackson's final version pleaded *nolo contendere* on the question of the legal status of the Korean War, instead "[a]ssuming that we are in a war *de facto*, whether it is or is not a war *de jure*. . . ." ¹⁰⁵ But in his drafts, Jackson did not hesitate to criticize President Truman for perpetrating an "unconstitutional" war.

In edits to his May 22 draft, responding to the government's argument that President Truman was empowered to seize the steel plant because the nation was at war, Jackson stressed the perniciousness of such a doctrine in the context of a "war" commenced without congressional authorization: "That seems to be the logic of an argument tendered at our bar—that the President having, on his own responsibility, sent American troops abroad, derives from that act, [war powers]."¹⁰⁶ In the original version of this draft, Jackson flatly concluded that if "the Korean enterprise" were "war," then it was an "unconstitutional" war: "Any action which the President has constitutional power to initiate on his own cannot be deemed in law to be a war and, hence, is no foundation for a claim to war powers, *unless an unconstitutional action brings enlarged constitutional powers*."¹⁰⁷ In Jackson's markup of this draft he crossed out most of that passage, replacing it with, "[n]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President can vastly enlarge his mastery over the internal affairs of the country by his own unauthorized commitment of the nation's armed forces to some foreign venture."¹⁰⁸ This survived until the final version.¹⁰⁹

¹⁰⁴ Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 116 (1951). The speech was delivered May 9, 1951. *Id.* at 103 n.*.

¹⁰⁵ *Youngstown*, 343 U.S. at 643 (emphasis added).

¹⁰⁶ 5/22 Draft at 8.

¹⁰⁷ 5/22 Draft at 9 (emphasis added).

¹⁰⁸ *Id.* Or, with a revealing strike-out, "some foreign ~~military~~ venture." *Id.*

¹⁰⁹ *Youngstown*, 343 U.S. at 642.

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IX. THE SHADOW OF "THAT MAN"

Although *Youngstown* concerned the Truman Administration, Justice Jackson clearly wrote his opinion with another President in mind: Franklin Delano Roosevelt. The depth of discussion of the Roosevelt Administration, and the degree to which Jackson excised the discussion before final issuance of his opinion, is remarkable.

Justice Jackson himself later recognized, explicitly, that *Youngstown* brought Roosevelt to the forefront of his mind. In the introduction to his draft manuscript on Roosevelt, which Professor John Barrett later edited, supplemented, and published as the invaluable *That Man: An Insider's Portrait of Franklin D. Roosevelt*, Jackson admitted that his effort to write a book-length ode to President Roosevelt was inspired, at least in part, by *Youngstown*:

Not long ago I was sharply reminded that if I am ever to tell what I saw of the story of [the Roosevelt Administration], I must be about it. In defending, before the Supreme Court, President Truman's seizure of the steel plants, the Solicitor General cited President Roosevelt's 1941 seizure of the North American Aviation plant in California and my justification of it as Attorney General. Turning to the record, it was a shock to realize that of those who participated in the conference at which that decision was made, I am the only survivor. That hinted to me that time does not wait upon our convenience.¹¹⁰

A. *The North American Aviation Seizure*

The government's case in *Youngstown* relied heavily on a purported precedent from the Roosevelt Administration: FDR's June 1941 seizure of the North American Aviation Company, which occurred during Jackson's tenure as Attorney General. Jackson summarized that seizure briefly in footnote seventeen of his published opinion.¹¹¹ For a "substantially accurate account of the proceedings and the conditions of violence at the North American plant,"¹¹² Jackson pointed to an article in the June 10, 1941 edition of the *New York Times*.

The front page of the *Times* proclaimed in bold headline print, *Roosevelt Explains Seizure; Jackson Cites Insurrection / Attorney*

¹¹⁰ JACKSON, *supra* note 54, at 1 (footnote omitted).

¹¹¹ *Youngstown*, 343 U.S. at 649 n.17.

¹¹² *Id.*

*General Condemns California Strike as Disloyal—C.I.O. Official Says Reds Aim to Block Defense.*¹¹³ Attorney General Jackson, who received innumerable J. Edgar Hoover briefings on Communist involvement in the labor movement,¹¹⁴ was adamant that the strike was an act of Communist subversion, noting, “[t]he distinction between loyal labor leaders and those who are following the Communist party line is easy to observe. Loyal labor leaders fight for a settlement of labor grievances.”¹¹⁵ Jackson considered the matter to be so pressing that he “assigned associates to formulate a practicable procedure for ridding defense industries of potential saboteurs.”¹¹⁶

In the final version of his opinion, Jackson dismissed the government’s attempted comparison of Truman’s seizure to Roosevelt’s seizure, noting that “[i]ts superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure.”¹¹⁷ On this point, Jackson noted the Communist nature of the strike, the presence of government property at the facility, the company’s government contracts, and the presence of congressional policy on the matter.¹¹⁸

But the similarities were not so “superficial” to Jackson’s clerk George Niebank, who spent one of the four pages of his bench memo distinguishing that seizure. Niebank appeared convinced that the North American Aviation seizure was not consistent with congressional policy because the relevant statute only authorized seizure of companies that “refused to comply with government defense materials orders.”¹¹⁹ There, he found the strike-paralyzed company had not “refused” to fill the order.¹²⁰ The government, too,

¹¹³ Louis Stark, *Roosevelt Explains Seizure; Jackson Cites Insurrection / Attorney General Condemns California Strike as Disloyal—C.I.O. Official Says Reds Aim to Block Defense*, N.Y. TIMES, June 10, 1941, at 1 [hereinafter *Roosevelt Explains Seizure*].

¹¹⁴ See JACKSON, *supra* note 54, at 71–72 (“J. Edgar Hoover frequently sent reports to the President—often directly to the President, although sometimes through me,” regarding “strikes that were Communist-inspired, undoubtedly.”).

¹¹⁵ *Roosevelt Explains Seizure*, *supra* note 113, at 16 (reporting on the North American Aviation seizure); see also Robert H. Jackson, *Our Government Is Prepared Against the Fifth Column*, 29 SURV. GRAPHIC 545 (1940), available at http://www.roberthjackson.org/documents/29_SG_545/ (discussing subversive activities generally).

¹¹⁶ Louis Stark, *Capital Weighing Plan To Fire Reds*, N.Y. TIMES, June 12, 1941, at 12.

¹¹⁷ *Youngstown*, 343 U.S. at 648–49 (Jackson, J., concurring) (footnote omitted).

¹¹⁸ *Id.* at 649 n.17.

¹¹⁹ See Bench Memo of George Niebank, May 8, 1952, in Jackson Papers, *supra* note 8.

¹²⁰ *Id.*

cited that seizure.¹²¹

In his May 7 draft, Jackson dismissed the comparison: "If we simplify both occasions to the mere statement 'The President seizes a manufacturing plant,' there is a similarity in the subject, verb and object. Hardly another qualification can be added that does not point to difference instead of likeness."¹²² Although his outline did not stress the Communist influence, his first draft opinion did:

The seizure . . . took place when a line of workmen with their dinner pails was outside trying to go to work and a Communist-led picket line was standing at the gate preventing their entrance. As the sole survivor of the group that was present when the seizure order was signed, I may say that *it was this situation*, communicated to the meeting in the President's office, that finally decided the seizure."¹²³

The May 8 draft included much of the same content, but in a less dismissive tone.¹²⁴

The government pressed the issue of FDR-era seizures at the *Youngstown* oral arguments so much so that at one point Jackson interrupted counsel in order to "interplead as Defendant."¹²⁵ At conference, according to Jackson, Chief Justice Vinson, who wrote the three-justice dissent, "[c]ompare[d] to F.D.R. at length."¹²⁶

Jackson's extended discussion of the North American Aviation seizure remained in the edited May 22 draft.¹²⁷ But in the May 29 draft, Jackson excised nearly all of the discussion, replacing it with a footnote discussion virtually identical to that in the final version.¹²⁸

B. Jackson's Participation In Youngstown

North American Aviation was relevant not only as a precedent, but also as cause for concern over Jackson's participation in *Youngstown* to begin with. In his May 7 opinion, he wrote one and a half pages justifying his decision not to recuse: "[c]andor requires me to state that I have considered whether I should sit in this

¹²¹ Government Brief, *supra* note 71, at 109 n.11 (citing 89 CONG. REC. 3992 (1943)).

¹²² 5/7 Draft at 1.

¹²³ *Id.* at 2–3 (emphasis added).

¹²⁴ See generally 5/8 Draft at 1–3.

¹²⁵ Tr. of Oral Argument, *supra* note 54.

¹²⁶ Conference Notes of Justice Jackson, in Jackson Papers, *supra* note 8.

¹²⁷ See 5/22 Draft at 18–19 (assembled clippings).

¹²⁸ 5/29 Draft at n.17.

case”¹²⁹ He waxed Shakespearean—“*[t]o sit or not to sit*”¹³⁰—but ultimately justified his involvement on the ground that questions of the separation of powers would in fact be *best* adjudicated by judges having executive and legislative branch experience.¹³¹

The May 8 draft downplayed the question of recusal: “Such a role [in the FDR seizures] might suggest withdrawal from this case. Having weighed all of those considerations, I have concluded instead that I may contribute some teachings of practical experience tempered by a decade of detached reflection.”¹³² The edited May 22 draft—following briefs, arguments, and conference—shortened this discussion to only two sentences, not even suggesting the possibility of recusal.¹³³

C. FDR’s Secret Legal Memorandum

Of all of the fascinating material excised from drafts before publication of his final opinion, perhaps none compares with Justice Jackson’s inclusion and eventual exclusion of a then-unpublished private legal memorandum on the separation of powers, written by FDR himself.

It was, as Jackson later described it, “probably . . . the only one of its kind in our history—it is extraordinary for the President to render a legal opinion to the Attorney General.”¹³⁴ Roosevelt objected to a provision of the Lend-Lease Act under which Congress could terminate the President’s authority to transfer ships upon passage of a joint resolution to that effect.¹³⁵ FDR believed that such action would constitute an unconstitutional “repeal . . . by concurrent resolution.”¹³⁶ Jackson did not share such doubt of the Act’s constitutional soundness and, according to the edited May 22 draft, noted, “I felt unable to give him an opinion to that effect.”¹³⁷ According to this draft opinion, the President had acquiesced to the view of his Attorney General. Yet days later, Roosevelt delivered to

¹²⁹ 5/7 Draft at 1.

¹³⁰ *Id.* (emphasis added) (handwritten edits).

¹³¹ *Id.* at 1–2.

¹³² 5/8 Draft at 1.

¹³³ 5/22 Draft at 1.

¹³⁴ Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1353 (1953) [hereinafter *A Presidential Legal Opinion*].

¹³⁵ *Id.* at 1354.

¹³⁶ *Id.*

¹³⁷ 5/22 Draft at 25.

Jackson a short memorandum detailing his legal analysis of the Act, with instructions that the memorandum “be published some day as an official document, and I leave the method thereof to your discretion.”¹³⁸

In mid-May 1952, Jackson saw his *Youngstown* concurrence to be the proper opportunity for publication of FDR's memorandum. In his edited May 22 draft, Jackson cited the Lend-Lease Act as an example of congressional control of the war effort.¹³⁹ He explained his own opinion of that legal controversy, but noted that “it is fair to say that the late President Roosevelt” disagreed.¹⁴⁰ Jackson continued further: “Since we are considering the powers of his office vis-a-vis the Congress this seems an appropriate time to take note of his view.”¹⁴¹

Jackson expanded his discussion of FDR's views in the edited May 29 draft, wherein he explained the core of FDR's analysis in two footnote paragraphs.¹⁴² This discussion was removed prior to the June 2 draft, and Jackson kept the secret FDR memo out of public discussion until publication of a *Harvard Law Review* article dedicated to the subject the following year.¹⁴³ In his *Harvard Law Review* account, however, Jackson sets forth a different recollection in explaining the degree to which he disagreed with FDR. He explains that the President asked him for a legal opinion on the joint-resolution repeal provision “the day before I was to leave Washington as a guest of the President”¹⁴⁴ on a trip to the Bahamas. He further explained: “I passed the memorandum and letter to Alexander Holtzoff, Special Assistant to the Attorney General, to formulate the statement requested.”¹⁴⁵ While Jackson noted that “we discussed [the question of constitutionality] over and over,”¹⁴⁶ and that “[t]he question on which my doubts were not fully satisfied never bothered the President,”¹⁴⁷ he never goes so far as to say that he rebuffed the President's request for the opinion.

¹³⁸ *A Presidential Legal Opinion*, *supra* note 134, at 1359 (quoting Memorandum from Franklin D. Roosevelt, President, U.S., to Robert H. Jackson, U.S. Att'y Gen. (Apr. 7, 1941)).

¹³⁹ 5/22 Draft at 24. Jackson offers no obvious clue as to why the propriety of inclusion of the FDR letter only grew evident to Jackson upon his fourth draft of the opinion.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 25 (handwritten edits).

¹⁴² 5/29 Draft at nn.14 & 16.

¹⁴³ *A Presidential Legal Opinion*, *supra* note 134, at 1353.

¹⁴⁴ *Id.* at 1354.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1355.

¹⁴⁷ *Id.*

Jackson's explanation of the President's purpose in drafting the secret memo was much more detailed in the *Harvard Law Review* article than it was in the draft opinion. In the typed May 22 draft opinion, he wrote only that FDR "entrusted me with a memorandum to be made public in my discretion."¹⁴⁸ But in the *Harvard Law Review* article, he offered a more specific reason why FDR wanted an opinion on file:

The reason was political. . . .

. . . He had to reckon on the possibility, even if remote, of an attempt to invoke the provision. If he then challenged its constitutionality, he would be confronted with his own signature to the Act he was contesting. Therefore, he wanted a record that his constitutional scruples did not arise only after the shoe began to pinch¹⁴⁹

According to this account, upon Jackson's return from the Bahamas he received the requested opinion from Holtzoff.¹⁵⁰ FDR approved it and committed it to Jackson's safekeeping, with a personal note instructing him to release it someday.¹⁵¹

Jackson's ultimate decision to exclude the FDR memorandum from his opinion could be ascribed to any number of reasons. Yet I note that its inclusion would have in fact undermined Jackson's insistence, as expressed in his drafts and final opinion, that his work in the Roosevelt Administration, cited by the government as precedents, should be discounted. Confronted with statements he made while Attorney General regarding the North American Aviation seizure, Jackson retorted, "I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did."¹⁵² Moreover, in footnote seventeen of the final version of his opinion, Jackson referred to his Attorney General work as "earlier partisan advocacy."¹⁵³

But Jackson's suggestion that he argued for expansive interpretation of executive power regardless of his personal opinions was belied by his experience with FDR and the Lend-Lease Act. As Jackson's description of that episode made clear, where Jackson felt

¹⁴⁸ 5/22 Draft at 25.

¹⁴⁹ *A Presidential Legal Opinion*, *supra* note 134, at 1356–57.

¹⁵⁰ *Id.* at 1357.

¹⁵¹ *See id.* at 1357–59.

¹⁵² Tr. of Oral Arguments, *supra* note 54.

¹⁵³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 n.17 (1952) (Jackson, J., concurring).

unable to submit to the President a legal opinion favorable to the President's position, he simply did not. To include the FDR tale in the opinion would have undermined his insistence that his work as Attorney General could not be taken as a reflection of his own views of those events, for it stood as stark evidence that on at least one occasion Attorney General Jackson was not required to take legal positions with which he strenuously disagreed.

X. CONCLUSION

Jackson's concurring opinion in *Youngstown* continues to retain great prominence in debates on the President's power in wartime. The opinion is so deeply ensconced in the canon that its omission from debate is a sign of malfeasance, if not outright malpractice.¹⁵⁴ Indeed, its familiar tripartite framework has transcended consensus to become conventional wisdom. Nonetheless, these ideas did not spring, fully formed, from the mind of Justice Jackson; rather, they were the product of deliberation, draft, and re-draft. His papers reveal not only the substantive evolution of his views, but also his various efforts to justify the wartime actions of FDR as well as his own participation in the *Youngstown* case. His drafts reflect his own ambivalence toward judicial limitation on the powers of the President,¹⁵⁵ as well as his deep concern—relatively muted in his final opinion—that Congress would be unwilling to check the President. In sum, the drafts warn of the folly inherent in reducing Jackson's views to a bullet-point version of his tripartite framework. Jackson's views—like the institutions he analyzed—were not so simple.

¹⁵⁴ See Koh, *supra* note 9, at 649.

¹⁵⁵ See *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting).