

WARTIME SECURITY AND CONSTITUTIONAL LIBERTY

FOREWORD

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It is my great pleasure to write this foreword. This symposium on *Wartime Security and Constitutional Liberty* was organized to honor Justice Robert H. Jackson, who graduated from Albany Law School in 1912. The very successful live symposium, at which the papers were presented, was part of the 2004 International Law Weekend of the American Branch of the International Law Association, which was held on October 15, 2004 in New York City.

The symposium was one in a series of events organized at Albany Law School in 2004 to mark Justice Jackson's fiftieth memorial anniversary. Albany Law School's Robert H. Jackson and International Programs Committee organized this symposium on wartime security and constitutional liberty. I would like to thank the *Albany Law Review*, particularly Allen J. Vickey, Editor-in-Chief, and Noelle Lagueux-Alvarez, Executive Editor for Symposia, for their invaluable assistance in putting the papers for this symposium together for publication. I would also like to thank Professor Patricia Reyhan, my co-chair, in putting together this symposium. Without her vision, this symposium would not have been possible. For the generous funding and support of this event, Dean Thomas Guernsey deserves gratitude as well.

Among his many achievements, Justice Jackson served as the Chief U.S. Prosecutor at Nuremberg, as a Supreme Court Justice and as the U.S. Attorney General. Wartime security and constitutional liberty was a central theme of his career at Nuremberg and as an Associate Justice. His contribution at Nuremberg was instrumental in shaping the law of individual

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responsibility for war crimes and for crimes against humanity. This legacy continues into the twenty-first century as an influence on the creation of the International Criminal Court.

Justice Jackson's Supreme Court opinions continue to be influential. For example, his opinion in *Johnson v. Eisentrager*¹ has framed discussions on the scope of the President's authority to hold aliens and citizens captured abroad in military custody and their rights of access to U.S. courts. His dissent in *Korematsu v. United States* also demonstrates the challenges courts have faced recently.² In this dissent, Justice Jackson declined to uphold the constitutionality of the exclusion and detention of citizens of Japanese ancestry. Yet as he later explained, this dissent would have allowed military authorities by their own force and authority at a time and place found proper for military control to enforce this exclusion and detention measure without judicial intervention.³

In the 1952 *Youngstown Sheet & Tube Co. v. Sawyer*⁴ decision, Justice Jackson's concurring opinion held that a Presidential order authorizing the seizure of the steel industry during the Korean War was unconstitutional. In this much remembered concurring opinion, he introduced a three-tiered framework to test the power and authority of the President. Professor Cleveland illuminatingly discusses Justice Jackson's *Youngstown* concurrence in her essay in this symposium. Finally, fifty years ago in 1954, Justice Jackson left his sick-bed where he was recovering from a heart attack to cast his vote to make the decision in *Brown v. Board of Education*⁵ unanimous.

To reflect on the important questions of constitutional liberty and wartime security, we were delighted to have a very distinguished group of speakers. They were: Ambassador Pierre-Richard Prosper of the Office of War Crimes Issues at the State Department. His office advises the Secretary of State on the disposition of the cases involving the Guantanamo Bay detainees; Professor Erwin Chemerinsky, the Alston & Bird Professor of Law at the Duke University School of Law and formerly the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School. His scholarly

¹ 339 U.S. 763 (1950).

² *Korematsu v. United States*, 323 U.S. 214 (1944).

³ Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103 (1951).

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

⁵ 347 U.S. 483 (1954).

reputation and litigation experience on the intersection of constitutional liberty and wartime security have brought Professor Chemerinsky both national and international recognition; Sarah H. Cleveland, the Marrs McLean Professor of Law at the University of Texas School of Law. Professor Cleveland has done very important work demonstrating the relationship between the doctrines of sovereignty relating to Indians, aliens and territories, on the one hand, and modern foreign relations jurisprudence, on the other. She has shown that the peculiarly nativist and nationalist impulses informing modern foreign relations jurisprudence has a long history; last but not least, we were also very fortunate to have Paul L. Hoffman, who was the lead counsel in the important U.S.-Mexico Extradition Treaty case in the Supreme Court, *United States v. Alvarez-Machain*,⁶ as well as its progeny, *Sosa v. Alvarez-Machain*.⁷ He is currently a partner at Schonbrun DeSimone Seplow Harris & Hoffman LLP in Venice, California, from where he continues to litigate leading cases at the Supreme Court and elsewhere.

Each of our speakers also kindly agreed to contribute their papers to this symposium. Each of their papers continues and advances the robust discussion of the live symposium. Mr. Hoffman emphasizes the importance of the legacy of Nuremberg in preventing impunity in litigation brought under the Alien Tort Claims Act. Ambassador Prosper underlines the Bush administration's view of the war on terror as framing the context within which litigation on enemy combatants ought to be seen. By contrast, Professor Chemerinsky argues that the rights of the Guantanamo detainees ought to frame how courts should respond to their habeas petitions as well as their petitions to have their due process guarantees enforced. He argues that the Supreme Court only got it half right in *Rasul v. Bush*⁸ by allowing access to American courts, but saying little or nothing about the due process rights of these detainees. Finally, Professor Cleveland gives us a *tour de force* through Justice Jackson's important and continuing legacy as a jurist of foreign affairs law, particularly in light of the Supreme Court's *Padilla* decision in the 2004 term. As she notes, while he was no dove, Justice Jackson recognized that national security posed a danger to judicial protection of individual rights. However, his *Youngstown* concurrence, often thought of as a bulwark against executive power, spoke not in the language of

⁶ 504 U.S. 655 (1992).

⁷ 124 S. Ct. 2739 (2004).

⁸ 124 S. Ct. 2686 (2004).

rights, but of the institutional balance between the powers of the President relative to those of Congress.⁹ Professor Cleveland refers to Justice Jackson's approach on the balance between wartime security and constitutional liberty as an institutional process approach.

Such an institutional process approach leaves it to executive-congressional coordination to balance wartime security and constitutional liberty. Within this approach, courts seek to find congressional authorization of executive action to sustain executive conduct. Though Justice Jackson favored this approach, his dissent that the *Korematsu* precedent was a "loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need,"¹⁰ is prescient in retrospect. Perhaps legislative authorization of the curtailment of civil liberties under the institutional process approach is only a first safeguard. Without an opportunity to explore whether claims of national security and wartime defense by both Congress and the Executive unjustly encumber identifiable racial, cultural or minority groups, courts merely engage in a *de minimis* review that may well ratify such outcomes. What is more, the relationship between claims of heightened risks of terrorist attacks, on the one hand, and the probability of such attacks, on the other, remains unexamined and susceptible to coincide with irrational stereotypes and fear.¹¹ For these reasons, the prolonged detentions of enemy combatants without access to lawyers or to even minimal due process guarantees—for up to three years now—suggests that courts ought to give enhanced scrutiny of these detentions when they are invited to do so. After all, an overwhelming majority of these detentions are targeted towards members of identifiable racial groups particularly from the Middle East.¹²

In addition, extraordinary security measures such as indefinite detentions ought to be subjected to judicial review under

⁹ Justice Jackson's explained that:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

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

¹⁰ *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

¹¹ See generally CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

¹² See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

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circumstances where judges can balance the needs of security against the liberty interests of those sought to be detained. A combination of these safeguards might help avert the development of a “colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution,”¹³ as Justice Harlan’s dissent in *Hawaii v. Mankichi* had predicted well over a hundred years ago.

¹³ *Hawaii v. Mankichi*, 190 U.S. 197, 240 (1903) (Harlan, J., dissenting). Similarly, Harold Hongju Koh argues that while responding to threats to national security may warrant enhanced measures, it does not follow that the rule or law has to be suspended or that courts have to surrender their jurisdiction with respect to aliens, even those suspected of terrorism. See Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 37–38 (2002).