SOURCES AND LIMITS FOR PRESIDENTIAL POWER: PERSPECTIVES OF ROBERT H. JACKSON

Louis Fisher[*]

ABSTRACT

In defining the scope of presidential power, no decision is cited with such frequency as Robert Jackson's concurrence in *Youngstown Co. v. Sawyer,* 343 U.S. 579 (1952). A recent example of this Supreme Court dependence is *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). The purpose of this Article is to analyze Jackson's concurrence in the context of his other writings, both as Attorney General and Associate Justice of the Supreme Court, to better understand his position on presidential power. The principles that guided him throughout his legal career were not always clear or consistent. The *Youngstown* tripartite framework is frequently referred to as a reliable way to judge the constitutionality of a presidential action. Yet he offered it as a starting point for analysis, not a method to settle each constitutional dispute. The framework is sufficiently general to lead analysts to disagree on whether a presidential action fits one category or another. With regard to the authority of the Supreme Court to check executive actions, Jackson varied from promoting judicial independence to deferring to judgments reached by executive and military officials, especially in time of war. Still, his rich experience in government allowed him to comprehend and anticipate complexities, both legal and political, that often escaped others.

[*] Visiting Scholar, William and Mary Law School. From 1970 to 2010, Dr. Fisher served as Senior Specialist in Separation of Powers with Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress. Many of his articles and congressional testimony appear on his personal webpage, http://www.loufisher.org. Upon retirement, he joined the Constitution Project as Scholar in Residence. He thanks Dave Adler, John Barrett, Reb Brownell, Henry Cohen, Jeff Crouch, Neal Devins, Chris Edelson, Jenny Elsea, Joel Goldstein, Ryan Hendrickson, Nancy Kassop, Derek Mathis, Bruce Peabody, Dick Pious, Jeff Powell, Dave Pozen, Harold Relyea, Bob Reinstein, Mort Rosenberg, Mike Shenkman, and Mitch Sollenberger for their comments and advice. Appreciation to Derek Mathis at the law school for submitting this Article to law reviews.

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INTRODUCTION

In determining the scope of presidential power, the Supreme Court and scholars turn with great frequency to the concurrence by Justice Robert Jackson in the Steel Seizure Case of 1952.[1] A recent example is the 2015 Jerusalem passport case of *Zivotofsky v. Kerry*.[2] In deciding the President's authority to grant formal recognition to a foreign sovereign, the Court turned to "Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*."[3] The Court explained that Jackson's framework divides the exercise of presidential power into three categories: the "[f]irst when 'the President acts pursuant to an express or implied authorization of Congress, [placing] his authority . . . at its maximum'";[4] the second when the lack of statutory authority creates a "zone of twilight" in which the President and "Congress may have concurrent authority and where 'congressional inertia, indifference, or quiescence may' invite the exercise of [presidential] power";[5] and the third, when the President acts in ways "incompatible with the expressed or implied

[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[2] Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).
[3] *Id.* at 2081, 2083 (citing *Youngstown*, 343 U.S. at 635–38 (1952) (Jackson, J., concurring)).
[4] *Id.* at 2083–84 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).
[5] *Id.* at 2084 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

will of Congress," requiring the President to "rely only on his own constitutional powers minus any constitutional powers of Congress over the matter."[6] This framework and the Court's analysis in *Zivotofsky* are analyzed in Part XI.

The political and legal career of Robert H. Jackson followed an extraordinary path of increasingly senior positions within the executive branch, culminating in his appointment to the Supreme Court in July 1941.[7] He served on the Court until October 9, 1954.[8] For eighteen months he served as chief prosecutor at the Nuremberg trials of Nazi defendants.[9] As a result, he did not participate in a number of Court decisions that dealt directly with executive power. He took no part in the issue of martial law in Hawaii, decided by the Court on February 25, 1946, in *Duncan v. Kahanamoku*,[10] nor did he participate in the Court's decision on the President's authority to recognize foreign governments,[11] the use of a military commission to try General Tomoyuki Yamashita,[12] or the related cases of *Homma v. Patterson*,[13] *Homma v. Styer*,[14] and *Hirota v. MacArthur*.[15]

Eugene Gerhart, author of a biography on Jackson, characterized his decisions in a Nazi saboteur case (*Cramer v. United States*)[16] and a Japanese American case (*Korematsu v. United States*)[17] in this manner: "Jackson, at least, cannot be charged with yielding to war hysteria."[18] It would indeed be unfair to accuse Jackson of succumbing in any full sense to war hysteria, but frequently (as will be explained) he expressed the view that in times of war the judiciary should not exercise its customary independence to review and possibly invalidate executive and military judgments.[19]

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[6] *Id.*

[7] *Robert H. Jackson, 1941-1954*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_robertjackson1941-1945.html [https://perma.cc/RJ54-3DNA].

[8] *Id.*

[9] Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 488 (1955). Jackson was appointed on May 2, 1945, *id.* at 496, and submitted his final report to President Truman on Oct. 7, 1946, *id.* at 522 n.164. He resigned on Oct. 17, 1946. *Id.* at 488 n.2.

[10] *See* Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946).

[11] *See* United States v. Pink, 315 U.S. 203, 233–34 (1942).

[12] *See In re* Yamashita, 327 U.S. 1, 11, 26 (1946).

[13] Homma v. Patterson, 327 U.S. 759, 759 (1946).

[14] *Id.*

[15] Hirota v. MacArthur, 338 U.S. 197, 197–98, 199 (1948).

[16] Cramer v. United States, 325 U.S. 1 (1945).

[17] Korematsu v. United States, 319 U.S. 432 (1943).

[18] Eugene C. Gerhart, *A Decade of Mr. Justice Jackson*, 28 N.Y.U. L. REV. 927, 948 n.96 (1953).

[19] *See* Korematsu v. United States, 323 U.S. 214, 244–45 (1944) (Jackson, J., dissenting); Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 480; *infra* notes 291–300 and accompanying text.

Philip Halpern described Jackson's writing as "pithy and pungent; yet he never sacrificed clarity of thought for a well-turned phase."[20] That was not always the case. Jack Goldsmith has pointed out that "Jackson's analysis of the separation of powers between the Executive and Congress [could be] dense and somewhat ambiguous."[21] In contrast, Jackson's "analysis of the separation of powers between the Judiciary and the Executive was much clearer."[22] There is much to be said for Goldsmith's position, but clear statements can also be erroneous statements, a point to be developed in this Article.

The difficulty in analyzing Jackson's interpretation of executive power comes in part from his style of writing. He was widely considered the best writer during his service on the Court,[23] and possibly one of only a half dozen Justices over two centuries praised for mastery of the English language.[24] However, Dennis Hutchinson has observed that Jackson "could be substantively elusive, notwithstanding all his style and eloquence."[25] He "often preferred ringing imagery to close analysis, a natural tendency, perhaps, in a trial lawyer, but a liability for an appellate judge."[26] Bernard Schwartz noted that so "felicitous" is Jackson's style that "at times it makes the reader overlook weaknesses in the substance."[27] Walter Murphy found it difficult to understand Jackson because of "his marvelous ability to weave words."[28] He said Fred Rodell attributed to Jackson "an extraordinary command of language which enabled him to clothe even the scrawniest of his ideas in verbal raiment that gave them a verisimilitude of solidity."[29]

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[20] Philip Halpern, *Robert H. Jackson, 1892-1954*, 8 STAN. L. REV. 3, 4 (1955).

[21] Jack Goldsmith, *Justice Jackson's Unpublished Opinion in* Ex parte Quirin, 9 GREEN BAG 223, 229 (2006).

[22] *Id.*

[23] *See* Bryan A. Garner, *Celebrating the Powerful Eloquence of Justice Robert Jackson*, A.B.A. J. (Oct. 1, 2016, 2:50 AM), http://www.abajournal.com/magazine/article/powerful_eloquence_justice_robert_jackson [https://perma.cc/ELD7-XKC3].

[24] *See id.*

[25] Hutchinson, *supra* note 19, at 487.

[26] *Id.* at 491–92.

[27] Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 255.

[28] Walter F. Murphy, *Mr. Justice Jackson, Free Speech, and the Judicial Function*, 12 VAND. L. REV. 1019, 1019 (1949).

[29] *Id.* at 1020 & n.2.

I. DESTROYERS-BASES DEAL (1940)

The destroyers-bases deal is often described as an example of a President asserting independent power to circumvent legal restrictions imposed by Congress.[30] In a message to Congress on September 3, 1940, President Franklin D. Roosevelt announced he had entered into an agreement to transfer fifty "over-age" destroyers to Great Britain in return for ninety-nine-year leases to a number of British air and naval bases in North and South America.[31] A book published by Robert Shogun, *Hard Bargain*, carries this subtitle: *How FDR Twisted Churchill's Arm, Evaded the Law, and Changed the Role of the American Presidency*.[32]

Shogun's study is insightful, but the theme of illegality that pervades the book is never substantiated. Roosevelt is said to be responsible for the "flouting of constitutional principles."[33] He "flouted international law, as well as the laws of his own country."[34] Chapter 9 of the book is called *Getting Around the Law*,[35] but a particular law that was circumvented is never identified.[36] Nowhere does Shogun identify a law that Roosevelt evaded or violated.

Throughout the process of reaching agreement with Great Britain, Attorney General Robert H. Jackson provided key legal advice to Roosevelt. Jackson's opinion of August 27, 1940, gave the impression that Roosevelt could rely on independent presidential authority.[37] Jackson addressed questions of "constitutional and statutory authority."[38] He referred to the President's power as Commander in Chief, but found it unnecessary "to rest upon that power alone to sustain the present proposal."[39]

Jackson explored a second source of authority: "control of foreign relations which the Constitution vests in the President as a part of the Executive function."[40] However, Articles I and II of the Constitution allocate external relations to both Congress and the

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[30] ROBERT SHOGUN, HARD BARGAIN: HOW FDR TWISTED CHURCHILL'S ARM, EVADED THE LAW, AND CHANGED THE ROLE OF THE AMERICAN PRESIDENCY 244 (1999).

[31] 86 CONG. REC. 11352, 11354 (1940).

[32] SHOGUN, *supra* note 30.

[33] *Id.* at 1.

[34] *Id.* at 7.

[35] *Id.* at 177.

[36] *See, e.g., id.* at 178.

[37] *See* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 496 (1940).

[38] *Id.* at 485.

[39] *Id.* at 486.

[40] *Id.*

President.[41] They do not concentrate that power solely in the President, as Jackson incorrectly suggested.[42] To reach that position of executive power, he relied on what he regarded as language that had been "explicitly and authoritatively defined" by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*,[43] which referred to "the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations."[44]

In a book published in 1941, Jackson correctly described *Curtiss-Wright* as "a Christmas present to the President of a power over foreign affairs larger than the Government had really contended for."[45] Not only did the Court support a statute that authorized President Roosevelt to maintain an arms embargo in an area in South America, it referred to

> the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[46]

What Jackson failed to analyze is how the Court decided to designate the President as the "sole organ" in external affairs. Not only was the Court's language clearly dicta, but it was judicial error.[47] The sole-organ doctrine is derived from a speech given by John Marshall in 1800 while serving as a member of the House of Representatives.[48] With Jeffersonians prepared to either impeach or censure President John Adams for turning over to Great Britain an Englishman charged with murder, Marshall said, "The President is the sole organ of the nation in its external relations, and its sole

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[41] *See* U.S. CONST. art. I, § 8, cl. 10–11, 18; *id.* art. II § 2, cl. 1–2.

[42] *See id.* art. I, § 8, cl. 10–11, 18; *id.* art. II § 2, cl. 1–2; Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. at 486.

[43] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

[44] Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. at 486 (quoting *Curtiss-Wright*, 299 U.S. at 320).

[45] ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 201 (1941).

[46] *Id.* at 202 (quoting *Curtiss-Wright*, 299 U.S. at 320).

[47] Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 169 (2016).

[48] *Id.* at 150.

representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation."[49] The term *sole organ* is ambiguous. *Sole* means exclusive and plenary, but what is *organ*? Does it mean communicating to other nations U.S. policy after it has been decided by both elected branches?

When read in full, Marshall's speech did not advocate plenary or exclusive presidential power in the field of international relations. He merely explained that President Adams was carrying out an extradition provision in the Jay Treaty.[50] Adams was not making foreign policy unilaterally. Marshall's floor statement was so tightly reasoned that Jeffersonians did not attempt a rebuttal. They abandoned their campaign for impeachment or censure.[51]

In his opinion as attorney general, Jackson seemed to understand that the Court in *Curtiss-Wright* overstated the President's authority over international affairs. Jackson observed, "The President's power over foreign relations while 'delicate, plenary, and exclusive' is not unlimited."[52] Yet how could a plenary and exclusive power be limited? Jackson's opinion stretches over thirteen pages, ending with three paragraphs from Oppenheim's work on international law.[53] Although repeatedly rejected by scholars, Justice Sutherland's sole-organ dicta in *Curtiss-Wright* guided constitutional law for nearly eight decades[54] before being jettisoned by the Supreme Court in *Zivotofsky v. Kerry*, discussed in Part XI.[55]

Jackson's opinion on the destroyers-bases agreement referred to statutory language authorizing the Chief of Naval Operations to certify that the destroyers involved were not essential to the defense of the United States.[56] In short, Jackson faced not a question of

[49] 10 ANNALS OF CONG. 613–14 (1800).

[50] Fisher, *supra* note 47, at 190.

[51] *Id.* at 164, 197. For greater detail on Marshall's speech, see Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139 (2007) [hereinafter Fisher, *Presidential Inherent Power*]; Louis Fisher, *The "Sole Organ" Doctrine*, LAW LIBR. CONGRESS (Aug. 2006), http://loufisher.org/docs/pip/441.pdf [https://perma.cc/95UR-5MVH]. For greater detail on how the sole-organ doctrine guided federal courts in broadly defining presidential power, see Louis Fisher, *Getting it Wrong Again and Again—Judicial Error's Compounding Effect*, 2013 NAT'L L.J. 31; Louis Fisher, *Judicial Errors that Magnify Presidential Power*, 61 FED. LAW. 66 (2014).

[52] Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 487 (1940).

[53] *Id.* at 494–96.

[54] *See* Fisher, *supra* note 47, at 154.

[55] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089 (2015).

[56] *See* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. at 490.

constitutional or international law but statutory policy binding on President Roosevelt. Senator David Walsh, after discovering that the Navy was about to modify certain contracts to permit the transfer of eleven torpedo boats and twelve submarine chasers to allies,[57] took steps to restrict such transfers.[58] President Roosevelt signed a bill that included the Walsh amendment: "[N]o military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment" could be transferred or sold "unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States."[59]

Thus, statutory policy permitted transfers of ships and boats if certified by the Chief of Naval Operations. That is all Jackson's opinion needed to say. There was no reason to talk about the Commander in Chief Clause, the sole-organ dicta in *Curtiss-Wright*, or cite language in an international law treatise. A brief opinion should have focused solely on the Walsh amendment and the administration's compliance with it. When Roosevelt sent his message to Congress announcing the destroyers-bases deal, he forwarded several other documents, including Jackson's opinion and the statutorily required certification by Admiral Harold Stark, Chief of Naval Operations.[60]

Warner Gardner, who served in the Justice Department from 1935 to 1941, described Jackson's opinion in the destroyers-bases deal as "brilliantly executed," marshaling "a number of debatable propositions into an array that is powerfully persuasive."[61] That praise is wide of the mark. The undisciplined, discursive nature of Jackson's opinion invited—and received—rebukes from several scholars, including a lengthy letter to the *New York Times* by Edward Corwin, published on October 13, 1940.[62] Another critique by Herbert W. Briggs appeared in the *American Journal of International Law*.[63] That journal also published unfavorable evaluations of

[57] *See* 86 CONG. REC. 8123, 8775, 8778 (1940).

[58] *See id.* at 8828.

[59] Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 676, 681; 86 CONG. REC. 8828.

[60] *See* 86 CONG. REC. 10463, 11354, 11357.

[61] Warner W. Gardner, *Government Attorney*, 55 COLUM. L. REV. 438, 438, 444 (1955).

[62] *See* Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940, at B6.

[63] *See* Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569, 569 (1940).

Jackson's opinion by Quincy Wright and Edwin Borchard.[64] Recent scholarship continues to focus on Jackson's opinion.[65]

A book by Jackson explained that Roosevelt originally planned to submit his destroyers-bases plan to Congress "for specific authorization" but "shifted to one of independent executive action."[66] That is incorrect. Roosevelt acted under the procedure set forth in the Walsh amendment.[67] Elsewhere Jackson discussed the existence of an executive prerogative that allowed Roosevelt "to bypass Congress."[68] He said that "evidence accumulated that it was politically safe to proceed by executive agreement."[69] He saw reasons why Roosevelt had "power to act independently of Congress."[70] However, the record is clear that Roosevelt acted pursuant to statutory authority.[71] Other parts of Jackson's book acknowledge that the actions of Roosevelt with the destroyers-bases deal were consistent with the law, not in violation of it, and made no claim to plenary, independent, exclusive, or inherent power.[72]

II. EXECUTIVE PRIVILEGE (1941)

On April 30, 1941, Attorney General Jackson wrote to Rep. Carl Vinson, chairman of the House Committee on Naval Affairs.[73] Vinson had requested all FBI reports since June 1939, together with all future reports, memos, and FBI correspondence in connection with Justice Department investigations "of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which have naval contracts, either as prime contractors or subcontractors."[74] Because Jackson had

[64] *See* Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 690 (1940); Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT'L L. 680, 680 (1940).

[65] *See* William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM J. LEGAL HIST. 1, 2 (2012) [hereinafter Casto, *Advising Presidents*]; William R. Casto, *Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 365 (2010); Richard M. Pious, *Franklin D. Roosevelt and the Destroyers Deal: Normalizing Prerogative Power*, 42 PRESIDENTIAL STUD. Q. 190, 191 (2012).

[66] ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 82 (John Q. Barrett ed., 2003).

[67] *See* Casto, *Advising Presidents*, *supra* note 65, at 95.

[68] JACKSON, *supra* note 66, at 91–92.

[69] *Id.* at 93.

[70] *Id.* at 99.

[71] *See id.* at 96.

[72] *See id.* at 91, 93, 96–97.

[73] Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y. Gen. 45 (1941).

[74] *Id.* at 45.

received similar requests from other congressional committees, he decided to restate Justice Department policy regarding access to FBI reports.[75]

He explained that it was department policy, "with the approval of and at the direction of the President," to regard all investigative reports as "confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest."[76]

Jackson put Vinson's request in the context of the war in Europe and Asia.[77] Disclosure of agency documents "at this particular time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country."[78] To substantiate his position, Jackson cited the decision of President George Washington in 1796 to withhold from the House of Representatives documents related to the Jay Treaty, claiming it was "essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved."[79]

Washington's precedent is frequently cited but his argument was strained and highly artificial. The Constitution does not fix with any clarity the boundaries between the branches.[80] In the case of the Jay Treaty, if the House had sufficient votes it could have told President Washington, "We are not part of the treaty-making process, but we are vital in passing legislation and appropriations to carry out the Jay Treaty. To perform that task in an informed manner, we need the documents we requested. We will not consider legislation until they are furnished to us." Washington could then decide whether to let the treaty die or seek an accommodation with the House.[81] Washington's argument was not merely strained. It was wholly at odds with his decision a few years earlier to treat the House as equal to the Senate with regard to the Algerine Treaty,[82] which provided

[75] *Id.* at 45–46.
[76] *Id.* at 46.
[77] *See id.*
[78] *Id.*
[79] *Id.* at 48; *see* LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 276–77 (2014).
[80] *See, e.g.*, FISHER, *supra* note 79, at 273.
[81] *See id.* at 278.
[82] *See id.*

funds to pay "tributes" (bribes) to the Barbary pirates.[83] Whatever treaty documents were made available to the Senate, the same were provided to the House.[84]

Jackson claimed that the discretion of the executive branch to withhold documents "has been upheld and respected by the judiciary."[85] There follows a string cite to sixteen court decisions.[86] Six are lower court decisions; four are state court rulings.[87] The remaining six do not make a case for exclusive executive control over agency documents.[88] The citation to *Marbury v. Madison*[89] ("1 Cranch 137, 169") refers to certain political duties that executive officials have to the President, questions that "can never be made in this court."[90] The lack of a judicial check does not eliminate an independent role for Congress.[91] Jackson ignored language about "ministerial" actions by executive officers where the duty is not to the President but to the law.[92]

Jackson cited the Supreme Court case of *Totten v. United States*,[93] which concerned a secret agreement entered into by President Lincoln with someone he selected to spy on Confederate forces.[94] The decision does not support a broad reading of executive privilege, but only the narrow point that the government need not reveal contracts secretly entered into with private parties.[95] Jackson also relies on the trial of Aaron Burr,[96] charged with treason on the basis of

[83] *See id.*

[84] *See id.* For background on the Jay Treaty, see *id.* at 276–79.

[85] Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y. Gen. 45, 49 (1941).

[86] *See id.*

[87] *See* Worthington v. Scribner, 109 Mass. 487 (1872); Thompson v. German Valley R.R, Co., 22 N.J. Eq. 111 (Ch. 1871); Appeal of Hartranft, 85 Pa. 433 (1878); Gray v. Pentland, 2 Serg. & Rawle 23 (Pa. 1815).

[88] *See* Boske v. Comingore, 177 U.S. 459, 470 (1900); *In re* Quarles, 158 U.S. 532, 536–37 (1895); Vogel v. Gruaz, 110 U.S. 311, 311 (1884); Kilbourn v. Thompson, 103 U.S. 168, 181, 204–05 (1881); Totten v. United States, 92 U.S. 105, 105 (1876); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 172–73 (1803).

[89] *See* Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y. Gen. at 49.

[90] *Marbury*, 5 U.S. (1 Cranch) at 170.

[91] *See* Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y. Gen. at 49–50.

[92] *See Marbury*, 5 U.S. (1 Cranch) at 158; *see generally* Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y. Gen. 45 (ignoring ministerial actions by executive officers). The language "can never be made in this court" appears in *Marbury*, 5 U.S. (1 Cranch) at 170. For further analysis of ministerial powers, see FISHER, *supra* note 79, at 76–84.

[93] Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y. Gen. at 49.

[94] *See* Totten v. United States, 92 U.S. 105, 105–07 (1875).

[95] *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 222 (2006).

[96] Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y Gen. at 49.

confidential letters written by General James Wilkinson.[97] The Jefferson administration understood it could not bring criminal charges (carrying a death penalty) against someone based on secret letters.[98] The documents were made available to Burr and his attorneys, resulting in Burr's acquittal.[99] The Totten/Burr cases are closely analyzed in Part XII.

Toward the end of his letter to Vinson, Jackson recognized that where the public interest "seemed to justify it, information as to particular situations has been supplied to congressional committees by me and by former Attorneys General."[100] As an example, committees asked to confirm persons recommended for appointment by the Attorney General "would be afforded confidential access to any information that we have—because no candidate's name is submitted without his knowledge and the Department does not intend to submit the name of any person whose entire history will not stand light."[101]

Beyond the example of confirmations, the record is quite clear that Congress has ample authority through its powers over appropriations, impeachment, committee subpoenas, and holding individuals in contempt to secure agency documents needed for legislation and oversight.[102] Moreover, Jackson strongly objected to the Truman administration's attempt to exclude Ellen Knauff on the basis of confidential information,[103] an issue analyzed in Part VIII.

III. *EX PARTE QUIRIN* (1942)

In June 1942, eight German saboteurs arrived by two submarines on the East Coast of the United States, placed on shore at night.[104] They were trained to use "explosives, fuses, and detonators . . . against railroads, factories, bridges, and other strategic targets in the United States."[105] Within a matter of weeks they were arrested, in large part because two—George Dasch and Peter Burger—decided to turn themselves in and help the FBI locate their colleagues.[106] The

[97] *See* FISHER, *supra* note 95, at 213.
[98] *See id.* at 213, 215.
[99] *Id.* at 218, 220. For details on the Burr trial, see *id.* at 212–21.
[100] Position of the Exec. Dep't Regarding Investigative Reports, 40 Op. Att'y Gen. at 51.
[101] *Id.*
[102] LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 27, 49, 91, 111 (2004).
[103] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 550–52 (1950) (Jackson, J., dissenting).
[104] LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW, at ix (2003).
[105] *Id.* at 1.
[106] *See id.* at 7, 40, 42.

initial plan was to prosecute all eight in civil court, but instead they were brought before a military tribunal.[107]

The Supreme Court, which by now included Jackson, upheld the tribunal's jurisdiction in *Ex parte Quirin*.[108] In a dissent in 2004, Justices Scalia and Stevens properly referred to *Quirin* as "not this Court's finest hour."[109] What were the fundamental deficiencies? How did Jackson analyze this use of presidential power?

Why weren't the eight saboteurs tried in civil court? The FBI warned Dasch that if he appeared in open court and testified about cooperating with the government, it might endanger his family in Germany.[110] Dasch later decided he wanted to go to civil court and explain how he helped the FBI.[111] The administration would not allow that. It gave the American public the impression that superior FBI investigative skills quickly uncovered the plot.[112] President Roosevelt and FBI Director J. Edgar Hoover did not want the public to know how easily German U-boats reached American shores undetected.[113] Civil courts were now ruled out.[114]

There was a second reason for a military tribunal. The statute on espionage, under which the saboteurs might be prosecuted, carried a maximum thirty-year penalty,[115] but the government had little confidence it could prevail on that count.[116] The men had not actually committed an act of sabotage.[117] The maximum penalty the Justice Department could identify amounted to three years in prison.[118] A military tribunal offered many advantages. It could act in secret, adopt ad hoc rules, move swiftly, and mete out the ultimate penalty:

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[107] *See id.* at 43, 45–46.

[108] *Ex parte* Quirin, 317 U.S. 1, 48 (1942).

[109] Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

[110] Transcript of Trial at 541–42, C.M.R. 334178 (1942), https://catalog.archives.gov/OpaAPI/media/6121081/content/arcmedia/dc-metro/2133139-german-saboteurs/CM-33-41-78-Vol-4/CM-33-41-78-Vol-4.pdf [https://perma.cc/7DNB-F25H]. Copies of the 2,967-page transcript are located in several places. I used the one at National Archives, College Park, Md., identified as "RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 334178, 1942 German Saboteur Case."

[111] *Id.* at 677; FISHER, *supra* note 104, at 46.

[112] *See* DAVID ALAN JOHNSON, BETRAYAL: THE TRUE STORY OF J. EDGAR HOOVER AND THE NAZI SABOTEURS CAPTURED DURING WWII 142 (2007).

[113] *See id.* at 19, 116–17.

[114] *See id.* at 148–49.

[115] *See id.* at 147–48.

[116] *See* FRANCIS BIDDLE, IN BRIEF AUTHORITY 328 (1962); JOHNSON, *supra* note 112, at 147.

[117] *See* BIDDLE, *supra* note 116, at 328.

[118] *See id.*

death.[119] President Roosevelt considered the death penalty as "almost obligatory."[120]

On July 2, 1942, less than a week after the eight Germans had been apprehended, Roosevelt issued Proclamation 2561 to create a military tribunal.[121] Also on that date, he issued a military order appointing the members of the tribunal (seven generals), the prosecutors (Attorney General Francis Biddle and Major General Myron C. Cramer), and the defense counsel (Colonels Cassius M. Dowell and Kenneth Royall).[122] The military tribunal began without any rules. It created rules by responding to motions made by the government and defense counsel as the trial progressed.[123] Early in the trial, Royall announced his intention to take the case to civil court or "designate someone from the private sector to do that."[124] After he met with Justices Hugo Black and Owen Roberts to discuss the case, Chief Justice Harlan Fiske Stone decided the Court would hear oral argument on Wednesday, July 29.[125]

No action had been taken by any lower federal court and no one could possibly regard the case as one of original jurisdiction.[126] Royall managed to get the issue to a federal district court in the District of Columbia.[127] On July 28, at 8 p.m., District Judge James W. Morris issued a brief statement turning down Royall's request for a habeas petition.[128] Oral argument before the Supreme Court began the next day at noon.[129] The Justices were not prepared to analyze complex issues of military law and Articles of War that are rarely placed before the Court. The briefs are dated the same day that oral argument began.[130] To compensate for the lack of preparation, the Court allowed nine hours of oral argument over two days.[131]

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[119] *See* BIDDLE, *supra* note 116, at 328; JOHNSON, *supra* note 112, at 148, 260.

[120] *See* FISHER, *supra* 104, at 49.

[121] *See* Proclamation No. 2561, 7 Fed. Reg. 5101, 5101 (July 7, 1942) ("Denying Certain Enemies Access to the Court of the United States"); BIDDLE, *supra* note 116, at 327.

[122] *See* LOUIS FISHER, CONG. RESEARCH SERV., RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 6 (2002).

[123] *See* FISHER, *supra* note 104, at 42, 49, 54.

[124] FISHER, *supra* note 122, at 10; FISHER, *supra* note 104, at 55; *see* Transcript of Trial at 2771–72, C.M.R. 334178 (1942), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/RoyallClosing_Argument.pdf [https://perma.cc/3VPV-MQZZ].

[125] *See* FISHER, *supra* note 104, at 58.

[126] *See id.*

[127] *See id.*

[128] *See Ex parte* Quirin, 47 F. Supp. 431, 431 (D.D.C. 1942); FISHER, *supra* note 104, at 58.

[129] *See* FISHER, *supra* note 122, at 12.

[130] *See ID.* 16.

[131] FISHER, *supra* note 104, at 73–74, 87, 90.

Without action by the D.C. Circuit, some Justices wondered if the Court could hear the case.[132] After some discussion, Royall agreed to get papers to the appellate court.[133] On July 31, after two days of oral argument, the Court received the case from D.C. Circuit. At 11:59 a.m., it officially took the case and one minute later issued a one-page per curiam that upheld the jurisdiction of the military tribunal.[134] The per curiam provided no legal reasoning or justification.[135] The legal community and the public knew what the Court did but not why. The Court promised to issue a full opinion at a later date.[136] The full opinion was not released until nearly three months later, on October 29, 1942.[137]

The burden of writing the full opinion fell to Chief Justice Stone. His labors increased when the military tribunal completed its work and recommended the death sentence for all eight men.[138] The administration decided to give prison sentences to Dasch and Burger and execute the others.[139] Electrocutions were carried out on August 8.[140] Stone realized that nothing in the full opinion could cast doubt on the per curiam and imply that six men had been improperly executed.[141] Also, he did not want the Court's reputation (and perhaps Roosevelt's as well) damaged with concurrences and dissents.[142] Jackson prepared a concurrence about possible congressional limitations on presidential power but was persuaded to withhold it.[143] He wrote,

> We should not only be slow to find that Congress unwittingly had done such a thing, but even if it had clearly done so we would have a serious question of the validity of any such effort to restrict the Commander in Chief in the discharge of his Constitutional functions.[144]

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[132] *See id.* at 80–81.

[133] *Id.* at 81.

[134] *Ex parte* Quirin, 317 U.S. 1, 6 (1942) (per curiam); Myron C. Cramer, *Military Commissions: Trial of the Eight Saboteurs*, 17 WASH. L. REV. 247, 253 (1942).

[135] *See Ex parte Quirin*, 317 U.S. at 6.

[136] *Id.* at 2.

[137] *Id.* at 18.

[138] FISHER, *supra* note 104, at 66.

[139] *Id.* at 66–67.

[140] *Id.*

[141] *Id.* at 109.

[142] *Id.*

[143] *Id.* at 114, 116.

[144] *Id.* at 114. For additional information of Jackson's draft concurrence, see *id.* at 114–17.

Jackson's draft concluded it was "well within the war powers of the President as Commander in Chief to create a non-statutory Presidential military tribunal of the sort here in question."[145] Moreover, he believed the power to create military tribunals was inherent in the presidency and, for that reason, could not be regulated by Congress.[146] The seizure and trial of the eight Germans made them "prisoners of the President by virtue of his status as the constitutional head of the military establishment and their own status as enemy forces captured while conducting a military operation within and against this country. The custody and treatment of such prisoners of war is an exclusively military responsibility."[147]

On September 10, 1943, Stone told Frankfurter it was "very difficult to support the Government's construction of the articles [of war]."[148] To Stone "it seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated."[149] Only after the war, Stone said, would the facts be fully known with the public release of the tribunal's trial transcript and other documents.[150] By that time, Dasch and Burger could raise some questions successfully, which "would not place the present Court in a very happy light."[151]

When the full opinion was released on October 29, it concluded that the secrecy surrounding the trial made it impossible for the Court to judge whether Roosevelt's proclamation and military order violated the Articles of War.[152] Having issued a hasty per curiam, the Justices were in no position to closely examine whether Roosevelt acted inconsistently with the Articles of War. In the words of Alpheus Thomas Mason, "Their own involvement in the trial through their decision in the July hearing practically compelled them to cover up or excuse the President's departures from customary [practice]."[153]

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[145] Goldsmith, *supra* note 21, at 227.

[146] *Id.*

[147] *Id.*

[148] Letter from Chief Justice Stone to Justice Frankfurter (Sept. 10, 1942), pt. III, Reel 43, at 3 (on file with Frankfurter Papers, Library of Congress). For additional information, see FISHER, *supra* note 104, at 110–11.

[149] Letter from Chief Justice Stone to Justice Frankfurter, *supra* note 148, at 3–4.

[150] FISHER, *supra* note 104, at 110–11.

[151] Letter from Chief Justice Stone to Justice Frankfurter, *supra* note 148, at 4–5.

[152] *See Ex parte* Quirin, 317 U.S. 1, 46–47 (1942).

[153] Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806, 826 (1956).

Years later, Justice Douglas said that "it was unfortunate the Court took the case."[154] "While it was easy to agree on the original per curiam, we almost fell far apart when it came time to write out the views."[155] "[Justice] Frankfurter was sufficiently troubled by the decision to ask Frederick Bernays Wiener, an expert on military justice, to express his views on *Quirin*."[156] Among other points, Wiener spoke about "the Administration's disregard for 'almost every precedent in the books' when it established the . . . tribunal."[157] As for Article of War 46, "which required . . . the trial record of a general court-martial or military commission [to] be referred for review to the staff judge advocate or the Judge Advocate General,"[158] Wiener concluded that Roosevelt ignored that requirement.[159]

Justice Jackson authored an opinion for the Court in 1945 concerning an individual in the United States charged with treason for giving some assistance to two of the Nazi saboteurs.[160] Jackson held that the government failed to provide sufficient proof for two overt acts and reversed the conviction.[161] Four Justices dissented.[162]

In 1953, when the Court was deciding whether to sit in summer session to hear the espionage case of Ethel and Julius Rosenberg, a Justice recalled that the Court had sat in summer session in 1942 to hear the Nazi saboteur case.[163] Could the Court once again issue a short per curiam and file a full opinion at a later date? Jackson opposed this suggestion, as did Frankfurter, who "added that the *Quirin* experience was not a happy precedent."[164]

IV. COMPULSORY FLAG SALUTES (1940–43)

The flag-salute cases of 1940 and 1943 raised fundamental issues about appropriate methods to protect and foster national security. In 1940, the year before Jackson became Associate Justice, Justice Frankfurter issued an 8-1 decision upholding a Pennsylvania regulation that required children in public schools to extend their right hand while reciting these words: "I pledge allegiance to my flag,

154 WILLIAM O. DOUGLAS, THE COURT YEARS: 1939-1975, at 138 (1980).
155 *Id.* at 138–39.
156 FISHER, *supra* note 104, at 108.
157 *Id.* at 109.
158 *Id.* at 110.
159 *See id.*
160 Cramer v. United States, 325 U.S. 1, 3 (1945).
161 *Id.* at 48.
162 *Id.*
163 FISHER, *supra* note 104, at 112.
164 *See id.* at 112–13.

and to the Republic for which it stands; one nation indivisible, with liberty and justice for all."[165] Three years later, Jackson wrote for a 6-3 Court to reverse Frankfurter.[166]

In the 1940 case, two children of a family affiliated with the Jehovah's Witnesses refused to salute the flag because to do so would violate what they considered to be biblical commands not to bow down to a graven image.[167] Frankfurter recognized a collision between the right to freedom of religious belief and the need of state officials to regulate public schools.[168] The task was "to reconcile two rights in order to prevent either from destroying the other."[169] Yet he permitted the state's right to destroy the Witnesses' right.[170] To Frankfurter, the compulsory flag salute represented the state's interest in "the promotion of national cohesion."[171] "We are dealing," he said, "with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."[172]

Frankfurter considered the compulsory flag salute as a means of evoking "that unifying sentiment without which there can ultimately be no liberties, civil or religious."[173] "The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment."[174] Of course it was. That is why the Court granted certiorari to hear the case. In the end, Frankfurter concluded that in order to have national security one must have national unity, and in order to foster national unity a compulsory flag salute was essential.[175]

The lone dissent by Justice Stone said that even if the Court believed that some compulsions will contribute to national unity, there are other ways to teach loyalty and patriotism "than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious

[165] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940).

[166] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Symone Mazzotta, West Virginia v. Barnette*: The Freedom Not to Pledge Allegiance*, NAT'L CONST. CTR.: CONST. DAILY (June 14, 2017), https://constitutioncenter.org/blog/west-virginia-v.-barnette-the-freedom-to-not-pledge-allegiance [https://perma.cc/2NB6-UK7B].

[167] *See Minersville Sch. Dist.,* 310 U.S. at 592 & n.1.

[168] *See id.* at 594–95.

[169] *Id.* at 594.

[170] *See id.* at 601 (Stone, J., dissenting).

[171] *Id.* at 595 (majority opinion).

[172] *Id.*

[173] *Id.* at 597.

[174] *Id.* at 598.

[175] *Id.* at 596.

convictions."[176] History instructs that "there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities."[177]

Frankfurter's opinion provoked broad condemnation in the press, law journals, and religious organizations.[178] Justices Black, Douglas, and Murphy came to regret their willingness to join Frankfurter's opinion. In 1942, they publicly expressed their disapproval and announced that *Gobitis* had been "wrongly decided."[179] Frankfurter's commanding 8-1 majority now fell to 5-4. Two Justices who had been part of the eight-man majority retired and were replaced by Wiley Rutledge and Robert Jackson. On June 14, 1943, Jackson spoke for a 6-3 Court in finding the mandatory flag salute a violation of the First and Fourteenth Amendments.[180] As to Frankfurter's plea for national unity, Jackson wrote, "Compulsory unification of opinion achieves only the unanimity of the graveyard."[181] To believe that patriotism cannot survive "if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[182]

Jackson prepared "a powerful . . . defense of individual freedom and the Bill of Rights," but credit for the Court's decision to reverse itself within three years comes from a broad segment of the public that refused to accept Frankfurter's decision "as the last word on constitutional meaning."[183] The public "told the Court that it did not understand the Constitution, minority rights, or religious liberty" and erred by elevating national security over individual rights.[184]

Jackson's opinion appeared to promote judicial supremacy. He said,

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to

[176] *Id.* at 603–04 (Stone, J., dissenting).
[177] *Id.* at 604.
[178] *See* LOUIS FISHER, DEFENDING CONGRESS AND THE CONSTITUTION 149–50 (2011).
[179] Jones v. Opelika, 316 U.S. 584, 611, 623–624 (1942) (Murphy, J., dissenting).
[180] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637, 639, 642–643 (1943).
[181] *Id.* at 641.
[182] *Id.*
[183] FISHER, *supra* note 178, at 151.
[184] *Id.* at 150–51.

> establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[185]

His formulation overlooked the frequency with which the elected branches have defended rights that could not be secured from courts: the rights of blacks by congressional legislation in 1875 to have equal access to public accommodations (declared unconstitutional by the Court in 1883);[186] the rights of women to practice law (gained by legislative action, not by litigation);[187] and the rights of children not to be subject to dangerous occupations at a young age (achieved through congressional legislation after the Court earlier struck down statutory efforts).[188] Jackson would be part of Court rulings in the Japanese American cases that failed to protect individual rights, choosing to defer to executive and military judgments. Groups and individuals frequently secure constitutional protection by elections and majority vote, not by judicial rulings.

Here is another passage from Jackson's opinion that merits close analysis:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[189]

The Court, however, often attempts to decide what is orthodox. Some examples are: slavery (*Dred Scott*);[190] women not allowed to practice law (*Bradwell v. State*);[191] upholding mandatory sterilization (*Buck*

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[185] *Barnette,* 319 U.S. at 638.

[186] *See* FISHER, *supra* note 178, at 111, 115 (equal accommodations).

[187] *See id.* at 121, 124 (women practicing law).

[188] *See id.* at 92–94 (child-labor legislation). For further analysis, see LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION (2019).

[189] *Barnette,* 319 U.S. at 642.

[190] *See* Scott v. Sandford, 60 U.S. 393, 452 (1856).

[191] *See* Bradwell v. State, 83 U.S. 130, 139 (1872).

v. Bell);[192] the child-labor cases, and the 1940 flag-salute case.[193] When the Court believes it has the final word on the meaning of the Constitution, it pretends it has authority to declare what is orthodox. The Court's record provides no evidence that it possesses the competence and judgment to reliably discharge that high task.

Jackson's most famous claim of judicial supremacy appears in a 1953 decision: "We are not final because we are infallible, but we are infallible only because we are final."[194] The sentence brims with irony and cleverness, but Jackson was too sophisticated to believe in either judicial infallibility or finality. He himself in 1943 overturned Frankfurter's 8-1 flag-salute decision.[195] Jackson's law clerk, William Rehnquist, later spoke during his service as Chief Justice about the capacity for judicial error.[196] His message is remarkably blunt: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible."[197] The Japanese American cases, discussed next, underscore the existence of unacceptable judicial precedents.

V. *HIRABAYASHI V. UNITED STATES* (1943)

The Japanese American cases of 1943 and 1944 severely undermined the Supreme Court's claim that it serves as guardian of individual liberties and constitutional rights. On February 19, 1942, President Roosevelt issued Executive Order 9066,[198] leading to a curfew ordered by the military of all persons of Japanese ancestry within a designated military area,[199] requiring them to "be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M."[200] A month later, Congress enacted legislation to support the executive order.[201] Gordon Hirabayashi, a U.S. citizen of Japanese

[192] *See* Buck v. Bell, 274 U.S. 200, 206–07 (1927).

[193] *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599–600 (1940); Child Labor Tax Case, 259 U.S. 20, 43–44 (1922); Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918). *Hammer* and the *Child Labor Tax* cases were overturned by *United States v. Darby*, 312 U.S. 100, 116–17, 125–26 (1941).

[194] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[195] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[196] *See* Herrera v. Collins, 506 U.S. 390, 415 (1993).

[197] *Id.*

[198] Hirabayashi v. United States, 320 U.S. 81, 85 (1943); Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 25, 1942).

[199] *See Hirabayashi*, 320 U.S at 88.

[200] Conduct of Enemy Aliens in Military Areas, 7 Fed. Reg. 2543, 2543 (Apr. 2, 1942).

[201] *See* Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942).

descent, was prosecuted in federal district court for violating the curfew order.[202]

A unanimous Court upheld the curfew order.[203] Hirabayashi, born in Seattle, "had never been in Japan or had any association with Japanese residing there."[204] He stated "it had at all times been his belief that he would be waiving his rights as an American citizen" by complying with the curfew order.[205] The jury returned a verdict of guilty on two counts: not remaining in his place of residence during the curfew period and failing to report to the Civil Control Station to register for evacuation from the military area.[206] He was sentenced to three months on each count to be served concurrently.[207]

Writing for the Court, Chief Justice Stone concluded, "[I]t was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power."[208] He said it was "not for any court to sit in review of the wisdom" of what President Roosevelt and Congress decided "or substitute its judgment for theirs."[209] He claimed that the policy of General J. L. DeWitt, who established the curfew, "involved the exercise of his informed judgment."[210] DeWitt's judgment was not informed. He believed that all Japanese, by race, are disloyal.[211] There could be no such thing as "a loyal Japanese."[212] Deferring to a military judgment might be justified. Deferring to racism is not.

In one of three concurrences, Justice Douglas wrote, "If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency."[213] *If*? *Belief*? Courts are supposed to operate on the basis of evidence, not suppositions, claims, and assertions. Douglas adopted a broad position: "The point is that we cannot sit in judgment on the military requirements of that

202 *Hirabayashi*, 320 U.S. at 83.
203 *Id.* at 105.
204 *Id.* at 84.
205 *Id.*
206 *Id.*
207 *Id.*
208 *Id.* at 92.
209 *Id.* at 93.
210 *Id.* at 103.
211 Hirabayashi v. United States, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).
212 *Id.*
213 *Hirabayashi*, 320 U.S. at 105–06 (Douglas, J., concurring).

hour."[214] He asked whether it might have been "wiser for the military to have dealt with these people on an individual basis and through the process of investigation and hearings separated those who were loyal from those who were not."[215] Such questions, Douglas said, were "not for us to review."[216] Inconsistently, he argued, "Loyalty is a matter of mind and of heart not of race. That indeed is the history of America."[217]

A concurrence by Justice Murphy could find no earlier ruling where the Court had "sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry."[218] To him the curfew order "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."[219] He cited earlier rulings where the Court "consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments."[220]

A third concurrence by Justice Rutledge disagreed with the suggestion that the courts have no power to review an action by a military officer.[221] He did not think it was necessary in this case to decide that there "is no action a person in the position of General DeWitt here may take" that would be immune from judicial review.[222] Although a military officer "must have wide discretion and room for its operation," it did not follow "there may not be bounds beyond which he cannot go."[223] Justice Jackson wrote a draft concurrence but withheld it. Some views in that draft would later appear in his dissent in *Korematsu*.[224]

VI. *KOREMATSU V. UNITED STATES* (1944)

President Roosevelt's Executive Order 9066 led to the transfer of more than 110,000 Americans of Japanese descent (about two-thirds of them natural-born U.S. citizens) to what were euphemistically

214 *Id.* at 106.
215 *Id.*
216 *Id.*
217 *Id.* at 107.
218 *Id.* at 111 (Murphy, J., concurring).
219 *Id.*
220 *Id.*
221 *Id.* at 114 (Rutledge, J., concurring).
222 *Id.*
223 *Id.*
224 *See* Hutchinson, *supra* note 19, at 480.

called "relocation centers."[225] Roosevelt said he acted under his authority as President and Commander in Chief.[226] With no evidence of disloyalty or subversive activity and without benefit of any procedural safeguards, these individuals were imprisoned solely on grounds of race.[227] Divided 6-3, the Court supported the placement of Japanese Americans in detention camps.[228]

A dissent by Justice Murphy protested that the exclusion order resulted from an "erroneous assumption of racial guilt" found in General DeWitt's report,[229] which referred to all individuals of Japanese descent as "subversive," belonging to "an enemy race" whose "racial strains are undiluted."[230] Murphy dissented from "this legalization of racism."[231] In another dissent, Justice Jackson remarked, "[H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign."[232]

Why did the Court extend its blessing to this military operation? Writing for the Court, Justice Black acquiesced to military expertise: "[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."[233] Although Jackson dissented, he also wrote. "[T]he Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order."[234]

Jackson claimed the Court had "no choice."[235] Justices always have a choice. Certainly, they had a choice when Jackson described DeWitt's statement as unsworn, self-serving, and untested by any cross-examination.[236] The Justices could have insisted: "We decide

[225] *Japanese Relocation During World War II*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/japanese-relocation [https://perma.cc/XJV3-HRTF].

[226] Exec. Order No. 9066, 7 Fed. Reg. 38, 1407 (Feb. 19, 1942).

[227] *See A Brief History of Japanese American Relocation During World War II*, NAT'L PARK SERV., https://www.nps.gov/articles/historyinternment.htm [https://perma.cc/A5MJ-FD2W].

[228] Korematsu v. United States, 323 U.S. 214, 224 (1944).

[229] *Id.* at 235 (Murphy, J., dissenting).

[230] *Id.* at 236.

[231] *Id.* at 242.

[232] *Id.* at 243 (Jackson, J., dissenting).

[233] *Id.* at 217–18 (majority opinion).

[234] *Id.* at 245 (Jackson, J., dissenting).

[235] *Id.*

[236] *See id.*

cases based on evidence. You have provided none, other than crude assertions of racism. Both for the rights of Japanese Americans and our own institutional self-respect, we must hold against the exclusion order." The dissent by Justice Murphy identified one way to challenge executive assertions: "Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment."[237] The Court was not faced with what might be called a "military judgment." There was no reason to defer to DeWitt's purely prejudiced and ignorant beliefs about race and sociology.

To John Barrett, Jackson's dissent in *Korematsu* "merits its very high place in both the American legal and the human canons" and "deserves to be studied, admired, and celebrated."[238] Several parts of the dissent demonstrate Jackson's thoughtful exploration of the judicial risks in deciding national security cases. Harm can come from executive and military actions, but that harm is compounded when the Court adds its consent:

> A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[239]

Eugene Rostow regarded Jackson's dissent as "a fascinating and fantastic essay in nihilism."[240] Rostow added, "It is hard to imagine what courts are for if not to protect people against unconstitutional arrest."[241] Nanette Dembitz referred to Jackson's "rather defeatist

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[237] *Id.* at 236–37 (Murphy, J., dissenting).

[238] John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's* Korematsu *Dissent*, 68 LAW & CONTEMP. PROBS. 57, 59 (2005).

[239] *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

[240] Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 510 (1945).

[241] *Id.* at 511.

view on the possibility of judicial restraint of military orders."[242] The Court's deference to military judgment, she said, "will stand as an insidious precedent, unless corrected, for the emergencies of peace as well as of war."[243] A study by Peter Irons described Jackson's dissent in *Korematsu* as "a curious kind of judicial schizophrenia."[244] An article by Dennis Hutchinson attributed many of the weaknesses in Jackson's opinion in *Korematsu* to his decision to rely on rhetoric in an effort to conceal analytical failings and inconsistencies.[245]

In 1951, Justice Jackson gave an address at the Buffalo Law School.[246] In commenting on the Japanese American cases, he said that issues that come to the courts are "not a clear and simple one between security and liberty."[247] By the time the case reaches the Supreme Court "it is more nearly this: 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."[248] Executive officials are also in the best position to deceive and dissemble, as demonstrated in the Japanese American cases. Jackson continued, "[T]he necessity is not provable by ordinary evidence and the court is in no position to determine the necessity for itself."[249] No position to see racism? Jackson feared that *Korematsu* "will long be most useful to justify wartime invasions of civil liberty."[250]

In 1962, Chief Justice Warren reflected on the Court's performance in the Japanese American cases.[251] In times of emergency, he suggested that the judiciary could not function as an independent and coequal branch: "The consequence of the limitations under which the Court must sometimes operate in this area is that other agencies of government must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution."[252] Then comes this remarkable sentence: "To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional does not necessarily answer

[242] Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175, 232 (1945).
[243] *Id.* at 239.
[244] PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 332 (1983).
[245] *See* Hutchinson, s*upra* note 19, at 491.
[246] Robert H. Jackson, *Wartime Security and Liberty under Law*, 1 BUFF. L. REV. 103 (1951).
[247] *Id.* at 115.
[248] *Id.*
[249] *Id.*
[250] *Id.* This address was later reprinted at 55 BUFF. L. REV. 1089 (2008).
[251] *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 (1962).
[252] *Id.*

the question whether, in a broader sense, it actually is."[253] In brief, the Court held that the government's action was constitutional when it was not.

On February 19, 1976, President Gerald Ford issued a proclamation publicly apologizing for the treatment of Japanese Americans, "resulting in the uprooting of loyal Americans."[254] In 1980, Congress established a commission to gather facts to determine the wrong done by Roosevelt's order.[255] Released in 1982, the report stated that the order "was not justified by military necessity" and the policies that followed from it—exclusion and detention—"were not driven by analysis of military conditions."[256] The factors that shaped those decisions were "race prejudice, war hysteria and a failure of political leadership."[257] Another factor not mentioned: surrender of judicial independence. Congress passed legislation in 1988 to establish a trust fund of $1.25 billion to pay up to $20,000 to eligible individuals.[258]

In the 1980s, Gordon Hirabayashi and Fred Korematsu returned to court after newly discovered documents revealed the extent to which executive officials had deceived federal courts.[259] At the time of Korematsu's case in 1944, Justice Department attorneys were aware that a 618-page document called *Final Report*, prepared by the War Department for General DeWitt, contained erroneous claims about alleged espionage efforts by Japanese Americans.[260] The FBI and the Federal Communications Commission rejected War Department assertions that some Japanese Americans had sent signals from shore to assist Japanese submarine attacks along the Pacific coast.[261]

The administration had a professional obligation to inform the judiciary about these false allegations.[262] A footnote, to be included in the Justice Department brief for *Korematsu*, should have clearly identified the errors that appeared in the final report. Yet the footnote was so reworked and watered down that courts could not

[253] *Id.* at 192–93.

[254] Proclamation No. 4417, 3 C.F.R. § 1938–1943 (1976).

[255] 1 COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1 (1982).

[256] *Id.* at 18.

[257] *Id.*

[258] *See* Civil Liberties Act of 1988, Pub. L. No. 100-383, §§ 104–05, 102 Stat. 903, 905–06.

[259] *See* Hirabayashi v. United States, 627 F. Supp. 1445, 1454 (W.D. Wash. 1986); Korematsu v. Unites States, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).

[260] *See* IRONS, *supra* note 244, at 278, 285.

[261] *Id.* at 284–85.

[262] *See id.* at 282.

possibly have understood the degree to which the administration had misled them.[263] A district court in 1984 concluded that the executive branch had "knowingly withheld information from the courts when they were considering the critical question of military necessity in this case."[264] To the court, there was "substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court."[265] After the district court vacated Korematsu's conviction, the Justice Department did not appeal.[266]

Hirabayashi also challenged his conviction for violating the curfew order.[267] The Justice Department had argued that the government lacked time to separate loyal Japanese Americans from those who might be subversive.[268] It did not claim it was impossible to make that distinction. However, General DeWitt believed that because of racial ties, filial piety, and strong bonds of common tradition, culture, and customs, it was "impossible to establish the identity of the loyal and the disloyal with any degree of safety."[269] For DeWitt, "[t]here isn't such a thing as a loyal Japanese."[270] The initial draft report contained his remarks.[271] The final report, after War Department editing, did not.[272] The Justice Department received the final report but not the draft version.[273]

A district court ruled that, "[a]lthough the Justice Department did not knowingly conceal from [Hirabayashi's] counsel and from the Supreme Court" the reasons DeWitt offered, it was necessary to charge the executive branch with concealment because the information was "known to the War Department, an arm of the government."[274] The failure of the executive branch to disclose DeWitt's position "was an error of the most fundamental character."[275] Hirabayashi "was in fact very seriously prejudiced by that non-disclosure in his appeal from his conviction of failing to

[263] *See id.* at 286.
[264] *Korematsu*, 584 F. Supp. at 1417.
[265] *Id.* at 1420.
[266] Nancy Blodgett, *Justice at Last?*, A.B.A. J., June 15, 1986, at 24, 24.
[267] *See* Hirabayashi v. United States, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986).
[268] *Id.* at 1453.
[269] *Id.* at 1449.
[270] *Id.* at 1452.
[271] *See id.* at 1449.
[272] *See id.* at 1451–52.
[273] *Id.* at 1454.
[274] *Id.*
[275] *Id.* at 1457.

report."[276] The district court vacated that conviction but declined to vacate his conviction for violating the curfew order.[277] On appeal, the Ninth Circuit vacated both convictions.[278]

In 1985, Peter Irons discovered a copy of the transcript where Solicitor General Charles Fahy argued *Korematsu* before the Supreme Court.[279] A Justice Department lawyer warned Fahy "not to pass on War Department 'lies' to the Supreme Court."[280] Fahy decided to conceal from the Justices the false claim that Japanese Americans had signaled from the coast to Japanese submarines.[281] He denied that "a single line, a single word, or a single syllable" in DeWitt's report could cast any doubt on the military necessity for the curfew and exclusion orders.[282] During oral argument on October 12, 1944, Fahy did disclose that about 2,000 Japanese Americans were released because they posed no danger.[283] Therefore, the administration did have the capacity to distinguish between loyal and disloyal Japanese Americans. On May 20, 2011, Acting Solicitor General Neal Katyal publicly acknowledged that Solicitor General Fahy in *Korematsu* failed to inform the Supreme Court of evidence that undermined the rationale for internment.[284]

On June 26, 2018, the Supreme Court finally repudiated *Korematsu*.[285] In writing for the Court in a case involving President Trump's effort to restrict aliens from entering the United States, Chief Justice Roberts initially rejected the criticism that Justice Sotomayor leveled at *Korematsu*: "Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case."[286] Yet Roberts proceeded to say that the dissent "affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overturned in the court of history, and—to be clear—'has no place in

[276] *Id.*

[277] *See id.* at 1457–58.

[278] Hirabayashi v. United States, 828 F.2d 591, 594 (9th Cir. 1987).

[279] Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 35, 35–38 (1986).

[280] *Id.* at 37.

[281] *Id.* at 39.

[282] *Id.* at 39, 41.

[283] Transcript of Oral Argument, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), *reprinted in* Irons, *supra* note 279, at 58.

[284] Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T. JUST. (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/ZG4Z-LHL6].

[285] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[286] *Id.* at 2403, 2423; *id.* at 2447 (Sotomayor, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214 (1944)).

law under the Constitution.'"[287] Curiously, the Court said nothing about *Hirabayashi*. Is that still good law?

VII. *CHICAGO & SOUTHERN AIR LINES, INC. V. WATERMAN STEAMSHIP CORP.* (1948)

A judicial ruling routinely cited to uphold broad presidential power in external affairs was written by Justice Jackson in 1948.[288] The Supreme Court reviewed a statutory provision that authorized judicial review of orders issued by the Civil Aeronautics Board, including those that grant or deny applications by citizen carriers to engage in overseas and foreign air transportation.[289] Those orders were subject to the President's approval.[290]

Writing for a 5-4 Court, Jackson acknowledged that Congress has constitutional authority over foreign commerce and may delegate "large grants" to the President.[291] But he argued that the President "also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."[292] Did the President's authority come from the statute or independent executive power? Jackson's answer: "For present purposes, the order draws vitality from either or both sources."[293]

In referring to the President "as the Nation's organ in foreign affairs," Jackson provided no citation.[294] Two pages later, however, he cited *Curtiss-Wright* and explained why courts could not review orders that result from presidential direction: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."[295] That was highly misleading. Independent judicial review obviously does not require publication to the world. Yet Jackson said that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into

[287] *Id.* at 2423 (majority opinion) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

[288] Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

[289] *Id.* at 104.

[290] *Id.*

[291] *See id.* at 109 (citing Norwegian Prods. Co. v. United States, 288 U.S. 294, 318 (1933)).

[292] *Id.*

[293] *Id.* at 109–10.

[294] *See id.* 109.

[295] *Id.* at 111 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1948)).

executive confidences."[296] However, federal judges often meet with executive officials *in camera* to receive advice and documents.[297]

Jackson further argued that "even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."[298] He spoke at cross-purposes by confiding such decisions not to the elected branches but solely to the President. Although the President was acting under a provision of the Civil Aeronautics Act,[299] Jackson chose to interpret this authority not as a statutory grant but as a power the President possesses "in his own right"—that is, *inherent* powers.[300] Some powers reside exclusively with the President, such as the pardon power, but that is vested by express constitutional language,[301] not a power the President possesses "in his own right." Once again Jackson was unaware that the sole-organ doctrine in *Curtiss-Wright* was not merely dicta but erroneous dicta.

Toward the end of his decision, Jackson claimed that the subject matter of the case was "concededly within the President's exclusive, ultimate control."[302] Why concede that presidential decisions in foreign affairs are so exclusive they may not be reviewed and limited by Congress and the courts? Four years later, in the *Steel Seizure* Case[303] (discussed in Part XI), Jackson would reject the broad doctrine of inherent executive powers promoted by the Truman administration,[304] especially as it involved domestic actions taken to prosecute the war in Korea.[305]

In the civil aeronautics case, a dissent by Douglas joined by Black, Reed, and Rutledge noted that Congress had "specifically provided for judicial review of orders of the Civil Aeronautics Board of the kind involved in this case."[306] Thus, the statute invited the judiciary to participate and reach independent judgments. How could Jackson

[296] *Id.*
[297] *See* Fisher, *supra* note 47, at 177.
[298] *Chi. & S. Air Lines, Inc.*, 333 U.S. at 111.
[299] *Id.* at 104.
[300] *See id.* at 109–10.
[301] U.S. CONST. art. II, § 2, cl. 1; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1948).
[302] *Chi. & S. Air Lines, Inc.*, 333 U.S. at 113.
[303] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[304] *See* Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1121 (2006).
[305] *See id.* at 1124.
[306] *Chi. & S. Air Lines, Inc.*, 333 U.S. at 114 (Douglas, J., dissenting).

take that away? As to the belief that the President possesses some type of exclusive authority in this field, Douglas pointed out that the Commerce Clause "grants Congress control over interstate and foreign commerce."[307] Oddly, Douglas concluded that the particular order before the Court involved presidential discretion "in foreign affairs or military matters" and did not think Congress "intended them to be subject of judicial review."[308] Both Jackson's opinion and Douglas' dissent suffer from incoherence.

It is obvious that Articles I and II of the Constitution do not assign all of foreign affairs to the President.[309] Jackson described foreign policy as "delicate, complex, and involv[ing] large elements of prophecy."[310] The same can be said about judicial decisions and congressional policy over foreign trade, agriculture, the economy, housing, taxation, and other matters of public policy. Jackson urged that such questions "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."[311] What happens if executive officials imperil legal and individual rights, as has often been the case? Under such circumstances there can be appropriate recourse to the judiciary. In the next section, we will see Jackson willing to intervene and object to the Justice Department's decision to send Ellen Knauff out of the country because of confidential allegations she was a security risk.

VIII. DEFENDING ELLEN KNAUFF (1948–51)

From 1903 to 1921, the United States excluded thirty-eight persons charged with anarchistic beliefs.[312] John Turner, one of the individuals excluded, received legal assistance from Clarence Darrow and Edgar L. Masters.[313] They argued that congressional legislation abridged Turner's freedom of speech.[314] Finding no constitutional violation, the Supreme Court in 1904 said that Turner did not "become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law."[315] Darrow and Masters objected that Congress had provided for the trial of an alien

[307] *Id.*
[308] *Id.* at 115.
[309] *See* U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2.
[310] *Chi. & S. Air Lines, Inc.*, 333 U.S. at 111.
[311] *Id.*
[312] WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 33 (2d ed. 1994).
[313] United States *ex rel.* Turner v. Williams, 194 U.S. 279, 285 (1904).
[314] *Id.* at 289.
[315] *Id.* at 292.

"by a Board of Special Inquiry, secret and apart from the public; without indictment; without confrontation of witnesses; . . . without the right of counsel."[316] The Court answered that constitutional rights available to an accused in a criminal proceeding do not apply to the exclusion or deportation of an alien.[317]

Lack of procedural safeguards applies to Ellen Knauff, held on Ellis Island from 1948 to 1951 and regularly threatened with deportation.[318] The Truman administration "justified its action on the basis of 'confidential information'"[319] that it need not show to Knauff, her attorney, or even to federal courts.[320] "[She] was born in Germany and lived in Prague. Her mother, father, and other Jewish relatives perished in the Nazi camps."[321] She managed to escape to England, where she worked during World War II.[322] After the war, she returned to Germany to assist the American military government.[323] "On February 28, 1948, she married Kurt Knauff, a U.S. citizen and veteran" who had been honorably discharged.[324] "Intent on becoming a U.S. citizen, Ellen Knauff booked a ship to America and arrived in New York Harbor on Aug. 14, 1948."[325]

Instead of being permitted to land and meet her husband's family, she was taken to Ellis Island where she was questioned without being able to receive visitors or obtain any legal assistance.[326] "On Oct. 6, an immigration official recommended that she be permanently excluded" from America.[327] There was no hearing.[328] The official justified exclusion because "her admission would be 'prejudicial' to the United States."[329] Specific reasons or evidence were not offered. "On that same day, Attorney General Tom Clark entered a final order of exclusion."[330]

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316 *Id.* at 286.

317 *See Turner*, 194 U.S. at 289–90.

318 *See* Louis Fisher, *To Have and To Hold; Those in U.S. Custody Deserve Reliable Evidence*, LEGAL TIMES, March 16, 2009, https://www.loc.gov/law/help/usconlaw/pdf/knauff.2009.pdf [https://perma.cc/9GRF-FSSS].

319 *Id.*

320 *Id.*

321 *Id.*

322 *See id.*

323 *See id.*

324 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 539 (1950); Fisher, *supra* note 318.

325 *See* Fisher, *supra* note 318. For details on her arrival in New York City and subsequent detention on Ellis Island, see ELLEN RAPHAEL KNAUFF, THE ELLEN KNAUFF STORY (1952).

326 Fisher, *supra* note 318.

327 *Id.*

328 *Id.*

329 *Id.*

330 *Id.*; *see* KNAUFF, *supra* note 325, at 78.

After receiving legal assistance, Knauff filed a habeas petition with a district court, which dismissed the petition, as did the Second Circuit.[331] Neither court objected to basing her exclusion on confidential information withheld from her attorney and federal judges. The Second Circuit was willing to defer wholly to unsupported and uncorroborated executive claims.[332] Lacking information as to why she was being excluded, the courts had no basis to judge whether the administration's action was justified. On January 16, 1950, the Supreme Court decided 4-3 in favor of the Truman administration.[333]

In one of the dissents, Justice Jackson found no evidence that Congress had authorized "an abrupt and brutal exclusion of the wife of an American citizen without a hearing."[334] He said the administration told the judiciary "that not even a court can find out why the girl is excluded."[335] To Jackson, the claim that evidence of guilt "must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."[336] He added, "Security is like liberty in that many are the crimes committed in its name."[337] He would have directed the Attorney General "either to produce his evidence justifying exclusion or to admit Mrs. Knauff to the country."[338]

Several times she faced deportation. "On one occasion, immigration officials in the Truman administration suggested to her attorney that he travel to Washington, DC, to block deportation, even though the agency had already decided to immediately deport her on the morning of May 17, 1950."[339] Agency officials drove her to Idlewild airport and had a plane ready to take her out of the country.[340] "In his capacity as circuit justice, Jackson learned of the

[331] *See* United States *ex rel.* Knauff v. Watkins, 173 F.2d 599, 601, 60404 (2d Cir. 1949); Fisher, *supra* note 318.

[332] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551–52 (1950) (Jackson, J., dissenting).

[333] *See id.* at 547 (majority opinion).

[334] *Id.* at 550 (Jackson, J., dissenting).

[335] *Id.* at 551.

[336] *Id.*

[337] *Id.*

[338] *Id.* at 552.

[339] Louis Fisher, *Truman's National Security Policy: Constitutional Issues*, *in* CONGRESS AND HARRY S. TRUMAN: A CONFLICTED LEGACY 156, 166 (Donald A. Ritchie ed., 2011).

[340] *Id.*

ploy and issued an emergency stay. His order reached the airport about 20 minutes before her scheduled departure."[341]

Although President Truman, Attorney General Clark, the Justice Department, and the Supreme Court did not protect Knauff's rights, a "number of newspapers came to [her] defense,"[342] as did Representative Francis Walter.[343] The House Judiciary Committee unanimously supported a private bill to permit Knauff to enter the country.[344] The committee report included a letter from the Justice Department that the President and the Attorney General had sole authority to deny entry "for security reasons."[345] "Knauff had 'to stand the test of security' and 'she failed to meet' that test."[346] Confidentiality prevented lawmakers and judges from knowing on what ground she was being excluded. They did not know the "test" or how she failed to meet it. The private "bill reached the House floor on May 2, 1950 and passed unanimously. Legislation was introduced in the Senate, but no further [legislative] action was taken."[347]

On March 26, 1951, the Immigration Service finally held a hearing.[348] Three witnesses selected by the administration testified that Ellen Knauff was a security risk.[349] Although their statements relied entirely on hearsay,[350] the immigration board found the information sufficient.[351] Two questions were taken to an immigration appeals board: (1) did the evidence before the Immigration Service justify its findings and (2) was Knauff accorded a fair and impartial hearing?[352] On August 29, 1951, the appeals board held there was not adequate evidence to justify her exclusion.[353] Having answered the first question, it found it

[341] *Id.*
[342] *Id.*
[343] *Id.* "[T]he *New York Times* protested the 'remarkably un-American aspect of our immigration procedures'. . . . [T]he *St. Louis Post-Dispatch* condemned the administration for acting contemptuously toward Congress and the courts." *Id.* Regarding the scheduled flight from Idlewild, the *Post-Dispatch* said the Justice Department "had tried to get away with a 'Fascistlike scheme.'" *Id.*
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] *Id.*; *see* 96 CONG. REC. 6174 (1950).
[348] Fisher, *supra* note 339, at 166.
[349] *See* KNAUFF, *supra* note 325, at 196–99.
[350] *See id.* app. (B.I.A., August 29, 1951, at 12).
[351] *See id.* at 201–02.
[352] *See id.* app. (B.I.A. Decision, August 29, 1951, at 2).
[353] *See id.* app. (B.I.A. Decision, August 29, 1951, at 1, 16, 18).

unnecessary to answer the second. The appeals board ordered Knauff admitted for permanent residence.[354]

The appeals board referred to "several kinds of hearsay."[355] One consists of statements "purporting to be based on the declarant's own knowledge, but is unsworn."[356] The second is a sworn statement regarding "matters known to the declarant through hearsay."[357] To the appeals board, the statements of the three witnesses fell in the second category.[358] As to anything dealing with espionage or subversive activities by Knauff, they had no personal knowledge. "The sum total then of all of the testimony is hearsay."[359] Hearsay in an administrative hearing might be admissible if corroborated by direct evidence, but "all we have in this case is hearsay."[360] On November 2, 1951, Attorney General J. Howard McGrath approved the decision of the appeals board and Ellen Knauff left Ellis Island to begin her life in America.[361]

She survived because her case did not depend on the world of shadows, secrets, and confidentiality embraced by the executive branch combined with a deferential judiciary. Her rights moved into the public arena, to be scrutinized by the press and members of Congress. Statements by the three witnesses could be analyzed by those who knew them, including individuals following the case from Europe. Citizens and aliens should not be condemned by informers who rely on speculation, secondhand conjectures and perhaps malice.

IX. OTHER DEPORTATION-EXCLUSION CASES (1948–54)

Justice Jackson held differing views on the rights of aliens. He told President Roosevelt there was "somewhat the same tendency in America to make goats of all aliens that in Germany had made goats of all Jews."[362] He was opposed to a policy of "persecuting or prosecuting aliens just because of alienage."[363] Over time, his record

354 *See id.* app. (B.I.A. Decision, August 29, 1951, at 18).
355 *Id.* app. (B.I.A. Decision, August 29, 1951, at 12).
356 *Id.*
357 *Id.*
358 *Id.*
359 *Id.* app. (B.I.A. Decision, August 29, 1951, at 16).
360 *Id.*
361 *See* KNAUFF, *supra* note 325, app. (Attorney General Approval Letter, November 2, 1951); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 964 (1995).
362 JACKSON, *supra* note 66, at 61.
363 *Id.* at 62.

as a Justice displayed sympathy for some aliens and indifference to others.

After Germany agreed to an unconditional surrender at the end of World War II, the Supreme Court heard cases to determine how long the war power could continue to be exercised.[364] A case decided in 1948 agreed unanimously that the authority of Congress to regulate rents by virtue of the war power could continue even after President Truman issued a proclamation on December 31, 1946, terminating hostilities between the United States and Germany.[365] In a concurrence, Justice Jackson felt compelled "to utter more explicit misgivings about war powers than the Court has done."[366] He said, "No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult."[367] It is carried out "in a time of patriotic fervor that makes moderation unpopular."[368] "[W]orst of all, it is interpreted by judges under the influence of the same passions and pressures."[369] Although agreeing on the need to continue federal rent control, he "would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."[370]

Four months later, Jackson joined a 5-4 majority that agreed that the executive branch, under the Alien Enemy Act of 1798, had authority to remove Kurt Ludecke from the United States.[371] Born in Germany in 1890, he left for most of the period from 1923 to March 1933, and returned to become a member of the Nazi party.[372] After being sent to a German concentration camp, he escaped on March 1, 1934, and came to the United States in 1937.[373] He was denied a petition to be a U.S. citizen on December 18, 1939; arrested on December 8, 1941; and brought before an Alien Enemy Hearing Board and interned by order of the Attorney General on February 9, 1942.[374] Acting under the Alien Enemy Act, President Truman on

364 *See, e.g.*, Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948).
365 *See id.* at 140–41, 144.
366 *Id.* at 146 (Jackson, J., concurring).
367 *Id.*
368 *Id.*
369 *Id.*
370 *Id.* at 147.
371 *See* Ludecke v. Watkins, 335 U.S. 160, 162–63, 173 (1948).
372 *Id.* at 162 n.3.
373 *Id.*
374 *Id.* at 162–63 & n.3.

July 18, 1945 ordered the removal from the United States of all alien enemies deemed by the Attorney General "to be dangerous to the public peace and safety of the United States."[375] Ludecke was among them.[376]

To the Supreme Court, the elected branches had not brought the war with Germany to an end:

> It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.[377]

Such matters require "political judgment for which judges have neither technical competence nor official responsibility."[378]

Four dissenters (Black, Douglas, Murphy, and Rutledge) objected that Ludecke could be deported "without having been afforded notice and a fair hearing to determine whether he was 'dangerous,'" and that the Attorney General "can deport him whether he is dangerous or not."[379] In their judgment, "the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction."[380]

In 1952, Jackson wrote for the Court in holding that the Alien Registration Act of 1940, which authorized the deportation of a legally resident alien because of membership in the Communist Party, did not deprive an alien of liberty without due process of law.[381] For each of the three individuals involved in this case, the Court held that during their period of membership, the Communist Party "taught and advocated overthrow of the Government of the United States by force and violence."[382] Jackson rejected the three noncitizens' contention that an alien "is entitled to constitutional protection" with regard to admission for permanent residence to remain in the country "to the same extent as the citizen."[383]

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375 *Id.* at 163.
376 *See id.*
377 *Id.* at 170.
378 *Id.*
379 *Id.* at 174 (Black, J., dissenting).
380 *Id.* at 175.
381 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 581, 591 (1952).
382 *Id.* at 584.
383 *Id.*

Jackson noted that Congress had "received evidence that the Communist movement [in the United States] has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists."[384] He cited for support the Japanese American cases of *Hirabayashi* and *Korematsu*, but those decisions had nothing to do with membership in the Communist Party.[385] Moreover, two-thirds of Japanese Americans placed in detention camps during World War II were U.S. citizens.[386] Jackson cited a Supreme Court decision by Justice Holmes stating that "[i]t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful."[387] Jackson refused to accept that vague standard in the Ellen Knauff case or in the litigation discussed next, involving Ignatz Mezei.

In 1953, the Supreme Court upheld the right of the Attorney General to exclude Ignatz Mezei.[388] Pending inquiry, he was temporarily excluded and kept on Ellis Island.[389] The Attorney General then "ordered the temporary exclusion to be made permanent without a hearing before a board of special inquiry, on the 'basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.'"[390] Jackson, joined by Frankfurter, dissented, insisting that Mezei was entitled by procedural due process to be informed of the grounds for exclusion and to have "a fair chance" of overcoming the government's decision.[391] Jackson wrote, "It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone."[392]

In 1954, the Court split 5-4 on the issue of an individual, born in Italy of Italian parents, subject to deportation in 1947.[393] The Attorney General announced at a press conference that he planned to deport certain "unsavory characters" and "prepared a confidential

[384] *Id.* at 590.

[385] *See id.* at 591 n.17 (citing Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944)).

[386] *Hirabayashi*, 320 U.S. at 96.

[387] *Id.* at 594 (quoting Bugajewitz v. Adams, 228 U.S. 585, 591 (1913)).

[388] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214–15 (1953).

[389] *Id.* at 207.

[390] *Id.* at 208.

[391] *Id.* at 227 (Jackson, J., dissenting).

[392] *Id.* at 228.

[393] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 262 (1954).

list of one hundred individuals, including petitioner."[394] The Board of Immigration Appeals, appointed by the Attorney General, was required "to exercise its own judgment when considering appeals."[395] The Court held that if the petitioner could prove his allegation that the Attorney General's announcement prejudged his application to have his deportation suspended, he should receive a new hearing to convince the Board that he is entitled to suspension.[396]

Jackson, in dissent, held that the petitioner was in the country illegally and had no grounds to challenge his deportation.[397] He said that the "power and discretion vested in the Attorney General [was] analogous to the power of pardon or commutation of a sentence, which [the Court] trust[s] no one thinks is subject to judicial control."[398] The analogy fails. The President has Article II power to issue pardons.[399] No such constitutional authority is expressly provided for deportation by the executive branch. Jackson denied that courts have any role in reviewing "a discretionary and purely executive function."[400] Yet with Knauff and Mezei he believed the judiciary had both a right and a duty to independently review executive judgments about deportation and exclusion.

X. *JOHNSON V. EISENTRAGER* (1950)

"Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of *habeas corpus*," claiming that "prior to May 8, 1945," the day Germany executed an act of unconditional surrender, "they were [either] in the service of German armed forces" or German civilian agencies in China.[401] The men were convicted of continued military activity after Germany's surrender and before Japan's surrender, charged with collecting and furnishing to Japanese armed forces intelligence concerning American forces and their movements.[402] They were tried and convicted by a military commission sitting in China, with express consent of the Chinese government.[403] The trial functioned solely under American auspices.

394 *Id.* at 264.
395 *Id.* at 266.
396 *Id.* at 267–68.
397 *Id.* at 269 (Jackson, J., dissenting).
398 *Id.*
399 U.S. CONST. art. II, § 2, cl. 1.
400 *Accardi*, 347 U.S. at 271 (Jackson, J., dissenting).
401 Johnson v. Eisentrager, 339 U.S. 763, 765 (1950) (noting that the nationals' "exact affiliation" with the German government was "disputed," but, "for our purposes, immaterial").
402 *Id.* at 766.
403 *Id.*

The prisoners were sent to Germany to serve their sentences at Landsberg Prison.[404]

Justice Jackson, writing for a 6-3 Court, reviewed the claim that their trial, conviction, and imprisonment violated Articles I and III of the Constitution, the Fifth Amendment, "and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war."[405] The appellate court concluded that "any person, including an enemy alien, deprived of his liberty anywhere" is entitled to the writ of habeas corpus if he can point to "any constitutional rights or limitations [that] would show his imprisonment [to be] illegal."[406] The habeas petition would lie in the district court with territorial jurisdiction over officials who have "directive power over the immediate jailer."[407] Toward that end, the individuals named in the petition included the "Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States."[408]

Jackson could find no instance where a court in the United States, or any other country where the writ is known, "issued [a writ] on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."[409] In distinguishing between aliens and U.S. citizens, Jackson claimed that "[t]he years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection."[410] Did he not recall what happened with the Japanese American cases of 1943 and 1944, where two-thirds of that population were U.S. citizens and yet had no constitutional protection from racially discriminatory curfew and detention policies?

The prisoners relied in part on the German saboteur case, *Ex parte Quirin*, an argument Jackson said was "clearly mistaken."[411] The eight German saboteurs were in custody in the District of Columbia.[412] The prisoners also cited for their protection the case of *In re Yamashita*, involving the trial of a Japanese general before a

404 *Id.*
405 *Id.* at 767.
406 *Id.*
407 *Id.*
408 *Id.* at 766.
409 *Id.* at 768.
410 *Id.* at 769.
411 *Id.* at 779 (citing *Ex parte* Quirin, 317 U.S. 1 (1942)).
412 *Id.* at 780.

military commission.[413] However, he was tried, found guilty, and executed in the Philippines.[414] Jackson concluded "that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."[415] He tilted far toward unreviewable executive power by claiming that the prisoners challenged the "conduct of diplomatic and foreign affairs, for which the President is exclusively responsible," citing the defective 1936 *Curtiss-Wright* opinion and his own ruling in *Chicago & Southern Air Lines v. Waterman Steamship Corp*.[416]

XI. *YOUNGSTOWN CO. V. SAWYER* (1952)

Jackson formed part of a six-Justice majority in 1952 to strike down President Truman's seizure of steel mills as part of an effort to prosecute the war in Korea.[417] In his concurrence, Jackson warned that the Court "should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief."[418] He would "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."[419] Jackson spoke of the President's *lawful* role as Commander in Chief. Who decides if the President is acting lawfully?

Jackson spoke too broadly about the President's "exclusive" function in commanding U.S. forces. Congress has placed limits on what a President may and may not do in time of war, such as supporting only naval (not land) actions in the Quasi-War against France in 1798.[420] In that conflict the Court found it necessary to interpret statutory restrictions that Congress had placed on the capture of ships.[421] A unanimous Court in *Little v. Barreme*[422] held

[413] *Id.* (citing *In re* Yamashita, 327 U.S. 1 (1946)); *see Yamashita*, 327 U.S. at 5.

[414] *See* ALAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY, at xiii (2012).

[415] *Johnson*, 339 U.S. at 785.

[416] *Id.* at 789 (citing United States v. Curtis-Wright Corp., 299 U.S. 304, 319–20 (1936); Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109–110 (1948)).

[417] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–83, 589 (1952).

[418] *Id.* at 645 (Jackson, J., concurring).

[419] *Id.* For an instructive analysis of the various drafts prepared by Jackson in writing his concurrence, see White, *supra* note 304.

[420] *See* LOUIS FISHER, PRESIDENTIAL WAR POWER 23–25 (3d ed. 2013).

[421] *See id.* at 24–25.

[422] Little v. Barreme, 6 (2 Cranch) U.S. 170 (1804).

that when a presidential proclamation exceeds the stipulations set forth by Congress in a statute, the legislative policy defines national policy and must prevail.[423]

Jackson's distinction between foreign and domestic affairs in *Youngstown* is artificial and seems to invoke Justice Sutherland's misconceived sole-organ doctrine in *Curtiss-Wright*, creating a strict separation between external and internal affairs. Presidents do not have a free hand when operating abroad.[424] At various times, they are restricted by Congress and the courts.[425] In addition to *Little v. Barreme*, other examples where presidential proclamations exceeded congressional authorization include judicial restrictions on executive agreements that affect private claims protected by the Due Process and Just Compensation Clauses.[426]

Later in his concurrence, Jackson abandoned his model of Presidents exercising unfettered power abroad. The Constitution, he said, was created for good times and bad times.[427] He asserted emergencies do not suspend the Constitution.[428] The appeal that "we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted."[429] Jackson said the Framers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."[430] In reviewing the history of the Weimar Constitution in Germany and Hitler's reign of emergency government, Jackson concluded that "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."[431]

Initially, Jackson lamented the meager guidance left by the Framers: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called

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[423] *See id.* at 179.

[424] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1948).

[425] *See, e.g.*, *id.* at 321–22; *Little*, 6 U.S. at 179.

[426] *See, e.g.*, Seery v. United States, 127 F. Supp. 601, 606–607 (Ct. Cl. 1955).

[427] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–51 (1952) (Jackson, J., concurring); *see also id.* at 589 (majority opinion) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.").

[428] *See id.* at 650–51 (Jackson, J., concurring).

[429] *Id.* at 649–50.

[430] *Id.* at 650.

[431] *Id.* at 651–52.

upon to interpret for Pharaoh."[432] Here, he let his gifts as a writer outrun his judicial duty as legal analyst. In fact, he did not throw his hands in the air and say, "The constitutional text and Framers' intent are too vague for us to interpret." Other sections of his concurrence identified and defended basic principles: "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."[433]

Toward the end of his opinion, Jackson clearly identified fundamental constitutional principles established by the Framers. With clear and explicit reasoning, he rejected the notion of a President at liberty to act unilaterally in external affairs: "With all its defects, delays and inconveniences, 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."[434]

Jackson's concurrence is best known for his tripartite analysis of presidential power. In his first category, when the President acts pursuant to an express or implied authority from Congress, executive authority "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[435] A third category covers instances when the President's measures are "incompatible with the expressed or implied will of Congress."[436] Under those conditions 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."[437] Such presidential claims to "conclusive and preclusive" power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[438] In between those two positions he identified a middle category—a "zone of twilight"—where the President and Congress "may have concurrent authority, or in which its distribution is uncertain."[439] Jackson noted that "congressional inertia, indifference or quiescence may sometimes, at least as a

[432] *Id.* at 634.
[433] *Id.* at 635.
[434] *Id.* at 655.
[435] *Id.* at 635.
[436] *Id.* at 637.
[437] *Id.*
[438] *Id.* at 638.
[439] *Id.* at 637.

practical matter, enable, if not invite, measures on independent presidential responsibility."[440]

Jackson offered his framework as a starting point, not a formula to settle every constitutional dispute. He described his model as "a somewhat over-simplified grouping of practical situations."[441] In 1981, Justice Rehnquist (who had clerked for Jackson) noted, "[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[442] One should not expect to find every presidential action located in one of Jackson's three categories.

Even if a presidential action fell into the first category, with executive power "at its maximum" because it enjoys congressional support, a presidential initiative might offend the Constitution. One need only recall actions taken against Japanese Americans during World War II, supported by President Roosevelt's executive order and congressional legislation but later condemned as unconstitutional.

The capacity to produce wholly conflicting legal analyses by relying on Jackson's model can be illustrated by the controversy over warrantless surveillance conducted by the Bush administration after 9/11. The program continued for years in secret until the *New York Times* broke the story on December 16, 2005.[443] Three weeks later, two attorneys in the Congressional Research Service concluded that the program was incompatible with the Foreign Intelligence Surveillance Act (FISA),[444] placing presidential power "at [its] lowest ebb" in Jackson's third category.[445] Two weeks after that, the Justice Department released its analysis and concluded that President Bush operated under the Authorization for Use of Military Force (AUMF) enacted after 9/11 and was therefore within Jackson's first category, placing presidential action "at the zenith."[446]

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[440] *Id.*

[441] *Id.* at 635.

[442] Dames & Moore v. Regan, 453 U.S. 654, 669 (1981); Benjamin Pomerance, *Center of Order: Chief Justice John Roberts and the Coming Struggle for a Respected Supreme Court*, 82 ALB. L. REV. 449, 501 (2019).

[443] *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html [https://perma.cc/3D5L-WKFY].

[444] *See* ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 43 (2006), https://fas.org/sgp/crs/intel/m010506.pdf [https://perma.cc/EYW5-NPAB].

[445] *Id.* at 28.

[446] U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 2 (2006).

More recently, in the Jerusalem passport case of *Zivotofsky v. Kerry*, the Supreme Court relied on Jackson's concurrence in deciding that the President possesses the exclusive power to grant formal recognition to a foreign sovereign.[447] The administration acknowledged that under Jackson's framework the President's power is "at its lowest ebb" in the third category.[448] No statutory authority existed to support presidential action. In fact, Congress, in the Foreign Relations Authorization Act, Fiscal Year 2003,[449] required the State Department to place on a passport, at the request of a U.S. citizen whose child was born in Jerusalem, Israel, as the place of birth.[450]

The Court offered this reasoning: "Because the President's refusal to implement §214(d) falls into Justice Jackson's third category, his claim must be 'scrutinized with caution,' and he may rely solely on powers the Constitution grants to him alone."[451] However, the Constitution does not expressly grant the President exclusive power over recognition. To vest that power solely in the President, the Court looked for guidance from history and precedent.[452]

In moving in that direction, the Court was not on strong ground. Its capacity for misjudging history and precedent has been well established. One example is a footnote that appears in Jackson's concurrence in *Youngstown*. In referring to *Humphrey's Executor v. United States*,[453] regarding congressional restrictions on the President's removal power, he claimed, "However, his exclusive power of removal in executive agencies, affirmed in *Myers v. United States*, 272 U.S. 52, continued to be asserted and maintained."[454]

That is incorrect. In *Myers*, the Court clearly identified two limitations on the President's removal power that have existed from 1789 to the present time.[455] The Court admitted that "there may be duties so peculiarly and specifically committed to the discretion of a

[447] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015).

[448] *See id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson, J., concurring)).

[449] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228, 116 Stat. 1350 (2002).

[450] *Id.* § 214(d).

[451] *Zivotofsky*, 135 S. Ct. at 2084 (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)).

[452] *See id.*

[453] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[454] *Youngstown*, 343 U.S. at 638 n.4 (Jackson, J., concurring) (first citing *Humphrey's*, 295 U.S. at 631–32; and then citing Morgan v. Tenn. Valley Auth., 115 F.2d 990, 992 (6th Cir. 1940)).

[455] *See* Myers v. United States, 272 U.S. 52, 135 (1926).

particular [executive] officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."[456] The next sentence identifies a second limitation: "Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control."[457]

To illustrate the Court's capacity to make errors when it relies on history and precedent, in *Zivotofsky*, the Court finally jettisoned the erroneous sole-organ doctrine espoused by Justice Sutherland in the 1936 *Curtiss-Wright* decision.[458] For more than seven decades, historians, lawyers, and political scientists had fully demonstrated the misrepresentations committed by Sutherland.[459] The grounds for his erroneous dicta are set forth in my amicus brief submitted to the Court on July 17, 2014, urging the Court in *Zivotofsky* to repudiate the sole-organ doctrine.[460]

The Court's use of history and precedent in discovering an exclusive power of the President to recognize foreign governments sparked strong dissents from Chief Justice Roberts and Justices Alito and Scalia.[461] They found insufficient evidence in history and precedent to support the Court's judgment.[462] Roberts, joined by Alito, objected: "Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs."[463] As to history and precedent, he added, "For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs."[464] In his dissent, Scalia noted, "In the end, the Court's decision does not rest on text or history or precedent."[465]

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[456] *Id.*

[457] *Id.* For details on limitations imposed on presidential control over executive branch officials, see FISHER, *supra* note 79, at 76–91.

[458] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089 (2015) (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

[459] *See* Fisher, *Presidential Inherent Power*, *supra* note 51, at 149–50.

[460] *See* Brief Amicus Curiae of Louis Fisher in Support of Petitioner, Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (No. 13-628), http://www.loufisher.org/docs/pip/Zivotofsky.pdf [https://perma.cc/7KBD-H7L9].

[461] *See Zivotofsky*, 135 S. Ct. at 2118, 2121 (Scalia, J., dissenting).

[462] *Id.*

[463] *Id.* at 2113 (Roberts, C.J., dissenting).

[464] *Id.* (citing Medellin v. Texas, 552 U.S. 491, 523–26 (2008); Hamdan v. Rumsfeld, 548 U. S. 557, 590–95, 613–25 (2006); Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 587–89 (1952); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804)).

[465] *Id.* at 2123 (Scalia, J., dissenting).

XII. *UNITED STATES V. REYNOLDS* (1953)

After the terrorist attacks of 9/11, the Bush administration invoked the "state secrets privilege" to block efforts by private citizens to gain access to agency documents about statutory and constitutional violations in several areas, including warrantless surveillance and the policy of "extraordinary rendition" used to transfer individuals to other countries for interrogation and torture.[466] When Barack Obama became President, his administration continued to invoke the state secrets privilege in private lawsuits.[467] Both administrations advised federal courts that the cases could not proceed without jeopardizing national security and foreign policy.[468]

The executive branch relies heavily on *United States* v. *Reynolds*,[469] the first time the Supreme Court recognized the state secrets privilege in its full scope.[470] Jackson joined Black and Frankfurter in dissenting against the majority opinion issued by Chief Justice Vinson, but their dissent entirely avoided *any* analysis of Vinson's ruling, which is marred by contradictions and poor legal reasoning.[471] As will be explained, *Reynolds* has had a major impact in expanding executive power, weakening judicial review and the rights of litigants, and impairing the adversary process needed to inform courts.

The case involved a B-29 explosion that killed several military crew and civilian engineers.[472] The widows of three engineers sued in court and asked for the official accident report to determine if there had been government negligence.[473] The executive branch indicated to the Supreme Court that the report contained state secrets and could not be shared with the widows and their attorneys without endangering national security.[474] The Court, without looking at the

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[466] LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 248 (2008) [hereinafter FISHER, THE CONSTITUTION AND 9/11]; Louis Fisher, *The State Secrets Privilege: From Bush II to Obama*, 46 PRESIDENTIAL STUD. Q. 173, 185–86 (2016) [hereinafter Fisher, *State Secrets Privilege*].

[467] *See* Fisher, *State Secrets Privilege*, *supra* note 466, at 185.

[468] *See* LOUIS FISHER, PRESIDENT OBAMA: CONSTITUTIONAL ASPIRATIONS AND EXECUTIVE ACTIONS 168 (2018) [hereinafter FISHER, PRESIDENT OBAMA]; Fisher, *State Secrets Privilege*, *supra* note 466, at 185.

[469] United States v. Reynolds, 345 U.S. 1 (1953).

[470] Louis Fisher, *The State Secrets Privilege: Relying on* Reynolds, 122 POL. SCI. Q. 385, 386 (2007).

[471] *See* United States v. Reynolds, 345 U.S. 1, (1953); FISHER, PRESIDENT OBAMA, *supra* note 468, at 176.

[472] *See Reynolds*, 345 U.S. at 3; FISHER, PRESIDENT OBAMA, *supra* note 468, at 176.

[473] *See Reynolds*, 345 U.S. at 3.

[474] *See id.* at 6.

report, ruled in favor of the government.[475] Four decades later, the government declassified the accident report.[476] It contains no state secrets.[477] It does, however, reveal government negligence.[478] The executive branch misled the Court in 1953 just as it did in the Japanese American cases.

In its brief in the 1953 *Reynolds* case, the Justice Department attempted to add legitimacy to the state secrets privilege by citing two early precedents: the Aaron Burr trial of 1807 and the Civil War *Totten* case that involved a spy who assisted President Lincoln.[479] As explained in Part II, Jackson as Attorney General also cited the *Burr* case and the *Civil War* case to defend executive privilege, but his analysis was faulty. As Associate Justice in the *Reynolds* case, he had a duty to independently examine assertions by the Justice Department. If the claims were shown to be defective and misleading, the administration's case for the state secrets privilege would be undermined. The dissent by Jackson, Black, and Frankfurter provided no such analysis.

As to the Aaron Burr trial, on December 2, 1806, President Jefferson informed Congress about the plans of several private citizens to carry out a military expedition against the territories of Spain.[480] He later said it would be inappropriate and unjust to name particular individuals involved in the conspiracy, given the mix of rumors and conjectures, but he did not hesitate to identify "the principal actor, whose guilt is placed beyond question."[481] Jefferson singled out Aaron Burr as "the prime mover" and referred to three incriminating letters from General James Wilkinson as evidence.[482]

Burr, accused of a criminal offense that carried the death penalty, had every right to subpoena the Wilkinson letters to determine their credibility and worth. According to the government's brief in the *Reynolds* case, "Jefferson ignored the subpoena," and the court "avoided the ultimate test of power with the executive."[483] The brief further claimed that whenever disclosure of information to plaintiffs

[475] *See id.* at 11.

[476] FISHER, *supra* note 95, at 176.

[477] *Id.* at 177.

[478] *Id.* at 178–79.

[479] Brief for Petitioner at 32–33, 42, United States v. Reynolds, 345 U.S. 1 (1953) (No. 21); *see supra* note 94 and accompanying text.

[480] 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 394 (James D. Richardson ed., 2004).

[481] *Id.* at 400.

[482] *Id.* at 400–01; Louis Fisher, *Jefferson and the Burr Conspiracy: Executive Power Against the Law*, 45 PRESIDENTIAL STUD. Q. 157, 158, 161, 167, 171–72 (2015).

[483] Brief for Petitioner, *supra* note 479, at 32.

"would be detrimental to the public interest . . . the determination of the executive is conclusive."[484] All three statements were false, as should have been obvious to all Justices of the *Reynolds* Court, including Jackson. The government may not charge and convict someone of a criminal offense on the basis of secret evidence. The government has a choice: give the defendant the evidence or do not prosecute.

Chief Justice John Marshall, presiding over the trial as part of his circuit duties, said he would deplore any action on his part to deny an accused the information needed to rebut the government's charges.[485] Jefferson directed government prosecutors to provide the letters to Burr.[486] On September 1, 1807, the jury found Burr not guilty on the charge of treason.[487] The court then considered seven counts of a misdemeanor charge.[488] Again, Burr and his attorneys were able to examine various documents.[489] The jury returned with a judgment of "Not guilty."[490] Contrary to the government's brief in *Reynolds*, the decision about access to documents in a criminal case was not made exclusively by the executive. The determination was made by Chief Justice Marshall.[491]

The government's brief in *Reynolds* also cited the case of *Totten* v. *United States*.[492] The Supreme Court in *Reynolds* described the government's attempt to invoke the state secrets privilege as one "well established in the law of evidence."[493] Among the cases cited by the Court and standing first in line: *Totten*.[494] It has some relevance to the state secrets privilege, but only to a very narrow set of cases. It had no relevance to the case brought by the three widows.

President Lincoln had entered into a private contract with William A. Lloyd, directing him to travel behind Confederate lines to collect military information.[495] Lloyd was promised $200 a month but "received funds only to cover his expenses."[496] "After he died, his

[484] *Id.* at 33.
[485] United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807).
[486] United States v. Burr, 25 F. Cas. 55, 65, 69, 74 (C.C.D. Va. 1807); 9 THE WRITINGS OF THOMAS JEFFERSON 60–61 (Paul Leicester Ford ed., 1898).
[487] *Burr*, 25 F. Cas. at 180–81.
[488] United States v. Burr, 25 F. Cas. 187, 188, 193 (C.C.D. Va. 1807).
[489] *Id.* at 190.
[490] *Id.* at 201. For further details on the Burr case, see FISHER, *supra* note 95, at 212–21.
[491] *See Burr*, 25 F. Cas. at 187.
[492] *See* Brief for Petitioner, *supra* note 479, at 34, 42.
[493] United States v. Reynolds, 345 U.S. 1, 6–7 (1953) (citing Totten v. United States, 92 U.S. 105, 107 (1875)).
[494] *See id.* at 7 n.11 (citing *Totten*, 92 U.S. at 107).
[495] FISHER, *supra* note 95, at 221.
[496] *Id.*

family sought to recover compensation for his services."[497] The Supreme Court rejected the lawsuit.[498] The "existence of a contract of that kind is itself a fact not to be disclosed."[499] *Totten* had no application to the *Reynolds* case. The *Totten* principle covers lawsuits involving private individuals who enter into secret contracts with the government.[500] In this type of case, courts regularly dismiss claims by litigants seeking funds or assistance they thought they were entitled to.[501]

In the *Reynolds* case, on October 6, 1948, a B-29 lost control at 19,000 feet over Waycross, Georgia, and exploded.[502] Killed in the blast were six of nine crew members and three of four civilian engineers who served as technical advisers of confidential equipment.[503] Three widows of the civilian engineers, acting under Section 403 of the Federal Tort Claims Act, sued the government for negligent and wrongful acts.[504] In a tort claims case, courts have a duty to examine evidence from both sides.[505]

In the district court in Pennsylvania, attorneys for the three widows submitted a number of questions to the government. They asked "whether the government had prescribed modifications for the B-29 engine to prevent overheating and to reduce fire hazards."[506] If modifications had been carried out, the interrogatory asked for details.[507] In each case the government answered "No."[508] When the three families discovered the declassified accident report in 2000, they realized the government's answer was false.[509]

District Judge William Kirkpatrick decided on June 30, 1950, that the accident report on the B-29 crash was "not privileged."[510] "The Secretary of the Air Force, Thomas K. Finletter, issued a statement about state secrets and the accident report without saying explicitly that state secrets were in the report. Kirkpatrick directed the

[497] *Id.*
[498] *Totten*, 92 U.S. at 107.
[499] *Id.*
[500] *See id.* at 106.
[501] For details on those cases, see *id.* at 223–27.
[502] *See* Reynolds v. United States, 192 F.2d 987, 989, 991 (3d Cir. 1951).
[503] *Id.* at 898.
[504] United States v. Reynolds, 345 U.S. 1, 2–3 (1953); *see* Federal Tort Claims Act, ch. 753, § 403(a), 60 Stat. 842, 843 (1946).
[505] *See* FISHER, *supra* note 95, at 17.
[506] *Id.* at 35.
[507] *See id.*
[508] *Id.*
[509] *See id.*; For access to the declassified accident reports, visit http://www.fas.org/sgp/othergov/reynoldspetapp.pdf [https://perma.cc/8QTG-DDJB].
[510] Brauner v. United States, 10 F.R.D. 468, 472 (E.D. Pa. 1950).

government to give him the accident report to be read in his chambers."[511] When the government refused, he ruled in favor of the widows.[512] On December 11, 1951, a unanimous Third Circuit upheld his decision.[513] Allowing the privilege would be "a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers."[514] To permit the government as a party to "conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[515] At this point, the judiciary had protected its independent role and the adversary process, but not for long.

In its brief to the Supreme Court, the executive branch continued to muddle the basic issue: Did the accident report contain state secrets? The government wrote, "[T]o the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized 'state secrets' privilege."[516] *To the extent*? Did the report contain state secrets or not? That question could be answered only if the Court read the report, which it chose not to do.

For a 6-3 Court, Chief Justice Fred Vinson announced incoherent principles of judicial responsibility: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[517] Disclosure to the public is a legitimate concern, but there is no such risk when Justices read an accident report in their chambers. By deciding not to examine the report, the Court could not possibly determine "whether the circumstances are appropriate for the claim of privilege."[518] The Court accepted at face value a self-serving statement by the executive branch, an assertion that turned out to be false.

Vinson argued that Secretary Finletter attempted "to invoke the privilege against revealing military secrets, a privilege which is well

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[511] LOUIS FISHER, ON THE SUPREME COURT: WITHOUT ILLUSION AND IDOLATRY 119 (2006); *see* Reynolds v. United States, 192 F.2d 987, 997–98 (3d Cir. 1951).

[512] FISHER, *supra* note 95, at 58; *see Brauner*, 10 F.R.D. at 471–72.

[513] *Reynolds*, 192 F.2d at 998.

[514] *Id.* at 995.

[515] *Id.* at 997.

[516] Brief for Petitioner, *supra* note 479, at 45.

[517] United States v. Reynolds, 345 U.S. 1, 8 (1953).

[518] *Id.*

established in the law of evidence."[519] That was not Finletter's objective. The report contained no military secrets. Vinson drew attention to a fundamental constitutional principle: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[520] He then contradicted himself: "Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[521] Abdication to an executive officer occurs whenever a judge fails to look at relevant evidence held by the executive branch.[522]

Through his disjointed reasoning, Vinson deliberately placed courts in an inferior institutional position. Without looking at the accident report, the Court could not independently evaluate the merits of a privilege claimed by an executive official. Nor could it protect the rights of the three widows. The Court surrendered to the executive branch fundamental judicial duties in deciding questions of privilege and access to evidence. Refusing to examine the report, the Court took the risk of being hoodwinked by the executive branch. As it turned out, it was.

Jackson, along with Black and Frankfurter, did not draft a full dissent. Instead, they wrote: "MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON dissent, substantially for the reasons set forth in the opinion of Judge Maris below."[523] Obviously, Judge Maris in the Third Circuit could not anticipate the analytical deficiencies of the Vinson opinion. The three dissenters were in a position to do that but chose not to. Moreover, what parts of Maris's decision did they accept and what parts did they reject? We do not know. In a tort claims case discussed in Part XIII, Jackson was willing in a dissent to analyze the underlying issues.

In 2000, the three widows obtained a copy of the declassified accident report.[524] When their attorneys read the report, they realized it contained no state secrets.[525] Furthermore, it revealed the government had been negligent by not installing heat shields in the B-29 to avoid overheating of the engines.[526] The Air Force committed

[519] *Id.* at 6–7.
[520] *Id.* at 9–10.
[521] *Id.* at 10.
[522] Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951).
[523] *Reynolds*, 345 U.S. at 12 (Black, Frankfurter & Jackson, JJ., dissenting) (citing *Reynolds*, 192 F.2d 987 (3d Cir. 1951)).
[524] FISHER, *supra* note 95, at 166–68.
[525] *Id.* at 177.
[526] *Id.* at 178.

other negligent acts.[527] The families decided to file a new lawsuit: not for tort claims this time but for a writ of *coram nobis*, charging that the executive branch had misled the judiciary and committed fraud against it.[528] First they filed the writ with the Supreme Court, but the Court declined to take it.[529] They had to start over in district court.[530]

The widows lost in district court on September 10, 2004,[531] and their appeal to the Third Circuit failed on September 22, 2005.[532] On May 1, 2006, the Supreme Court denied certiorari.[533] The constitutional value given short shrift in this *coram nobis* is the need to protect the integrity, independence, and reputation of the federal judiciary. In accepting the government's claim in 1953 without examining the accident report, the Supreme Court functioned as an arm of the executive branch. When courts operate in that manner, litigants and citizens lose faith in the judiciary, the rule of law, the adversary system, and the constitutional principle of checks and balances.

The flawed analysis of *Reynolds* continues to damage judicial independence. Consider a ruling by the Ninth Circuit on September 8, 2010, in *Mohamed* v. *Jeppesen Dataplan*.[534] Plaintiffs wanted information about the "torture flights" conducted by the CIA with the assistance of a private contractor.[535] The Ninth Circuit said it "must make an independent determination whether the information is privileged," claiming that federal courts "take very seriously our obligation to review the [government's claims] with a very careful, indeed a skeptical, eye."[536] Promises of judicial independence were then discarded with this statement: "[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."[537] Under that reading, the

[527] *Id.* at 178–79.

[528] *Id.* at 169. For examples of *coram nobis* lawsuits, see *id.* at 169–76.

[529] *See In re* Herring, 539 U.S. 940 (2003) (mem.); FISHER, *supra* note 95, at 176.

[530] Herring v. United States, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *6 (E.D. Pa. Sept. 10, 2004); FISHER, *supra* note 95, at 188.

[531] *Herring*, 2004 U.S. Dist. LEXIS 18545, at *37.

[532] Herring v. United States, 424 F.3d 384, 392 (3d Cir. 2005). Details on these two decisions are provided in FISHER, *supra* note 95, at 188–211.

[533] Herring v. United States, 547 U.S. 1123 (2006) (mem.).

[534] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

[535] *Id.* at 1075–76, 1083–84.

[536] *Id.* at 1080, 1082 (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1202–1203 (9th Cir. 2007)) (alteration in original).

[537] *Id.* at 1081–82 (quoting *Al-Haramain Islamic Found., Inc.*, 507 F.3d at 1203).

executive branch may commit illegal and unconstitutional actions without any independent judicial check.

XIII. *DALEHITE V. UNITED STATES* (1953)

The Federal Tort Claims Act of 1946 (FTCA) authorized federal agencies to settle any claim against the United States "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[538] Employees of the government included "members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."[539] The phrase "acting within the scope of his office or employment," as applied to a member of the U.S. military or naval forces, meant "acting in line of duty."[540] Claims settled by executive agencies could be for money only and could not exceed $1,000.[541]

Tort suits involving greater sums of money would be handled by federal district courts.[542] The claims would be those that the United States (the same as a private person) "would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act of omission occurred."[543] Several provisions of the bill underscored the point that in tort actions, the federal government would be treated on a par with the private claimant.[544] The United States would be liable in respect of such claims "in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages."[545] To limit the number of tort suits filed against the government, Congress excluded such claims as those "arising out of the loss . . . or negligent transmission of letters or postal matter."[546]

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538 Federal Tort Claims Act, ch. 753, § 403(a), 60 Stat. 842, 843 (1946).
539 *Id.* § 402(b).
540 *Id.* § 402(c).
541 *Id.* § 403(a).
542 *Id.* § 410(c).
543 *Id.*
544 *See, e.g.*, *id* §§ 403(a), 410(a).
545 *Id.*
546 *Id.* § 421(b).

Dalehite v. United States[547] focused on a military matter.[548] The Supreme Court split 4-3, with a dissent by Justice Jackson joined by Justices Black and Frankfurter.[549] The Court considered personal and property claims resulting from a disastrous accident at Texas City, Texas.[550] A massive explosion led to 560 deaths, 3,000 injuries, and the leveling of the surrounding area.[551] Some 1,850 tons of fertilizer-grade ammonium nitrate (FGAN) had been loaded on the steamship *Grandcamp*, with another 1,000 tons on the High Flyer docked nearby.[552] The *Grandcamp* also carried a substantial cargo of explosives, and the High Flyer carried 2,000 tons of sulfur.[553]

Plant facilities used to produce FGAN had been used during World War II to make ammonium nitrate for explosives.[554] The fertilizer was produced and distributed "according to the specifications and under the control of" the U.S. government.[555] Shipment of FGAN abroad was part of the government's effort to feed the populations of Germany, Japan, and Korea after the war, and to prevent possible insurgent attacks against the U.S. occupation.[556] The Court held that the government was not liable under the FTCA, which contained an exception for a "discretionary function or duty on the part of a federal agency or an employee of the Government."[557]

Justices Douglas and Clark took no part in the decision.[558] Justice Reed wrote for the majority.[559] In his dissent, Jackson called the Texas City explosion "a man-made disaster; it was in no sense an 'act of God.' The fertilizer had been manufactured in Government-owned plants at the Government's order and to its specifications" and "was shipped as part of its program of foreign aid."[560] "Congress," Jackson said, "has defined the tort liability of the Government as analogous to that of a private person."[561] "[O]ne function of civil liability for negligence," he said, "is to supply a sanction to enforce the degree of

[547] Dalehite v. United States, 346 U.S. 15 (1953).
[548] *Id.* at 18–20 (1953).
[549] *See id.* at 45; *id.* at 47 (Jackson, J., dissenting).
[550] *Id.* at 17 (majority opinion).
[551] *Id.* at 48 (Jackson, J., dissenting).
[552] *Id.* at 22–23 (majority opinion).
[553] *Id.*
[554] *Id.* at 18–19.
[555] *Id.* at 18.
[556] *See id.* at 19.
[557] *Id.* at 35–36; Federal Tort Claims Act, ch. 753, § 421(a), 60 Stat. 842, 845 (1946).
[558] *Dalehite*, 346 U.S. at 45.
[559] *Id.* at 17.
[560] *Id.* at 48 (Jackson, J., dissenting).
[561] *Id.* at 49.

care suitable to the conditions of contemporary society and appropriate to the circumstances of the case."[562]

Jackson denied that the catastrophe resulted from a "discretionary function" of the government, or that finding negligence in this case would make executive officials "timid and restrained" for fear that their decisions would be liable in court.[563] "The Government's negligence . . . was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper."[564] As for the reach of the tort claims statute, Jackson said that "[s]urely a statute so long debated was meant to embrace more than traffic accidents."[565]

Although the citizens of Texas City found no relief from the Supreme Court, Congress two years later passed legislation to settle private claims.[566] It "recognizes and assumes the compassionate responsibility of the United States for the losses sustained by reason of the explosions and fires at Texas City, Texas, and hereby provides the procedure by which the amounts shall be determined and paid."[567] A Senate report acknowledged that the federal government "was responsible for the explosions and the resulting catastrophe at Texas City; that the disaster was caused by forces set in motion by the Government, completely controlled or controllable by it."[568] However, conferees decided not to acknowledge legal responsibility or negligence on the part of the government.[569] Instead, conferees recognized "compassionate responsibility."[570]

CONCLUSION

On February 1, 1940, Attorney General Jackson addressed the Supreme Court on its one hundred fiftieth anniversary.[571] He acknowledged that the framers left "many controversial details . . . to be filled in from time to time by the wisdom of those who were to follow."[572] He argued that the logic of the judicial function is that

562 *Id.*
563 *Id.* at 58.
564 *Id.* at 60.
565 *Id.*
566 *See* Texas City Disaster Claims Act, Pub. L. No. 378, 69 Stat. 707 (1955).
567 *Id.*
568 S. REP. NO. 84-684, at 4 (1955).
569 H.R. REP. NO. 84-1623, at 4 (1955).
570 *Id.*
571 Attorney General Robert H. Jackson, 150th Anniversary of the Supreme Court, 309 U.S. v (1940).
572 *Id.* at vi.

contending parties in court are "willing to submit its conflicts to adjudication and to subordinate power to reason."[573]

In *Korematsu* and other cases, the Supreme Court did the opposite: subordinating reason to executive and military assertions. In his address on the same occasion, Charles A. Beardsley, president of the American Bar Association, stated,

> For 150 years the American people have honored, respected, and sustained this Court, and, through the years this Court has gained for itself the gratitude and affectionate regard of the American people, because the American people have been steadfast in their devotion to the fundamental principles upon which our Government is founded.[574]

Beardsley chose to ignore periods when the Court decided cases that violated individual rights and freedoms.

Following Jackson's death, Justice Frankfurter wrote a tribute that praised Jackson's contribution to law.[575] He referred to Jackson's commitment to these essential qualities: "Self-reliance, good-humored tolerance, [and] recognition of the other fellow's right to be and to thrive even though you may not think he is as good as you are . . . ."[576] Frankfurter also attributed additional values to Jackson: "[S]uspicion of authority as well as awareness of its need, disdain of arrogance and self-righteousness, a preference for truculent independence over prudent deference and conformity . . . ."[577] Suspicion of authority and independent analysis are on full display in Jackson's 1943 flag-salute decision, his assistance to Ellen Knauff, the *Youngstown* concurrence, and dissents in the *Mezei* and *Dalehite* cases.

In other important cases, including his draft concurrence in the Nazi saboteur case, the Japanese American cases, and *Chicago & Southern Air Lines*, Jackson chose to defer to executive and military assertions and argued that in certain periods it is necessary to sacrifice individual rights to what executive officials claim to be in the national interest, even if later shown to be false. Individual

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[573] *Id.* at vii.

[574] Charles A. Beardsley, President of the American Bar Association, 150th Anniversary of the Supreme Court, 309 U.S. ix (1940).

[575] *See* Felix Frankfurter, *Foreword: Robert H. Jackson*, 55 COLUM. L. REV. 435, 436–37 (1955).

[576] *Id.* at 436.

[577] *Id.*

freedom pays a high price in that political orientation. So did the reputation of the Supreme Court for failing to protect constitutional rights. We owe much to Justice Jackson for identifying the values that are essential to preserve self-government, including his final paragraphs of the *Youngstown* concurrence and a memorable warning in the Ellen Knauff case: "Security is like liberty in that many are the crimes committed in its name."[578]

[578] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).