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ARTICLES

ROBERT JACKSON'S CRITIQUE OF *TRUMP V. HAWAII*

WILLIAM R. CASTO[†]

If the people ever let the command of the war power fall into irresponsible and unscrupulous hands¹

— *Robert Jackson*

I. INTRODUCTION

Over seventy years ago, United States Supreme Court Justice Robert H. Jackson accurately predicted the Supreme Court's decision in *Trump v. Hawaii*.² As he foresaw, the Court rubber-stamped a President's purposeful discrimination against a minority religion. This brief Essay explains *Trump* using Jackson's critique of judicial review in national-security cases.³ The Essay also uses *Trump* to examine a flaw—probably structural—in the constitutional theory of process jurisprudence.⁴ The *Trump* case involved the Court's construction of congressional legislation apparently limiting the President's authority, but the present Essay does not address that aspect of the opinion.⁵

Jackson was a great Justice, who also served as chief United States prosecutor at the Nuremberg Trials.⁶ Prior to joining the Court, he served as President Franklin Roosevelt's Attorney General and advised the President on many complicated national-security issues.⁷ He had a detailed, thoughtful, and practical

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¹ *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

² 138 S. Ct. 2392 (2018).

³ See *infra* notes 143–160 and accompanying text.

⁴ See *infra* notes 149–157 & 168–172 and accompanying text.

⁵ *Trump*, 138 S. Ct. at 2408. The Court construed the statute in the President's favor and in doing so presumably was influenced by a desire not to limit the President's authority to protect the nation. *Id.*

⁶ See NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 276 (2010). There is no good biography of Jackson.

⁷ See WILLIAM R. CASTO, ADVISING THE PRESIDENT: ATTORNEY GENERAL ROBERT H. JACKSON AND FRANKLIN D. ROOSEVELT 2 (2018).

understanding of the intersection of law and national defense. Based upon Jackson's extensive experience, he believed that the judiciary has a structural disability to assess national-security issues, and that judges will typically rubber-stamp a President's purported national-security decision.⁸ In *Korematsu v. United States*,⁹ the Court—over Jackson's dissent—approved the President's egregious misconduct. The Court has now done the same in *Trump*.

A number of capable and thoughtful writers have vigorously criticized the *Trump* decision.¹⁰ The present Essay, however, does not condemn the *Trump* majority or its opinion. Rather, it focuses in significant part on Jackson's idea that courts are relatively incompetent to review the lawfulness of national-security decisions, and that this blameless incompetence is a structural defect in government under the Constitution. Jackson called it "the Achilles Heel of our constitutional system."¹¹ If Jackson's view is accurate, the defect cannot be wholly corrected. Nevertheless, we should strive to understand the nature of the problem, so that we can realistically assess judicial decision-making in national-security cases.

As a matter of neutrally applicable constitutional principles, the most disturbing aspect of the *Trump* Court's decision is that the Justices split along "party" lines. Five "Republican" Justices voted to support a Republican President's decision, and four "Democratic" Justices voted to overturn a Republican President's decision.¹² If the President had been a Democrat, perhaps some of the Justices might have changed their vote.¹³ In the author's mind,

⁸ Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 459, 468.

⁹ 323 U.S. 214, 215–16 (1944) (upholding the constitutionality of Japanese internment camps during World War II).

¹⁰ See, e.g., Mark Tushnet, *Trump v. Hawaii: "This President" and the National Security Constitution*, 2018 SUP. CT. REV. 1; Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019); Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019).

¹¹ Hutchinson, *supra* note 8, at 468.

¹² The five Justices in the *Trump* majority were appointed by Republican presidents. *Justices 1789 to Present*, SUP. CT., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/UKJ4-QYFY>] (last visited Mar. 4, 2021). Similarly, the four *Trump* dissenters were appointed by Democratic presidents. *Id.*

¹³ In *Trump*, five Justices appointed by Republican presidents showed immense deference to a Republican President. See *infra* notes 148–155 and accompanying text; see also *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576–77, 2596–97 (2019) (four dissenting "Republican" Justices accept a Republican Administration's position,

Jackson's explanation of the *Trump* decision is more persuasive and certainly more attractive than the simplistic specter of raw partisan politics.

The apparently partisan split also might be viewed as a matter of conservative Justices deciding a case based upon conservative principles and liberal Justices resorting to liberal principles.¹⁴ As a matter of process jurisprudence, there can be no valid objection to Justices resorting to their conservative or liberal principles in legislating through adjudicating the law of the land. At the same time, *Trump* illustrates a problem at the outer limits of process jurisprudence.

Trump is best understood as turning on the influential concept of process jurisprudence, which for over a half century has exerted an extraordinary influence upon sophisticated American attorneys and judges.¹⁵ In judging seriously disputed matters, the concept's adherents try to factor out the substantive desirability or propriety of the action under review.¹⁶ A central approach of process jurisprudence is to defer to the government actor best suited to decide the desirability or propriety of the action.¹⁷ This

which was based on an obvious falsehood), discussed *infra* in notes 161–171 and accompanying text. More recently, the four “Republican” diehards did not even hint at deferring to a Democratic President’s use of prosecutorial discretion to defer the deportation of a class of individuals who were technically undocumented immigrants. *Dep’t of Homeland Sec. v. Regents of Univ. Cal.*, 140 S. Ct. 1891 (2020).

¹⁴ In 2018, President Trump referred with disdain to an unwelcome judicial opinion from the Ninth Circuit as having been written by an “Obama judge.” See Robert Barnes, *Rebuking Trump’s Criticism of “Obama Judge,” Chief Justice Roberts Defends Judiciary as “Independent,”* WASH. POST (Nov. 21, 2018, 6:21 PM), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-ed7-11e8-96d4-0d23f2aaad09_story.html [https://perma.cc/QA2D-DUR8]. The President retorted, “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country.” *Id.* If the President had judicial philosophy in mind, his retort makes sense. One wonders, however, whether the retort was inspired by careful consideration of judicial philosophy.

¹⁵ See William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2031, 2040 (1994) (identifying process jurisprudence’s central texts as HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958) and HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953)). See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959). These books “provided the agenda, much of the analytic structure, and even the name of the ‘legal process school’ of the 1950s and the 1960s.” Eskridge & Frickey, *supra*, at 2031.

¹⁶ Eskridge & Frickey, *supra* note 15, at 2038.

¹⁷ *Id.*

approach confers great discretion on the selected actor to reach the best solution to a problem.

Process jurisprudence originated in the 1940s and 1950s as an idea that would constrain conservative judges' power to overturn liberal programs created by Congress, the President, and administrative agencies.¹⁸ In recent decades, conservatives have sought to enhance the power of Republican Presidents. Process jurisprudence now supports this conservative agenda.¹⁹

Process jurisprudence is primarily concerned with the judiciary and, as the name implies, addresses the process of judicial decision-making and not the substance of specific principles or rules created by judges. In particular, judicial decisions should not be based upon some form of fact utilitarianism in which a judge in each case strives to reach an *ad hoc* result by weighing and balancing the interests of the specific parties and the facts of the specific case. In Herbert Wechsler's words, judicial decision-making in any particular case should rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved."²⁰

In addition, process jurisprudence teaches that when a judge is asked to review or enforce an act or action of another branch of government, the judge should carefully consider whether the other branch has a structural or political advantage in deciding the best course of action. Ernest Young concisely encapsulated this idea: "[L]aw should allocate decision[-]making to the institutions best suited to decide particular questions, and . . . the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion."²¹

In *Trump*, the conservative majority resorted to process jurisprudence to legitimize the President's project to discriminate against immigrants based upon their religion.²² At least, this

¹⁸ *Id.* at 2032–33.

¹⁹ For a recent analysis exploring the conservative/liberal flip-flop, see Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 216 (2019).

²⁰ Wechsler, *supra* note 15, at 19.

²¹ Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1149–50 (2005). Similarly, Professor Tushnet has suggested that judicial deference to the more political branches accommodates the rampant pluralism that dominates our society. Tushnet, *supra* note 10, at 13–14. One suspects, however, that Professor Tushnet is not a firm disciple of process jurisprudence.

²² See *infra* notes 143–160 and accompanying text.

rationale is the strongest argument in favor of the *Trump* decision. The majority held that a President's facially neutral policy whose underlying purpose was to discriminate against a minority religion was constitutional as long as the "policy is plausibly related to the Government's *stated* objective to protect the country."²³ In other words, the Court will accept pretextual claims regardless of a program's actual purpose.

The *Trump* decision is easily explained in terms of Jackson's belief that courts are relatively incompetent to review national-security decisions.²⁴ In addition and as a separate matter, *Trump* highlights a defect in process jurisprudence—the concept's Achilles Heel, if you will. Process jurisprudence is based upon an implicit assumption that government officers, more or less and with significant room for disagreement, act in good faith. But what should we do when a President acts in bad faith? This unfortunate possibility presents a threshold question of whether President Trump's discrimination against a minority faith was or was not actually the purpose of his policy. To put the matter differently, we must decide whether the President's avowed purpose was pretextual and advanced in bad faith.

The issue of the President's actual bad faith is factual, and in the context of litigation, attorneys and law professors are quite uncomfortable about resolving disputed issues of fact. That is for the factfinders. Instead, we reflexively think in terms of what is arguable. Moreover, anything is arguable. After a long career, a highly respected law professor once concluded "[t]hat every proposition is arguable."²⁵

As attorneys, we may think that everything is arguable. But as human beings, we are quite willing to engage in factfinding regarding a person's good faith. All of us have encountered people who lie to us on important issues. Most of us indulge a presumption of good faith, but we all understand that people sometimes lie. As a result, we sometimes pass judgment on the *bona fides* of others. This unpleasant task is simply an inevitable aspect of working with others. We may not like it, but we must do it.

The law has always recognized the sad fact of human mendacity. For example, in contract law, the issue of whether someone has acted in actual bad faith occasionally arises. Reflecting the

²³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (emphasis added).

²⁴ See *infra* notes 115–134 and accompanying text.

²⁵ DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 192 (2007) (quoting former Harvard Law professor Kingman Brewster).

painful existence of human duplicity, factfinders are not required to accept an individual's self-serving claim of good faith. Rather, a person's good faith is routinely decided by reference to all the surrounding circumstances.²⁶

Part of the present Essay is based upon a factual determination that the President was consciously deceptive about the immigration order.²⁷ His purpose was to harm people based on their religious faith, and his pretention of a national-security concern unrelated to religion appears to be pretextual. There is overwhelming evidence to conclude that the President acted in subjective bad faith in enacting the travel ban.²⁸ To repeat, this aspect of the present Essay is not concerned with whether an advocate could argue that the President acted in good faith—anything is arguable. The real problem is what to do when we conclude that a President is purposefully acting in bad faith—that he is consciously practicing to deceive. What happens when the President purports that his action stems from a national-security purpose, but we seriously believe that it does not?

This horrible problem is not unique to judicial review. Some members of the Trump Administration have also had to reconsider their understanding of how Executive Branch officers generally should act.²⁹ Take the case of leaking, which invites the development of general guidelines regarding when it is appropriate to leak and when it is not.³⁰ Under general guidelines, the widespread leaking of the Trump Administration is easily condemned.³¹ But others justify this unusual amount of leaking because the current President's thoroughgoing mendacity is extraordinary, and “[e]xtraordinary times demand extraordinary actions.”³² Similarly,

²⁶ See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 440–42 (3d ed. 2004); 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 38:21 (4th ed. 1990 & Supp. 2020).

²⁷ See David J. Bier, *A Dozen Times Trump Equated His Travel Ban with a Muslim Ban*, CATO AT LIBERTY (Aug. 14, 2017, 12:06 PM), <https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban> [<https://perma.cc/8R73-K4EU>].

²⁸ See *id.*

²⁹ See, e.g., Michael Walzer, *Just and Unjust Leaks: When to Spill Secrets*, FOREIGN AFFS., Mar.–Apr. 2018, at 48, 48; Peter Feaver, *The Secret Sharers: Leaking and Whistle-Blowing in the Trump Era: Too Many Leaks*, FOREIGN AFFS., Nov.–Dec. 2018, at 199, 200 (2018) (discussing the propriety of leaking in light of unique concerns surrounding the Trump Administration).

³⁰ See, e.g., Walzer, *supra* note 29; Feaver, *supra* note 29, at 199.

³¹ See, e.g., Feaver, *supra* note 29, at 199.

³² Allison Stanger, *The Secret Sharers: Leaking and Whistle-Blowing in the Trump Era: No Ordinary Times*, FOREIGN AFFS., Nov.–Dec. 2018, at 202, 202 (2018) (arguing that the Trump Administration's “assault on the rule of law and the norms

as a general proposition, members of the Executive Branch surely should strive to support their President's policies. Nevertheless, an anonymous "senior official in the Trump [A]dministration" has sincerely complained about the current President's general ineptitude and total amorality.³³ The official has assured the nation that "many of the senior officials in [Trump's] own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations."³⁴ There is ample evidence to support the empirical claim that many senior officials have actively sought to thwart the President's agenda.³⁵

The *Trump* case presented the judiciary with the same problem that has bedeviled some members of the Trump Administration. What should a person do when confronted with a President who is acting in bad faith? What should the Court do about a President who claims to be acting to defend the nation, but who actually has an ulterior motive to harm members of a minority religious faith? In regard to these questions, one of the most respected jurists of the last century quipped that judges are "not required to exhibit a naiveté from which ordinary citizens are free."³⁶

In the President's case, we know beyond dispute that he is an inveterate prevaricator. Not just an occasional deceiver, but an inveterate deceiver. The fact of his habitual, notorious, and widespread practice of not telling the truth about anything and everything, large or small, is so well known that a judge easily could and should take judicial notice of this dismaying and engrained defect in his character.³⁷ President Trump and his representatives have claimed that his action against Muslim immigrants stems from national-security necessity.³⁸ There are

and practices of American democracy" justifies leaking that may not otherwise be justified in other contexts).

³³ Anonymous, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/39YY-4GQ7>].

³⁴ *Id.* See generally ANONYMOUS, A WARNING (2019).

³⁵ See, e.g., BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE, at xvii–xxii (2018) (reporting examples of senior White House officials, among other things, snatching documents from President Trump's desk and talking him out of farfetched foreign policy actions).

³⁶ *Dep't of Com. v. New York*, 139 S. Ct. 2251, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

³⁷ This engrained defect in President Trump's character is "generally known" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b).

³⁸ *Trump v. Hawaii*, 138 S. Ct. 2392, 2436 (2018) (Sotomayor, J., dissenting).

ample grounds, however, to conclude that this claim is a sham. Before the election, he shouted to the rooftops that he planned to discriminate against Muslim immigrants based upon their religious faith and did just that after the election.³⁹ But at his direction, his lawyers cleverly sought to disguise his discriminatory purpose by using predominately Muslim countries as a proxy for the President's underlying discriminatory purpose.⁴⁰

Perhaps the President actually and sincerely believes that faithful Muslims are inherently dangerous to our national security. If so, the President's discrimination against Muslims would be a good faith, albeit presumably unlawful,⁴¹ effort to protect us. If he had stated that he was taking action because he had national-security concerns about the Islamic faith, his good faith could not have been seriously questioned. His order, however, made no such statement. Instead, he cleverly insisted that his concern was with immigrants who coincidentally come from specific predominantly Muslim countries. This clever pretextual reason was not given in good faith. Its evident bad-faith purpose was to pretend that the case did not present a direct conflict between discriminating against a minority religion and securing the nation against harm.⁴²

In real life, what do we do with someone who repeatedly promises that she will do something for a specific despicable reason and then does just that? Obviously, all of us would assume that she acted for the reason that she had so avidly avowed. But what do we do if this person now claims that she has fulfilled her promise for a non-despicable reason? Add to this predicament the fact that the person is routinely untruthful. To be sure, her pretensions of a non-despicable reason may as a matter of mathematical possibility be true. But only a hopelessly naive person⁴³ would accept her pretextual pretenses.

The strongest justification for the *Trump* majority's decision comes from process jurisprudence.⁴⁴ But process jurisprudence implodes when government actors do not act in good faith. To use

³⁹ *Id.* at 2435–36. The President's shameful misconduct is briefly detailed in Justice Sotomayor's dissenting opinion. *Id.*

⁴⁰ *Id.* at 2417 (majority opinion) (citing President Trump's request to his advisors to "legally" establish a Muslim ban).

⁴¹ *See id.* at 2423 (renouncing *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans as constitutional)).

⁴² I thank my colleague Dustin Benham for this insight.

⁴³ Or perhaps someone utterly and helplessly enthralled to the proposition that anything is arguable. *See supra* note 25 and accompanying text.

⁴⁴ *See infra* notes 149–159 and accompanying text.

Justice Jackson's words, what happens when an "irresponsible and unscrupulous" person⁴⁵ is entrusted with the powers of the presidency?

II. THE PRESIDENT'S PREROGATIVE POWER

Justice Jackson was a sophisticated, thoughtful, and pragmatic judge who had immense hands-on executive experience at the highest levels of government. His concurring opinion in the *Steel Seizure Case*⁴⁶ has been regarded as "the greatest single opinion ever written by a Supreme Court justice."⁴⁷ In foreign policy and national defense cases, his opinion sets the stage for all discussions of the Constitution's allocation of powers between the President and the Congress.

Another aspect of *Steel Seizure* has been less explored. Jackson thought that the case implicated the President's prerogative power to violate the law in order to achieve a national good.⁴⁸ To put in bluntly, Jackson understood that the President has and should have a political, though not legal, power to act unlawfully.⁴⁹ In the *Steel Seizure* case, the President had unconstitutionally seized the nation's steel industry during the Korean War.⁵⁰ When the Justices discussed the case in conference, Justice Douglas noted Jackson's comment that the "President can throw Constitution overboard but we can't."⁵¹ At first glance, these words could be dismissed as a "simple colloquial condemnation" of the President's action.⁵² But Jackson meant what he said: he believed that the President has a prerogative political power to disregard the Constitution when facing complicated issues.⁵³ Moreover, Jackson believed that in some situations the President should do so.

⁴⁵ *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

⁴⁶ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

⁴⁷ Sanford Levinson, *Why the Canon Should Be Expanded To Include The Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 242 n.2 (2000).

⁴⁸ *Youngstown Sheet & Tube Co.*, 343 U.S. at 640 (Jackson, J., concurring).

⁴⁹ *Id.* at 653–54 ("[I]t is relevant to note the gap that exists between the President's paper powers and his real powers.").

⁵⁰ *See id.* at 699–700 (Vinson, J., dissenting); *see also* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (rev. ed. 1994) for the best general description of the case. *See also* CASTO, *supra* note 7, at 83–109.

⁵¹ CASTO, *supra* note 7, at 101 (quoting Conference Notes, William O. Douglas, Assoc. J., U.S. Sup. Ct. (May 16, 1952) (on file with the William O. Douglas Papers at the Library of Congress in Washington, D.C.)).

⁵² *Id.*

⁵³ *Id.*

During Jackson's tenure in the Executive Branch, he saw President Roosevelt throw the Constitution overboard more than once. Based upon his direct personal experience, Jackson understood that Roosevelt "had a tendency to think in terms of right and wrong, instead of terms of legal and illegal. Because he thought that his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations on them."⁵⁴

President Roosevelt's relative disdain for legal restrictions surfaced in his 1933 inaugural address, when the nation was in the depths of the Great Depression. He warned the country that "it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure."⁵⁵ Roosevelt quickly followed through with his warning. In an effort to lead the nation out of the Depression, he resolved to abandon the country's gold standard for its currency.⁵⁶ He believed that the resulting inflation would help the plight of farmers and others by increasing the price of goods that they sold.⁵⁷ To accomplish his program of controlled inflation, he was determined to devalue our currency.⁵⁸ As a result, the farmers and others would receive more dollars for their goods and services, and they would have more dollars to pay their debts.

There was, however, a major impediment to the controlled devaluation of the dollar. Almost all corporate bonds, government bonds, mortgages, and other debt contracts called for payment in dollars but included gold clauses keying payment to the dollar value of gold rather than dollars.⁵⁹ If the dollar were devalued, the amount due under the gold clauses would increase dramatically, which would impose great hardship on debtors.⁶⁰ The federal government resolved this problem by voiding all these gold clauses.⁶¹ Of course, creditors immediately challenged the government's

⁵⁴ ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 74 (John Q. Barrett ed., 2003). Similarly, in an impromptu eulogy on Roosevelt's death, Jackson remembered that the President "often was critical of our [legal] profession, of its backward-looking tendencies, its preoccupation at times with red tape to the injury of what he thought were more vital interests." *Id.* at 168.

⁵⁵ President Franklin D. Roosevelt, Inaugural Address (Mar. 4, 1933).

⁵⁶ The story is well told in SEBASTIAN EDWARDS, *AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD* 78 (2018).

⁵⁷ *Id.* at xi.

⁵⁸ *Id.* at 49.

⁵⁹ *Id.* at 68–69.

⁶⁰ *Id.*

⁶¹ *Id.* at 71.

action and the litigation quickly reached the Supreme Court in the *Gold Clause Cases*.⁶²

Jackson closely consulted with the President on the gold clause litigation. He later remembered that during oral argument in the Court, “[s]ome very disturbing questions had been put to [Attorney General Homer Cummings] and these the President viewed as an indication that the devaluation policy might be held unconstitutional”⁶³ The President was deeply disturbed, and in Jackson’s words, “[o]utright defiance of the Court was possible.”⁶⁴

A true constitutional crisis was in the offing: “The President was greatly concerned about the possible outcome of that case and was quite determined that he just could not accept an adverse decision.”⁶⁵ Roosevelt considered various approaches, including outright public defiance of the Court.

The President told others that he had actually drafted a “radio speech to be given on the night of the day the [C]ourt hands down the decision.”⁶⁶ In the speech, Roosevelt described the dire consequences that would flow from a Supreme Court decision enforcing the gold clauses.⁶⁷ He also clearly stated that in this event he would not abide by the Court’s decision. In his planned radio address, Roosevelt planned to say:

[The Justices] have decided these cases in accordance with the letter of the law as they saw it. It is nevertheless my duty to protect the people of the United States to the best of my ability. To carry through the decision of the Court to its logical and inescapable end will so endanger the people of this Nation that I am compelled to look beyond the letter of the law to the spirit of the original contracts.⁶⁸

Fortunately, the Court ruled five to four in the President’s favor⁶⁹ and thereby averted the crisis.

⁶² *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 291 (1935); *Nortz v. United States*, 294 U.S. 317, 324 (1935); *Perry v. United States*, 294 U.S. 330, 347 (1935).

⁶³ JACKSON, *supra* note 54, at 65.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ EDWARDS, *supra* note 56, at 167 (quoting Franklin D. Roosevelt).

⁶⁷ *See id.* at 167–69.

⁶⁸ JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 99 (2010) (quoting the president’s draft).

⁶⁹ *See* EDWARDS, *supra* note 56, at 172. Given the sui generis political context, the *Gold Clause Cases* are almost never studied in Constitutional Law and almost never mentioned.

A few years later, the President wished to build a modern airport for the nation's capital, but Congress was hopelessly "bogged down."⁷⁰ "The situation was ridiculous."⁷¹ In Jackson's words, the national airport "consisted of a pasture intersected by a highway. When a plane came in, they had to close the road to traffic and open it again after the plane had landed."⁷² "[T]he President was pretty much disgusted."⁷³ Congress had not appropriated funds specifically for an airport, but the Public Works Administration ("PWA") and the Work's Progress Administration ("WPA") had enough money to commence construction.⁷⁴ Roosevelt told Jackson, "Bob, I want you to get [the WPA and the PWA together] at once and knock their heads together until you get that money knocked out of them."⁷⁵ Jackson did so, and groundbreaking quickly commenced on the National, now Reagan, Airport.⁷⁶

Unfortunately, the President's action was blatantly unconstitutional,⁷⁷ and Jackson knew so. He later described the episode as "an instance in which . . . the President act[ed] beyond the Constitution."⁷⁸ Jackson had no qualms about this flagrant violation, which he viewed as a benign transgression, because the construction "invade[d] no private right and . . . took nobody's property."⁷⁹ Moreover, he noted that but for "that Presidential initiative, Washington probably would have faced World War II without an adequate airport."⁸⁰ We see the technical issue in the

⁷⁰ See CASTO, *supra* note 7, at 22–24.

⁷¹ *Id.*

⁷² JACKSON, *supra* note 54, at 47.

⁷³ *Id.*

⁷⁴ *Id.* at 47–48.

⁷⁵ *Id.* at 48.

⁷⁶ *Id.*

⁷⁷ See Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 20 (1998). A fundamental clause of the Constitution provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7. Moreover, an old statute, still in effect today, outlawed the expenditure of funds without an authorizing appropriation. See 31 U.S.C. § 1341 (2018), *amended by* Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5 § 103, 133 Stat. 11 (codifying a provision of the Anti-Deficiency Act, originally passed in 1870). In Jackson's words, Roosevelt acted to expend funds "without congressional authorization or appropriation." JACKSON, *supra* note 54, at 48.

⁷⁸ JACKSON, *supra* note 54, at 48.

⁷⁹ *Id.*

⁸⁰ *Id.*

National Airport episode repeated in President Trump's search for funds to construct his border wall.⁸¹

The National Airport episode is hardly significant. In fact, Jackson joked with the President about it.⁸² A far more serious problem arose two years later. An act of Congress made government wiretapping illegal, and Jackson so advised the President.⁸³ Nevertheless, Roosevelt directed Jackson to institute a program of illegal wiretapping.⁸⁴ Jackson never changed his mind about the program's illegality, but he complied with the President's directive.⁸⁵ Although the President violated a statute, his misconduct also had a significant constitutional dimension. Under the constitutional doctrine of legislative supremacy,⁸⁶ a President is bound to follow an otherwise constitutional statute. Jackson's acquiescence in the President's lawlessness was the basis for many decades of widespread intrusion into Americans' privacy.⁸⁷

Roosevelt's next unlawful action involved aiding Great Britain in its battle with Nazi Germany.⁸⁸ At the time, the United States had not entered the war, and Britain stood alone against the Nazi Colossus. We were neutral, but the President correctly viewed the beleaguered British as America's first line of defense against the Nazis. To assist the British, the President decided to sell them fifty old destroyers.⁸⁹ The sale was technically illegal because it encroached upon the Congress's plenary constitutional power to control the disposal of federal property,⁹⁰ but the President carried

⁸¹ See *Sierra Club v. Trump*, 929 F.3d 670, 676 (9th Cir. 2019); see also *infra* notes 158–160 and accompanying text.

⁸² JACKSON, *supra* note 54, at 48. In a jocular mood, the President “asked [Jackson] if he was likely to go to jail as a result” *Id.* Jackson quipped back, “I told him all that I could promise was to go to jail with him” *Id.*

⁸³ See CASTO, *supra* note 7, at 29, 45. At this time, the Constitution placed no limits on wiretapping. See *Olmstead v. United States*, 277 U.S. 438, 464–65 (1928).

⁸⁴ See CASTO, *supra* note 7, at 38.

⁸⁵ See *id.*

⁸⁶ English-speaking countries have followed this fundamental constitutional principle since Parliament beheaded Charles I in 1649. Louis J. Sirico Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 CONST. COMMENT. 51, 52 (1999).

⁸⁷ See Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1413 (2010); CASTO, *supra* note 7, at 45–46.

⁸⁸ See CASTO, *supra* note 7, at 66–70.

⁸⁹ *Id.* at 59–60, 66–67, 69.

⁹⁰ *Id.* at 62.

it out anyway. Attorney General Jackson published an official opinion supporting Roosevelt's unlawful action.⁹¹

III. THE RIDDLE OF *EX PARTE MERRYMAN*

For the last fifteen years of his life, Jackson struggled to solve the riddle of the judiciary's role when the President violates the Constitution in a national-defense context.⁹² He never found an answer. Initially, he thought that the courts should strive to avoid judicial review of unconstitutional presidential misconduct.⁹³ But, as a practical matter, this idea turned out to be unworkable.

For Jackson, the Civil War case of *Ex parte Merryman*⁹⁴ was the paradigm for national-security conflicts between the President and the judiciary. He was thinking about *Merryman* as early as 1940, when he wrote a book on the proper role of the Supreme Court in our society.⁹⁵ At the beginning of the Civil War, when Congress was not in session, President Abraham Lincoln authorized his generals to take vigorous action against people they suspected of being disloyal to the Union.⁹⁶ In Jackson's words, the Lincoln administration "resorted to wholesale arrests without warrants, detention without trial, and imprisonment without judicial conviction."⁹⁷ At the same time, the President unilaterally suspended the writ of habeas corpus.⁹⁸

Following President Lincoln's directive, the Union army arrested Maryland resident John Merryman, who later sought a writ of habeas corpus from Chief Justice Roger Taney of the Supreme Court.⁹⁹ Taney ruled that the President lacked unilateral constitutional authority to suspend the writ and ordered

⁹¹ See Op. on Exch. of Over-Age Destroyers for Naval and Air Bases, 39 Op. Att'y Gen. 484 (1940).

⁹² See *infra* notes 94–114 and accompanying text.

⁹³ Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFFALO L. REV. 103, 116 (1951).

⁹⁴ 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

⁹⁵ ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 324–27 (1941).

⁹⁶ *Merryman*, 17 F. Cas. at 147–48.

⁹⁷ Jackson, *supra* note 93, at 109.

⁹⁸ *Id.*

⁹⁹ *Merryman*, 17 F. Cas. at 147. Taney was sitting on a lower court, as many sitting Supreme Court Justices did at the time. *Id.*

Merryman's release.¹⁰⁰ The army, however, refused to comply with the Chief Justice's order.¹⁰¹

When Jackson first considered the Lincoln/Taney riddle in 1940, he was Attorney General, and he was sympathetic to Chief Justice Taney's plight.¹⁰² But Jackson ventured no opinion on the merits of the conflict.¹⁰³ He returned to the riddle a few years later when he was a Supreme Court Justice. This time he was considering President Roosevelt's egregious mistreatment of our Japanese-American citizens on the West Coast.¹⁰⁴

In *Hirabayashi v. United States*, the Court considered a curfew applicable only to people of Japanese ancestry.¹⁰⁵ The case was a precursor to the President's infamous imprisonment of innocent Japanese-American citizens. Jackson believed that discrimination based solely upon a person's ancestry was unconstitutional, but he was leery of reviewing a wartime military order. In a lengthy footnote to an unpublished draft opinion, he returned to the Lincoln/Taney paradigm.¹⁰⁶ He concluded: "I do not know that the ultimate cause of liberty has suffered, and it may have been saved by [Lincoln's] questionable arrests. I am sure the cause [of liberty] would have suffered if this Court had rationalized [the arrests] as Constitutional."¹⁰⁷ After much discussion, his fellow Justices convinced him to concur without opinion in a decision allowing the curfew to stand.¹⁰⁸

In 1951, Jackson returned to the Lincoln/Taney paradigm in a speech on "Wartime Security and Liberty under Law."¹⁰⁹ The problem continued to perplex him. There was no clear solution because the problem turned upon "two rights, each in its own way important."¹¹⁰ Our citizens have an expectation to be free from foreign attack, and they have an expectation that their civil

¹⁰⁰ *Id.* at 149.

¹⁰¹ JACKSON, *supra* note 95, at 324 ("An aide-de-camp in full military uniform and appropriately wearing a sword, appeared and declined obedience to the ancient writ of freedom . . .").

¹⁰² Hutchinson, *supra* note 8, at 467.

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁰⁵ *Hirabayashi*, 320 U.S. at, 88–89.

¹⁰⁶ Hutchinson, *supra* note 8, at 474 n.9.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 466–67. Jackson viewed the curfew as relatively minor and thought that the Court's *Hirabayashi* decision would not foreclose a later de novo consideration of the imprisonment (internment) program. *Id.*

¹⁰⁹ Jackson, *supra* note 93, at 103.

¹¹⁰ *Id.* at 117.

liberties will be preserved.¹¹¹ The Lincoln/Taney paradigm presented this dilemma, and Jackson said, "if logic supports Taney, history vindicates Lincoln."¹¹²

Finally, at the very end of his life, he once more took up the Lincoln/Taney riddle and still could find no satisfactory answer.¹¹³ He again concluded that history—but not law—vindicated Lincoln: "Had Mr. Lincoln scrupulously observed Taney's policy, I do not know whether we would have had any liberty, and had the Chief Justice adopted Mr. Lincoln's philosophy as the philosophy of the law, I again do not know whether we could have had any liberty."¹¹⁴ In a sense, Jackson was content with the ultimate outcome. Lincoln defended the nation, and Taney the law.

IV. THE JUDICIARY'S STRUCTURAL INCOMPETENCE

Jackson believed that any judicial attempt to review national-security or military decisions would always be inherently flawed. He believed that "[i]n the very nature of things military decisions are not susceptible of intelligent judicial appraisal."¹¹⁵ In addition, serious evidentiary problems typically preclude judges from even considering much of the most pertinent evidence regarding these decisions, rendering them incompetent to weigh and balance relevant factors.

In *Korematsu v. United States*, Jackson finally had to confront this structural defect when hearing a challenge to the government's internment of Japanese-American citizens.¹¹⁶ He noted the paucity of evidence on the fundamental issue of whether the internment order had "a reasonable basis in necessity."¹¹⁷ There simply was "[n]o evidence whatever on that subject . . . taken by this or any other court."¹¹⁸ All the Court had was a general's "unsworn, self-serving statement, untested by any cross-examination."¹¹⁹ Jackson's concern about the paucity of evidence was entirely justified: over sixty years later, the Solicitor General

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 76 (1955) (published posthumously).

¹¹⁴ *Id.*

¹¹⁵ *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

¹¹⁶ *Id.* at 215–16 (majority opinion).

¹¹⁷ *Id.* at 245 (Jackson, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

of the United States confessed error in his predecessor's concealment of information in *Korematsu* that drastically undercut the government's case.¹²⁰

Jackson believed that lack of evidence would be the typical situation. National-security and military orders frequently would be based on information not "admissible and on assumptions that could not be proved."¹²¹ The information might be confidential and "could not be disclosed to courts without danger that it would reach the enemy."¹²² Given these practical realities, "courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military [or national-security] viewpoint."¹²³

Even if the pertinent evidence were available, the judiciary would remain incompetent to gauge the reasonableness of a national-security decision. In Jackson's mind, the "very essence of the military job is to [gain] every strategic advantage."¹²⁴ He continued, "[n]o court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting."¹²⁵ Thus in *Korematsu*, the commander may have been "unreasonably cautious and exacting" in sweeping up all of our Japanese-American citizens in order to isolate just a few potential spies.¹²⁶ On issues of national security, you do not take chances. Echoing his thoughts on the Lincoln/Taney riddle, Jackson conceded that as a matter of military, but not constitutional

¹²⁰ When Roosevelt's Solicitor General argued *Korematsu* to the Court, he knew of and suppressed an Office of Naval Intelligence report, which said that "only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody." Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, DEP'T OF JUST. (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [<https://perma.cc/AS3K-XMJB>]. In addition, "a key set of allegations used to justify the internment [was] that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast . . ." *Id.* Roosevelt's Solicitor General knew that these allegations "had been discredited by the FBI and FCC," but the Solicitor General concealed the FBI and FCC conclusions. *Id.*

¹²¹ *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting).

¹²² *Id.*

¹²³ *Id.* In *Korematsu*, the information presumably would have been based upon the government's actual knowledge of specific security threats posed by specific individuals. Jackson also noted that the courts could not "act on communications made in confidence." *Id.*

¹²⁴ *Id.* at 244 (emphasis added).

¹²⁵ *Id.*

¹²⁶ *Id.*

analysis, “[p]erhaps [a commander] should be” “unreasonably cautious and exacting.”¹²⁷

Jackson thought that the gravest threat to our constitutional order in national-security cases was the clear possibility that the Court would rubber-stamp national-security decisions—in other words, would rationalize them as lawful.¹²⁸ This approach would turn the entire matter over to the political wisdom and judgment of the President. In effect, this is precisely what happened in *Korematsu* and *Trump*: the Court in both cases approved the President’s egregious misconduct. Because the Court in these cases likely would accept any President’s national-security rationale, Jackson concluded that as a practical matter, “[t]he chief restraint upon [executive abuse of power] must be [the Executive’s] responsibility to the political judgments of their contemporaries and to the moral judgments of history.”¹²⁹ He might have added that the President’s personal judgment would serve as an important third check.

In Jackson’s mind, the ultimate nightmare would come to pass “[i]f the people ever let command of the war power fall into irresponsible and unscrupulous hands.”¹³⁰ President Roosevelt’s lawlessness, however, did not seriously concern Jackson. He absolutely trusted Roosevelt’s personal judgment. In the words of a careful and capable student of Jackson’s life, Roosevelt was Jackson’s “hero, friend, and leader.”¹³¹

Jackson never solved the puzzle of the Lincoln/Taney paradigm. In *Korematsu*, he feared that the Court’s opinion would “lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”¹³² Moreover, he feared that the opinion would inevitably metastasize beyond its original limits. Quoting Benjamin Cardozo, Jackson noted “[t]he tendency of a principle to expand itself to the limit of its logic.”¹³³

Jackson thought that the judiciary perhaps could avoid the puzzle’s irreconcilable conflict by simply abstaining from reviewing national-security decisions. But in his lifetime, abstention

¹²⁷ *Id.*

¹²⁸ *Id.* at 245–46.

¹²⁹ *Id.* at 248.

¹³⁰ *Id.*

¹³¹ John Q. Barrett, *Introduction to JACKSON*, *supra* note 54, at xiii.

¹³² 323 U.S. at 246 (Jackson, J., dissenting).

¹³³ *Id.* (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

proved to be unworkable. His idea only works if the other Justices cooperate. They did not do so.¹³⁴

If we fully embrace Jackson's analysis, we must understand that his thinking was not *ad hominem*. He did not believe that his fellow Justices were recklessly conspiring to exult presidential power. Felix Frankfurter, his best friend on the Court, voted to approve *Korematsu's* imprisonment. Rather, Jackson believed that his brethren were acting under a structural disability. They simply could not bring themselves to overturn a President's purported national-security decision.

Finally, Jackson understood that the serious problem of judicial competence was not absolute. In *Korematsu*, three Justices, including Jackson, voted to invalidate the government's unconstitutional program of imprisonment, and in *Trump*, four Justices refused to abide by the President's misconduct.¹³⁵ Jackson's analysis of judicial incompetence is best viewed as a significant factor that will weigh heavily in judges' decisions.

Jackson never answered the Lincoln/Taney riddle to his satisfaction. Instead he resorted to *ad hoc* solutions. He voted to overturn a President's national-security program in two high-profile cases.¹³⁶ His case-by-case approach suggests a pragmatic method for working around the judiciary's national-security incompetence.

In *Korematsu*, Jackson completely avoided the factual issue of whether the President's imprisonment program was wise or even

¹³⁴ For detailed analyses of Jackson's preferred approach to interfering with a President's military or national-security decision, see Hutchinson, *supra* note 8, at 458–59, and CASTO, *supra* note 7, at 101–09. Jackson believed that the judiciary should show great deference to the President and that the remedy of habeas corpus should not be used to interfere with a President's national-security action. He conceded that under his preferred approach, Chief Justice Taney should not have challenged Lincoln's suspension of the writ of habeas corpus. Jackson, *supra* note 93. He viewed the *Korematsu* case differently, because the courts could not abstain from a decision when the President had invoked the judicial process in a criminal prosecution. *Id.* at 115.

Eugene Rostow excoriated Jackson's *Korematsu* opinion as "a fascinating and fantastic essay in nihilism." Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 510 (1945). As a practical matter, however, Jackson's abstention theory is quite unworkable. His theory does not work if the other Justices decide to address the merits. The abstaining Justice would simply be a Lone Ranger riding his "abstention hobby-horse." CASTO, *supra* note 7, at 108–09.

¹³⁵ See generally *Korematsu*, 323 U.S. at 214 (including dissenting opinions from Justices Roberts, Murphy, and Jackson); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (referencing the four Justices in dissent: Breyer, Kagan, Sotomayor, and Ginsburg).

¹³⁶ See *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652–55 (1952) (Jackson, J., concurring).

needed.¹³⁷ Instead, he concluded as a matter of law that the Constitution limited Roosevelt's authority to protect our national security. Regardless of need or necessity, Jackson decided that the Constitution does not permit the federal government to imprison people based solely on their parentage.¹³⁸

Jackson used the same approach in the *Steel Seizure* case.¹³⁹ During the Korean War, President Truman declared a national-security emergency and seized the nation's steel industry.¹⁴⁰ There was a possible factual issue of whether there actually was an emergency. In oral argument, however, Jackson plainly stated "[i]t is not our business to decide what is an emergency."¹⁴¹ Instead, he ruled as a matter of the law and without regard to national-security need or necessity that the President lacked authority to seize the steel mills.¹⁴² He believed that Congress had effectively removed the seizure power from the President's hands.

In *Korematsu* and *Steel Seizure*, Jackson never questioned the President's judgment regarding the need for the national-security program. Instead, he believed that as a matter of law, the President lacked authority to implement the two programs. In *Korematsu* the Constitution preempted the President's decision, and in *Steel Seizure* Congress did the same.

V. TRUMP

The factual background to the *Trump* case is well known and need not be rehearsed in any detail. During Trump's presidential campaign, he promised to discriminate against Muslim immigrants based upon their religion if elected.¹⁴³ After his election, he issued a series of executive orders that fulfilled his promise.¹⁴⁴ As a technical matter, the President's orders did not single out Muslims. Rather, he singled out immigrants from several predominantly Muslim countries.¹⁴⁵

¹³⁷ See *supra* notes 116–134 and accompanying text.

¹³⁸ *Korematsu*, 323 U.S. at 243–44 (Jackson, J., dissenting).

¹³⁹ See *supra* notes 46–51 and accompanying text.

¹⁴⁰ *Youngstown Sheet & Tube Co.*, 343 U.S. at 582.

¹⁴¹ 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 923 (Philip B. Kurland & Gerhard Casper eds., 1975).

¹⁴² *Youngstown Sheet & Tube Co.*, 343 U.S. at 652–55 (Jackson, J. concurring).

¹⁴³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2435–46 (2018) (Sotomayor, J., dissenting).

¹⁴⁴ *Id.* at 2436–39.

¹⁴⁵ The President's order also excluded immigrants from North Korea and Venezuela. *Trump*, 138 S. Ct. at 2399. These provisions should be dismissed as pretextual. Does anyone seriously believe that there is a problem of North Korean

Trump is a realization of Jackson's predictions in *Korematsu*. The Justices—at least the majority—viewed themselves as incompetent to second-guess the President on a decision that the President claimed was based upon national-security concerns. As Jackson predicted, the government refused to offer any evidence regarding the claimed underlying national-security threat. For example, the majority noted that the proclamation establishing the discriminatory program explained that all reasons for issuing the order could not be made public: “Describing all of those reasons publicly, however, would cause serious damage to the national security of the United States”¹⁴⁶

Jackson viewed the concern about national security as a factor that might unconsciously influence a judge's decision. Surely, national-security concerns exert an invisible gravitational pull in the judicial process. In *Korematsu*, Jackson refused to “distort the Constitution to approve all that the military may deem expedient,” and worried that “the Court appear[ed] to be doing [so], whether consciously or not.”¹⁴⁷ In *Trump*, the majority consciously bowed before the President's national-security claims. The majority frankly stated, “[W]hen it comes to collecting evidence and drawing inferences’ on questions of national security, ‘the lack of competence on the part of the courts is marked.’”¹⁴⁸

The five Justices in the majority were aware of the elephant in the room, and presumably understood that the President's purpose in enacting the travel ban was to cleverly discriminate against a minority religious faith. They knew that one of his senior advisors had explained that the President asked him in private to “[p]ut a commission together” to “legally” assemble a Muslim ban.¹⁴⁹ The majority tried to dance around that elephant by accusing the dissenters of using a reasonable-person standard, one that would empower the judiciary to overturn a national-

terrorists entering our country through the ordinary immigration system? In any event, there already is an order excluding North Korean nationals. See Exec. Order No. 13,810, 82 Fed. Reg. 44,705, 44,707–08 (Sept. 20, 2017); *Trump*, 138 S. Ct. at 2442 (Sotomayor, J., dissenting). The President's inclusion of Venezuelan immigrants is also pretextual. Only a few Venezuelan officials and their immediate families are barred from entry. See *id.*

¹⁴⁶ Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165 (Sept. 24, 2017), quoted in *Trump*, 138 S. Ct. at 2409 n.2.

¹⁴⁷ *Korematsu v. United States*, 323 U.S. 214, 244–45 (1944).

¹⁴⁸ *Trump*, 138 S. Ct. at 2419 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)).

¹⁴⁹ *Id.* at 2417 (quoting a Trump advisor recalling his discussions with the President).

security decision based upon judges' independent evaluations of reasonableness.¹⁵⁰ This supposed reasonable-person standard, however, is a strawman because the President was guilty under any known standard of judicial factfinding. The most stringent standard for making factual determinations is "beyond a reasonable doubt," where the factfinder must be in a "subjective state of near certitude" of [a criminal] defendant's guilt.¹⁵¹ Even under this most stringent standard, the evidence in *Trump* easily established presidential guilt.¹⁵²

The President's misconduct in this case is the ultimate nightmare for process jurisprudence. In terms of decision-making on national-security issues, the courts have demonstrated a lack of competence.¹⁵³ Moreover, process jurisprudence demands that judges eschew *ad hoc* decision-making and premise decisions on neutral principles that "transcend any immediate result that is involved" and would also apply to future cases.¹⁵⁴ A basis for overturning the President's decision must be equally applicable to the judicial review of future Presidents' national-security actions.

Being capable human beings, the majority fully understood that the President's facially neutral proclamation was pretextual. The President's obvious purpose was to discriminate against a minority religion. In a single sentence buried in the middle of its opinion, the majority candidly explained "we must consider not

¹⁵⁰ *Id.* at 2420 n.5.

¹⁵¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 7 (8th ed. 2018) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

¹⁵² Suppose, for example, that a private person had a lengthy history—comparable to President Trump's—of expressing personal animus towards Muslims in general, and like the President, she had vowed to harm Muslims. Suppose also that, unlike President Trump, the private person had gone to a part of town that she knew to be predominantly Muslim, entered a Muslim store, and randomly committed crimes against the people that she encountered. She is then indicted on a number of counts, including hate crimes. The applicable hate-crime statute applies only when the accused's actions are motivated by an animus to harm persons based upon their religion. At the trial, the defendant insists that her purpose was not to harm Muslims specifically—that she was simply trying to harm persons on a random basis. Let us also assume that the prosecution impeaches the defendant's testimony with an avalanche of proof that the defendant, like President Trump, is an inveterate liar.

If you, the reader of the present Essay, were on the jury, would you—in your heart of hearts—decide that, contrary to the defendant's pretensions, her purpose was to harm Muslims?

¹⁵³ *Trump*, 138 S. Ct. at 2419 ("[W]hen it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence on the part of the courts is marked.'" (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010))).

¹⁵⁴ Wechsler, *supra* note 15, at 19.

only the statements of a particular President, but also the authority of the Presidency itself.”¹⁵⁵ The majority appeared to be worried about creating a rule that would hamper a future President’s good-faith efforts to protect our national security. It apparently wished to create a standard that would generally bar judicial review of future presidential actions. A standard that requires factfinding would require a trial. In contrast, the majority’s standard merely requires a judge to conjure a hypothetically legitimate purpose regardless of the President’s actual purpose. This standard will facilitate pretrial motions to dismiss or grants of summary judgment.

Some commentators have rejected the *Trump* majority’s extreme deference and have argued for more skepticism, more searching scrutiny, heightened scrutiny, and other similar approaches.¹⁵⁶ These sensible proposals, however, do not address the *Trump* majority’s overriding concern to guard future Presidents’ national-security decisions. All of these approaches would involve more extensive judicial review of national-security measures.

Those who are so inclined might tease possible limitations out of the *Trump* Court’s decision. The Court stated and restated that their review is limited to “whether the Executive gave a ‘facially legitimate and bona fide’ reason for its action.”¹⁵⁷ Perhaps a facially legitimate presidential decision taken in bad faith would be subject to a more stringent review. The apparent requirement of good faith, however, must be dismissed as mere window dressing. Whether someone has acted in good faith is a factual issue to be determined by the entire context of the action under review. The *Trump* case involved the strongest possible evidence of presidential bad faith. If this evidence of bad faith does not suffice, there can be no realistic situation in which the *Trump* majority would hold a President not to have acted in good faith.¹⁵⁸

Jackson’s opinions in *Korematsu* and the *Steel Seizure* case suggest a way of working around the Justices’ understandable reluctance to second-guess a President’s national-security decision.

¹⁵⁵ *Trump*, 138 S. Ct. at 2418.

¹⁵⁶ See, e.g., Tushnet, *supra* note 10, at 9, 12; Ray, *supra* note 10, at 61; Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 691 (2019).

¹⁵⁷ *Trump*, 138 S. Ct. at 2419 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)).

¹⁵⁸ See Ray, *supra* note 10, at 62–63.

In each case, Jackson concluded as a matter of law that presidential authority to protect our national security had been removed from the presidency's hands. Perhaps the best way to deal with difficult factual issues like motivation, need, and necessity is to consider whether a President has the legal authority to take a particular action. For example, when the President's need for funds to construct a border wall comes to the Supreme Court, the better part of valor will be to avoid factual issues. A better legal argument would be that, in respect to the availability of funds, Congress has carefully and fully considered the need for a wall.¹⁵⁹ The upshot is that Congress—not the President and certainly not the judiciary—has decided that a wall is unnecessary and that therefore Congress refused to make the necessary appropriations. This analysis is fully supported by the well-established constitutional doctrine that Congress has plenary power over expenditures of federal funds.¹⁶⁰

VI. THE CENSUS CASE

The problem of blatant misrepresentation arose again in *Department of Commerce v. New York*, which involved the administration's decision to add a citizenship question to the 2020 census.¹⁶¹ The state of New York challenged this question on grounds that it would undercount noncitizen and Hispanic households, a move that arguably would give Republicans a structural electoral advantage.¹⁶² The administration defended the question as needed to enforce the Voting Rights Act ("VRA"), but the evidence established that this bizarre claim was pretextual.¹⁶³ Therefore the Court was left with a raw decision unsupported by any reason whatsoever.

¹⁵⁹ See Emily Cochrane & Catie Edmondson, *Border Security, Foreign Aid and a Raise for Federal Workers: What You Need To Know About the Spending Package*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/us/politics/congress-trump-border-deal-wall.html> [<https://perma.cc/5QF6-UA3V>].

¹⁶⁰ See *supra* note 77 and accompanying text.

¹⁶¹ 139 S. Ct. 2551, 2561 (2019).

¹⁶² Brief for Government Respondents at 1, *Dep't of Com. v. New York*, 139 S. Ct. 2551 (No. 18-966), 2019 WL 1468270, at *1; see also Letter Brief for Plaintiff N.Y. Immigr. Coal. at 1, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966) (letter to district court judge requesting an order to show cause in light of new evidence showing that a Republican operative proposed the citizenship question as a means of disadvantaging Democratic electoral prospects).

¹⁶³ Brief for Government Respondents at 54, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966), 2019 WL 1468270, at *54.

In the Census Case, Chief Justice Roberts gagged on the administration's falsehoods. He began by noting that "the VRA enforcement rationale—the sole stated reason [for the question]—seems to have been contrived."¹⁶⁴ He then noted that the administration's justifications were "incongruent with what the record reveal[ed]"; highlighted "the disconnect between the decision made and the explanation given"; declared the Department's explanation "a distraction"; and concluded that "[a]ccepting contrived reasons would defeat the purpose of the [administrative] enterprise."¹⁶⁵

The Chief Justice noted that "[o]ur review [of agency action] is deferential, but we are 'not required to exhibit a naivete from which ordinary citizens are free.'"¹⁶⁶ Notwithstanding the Chief Justice's allusion to naiveté, four Justices—three from the erstwhile *Trump* majority—did not gag on the administration's deceit. In the words of a famous Victorian, the dissenters essentially said, "[p]lease, sir, [we] want some more."¹⁶⁷

The four dissenters in the Census Case obviously are not naïve jurists. They thought that the Chief Justice's conclusion was "extraordinary,"¹⁶⁸ which it was. But they studiously avoided considering whether the administration in fact misrepresented the reason for its action.

The dissenters could not find their way out of a dark cul-de-sac at the outer limits of process jurisprudence. Several protested that the majority opinion "opened a Pandora's box of pretext-based challenges in administrative law."¹⁶⁹ In the alternative, several wrote "[h]opefully [the majority decision] comes to be understood as an aberration—a ticket good for this day and this train only."¹⁷⁰

Presumably, the dissenters hope that the majority opinion will be ignored as a sport or aberration with no precedential value. If so, the decision is a function of *ad hoc*, unprincipled analysis. This violates one of the central tenets of process jurisprudence. In

¹⁶⁴ *Dep't of Com.*, 139 S. Ct. at 2575.

¹⁶⁵ *Id.* at 2575–76.

¹⁶⁶ *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

¹⁶⁷ CHARLES DICKENS, *OLIVER TWIST* 12 (Ella Westland ed., Woodsworth Editions Ltd. 1992) (1838).

¹⁶⁸ *Dep't of Com.*, 139 S. Ct. at 2578 (Thomas, J., dissenting).

¹⁶⁹ *Id.* at 2583; *accord id.* at 2605 (Alito, J., dissenting) ("[W]idespread judicial review of the Secretary's conduct of the census will usher in an era of 'disruptive practical consequences.'").

¹⁷⁰ *Id.* at 2584 (Thomas, J., dissenting); *accord id.* at 2597 (Alito, J., dissenting) ("[T]oday's decision is either an aberration or a license for widespread judicial inquiry into the motivations of Executive Branch officials.").

Herbert Wechsler's words, judicial decisions should rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved."¹⁷¹

For the dissenters, the worst-case scenario is that the majority's decision is based upon general and neutral principles that transcend the immediate result. This scenario would save the decision from unprincipled decision-making but would run squarely into another key tenet of process jurisprudence. There can be no doubt that administrative matters like framing the census are best done by the Executive Branch—not the judiciary. The dissenters were likely worried that the majority opinion would usher in a new era in which the judiciary would constantly be second-guessing the Executive's administrative decisions.

VII. CONCLUSION

Our "irresponsible and unscrupulous" President was a nightmare for those—like the present author—who still believe in process jurisprudence.¹⁷² Hopefully *Trump's* precedential value will be limited to national-security cases. When Chief Justice Roberts called foul in the Census Case, he was not reviewing a national-security decision.

Trump is technically distinguishable from most national-security cases that are likely to arise in the future. Perhaps *Trump* applies only to immigration cases that do not involve the individual rights of one of our citizens or of an alien lawfully present in the United States. On the other hand, if Justice Jackson is right, the majority's action should be read as a simple rubber-stamping of a President's pretended national-security decision. Under this reading of the Court's opinion, the next controversial national-security case will again result in a majority of the Justices blindly accepting a President's decision and perhaps identifying some new set of convenient limiting or distinguishing factors.

The Court's structural incompetence to review national-security actions will significantly enhance the judicial inclination to expand principles to the limits of their logic.¹⁷³ We may safely predict that *Trump* will become an integral part of the government's future defense of all national-security actions. The opinion

¹⁷¹ See *supra* note 20 and accompanying text.

¹⁷² *Korematsu v. United States*, 323 U.S. 214, 248 (1944).

¹⁷³ See *Trump v. Hawaii*, 138 S.Ct. 2392, 2419 (2018).

will lie around “like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of . . . urgent need.”¹⁷⁴ Indeed, the government’s brief in *Trump* argued that the President’s overriding national-security power should extend to domestic action that seems to violate the Constitution.¹⁷⁵

The practical limits of the *Trump* decision are a function of the Court’s willingness to bow before a national-security President. The ultimate problem for the *Trump* majority is how far they should push their entirely legitimate, process-jurisprudence concerns about future Presidents’ constitutional authority. To repeat, the Trump presidency was a nightmare for those of us who still cleave to process jurisprudence.

¹⁷⁴ See *supra* note 132 and accompanying text.

¹⁷⁵ Brief for the Petitioners at 64–65, *Trump*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1050350, at *64–65.