

## YOUNGSTOWN, HAMDAN, AND “INHERENT” EMERGENCY PRESIDENTIAL POLICYMAKING POWERS

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This is form gulping after formlessness . . . .

Wallace Stevens, *The Auroras of Autumn*.<sup>1</sup>

### INTRODUCTION

The doctrine of the *Youngstown* case,<sup>2</sup> increasingly identified with Justice Jackson’s concurring opinion,<sup>3</sup> is an example of law that has been useful, but highly indeterminate, dominated more by its gaps than by its structure, and is likely to be under construction long into the future. The rule-like portions of Jackson’s statements create presumptions that, by themselves, were insufficient to dictate the result in *Youngstown* itself or in many likely future cases. They resemble the partially completed structure of a bridge, narrowing the possible ending points, while leaving open a wide variety of possibilities. It is from this sketchy structure of premises that Jackson jumped, figuratively, over a rather large gap in explicit reasoning, to the conclusion that President Truman lacked power to take action.

To understand *Youngstown*’s likely implications for future cases, it is necessary to speculate, based on inferences from Jackson’s opinion, other opinions in *Youngstown*, and later Supreme Court cases, about

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1. WALLACE STEVENS, *The Auroras of Autumn*, in THE COLLECTED POEMS OF WALLACE STEVENS 411, 411 (1954).

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

3. *Id.* at 634 (Jackson, J., concurring). As for the status of Jackson’s opinion as a de facto majority opinion, widely accepted as a starting place for analyzing the scope of presidential policymaking powers, see *infra* Part II, in which I describe the use made of Jackson’s framework by a majority of Justices in *Hamdan v. Rumsfeld*, who, together, invalidated aspects of the military commission system established by President George W. Bush’s executive order. 126 S. Ct. 2749, 2774 n.23 (2006); *id.* at 2800–01 (Kennedy, J., concurring in part); see also *Dames & Moore v. Regan*, 453 U.S. 654, 661–62, 668–69 (1981) (focusing on Jackson’s *Youngstown* opinion in its analysis of presidential powers). On the wider acceptance of Jackson’s opinion by judges and scholars as the crucial opinion in *Youngstown*, see Adam J. White, *Justice Jackson’s Draft Opinions in The Steel Seizure Cases*, 69 ALB. L. REV. 1107 (2006).

what law is crystallizing in the large interstices of Jackson's framework. The most recent set of opinions that add some concreteness to *Youngstown* are those, together signed by five Justices, which supported the result in *Hamdan v. Rumsfeld*.<sup>4</sup> *Hamdan* considered the validity of various features of the military commission system created by executive order to adjudicate claims to freedom made by detained enemy combatants. Those five Justices read a federal statute to forbid a commission so structured, and thus found that it was beyond the power of the President to authorize.<sup>5</sup>

The central question in *Youngstown* was the lawfulness of President Truman's seizure of steel mills in order to avert a possible materials shortage during the Korean War. Justice Jackson offered a very general framework that has endured, as evidenced most recently by its serving as the analytic starting point for the dispositive opinions in *Hamdan*. His opinion divides the world of presidential actions into three parts: (1) actions authorized by Congress; (2) those neither authorized nor prohibited by Congress; and (3) those prohibited by Congress.<sup>6</sup>

It is the simplicity, malleability, and basic common sense of that framework that has made Jackson's opinion into something resembling a de facto majority opinion. And, to a large extent, the views of the other Justices in *Youngstown* support this emphasis on Jackson's views. Several of the opinions in *Youngstown*, together joined by a majority of the other Justices, including dissenters, suggest agreement with some of the large-scale features of Jackson's views. All of these Justices apparently accepted (1) the absence of a clear answer in the text of the Constitution to many questions of the proper division of powers between Congress and the President, (2) the need for at least some pragmatic flexibility in working out that division, and (3) the importance of attempted statutory authorization or negation in determining the scope of presidential powers.<sup>7</sup>

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4. 126 S. Ct. 2749, 2774 n.23 (2006); *id.* at 2800–01 (Kennedy, J., concurring in part).

5. *Id.* at 2791–93 (majority opinion).

6. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

7. Both Justice Jackson and Justice Frankfurter recognized that some presidential policymaking powers might exist in the absence of statutory authorization, at least in very limited circumstances. Frankfurter recognized both that presidential powers are not completely defined by simple, bright-line rules, and that they are highly dependent on historical context. His formulations in this regard have some flexibility in common with views as emphasized in Jackson's opinion, though they are different in particulars. *Id.* at 596–98, 610–11 (Frankfurter, J., concurring) (suggesting openness to the possibility of temporary emergency powers in the absence of a prohibiting statute or of powers established by long-standing implicit acquiescence of Congress).

Thus the features of Jackson's opinion that make it broadly attractive are precisely those that render it highly indeterminate. Its rule-like portions combine form and formlessness: a clear division into categories, with the significance of inclusion in a particular category substantially unspecified. In *Youngstown*, the content—rules determining the existence and scope of inherent presidential policymaking powers in each of the categories—must be inferred from the circumstances of surrounding doctrine, the structure of *Youngstown* and later cases invoking it, and subtle suggestions in the language of various opinions in those cases. *Hamdan* is such a clarifying case. And yet its lessons, as with *Youngstown* itself, come less from formally articulated rules in the two main opinions than from inferences to be drawn from various observations made by the Justices and from surrounding circumstances.

## I. YOUNGSTOWN

### A. Jackson's Opinion

What Jackson's opinion tells us about the significance of a case's location in his framework is this: in the first set of cases, where presidential powers are authorized by statute, they are at a maximum; in the third, where Congress prohibits such powers, they are at a mini-

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Like Jackson, Frankfurter found a negation, by prior statute, of the powers claimed by the President and thought that it precluded presidential policymaking, at least in a largely domestic sphere. *Id.* at 601–02. Justice Burton, concurring, also stressed the lack of compliance with existing statutory provisions for seizure and noted the absence of a catastrophic situation. *Id.* at 657–60 (Burton, J., concurring). Justice Clark, concurring, concluded that the President must not transgress statutory limits, but that, absent statutory restriction, the President has some power to confront emergencies, depending on their gravity. *Id.* at 662 (Clark, J., concurring).

Unlike the four concurring Justices, the dissenters (Chief Justice Vinson, joined by Justices Reed and Minton) found no express congressional negation of presidential powers to deal with the strike and found support for President Truman's actions in other laws enacted to support the Korean military effort. *Id.* at 668–72, 702 (Vinson, C.J., dissenting). That opinion suggests the existence of presidential power to meet emergencies, at least a temporary power (existing until Congress can itself respond), to preserve existing federal enterprises authorized by statute. *Id.* at 672, 701–03. The dissent also decries the majority's treatment of the President as having no independent authority (metaphorically as Congress's constitutional "messenger-boy") to confront even a grave emergency until Congress can act. *Id.* at 708–09.

Thus, while differing in a number of ways, four concurring Justices and three dissenting ones at the very least leave open the possibility of emergency policymaking powers in some circumstances and at least recognize the potential significance of a congressional negation of such a claimed power. It is in these respects that Jackson's opinion is a majority opinion as to the broad outlines of limits on presidential policymaking power. While not great and specific, the agreement among these concurring and dissenting Justices is far from meaningless.

mum; and in the second, where no statute governs them, they are in some middling state.<sup>8</sup> These are more than statistical predictions made about the likelihood of sustaining any specifically claimed presidential power before examining its particular merits. *Youngstown* and later cases such as *Hamdan* make clear that they are also to be understood as reflecting presumptions of validity or invalidity, depending on whether and to what extent presidential action is in or out of phase with statutory law.<sup>9</sup>

Under judicial interpretations of separation of powers, Congress has now, and had at the time of *Youngstown*, enormous discretion to make statutory delegations of policymaking power to the President and to executive branch officers serving under him.<sup>10</sup> Thus, executive policymaking powers in Jackson's first category, those authorized by statute, rarely will be constitutionally problematic. Invalidity will occur only in circumstances in which (1) such a delegation transgresses the skimpy limits on transferring legislative power, or (2) the power, as transferred, violates some separate doctrine or textual provision of the Constitution, such as other aspects of separation of powers or some provision of the Bill of Rights. Given these doctrinal circumstances, Jackson's statement about the first category is little more than a confirmation of the obvious.

The portions of Jackson's framework that are at all interesting involve his second and third categories. Here, the suggestion is that some presidential powers may exist when they have not been prohibited by statute, and even some may exist despite a statute that attempts to rule them out. Each of his categories is a set of presidential powers, and Jackson never commits absolutely to the second and third sets as having many members.<sup>11</sup>

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8. *Id.* at 635–39 (Jackson, J., concurring).

9. Jackson contrasts the “flexible tests” of the second category with the “severe tests” of the third. *Id.* at 639–40. This contrast suggests that doctrine exists, or will be developed, for determining when presidential action is valid and that such doctrine should strongly disfavor, but not necessarily rule out, presidential action in the third category. This is a doctrinal commitment, though one of uncertain specific content, rather than simply a prediction.

10. Since the late 1930s, the Supreme Court has upheld extremely broad delegations of policymaking power to the executive branch. *See, e.g.,* *Yakus v. United States*, 321 U.S. 414, 420, 426–27 (1944) (allowing an administrator very broad powers to fix maximum prices and rents across wide-ranging parts of the economy); *see also* STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 71 (6th ed. 2006).

11. Jackson does recognize, though, that the Court had found that the power to remove certain executive officials is implicitly vested exclusively in the President. *Youngstown*, 343 U.S. at 638 n.4 (Jackson, J., concurring) (citing *Myers v. United States*, 272 U.S. 52 (1926)).

But this depends on what we count as members. Indeed if we confine discussion to inherent policymaking powers, only vaguely inferable from the constitutional text and structure, Jackson may be read as not committing to the presence of any such powers in the latter two categories. And broad powers, tenuously justified by the vesting of the executive power in the President or by virtue of his position as Commander in Chief are my focus. It is worth recognizing that Jackson never makes a distinction between these latter sorts of power and others in his initial statements creating his tripartite framework of powers of varying presumptive validity.

In those most rule-like passages of his opinion, he simply discusses presidential “powers” or “authority” without further qualification.<sup>12</sup> So, for example, it is possible that he is referring to (1) powers expressly specified, or strongly implied, by constitutional text (e.g., pardon power, power to direct troops as Commander in Chief, and limited control of policy embodied in the veto), as well as to (2) possible inherent powers more vaguely traceable to constitutional text, structure, and history. On this view, then, it is trivially true that there are powers not limitable by statute and that even some of those shape policy (e.g., the presidential veto).

But the interesting questions surrounding *Youngstown* and later cases have always been those of the existence of non-express or inherent presidential policymaking powers not fairly clearly and directly entailed by explicit grants. Justice Black’s opinion in *Youngstown*, formally the majority opinion, alone among all in the case rules these out clearly and completely, at least in some sufficiently domestic sphere.<sup>13</sup> What can we infer from Jackson’s opinion about the actual or probable existence of these sorts of powers?

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12. *Id.* at 635–38. It is later in the opinion that he explicitly addresses so-called “inherent powers.” *Id.* at 649–55.

13. *Id.* at 585, 588–89 (majority opinion). I agree with the views expressed in my colleague Peter Quint’s essay in this Quartet, that it is too simplistic to see *Youngstown* as a purely domestic case, not implicating foreign policy or military affairs. Peter E. Quint, *Silences and Peculiarities of the Hamdan Opinions*, 66 MD. L. REV. 772, 773 (2007). The question is always one of degree of relationship to foreign or military affairs and the significance of each such relationship to the existence of presidential powers. See *infra* note 17. Jackson seems to have found the relationship of the President’s Commander-in-Chief powers and the seizure of the steel mills rather tenuous. See *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring) (“There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.”). So in a real emergency more directly central to a war, perhaps, the calculus of powers would be different. But note that Jackson thought that Congress had great control even over indisputably military affairs: “He has no monopoly of ‘war powers,’ whatever they are.” *Id.* at 644.

Jackson makes clear that *Youngstown* was a third category case, one in which Congress had attempted to negate any presidential power to create and then enforce a seizure policy such as President Truman's.<sup>14</sup> He finds, in the combined implications of several enacted laws, a statutory prohibition of presidential seizure of the mills under the circumstances existing in *Youngstown*.<sup>15</sup> So, presidential power was "at a minimum." From here, Jackson makes the sort of leap to a conclusion that I described at the beginning of this Essay: he finds that no such power existed. Is this because no such power ever exists? Or is it because of unarticulated rules (as he calls them "severe tests")<sup>16</sup> limiting to a small sphere presidential power asserted against statutory restrictions?

From the trajectory of the leap in Jackson's opinion, can we learn anything that suggests unarticulated or developing principles or assumptions that would help determine when presidential powers are likely to exist in the second and third categories? He offers clues, but nothing definitive. After placing *Youngstown* in the third category, he examines several specific textual grants to the President and finds that none of these, either clearly or by reasonable inference, confers such powers on the President. It is fairly clear that, like Black, Jackson would not find that the President has any very general inherent legislative power to make policy, at least in some sufficiently domestic and nonmilitary sphere.<sup>17</sup> So, had Congress never regulated railroads, it is clear that the President could not, by executive order, comprehensively regulate them, at least in the absence of some true emergency, as discussed below. But this is not at all controversial and still leaves

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14. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

15. *Id.* at 639. Other Justices, concurring in *Youngstown*, reach a similar conclusion. And a majority of opinions necessary to the result see some form of congressional negation as significantly reducing the plausibility of presidential claims to power. *See id.* at 602 (Frankfurter, J., concurring) (giving strong, and most likely conclusive, effect to statutory negations of presidential powers); *id.* at 657-59 (Burton, J., concurring) (same); *id.* at 662-63 (Clark, J., concurring) (same). Even the *Youngstown* dissenters recognize the possibility that negations may limit inherent powers in some circumstances. *Id.* at 702 (Vinson, C.J., dissenting).

16. *Id.* at 640 (Jackson, J., concurring).

17. *See supra* note 13 and accompanying text. Emergency policies, like all policies, almost always have some connection, however infinitesimal, middling, or great, with military matters and foreign affairs. At some point, the connection might be seen as sufficiently tenuous to classify the problem as "domestic." Such an approach would arbitrarily mark off a border between domestic affairs and these special areas of presidential concern and apply presumptions of different strength on each side. Another approach would see these considerations on a continuum, on which the connections with military matters and foreign affairs is given whatever (often small, sometimes negligible) weight that it should have in interpolating inherent presidential powers in particular circumstances.

emergency powers to be considered. Yet even as to these, Jackson is not a devotee: "Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction."<sup>18</sup>

But, examined more closely, what he rejects most clearly are "inherent and unrestricted" emergency powers.<sup>19</sup> And given his premises, his objection might be limited to the exertion of emergency powers at a time when Congress is available to deal with the emergency by means of a law presented to the President. At one point Jackson says: "*In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute.*"<sup>20</sup>

Perhaps the opening qualification about Congress's availability has real significance. One can read this passage as open to the possibility of emergency powers in the second category where statutes neither authorize nor forbid a particular emergency policy. What if Congress itself were closed by an emergency, a state of affairs that seems less than fanciful today in a world of nuclear proliferation and biological warfare? And what of the analogous, but much shorter time frame, in an extreme crisis when a generally functioning Congress may take days to deal with a matter that can become critical in hours, perhaps minutes.

Let us imagine a temporary bird flu quarantine imposed by a President until Congress can pass legislation, under circumstances where no preexisting statutory framework exists. One can read Jackson as at least open to the possibility of such inherent powers through a possible negative implication in the passage of his opinion quoted immediately above. And certainly other Justices in *Youngstown* are open to this possibility.<sup>21</sup>

In times of emergency, a functioning Congress might reasonably be seen as a critical, limiting assumption of the usual division and sharing of responsibility between the President and the legislative process, a division that normally requires legislative policymaking and presidential supervision of its execution within his branch. Recogniz-

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18. *Youngstown*, 343 U.S. at 653 (Jackson, J. concurring).

19. *Id.* at 647 (emphasis added).

20. *Id.* at 653 (emphasis added). "Without statute" suggests that Jackson might well rule out such powers in cases resembling *Youngstown* and in many others, even in his second category, in which relevant statutes are silent.

21. See *supra* note 7 and accompanying text.

ing an emergency exception to this usual division of powers is within the more permissive reading of Jackson's opinion. Alternatively, of course, one may read Jackson as completely rejecting all emergency inherent powers fairly characterized as domestic and nonmilitary.

Let us first consider the latter, the strictest reading of Jackson. On this view, without statutory authorization, presidential policymaking powers are at a minimum because they are entirely limited to the more explicit ones granted in the Constitution. So the pardon power is in the third category, and even there, it would survive attempted statutory negation. And many decisions of the Commander in Chief need no advance authorization, though it is possible that some might be negated by statute. On this second reading of Jackson, in order to be constitutional, any sort of policymaking initiative, even in the gravest emergency, must be made by an executive officer acting under some authority that Congress has delegated. In such dire situations, a President's best decision may be an unconstitutional one made in the hope of a later statutory ratification. And at times Jackson's opinion tends strongly toward this strict view. At one point he says: "The Executive, except for recommendation and veto, has no legislative power."<sup>22</sup>

On the surface, this alone might seem enough to decide *Youngstown*. But I think that Jackson's opinion is more one of ambivalence, occasionally approaching contradiction, than one of resolution.<sup>23</sup> If he had relied on this point, his opinion would have been functionally identical to Justice Black's in crucial respects; the absence of statutory authority would decisively rule out presidential policymaking authority. There would have been no need to find statutory negation.

Jackson's opinion seems much more elaborate and open-textured than it would be were he absolutely sure that there are no presidential powers to initiate domestic policy save pursuant to statutory delegation. And his previously mentioned reference to Congress's availability to deal with any emergency suggests that he might be open to the first, much more permissive, of the two possibilities just discussed—that of special presidential powers for emergencies. And so Jackson's ambiguity (reflecting, I think, his ambivalence) leaves us with a range of possible readings of his opinion.

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

23. On this view, Jackson's opinion was in a sense simply the latest and best draft of his not completely gelled ideas published out of necessity, in a line of prior evolving drafts. See White, *supra* note 3, at 1123–26, 1133.



B. *Some Initial Thoughts About Emergency Powers*

But, even if we resolve Jackson's opinion to deny emergency powers, it does not definitively decide these questions, not even were we to treat it as the opinion of the Court to be followed until overruled. Today a court would have to reconsider these matters seriously, giving Jackson's, and other *Youngstown* opinions, whatever weight they warrant as to a situation not before the Justices at that time—an emergency that made timely congressional response impossible. One problem is *INS v. Chadha*.<sup>24</sup> Under its rules, as they apparently would extend to this scenario of legislative capacity lost then regained, a negation of emergency powers would have to take the form of a full-blown statute, meaning it would take a two-thirds vote of both houses to override such emergency powers, except in the unlikely circumstances in which a President signed a law limiting his own powers. This could unbalance the normal separation of powers long after an emergency. It would impart, to any prudentially necessary, “temporary” President-made policy, a momentum that would be hard for Congress to resist long after its justification expired.

As a counter to this drawback of reading into the Constitution short-term presidential emergency policymaking powers, there are two possibilities (not mutually exclusive) that would deprive Congress of no more of its ordinary control, by a majority vote of both houses, than is necessary to deal with an emergency while it exists. First, any inherent power would expire with the end of the emergency, a fact that could be left ultimately to the courts. Consequently, there would be no powers to negate outside of the emergency, during its existence, or at all, after its termination.

Second, *Chadha* might be seen as not applying to this very special constitutional situation in which the President is permitted legislative power without an approval of the House and Senate as part of the legislative process. Perhaps to the extent that the President can act on his own in an emergency to which Congress cannot respond, then a functioning Congress should be able to terminate that power via a concurrent resolution, which is subject to no presidential veto.

Arguably, part of the justification for rejecting the legislative veto as an illegitimate ex post check on the scope of the executive action in *Chadha* was the existence of an ex ante legislative check. This took the

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24. 462 U.S. 919, 952–59 (1983) (concluding that the Constitution generally forbids the House and the Senate, either separately or together (but without presentment to the President for signing or veto), to alter legal rights, duties, and the content of law generally).

form of Congress's fashioning the limits of the statute that authorized the executive action involved in *Chadha*. Hence the form, if not the true substance, of most executive action of a policymaking sort (to take the clearest example, administrative rulemaking) was seen as that of execution of the law, the law providing the authority.<sup>25</sup> But, our present concern is with statutorily unauthorized presidential policymaking powers. As to such powers, by hypothesis, the President is acting solely on his own asserted constitutional authority. Thus he is not executing a statutory delegation which would necessarily be limited in ways prescribed by Congress in advance of his action. And so, even if one agrees with Chief Justice Burger's formalistic arguments (and I do not), they seem not to speak to the best reading of the terms on which presidential emergency power should be interpolated from the Constitution alone.

In such circumstances, it seems to me that there is room to interpolate a compensating power of congressional (not statutory) veto. As to these inherent presidential powers, often only an ex post check is practically possible. So perhaps *Chadha* should be clarified and limited so as not to extend to ex post two-house negations of these sorts of powers. It seems natural to view the law of emergency presidential powers as much more focused on necessity and interbranch balance, rather than on the meaning of any particular piece of text. A constitutional calculus of checks seems an entirely appropriate consideration in the Court's inevitable choice of the shape of this sort of textually underdetermined law.

Let us now consider the recent *Hamdan* opinion which applies *Youngstown* to strike certain aspects of President Bush's military commission plan for the trials of enemy combatants. To what extent does *Hamdan* offer further guidance as to inherent presidential powers and as to the significance of a military context or emergency context to their existence and scope? While *Hamdan* did not consider a legislature-incapacitating emergency, some of its language might be seen as indicating openness on this score.

## II. *HAMDAN*

### A. *Youngstown in Hamdan*

The two opinions that are, together, signed by five Justices supporting the result in *Hamdan v. Rumsfeld* resolve the case based on

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25. *Id.* at 953–54 n.16 (arguing that legislative-style action by executive officers, authorized by statute, should be seen as execution of the law and not as legislation).

Justice Jackson's *Youngstown* framework.<sup>26</sup> This is most clear in Justice Kennedy's concurring opinion, joined by Justices Souter, Ginsburg, and Breyer, which explicitly invokes, and then applies, Jackson's framework in resolving the case. These Justices interpret two federal statutory provisions to prohibit several features of the military commission plan devised and deployed by President Bush. This conclusion places *Hamdan* in "Justice Jackson's third category, not the second or first."<sup>27</sup> Consequently, the jumping off point (to continue the metaphor of an incomplete bridge that started this Essay) is the assumption of these four Justices that the President's power is at a minimum.

Most of the other dispositive opinion, by Justice Stevens, was the majority opinion, which was signed as well by Justices Kennedy, Souter, Ginsburg, and Breyer. In Stevens's opinion, all five of these Justices voted to strike certain portions of the military commission structure.<sup>28</sup> That opinion, if not expressly, then almost as clearly, deploys Justice Jackson's analysis. *Youngstown* is referred to only in a footnote, but the note makes reference to Jackson's opinion and says: "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in *proper* exercise of its own war powers, placed on his powers. The Government does not argue otherwise."<sup>29</sup>

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26. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006); *id.* at 2800–01 (Kennedy, J., concurring in part).

27. *Id.* at 2800–02, 2807–08 (Kennedy, J., concurring in part).

28. *Id.* at 2792–93, 2798 (majority opinion). Justice Kennedy further elaborated on this reasoning in his concurrence:

These structural differences between the military commissions and courts-martial—the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress—remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.

*Id.* at 2807 (Kennedy, J., concurring in part). Justice Kennedy did not join parts of Justice Stevens's opinion. He refused to decide the constitutionality of certain issues that were resolved against the Bush Administration by Stevens and by the Justices joining Parts I and II of Kennedy's concurrence. Compare *id.* at 2775–86, 2797–98 (majority opinion), with *id.* at 2800–01, 2808–09 (Kennedy, J., concurring in part).

29. *Id.* at 2774 n.23 (majority opinion) (citation omitted) (emphasis added) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

Justice Stevens's opinion then proceeds to find various features of the commissions' structure unconstitutional, relying strongly on conclusions that two provisions of a federal statute prohibit them.<sup>30</sup> Thus his opinion implicitly, but clearly, deploys Jackson's general framework, giving powerful negative significance to statutory negation. And recall that the four Justices who join Stevens's opinion explicitly endorse *Youngstown* as the governing framework in Justice Kennedy's concurrence, which expressly invokes *Youngstown*.

But the qualifier in the passage from Stevens's opinion appearing immediately above—that Congress can negate presidential military power “in *proper* exercise of its own war powers”—leaves open when a limitation is “proper,” or to phrase it differently, it leaves open just when a claimed presidential power is negatable by statute and when a President's power is insulated even from statutory limitation. Stevens finds that the presidential actions that he invalidates in *Hamdan* have no constitutional support in the teeth of a statute prohibiting them.<sup>31</sup> As with Jackson's *Youngstown* opinion, we are left to guess about other circumstances and other cases. What, if any, presidential policymaking powers would survive a statute that is read by the Court to prohibit them? How will the line be drawn in future cases between powers that can be negated and those, if any, that cannot? Neither Stevens nor Kennedy provide guidelines, but they do provide clues worth exploring below.

Justice Kennedy's disagreement is solely as to the necessity of finding unconstitutional some, but not all, of the features that would be struck under Stevens's opinion.<sup>32</sup> As to the power of Congress, by statute, to control many of the features of the commission system, Kennedy agrees that “[t]he [Uniform Code of Military Justice] conditions the President's use of military commissions on compliance [with a variety of requirements]. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.”<sup>33</sup>

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30. *Id.* at 2779–80, 2785–86 (concluding that the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946 (2000), prohibits commission trial of a conspiracy charge through its incorporation of the law of war); *id.* at 2786–93, 2798 (concluding that some of the procedures and structural features of the commissions, as constituted by executive order, are inconsistent with the UCMJ).

31. *Id.* at 2786, 2791–92.

32. *Id.* at 2808–09 (Kennedy, J., concurring in part). Justices Souter, Breyer, and Ginsburg do not join this part, Part III, of Justice Kennedy's opinion. *Id.* at 2799.

33. *Id.* at 2786 (majority opinion) (citations omitted). This portion of Stevens's opinion was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Compare:

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§ 836 and 821 of the

Thus all five Justices agree with a Jacksonian method of analysis that places great weight on congressional negation of inherent policymaking powers claimed by a President. From this common doctrinal assumption, they leap to the joint conclusion that several features of the commission plan are constitutionally flawed. In this respect they resemble *Youngstown* itself. No algorithm is given for determining the President's "minimal" policy-initiating powers that survive a statutory negation. Perhaps they are so minimal as to be non-existent, the few powers surviving a negation being those given expressly by constitutional text, such as the pardon power.

But is it possible that such inherent policymaking powers are few, rather than nonexistent, and that the powers exercised as to the commissions simply are not among the few? While no clear formula is given for sorting out cases, there are suggestions in the Stevens and Kennedy opinions that might be seen as narrowing the analytical gap between placement of a presidential power in the third category and a finding that its exercise is unconstitutional. Let us focus on clues as to two matters: first, the significance of a military context to the validity of inherent powers and second, indications in the opinion of a possible openness to inherent powers for especially compelling emergencies.

*B. What Hamdan Suggests About the Significance of a Military Context to Application of Jackson's Framework*

A crude, but useful, first cut at understanding *Youngstown* might see it as indicating that, even if its framework applies to presidential actions directly connected with military and foreign affairs, the skepticism of inherent presidential powers suggested by the language and results of various opinions may be lessened in such areas.<sup>34</sup> At one point Jackson says: "There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants."<sup>35</sup> This suggests stringent limits on presidential regulation of nonmilitary activities within the United

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UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

*Id.* at 2808 (Kennedy, J., concurring in part).

34. See *supra* note 13 and accompanying text.

35. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952).

States, even if somewhat in furtherance of congressionally approved American military efforts abroad.

*Hamdan* displays a similar skepticism of a President's ability to ignore statutes that more directly implicate military operations. Portions of Justice Stevens's opinion, concurred in by four Justices including Justice Kennedy, make clear Congress's dominance of policymaking in basic division of powers even as to matters centrally concerning the military:

The Constitution makes the President the "Commander in Chief" of the Armed Forces, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," to "raise and support Armies," to "define and punish . . . Offences against the Law of Nations," and "To make Rules for the Government and Regulation of the land and naval Forces."<sup>36</sup>

Especially powerful is the very next passage from Stevens's *Hamdan* opinion, which approvingly quotes Chief Justice Chase's opinion in *Ex parte Milligan*:<sup>37</sup>

*The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.*<sup>38</sup>

Together, these passages seem a rebuke, however softly worded, to the Bush Administration's broad and tenuous claims of power to make policy after September 11, 2001, with little or no statutory au-

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36. *Hamdan*, 126 S. Ct. at 2773 (citations omitted). Jackson makes a similar point in *Youngstown*, though not in a majority opinion: "He has no monopoly of 'war powers,' whatever they are." *Youngstown*, 343 U.S. at 644.

37. 71 U.S. (4 Wall.) 2 (1866).

38. *Hamdan*, 126 S. Ct. at 2773-74 (alteration in original) (emphasis added) (internal quotation marks omitted) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139-40 (Chase, C.J., concurring)).

thority or even in apparent tension with acts of Congress.<sup>39</sup> Certainly they suggest the existence of little or no general presidential authority over military affairs in the teeth of a statute to the contrary. The arguable exception, once again, is an especially compelling emergency, which is what I take a “controlling necessity” to mean in the passage from *Ex parte Milligan* quoted immediately above. Perhaps such an exception may exist and extend beyond the battlefield in truly unusual circumstances.

Justice Breyer’s opinion for four Justices also strongly suggests both that, even as to military affairs, policymaking is almost always for Congress, but also that there might be an exception for emergencies. It too seems aimed at offering the executive a strong reminder of Congress’s role:

Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

*Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.*<sup>40</sup>

### III. SOME ADDITIONAL THOUGHTS CONCERNING TRUE EMERGENCY POWERS, EX ANTE STATUTORY NEGATION, AND STATUTORY INTERPRETATION

As my colleague Professor Singer has elaborated in her essay, constitutional concerns about presidential powers under *Youngstown* tend to be displaced and transformed into arguments about whether particular instances of presidential action are authorized by statute.<sup>41</sup> Reading a statute to provide authorization for a presidential action moves any such action into Jackson’s first category, making it the beneficiary of a strong presumption of constitutionality. And, as always, a Justice who finds a policy wise under particular circumstances, is more likely

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39. See, e.g., Harold Hongju Koh, Setting The World Right, 115 YALE L.J. 2350, 2355–56, 2367 (2006).

40. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (emphasis added).

41. Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 759–61 (2007).

to find it authorized by an ambiguous statute that generally addresses those circumstances and clearly confers some powers to make policy.

My focus here remains emergencies that must be dealt with in some way before Congress can act.<sup>42</sup> As should be apparent from earlier parts of this Essay, I believe that such very limited presidential powers should be recognized, but also limited by judicial review of the scope and termination of the emergency and hence of the limits of the power. I take this position with some reluctance in light of what I believe have been the abuses of the Bush Administration and the great concern that they naturally cause.<sup>43</sup> But unless one's views of the separation of powers validly vary from administration to administration (depending on one's views of their policies, ethics, and competence) one must take a longer, if not eternal view. Let me attempt to take such a longer view. It seems to me that a grave emergency, which would otherwise occur in a power vacuum, must be met. It would be better to recognize the constitutionality of the President's doing so, rather than simply offer hope of ex post ratification by statute.<sup>44</sup> Under the more rigid view, action by Congress is always required. Under the former view, a greater presidential flexibility is recognized and controlled by collaboration between Congress and the courts.

This suggests to me one last possibility worth exploring. Perhaps an ex ante statutory prohibition should not always be an effective negation of emergency powers even though an ex post negation should be decisive. There are a variety of reasons for considering this possibility. Such reasons stem from the fact that, by definition, such emergency powers would last only during that time when the legislature is not able to deliberate—specifically to change its “mind”—as such an emergency unfolds in detail. There are two elements to the rest of the argument. First, any statutory description of what is prohibited must be more general than any full description of a particular emergency. In responding to this problem one might resort to flexible statutory

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42. “Must” masks the necessity of making many judgments and of much balancing. At some point the costs of waiting for statutory authorization simply become too great. I believe that, ultimately, the Supreme Court should make this judgment in each case, giving whatever weight to various judgments made by other branches as to whether an emergency ever existed, whether it continues, and if so, its scope.

43. To paraphrase Justice Jackson writing in another context, documenting my views on this subject either has no beginning or virtually no ending. My conclusions rest on what I see as irresponsible actions and rhetoric, including misplanning for and conduct of the war in Iraq, and a lack of regard for human rights and traditional values of American constitutional government. On this, I offer one article in a sea of thoughtful statements. See Koh, *supra* note 39.

44. For an example of an effective ratification of presidential action assumed, *arguendo*, to be unauthorized, see *The Prize Cases*, 67 U.S. (2 Black) 635, 670–71 (1863).



interpretation to argue that what the statute prohibits does not contemplate this particular emergency, even though the latter meets the statutory description in very general terms.

But there is a more fundamental point. Even if one assumes that the statute was meant to prohibit just this sort of presidential action in just this sort of emergency, the legislative decision was made as an abstraction when the emergency was not real. If one sees the ability of a legislature to change its “mind” (whose “mind,” I note, is differently constituted as members come and go) as key to a proper negation, then for negations for emergencies that must be met before Congress can act, there is a strong and interesting argument that negations must be *ex post*.<sup>45</sup> Of course in reviewing any such asserted presidential emergency power, a preexisting statute that seems aimed at negating certain powers in future situations would not be irrelevant, even under the view we are considering. Often it might have real weight, as a political branch input, on the question of whether a situation before the court is a grave emergency that cannot await congressional action. But weight is different from conclusiveness. And I believe there are strong arguments that such statutes should not be conclusive.

#### CONCLUSION

Catastrophic emergencies aside, perhaps the “formless” qualities of *Youngstown* are in the process of taking on more shape. Given the balance of current Justices’ views, it appears that, not only must the President make policy domestically in accordance with statutory law, but also that most of the rules governing the military are subject to the same statutory control. The tradition of civilian control of the military seems, at the level of constitutional law, to have the corollary of control by the most widely democratic process—the legislative process.<sup>46</sup> Perhaps foreign affairs remains an area with yet unexplored spaces for inherent presidential policymaking, and perhaps that area has space for some actions not subject to negation by statute. As for cata-

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45. Some support for this position might be found in the *Youngstown* dissent. Chief Justice Vinson cites *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), as a case approving presidential emergency policymaking, though contrary to an express prior statute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 703 (1952) (Vinson, C.J., dissenting). Justice Frankfurter had a very different view of *Midwest*. *Id.* at 611–12 (Frankfurter, J., concurring). And there are other readings of *Midwest* that would read the “prior statute” as not negating the power exercised by the President that was the focus of *Midwest*.

If I am inclined to agree with Vinson on the larger point—that some emergency powers cannot be negated in advance—I am not inclined to agree with his view that *Midwest* presented the sort of emergency as to which a prior prohibition should be ineffective.

46. Quint, *supra* note 13, at 775–76.

strophic emergencies—those in which, for a while, effective control by legislation is impossible—the Constitution should be read realistically to permit action by the President, but also to provide an effective system of post-emergency congressional and judicial checks.