Youngstown’s Fourth Tier. Is There Zone of Insight Beyond the Zone of Twilight?

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YOUNGSTOWN’S FOURTH TIER
IS THERE ZONE OF INSIGHT BEYOND THE ZONE OF TWILIGHT?
Elizabeth Bahr and Josh Blackman

INTRODUCTION

From Rasul\(^1\) to Boumediene,\(^2\) professors and practitioners alike have deeply probed nearly every aspect of these significant national security cases. Many of these articles have considered how the Court has applied Justice Jackson’s seminal framework from Youngstown. In Youngstown, Justice Jackson established a three-tiered framework to analyze separation of powers issues.\(^3\) However, a glaring lacuna in the literature prevails. Examining national security and separation of powers cases that have employed the flexible and functionalist Youngstown framework yields a curious, and previously unidentified revelation. This article addresses this irregularity, and explains how in fact the Supreme Court has adopted an implied fourth tier of Youngstown.

Tier 1 involved a situation where “the President acts pursuant to an express or implied authorization of Congress, [bringing] his authority [to] . . . its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”\(^4\) Tier 2 was considered a “zone of twilight”, where the President acts in absence of either a congressional grant or denial of authority, [and] he can only rely upon his own independent powers . . . .”\(^5\) Tier 3 to Jackson was when the “President takes measures incompatible with the expressed or implied will of Congress,” and it is in Tier 3 where the President’s “power is at its lowest ebb, for then he can

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\(^3\) See infra Part II.C.
\(^4\) Id. at 637 (Jackson, J., concurring).
\(^5\) Id.
rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” 6 The Youngstown framework, as evidenced by the confirmation testimony of Chief Justice Roberts, Justice Alito, and most recently Justice Sotomayor, still serves as the definitive approach to resolving separation of powers and national security law controversies. 7

In some cases, the Supreme Court ostensibly applied the Youngstown framework, yet the Court’s analysis cannot be reasonably pigeonholed into one of the three tiers. This Article contends that the Court has implicitly recognized a fourth tier. In Tier 4, the separation of powers tension is not between the Executive and the Legislative branch, but between the Executive and the Judicial branch. In this tier, the Court, and not the legislature, is forced to determine the legal scope of the President’s unenumerated Article II powers.

Defining the scope of the President’s unenumerated Article II powers could potentially straightjacket the President’s Commander in Chief power during future conflicts. In order to avoid this perilous precedent, the Court has employed an implicit fourth tier. Beyond the zone of twilight, is the zone of insight.

The zone of insight reflects the Court’s pragmatic and functionalist approach to discern the true nature of the situation, and perceive and penetrate the issue in an intuitive manner, rather than clinging to a formalistic approach. The Court’s zone of insight into these cases embodies the pinnacle of judicial functionalism. This article explores this fourth tier, and explains how the Supreme Court balances formalist methods with functionalist needs.

Part I of this paper briefly introduces two competing schools of jurisprudential thought; formalism and functionalism. The distance from a formalist to a functionalistic jurisprudence represents an essential building block of Tier 4. Part II analyzes Youngstown through both

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6 Id. at 638 (Jackson, J., concurring).
7 See infra Part III.C.
formalistic and functionalistic lenses, and highlights how these prisms separately influenced the majority opinion of Justice Black and the more widely cited concurring opinion of Justice Jackson.

Part III continues the analysis from both Parts I and II, and discusses the influence of formalism and functionalism in separation of powers and national security law. By analyzing the strengths and weaknesses of both formalism and functionalism as presented in separation of powers cases, Part III elucidates why it was inevitable that Justice Jackson’s functionalist and pragmatic concurring opinion in *Youngstown* prevailed as the most popular judicial prism through which courts dissect and analyze national security-related separation of powers issues.

Parts IV and V undertake an analysis of the major separation of power cases the Supreme Court has decided since the 1952 *Youngstown* decision that have either explicitly or implicitly applied Justice Jackson’s three-tiered *Youngstown* framework. Since 1952, two types of *Youngstown* cases have emerged. In the first category are those cases that fit neatly within the three-tiered framework. In the second category are those cases that must employ a fourth tier, the zone of insight, in order to assess the limits of executive authority. Several of the Guantanamo Detention cases reside in this realm.

By thoroughly examining not only the published opinions, but also the appellate briefs of the petitioners and respondents, as well as any related amicus briefs or applicable legislative history, Parts IV and V expose the necessarily pragmatic nature of a functionalist method of judicial review. However, these Parts also reveal the benefit to a functionalist framework over a more formalist framework. With a functionalist approach, the Court avoids the risk of judicial overreaching is avoided. Further, the precise scope of the President’s Article II powers continue
to remain undefined, and thus, unimpeded by judicial precedent and available for future use should the national security of the United States ever require them.

I. FORMALISM AND FUNCTIONALISM: DIVERGING SCHOOLS OF JURISPRUDENTIAL THOUGHT

It is important to understand the doctrinal differences between legal formalism and legal functionalism. By assessing the strengths and weaknesses of each judicial philosophy, one can better understand why a judge employs either philosophy. However, this same analysis also sheds light on why it is that in national security-related separation of power issues, a judge—regardless of his usual philosophical predispositions—may prefer to employ a more functionalist analysis to assess the constitutional scope of the powers of the three branches of government.

A. Formalism

Legal formalism postulates that law is intelligible as an internally coherent phenomenon. Legal formalism, according to Professor Weinrib’s philosophical perspective, reflects “law’s most abiding aspiration: to be an immanently intelligible normative practice.” Professor Unger, a leader of the Critical Legal Studies movement, and an avowed critic of legal formalism, argues that formalism advocates for (1) “a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life”; (2) is based on the “claim that the content of law is elaborated from within”; and (3) the materials used to conduct legal analyses

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8 Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law 97 YALE L.J. 949, 951, 1015 (1988) (“In claiming that that answer is wrong, formalism gives voice to the most ancient aspirations of natural law theorizing by construing the law as permeated by reason.”).
9 Ernest J. Weinrib, The Jurisprudence Of Legal Formalism, 16 HARV. J.L. & PUB. POL’Y 583 (1993). See also, Lawrence B. Solum, The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, And The Future Of Unenumerated Rights, 9 U. PA. J. CONST. L. 155, 170 (2006) (legal formalism sees the “law (constitutions, statutes, regulations, and precedent) [as] provid[ing] rules and that these rules can, do, and should provide a public standard for what is lawful (or not)”; Weinrib, supra note 8, at 957 (“The function of law for the formalist is to express this immanent rationality in the doctrines, institutions, and decisions of the positive law.”).
11 Id.
“display, though always imperfectly, an intelligible moral order.”

At a broad level, legal formalism adopts several aphorisms. First, judges should apply the law as it exists, and not make it up. Second, legal rules exist that constrain what judges can and cannot lawfully do. Third, following the law is not the same thing as doing what you think will result in the best outcome. And fourth, that judges should resolve cases based on the controlling authority or precedent. To many formalists, following the constitutional separation of powers is an essential way to “ensure that liberty survives.” Formalism is also concerned with predictability, and yielding easy-to-follow bright-line rules. This approach, either intentionally or incidentally, inhibits and cabins a judge’s discretion.

With respect to separation of powers, formalism requires a commitment to the text of the Constitution to justify governmental action. Essential to this approach is that the literal text of the Constitution, and not the specific circumstances of the issue at hand, dictate the outcome. Formalism “insists upon a firm textual basis in the Constitution for any governmental act.”

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12 Id. at 565. Weinrib, supra note 8, at 955 (Formalism embodies an “immanent moral rationality,” in that “juridical content can somehow sustain itself from within.”). See also Lawrence B. Solum, The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, And The Future Of Unenumerated Rights, 9 U. Pa. J. Const. L. 155, 174-76 (2006).
14 See generally Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 Colum. L. Rev. 359 (1975).
16 Scott Altman, Beyond Candor, 89 MICH. L. REV. 296, 311 (1990) (“[A judge] differs from Houdini, however, both because she feels obligated to follow the law when she thinks it wrong, and because she feels obligated candidly to offer the reasons that convince her. An activist judge might believe that the goal of judging is to do what is best for the world in every case, and that she must consult her own moral vision in order to do so. Like Houdini, she does not have the goal of trying to follow law.”).
18 Rebecca L. Brown, Separated Powers And Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1525 (1991). See Morrison v. Olson, 487 U.S. at 710-11 (Scalia, J., dissenting) (arguing that separation of powers operates to “ensure that we do not lose liberty”); INS v. Chadha, 462 U.S. at 959 (“we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution”).
19 Brown, supra note 18, at 1525.
20 Id.
21 Brown, supra note 18, at 1523.
22 See Bowsher v. Synar, 478 U.S. 714, 736 (1986) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”) (quoting Chadha, 462 U.S. at 944).
approach seeks to “maintain[] clear constitutional roles for the branches of government.” Following the tripartite structure of government, formalists seek to delineate the contours between Article I, Article II, and Article III, and ensure that the actions of one branch do not encroach on the authority of a concomitant branch. A formalistic view of separation of powers requires the underlying presumption that the powers of the legislative, executive, and judicial branch are “inherently distinguishable as well as separable from one another.”

B. Functionalism

Legal Functionalism, also known as pragmatism, realism, or instrumentalism, is quite distinct from legal formalism. Oliver Wendell Holmes, Jr. is widely credited with first announcing the pragmatic approach to law in the opening sentence of his seminal *The Common Law*. Holmes eschewed the classical formalist approach of resolving problems by resource to process or logical syllogisms, but rather felt that judges in tough cases consider the social and economic consequences of their decisions.

In contrast to the non-political, immanent nature of formalism, according to the functionalist view, “law is regarded as an instrument for forwarding some independently desirable purpose given to it from the outside.” With respect to following precedent, the pragmatic judge “wants to come up with the best decision having in mind present and future

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26 Oliver W. Holmes, *The Common Law* 1 (1881) (“The life of the law has not been logic; it has been experience.”); *See also* id. at 5 (“the common law evolves through a process of rerationalization”).

27 Oliver W. Holmes, “Ideals and Doubts,” in Holmes, *Collected Legal Papers*, 303, 306 (1920) (“to rest upon a formula is a slumber that prolonged, means death.”).


29 Weinrib, *supra* note 8, at 955.
needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case.”

The modern-day patriarch of the functionalist movement is Seventh Circuit Judge Posner, who has restyled the philosophy as “pragmatism.” Pragmatism, according to Judge Posner, “refers to basing judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of syllogism.” Pragmatism is not “results oriented,” in that the judge will decide a case solely based on a desired outcome, but rather the judge will merely consider “systemic, including institutional, consequences as well as consequences of the decision in the case at hand.” This approach considers traditional legal formalist reasoning as a mere “fig leaf,” and focuses on the consequences of choosing one outcome over another.

In the context of separation of powers, functionalism is premised on the notion that the contours between the three branches are not clearly defined. The core tenant of functionalism is to grant the court latitude and discretion in deciding difficult constitutional issues. Inherent in this functionalist choice is assigning a value to different constitutional interests, and deciding to what extent changed circumstances should affect the determination at hand. Functionalism, in contrast to formalism, recognizes the need for flexibility in government, and permits a fluid

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32 Posner, supra note 29, at 40. Another leading pragmatist is Justice Steven Breyer, whom Judge Posner critically characterized as a bricoleur, which is a person who uses “the instruments he finds at his disposition around him, . . . which had not been especially conceived with an eye to the operation for which they are to be used and to which one tries by trial and error to adapt them, not hesitating to change them whenever it appears necessary.” Id. at 341.


34 Id. at 238. (“The core of legal pragmatism is pragmatic adjudication, and its core is heightened judicial concern for consequences [] rather than on conceptualisms and generalities.”)

35 Brown, supra note 18, at 1528.

exchange of responsibilities between the branches so long as this sharing does not “interfere[]
with the core functions of another” branch.\footnote{Brown, supra note 18, at 1527 (1991) (noting that functionalism grants the courts more discretion to resolve cases between the different branches of government).}

Formalism, more often than not, will strike down the action in question.\footnote{See, e.g., Bowsher, 478 U.S. 714; Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Youngstown Sheet, 343 U.S. 579; Myers v. United States, 272 U.S. 52 (1926).} In contrast, because functionalism is much more flexible, a judge applying this tact can find a way to uphold the challenged action.\footnote{See, e.g., Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).} “The activism of functionalism resides in the unguided discretion that it necessarily bestows on judges.”\footnote{Brown, supra note 18, at 1528.} Furthermore, in many respects, a functionalist approach toward the executive and legislative branch yields a strong form of judicial restraint, and delegates the responsibility of obeying the Constitution to the choices of the elected branches.\footnote{Brown, supra note 18, at 1529.}

\section*{II. \textit{Youngstown} Analyzed: Justice Black’s Formalist v. Justice Jackson’s Functional Approach}

On April 8, 1952, in the midst of the Korean War, President Truman issued Executive Order No. 10,340, ordering Thomas Sawyer, the Secretary of Commerce, to seize most of America’s steel mills to prevent a threatened strike by the United Steelworkers of America. Truman feared that this strike would cripple the war effort in Korea.\footnote{See \textit{Youngstown}, 343 U.S. at 589-92 (noting that the President ordered the seizure “by virtue of the authority vested in [him] by the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States”).} To justify this seizure, President Truman cited his inherent executive authority\footnote{U.S. Const. art. II, § 1. “The executive Power shall be vested in a President of the United States of America.”} under the vesting clause,\footnote{U.S. Const., art. II, § 3 “The president “shall take Care that the Laws be faithfully executed.”} the “take care” clause,\footnote{U.S. CONST. art. II, § 2. President “shall be the Commander in Chief of the Army and Navy of the United States.”} and the “commander in chief” clause, and argued that Congress did not need to be involved in the decision making process.
Once this issue came before the Supreme Court, Justice Black insisted that neither the statute in question nor the constitution supported the President’s action, and that President Truman’s executive order did not comply with the conditions of the legislation that permitted executive seizures of private property. Justice Black also rejected President Truman’s claimed inherent executive power, noting that the constitution delegated the power to seize a steel mill to the legislative branch. Although the six Justices in the majority did not agree on a single rationale, the Court held that President Truman’s executive order to unilaterally seize the mills without Congressional involvement constituted an unconstitutional violation of separation of powers. Justice Black wrote for the Court, and Justices Frankfurter, Douglas, Clark, Burton, and Jackson wrote concurring opinions. Justices Vinson, Reed, and Minton dissented.

The diverse opinions in Youngstown present a prototypical clash between formalism and functionalism. Justice Black’s opinion was a clear formalist opinion. The concurring opinions of Frankfurter, Jackson, Burton, and Clark “offered a less stark formalism than Justice Black’s.” Despite the varied approaches, the Court designated Justice Black’s opinion as the opinion of the Court. Ostensibly, Justice Black’s opinion was joined by Justice Jackson, Justice Burton, and Justice Douglas. Justice Frankfurter “join[ed]” Justice Black’s opinion, despite the formalist’s inflexible approach. Justice Clark concurred in judgment only. In light of the numerous opinions providing seemingly dissimilar rationales, “the Youngstown majority cannot be said to have wholeheartedly adopted Justice Black’s formalist separation of powers account, and his

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47 Id. at 585-86.
48 See id. at 587-89.
49 Youngstown, 343 U.S. at 587-89.
50 Fitzgerald, supra note 24, at fn 28.
51 Youngstown, 343 U.S. at 634.
52 Id.
53 Id. at 655.
54 Id. at 629.
55 Id. at 589.
56 Id. at 660.
version of formalism cannot, alone, explain the *Youngstown* outcome.” 57 This case represents a “contrast between exclusive reliance on the canonical Constitution and broader attention to other constitutive sources.” 58

A. *Justice Black’s Formalist Analysis*

Justice Jackson’s opinion, despite its prominence, was but a concurring opinion. 59 The majority opinion in *Youngstown* written by Justice Black, employed a formalistic judicial philosophy. Black held that the President did not have the power in the absence of either enumerated Executive authority under Article II of the Constitution or any statutory authority conferred on him by Congress. 60 Because Justice Black could not find any formal, textual authority granted to the President by Congress to justify the President’s actions, Justice Black held the President’s actions were beyond his Constitutional powers. 61

Justice Black’s “brisk and formalistic opinion” narrowly construed the executive power, and denied President Truman the power to take the mills. 62 The key to understanding Black’s opinion is recognizing how he presented the inquiry. Rather than looking toward a flexible framework, as Jackson does, he looked to how Congress delegated power by statute, and how the constitution granted authority to the executive. 63 Justice Black identified two primary reasons why President Truman violated the Separation of Powers doctrine; he chose a public policy, and selected the means of enforcing them. 64 First, in deciding to seize the steel mills, President Truman made a policy decision and decided that the strikes should be quashed “in order to assure

59 See, *id*.
60 *Youngstown*, 343 U.S. at 579.
61 *Youngstown*, 343 U.S. at 589.
63 *Youngstown* Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).
64 Fitzgerald, *supra* note 24, at 692.
the continued availability of steel and steel products” for the war efforts.\textsuperscript{65} Second, without consulting Congress, President Truman unilaterally chose the means to enact this policy; that is to seize the mills from the owners mired in union negotiations, and have the federal government, under the auspices of the Secretary of Commerce, operate those mills.\textsuperscript{66} 

Justice Black rejected this approach, and found that such decisions are “exclusive” to Congress.\textsuperscript{67} This reflects a formalist view of separation of powers, where the legislative powers delegated to Congress are reserved to Congress, and not to the President. Justice Black boldly proclaimed, “The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”\textsuperscript{68} Justice Black insisted “on a clear constitutional basis for executive action or a clear legislative grant of authority to the executive by Congress.”\textsuperscript{69} Because nothing in the Constitution or any statute “could even implicitly supply President Truman with the authority he sought, Justice Black invalidated the action.”\textsuperscript{70} 

Justice Black had little difficulty asserting that Congress, under its Article I powers, could take the steel mills for public use, regulate labor relations between the unions and the mill owners, and control wages in the economy.\textsuperscript{71} These powers were inherently legislative, and not executive, and can be derived from demonstrable grants of power in the Constitution, including the takings clause\textsuperscript{72} and the commerce clause.\textsuperscript{71} Because these powers were legislative under Article I, according to Black, a fortiori, the President under Article II could not carry them out. This holding is built on the premise that in our tripartite government, the President’s role in\textsuperscript{65} Exec. Order No. 10,340, 3 C.F.R. 861 (1949-1953), reprinted in 1952 U.S.C.C.A.N. (66 Stat.) 1043.
\textsuperscript{66} Id.
\textsuperscript{67} See Youngstown, 343 U.S. at 588 (Black, J.).
\textsuperscript{68} Youngstown, 343 U.S. at 585.
\textsuperscript{69} Turner, supra note 24, at 670.
\textsuperscript{71} Youngstown, 343 U.S. at 588.
\textsuperscript{72} U.S. CONST. amend. V.
\textsuperscript{73} U.S. CONST. art. I § 8.
executive the laws forecloses the possibility of him making the laws,\textsuperscript{74} for “all legislative Powers herein granted shall be vested in a Congress of the United States,”\textsuperscript{75} and not the President. The President’s executive power is constrained, such that he can only “direct that a congressional policy be executed in a manner prescribed by Congress.”

Under Justice Black’s approach, “he need only define what makes a task ‘legislative’ and then try that label on the task in dispute.” If the label fits, then it follows simply that the Constitution prohibits the President from performing that task unilaterally. This is formalist separation of powers doctrine in its purest state.”\textsuperscript{76} Justice Douglas was even more resolute than Justice Black, writing that the vesting clause “is not ambiguous” and that it “places not some legislative power in the Congress; . . . [it] says ‘All legislative Powers.’”\textsuperscript{77}

Justice Black also narrowly read the Commander in Chief clause, finding that it does not give the President “the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.”\textsuperscript{78} Rather, Justice Black found that “[t]his is a job for the Nation's lawmakers, not for its military authorities.”\textsuperscript{79} Further edifying the separation between the executive and the legislative branch, Justice Black commented that Congress’ legislative power over labor law is not subject “to presidential or military supervision or control.”\textsuperscript{80}

A curious exception to the generally formalistic opinion was the weight the Court attributed to the failure of Congress to pass legislation granting the President the power to seize

\textsuperscript{74} Fitzgerald, supra note 24, at 693.
\textsuperscript{75} Youngstown, 343 U.S. at 588.
\textsuperscript{76} Fitzgerald, supra note 24, at 694.
\textsuperscript{77} Youngstown, 343 U.S. at 630 (Douglas, J., concurring)
\textsuperscript{78} Id. at 587.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 588.
property.\textsuperscript{81} Formalism tends to disregard reliance on legislative history and tends to ignore laws not passed.\textsuperscript{82} Yet, even in the context of this national security case, the Court did not hew to an absolutist formalist opinion, but considered some extrinsic evidence of congressional intent.

Justice Douglas, who is generally not considered a formalist, also wrote a rather formalistic concurrence. Justice Douglas found that the power to seize the mills controversy “must depend on the allocation of powers under the Constitution,” and that the seizure is “an exercise of legislative power” reserved to the Congress.\textsuperscript{83} According to Justice Douglas, the “determination that sanctions should be applied [to the Steel Mills], that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power.”\textsuperscript{84} Further, hewing closely to the text of the Constitution, Justice Douglas found that the seizure is “a taking in the constitutional sense,” and necessitates just compensation.\textsuperscript{85} Although the Fifth Amendment does not specifically designate Congress as the branch to seize property, he reasoned that “[t]he branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effectuated.”\textsuperscript{86}

B. \textit{Justice Jackson’s Functionalist Analysis}

Justice Jackson began his concurring opinion by noting that

\[\text{[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves . . . and}\]

\footnotesize{\textsuperscript{81} See id. at 586 (Black, J.) (citing 93 Cong. Rec. 3637-45 (1947)). \textit{Id.} at 600 (Frankfurter, J., concurring) (An amendment in the House providing that where necessary “to preserve and protect the public health and security” the President might seize any industry in which there is an impending curtailment of production, was voted down, by a vote of more than three to one.) See Fitzgerald, supra note 24, at 697. \textsuperscript{82} See e.g., Rapanos v. United States, 126 S.Ct. 2208 (2006) (Scalia, J.) (“Congress takes no governmental action except by legislation. What the dissent refers to as ‘Congress’ deliberate acquiescence’ should more appropriately be called Congress’ failure to express an opinion.”). See also \textit{INS v. Chadha}, 462 U.S. 919, 951 (1983) (holding that Congress can only pass laws with the Constitution’s “single, finely wrought, and exhaustively considered, procedure” for lawmaking, which requires a majority in both houses of Congress, and with the President’s signature or a veto override). \textsuperscript{83} \textit{Youngstown}, 343 U.S. at 630. \textsuperscript{84} \textit{Id.} \textsuperscript{85} \textit{Id.} at 631. \textsuperscript{86} \textit{Id.} at 631-32}
court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.\footnote{Id. at 643 (Jackson, J., concurring).}

Justice Jackson also noted that Presidential powers are fluid and not fixed, causing both the President himself, as well as others, to doubt or challenge the legality of certain presidential actions.\footnote{Id.} In \textit{Youngstown}, Jackson asserted

\begin{quote}
\[\text{[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.}\footnote{Youngstown, 343 U.S. at 635 (Jackson, J., concurring).}
\end{quote}

Justice Jackson recognized the interdependence of the elected branches, foreshadowing the judgment the Court made in \textit{Chada} that the executive and legislative branches are not “‘hermetically’ sealed.”\footnote{INS v. Chadha, 462 U.S. 919, 951 (1983) (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)).} As a result, Jackson presented three tiers, or what he called “some what oversimplified grouping[s] of practical situations” that courts should consider once a separation of powers issues is raised.\footnote{Id. at 637 (Jackson, J., concurring).} Tier 1 involved a situation where “the President acts pursuant to an express or implied authorization of Congress, [bringing] his authority [to] . . . its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”\footnote{Id. at 643 (Jackson, J., concurring).}

Tier 2 was considered a “zone of twilight”, where the President acts in absence of either a congressional grant or denial of authority, \[\text{[and] he can only rely upon his own independent powers . . . .}\footnote{Id. at 635 (Jackson, J., concurring).} In the zone of twilight, the President “and Congress may have concurrent authority, or in which its distribution is uncertain.”\footnote{Id. at 637 (Jackson, J., concurring).} Tier 2, therefore, requires the courts to closely examine the precise facts at issue in a particular case, and may cause the courts to consult a wide range of supporting sources and/or legislative history in an attempt to conclusively
determine whether the President was acting with Congressional authority, or simply acting on his own authority. Interestingly, Justice Jackson considered congressional “quiescence,” as well as “inertia” and “indifference” as factors that authorize presidential action.\textsuperscript{95}

Tier 3 to Jackson was when the “President takes measures incompatible with the expressed or implied will of Congress,” and it is in Tier 3 where the President’s “power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”\textsuperscript{96} A Presidential claim that falls into Tier 3, according to Jackson, is “at once so conclusive and preclusive [and] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”\textsuperscript{97} A case falls into Tier 3 only when a court can conclusively hold that a situation falls solely within the President’s Article II powers, and beyond the control of Congress’s Article I powers.\textsuperscript{98}

In addition to the introduction of his tripartite framework, Jackson emphasized the complex issues involved in national security-related separation of powers dispute between the Executive and the Legislature. Jackson stressed that courts should be cautious not to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. [Courts] should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward . . . [h]is command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.\textsuperscript{99}

Additionally, foreshadowing what would become the basis of future separation of powers struggles, Jackson insisted that “[t]he purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential

\textsuperscript{95} Id.
\textsuperscript{96} Id. at 638 (Jackson, J., concurring).
\textsuperscript{97} Id.
\textsuperscript{98} Youngstown, 343 U.S. at 641 (Jackson, J., concurring).
\textsuperscript{99} Id. at 645–46 (Jackson, J., concurring).
And although at issue in *Youngstown* was the seizure of steel mills, Jackson again foreshadowed contemporary separation of powers struggles when he noted that “[w]hat the power of [the Commander in Chief power] may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.”

Jackson felt strongly, however, that just because “the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times.” Jackson insisted that he interrupts the scope of the enumerated powers with the “elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.” This broad and expansive characterization of separation of powers is prototypical functionalism.

Therefore, because of the unenumerated nature of constitutional presidential powers, as well as the nebulous, complex, and fact-specific nature of contentious separation of powers issues, the only plausible way for the judiciary to analyze such issues was through a functionalist approach. In stressing such an approach, Jackson emphasized that

> [t]he vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.

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100 Id. at 645-46 (Jackson, J., concurring).
101 Id. at 646 (Jackson, J., concurring).
102 Id. at 640 (Jackson, J., concurring).
103 *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring).
104 Id.
Therefore, in national security-related separation of powers issues, “prudence has counseled that actual reliance on such nebulous claims stop short of provoking a [formalistic] judicial test,” and—according to Jackson—courts should use a functionalist and flexible tripartite framework for analyzing separation of powers issues, rather than a more formal, bright-line test. The Youngstown tiers provide a framework for courts to assess the separation of powers issues between Congress and the Executive. The courts, under the framework, are merely the faithful interpreter of the law, fulfilling Justice Marshall’s mandate to “say what the law is.”

III. Formalism and Functionalism In National Security Law

As Justice Jackson aptly recognized, issues of national security create a tension between formalist and functionalist jurists. It is important to note, however, that despite the contemporary acceptance of Justice Jackson’s functional framework, this method of analysis is not without its pitfalls. However, understanding the strengths and weaknesses of a formalist versus functionalist approach to analyzing national security-related separation of powers issues helps shed light on exactly why it is that Justice Jackson’s concurring opinion emerged as the most acceptable judicial lens through which to view such issues—to functionalists and formalists alike.

Professor Brown characterizes this struggle, as a “battle between . . . [formalists] who would pay the price of rigidity in order to achieve an elusive determinacy on the one hand,” against functionalists “who would pay the price of indeterminacy in order to achieve unguided flexibility on the other.” In dissent in Bowsher, a classically formalist separation of powers opinion, Justice White chastised the “the Court's willingness to interpose its distressingly
formalistic view of separation of powers as a bar to the attainment of governmental objectives.\textsuperscript{109}

A. \textit{The Shortcomings of Formalism}

While formalism has the benefits of predictability, clear rules, and simplicity, there are many difficulties with applying a formalist approach, especially in the national security and separation of powers context. As the D.C. Circuit wrote in \textit{Goldwater v. Carter}, “history shows us there are too many variables to lay down any hard and fast constitutional rules.”\textsuperscript{110} First, formalism generally yields mechanistic and wooden solutions to problems.\textsuperscript{111} Black letter law does not lend itself well to flexible results.

Also, formalism, with its rigid adherence to rule-based-judging, can impose a “straightjacket” on the ability of the government to adapt to changing needs.\textsuperscript{112} In the case of \textit{Youngstown}, President Truman feared an imminent strike that could cripple the war efforts in Korea. To require the Congress to pass legislation, in the haste of preventing a strike, would have imposed a huge burden. Often, Congress may not even be able to reach a compromise in time. Executive power requires flexibility and expediency. A formalist approach fails this end. The line between our three branches is not always clear. Wrote Madison in Federalist No. 37, “Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces-the legislative, executive and judiciary.”\textsuperscript{113} For Justice Black to clearly assign certain powers to the legislative or the executive powers leads to many issues when these lines blur, especially when the branches

\textsuperscript{109} Bowsher v. Synar, 478 U.S. 714, 759 (White, J., dissenting)
\textsuperscript{110} Goldwater v. Carter (650)
\textsuperscript{111} Brown, \textit{supra} note 18, at 1524-25.
\textsuperscript{113} \textit{The Federalist} No. 37 (Madison).
choose, implicitly or explicitly, to share and disperse power throughout the federal government.\textsuperscript{114}

A general benefit of formalist opinions is the ability to create bright line rules that establish predictable standards, and enable future actors to rely on precedent. But in the national security context, issues are seldom similar. To establish a bright line rule for the facts in \textit{Curtis Wright}, would not aid the resolution of \textit{Youngstown}, it would not aid the resolution of \textit{Dames \\& Moore}, nor would it help in the detainee cases. The exigencies and unpredictability of national security cases, which often have vastly different facts, do not reduce to formal black-letter law. Cases are almost always resolved on fact-specific circumstances that seldom repeat. For this reason, a formalist approach yields little guidance to future governmental officials who seek to resolve the issues.

\textbf{B. \textit{The Pitfalls of Functionalism}}

\textbf{1. Requires Judges to Consider Unreliable Extrinsic Evidence}

While functionalism has many advantages over formalism, functionalism is not without its issues. One of the greatest strengths of formalism is the commitment to the text of the relevant statue or provision of the Constitution. If passed through the appropriate legislative means, the text of the statute carries the authority of the rule of law. Functionalism, however, in the context of Jackson’s \textit{Youngstown} framework, forces the Court to understand what congressional purpose and intent is. Often, as was the case in \textit{Youngstown}, intent cannot be derived from the text of duly enacted legislation, mainly because no such legislation exists. When exigencies of national security law emerge, Congress usually cannot act quickly enough; thus, there is no legislation to

\textsuperscript{114} Cooper, supra note 70, at 371-372 ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.")
consider. Therefore courts are forced to consider unreliable extrinsic sources, including legislative history.

The use of legislative history to derive legislative intent has been subject to vast amounts of criticism in recent years, mainly from Justice Scalia, Circuit Judge Easterbrook, and other prominent “new textualists.” There are several problems inherent in using legislative history to develop the legislative purpose or intent. First, does a legislature actually have a singular intent? Legislative bodies consist of many minds, voicing many different opinions. That a majority of legislators votes on one bill, does not necessary mean there was a singular intent.

Assuming that a legislature can have an intent, and a that judge knows whose statements most accurately reflect the intent of the body, relying on legislative history to recreate this intent still abounds with unreliability. The use of legislative history forces a tradeoff between reliability and usefulness. On the one hand, committee reports that confirm the plain meaning of a statutory text are very reliable, but are not particularly useful, as an interpreter could come to the same conclusion in the absence of the report. Conversely, when a committee report takes a stand on an issue where the text is not clear, it is very useful to supply meaning, but is not reliable, as it can be the result of an agenda to introduce a specific meaning not agreed upon by the entire body.


116 See e.g., Matter of Sinclair, 870 F.2d 1340, 1342, 1343 (7th Cir. 1989) (Easterbrook, J.).

117 See e.g., Covalt v. Carey Canada Inc., 860 F.2d 1434, 1438-39 (7th Cir. 1988); Electrical Workers v. NLRB, 814 F.2d 697, 712-15 (D.C. Cir. 1987), and id. at 715-20 (Buckley, J., concurring); FEC v. Rose, 806 F.2d 1081, 1089-90 (D.C. Cir. 1986); Wallace v. Christensen, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring).

Further, relying on legislative history is unreliable because it is often created early in the process and does not reflect many of the deals agreed upon to ensure passage of the bill. Legislative history may also be unreliable because it was created later in the process according to a specific agenda, and lacks much of the record devised while the bill was actually being deliberated. Other legislative history is not reliable because it reflects the views of outsiders to the bill who provide the testimony to give the bill a gloss favorable to their point of view, regardless if anyone else agrees with it.

When a court cites a committee report from either the House or the Senate, but not both, as opposed to a Conference Report, written based on the understanding of both houses, the Court is being unfaithful to the deals reached in compromise prior to presentment. Why only cite one? Why not cite both? Perhaps, the reason is because the legislative history from the House and Senate Committee Reports likely diverges, and it would be very difficult to reconcile them to establish a clear intent. Therefore, by picking one over the other, courts maintain the mirage that legislative history is a clear and unambiguous means to supplement the meaning of a statute. Relying on legislative intent “is much more likely to produce a false or contrived legislative intent than a genuine one.”

One of the hallmarks of relying on legislative history, a key element of a functionalist jurisprudence, is granting judges a wide swath of evidence with which to resolve an ambiguous text in numerous ways. Legislative history “is extensive [with] something for everybody. As Judge Harold Leventhal used to say, [reading legislative history is like looking] over the heads of the crowd and pick[ing] out your friends. The variety and specificity of results that legislative

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120 Legislation, supra note 118, at 308.
121 Legislation, supra note 118, at 308.
122 Scalia, supra note 115, at 32.
history can achieve is unparalleled.”123 Judges seeking to resolve a national security case in a functionalist approach rely on legislative history to create a flexible means to achieve a certain approach.

While relying on legislative history can be justified to fulfill the legislature’s desire, “[o]n balance, [the use of legislative history] has facilitated rather than deterred decisions that are based upon the courts’ policy preferences, rather than neutral principles of law.”124 The subjectivity is exacerbated due to the fact that there is no consistent approach to relying on legislative history.125 Patricia Wald laments, “consistent and uniform rules for statutory construction and use of legislative materials are not being followed today.”126 Often, the line between the intent of the legislature and the intent of the judge blurs beyond the point of recognition.127

2. Fails to Establish Predictable Rules

A significant criticism of functionalist jurisprudence is that it is indeterminate, ad-hoc, and does not provide any predictability.128 A persistent goal in Constitutional law is to yield predictable results, and to increase society’s justified expectations and reliance interests. A

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123 Scalia, supra note 115, at 36.
124 Scalia, supra note 115, at 36.
125 Scalia, supra note 115, at 36-37 (“Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility.”).
127 Matter of Sinclair, 870 F.2d 1340, 1342, 1343 (7th Cir. 1989) (Easterbrook, J.) (“Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize and by putting hypothetical questions-questions to be answered by inferences from speeches rather than by reference to the text, so that great discretion devolves on the (judicial) questioner. Sponsors of opinion polls know that a small change in the text of a question can lead to large differences in the answer. Legislative history offers willful judges an opportunity to pose questions and devise answers, with predictable divergence in results. These and related concerns have lead to skepticism about using legislative history to find legislative intent.”). See also, James N. Landis, A Note on “Statutory Interpretation,” 43 HARV. L. REV. 886, 891 (1930) (“To condone . . . [judges searching for] the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man.”). See e.g., Legislation, supra note 118, at 230 (“Often an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, because its application will depend heavily upon context and the interpreter’s perspective. Not only are such judgments difficult, but they implicate political and policy considerations better suited to the branches that are more democratically accountable than the judiciary.”).
functionalist ad-hoc approach shakes the core of the ability of government to act within their
purview of authority, as legislators can no longer be sure that laws will be dutifully enforced by
the courts if they touch on a hot-button issue. “The rule of law requires a law of rules that are
predictably applied to everyone.” One of the key difficulties in relying on a functionalist
jurisprudence is that the precedential value of opinions is diminished by the fact-specific nature
of the holding. Therefore, future jurists will struggle to derive predictable rules of law from these
opinions. This lack of predictability forces all national security cases to stress how narrow they
are, cautioning future lawyers that they should not rely on this precedent. However, it may be
precisely because of its ad-hoc approach that yields no predictability—and this no restrictive
binding precedents—that all judges prefer to employ a functionalist approach in national
security-related cases so as to not rigidly define the President’s Article II powers, disabling the
executive from calling on such unenumerated authority in future crises.

In Dames & Moore v. Regan, Justice Rehnquist began the Court’s opinion by “stress[ing]
that the expeditious treatment of the issues involved by all of the courts which have considered
the President's actions makes us acutely aware of the necessity to rest decision on the narrowest
possible ground capable of deciding the case.” Justice Rehnquist recognized that such an
opinion “does not mean that reasoned analysis may give way to judicial fiat,” and cited Justice
Jackson, curiously, for the proposition that judges decide cases based on their commissions, not
their competences. Nonetheless, the functionalist opinion in Dames & Moore does not “lay
down [any] general ‘guidelines’ covering other situations not involved here, and attempt[s] to
confine the opinion only to the very questions necessary to decision of the case.”

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129 Legislation, supra note 118, at 237 (discussing Justice Scalia’s “new textualism.”).
concurring).
131 Dames, at 661.
132 Id.
Justice Rehnquist wrote that “the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.” As a result, the executive branch will not know how the courts will interpret their actions. This can result in one of two possible approaches. First, if the law is uncertain, the administration will act conservatively for fear that their actions will be struck down. The second option, is that in the absence of guidelines, the administration will self-define broad parameters of executive power, and act with impunity. If the executive branch had clear guidance, they would be less willing to flout the Constitution.

In other words, a functionalist opinion, because it is so fact specific, and based on the interests in the case, cannot yield a clear rule of law for future situations, and provides no predictability for future circumstances. Justice Rehnquist concluded his opinion, stressing the unpredictability of national security cases, waxing, “we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live.”

In *Goldwater v. Carter*, the D.C. Circuit took a similar tact, holding “that the President has the absolute power to terminate [the specific] treaty [in issue] but [its] decision indicates it is not to be considered as a binding precedent that future Presidents could terminate treaties in similar circumstances.” Judge MacKinnon in dissent observed that the court attempted to “minimize [the] harmful effect for the future . . . by stating that the opinion is ‘narrow’ and could no necessarily be relied upon to terminate” other treaties.

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133 *Id.* 661
134 *Id.* at 662.
136 *Id.*
Because of this uncertainty, all three branches will be left in a confused haze when considering actions dealing with national security and the clash between the branches. Because the law is nebulous, this may actually encourage the President to attempt to exceed traditional bounds of the executive power. Similarly, it may embolden the Congress to attempt to unconstitutionally cabin the executive power. Neither is a desirable result. Our tripartite scheme of government requires that the executive and legislative branch carry out their own delegated powers, and it is the role of the court to ensure that those boundaries are respected.

When the Court fails to set the rules of law, it generates incentives for the other branches to overstep their bounds. Government acting beyond their roles without censure is antagonistic to our scheme of ordered liberty, and needs to be avoided. As wooden as formalistic rules may be, they would ultimately define what the Legislative and Executive branches can and cannot do, and create reliance interests and assure the public and private sector of what can and cannot be done. A steel mill in the future, in the time of war, afraid that its plant might be seized can take solace from Justice Black’s opinion of whether the action is constitutional. Justice Jackson’s opinion would provide less reliance. But a claimant with a claim against a foreign company, would have no idea whether his claim in federal district court could be suspended, as the Court looks to sources unknown to him. In the context of the detainee cases, Congress and the Executive have little insights how the Courts will treat their attempt to deal with passing laws defining treatment of detainees.\textsuperscript{137} As Justice Kennedy, O’Connor, and Souter jointly wrote, “liberty finds no refuge in a jurisprudence of doubt.”\textsuperscript{138} Youngstown and national security law can only be characterized as a field in doubt.

\textsuperscript{137} See infra Part IV.B.
However, as Chief Justice Roberts articulated in his confirmation hearings, judges have a "limited role" to "interpret the law and not make the law." National security law cases tend to bring out the functionalist side in the most traditionally formalist judges. Classical conservatives, including Justice Rehnquist, Justice Scalia, Judge Sentelle, Judge Kozinski, and others, who usually hew closely to the text and reject arguments about purposivism, when applying the *Youngstown* framework, choose to look at such unreliable extrinsic sources in order to establish which zone the act falls into. The benefit of straying from a more rule-based and predictable formalist philosophy, however, is that the courts do not risk too rigidly defining and limiting the Executive’s unenumerated Article II powers. The tradeoff in national security-related cases, therefore, is less predictability, but also less risk of overstepping the contours of a President’s ability to respond to a future national security crisis. Despite its negatives, therefore, one can see why *Youngstown* has been adopted as the de facto test to determine national security-related separation of powers cases.

C. *The Jacksonian Compromise Between Formalism and Functionalism Prevails*

Justice Jackson’s pragmatic compromise prevails as the most widely accepted framework by both formalistic and functionalistic judges alike. As a testament to the continued vitality of this framework, during Chief Justice Roberts’s confirmation hearings, he praised the wisdom of Justice Jackson’s concurrence. Echoing the same type of functionalist balancing approach that Jackson used in analyzing the *Youngstown* separation of power issue, Roberts insisted during his confirmation hearing that the contemporary Supreme Court continues to have “an obligation to

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140 See infra Part V.
'calmly poise the scales of justice’ in dangerous times as well as calm times.”

Similarly Justice Sotomayor spoke at great length about Youngstown, describing Jackson’s framework as the “best description of how to approach” separation of powers questions, and remarked that the “framework [is] generally . . . applied [by the courts to consider] to all questions of executive action.”

In light of his praise of Jackson’s Youngstown analysis and his call to “calmly poise the scale of justice,” Roberts seemingly advocated and embraced a functionalist, balancing approach to analyzing separation of powers issues. A functionalist judicial philosophy, in contrast to a formalist judicial philosophy, would eschew formal rules—like adhering to a law’s text or original meaning—in order to arrive at a just result. However, throughout his confirmation hearings, Roberts said that he does not have "an overarching judicial philosophy," but insisted he finds merit in textualist and originalist methodologies. Judges that embrace the judicial interpretation method of textualism take comfort in knowing that textualism promises a level of transparency, and feel that the “law” that a judge must interpret is the “set of words that the lawmaking body adopted.” In addition, some scholars feel that textualist and originalist

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142 Transcripts, Day One of the Roberts Hearings (Sept. 12, 2005), accessible at: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html. Roberts apparently found judicial inspiration from the treason trial of Aaron Burr, one of the first cases ever decided by the Court of Appeals for the D.C. Circuit. The nascent court articulated “[w]hen the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite or alarm, it is the duty of a court to be peculiarly watchful. . . . The Constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of multitude.” See United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (Cranch, C.J., dissenting).


144 See infra Part.I.


146 Symposium, Limits of Interpretivism, 32 HARV. J.L. & PUB. POL’Y 159, 164 (Winter 2009).
methods of interpretation are “two commitments . . . of a single whole . . .” and “interpreting the text means understanding it according to its original meaning.”  

Roberts endorsing textualism and originalism, while at the same time embracing a functionalist method of analyzing separation of powers issues may seem contradictory. However, as Justice Jackson’s *Youngstown* framework reveals, and this Article confirms, national security-related separation of powers issues must be analyzed according to a functionalist philosophy. By examining the national security-related cases that have employed the *Youngstown* framework since 1952, this Article contends that both traditionally formalist as well as traditionally functionalist judges have utilized the framework to analyze and assess the scope of the President’s unenumerated Article II powers. They adopt these methodologies despite the fact that a formalist judge is normally unwilling to look beyond the text of the law in order to find authorization for a particular executive action.

However, as now Chief Justice Roberts testified during his confirmation hearings, judges have a "limited role" to "interpret the law and not make the law."  

The purpose of Jackson’s *Youngstown* framework was to present courts with a framework for thoroughly analyzing the scope of the President’s Article II executive powers. These powers are both specific, and undefined; the Constitution did not define the scope of the President’s Commander in Chief power, the treaty power, or the appointment power, for example. Therefore, according to both Justice Jackson and Chief Justice Roberts, judges have the responsibility to interpret the law, but not to necessarily define the scope or limit of Executive authority.

IV. NATIONAL SECURITY CASES CONSISTENT WITH *YOUNGSTOWN* FRAMEWORK

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147 Symposia, Limits of Interpretivism, 32 HARV. J.L. & PUB. POL’Y 159, 168 (Winter 2009).
149 See U.S. CONST. art. II, § 2.
The section of this article is inherently limited by the small number of cases the Courts take dealing with the breadth of the Executive power in a national security-related context. The Court implicitly addressed this concern in *Dames & Moore*, and commented that it is difficult for the Court to “reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive . . . that the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.” Thus, the sample size of cases to work with is limited, but the wealth to be derived from these cases, as well as the related appellate briefs, is considerable.

This section takes a close at *Dames & Moore v. Regan*, a key Supreme Court cases that was one of the first to explicitly employ the *Youngstown* tripartite framework, and also represents the category of post-*Youngstown* cases that squarely fit within the original three-tired framework envisioned by Justice Jackson’s 1952 concurrence. This Part shows why it is that—due to the tremendous Constitutional issues at stake, and the danger of the judiciary pronouncing any opinions that would either restrict or aggrandize future Executive or Congressional ability to respond and protect the nation in a time of war—even Justices who have formalist tendencies ultimately rely on a functionalist method of analysis to resolve national security-related separation of powers issues.

**A. Facts of Dames & Moore v. Regan**

*Dames & Moore v. Regan* pitted the powers of the President against the powers of the Congress in the aftermath of the Iran hostage crisis. Justice Rehnquist, writing unanimously for the Court, affirmed the ability of the President to issue an executive order that nullified, voided,

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150 See William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, 88 B.U. L. Rev. 505, 510 (2008) (observing that the courts have decided more cases dealing with the powers of the legislative and judicial branches than the executive branch).

151 *Dames & Moore*, at 661.
and transferred all American claims against Iran to the specially created Iran-United States Claims Tribunal. But, the Court did not find that Congress permitted the President to suspend claims currently pending in federal court. Justice Rehnquist began the opinion by introducing Jackson’s framework from *Youngstown*. Applying the Jacksonian framework, Rehnquist found that the nullification and transfer of non-pending claims fell into the first zone.

With respect to suspending the claims, the Supreme Court found that the action fell into the “zone of twilight,” and was not explicitly authorized by Congress. Combing through a lengthy string of legislative actions, inactions, and history, the Court found a “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” which “may be treated as a gloss on ‘Executive Power.’” However, it is rather questionable how the Court found an unbroken executive practice when they could cite no prior instance where the President suspended claims pending in federal courts.

**B. The Petitioner’s Formalistic Approach**

Justice Rehnquist looks at the IEEPA (International Emergency Economic Powers Act) and the Hostage Act, and finds that when read together, they “indicate[] congressional willingness that the President has broad discretion when responding to the hostile acts of foreign sovereigns.” From these emanations of penumbras of the statutes, the Court grasps at a “general tenor of Congress’s legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress.” The Court’s approach to finding that the President could suspend the claims follows a long and winding logical path. The Court

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152 *Id.*
153 *Id.* at 675.
154 *Id.* at 675, 677-78.
155 *Id.* at 686 (quoting *Youngstown* Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).
156 *See*, e.g., William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Geo. L.J. 1083, 1165 (2008) (contending that the Court cited all pre-FSIA cases for congressional acquiescence and could show no previous instances of “presidential suspension of pending lawsuits”).
157 *Id.* at 677.
158 *Id.* at 678.
began by reasoning that just because the statute in question did not approve the President’s power to suspend the claims, did not signify that Congress disapproved, particularly when the matter concerns “areas of foreign policy and national security.”159 Because Congress cannot plan for every contingency, the failure of the Congress to delegate authority does not imply disapproval.160

The petitioners, Dames & Moore, rejected this argument in their briefs. “There is no judicial authority or historical precedent, either long and uninterrupted or occasional and fleeting, that supports Executive authority to undertake action of the sort attempted here.”161 The petitioner reviewed “89 executive agreements involving claim settlement between the United States and other countries from 1799 through 1979, including all of those that have been cited by the Government.”162 The petitioner observed that that none of the executive agreements purport to allow the President to terminate claims pending in courts. The Petitioner remarked that the instant case presents a “Radical and novel departure” from previous agreements.163

The petitioner observed that the “legislative history of the [FSIA] is replete with statements and testimony by members of Congress, the Executive Branch, and the private bar emphasizing the urgent need to strip from the Executive the authority to terminate pending litigation through invocation of the immunity doctrine.”164 “To uphold the President’s action in this case, this Court would have to rule for the first time that the President has inherent authority, without congressional approval, to enter into Executive agreements which deprive United States citizens of rights expressly granted them by congressional statute. However, Executive

159 Id. at 678 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).
160 Id. at 678.
161 Dames, Petr.’s Br. 9.
162 Dames, Petr.’s Br. 18.
163 Dames, Petr.’s Br. 19.
agreements made without congressional sanction, not pursuant to a treaty or act of Congress, simply cannot supersede inconsistent provisions of prior acts of Congress.”

D. Congressional Acceptance by Historical Practice and Acquiescence

Despite the strength of the petitioner’s arguments, citing Justice Jackson’s Youngtown concurrence, Justice Rehnquist notes that a statute that “evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’” In other words, when Congress indicates a willingness to delegate authority to the President, even if the action is not specifically authorized, congressional authorization can be implied.

The Court quickly disposed of the IEEPA and the Hostage Act, the two statues on which the President based his authority to suspend the claims. Under Justice Black’s formalistic admonition from Youngstown, that the President’s authority to act must stem from a statute of the Constitution, the inquiry should have ended here. But Rehnquist proceeded, and rejected this warning. Rehnquist conceded, even though “neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action.” How so? Justice Rehnquist attempts to answer this question by finding relevance of the statutes “in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances.” By looking at this history, the Court remarked that “Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced

\[\text{\footnotesize 165} \text{Petitioners Reply Brief, citing United States v. Guy W. Capps, Inc. 204 F.2d 665, 659-60 (4th Cir. 1953), aff’d on other grounds, 348 U.S. 296 (1955).}\]

\[\text{\footnotesize 166 Dames, at 678 citing Youngstown, 343 U.S., at 637, 72 S.Ct., at 871 (Jackson, J., concurring).}\]

\[\text{\footnotesize 167 Dames, at 675.}\]

\[\text{\footnotesize 168 Dames, at 677.}\]

\[\text{\footnotesize 169 Id. (emphasis added).}\]
in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.” 170 Based on that Jacksonian framework, the Court begins a lengthy and convoluted inquiry into the statutory history of the Congress and the President acting in this field. 171

The history begins in 1949, when Congress passed the International Claims Settlement Act. 172 The Court finds this act “crucial” to the holding, and infers from this act that “Congress has implicitly approved the practice of claim settlement by executive agreement.” 173 By tracing a progression of instances where Congress acquiesced to international claims settlement, “Congress has implicitly approved the practice of claims settlement by executive agreement.” 174 From these sources, the Court inferred “congressional acquiescence in the President’s power to settle claims.” 175 This reasoning is formally dubious. An Act passed in 1949 was passed by a different Congress, for a different security concern, with a different executive, under different circumstances. How can the court apply a statute passed thirty years earlier for radically different facts to show that Congress’ placed a “stamp of approval on such agreements.” 176

Justice Rehnquist continues tracing the history, and finds that because Congress frequently amended the International Claims Settlement Act, it demonstrated its “continuing acceptance of the President’s claim settlement authority.” 177 Generally, when a congress amends and changes a bill, this action demonstrates that Congress is not pleased with some aspect of the law. The fact that the Act was frequently amended could easily be read in a different light, and show that Congress sought to cabin the President’s discretion. Furthermore, the fact that Congress amended the statute for some purposes, and not for others, expresses a clear intent that

170 Id. at 686 citing United States v. Midwest Oil Co., 236 U.S. 459, 474, 35 S.Ct. 309, 313, 59 L.Ed. 673 (1915).
171 Id. at 678 ("It is to that history which we now turn.").
173 Dames, at 680.
174 Id.
175 Id. at 682.
176 Id. at 680.
177 Id. at 681.
they did not see fit to grant certain powers. The fact that it was frequently amended, but did not grant President Carter and Reagan the powers they sought, weakens Rehnquist’s argument. If they changed some aspects, why would they not have changed this power? This is a much more forceful argument than the congressional acquiescence argument the Court posits.

For example, in 1976, as Justice Rehnquist noted, the Congress specifically authorized a Commission to “adjudicate the merits of claims by adjudication the merits of claims by United States nationals against East Germany, prior to any settlement with East Germany, so that the Executive would “be in a better position to negotiate an adequate settlement . . . of these claims.”178 As well, Congress recently amended the International Claims Settlement Act to facilitate the settlement of claims against Vietnam.179 Further, Congress amended a treaty with the People’s Republic of China dealing with an “allocation formula for distribution of funds.”180 Congress took action for China, East Germany, and Vietnam, but not Iran. This speaks volumes. If Congress wanted to act on the Iranian conflict, it could have. Acquiescence is not a compelling enough argument.

In conclusion, Justice Rehnquist ties it all together, and writes, “In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims.” Further, “[s]uch practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.”181

180 Dames, at 681, citing 22 U.S.C. 1627(f).
181 Dames, at 686.
Justice Rehnquist favorably cited Justice Holmes’s admonition, a prominent functionalist of his time, that “[t]he great ordinances of the Constitution do not establish and divide the fields of black and white.”\textsuperscript{182} Further, Rehnquist further blurs the lines between Justice Jackson’s three zones, writing that “executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”\textsuperscript{183} Rehnquist continues that this the fluidity between the branches is amplified when the case “involve[ ] responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.”\textsuperscript{184}

E. The Indeterminacy of Justice Rehnquist’s Approach

Although the opinion in \textit{Dames & Moore} was unanimous, following such a functionalist approach yields many interpretations. This dynamic is illustrated by \textit{Marschalk Co., Inc. v. Iran Nat. Airlines Corp.}, a case involving the suspension of the claims by the President.\textsuperscript{185} It was decided by Southern District of New York in 1981 and was vacated after the Supreme Court decided \textit{Dames & Moore}. Yet, based on the same record, and the same congressional history, Judge Duffy, a Nixon appointee, came to a totally different conclusion.\textsuperscript{186}

Reading the legislative history of IEEPA, the court rejected the government’s, as well as Justice Rehnquist’s broad interpretation of Congressional acquiescence; “Moreover, the sweeping powers which the executive department would read into the IEEPA find no support in the legislative history of that Act.”\textsuperscript{187} In fact, the court found that “Congress intended to define

\textsuperscript{182} \textit{Dames}, at 669 citing Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting)
\textsuperscript{183} \textit{Dames}, at 669.
\textsuperscript{184} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id. at 79}
and reduce the power of the President by the passage of the Act, not to expand it.” 188 This is the exact opposite interpretation Rehnquist drew. Citing legislative history, which the Supreme Court did not see fit to mention, SDNY found specific language seeking to cabin the President’s discretion in this field. 189 This highlights the difficulty of citing legislative history; judges have a tendency to look over the crowds and only see their friends. 190 Ironically, perhaps, the court cites Youngstown for the proposition that the Supreme Court and Congress have limited the President’s executive power with respect to domestic matters, in that the President could not seize domestic steel mills. This historical precedent was lacking from Justice Rehnquist’s analysis.

The court also rejected Justice Rehnquist’s characterization that the suspension falls in the “zone of twilight,” finding that Congress prohibited the actions in passing FSIA. 191 “Rather than acquiescing to Presidential interference in the litigation of commercial claims against foreign defendants, Congress, in enacting FSIA in 1976, eliminated such Executive interference.” The court specifically found that Congress did not give the President this power to circumscribe the jurisdiction of the courts under FSIA. 192 The court also read the legislative history of the FISA to show that Congress actively refused to give the President the power to interfere with claims in times of national emergencies. 193 The court proceeded to compare the

188 Id.
189 Id. at 80. “The President does not have the power under IEEPA, as he did under TWEA, to seize foreign property or records or to take title to any property of any foreign country or national thereof for the benefit of the United States. Id. at 2; House Markup Before The Committee on International Relations, 95th Cong., 1st Sess. 3-4 (1977). Nor does the President have the power to regulate purely domestic transactions or authority to control non-economic aspects of international intercourse. IEEPA H.Rep. at 11.” Id. at 81. “The legislative history of IEEPA also indicates that Congress intended that the President, in responding to emergencies would protect, not prejudice, the ability of United States citizens to recover claims against foreign countries.”
190 Scalia, supra note 115, at 36.
191 Id. at 81. “The suspension by the President of litigation of Marschall's claim in the United States courts is not only unauthorized by IEEPA, it is prohibited by the FSIA. Thus, it cannot be argued that the President's actions fall within the “twilight zone” described in Justice Jackson's second category.”
192 Id. at 81 (“Congress also specifically refused to give the President the power to enter into agreements with other nations which would circumscribe the jurisdiction of the United States courts over international commercial claims under the FSIA.”)
193 Id. at 81. “Furthermore, Congress refused to adopt provisions allowing the President to determine the jurisdiction of the courts in times of emergency. At the hearings in the House of Representatives, Congress was asked to weigh the advantages and
original version of FSIA with the final version, and observed that language that would have permitted future agreements to limit the courts jurisdiction was deleted.\textsuperscript{194}

The court also disagreed with the power of the President to suspend the jurisdiction of federal courts as a violations of the separation of powers doctrine; “To find that a President, by virtue of his foreign affairs power, can dictate the jurisdictional bounds of United States courts violates both the words and the objectives of our Constitution.” According to the Constitution, only the Congress can proscribe the Court’s jurisdictions, and not the President.\textsuperscript{195} This echoes Justice Black’s formalistic distinction between the three branches of our government.

Analyzing this lower court opinion highlights the futility of a functionalist approach. When considering such nebulous evidence as legislative history and decades of precedent, different jurists can reach different outcomes, totally consistent with the record. By applying vague standards that are not clearly reducible to consistent rules, uncertainties abound, and the relevant parties cannot know how the courts will resolve an issue. This is a key shortcoming of functionalism.

\textsuperscript{194} Id. at 81 (“The original version of the FSIA proposed by the State and Justice Departments sought to allow executive interference with court jurisdiction through executive agreements. The proposed bill provided that the FSIA would be “subject to existing and future international agreements.” H.R. 11315, 94th Cong., 2d Sess. s 1604 (1976) (“FSIA H.Bill”) (emphasis added). The reference to “future international agreements” was deleted in committee, “to eliminate any possible question that this language might be construed to authorize a future international agreement” that might interfere with court jurisdiction. FSIA H.Rep. at 10, 6608. The committee wished to eliminate any possible “discretion to the State Department ... to change the basic substance of the law,” FSIA H.Hearings at 52.”).

\textsuperscript{195} Id. at 91 (“The Constitution is neither silent nor equivocal about who has the authority to legislate the jurisdiction of the courts. The Founders of this Nation entrusted that responsibility to the Congress. The Constitution does not subject this congressional power to presidential control in times of crisis.”).
F. *Formalistic Criticisms*

Such a functionalist opinion, where Justice Rehnquist considers the legislative history and amendments to numerous bills, passed over several decades, raises several questions. Which Congress is he speaking of? A key formalistic criticism of Justice Rehnquist is that he is very nebulous as to which congress he is referring to. Using the blanket term “congressional acceptance” without reference to a specific Congress perpetuates the logical fallacy that congress, which changes every two years, is a consistent entity. Imputing a collective consciousness throughout different congresses is questionable. New members bring new opinions. New crises generate new compromises. Change of party yields different strategies. To draw a linear chain between a Congress during World War II, to a Congress during the Korean War, to a Congress during the Vietnam war, to a Congress during the Iran hostage crisis mistakes a key aspect of our representative republic: elections matter. New voters, elect new members, who are responsible for making new law. This reflects the democratic nature of our elected branches, where officials are not granted life-time tenure. Congress is not a continual entity, but has different bodies. Drawing inferences throughout the years is a tenuous proposition that departs wildly from the realities of legislative politics. Further, does one congress bind another? In addition, Rehnquist often considers provisions of big bills in isolation. A common cannon of statutory interpretation is to consider the entire act. This does not yield a historical trend, but cherry picks certain aspects.

The Court also blurs the lines between the three branches of our government. The Petitioners claim that “by suspending its claims, [the President] has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.” The Court

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196 Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in part) (citation omitted)[legislative history is a "frail substitute"] for bicameral vote upon the text of a law .... It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.")
finds that “the President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit.” It is very questionable whether Congress actually acquiesced to allow the President to suspend the claims. But, Justice Rehnquist provides no support that Congress ever delegated the power to affect the Court’s adjudication policy, whether he calls it the substantive law or jurisdiction.

The petitioner remarked that “in the absence of any clearer Congressional approval” of the Executive’s power, the suspension is not valid, as this would “leave the judiciary subject to the unbridled whims of the Executive Branch, and render the orders and judgments of courts acting pursuant to express Congressional grants of jurisdiction mere advisory opinions.” This raises an important separation of powers concern, as Article III courts are prohibited from issuing advisory opinions. Yet the President’s actions would reduce the judgments of the courts to a nullity.

These sentiments echo the formalist approach of Justice Black, who sought to clearly demarcate the lines between the separate branches, and construe the law to preserve these boundaries, and not render any branch weaker. According to this theory, for the President to abrogate the jurisdiction of federal courts to hear the claims would weaken the power of Congress, and reduce the courts to issuing unconstitutional advisory opinions. “Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.”

The petitioner cited numerous occasions where the Executive determined that it lacked the power to enter into executive agreements that would have taken jurisdiction of a private claim away from

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197 Dames, at 685.
198 Dames, Petr.’s Br. 22.
199 Dames, Petr.’s Br. 23.
the Court of Claims and placed it in an international claims tribunal. This diminishes the persuasiveness of the Court’s longstanding historical practice arguments.

Scholars have criticized the *Youngstown* approach for “allowing congressional opposition . . . to be interpreted as congressional silence; or allowing congressional silence . . . to be interpreted as congressional approval.” Using canons such as the “dog didn’t bark,” and attempting to derive meaning from silence is quintessential functionalist approach to finding an answer, even where the statute or text is silent. In *FDA v. Brown & Williamson Tobacco*, which dealt with federal preemption of tobacco legislation, an opinion written by Justice O’Connor, and joined by Justices Scalia and Thomas, traced a lineage of legislative history that spanned the “past 36 years” to find that Congress did not authorize the FDA’s actions. This functionalist approach was very similar to Justice Rehnquist’s approach in *Dames & Moore*.

G. *Dames & Moore Can be Analyzed Within the Youngstown Framework*

What distinguishes *Dames & Moore* from other separation of powers case employing the *Youngstown* framework—such as the Guantanamo Bay detainee case, discussed below—is that the holding in *Dames & Moore* actually fits (roughly) into the original three-tiered *Youngstown* framework. Justice Rehnquist was able to find a relationship between the actions of Congress and the actions of the President, to identify the zone of twilight, and come to a resolution. In contrast, the detention cases use *Youngstown* for analytical purposes, but ultimately the holdings were outside *Youngstown* Tiers 1-3. *Dames & Moore* represents the prototypical national security case wherein the Court can apply the traditional *Youngstown* framework. The facts are relatively straightforward; though it presents an issue involving foreign policy, there are no

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200 *Dames*, Petr.’s Reply. Br. 23
active military conflicts involved; and the exigencies are minimal, as the resolution of the claims does not constitute a matter of national security. The detention cases failed all three of those qualifications, and thus the need for a *Youngstown* Tier 4 emerged.

When the issue can be resolved with *Youngstown*, the court adopts it. When the issue cannot be resolved with *Youngstown*, the court pays lip service to it, and resolves the issue on other grounds. In one sense, the development of an implicit *Youngstown* Tier 4—as discussed further in Part V in respect to the Guantanamo Detention cases—shows precisely how the *Youngstown* framework has continued to evolve since 1952, and shows how this functionalist framework continues to be the best method of analyzing the contours of Article II authorities.

V. *YOUNGSTOWN’S FOURTH TIER- THE ZONE OF INSIGHT*

The events of September 11, 2001, and the subsequent actions taken by the President, Congress, and the Supreme Court provide a unique lens through which to view contemporary separation of powers issues, as well as the contemporary Supreme Court’s application of the *Youngstown* framework to terrorism-related detention cases. By examining these opinions, despite the Court’s desire to adhere to a formalist interpretation of the President’s powers in a time or war, the only plausible way for judges to ensure that, as Chief Justice Roberts testified, no one is above the law under our system—including the president—while also ensuring that the judiciary or legislature does not jeopardize the nation’s security—is through a functionalist approach.

Just one week after 9/11, on September 18, 2001, Congress passed a Joint Resolution entitled, “Authorization for Use of Military Force” ("AUMF"). In passing the AUMF, Congress asserted that

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203 Public Law 107-40 [S. J. RES. 23]
the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.204

Subsequently, in November 2001, President Bush issued a Presidential Military Order, asserting that “any individual who is not a U.S. citizen with respect to whom [the President] determines from time to time in writing that there is reason to believe that such individual, at the relevant times . . . is or was a member of the organization known as al Qaida [or] has engaged in, aided or abetted, or conspired to commit, acts of international terrorism. . . . [shall be] detained at an appropriate location designated by the Secretary of Defense outside or within the United States.”205

These two proclamations served as the President’s support granting him Congressional authorization to conduct a wide-range of activities, in the name of national security, to protect the nation. According to the President, this delegation included the power to capture and detain people he “determines from time to time” to be enemies of the United States. According to the President, he was acting within Youngstown Tier 1, and he considered his power was at its zenith. However, as some Supreme Court rulings would later show, the President was most often acting in either a Youngstown Tier 2 “zone of twilight” situation or Youngstown Tier 3 situation—making the legality of the President’s actions uncertain,

However, several of the Guantanamo Bay detention cases do not squarely fit within the traditional three tiers of the Youngstown framework. In such cases, the Court found it necessary to apply an ultra-functionalist analysis of the separation of powers issues at issue. This article suggests the Court adopted an implicit Youngstown Tier 4 analysis. In this Tier, the Court determines whether or not the President’s actions fall solely within his unenumerated Article II

204 Public Law 107-40 [S. J. RES. 23]
powers, regardless of whether he was acting with or against the explicit or implicit will of Congress.

Rather than residing in a Tier 3 *zone of twilight*, Tier 4 is the Court’s *zone of insight*. While the zone of twilight reflects the Court’s uncertainty as to how Congress would consider an issue, in the zone of insight the Court substitutes their own judgment. The zone of insight reflects the courts pragmatic and functionalist approach to discern the true nature of the situation, and perceive and penetrate the issue in an intuitive manner, rather than clinging to a formalistic, and likely deferential, approach. The Court’s insight into these cases embodies the pinnacle of judicial functionalism.

Like most functionalist analysis, the determination of the President’s powers becomes highly fact specific, and the petitioners and respondents to the Supreme Court went to great lengths to explain the relevant facts at issue to cast the President’s actions in the proper light. As this section will demonstrate, such a flexible approach finds no home in the *Youngstown* framework. Thus, Tier 4 is born.

Tiers 1 through 3 of Jackson’s framework assist courts in determining the balance of power between Congress and the Executive. Jackson articulated that *Youngstown* Tier 3 occurs when the President is acting in contradiction to the express or implied will of Congress and thus relies solely within the President’s Article II powers. These actions exist beyond the control of Congress’s Article I powers. However, in certain separation of powers issues, the conflict often emerges not between the President and Congress, but between the President and Judiciary. As prescient as Jackson’s framework is, the three tiers fail to provide an approach to deal with this unanticipated conflict. This Article contends that after diligently analyzing a separation of powers issue using the *Youngstown* three-tiered framework, an implicit *Youngstown* Tier 4
emerges. The traditional *Youngstown* framework, as presented by Justice Jackson, creates a balancing test among three tiers that courts use in order to assess the balance of power between the Executive and the Legislative branches. In Tier 4, however, the separation of powers tension is between the Executive and the Judiciary—here, the Legislature has not spoken, and the only authority on the issue is the Constitution. Therefore, in a Tier 4 issue, the Court must determine the legal scope of the President’s unenumerated Article II powers.

This question leaves many more questions unresolved. Primarily, how is a court supposed to assess or judge a situation where the President is *not* acting incompatibly with the express or implied will of Congress, and yet is arguing that he is acting solely within under his unenumerated Article II authority? How should a judge “interpret” this area of law, without setting dangerous judicial precedents straight-jacketing the scope of the President’s important powers?

These questions fall outside of the traditional *Youngstown* framework. As Chief Justice Roberts insisted himself during his confirmation hearings, “no one is above the law under our system, and that includes the president.”\(^{206}\) However, by employing functionalist judicial analysis to ensure a just result, and in an effort to avoid having to define the scope of the President’s Article II powers, the Supreme Court has seemingly developed an implicit *Youngstown* Tier 4 to assess national security-related separation of powers issues.

A. *Rasul v. Bush*

*Rasul v. Bush* represents an archetypal case residing in the zone of insight. In *Rasul*, two Australians and twelve Kuwaiti citizens were captured in Pakistan and Afghanistan in late 2001

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or early 2002 and sent to Guantanamo Bay.\textsuperscript{207} The aliens filed suit in U.S. district court, challenging their confinement after being detained by U.S. forces for over two years without being charged with any offense.\textsuperscript{208} The aliens also alleged they had never been a combatant against the United States or never engaged in any terrorist acts.\textsuperscript{209} All of the aliens were contesting the legality and conditions of their confinement. Ultimately, the question before the Supreme Court in \textit{Rasul} was simply whether the district courts even had jurisdiction to “consider challenges to the legality of the detentions of foreign national captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.”\textsuperscript{210} Therefore, the narrowness of the issue in \textit{Rasul}, as well as the narrowness of the Court’s ultimate holding in the case, is an important fact to keep in mind.

1. Petitioners’s Claim: The Executive is Acting Contrary to and Without Congressional Authority, and His Power is Therefore at its Lowest Ebb

The petitioners in \textit{Rasul} wasted no time highlighting for the Supreme Court the tremendous separation of powers issues at play in the case. The \textit{Rasul} petitioners insisted that they were neither challenging their initial capture nor seeking immediate release from confinement: they asked only that they be accorded fundamental rights during their confinement.\textsuperscript{211} Insisting that it was “contrary to our most fundamental traditions,” and “contrary to statutes enacted by Congress defining the jurisdiction of the federal courts,”\textsuperscript{212} the \textit{Rasul} petitioners insisted that the Supreme Court had long held “that the judiciary cannot shirk its duty regardless whether . . . the challenged government actions were undertaken to protect national

\begin{footnotesize}
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\item \textsuperscript{207} \textit{Rasul v. Bush}, 542 U.S. 466, 470 (2004).
\item \textsuperscript{208} \textit{Rasul} 542 U.S. at 466.
\item \textsuperscript{209} \textit{Rasul} 542 U.S. at 471.
\item \textsuperscript{210} \textit{Rasul} 542 U.S. at 466.
\item \textsuperscript{211} \textit{Rasul}, Petr.’s Br. 4.
\item \textsuperscript{212} \textit{Rasul}, Petr.’s Br. 5.
\end{itemize}
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security . . .” Citing Youngstown, the petitioners asserted that “no penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.”

The petitioners also alleged that the “President made no determination that there [was] reason to believe any of the petitioners is or was a member of al Qaida or has engaged in any act of terrorism and is therefore subject to detention under the Military Order.” Therefore, the petitioners insisted that the situation in Rasul was a Youngstown Tier 3 situation. The President was acting contrary to Congressional authorization. Thus the Executive’s power flowed at its lowest ebb, and could only be justified if the a court could conclusively hold that the situation falls solely within the President’s enumerated Article II powers, and beyond the control of Congress’s Article I powers.

Despite their invocation of this functionalist approach, however, the petitioners supported their argument with some very formalist assertions. Considering the black letter law, they insisted the Executive’s actions violated the Constitution, international law, treaties of the United States, and federal laws and regulations. They also insisted that under 28 U.S.C. § 1331, the courts of the United States had jurisdiction to hear their habeas corpus petitioners—empowered to them under 28 U.S.C. § 2243—due to the tremendous federal question issues at play in the case. They argued that “restrictions of that judicial authority are not to be implied in the absence of a clear and unambiguous congressional statement restricting or repealing the courts’ jurisdiction.”

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213 Rasul, Petr.’s Br. 20.
214 Rasul, Petr.’s Br. 20, n. 35 (citing Youngstown, 343 U.S. at 646 (Jackson, J., concurring).
215 Rasul, Petr.’s Br. 2.
216 Youngstown, 343 U.S. at 641 (Jackson, J., concurring).
217 Rasul, Petr.’s Br. 4. (“This Court has long and repeatedly held that broad jurisdictional grants like [§1331] give the courts created by Congress authority to review executive actions, particularly when the actions deprive individuals of their liberty.”)
218 Rasul, Petr.’s Br. 4.
The petitioners also went to great lengths to distinguish their case—in a formalistic common law fashion—from *Eisentrager*.\(^{219}\) In *Rasul*, the District Court relied on *Eisentrager* hold that the court lacked jurisdiction to even hear the petitioners’ claims for relief. The petitioners insisted that “*Eisentrager* [stood] for the sensible proposition that enemy aliens, who had been tried and convicted overseas by a duly constituted military tribunal established under law, could not obtain review of their convictions in the U.S. civil courts.”\(^{220}\) The situation in *Rasul*, however, could not be controlled by *Eisentrager*, because here:

1. the Court was dealing with habeas petitions from aliens from allied countries (Australia and Saudi Arabia), not claims from enemy aliens;\(^{221}\)
2. in *Eisentrager*, the enemy aliens had already received process, and had been tried and convicted by a legally constituted military commission; here, the aliens had received no process, let alone been charged;\(^{222}\)
3. unlike Germany and China, where the enemy aliens in *Eisentrager* were captured and detained, Guantanamo Bay was under U.S. control and is, “for all practical purposes . . . American territory.”\(^{223}\)
4. the actions taken by the Executive in *Eisentrager* was fully in accord with the Geneva Conventions and internal law; here, “the idea that this or any nation can go around the world rounding up aliens and imprisoning them outside the rule of law and without court review is simply anathema to the law of civilized nations;” and lastly
5. The Court’s holding in *Eisentrager* fell under 28 U.S.C. § 2243, meaning, there the Court simply held that the aliens did not have access to the writ. “Had the Court decided that the district court lacked jurisdiction, it would have decided the case under § 2241, which grants habeas jurisdiction, rather than § 2243, which establishes the standards for issuing the writ.”\(^{224}\)

Therefore, the petitioners in *Rasul* attacked the District Court’s dismissal of their claim with very clear, formalistic arguments, in an effort to convince the Supreme Court to reverse the District Court’s determination that lacked the jurisdiction to hear the petitioners challenge to their detention.

However, the petitioners tempered some of their formalist arguments with quite functionalist assertions. Recognizing the needs of the Commander in Chief to protect the nation, and appealing to the Justice’s pragmatic concerns of not overstepping the Court’s authority, they

\(^{220}\) *Rasul*, Petr.’s Br. 7.
\(^{221}\) *Rasul*, Petr.’s Br. 7.
\(^{222}\) *Rasul*, Petr.’s Br. 8.
\(^{223}\) *Rasul*, Petr.’s Br. 8.
\(^{224}\) *Rasul*, Petr.’s Br. 30.
calculatingly only requested as much process and rights owed to them “subject to any restrictions that might be reasonably necessary to protection national security.”225 They also insisted that they were not arguing for an Article III court to review the basis of each individual detention at Guantanamo Bay—simply that the Supreme Court hold that some legal process applies and that federal courts have jurisdiction to ensure that it does.226 In addition, the petitioners conceded that the “courts should certainly pay considerable deference to the executive in times of crisis,” but insisted that in this case, the government was not asking for deference—it was contending “that the courts do not even have the authority to defer . . . and that they lack jurisdiction even to examine the government’s actions.”227 The petitioners, in highlighting the tremendous separation of powers at stake, insisted that “the courts’ role may be limited in times of crisis, but they must have a role to play.”228

2. Government’s Response: The President is Acting Pursuant to Congressional Authority, and “There is No Basis For Carving A ‘Guantanamo Exception’ Out of Eisentrager’s Sovereignty-Based Rule”229

The Government’s response wasted no time setting the tone of what was at stake for the Court: “On September 11, 2001, the United States experienced the most deadly and savage attack on civilian lives and property and its commercial and government infrastructure in one day in the Nation’s history.”230 Citing the AUMF and the sentiment of Congress that those responsible for 9/11 “continue to pose an unusual and extraordinary threat to the national security, and that the President has the authority under the Constitution to take action to deter and prevent attacks of international terrorism against the United States . . .”, the Government’s brief asserted that the President took lawful action as Commander in Chief—pursuant to an act

225 Rasul, Petr.’s Br. 4.
226 Rasul, Petr.’s Br. 12.
227 Rasul, Petr.’s Br. 12.
228 Rasul, Petr.’s Br. 12.
229 Rasul, Petr.’s Br. 28.
230 Rasul, Resp.’s Br. 2.
of Congress—to defend the country and prevent additional attacks. According to the Government, therefore, this was a *Youngstown* Tier 1 scenario, and the President’s power was at its highest.

The Government’s contended that under *Eisentrager*, federal courts lack jurisdiction to hear challenges to the detention of enemy combatants at Guantanamo Bay. In a very functionalist fashion, the United States explained to the Court that “[a]s in virtually every other armed conflict in the Nation’s history,” the military had detained enemy combatants, and such detention “serves the vital military objectives of preventing the captured combatants from rejoining the conflict and gathering intelligence to further the overall war efforts and prevent additional attacks.” In addition, the Government asserted that the detainees undergo a “multi-step screening process to determine if their detention is necessary.” Lastly, the Government appealing to the Court’s obligation to ensuring due process is accorded, acknowledged that “in

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231 *Rasul*, Resp.’s Br. 2.
232 *Rasul*, Resp.’s Br. 1.
233 *Rasul*, Resp.’s Br. 2.
234 *Rasul*, Resp.’s Br. 2.

... when an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, i.e., whether the individual is “part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.”

Individuals who are determined to be enemy combatants are sent to a centralized holding in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews of the detainee. That screening team looks at the circumstances of capture, the threat the individual poses, his intelligence value, and with the assistance from other U.S. government officials on the ground, determines whether continued detention is warranted. Detainees whom the U.S. military determines, after conducting this screening process, have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. A general officer reviews the screening team’s recommendations. Any recommendations for transfer for continued detention at Guantanamo are further reviewed by a Department of Defense review panel.

...
addition to these existing procedures, the Department of Defense . . . will, on a going-forward basis, establish administrative review boards to review at least annually the need to detain each enemy combatant.”

Continuously insisting that *Eisentrager* controls this case and that there are no distinguishing characteristics between the facts in *Eisentrager* and the facts in *Rasul*, the Government was quick to caution the court that “[d]eviating from the principles recognized in *Eisentrager* in this case would raise grave constitutional concerns.”

The Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation’s foreign affairs and military operations. Exercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would place the federal courts in the unprecedented position of micro-managing the Executive’s handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require U.S. soldiers to divert their attention from the combat operations overseas; and strike a serious blow to the military’s intelligence-gathering operations at Guantanamo.

Therefore, based on very functionalist claims, the Government asserted that because *Eisentrager* prevents the detainees from having jurisdiction, and because the President was acting pursuant to authority granted by Congress, the Court did not have the power to hear the claims at all. According to the Government, “the responsibility for observance and enforcement of the rights of aliens held abroad under the law of armed conflict is upon political and military authorities, not the courts.”

It is curious how infrequently the Government cites any law, other than *Eisentrager*, for its propositions in the *Rasul* brief. However, the Government did try to craft several formalist arguments to support its sweeping pronouncements. In one section, the Government noted that in 1951, immediately after *Eisentrager*, there was a “failed legislative attempt” to create jurisdiction for habeas corpus “inquiring into the legality of any detention by any officer, agent, or employee of the United States, irrespective of whether the detention is in the United States or

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235 *Rasul*, Resp.’s Br. 5, at n. 4.
238 *Rasul*, Resp.’s Br. 13 (internal citations omitted).
in any other part of the world, and irrespective of whether the person seeking the writ is a citizen or an alien.”

Thus, in the event that the Supreme Court may have considered that Rasul fell into the zone of twilight—where it was unclear whether the President was acting with or without Congressional authority—the Government attempted to show the Court that, like the situation in Youngstown, Congress had attempted but to failed to pass legislation that would have changed the outcome under these particular facts. The Government emphasized that this failed legislative attempt “was never voted out of committee, much less enacted into law.”

Another glaring deficit in the Government’s response is its dearth of discussion on the Petitioners’ claim that they had jurisdiction to petition federal courts under 28 U.S.C. § 2241 or § 1331. Interestingly, the Government agreed that allowing the detainees to challenge their detentions before hostilities had ended “implicates political questions that the Constitution leaves to the President as Commander in Chief.” Despite this fact, however, the Government does not even address the petitioners’ § 2241 or § 1331 claims, and merely insists that “departing from Eisentrager would raise grave separation of powers concerns.”

Although the Government’s ostensibly argued that the President’s actions fell within Youngstown Tier 1, the Government’s implicitly argued in the alternative that the detention of Rasul fell into the Tier 4 zone of insight. Specifically, the Court’s opinion would by necessity have to limit, define, and restrict the President’s unenumerated Article II authorities. This determination would be based solely on the Court’s insight into the collateral concerns and policy issues dealing with indefinite detention, rather than any formalistic considerations such as case law, statutes, or executive orders.

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239 Rasul, Resp.’s Br. 18 (internal citations omitted)(emphasis in original).
240 Rasul, Resp.’s Br. 18.
241 Rasul, Resp.’s Br. 18.
242 Rasul, Resp.’s Br. 41.
That the government and the Supreme Court can each describe two wholly separate, yet
totally coherent and logical functionalist arguments illustrates several of the pitfalls of
functionalism. Namely, the inability to create predictable rules and provide guidance for future
parties.

3. The Supreme Court’s Functionalist Analysis: § 2241 Provides the District Court
Jurisdiction to Hear Petitioners’ Claims

Considering the Petitioners’s formalistic brief, replete with a plethora of citations to case
law and statues, with the Government’s very functionalist brief, consisting mainly of policy
driven arguments concerning national security and executive power, the Supreme Court accepted
one of the petitioners’ main formalist arguments, but proceeded with its own functionalist
argument distinct from the Government’s brief.

First, Justice Stevens held that under 28 U.S.C. § 2241, U.S. courts have jurisdiction to
consider challenges to justify the legality of detention of foreign nationals captured abroad in
connection with hostilities and incarcerated at Guantanamo Bay.\textsuperscript{243} Using a formalistic analysis,
the Court parsed precedent, and distinguished \textit{Eisentrager}, finding that it dealt with whether the
enemy aliens enjoyed a \textit{constitutional} right to habeas, whereas the situation in \textit{Rasul} dealt with
whether the aliens enjoyed a \textit{statutory} right to habeas.\textsuperscript{244} In so holding, the Court rejected the
Government’s position that these detention cases were controlled by \textit{Eisentrager}, citing the same
distinguishing factors that the petitioners raised in their brief that distinguished their case from
the enemy aliens in \textit{Eisentrager}.\textsuperscript{245}

Despite its citation to the law, the major thrust of \textit{Rasul} followed a functionalist
approach. Looking to the Judiciary Act of 1789 and its legislative history, the Court found

support for the proposition that Congress’s original intention with the first habeas statute was to extend the protections of the writ “to all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty of the United States . . .” Justice Stevens thus found it plausible that the writ could be extended to aliens being held abroad.\textsuperscript{246} The Court also reviewed a number of common law holdings on habeas, and concluded that the historic purpose of the writ was to “relieve detention by executive authorities without judicial trial.”\textsuperscript{247} Therefore, in \textit{Rasul}, the Court found its legislative and common law support for extending the writ by focusing on the purposes behind the law. Considering purposivism is a hallmark trait of functionalism, as it places pragmatic policy concerns ahead of what the law actually provides.

In addition, Justice Kennedy’s concurring opinion was a classic functionalist approach to the separation of powers at issue in \textit{Rasul}, and—as can be seen by reviewing subsequent detention cases—likely served as the framework analysis for the Court’s future habeas holdings. Kennedy highlighted that in \textit{Eisentrager}, the Court looked to an “ascending scale of rights” that courts have recognized depending on their connection to the United States.\textsuperscript{248} Kennedy appreciated such an ascending scale, because he felt that “there is a realm of political authority over military affairs where the judicial realm may not enter,” and as such the authority of the Court to enter such a realm must be balanced against “the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs.”\textsuperscript{249} This is evidence of the ultra-functionalist, implicit \textit{Youngstown} Tier 4 category that the Government alluded to. That is, certain separation of powers issues fall outside the traditional

\begin{itemize}
\item \textsuperscript{246} \textit{Rasul}, 542 U.S. at 473.
\item \textsuperscript{247} \textit{Rasul}, 542 U.S. at 473.
\item \textsuperscript{248} \textit{Rasul}, 542 U.S. at 486 (Kennedy, J., concurring).
\item \textsuperscript{249} \textit{Rasul}, 542 U.S. at 487 (Kennedy, J., concurring).
\end{itemize}
three *Youngstown* tiers, and the Court would therefore—in order to “interpret” the law—have to define the scope of Article II authority.

In the end, Kennedy asserted that even after balancing the petitioners’ right to habeas with the President’s Commander in Chief authorities, the fact that petitioners had been held for years without being charged fatally weakened the President’s argument that the petitioners needed to be detained as a matter of military necessity. Thus federal question jurisdiction should be extended to detainees held at Guantanamo Bay, and the petitioners are permitted to properly file habeas actions in U.S. district court. Kennedy chose to avoid ruling on the scope of the President’s authority to detain the petitioners. After initially highlighting the *Youngstown* Tier 4 concerns, he ultimately based his opinion on a jurisdictional issue. Kennedy merely found that the lower courts misapplied or misinterpreted the law as it pertains to habeas jurisdiction.

Lambasting both the majority and concurring opinions, Justice Scalia’s dissent characteristically attempts to take a more formalistic, textualist reading of the statutes at issue in *Rasul,* Asserting that “Justice Kennedy’s approach provides enticing law-school-exam imponderables in an area where certainty is called for . . .”, Justice Scalia insists the only proper way to analyze such a case is by looking at the text of the statutes involved, particularly 28 U.S.C. § 2241.

Allowing such vague balancing tests as “ascending scales” is a functionalist approach that fails to provide guidance for future cases, and permits no certainty. Does security find a refuge in such a jurisprudence of doubt?

Scalia concedes that § 2241 could be construed atextually to imply the extension of habeas jurisdiction to an American citizen being held outside of the United States. However, the Grandfather of textualism rebuffs that proposition, as “the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application

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250 *Rasul*, 542 U.S. at 495 (Scalia, J., dissenting).
of the text to a situation in which it raises no constitutional doubt.”\textsuperscript{251} Scalia, vaunted for hewing closely to the text, rejects the majority’s approach of clinging to possible atextual exceptions, and harks to the world that the text of the statute controls. This exchange between Kennedy and Scalia highlights the distinction between the functionalist and the formalistic approach. Whereas Kennedy, the functionalist, is willing to challenge the executives power by relying on an atextual exception to a statute, Scalia, the formalist, is loathe to depart from the statute when the text clearly controls the matter at hand.

Later in the opinion, after establishing the formalistic and legalistic justifications for his favored resolution of the case, Scalia adopts functionalist overtones, as he considers the policy implications of the majority opinion, and how the judiciary’s involvement in this matter may impact national security. Justice Scalia cautions that the Court’s holding would create a “monstrous scheme in a time of war” and would frustrate “our military commanders’ reliance upon clearly stated prior law.”\textsuperscript{252} Therefore, even Justice Scalia, in an attempt to make a formalistic, textualist argument, ends up advocating that the Court be deferential to the executives prerogative. In other words, the Court should be look at the issues in a functionalist fashion, so as to obtain a more policy-driven result.

Thus, although it seemed that the Petitioners’s formalistic brief ultimately convinced the Justices to rule in their favor, even the Supreme Court’s analysis—in the majority, concurring, and dissenting opinions—adopted a functionalist analysis. Scalia’s departure from the printed pages of the U.S. Code and his journey to the free-wheeling wilderness of policy judgments underscores the argument that ultimately, all national security decisions compel Judges to resolve the issue with functionalist concerns in mind. Obviously, Stevens and Scalia have

\textsuperscript{251} \textit{Rasul}, 542 U.S. at 495 (Scalia, J., dissenting).
\textsuperscript{252} \textit{Rasul}, 542 U.S. at 506 (Scalia, J., dissenting).
divergent views of what policy interests should prevail, but both justified their opinions by looking toward the outcome.

Although both the Petitioners and the Government in Rasul highlighted the separation of powers issues at play, and both asserted that the Rasul case could be placed in the Youngstown framework, the Supreme Court’s holding did not place the case under any of Youngstown’s tiers original three tiers; it simply held that U.S. district courts had the statutory authority to hear the petitioner’s claims. If a separation of powers case does not fall within the three tiers of Youngstown, where does it reside? Hamdi v. Rumsfeld, decided within days of Rasul, illustrates the Court’s implicit adoption of a Fourth Tier of Youngstown.

B. Hamdi v. Rumsfeld

Hamdi—a decision that only garnered a plurality of the Court—was decided just one week after Rasul. This seminal case brought to light the contentious issue of whether due process required that a U.S. citizen being held as an enemy combatant by the President should be given a meaningful opportunity to contest the factual basis for his detention.253 Hamdi was born in Louisiana in 1980, but moved to Saudi Arabia as a child.254 At some point in 2001, Northern Alliance captured him in Afghanistan, and eventually turned him over to U.S. military custody. He was subsequently transferred to Guantanamo Bay, but after learning he was a U.S. citizen, the military transferred him to military brigs in the United States. The Government designated him as an enemy combatant, and held him there for over two years without charging him with any crimes, despite the fact that he was an American citizen, The Government nebulously asserted that they could indefinitely detain him without formally charging him “unless and until

254 Hamdi, 542 U.S. at 511.
it makes the determination that access to counsel of further process is warranted.” Like Rasul, the actual issue in Hamdi was extremely narrow. The questioned presented was whether Constitutional due process requires that an American citizen being detained by the Executive as an enemy combatant is entitled to any process that would enable him to challenge his detention. However, unlike Rasul, the facts of Hamdi raised considerably complicated and significant separation of powers issues.

1. Petitioner’s Argument: “Judicial Review of Executive Detention is Demanded By, Not Contrary To, the Separation of Powers”

The overall tone of the petitioner’s brief in Hamdi is very formalistic. The petitioner sticks to black letter law to make a strong argument that due to his citizenship, Hamdi is entitled to due process review of his detention. Echoing the argument raised by the petitioners in Rasul, Hamdi also asserted that district courts have jurisdiction over his claims for habeas corpus pursuant to § 2241. Additionally, one of the most prominent arguments raised in Hamdi was that under 18 U.S.C. § 4001(a), the President lacked any authority to detain Hamdi, regardless of the AUMF. 18 U.S.C. § 4001(a) provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” Also, the petitioner emphasized that the Court’s holding in Ex Parte Quirin pre-dated the passage of § 4001(a), and thus any reliance on Quirin without addressing § 4001(a) is misguided and incorrect. In addition, Hamdi challenged the President’s assertion that he could be indefinitely detained, and alleged

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255 Hamdi, 542 U.S. at 511-12.
256 Hamdi, Petr.’s Br., 12.
257 Hamdi, Petr.’s Br., 1.
258 Hamdi, Petr.’s Br., 2.
259 Ex parte Quirin, 317 U.S. 1 (1942). Petitioners asserted that Quirin “provides no precedent for unilateral executive detention of citizens . . . [for] [t]he military authority at issue in Quirin that the Court permitted to be exercised over a citizen was explicitly authorized by Congress. No such congressional authorization exists here.” Id. at 13.
that, as a citizen, Hamdi’s conditions of confinement amount to punishment, and therefore violate his due process rights.\footnote{Hamdi, Petr.’s Br., 8.}

Appealing to the Justice’s concerns for the policy implications of this important decision, the petitioner also employed functionalist methods in an effort to emphasize that the President was acting extralegally by continuing to detain Hamdi. Citing the legislative history to § 4001(a), the petitioner asserted that the “text and the history of § 4001(a) weigh against finding that the AUMF permits the indefinite detention of citizens. Section 4001(a) prohibits detention of ‘any kind absent a congressional grant of authority to detain.’”\footnote{Hamdi, Petr.’s Br., 45 (citing Howe v. Smith, 452 U.S. 473, 479 n.3).} Therefore, by virtue of § 4001(a) and its legislative history, Congress had specifically addressed “the precise authority at issue and required that citizens not be imprisoned or otherwise detained by the United States ‘except pursuant to an Act of Congress . . .’”\footnote{Hamdi, Petr.’s Br., 45.} The AUMF provided no such explicit authority. The President’s power, therefore, was at its lowest ebb in this Youngstown Tier 3 situation, for he was acting in contradiction to Congressional authority.

The petitioners also implicitly invoked a Youngstown Tier 4 scenario. The petitioners insisted that “[i]t is well-settled . . . that the phrase war power cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit . . .”\footnote{Hamdi, Petr.’s Br., 41 (internal citations omitted).} Citing Youngstown, Hamdi argued “[b]ecause the Executive’s power ‘must stem either from an act of Congress or from the Constitution itself,’ and the authority to indefinitely detain Hamdi is derived from neither source, his detention is illegal.”\footnote{Hamdi, Petr.’s Br., 41 (internal citations omitted).} Such an argument does not place executive action within any of Youngstown’s original three tiers, and instead pushes the
President’s actions into Youngstown Tier 4. The Petitioner’s therefore asks the Court to make a ruling as to the scope and limit of the President’s unenumerated Article II war powers.

2. The Government’s Response: The Responsibility for Waging War is Committed to the Political Branches

In responding to the petitioners, it is interesting to note that the Government seldom invokes the moniker “the President,” and instead refers almost exclusively to the authorities of the “Commander in Chief.” Such a deliberate phrasing connotes that the ultimate issue is to define the scope of the President’s unenumerated powers as Commander in Chief. Echoing the arguments made in Rasul, the Government in Hamdi again assured the Supreme Court that the detainees were given ample amounts of process, and that the military had a multi-layered screening system in place to determine whether a detainee should continue to be held or released. In addition, the Government pointed out to the Court that in 2003 (two years after Hamdi was captured), the Department of Defense, without any prodding from the Courts, had announced “as a matter of policy” that it would

permit an enemy combatant who is presumed a citizen and detained in the United States to have access to counsel after the military has determined that such access will not compromise national security and it has either completed intelligence collection from the detainee or determined that access to counsel would not interfere with such efforts.

In an effort to rebut the petitioner’s argument regarding § 4001(a), the Government employs a quasi-formalist analysis. First the Government articulates that § 4001(a) is not applicable to military scenarios, because it is located in Title 18, the criminal code, and therefore only applies to civilian situations. As a result, § 4001 “does not intrude on the authority of the

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264 Hamdi, Resp.’s Br. 9.
265 Hamdi, Resp.’s Br. 1.
266 Hamdi, Resp.’s Br. 3.
267 Hamdi, Resp.’s Br. 8-9.
executive to capture and detain enemy combatants in wartime."\textsuperscript{268} In addition, the Government asserts, "[t]he fact that § 4001(a) does not apply to military detentions is bolstered by [§4001(b)], which is addressed to ‘control and management of Federal penal and correctional institutions,’ and exempts ‘military or naval institutions.’"\textsuperscript{269}

At first glance, the government’s position seems grounded on a strong formalist foundation. However, upon closer scrutiny, this argument fails on two grounds. First, § 4001(b) simply asserts that the federal penal and correctional institutions shall be managed by the Attorney General, and the Attorney General “shall promulgate rules for the government thereof,” but that the Attorney General does not have the authority to control or promulgate rules for military or naval institutions.\textsuperscript{270} Therefore, the text of § 4001(b) does not clearly assert that there is an exception for military or naval institutions to § 4001(a), and therefore the President can detain indefinitely detain an American citizen without an act of Congress. The “exception” the Government mentions applies internally to § 4001(b), and is not an exception to the limits of § 4001(a).

Second, unlike the petitioner’s brief to the Supreme Court, Government failed to mention the case of \textit{Howe v. Smith},\textsuperscript{271} which explicitly held that § 4001(a) applies to all U.S. citizens regardless of “enemy combatant” status.\textsuperscript{272} This glaring oversight of the Government would clearly make the President’s actions in regard to Hamdi squarely within \textit{Youngstown} Tier 3, and the President acted in direct contradiction to a Congressional prohibition against the detention of an American citizen without explicit Congressional Authorization.

\textsuperscript{268} \textit{Hamdi}, Resp.’s Br. 21.
\textsuperscript{269} \textit{Hamdi}, Resp.’s Br. 21 (internal citations omitted) (emphasis in original).
\textsuperscript{271} 452 U.S. 473 (1981).
\textsuperscript{272} See Stephen Vladeck, \textit{A Small Problem of Precedent: 18 U.S.C § 4001(a) and the Detention of U.S. Citizen “Enemy Combatants,”} 112 YALE L.J. 961 (2003) (eluca=ldating that §4001(a) was enacted amid mounting public pressure during the Vietnam War, and sought to “restrict the . . . detention of citizens of the United States to situations in which statutory authority for their incarceration exists.” At the time, it represented a legislative response to the outrage over the executive internment of Japanese Americans during World War II, detentions carried out pursuant only to a presidential order.) \textit{Id.}
On the issue of Hamdi’s U.S. citizenship, however, the Government’s main response was simply that, under *Quirin*, the President had the authority to detain anyone—citizen or non-citizen—under his Commander in Chief and war powers.\(^{273}\) In fact, the Government also argued that detaining Hamdi is a “time-honored and humanitarian practice . . . as opposed to subject[ing] such combatants to the more harmful consequences of war.”\(^{274}\) Therefore, the Government, like the petitioner, also makes an implicit *Youngstown* Tier 4 appeal to the Supreme Court. They assert that the President’s actions fall squarely within his Article II authorities, and that “the President’s authority to wage war is not dependent on any special legislative authority.”\(^{275}\) This typifies the Government’s attempt to push the issues out of the normal three-tiered *Youngstown* framework, which would help solve disputes between Congress and the President, and into a *Youngstown* Tier 4, where the dispute exists between the President and the Court. In fact, in further articulating this tension, albeit implicitly, the Government asserted that “a court’s proper role in a habeas proceeding such as this would be to confirm that there is an adequate basis for the military’s determination that an individual is an enemy combatant.”\(^{276}\) In other words, the Supreme Court has no places to articulate, rule upon, define, or limit, the unenumerated war powers of the President.

3. The Plurality Opinion: *Youngstown* Tier 1, or *Youngstown* Tier 4?

The plurality opinion in Hamdi ultimately rejected the petitioner’s § 4001(a) argument, and held that in regard to § 4001(a), the AUMF provided the President with the authority to detain combatants “in the narrow circumstances here.”\(^{277}\) Therefore, in one respect the situation in *Hamdi* was not a *Youngstown* Tier 3 situation, but rather was a *Youngstown* Tier 1 situation.

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\(^{273}\) *Hamdi*, Resp.’s Br. 17.
\(^{274}\) *Hamdi*, Resp.’s Br. 19.
\(^{275}\) Id.
\(^{276}\) *Hamdi*, Resp.’s Br. 27.
The President’s power was at its zenith because he was acting under the authority of both his Article II powers, as well as Congress’s Article I powers. However, the plurality held that “due process demands that a citizen being held in the United States as an enemy combatant be given meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”278

Imposing the *Youngstown* framework onto the plurality holding in *Hamdi*, one can see that the outcome of the case can be interpreted in more than one way. In one respect, although the ultimate effect in *Hamdi* was that the petitioner was entitled to more robust, constitutional due process considerations and could therefore question the President’s grounds for his detention, it is interesting to note that the Court’s holding in no way involved defining the scope of the President’s Commander in Chief or war power authorities to detain enemy combatants in a time of war. The plurality opinion in *Hamdi* can be read to acknowledge that the President was acting within the scope of authority granted to him by Congress, but that it was *Congress* that was deficient for failing to more artfully articulate for the President “what process is due to a citizen who disputes his enemy-combatant status.”279 Under this analysis, the Court in *Hamdi* would have considered this scenario as a *Youngstown* Tier 2 situation. Because Congress failed to clearly articulate the process due to citizen detainees, they generated an uncertain zone of twilight and thus the President was not acting ultra vires.

However, another interpretation of the plurality opinion in *Hamdi* would push its analysis into the implicit *Youngstown* Tier 4, and therefore, the ultimate effect of the opinion would be that the Supreme Court is definitively ruling on the scope of the President’s unenumerated Article II powers. In fact, the plurality cites *Youngstown* and insists that

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278 Id.
279 *Hamdi*, 542 U.S. at 525,
[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.  

Such a declaration articulates that the Court considered the separation of powers issue in Hamdi was not limited to Congress and the President, but that it also involved the Court. Under this reading of the opinion, in holding that as a citizen, Hamdi was entitled to more due process than the Government provided to him under the system that the President executed and Congress authorized, the Court took a stand. Article III made the decision to decisively “say what the law is,” and thus definitively set a limit—albeit a very narrow one—on Presidential Article II powers.

Under both readings of the opinion, however, the Court employs a very functionalist analysis of the issues. Justice Souter’s concurring opinion delves into the legislative history of § 4001(a). Legislative history, an unreliable form of extrinsic evidence, is a hallmark of functionalistic jurisprudence, as it puts statements not enacted into law potentially above the text of the statute itself. Souter asserts that the AUMF did not provide enough authority to detain Hamdi, and by citing Youngstown, that reminded the Court that “the President is not the Commander in Chief of the country, only of the military . . . “, and his Commander in Chief power would not extend to detaining a citizen. Such an analysis would put the case in Hamdi either under Tier 3 or the implicit Tier 4. Ultimately, however, Justice Souter concurred in the overall judgment.

Justice Scalia’s dissenting opinion also employed functionalist analysis. By examining the Federalist Papers, Blackstone, and common law from the seventeenth century, Scalia

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280 Hamdi, 542 U.S. at 536 (internal citations omitted) (emphasis added).
281 See supra Part III.B.
282 Hamdi, 542 U.S at 543, 553 (Souter, J., concurring).
283 Hamdi, 542 U.S at 540 (Souter, J., concurring).
ultimately assert that the Executive lacks indefinite wartime detention authority over citizens.\(^{284}\) Justice Scalia is clearly making a *Youngstown* Tier 4 argument. He contends that the President was unconstitutionally exceeding his Article II powers. Further, Justice Scalia thereafter castigates the plurality for their unwillingness to declare that it, too, was making a similar holding. Justice Scalia exclaims

> [t]here is a certain harmony of approach in the plurality’s making up for Congress’s failure to invoke the Suspension Clause and its making up for the Executive’s failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-It Mentality. The plurality seems to view it as its missions to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions.\(^ {285}\)

Thus, the varying opinions in *Hamdi* depict not only the application of the *Youngstown* framework to a national security-related separation of powers issue, but also depicts the Court’s contemporary willingness to recognize a clear, implicit *Youngstown* Tier 4 situation. In this zone of insight, the essential question involves the actual, pure scope of Article II power, and thus the tension becomes one between the judiciary and the executive—and yet the overall unwillingness, except for the strong language in Justice Scalia’s dissent, to make an outright judgment that would conclusively limit the scope of an Article II power. Rather, using a functionalist analysis, the Court remains cautious to “not circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief.”\(^ {286}\)

**CONCLUSION**

Since Justice Jackson articulated his three-tiered framework for analyzing separation of powers issue, the Supreme Court has issued two types of cases. Those cases that fit within the original *Youngstown* framework and those that either fall outside the framework, and those that

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\(^{284}\) *Hamdi*, 542 U.S at 555 (Scalia, J., dissenting).  
\(^{285}\) *Hamdi*, 542 U.S at 576 (Scalia, J., dissenting).  
\(^{286}\) *Youngstown*, 343 U.S. at 645-46 (Jackson, J., concurring).
push the framework into an implicit Tier 4. This flexible approach reinforces now Chief Justice Roberts’s caution that even in contemporary times, the Supreme Court must continue to “calmly poise the scales of justice,” and ensure the delicate constitutional balance between the Executive, the Legislature, and the Judiciary remains fluid and functioning.

The prevalence and success of Justice Jackson’s framework to analyze the President’s Article II powers also sheds light on why it is that judges, regardless of their normal judicial predispositions, may find a functionalist approach to national security-related separation of powers issues a more efficient and safe way to calmly poise the scales of justice. In fact, by analyzing the *Dames & Moore* scenario, as well as the Detention Cases, although petitioners, respondents, and the Court itself may make formalist arguments of the limits of unenumerated Article II powers, all parties tend to conclude with an overall functionalist assertion. Although a formalist analysis may “maintain clear constitutional roles for the branches of government,” may lead to more predictable results, and provide more guidance for future Presidential actions, these very factors may themselves turn out to be the dangerous precedent.

By employing a functionalist analysis on national security-related separation of powers issues, on the other hand, many of functionalism’s alleged pitfalls suddenly become attractive strengths in certain contexts. Allowing a judge to consult a myriad of extrinsic sources, mitigating the risk of creating any sort of binding rules for future Presidential actions, and being able to arrive at a just result without straight-jacketing executive action makes functionalism a sustaining judicial philosophy for all jurists. This dynamic actualizes why Justice Jackson’s framework emerged as the most efficient framework for analyzing separation of powers issues.

As *Rasul* and *Hamdi* show, the need for a functionalist result will sometimes push the Court into an implicit Tier 4. In this zone of insight, the only question for the Court is to resolve

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287 *See supra* Part III.B.
the scope of the President’s unenumerated Article II powers. Thus, in an effort to avoid having to define this scope, the Court will employ a functionalist analysis to either rule on a matter outside the *Youngstown* framework, such as the jurisdictional holding in *Rasul*, or will insist that the President’s actions do fall within the *Youngstown* framework, but will nonetheless establish a limit on Congressional and/or Presidential action, such as the due process holding in *Hamdi*.

The Detainee cases leave much unresolved; namely, whether the *Youngstown* framework, in either its original three-tiered form or the newly emerging four-tired form, will survive as the preferred method of analysis for contemporary separation of powers cases. As Justice Scalia’s dissent in *Hamdi* exposes, the functionalist method of analysis the plurality employed aims to “to Make Everything Come Out Right,” rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions.\(^{288}\) The consequences Justice Scalia augurs, are the effects of a definitive Supreme Court ruling limiting the unenumerated Article II powers of the President.

As Chief Justice Roberts insisted in his confirmation hearings, however, judges have a "limited role" to "interpret the law and not make the law."\(^{289}\) And as long as the Court continues to employ a functionalist framework first envisioned by Justice Jackson in *Youngstown*, judges can choose to rule on functionalist grounds—cognizant of both a just result as well as the consequences of holding on more formalist grounds—and the delicate interplay between the three branches of government can remain fluid, allowing the Court to continue to fulfill its mandate to “calmly poise the scales of justice.”

With Guantanamo Bay scheduled to close, many may feel that this separation of powers jurisprudence is less significant. However, we sincerely disagree. The future of separation of

\(^{288}\) *Hamdi*, 542 U.S at 576 (Scalia, J., dissenting).
powers will be decided based on the cases that emerge. Compare Justice Jackson considering whether President Truman could seize a steel mill in *Youngstown*, or Justice Stone deciding the rights of Nazi Saboteurs in *Quirin*, or Justice Rehnquist ruling on frozen Iranian bank accounts in *Dames & More*, or Justice Kennedy extending the writ of habeas corpus to enemy combatants in Guantanamo Bay in *Boumediene*. Expounding the same constitution, the Courts are called upon to deal with unpredictably different circumstances.

In the nature of national security issues exists a zone of the unknown and unpredictable. No one can say today what the next separation of powers conflict will be. Comporting with the fluid nature of this dynamic is the Supreme Court’s ultra-flexible and functionalist *Youngstown* Tier 4. In order to understand future conflicts, scholars, practitioners, and the government alike must come to grips with the reality that *Youngstown* is not limited to the three tiers Justice Jackson eloquently waxed. Rather the pragmatic concerns for the policy implications of the President’s potentially unbridled power checked by the courts informs a new zone; the zone of insight.

This article attempts to characterize and understand this zone through the context of the separation of power cases with the hope that if a future conflict arrives at the Supreme Court, the legal community will have a solid background and understanding of what factors the Justices have considered in the past, with the hope that this will potentially inform the resolution of future cases. On September 10th 2001, few legalists could have possibly predicted the events that would unfold in the skies, in the battlefields, and most significantly to attorneys, in the courts of law. Thus, the timeliness of this Article is timeless. Going forward, all we know for certain is where we’ve been. And that knowledge will faithfully guide us towards whatever tomorrow may bring.