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The Political Economy of Youngstown

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THE POLITICAL ECONOMY OF *YOUNGSTOWN*

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ABSTRACT

The time is ripe for a non-doctrinal assessment of Justice Jackson's famous three-category framework for challenges to presidential action, elaborated in *Youngstown Sheet & Tube Co. v. Sawyer* (also known as the *Steel Seizure Case*). Recent national security controversies have given the *Youngstown* framework a whole new lease on life, and its relevance for courts, Congress, and executive branch officials has never been higher. During the same period, empirical and analytical studies of presidential policymaking have advanced beyond personality-driven accounts of particular administrations. Together, these developments offer a terrific opportunity to assess how well the *Youngstown* framework fulfills its objective of advancing congressional interests and constraining presidential power.

A political economy approach better explains the problem to which Justice Jackson was responding – the capacity of presidential unilateralism to establish policy that can withstand statutory correction, regardless of whether it has a legal basis – and also explains more formally how *Youngstown's* categories offer a practical, if legally unorthodox, constraint. The assessment becomes more negative, though, once those categories are treated endogenously – that is, once the political branches are modeled as behaving dynamically and reacting to the framework itself. For example, both empirical surveys of executive orders and case studies suggest that the President may react to the risk of legislative disapproval (which under *Youngstown* will likely result in judicial disapproval as well) by avoiding Congress altogether or by seeking only its indirect blessing. Because these and other results disserve the framework's objectives, this Article proposes several more benign alternatives – and, in general, advocates re-seizing *Steel Seizure*.

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THE POLITICAL ECONOMY OF *YOUNGSTOWN*

Edward T. Swaine[†]

INTRODUCTION

Everybody loves *Youngstown Sheet & Tube*, also known as the *Steel Seizure Case*¹ – and how could they not? The decision establishes that the President is governed by the law and by the courts, kind of a *Marbury v. Madison* for the executive branch,² better yet, it did so despite appeals to wartime exigencies, and so reinforced the immutability of constitutional principles.³ *Youngstown* is one of the most celebrated cases dealing with the separation of powers, and even contends for best in show.⁴

Justice Jackson's concurrence is even more beloved. This may have been unexpected: he wrote only for himself (there were five such solo concurrences) under

[†] Associate Professor, George Washington University Law School. For comments on earlier drafts, I am grateful to participants in the annual meeting of the International Law in Domestic Courts section of the American Society of International Law and at the Potomac Foreign Relations Law Roundtable, including in particular Curt Bradley, Brannon Denning, Maeva Marcus, Jeremy Rabkin, Carlos Vazquez, and Steve Vladeck. I also received very helpful research assistance from Andrew Nolan and Bonnie Chen.

¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The fact that the decision is well known by two names, like some celebrities, is independent testimony to its fame.

² Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 217-18 (2002) (“*Youngstown* is to executive power what *Marbury v. Madison* is to legislative power, only more so. *Marbury* was, at most, a weak assertion of judicial power over the legislature . . . *Youngstown*, in contrast, is a bold assertion of judicial power over the conduct of the President . . .”).

³ *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (stating that “we have long held that when the president takes official action, the Court has the authority to determine whether he has acted within the law,” but citing *Youngstown* as “[p]erhaps the most dramatic example of such a case”); Louis Fisher, *Foreword* to MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER*, at ix (1994) (citing the decision as “one of the rare occasions when the Court has rebuked a presidential act in wartime”); *see also* Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES* 233 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (stating that “[s]ome observers regard the *Steel Seizure* case . . . as a turning point in the Court’s handling of politically charged constitutional questions”).

⁴ David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 156 (2002) (“Justly celebrated . . . for its landmark status and deserving rank in the pantheon of great cases--alongside *Marbury*, *McCulloch*, and *Brown* – *Youngstown* has been assured of immortality in the annals of constitutional jurisprudence.”); *id.* at 156-67 (“When measured against *Youngstown*, . . . all other [separation of powers] cases pale into insignificance.’ *Youngstown* featured the most thorough judicial exploration of presidential powers in the history of the Republic, and it constituted the most significant judicial commentary in the 20th century on the limits of those powers.”) (quoting C. Herman Pritchett, *Civil Liberties and the Vinson Court* 206 (1954)).

considerable time pressure (probably contributing to the need to write separately),⁵ and his contemporaries were not bowled over.⁶ But with time, buoyed by Jackson's growing reputation as a jurist, his concurrence's signal contribution – a nifty three-tiered approach that looked approvingly on presidential action taken with the approval of Congress (Category One), virtually condemned action taken contrary to Congress' will (Category Three), and cast other actions into a “zone of twilight” (Category Two)⁷ – has become *Youngstown's* enduring legacy. When the decision's fiftieth anniversary was celebrated,⁸ Justice Jackson's approach, lately dubbed the “*Youngstown* framework,”⁹ was the subject of particular acclaim, and it is widely accepted that his opinion is one of the Court's all-time greats.

For some time, one could dismiss this as academic ardor. When *Youngstown* was rendered, Jackson's concurrence (and his sixth vote supporting the majority) had no direct effect on the result.¹⁰ Even as critical appreciation for the framework grew, its utility for courts lagged, not least because the circumstances of the underlying dispute

⁵ Bellia, *supra* note 3, at 256-60 (reviewing conference notes); *see infra* text accompanying note 52 *et seq.* (describing opinions).

⁶ *See, e.g.*, Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 63 (1953) (“Justice Jackson's rather desultory opinion contains little that is of direct pertinence to the constitutional issue.”); Paul G. Kauper, *The Steel Seizure Case: Congress, the President, and the Supreme Court*, 51 MICH. L. REV. 141, 166 n.71 (1952) (describing substantial part of Justice Jackson's opinion as “in the nature of a gratuitous discussion, although an interesting and valuable one,” given the issues in controversy); *id.* at 175 n.97 (same); *id.* at 176 (same); *id.* at 180 (describing position shared by Justices Frankfurter, Jackson, Burton, and Clark as “an adequate and sound ground for disposition of the case”). A contemporary celebration of Justice Jackson's career praised his *Youngstown* opinion only in a footnote concerning Jackson's inconsistencies – and omitted any mention of the framework that is the subject here. Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 989 n.199 (1955).

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

⁸ *See, e.g.*, Ken Gormley, *Foreword: President Truman and The Steel Seizure Case: A Symposium*, 41 DUQ. L. REV. 667 (2003); *Youngstown at Fifty: A Symposium (Dedication and Forward)*, 19 CONST. COMM. 1 (2002). Stanford Law School actually reheard the case and co-produced a multimedia extravaganza. *Presidential Power in Times of Crisis: The Steel Seizure Case Revisited*, <http://steelseizure.stanford.edu/>; *see also* Charles C. Hileman *et al.*, *Supreme Court Law Clerks' Recollection of October Term 1951, Including the Steel Seizure Cases*, 82 ST. JOHN'S L. REV. 1239 (2008) (published on occasion of fifty-fifth anniversary).

⁹ *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008).

¹⁰ *But see infra* note 64 (noting Justice Clark's pledge to change his own vote).

were rarely replicated.¹¹ Some celebrating the decision earlier this decade asked despairingly whether *Youngstown* was one-of-a-kind.¹²

What a difference a war makes – especially an unpopular one.¹³ In the wake of President Bush’s first-term controversies, his Supreme Court nominees sounded obeisance to Jackson’s framework during their confirmation hearings.¹⁴ This proved to be more than lip service. By the end of the October 2007 Term, Chief Justice Roberts and Justice Alito had joined every other member of that Court in subscribing to the *Youngstown* framework.¹⁵ Others failed to heed it at their peril. When the Office of

¹¹ Justice Jackson’s framework was not invoked until Justice Powell’s separate opinion in *Nixon v. Administrator of General Services*, when it was cited – somewhat cryptically – in support of the contention that the President could waive a constitutional objection, based on Article II, to an otherwise valid congressional act. *Nixon v. Adm’r of Gen. Serv.*, 433 U.S. 425, 503 n.6 (1977) (Powell, J., concurring in part and concurring in the judgment). Its first prominent role was in *Dames & Moore v. Regan*, where it was not shown to its best advantage. *See infra* text accompanying notes 22, 178-188.

¹² Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 81-83, 85, 86 (2002).

¹³ Devins and Fisher, who focused on congressional control of the war-making power, suggested that *Youngstown* would become more relevant when Congress and the public had turned against an unpopular war. Devins & Fisher, *supra* note 12, at 86. Others, agreeing with the perception but extracting a different lesson, suggested that *Youngstown*’s legacy is simply “the tendency of judges to pile on a politically weakened president after the heat of the emergency has cooled.” ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 51 (Oxford University Press 2007).

Between the Korean and Iraq conflicts, *Youngstown* had experienced at least a minor resurgence roughly coterminous with President Nixon’s second term and the winding down of the Vietnam War. *See*, for example, the expanding discussion in GERALD GUNTHER & NOEL T. DOWLING (DEC’D), *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 571-72 (8th ed. 1970), and GERALD GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 414-16 (9th ed. 1975); *see also* PAUL BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 404-05 (1975).

¹⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of John G. Roberts, Jr.); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 318 (2006) (testimony of Samuel A. Alito) (indicating agreement with Jackson approach as “a very useful framework,” remarking that “it doesn’t answer every question that comes up in this area, but it provides a very useful way of looking at them”). This went over well with the Senate. 152 CONG. REC. S340, S345 (Jan. 31, 2006) (remarks of Sen. Specter); 152 CONG. REC. S260, S306 (Jan. 30, 2006) (same); 151 CONG. REC. S10481, S10483 (Sept. 27, 2005) (remarks of Sen. Dodd, opposing in other respects the nomination of Judge Roberts); *id.* at S10484 (remarks of Sen. Reed, opposing in other respects the nomination of Judge Roberts).

¹⁵ In fact, the two justices Roberts and Alito replaced could also be added, since they too had recently subscribed to Justice Jackson’s framework. *See* *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) (Roberts, C.J., joined by Alito, Kennedy, Scalia, & Thomas, JJ.); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (Kennedy, J., concurring, joined by Breyer, Ginsburg, & Souter, JJ.); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (Souter, J., joined by Rehnquist, C.J., and Stevens, O’Connor, Kennedy, Ginsburg, and Breyer, JJ.); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Thomas, J., dissenting). Justice Sotomayor has not yet had a chance to opine, but there is no indication that she has a different view. *See infra* text accompanying note 21.

Legal Counsel (OLC)'s so-called Torture Memo was released,¹⁶ its authors were lambasted for neglecting Justice Jackson's concurrence.¹⁷ A similar oversight reportedly helped spur OLC's internal reconsideration of memoranda on the National Security Agency's terrorist surveillance program (TSP);¹⁸ perhaps forewarned by the Torture

¹⁶ Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).

¹⁷ See, e.g., FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 195-96* (2007) (describing "more significant omission" in the torture memos of "the most recent and authoritative opinion on presidential powers in wartime: the *Youngstown* case" – by which the authors mean Justice Jackson's opinion – and cataloging indictments of this failing); Stephen Gillers, *The Torture Memo*, *THE NATION*, Apr. 9, 2008 (likening failure to heed *Youngstown* to "advising a client on school desegregation law and ignoring *Brown v. Board of Education*"); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1568, 1585 (2007) (criticizing the opinion for failing to cite or apply "the watershed Supreme Court opinion most relevant to assessing the constitutionality of the statute: Justice Jackson's three-part [*Youngstown*] framework"); Neil Kinkopf, *The Statutory Commander in Chief*, 81 *IND. L.J.* 1169, 1171 (2006) (arguing that "fail[ing] even to cite to Justice Jackson's seminal opinion from *Youngstown*" was "no mere violation of citation etiquette, for it led OLC to fail to acknowledge that Congress has any relevant authority whatsoever"); Stephen Rohde, *War By Other Means*, *LOS ANGELES LAWYER*, Feb. 2007, at 44 (reviewing JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006)) ("A first-year associate would have been fired for writing a memo on the president's war powers without addressing *Youngstown*. For Yoo to do so while advising the president of the United States is unconscionable."); Bradley R. Wendell, *Professionalism As Interpretation*, 99 *NW. U. L. REV.* 1167, 1172 n.18 (2005) (describing the failure to cite or distinguish *Youngstown* as a "either blatant incompetence or highly tendentious advocacy"). The criticism was sounded in congressional hearings, see *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 534-37 (2005) (statement of Dean Harold Hongju Koh) (condemning the failure to cite *Youngstown* and Justice Jackson's concurrence as "a stunning failure of lawyerly craft"), and in pursuit of academic sanctions. See, e.g., David Glenn, "*Torture Memos*" vs. *Academic Freedom*, *CHRONICLE OF HIGHER EDUC.*, March 20, 2009, at A12; Letter from Professor J. Bradford DeLong to Chancellor Robert Birgeneau at 1 (Feb. 16, 2009), available at <http://braddelong.posterous.com/letter-to-chancellor-birgeneau> (criticizing "failure to make any reference to the Korean War case of *Youngstown*, an essential part of any good-faith analysis of the war powers of the President").

Certainly the mere failure to cite *Youngstown* does not necessarily mean that it was being ignored. See MARCUS, *supra* note 3, at 358 n.31 (citing opinion of former OLC official that its attorneys "do not often cite" *Youngstown*, "but it is always in the back of their minds"); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 185 (2007) (claiming that among the critics were those who had, in comparable circumstances, failed to emphasize *Youngstown*); see *infra* note 208 (noting another failure to cite the framework). The real objection, presumably, was that the memorandum erred because it disregarded binding precedent and failed to convey legal risks.

¹⁸ See Offices of the Inspector Gen. of the Dep't of Def., Dep't of Justice, CIA, NSA, and Office of the Dir. of Nat'l Intelligence, *Unclassified Report on the President's Surveillance Program 13* (July 10, 2009) (No. 2009-0013-AS) [hereinafter *Unclassified IG Report*] (noting apparent omission of *Youngstown* analysis in the yet-classified OLC memos drafted in 2001 by John Yoo, and asserting that "Justice Jackson's analysis of President Truman's Article II Commander-in-Chief authority during wartime in the *Youngstown* case was an important factor in OLC's subsequent reevaluation of Yoo's opinions on the legality of the [Presidential Surveillance Program]"). The TSP was only one component of the President's Surveillance Program (PSP), *id.* at 1 n.1 (quoting Foreign Intelligence Surveillance Amendments Act of 2008, tit. III, § 301(a)(3)), but discussion here will focus on the former, since the ensuing debate about

Memo controversy, once the TSP was disclosed, both its critics and defenders pitched their cases in the framework's terms.¹⁹ The lesson seems to have transcended President Bush's administration. President Obama's nominee for Attorney General lavished attention on Justice Jackson's concurrence during his confirmation hearing, saying it "set out in really wonderful form" the proper approach to presidential power;²⁰ Justice Sotomayor likewise invoked *Youngstown* and Justice Jackson during her own hearings.²¹

Over the long haul, but with a flurry near the end, Justice Jackson's framework has insinuated itself into the *Youngstown* majority.²² Along the way, the framework has

constitutional authority was at least nominally directed at the TSP. *See infra* text accompanying note 217 et seq.

¹⁹ Letter from William E. Moschella, Assistant Attorney Gen., U.S. Dep't of Justice, to the Leadership of the Senate Select Comm. on Intelligence and the House Permanent Select Comm. on Intelligence at 1 (Dec. 23, 2005), *reprinted in* 81 IND. L.J. 1360, 1360-61 (2006) [hereinafter Moschella Letter]; January 9, 2006 Letter from Scholars & Former Gov't Officials to Congressional Leadership in Response to Justice Dep't Letter of December 22, 2005, *reprinted in* 81 IND. L.J. 1364, 1367-68 (2006) [hereinafter January 9 Scholars' Letter]; United States Dep't of Justice, Legal Auth. Supporting the Activities of the Nat'l Sec. Agency Described by the President (Jan. 19, 2006), *reprinted in* 81 IND. L.J. 1374, 1383 (2006) [hereinafter DOJ Legal Authorities]; February 2, 2006 Letter from Scholars and Former Gov't Officials to Congressional Leadership in Response to Justice Dep't Whitepaper of January 19, 2006, *reprinted in* 81 IND. L.J. 1415, 1417-18 (2006) [hereinafter February 2 Scholars' Letter]; *see also* Memorandum from David Kris, former Assistant Deputy Attorney Gen. 8 (Jan. 25, 2006), *available at* <http://balkin.blogspot.com/kris.fisa.pdf>.

²⁰ General Holder spent more time on only one Supreme Court case: *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008), a recent case in which he had participated on the losing side. *See Senate Confirmation Hearings: Eric Holder Day One*, N.Y. TIMES, Jan. 16, 2009, <http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?pagewanted=all>.

²¹ *Confirmation Hearing on the Nomination of Sonia Sotomayor to be Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=2&ref=global-home&pagewanted=all (stating, in response to question concerning presidential authority to disregard statute encroaching on what are alleged to be presidential prerogatives, that "Justice Jackson has sort of set off the framework in an articulation that no one's thought of a better way to make it. (Chuckles.)").

²² *See, e.g.,* *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (stating that "[Justice Jackson's] concurring opinion in *Youngstown* . . . both parties agree brings together as much combination of analysis and common sense as there is in this area"); CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 5 (2006) ("The *Steel Seizure Case* is not remembered as much for the majority opinion as it is for the concurring opinion of Justice Robert Jackson, who . . . laid out what is commonly regarded as the seminal explication of separation-of-powers matters between Congress and the President."); H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 24 (2004) (stating that Justice Jackson's opinion "has become in effect the lead opinion in the case"); Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 561 (2007) (calling Jackson's concurrence "the opinion that has subsequently proved the most influential"). This subsequent endorsement makes it difficult for those rendering advice to dismiss it as "representing his views alone" or merely his "individual views." YOO, *supra* note 17, at 184.

not only transcended its original context to speak to presidential authority in all settings,²³ but somehow leapt into the active consciousness of members of Congress and the executive branch. Michael Gerhardt, citing *Youngstown* as an example of “super precedent,” added that:

Supreme Court Justices for years have given special deference to the concurring opinion of Justice Jackson in that case. Members of Congress routinely cite *Youngstown* in separation of powers discussions. They, too, tend to defer to Justice Jackson's concurrence, often referencing it in confirmation hearings. Presidents similarly have pledged fidelity to *Youngstown*, frequently citing Jackson's concurrence as authority. Jackson's concurrence . . . provides a roadmap for lawmakers to follow.²⁴

Such universal acclaim is suspicious – everybody loved Raymond, after all²⁵ – and the recent relevance of *Youngstown* presents a unique opportunity for reassessment. Given its renaissance, the question now is less whether the *Youngstown* framework is influential than whether its influence is constructive, and there is cause for doubt. Nothing in this evaluation turns on the old objection that Jackson's approach somehow undermined executive power. The immediate result in *Youngstown* was certainly defensible: even some strong proponents of presidential power did not favor President Truman's side.²⁶ Nor did Justice Jackson's approach do any particular disservice to the President's constitutional authority, either in his construction of Article II or by suggesting that some presidential authority is defeasible by Congress.²⁷ (Indeed, Jackson

²³ Including those in which presidential prerogatives are traditionally supreme. See, e.g., Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants"*, 68 ALB. L. REV. 1127, 1128 (2005) (“It is impossible to exaggerate the significance of Justice Jackson's concurrence in *Youngstown* for U.S. foreign relations jurisprudence.”).

²⁴ Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1217 (2006).

²⁵ The title was meant to be ironic, but then, ironically, the show in fact proved to be broadly popular – meaning that the claim had to be taken seriously, and disproven. See, e.g., Virginia Heffernan, *Why Does Everybody Love Raymond?*, SLATE, Nov. 21, 2002, <http://www.slate.com/?id=2074388>.

²⁶ See, e.g., Corwin, *supra* note 6, at 65 (endorsing Justice Clark's concurrence, which emphasized the incompatibility of President Truman's order with the Taft-Hartley Act).

²⁷ As discussed briefly below, Justice Jackson's opinion did reject claims that the President's authority might be rooted in “[t]he executive Power,” the Commander in Chief clause, and the Take Care Clause, as well as inherent authority accruing via custom – recognizing in each case the possibility of congressional limitation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-52 (1952) (Jackson, J., concurring); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citing *Youngstown* for the proposition that “a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens”); *id.* at 552 (Souter, J., concurring in part and dissenting in part) (claiming that “it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military”). For one objection, see “*The Powers of War and Peace*”; *The Constitution*

was generous in some regards, insofar as he suggested that the President might sometimes have plenary authority enabling him to defy Congress.²⁸) Those objecting on this score must engage Jackson's position that while the answers to specific inquiries about presidential authority are beyond our ken, the overall authority of the modern President certainly exceeds the constitutional design.²⁹ As a practical matter, finally, Article II criticisms of Jackson's concurrence have never gained much traction, save perhaps within the executive branch – and, as already noted, they seem to backfire whenever they have surfaced. We can put this quarrel to one side.

The more serious and unexplored problem is that the conventional argument in favor of Jackson's approach – that it better secures congressional authority³⁰ – may well be backwards. To be sure, it has long been obvious that the *Youngstown* framework was

and Foreign Affairs after 9/11, WASHINGTONPOST.COM, Jan. 13, 2006 Friday 01:00 PM, available on LEXIS, ALLNEWS FILE, (remarks of John Yoo) (“I am not a big fan of the concurrence by Justice Jackson. . . I have long thought Justice Jackson's concurrence is more of a statement about politics, and a true one, than one of constitutional law. How could, for example, Congress pass a statute prohibiting the President from exercising a power given to him under the Constitution?”); *id.* (indicating approval of Justice Black's majority opinion). For one evaluation of how aggressive application of the *Youngstown* framework may disserve executive power, see Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87 (2002).

²⁸ See Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 955 (2007) (noting that “we might well trace the origins of the override theory [pursued in recent executive branch memoranda] to Justice Jackson”); e.g., John Yoo, *Why We Endorsed Warrantless Wiretaps*, WALL ST. J., July 16, 2009 (minimizing significance of *Youngstown* for “military strategy or tactics in war,” and claiming that “[i]f anything, it supports the proposition that one branch cannot intrude on the clear constitutional turf of another”).

²⁹ See *infra* text accompanying note 65. This poses an obvious issue of determining the right baseline for purposes of constitutional and political analysis. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 360-61 (2006); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).

³⁰ POWELL, *supra* note 22, at 24 (explaining that *Youngstown* “is a mainstay of the pro-congressional perspective, and unsurprisingly so,” and that Justice Jackson's concurrence “is often seen as a pro-congressional document as well”); Bellia, *supra* note 3, at 271 (noting claim by scholars “that the framework embodies a normative commitment to congressional ‘primacy’ in foreign affairs”); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989) (noting that “advocates of congressional authority look to *Youngstown* . . . as the basis for imposing limits on executive authority”); Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1122 (2006) (considering it “obvious” that “Jackson's *Youngstown* opinion has long been favored by proponents of congressional authority”); e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 105-113 (1990); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1155 (2006); see also JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 147 n.53 (1993) (describing *Youngstown* as “a naked ‘legislative power’ vs. ‘executive power’ case”); ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 6-7 (2007) (depicting rivalry between strong claims to presidential power, based on *Curtiss-Wright*, and Justice Jackson's *Youngstown* concurrence);

open to manipulation, and that this might contribute to its near-universal appeal. Professor Neal Katyal observed ruefully that recent litigation “showcases just how much of an empty vessel Justice Jackson’s three canonical categories in his famous *Youngstown* concurrence are,” and speculated that “*Youngstown*’s framework has become the gold standard, perhaps because its all-things-to-all-people quality can provide arguments favoring any branch of government under many circumstances.”³¹ The problem is more severe than this suggests. The framework is *not* just an empty vessel; to the contrary, it affects the behavior of relevant institutions – namely, the President, Congress, and the courts – in ways that undermine its supposed objectives. If the *Youngstown* framework is not merely of dubious utility, but also backfires, serious attention should be given to its repudiation. *Steel Seizure* should be re-seized.

Part I briefly describes *Youngstown*. Part II then offers a partial defense of the *Youngstown* framework based on insights from modern political science, which increasingly employs rational choice models of the interaction between the President and Congress.³² A simple spatial schematic is used to explain both the problem to which Justice Jackson was reacting – the President’s capacity to act unilaterally in ways that Congress cannot meaningfully constrain – and the nature of his solution, which constructs and enforces Congress’ unadopted preferences as a counterweight to the President’s capacity for initiative. As an *ex post* solution, at least, the *Youngstown* framework has advantages that have not to date been fully appreciated.

Part III – the heart of the Article – describes some less salutary effects that result when the President and Congress are allowed to react, dynamically, to the *Youngstown*

³¹ Neal Kumar Katyal, Comment, *The Supreme Court, 2005 Term -- Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 69 n.16 (2006); see also Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1141-42 (2009) (“In a world of multiple and very vague statutory delegations bearing on national security, foreign relations, and emergency powers, judges have a great deal of freedom--not infinite freedom, of course-- to assign *Youngstown* categories to support the decisions they want to reach, rather than reach decisions based on the *Youngstown* categories.”).

³² The core of this approach, adopted here as well, seeks to understand the President and Congress as rational actors engaged in attempting to achieve particular policy objectives within a relatively structured and stylized institutional setting – dispensing, for example, with the tendency of presidential studies toward normative or descriptive analyses of a particular President’s administrative preferences, governing style, or personality. See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 24-25 (2003) [hereinafter Howell 2003]; William G. Howell, *Executives – the American Presidency*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 303, 303-08 (R.A.W. Rhodes, Sarah A. Binder, & Bert A. Rockman eds., 2006).

framework. In an ideal world, the President might react by seeking legislative authorization, the better to immunize his action from adverse review. Numerous empirical studies of executive orders suggest, however, that the President seeks to avoid legislative overruling. Based on these analyses, and case studies involving recent invocations of *Youngstown*, Part III both revises the schematic and tenders several hypotheses about presidential and congressional decision-making in the shadow of *Youngstown*, namely that: (1) a President's reluctance to risk review at Justice Jackson's "lowest ebb" will tend to discourage seeking congressional authorization at all; (2) the sufficiency within the framework of implied legislative authorization diminishes the President's incentive to seek explicit authorization; (3) the President will seek to defuse any adverse expressions of congressional with interpretive techniques that may confound the framework; and (4) attributing categorical significance to congressional action (or inaction) tends to substitute judicial for congressional judgment. These effects may be marginal, as is repeatedly stressed, but all the same must be appreciated as likely consequences of Justice Jackson's approach – and taken together, they suggest a potentially serious, perverse result from an otherwise laudatory precedent.

Part IV, finally, sketches possible avenues for reform. After noting the possibility that the courts might simply reform their application of the *Youngstown* framework, it considers expanding the use of soft law and framework statutes as supplementary measures. As a thought experiment, it then sets out an alternative framework that would inquire as to the legal bases for executive branch action without inspiring any pronounced strategic behavior by the President or other institutions. A brief conclusion follows.

Sadly, an additional caveat may be in order. Regardless of whether the *Youngstown* framework is counterproductive, *Youngstown* remains binding law, including – to the extent it has been adopted as precedent by the Supreme Court or the lower courts – Justice Jackson's concurrence. Nothing here suggests that the executive branch or anyone else is free to ignore relevant constitutional authority.³³ The point

³³ I do contend, however, that the categorical aspects of Justice Jackson's concurrence – what I mean by the *Youngstown* framework – may be misapplied outside the court, and suggest that consideration be given to suspending this use. *See infra* Part IV.

instead is that the framework should be employed with a fuller understanding of its consequences, particularly by those institutions that seemed to be its principal audience.

I. *YOUNGSTOWN* REVISITED

The basic facts of *Youngstown* – the political circumstances, the litigation, and the opinions ultimately rendered by the Supreme Court – are so widely understood that only the briefest recounting is necessary.³⁴ The whole affair was precipitated by North Korea’s invasion of South Korea in 1950, which compelled President Truman to send U.S. troops to South Korea’s assistance. The process by which Truman reached this decision was a harbinger of the later litigation; Truman failed to consult much with Congress beforehand, or seek congressional ratification immediately afterward,³⁵ excusing the failure to observe protocol on grounds that the United States was “not at war”³⁶ and had received the Security Council’s blessing.³⁷ Truman’s path may have been influenced by his political standing at the time, which made working with Congress difficult.³⁸ Even so, he probably underestimated the political benefits of securing early legislative support, as well as the costs of delaying.³⁹ Ironically, when Truman later sought legislative support, some in Congress invoked his earlier claim that it was unnecessary.⁴⁰

More to the point, authorization to use force might have resolved problems that haunted Truman on the domestic front, which were the more immediate subject of

³⁴ For particularly comprehensive and insightful discussions, see MARCUS, *supra* note 3; ALAN F. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1995 ed.) (reprinting excerpts from key documents); Bellia, *supra* note 3, at 235-56.

³⁵ MARCUS, *supra* note 3, at 1-3; GLENN D. PAIGE, *THE KOREAN DECISION* 187-91 (1968).

³⁶ The President’s News Conference of June 29, 1950, PUB. PAPERS, Harry S. Truman, 1950 at 503 (1965), available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=806&st=&st1=> (“We are not at war.”).

³⁷ Complaint of Aggression upon the Republic of Korea, S.C. Res. 83, U.N. Doc. S/RES/1511 (June 27, 1950). For citations to the literature contesting and defending Truman’s claim, see Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 391 n.316 (2008); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2060 n.43 (2005).

³⁸ Secretary of State Acheson advised Truman against seeking a joint resolution supporting his decision, for fear that it give members of Congress a platform for attacking the President’s approach and undermining troop morale. PAIGE, *supra* note 35, at 187.

³⁹ ROBERT J. DONOVAN, *TUMULTUOUS YEARS: THE PRESIDENCY OF HARRY S. TRUMAN, 1949–1953*, at 217-24 (1982).

⁴⁰ MARCUS, *supra* note 3, at 3. Some, on the other hand, asked Truman why Congress had not been consulted. PAIGE, *supra* note 35, at 190 n.14.

interest in *Youngstown*.⁴¹ A serious labor-management dispute came to threaten steel production, which was considered essential to the war effort. Truman attempted through various means to resolve the dispute, including by referring the matter to the Wage Stabilization Board.⁴² As these efforts failed and a strike loomed, Truman pondered taking control of the steel industry, despite the fact that none of the various statutory schemes available to him – including the Taft-Hartley Act,⁴³ the Selective Service Act,⁴⁴ and the Defense Production Act⁴⁵ – expressly afforded him that option. The day before the strike was scheduled to take place, Truman adopted an executive order directing the Secretary of Commerce to seize the steel mills in order to avert a production crisis.⁴⁶ The day after, his message to Congress opened the door for legislative authorization without exactly inviting it – noting that “sound legislation” regulating the steel seizure’s specifics

⁴¹ Compare, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (concluding that the Authorization to Use Military Force, 115 Stat. 224, which permitted the President to use “all necessary and appropriate force” to respond to the attacks of September 11, 2001, also permitted the capture and detention of individuals).

⁴² Statement by the President on the Labor Dispute in the Steel Industry, 1951 PUB. PAPERS 651 (Dec. 22, 1951). The Board eventually submitted recommendations, but these proved unacceptable to industry while, at the same time, worrying some Administration officials responsible for stabilizing prices. MARCUS, *supra* note 3, at 59-75.

⁴³ The Taft-Hartley Act, *see* Labor Management Relations Act of 1947, ch. 120, §§ 206, 209-10, 61 Stat. 136, 155-56, permitted the President to respond to certain work shortages by appointing a board of inquiry that could order a cooling-off period of limited duration. It did not refer to seizure as a possibility, and because it sought to maintain the status quo did not do well by the steelworkers, with whom the Administration was sympathetic. MARCUS, *supra* note 3, at 75-76; *see also* Transcript of Oral Argument at 7-13, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 744), *available at* <http://steelseizure.stanford.edu/arguments/transcript51252.pdf> [hereinafter *Youngstown May 13 Tr.*] (argument of Philip B. Perlman, Solicitor General) (discussing limits to Taft-Hartley).

⁴⁴ Section 18 of the Selective Service Act of 1948, ch. 625, § 18(d), 62 Stat. 604, 626, *did* license seizure of facilities that failed to fulfill government orders relating to national defense. However, the procedure was cumbersome and ill-suited; it assumed that the government was seizing particular manufacturers with which it had placed orders, when the government ordinarily participated only indirectly in the steel market via the purchase of finished goods containing steel. MARCUS, *supra* note 3, at 76-78; *see* *Youngstown May 13 Tr.*, *supra* note 43, at 15 (colloquy between Justice Jackson and Solicitor General Perlman).

⁴⁵ The Defense Production Act of 1950, ch. 932, 64 Stat. 798, as amended, not only allowed the President to stabilize prices and to mediate labor disputes concerning national defense, *see* §§ 402(b), 502, 64 Stat. at 803, 812, but also authorized him to obtain property under certain conditions by instituting condemnation proceedings. *Id.* § 201(a), 64 Stat. at 799-800; Amendments to Defense Production Act of 1950, ch. 275, § 102, 65 Stat. 131, 132. The White House considered these condemnation proceedings to be too time-consuming and complex. MARCUS, *supra* note 3, at 75; *Youngstown May 13 Tr.*, *supra* note 43, at 14-16 (argument of Philip B. Perlman).

⁴⁶ Exec. Order No. 10340, 17 Fed. Reg. 3139 (1952).

might be “very desirable,” but that immediate action was not “essential,” since he would in the interim take responsibility for operating the steel mills.⁴⁷

Congress did not, in fact, intercede, and the aggrieved steel companies initiated litigation. The Justice Department initially took President Truman’s go-it-alone rhetoric as expressing a constitutional prerogative; their claim in the lower courts that the President’s exercise of authority could not be regulated by Congress did not go over well, to put it mildly.⁴⁸ In the Supreme Court, the executive branch shifted to arguing that the President had authority in the absence of congressional contraindication – and, still more modestly, that the lower courts had erred regarding the injunctive remedy, such that no constitutional issues needed to be resolved.⁴⁹ There was no disagreement, then, that Congress had the authority to foreclose the President from seizing the steel mills, but rather a threshold controversy as to what Congress had done.⁵⁰

⁴⁷ Special Message to the Congress Reporting on the Situation in the Steel Industry (Apr. 9, 1952), reprinted in H.R. Doc. No. 82-422 (1952), 1952 U.S.C.C.A.N. 883; MARCUS, *supra* note 3, at 94-99; see also Transcript of Oral Argument at 27-28, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 744) available at <http://steelseizure.stanford.edu/arguments/transcript51252.pdf> [hereinafter *Youngstown* May 12 Tr.] (argument of Philip B. Perlman, Solicitor General). Truman also noted that Congress might countermand his seizure, but added that since “that would immediately endanger the safety of our fighting forces abroad and weaken the whole structure of our national security,” he did “do not believe the Congress will favor” such a course. Special Message, *supra*; accord Letter to the President of the Senate Concerning Government Operation of the Nation’s Steel Mills, reprinted in CONG. REC., Apr. 21, 1952, at 4192.

⁴⁸ See MARCUS, *supra* note 3, at 105-24 (describing Justice Department arguments in lower courts, including the claim that the President’s authority was not limited by the Constitution); *id.* at 124-29 (noting abreaction in the press, Congress, and within the executive branch, and rejection by the district court); see also William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 758-62 (1986) (citing examples of newspaper coverage).

⁴⁹ Rehnquist, *supra* note 48, at 765-66 (noting shift in argument), citing Brief for Petitioner at 102-50, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). It was easier to change the lawyers’ script than it was to change the President’s. See *id.* at 125-26 (describing purported denunciation by President Truman of position espoused by the Justice Department in the district court oral argument, and ambiguous response by Truman to public inquiry); *id.* at 176-77 (noting President Truman’s statement, during the Supreme Court deliberations, that “The President has the power [to seize domestic industries in time of emergency,” and [Congress and the courts] can’t take it away from him.”).

⁵⁰ HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1011 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1958-1994) (“The President and his legal advisers seemed at all times, and in any event at all crucial times, to have conceded that Congress had the power to forbid the President to resort to seizure. Thus, the only question arising under the statutes was whether any act of Congress *had* so forbidden him”) (emphasis in original); accord JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 272, 318.

Unfortunately for President Truman, even this more modest approach fell flat.⁵¹ Justice Black's majority opinion, joined by four of his colleagues,⁵² showed a characteristic rigidity. After rejecting the argument that the injunction against the President's order should have been refused on non-constitutional grounds,⁵³ Justice Black stated simply that "[t]he President's power . . . to issue the order must stem either from an act of Congress or from the Constitution itself."⁵⁴ As to Congress, Justice Black denied that the President had any express authority, and that no statute had been brought to the Court's attention that would imply such authority – "[i]ndeed," he continued, "we do not understand the Government to rely on statutory authorization for this seizure."⁵⁵ Nevertheless, he examined the possibility. Although the Selective Service Act and the Defense Production Act allowed seizure of property under particular circumstances, their conditions were admittedly not met; indeed, he continued, Congress had just rejected a proposed amendment to the Taft-Hartley Act that would have permitted seizure as a means of resolving labor disputes.⁵⁶ Absent congressional authorization, Justice Black contended, the President's authority had to be rooted in a particular constitutional provision, and he made short work of that possibility: Nothing in the Constitution's text, including the Commander in Chief power or the executive power, licensed seizure.⁵⁷

All five concurrences are interesting, as is Chief Justice Vinson's dissent. But time has reckoned Justice Jackson's opinion the most important – to the point, as noted earlier, that it has essentially eclipsed the majority opinion.⁵⁸ Jackson begins by intimating, in an off-putting mix of the personal and Olympian,⁵⁹ that the proper division

⁵¹ William Rehnquist, who was clerking for Justice Jackson at the time, suggested that "I don't think the government's arguments in the district court could have been erased from anyone's mind." Rehnquist, *supra* note 48, at 766.

⁵² Justices Burton, Douglas, Frankfurter, and Jackson concurred in Justice Black's opinion and in the judgment, while Justice Clark concurred in the judgment only. For fuller descriptions of the Supreme Court proceedings and the resulting opinions, *see, e.g.*, Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373 (2002).

⁵³ *Youngstown*, 343 U.S. at 584-85.

⁵⁴ *Id.* at 585.

⁵⁵ *Id.* at 585.

⁵⁶ *Id.* at 586.

⁵⁷ *Id.* at 587-89.

⁵⁸ *See supra* text accompanying note 22.

⁵⁹ This is admittedly a matter of taste. Sanford Levinson, *Introduction: Why Select a Favorite Case?*, 74 TEX. L. REV. 1195, 1196-97, 1198 (1996) (describing the concurrence as "one of the few opinions that make me truly proud to be a constitutional lawyer," by virtue of the "interplay of persona and

of federal authority is a question colored by perspective and experience. Justice Jackson (rather, “anyone who has served as legal adviser to a President in time of transition and public anxiety”⁶⁰) is well situated, we are told, to recognize both the virtues of plenary presidential power and its vices. Jackson advises, half-apologetically, that a period of “detached reflection” may have tempered the teachings of that experience, but that he himself has not yet substituted “the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction”; unlike Justice Black, maybe, he has “half overcome” this particular “mental hazard” by recognizing it. Jackson cautions that it is for everyone – not just executive branch officials – to vigilantly avoid the common tendency to exaggerate “transient results” over consequences for “the balanced power structure of our Republic.”⁶¹

This preface helped defuse the awkwardness of Justice Jackson’s own position in *Youngstown*. As Attorney General, Jackson had defended a very broad view of the President’s seizure power⁶² – a point stressed enough by government attorneys that Jackson, awash in Vinson Court recusal controversies largely of his own making,⁶³

analysis” that is “revealed” or “constructed” by the opinion’s rhetoric); *see also* Jaffe, *supra* note 6, at 940 (praising, effusively, Jackson’s style).

⁶⁰ 343 U.S. at 634 (Jackson, J., concurring). Among the other justices, Stanley Reed (who dissented) had served as Roosevelt’s Solicitor General; Tom Clark had served as Truman’s Attorney General.

⁶¹ 343 U.S. at 634 (Jackson, J., concurring).

⁶² Jackson’s opinion alludes, briefly, to the seizure of the North American Aviation Company, a precedent heavily relied upon by the government in briefing and at oral argument. *Id.* at 649 n.17 (Jackson, J., concurring). His draft opinions distinguished that episode at much greater length, *see* White, *supra* note 30, at 1127-29, and the issue was prominent at oral argument. *Youngstown Tr. May 12*, *supra* note 47, at 41-42 (Jackson distinguishes prior seizure); *id.* at 42 (Jackson, following remark by Solicitor General Perlman that “Your Honor, we lay a lot of it at your door,” responds that “Perhaps rightly. . . . I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did.”). Likewise John W. Davis, advocate for the steel companies, had to differentiate the more robust view of executive power he had earlier advocated when serving as Solicitor General. *Youngstown Tr. May 12*, *supra* note 47, at 15, 19.

⁶³ First there was a contretemps over Justice Jackson’s withdrawal from a case tried before his service as Attorney General, which he did in a way that cast aspersions on Justice Murphy. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 47-48 (1970). Then, while at the Nuremberg Tribunal, Jackson aired objections to Justice Black’s failure to disqualify himself – with Jackson telling Congress that he wanted similar practices “stopped.” *Letter of Associate Justice Robert H. Jackson to Congressional Judiciary Committee*, N.Y. TIMES, June 11, 1946, at 2; *see* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203; GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 224-49 (1977).

considered withdrawing from the case.⁶⁴ The other function was to challenge the sufficiency of mere doctrine. As Jackson recounted, judicial authority shed little light on the proper bounds of executive power under the Constitution; that dearth of authority, he notes, was due not only to the enigmatic materials left by the Framers, but also to the “judicial practice of dealing with the largest questions in the most narrow way.”⁶⁵

Jackson set about addressing the issue in a far less narrow way. His concurrence focused holistically on relations between the political branches – the premise being that separated powers were supposed to be smoothed by practice into a workable government, and that presidential powers fluctuated depending on whether they were in “disjunction or conjunction with those of Congress.”⁶⁶ The result is the famous three-part framework, which Justice Jackson called “a somewhat over-simplified grouping of practical situations”:

1. *When the President acts pursuant to an express or implied authorization of Congress*, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure

⁶⁴ White, *supra* note 30, at 1129-30. Jackson’s decision to participate was well within prevailing standards, even if his rationale – that the case should be heard by judges with executive and legislative experience (*id.* at 1129-30) – was not the strongest. Jackson would also have been aware that while serving as Attorney General in 1949, his colleague Tom Clark had advised that the President had independent constitutional authority to seize facilities subject to strike. As it developed, Clark nonetheless favored the steel companies in *Youngstown*, on the ground that the President had eschewed statutory procedures, but apparently told Chief Justice Vinson that he would supply the fifth vote in the event four others supported Truman’s order. WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953*, at 388, 390 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Vol. 12, 2006); ALAN WESTIN, *ANATOMY OF A CONSTITUTIONAL LAW CASE 190* (rev. ed. 1990). Clark’s prior advice was well known – he had proffered it in a reply to the chair of the Senate Labor Committee, in connection with a proposed repeal of Taft-Hartley – and gave rise to pressure on him to withdraw from the case. Oral History Interview with Tom C. Clark at 219-20 (Washington, Feb. 8, 1973), on file at the Harry S. Truman Library, available at <http://www.trumanlibrary.org/oralhist/clarktc.htm>. Jackson’s remarks in his published opinion about the valued perspective of those serving “as legal adviser to a President in time of transition and public anxiety” were thus well calculated to defend both himself and Clark.

As if matters weren’t compromised enough, Chief Justice Vinson is alleged to have “privately consulted with Truman, recommended the seizure, and assured him of its constitutionality.” WIECEK, *supra* note 64, at 388 & n.90 (noting, however, challenges to this account).

⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

⁶⁶ *Id.* at 635 (Jackson, J., concurring).

executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. *When the President acts in absence of either a congressional grant or denial of authority*, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. *When the President takes measures incompatible with the expressed or implied will of Congress*, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁶⁷

Though he had scarcely finished intimating that different actors had different takes on presidential authority, Justice Jackson was surprisingly unspecific about the framework's intended audience. Jackson may have hoped to fuel the executive branch's self-examination as to when "a President may doubt" a proposed action's legality;⁶⁸ that would be consistent with his view that judges were ill-situated to address separation of powers questions. But the framework also identified when "others may challenge" presidential actions, how courts should proceed, and ultimately the "legal consequences."⁶⁹ Its utility for courts was confirmed by the case at hand, which Jackson described – because it fell within the third category – as "circumstances which leave Presidential power most vulnerable to attack and in the least favorable of possible

⁶⁷ *Id.* at 635-38 (Jackson, J., concurring).

⁶⁸ *Id.* at 635 (Jackson, J., concurring).

⁶⁹ *Id.* at 635 (Jackson, J., concurring). For example, in discussing Category Three, Justice Jackson noted that "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring).

constitutional postures.”⁷⁰ In any case, after the President acts, it remains for the judiciary to take account of Congress’ posture in evaluating the legality of presidential action.

In the judiciary’s hands, at least, Jackson’s categories serve both a *sorting* function – identifying which category applies to a given case – and a *standard-setting* function, articulating how each set of circumstances should be scrutinized. Category One cases are those in which Congress has authorized the President’s actions; this places executive branch authority “at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁷¹ This notion of additive, “maximizable” power is unhelpful. The scope of presidential action being reviewed by the judiciary is, by Jackson’s lights, already cast in stone; the question is simply whether that action is lawful, so if the President ekes out sufficient authority from Congress (or possesses it “in his own right”) his authority is already in every relevant sense “at its maximum.”⁷² (Ordinarily, one expects, presidential authority is simultaneously established and maximized by virtue of a congressional delegation, but once in a while Congress has nothing to add – for example, when it comes to exercising the pardon power.⁷³) Jackson may have meant that the *probability* of legality is greatest when Congress lends its support, because the President can cite both executive and legislative authority in his defense and prevail even if partly wrong.⁷⁴ Arguably that then warrants “the strongest of presumptions,” “the widest latitude of judicial interpretation,” and the heaviest “burden of persuasion” for those objecting – it is not clear whether Justice Jackson meant

⁷⁰ *Id.* at 640 (Jackson, J., concurring).

⁷¹ *Id.* at 635 (Jackson, J., concurring).

⁷² Some cases might seem to be more about the extent of a presidential action than about its bare lawfulness. In *Crosby*, for example, the Supreme Court was concerned solely with whether President’s authority had preemptive effect, and it invoked the *Youngstown* framework and Category One to determine that it did. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375 (2000). But ultimately every challenge to executive branch action seeks to disable it only insofar as it has pertinent legal effect, so it is hard to see how a continuum is relevant for judicial analysis. *Ex ante*, however, the President may face a question as to the breadth of a potential program, and so may wish to calculate the sum of authority available via Congress and independent executive branch authority. *See infra* Part III.

⁷³ *United States v. Klein*, 13 Wall. 128, 147 (1872) (Congress may not interfere with a Presidential pardon).

⁷⁴ *Cf. id.* at 636-37 (Jackson, J., concurring) (“If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.”).

something different by each of these terms – but the impact, again, should be limited, since measures taken under other circumstances have equal potential legality.

Category Two cases are those in which the President has acted without congressional approval or disapproval; in such cases, Jackson states, “he can rely only upon his own independent powers.”⁷⁵ So far, so good. But what follows confounds matters. The President may not, it turns out, be left entirely to his own devices, because there is a “zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” It is not self-evident whether this twilight zone is a discrete subset of Category Two, or whether constitutional uncertainty is so pervasive that everything within Category Two falls into this zone. This subset (if subset it was) may or may not be distinct from that in which Congress not only failed to grant or deny presidential authority, but also demonstrated “inertia, indifference or quiescence.”⁷⁶ Jackson moves from unclear to tentative in sketching the appropriate standard to be applied in Category Two. All that can be said is that congressional inaction “may sometimes” (not definitely, or all the time), “at least as a practical matter” (if not necessarily in the eyes of the law), “enable, if not invite” (again, perhaps a distinction between practical and formal licensing) “measures on independent presidential responsibility” (ditto). Assuming that all gets cleared up, the resulting test of authority is “likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of law,” which sounds even more imponderable. Whether this provides an approach to constitutional interpretation in this class of cases or a theory of abstention resists definitive conclusion.

Category Three, involving circumstances in which Congress has disapproved of presidential action, is perhaps the most conventional. Here the President’s benefit of the doubt is surely lost, as is any immunity from judicial review. Rather, the President’s

⁷⁵ *Id.* at 637 (Jackson, J., concurring).

⁷⁶ *Id.* at 637 (Jackson, J., concurring). Jackson may also have meant this to be synonymous with the threshold conditions of congressional inaction (as suggested by his use of “[t]herefore”), or might require a more concerted showing as a threshold to any Category Two treatment. For example, the Court in *Medellin v. Texas* stated that “[u]nder the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President’s action falls within the second category – that is, when he ‘acts in absence of either a congressional grant or denial of authority,’” and proceeded to analyze whether there was congressional acquiescence on the assumption – contrary to the remainder of its analysis – that the “prerequisite” of congressional failure to grant or deny authority had been met. *Medellin v. Texas*, 128 S. Ct. 1346, 1370 (2008).

action must be “scrutinized with caution” (meaning, one supposes, searchingly rather than reluctantly) for fear of letting the constitutional balance skew toward the executive branch. Precisely how much caution is unclear, not least because it is relative to the (unclear) treatment due within the other categories. As with Category One, Jackson employs the rhetoric of arithmetic, here to the effect that the President enjoys “his own constitutional powers minus any constitutional powers of Congress over the matter.” But this makes more sense in Category Three: One can see how some presidential powers may be defeasible, or subject to subtraction, by Congress – though Jackson also recognizes that the subtrahend may be zero, if the Presidential power at issue is not one Congress may limit.⁷⁷

In applying these categories, the primary variable is straightforward: what matters is what Congress had done. Critically, for purposes of sorting, Jackson was preoccupied with what Congress had done relative to *that particular* presidential action. Each of the measures to which he adverted in applying his framework (for purposes of shunting the matter from Category Two to Category Three, as we will see) had recently been adopted or rejected;⁷⁸ the prior cases he cited as illustrating each category also dealt with congressional action of recent vintage, and of particular relevance to the action under review.⁷⁹ Any longer-term *modus vivendi* between the President and Congress was more relevant, seemingly, to assessing particular claims of authority per the appropriate standard *after* sorting had been performed – as in considering, within Category Three, whether political branch practices had so buttressed the President’s Commander in Chief authority that a presidential initiative could be sustained.⁸⁰ It was Justice Frankfurter, more than Justice Jackson, whose *Youngstown* opinion described a method for discerning when courts should defer to the political branches’ interpretation of the Constitution.⁸¹

⁷⁷ *Id.* at 637-38 (Jackson, J., concurring).

⁷⁸ *Id.* at 639 nn.6-8 (Jackson, J., concurring) (citing the Selective Service Act of 1948, the Defense Production Act of 1950, and the Labor Management Relations Act – or Taft-Hartley Act – of 1947).

⁷⁹ *Id.* at 635-38 nn. 2-4 (Jackson, J., concurring).

⁸⁰ *Id.* at 644-45 & nn. 12-14 (Jackson, J., concurring).

⁸¹ *Id.* at 610-11 (Frankfurter, J., concurring) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”); see *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting Justice Frankfurter); *Medellin v.*

II. THE CONCURRENCE AND CONGRESS: THE HIDDEN VIRTUES OF HIDDEN WILL

Justice Jackson's concurrence has long been endorsed by skeptics of executive power,⁸² and it is easy to see its appeal. The entire premise was that the executive branch might require policing; his framework was unsuited to any claim that Congress had encroached on executive branch prerogatives.⁸³ And despite Justice Jackson's personal history of executive branch service, his sympathies in any clash between the branches were apparent. He discounted claims that judicial intervention would undermine executive branch authority, reasoning that the President's contemporary capabilities exceeded anything specified by the Constitution – noting “the gap between the President's paper powers and his real powers,”⁸⁴ and suggesting that the President's function as a national and party figurehead would maintain or even enhance that gap.⁸⁵ Refusing President Truman, consequently, was only to refuse “*further* to aggrandize the presidential office.”⁸⁶ Conversely, permitting the executive branch to seize (literally) authority without congressional approval did not leave him “alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.”⁸⁷

Still, reexamining the *Youngstown* opinions, it isn't obvious why Justice Jackson in particular should be considered Congress' champion. As previously noted, Jackson's framework preserved the possibility that the President would prevail sometimes even when directly gainsaid by Congress,⁸⁸ and he seemed particularly indulgent toward the President's wartime powers – so long as they were directed outward.⁸⁹ While Justice

Texas, 128 S. Ct. 1346, 1352 (2008) (citing *Dames & Moore*); see also *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (stating that “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that [an executive action] had been [taken] in pursuance of its consent...”); *id.* at 472-74 (citing cases). A similar approach was adopted by Chief Justice Vinson in dissent, but with less clearly specified criteria. See 343 U.S. at 683-700 (reviewing history of presidential powers to address emergencies).

⁸² See *supra* text accompanying note 30.

⁸³ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996).

⁸⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

⁸⁵ *Id.* at 653-54 (Jackson, J., concurring).

⁸⁶ *Id.* at 654 (Jackson, J., concurring) (emphasis added).

⁸⁷ *Id.* at 653-54 (Jackson, J., concurring).

⁸⁸ See *supra* text accompanying note 28.

⁸⁹ See POWELL, *supra* note 22, at 130; e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) (“I 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”).

Black’s majority opinion lacked Jackson’s rhetorical flourish, his rejection of executive power was actually much more sweeping. Justice Black strongly implied that the President’s powers were solely those identified in the constitutional text, whether considered singly or in the aggregate, and he viewed those enumerated powers narrowly.⁹⁰ Moreover, Justice Black regarded the seizure order as lawmaking of the kind “entrusted . . . to the Congress alone.”⁹¹ None of the other opinions, including Justice Jackson’s, seemed to take such a categorical view.⁹² And even if Justice Black’s position was regarded as untenable,⁹³ or prone to interfere with congressional authority to delegate,⁹⁴ others concurring in *Youngstown* – Justices Frankfurter, Burton, Clark, and Douglas, to be precise – also went to bat for congressional prerogatives.

Why then is Justice Jackson considered first among the majority’s equals? Certainly because of the quality of his writing and the versatility of his framework, but something more specific is also at work: namely, his sensitivity as to how the President and Congress actually interact and his expansive understanding of authoritative congressional action. Recall that under Jackson’s framework, for presidential authority to be considered at its “maximum,” the President must act “pursuant to an express *or*

⁹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution.”).

⁹¹ *Id.* at 589.

⁹² The closest, in all probability, was Justice Douglas, who – while intimidating less of a textualist approach, and saying less about the President’s Article II authorities – did also stress that “the Constitution is not ambiguous or qualified,” placing “not *some* legislative power in the Congress” but rather all of it. *Id.* at 630; *see also id.* at 630 (“The legislative nature of the action taken by the President seems to me to be clear.”). Concededly, evidencing this conclusion would require a careful synthesis of each opinion’s argument. For what it is worth, it seems consistent with the conclusions of others. *See, e.g.*, MARCUS, *supra* note 3, at 215-17 (noting Justice Black’s relatively narrow view of inherent presidential authority); Bellia, *supra* note 27, at 99, 103 (same). *But see* Paulsen, *supra* note 2, at 225 (describing approaches taken by Justices Black and Jackson as “perfectly harmonious,” and disagreeing with those suggesting that the two opinions are inconsistent).

⁹³ *See, e.g.*, Kauper, *supra* note 6, at 180-81 (voicing early criticism of Black’s distinction between legislative and executive powers); *cf.* Corwin, *supra* note 6, at 64 (voicing early criticism of Black’s disregard for constitutional practice).

⁹⁴ That is, Justice Black seemed to be suggesting that even were the President otherwise capable of arguing that the steel seizure effectuated one of his Article II powers, the kind of action he took could only be exercised by Congress; this suggests that Congress could not even assign it to him. *See, e.g.*, *Youngstown*, 343 U.S. 579, 587-88 (describing limitations that Article I places on presidential authority).

implied authorization of Congress.”⁹⁵ The President’s authority is “at its lowest ebb,” on the other hand, if he “takes measures incompatible with the expressed *or implied* will of Congress.”⁹⁶ Whether a matter falls within Category One or Category Three, and is subject to presumptions of legality or illegality, could therefore turn rather on whether Congress had implicitly favored or disfavored the action.⁹⁷

While one might construe “implied authorization” and “implied will” modestly,⁹⁸ Jackson meant something more, so far as can be reconstructed. At a minimum, Congress’ endorsement or negative could be divined from a statute according to a standard that was unusually tractable and quite possibly asymmetrical. Justice Jackson and others in the majority pretermitted evaluation of President Truman’s steel seizure by asserting that the Truman Administration had “conceded that no congressional authorization exist[ed]” for the seizure.⁹⁹ This was plainly wrong – the government *had* conceded that no explicit (or “specific”) authorization existed, but at the same time had invoked implicit authorization from the overall pattern of congressional activity¹⁰⁰ – and

⁹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring) (emphasis added).

⁹⁶ *Id.* at 637 (Jackson, J., concurring).

⁹⁷ Professor Yoo was mistaken, then, in asserting that “Jackson’s *Youngstown* concurrence hinged the legality of presidential power on explicit congressional authorization.” JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 6 (2005).

⁹⁸ Conceivably, the framework simply calls on courts to read what Congress has enacted, and to understand both the literal text and its unavoidable implications. One might, for example, think of Category Three as encompassing several means by which Congress can preempt presidential action: by doing so expressly, as Congress might expressly preempt state laws via a preemption clause, or by doing so implicitly, as Congress might enact a statute conflicted with state law. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) (describing conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility”); *see Gade v. Nat’l Solid Wastes Mgmt Ass’n*, 505 U.S. 88, 98 (1992) (characterizing this kind of preemption as implied in character).

⁹⁹ *Id.* at 638 (Jackson, J., concurring). Others shared this view. *E.g., id.* at 585 (“[W]e do not understand the Government to be rely on statutory authorization for this seizure.”). Justice Frankfurter, however, seems not to have under that illusion, or at least thought that the dissent put it into question. *Id.* at 603 (Frankfurter, J., concurring) (“It is now claimed that that President has seizure power by virtue of the Defense Production Act and its Amendments.”).

¹⁰⁰ *See, e.g.,* Brief for Petitioner at 148, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (“In the present case . . . there was . . . a clear implication of power to seize the steel companies from an array of statutes and treaties which commit the Nation by law to a program of self-preservation which could not fail to suffer through a loss of steel production.”). At oral argument, Solicitor General Perlman conceded, in response to a question from Justice Reed as to whether he depended on “any statute that gives the President the power to do this specifically,” that “[t]here is no specific authority,” but (in response to a prompt from Justice Reed) he added that the Defense Production Act provided authority. Justice Black then followed up, seeking a concession that the U.S. position depended solely on the President’s constitutional authority. Perlman did not give in, and repeatedly claimed that Congress had provided authority under both the Defense Production Act and the Selective Service Act, conceding only

suggested that the executive branch would have to be explicit about invoking implicit authorization and assiduous about evidencing it. On the other hand, in discussing the possible application of Category Two, Jackson stated that three statutes permitting seizure under other circumstances effectively “covered” the “field” and denied presidential authority.¹⁰¹ This evoked a preemption-like analysis in which no conflict with an enacted law is required;¹⁰² presumably it would also suffice to show that a presidential initiative posed an obstacle to accomplishing congressional designs.¹⁰³

Furthermore, Justice Jackson’s framework also suggested that congressional will could be expressed non-statutorily – again, at least insofar as its negative was involved. Assessing Truman’s seizure, Jackson appeared to reason that the absence of circumstances qualifying for Category One or Category Two necessarily meant that Category Three applied; where “the President cannot claim that [his action was] necessitated or invited by failure of Congress to legislate,” he suggested, such an action must be incompatible with the implied will of Congress.¹⁰⁴ That implied will might be

that “[t]here is no statute that *specifically* gives” the President the power he exercised relative to the steel mills. *Youngstown Tr. May 12* at 33-34 (emphasis added).

It was thus misleading to treat the government as having conceded that the President lacked implicit authorization from Congress, as Justice Jackson’s framework would have required. And even if the argument was unpersuasive, it was hardly unprecedented: the U.S. brief quoted at length from similar reasoning that then-Attorney General Jackson had employed on behalf of a prior seizure. *Id.* at 148-50 (“[T]he President has back of him not only each general law enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws”) (citing 89 Cong. Rec. 3992); *see supra* text accompanying note 62.

¹⁰¹ *Id.* at 639 (Jackson, J., concurring). The government, again, specifically denied the validity of this implication, arguing *inter alia* that the seizure was actually more consistent with those statutes than the contrary. *See* Brief for Petition, *supra* note 49, at 58-60.

¹⁰² *See, e.g.,* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption may be inferred from a “scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”). I recognize that the categories of preemption analysis are not hermetically sealed, that field preemption may be recharacterized as just another species of conflict preemption, and that it may also be express or implied. *See* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.6 (2000).

¹⁰³ *See, e.g.,* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (inquiring as to whether state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”). *Cf.* Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. L. REV. 175, 207 (stating that relative to obstacle preemption, with field preemption “the likelihood of reliance . . . on nontextual purposes and interests is greater, and because there is no particular federal statute identified to preempt state law); *accord* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2015 (2000).

¹⁰⁴ *Id.* at 639-40 (Jackson, J., concurring). A President’s potential for claiming that he was merely “enabled” by Congress, as opposed to being “necessitated or invited,” was for some reason dropped from the broader description. *Compare id.* at 637 (Jackson, J., concurring).

expressed informally,¹⁰⁵ as clarified by passages from the other concurrences to which Justice Jackson expressly subscribed.¹⁰⁶ Justices Black and Frankfurter, in particular, each invoked congressional *inaction* – namely, the fact that Congress had refused amendments to the Taft-Hartley Act that would have clearly given President Truman seizure authority.¹⁰⁷ If congressional will can be informally expressed, as by refusing to take action, it suggests the relevance of acts by a subset of Congress rather than Congress as a whole. Individual legislators, certainly, may rise in sufficient opposition to defeat a statutory initiative, and a committee may prevent a bill from making the requisite progress. Presumably other “soft law” measures – like simple resolutions passed by the majority of one house only, or concurrent resolutions passed by both houses but not presented to the President – would be even better indicia.¹⁰⁸

Attaching legal consequence to non-statutory actions, or even inaction, is in tension with constitutional principles requiring that Congress attend to legislative formalities. Professor Tribe, for example, has objected to employing “a constitutional default rule regarding the scope of executive power . . . that purports to discern what

¹⁰⁵ To be sure, Jackson also thought that the statutes actually adopted by Congress had contraindicated the seizure (or at least, that the previously enacted “policies” were “inconsistent” with it. *Id.* at 639 (Jackson, J., concurring).

¹⁰⁶ *Id.* at 639 n.8 (Jackson, J., concurring) (endorsing the statutory analyses of Justices Black, Frankfurter, and Burton).

¹⁰⁷ *Id.* at 586 (“When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining”) (citing Congressional Record debates); *id.* at 602-03 (Frankfurter, J., concurring) (stating that “Congress has expressed its will to withhold this power from the President as though it had said so in so many words . . . It would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President’s power in terms into a statute rather than to have it authoritatively expounded, as it was, by controlling legislative history”); *id.* at 657 n.4 (Burton, J., concurring) (quoting congressional debate on the original legislation also to the effect that Congress wished to withhold seizure authority).

¹⁰⁸ See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008) (defending, generally, the potential value of congressional soft-law communications, particularly “soft statutes” like simple and concurrent resolutions). Gersen and Posner specifically advocate turning away from legislative inaction in administering the *Youngstown* framework:

The soft statute should be the preferred mechanism for articulating congressional views . . . because it is a better indicator of legislative views than legislative inaction. There are dozens of reasons Congress fails to act, and negative inferences in the context of Article II powers are especially hazardous.

Id. at 603; see also *id.* at 603 (criticizing references to “congressional agreement, disapproval, or silence” as “unnecessarily crude,” given possibility of disagreement among the houses).

Congress meant by what it failed to say”¹⁰⁹ – including Justice Jackson and some of his *Youngstown* colleagues among the offenders – because “it is essential that such [congressional] approval or disapproval take the form of legislation made through Article I’s formal procedures of bicameral voting and presentment to the President.”¹¹⁰ Still, one can distinguish Justice Jackson’s inquiry, which sought to establish the appropriate degree of judicial scrutiny, from an Article I threshold for determining whether an action can have binding legal force for third parties.¹¹¹ The sounder objection is that Justice Jackson took a stricter approach to the President’s powers – insisting, for example, on finding non-nebulous grounds for executive branch authority,¹¹² and on enabling the public to realize “the extent and limitations of the powers that may be asserted.”¹¹³ His view of Congress’s implied will contrasts awkwardly, in other words, with the admonition that affirming the possession of presidential powers “without statute” yields a power that “either has no beginning or it has no end.”¹¹⁴

Even so, this disparate treatment objection may be rebutted with the aid of a political scientist’s basic toolkit.¹¹⁵ We might begin with the ideal case in which Congress and the President agree on a legislative proposal and their assent results in a statute. It is possible, of course, that Congress will reject (or simply fail to act upon) a legislative proposal favored by the President. Conversely, the President may demur from a bill supported by both houses of Congress by exercising a veto, and will prevail if

¹⁰⁹ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 204 n.8 (3d ed. 2000).

¹¹⁰ *Id.* at 205.

¹¹¹ *Compare id.* at 205 n.6, citing *INS v. Chadha*, 462 U.S. 919, 952 (1983) (categorizing as “legislative” an action “that had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch”).

¹¹² *Id.* at 646-47 (Jackson, J., concurring); *see also id.* at 654-55 (denying to the President “legislative power”).

¹¹³ *Id.* at 653 (Jackson, J., concurring).

¹¹⁴ *Id.* at 653 (Jackson, J., concurring). It also existed in some tension with Jackson’s resistance to using legislative history, which he felt undermined the exactitude demanded by the Constitution. Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948) (“The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to speak its will with considerable formality . . . Its exact language requires Executive approval, or enough support to override a veto. How far, then, should this formal text and context be qualified or amplified by expressions of one or several Congressmen in reports or debates which did not find place in the enactment itself?”); *see also infra* text accompanying note 267 (noting Jackson’s criticisms of legislative history).

¹¹⁵ Qualifications to this model will be discussed below. *See infra* text accompanying notes 135-136, 153-163.

Congress is unable to muster a two-thirds majority in both houses.¹¹⁶ Even so, in all of these cases, the basic initiative is a legislative proposal, and the sole question is whether it receives the necessary degree of assent from the political branches; if it does not, the status quo is maintained.

This is illustrated by a simple spatial model that depicts choices for a particular policy issue along one dimension. Beginning with Figure 1 below,¹¹⁷ this model indicates the status quo ante (SQ); the President's policy position (P); the policy position of a notional median congressional voter (CM), which illustrates the point on the policy spectrum at which Congress is indifferent as between two policy alternatives;¹¹⁸ and the policy position of a notional congressional "veto pivot" (CV), the notional member whose vote is necessary to override a presidential veto.¹¹⁹ As shown in Figure 1, were Congress free to make up its own mind, it would elect a policy at CM. The President might sometimes support such an initiative, but for purposes of illustration is assumed to prefer a different and more extreme position (P). Here, should Congress act, the President would lack any recourse: any presidential veto could be overridden, because the position lies to the left of CV. Assuming perfect information, the President would anticipate this result, and his veto would not be exercised in the first place.

¹¹⁶ U.S. Const. art. I, § 7.

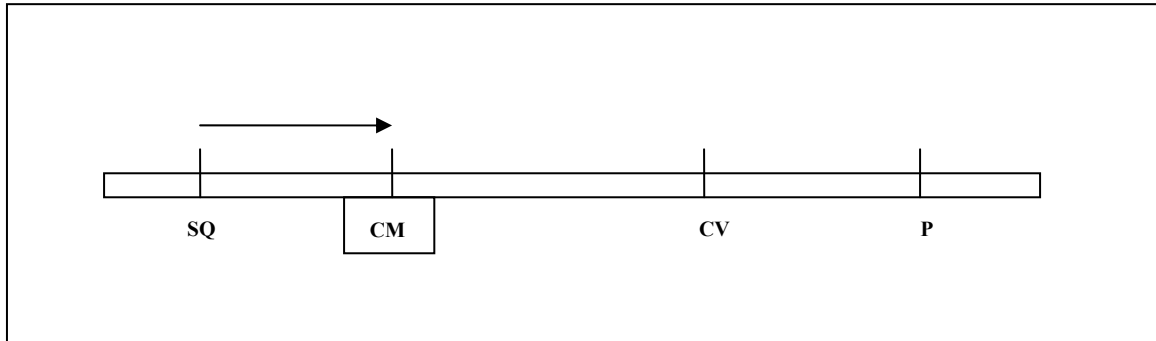
¹¹⁷ The design of Figures 1 and 2 (but not those following) is derived from Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 139-41 (1999).

¹¹⁸ For a popular and influential explanation of the median voter principle, see generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). This clearly employs the simplifying assumption of a unicameral legislature, not unlike the simplifying assumption of a unitary executive branch. *But cf.* Moe & Howell, *supra* note 117, at 144-45 (suggesting, nonetheless, ideal types of disaggregated Congress and unitary presidency).

¹¹⁹ That is, if the median congressional voter (CM) occupies a position in which half the members sit to the left and half to the right, the veto pivot (CV) occupies a position in which two-thirds sit to the left and one-third sit to the right. This employs the simplifying assumption that the relevant decision juncture is a floor vote on the merits of a legislative proposal, but there are of course procedural hurdles that create their own pivots. See, e.g., HOWELL 2003, *supra* note 32, at 29 (depicting sequence of play involving introduction of a bill, filibuster, and other junctures); Gregory J. Wawro & Eric Schickler, *Where's the Pivot? Obstruction and Law-making in the Pre-cloture Senate*, 48 AM. J. POL. SCI. 758 (2004).

The points might be arrayed to show greater variety – for example, if one imagines the axis as depicting a conservative-to-liberal policy spectrum, a President might sit either to the left or to the right of Congress – but is simpler to depict it as unidirectional.

Figure 1: Legislative Initiative



Problems begin to arise when we relax the assumption that Congress is in the driver's seat. What if the President initiates policy without waiting for Congress' imprimatur? The possibility seems substantial; nearly any modern observer would say that the President can act more swiftly than Congress, even if they might differ as to whether that is desirable.¹²⁰ Assuming, in any event, that the President does act, however, his veto will enforce the possibility of moving to a new status quo. This is illustrated in Figure 2. If the President elects P, the policy he favors best, Congress would nullify it through legislation, because it lies outside the bounds of its preference (CM) *and* outside the bounds established by its veto override (CV).¹²¹ However, if the President elects a position anywhere between CM and CV (and his incentive will be to choose CV, as it is closest to his preference), it is Congress that will be helpless.¹²² Critically, this result holds whenever the President has the *capacity* in a practical sense to

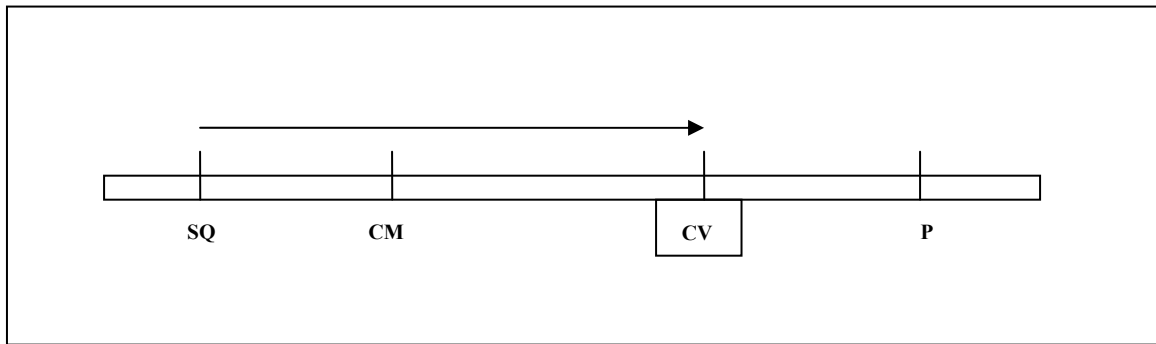
¹²⁰ See, e.g., KENNETH R. MAYER, *WITH THE STROKE OF A PEN* 26 (2001); cf. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (remarking that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility”); THE FEDERALIST No. 70 (Alexander Hamilton) (defending a unitary executive by explaining that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”).

¹²¹ Again, the assumption is that these interactions would be anticipated and avoided. Empirically, Congress very rarely overrides a presidential veto, see, e.g., Moe & Howell, *supra* note 117, at 142 (citing study indicating that approximately seven percent of presidential vetoes are overridden), but that may well be because presidents exercise the veto rarely when an override is likely.

¹²² For a clear exposition along these lines, see Moe & Howell, *supra* note 117, at 139-41; see also HOWELL 2003, *supra* note 32; Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677-78 (2005).

act unilaterally, regardless of whether he has a valid legal basis for so acting.¹²³ The result is deeply unsettling to conventional views of the separation of powers. Those insisting that presidents lack the legal capacity to originate policy, or urging that the President's power of initiative is nonetheless defeasible by Congress,¹²⁴ must nevertheless come to grips with the prospect that Congress cannot staunch the exercise of unilateral executive authority.

Figure 2: Presidential Initiative



It should be evident, though, that Figure 1 and Figure 2 have ignored the judiciary. Either a statute or the Constitution may explicitly prohibit executive branch activities.¹²⁵ And, though they will undoubtedly accord those activities a margin of error (reflecting, for example, justiciability or deference doctrines), courts will sometimes

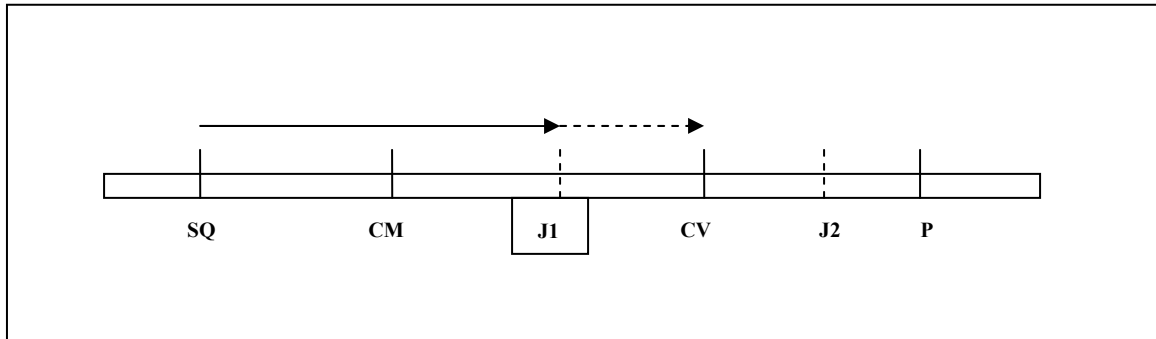
¹²³ Of course, congressional preferences (CM and CV) might well shift in abreaction to a lawless power grab. Moreover, the President may independent reasons for desiring to avoid lawless behavior, whether because he is legally scrupulous or because he fears electoral or other consequences. Cf. MAYER, *supra* note 120, at 18-20 (citing evidence from presidential remarks, and from members of the Justice Department, that the executive branch carefully considers the legal aspects of presidential action, “often placing more importance on legal issues than on strategic ones”). Nevertheless, it is valuable to make the (somewhat) artificial assumption that the only constraints on unilateral action in pursuit of a policy preference are imposed by other institutions – Congress and, as we shall, the courts. See HOWELL 2003, *supra* note 32, at 65 (assuming that “[t]he ability of presidents to act unilaterally depends on other institutions’ abilities to stop them”).

¹²⁴ For an example of the former view, one might cite Justice Black’s opinion in *Youngstown* itself; for an example of the latter, essentially confined to the area of foreign affairs, see POWELL, *supra* note 22, at 139-40. In Professor Powell’s view, Justice Jackson’s own view – reflected more in his analysis of the President’s Commander-in-Chief power than in his framework – was reasonably sympathetic to “a presidential-initiative reading of the Constitution of *foreign* affairs.” *Id.* at 130.

¹²⁵ These limits may be procedural or substantive in character, but it is easier for now to model direct limits, even though the President’s trespasses may be indirect in character – for example, exceeding limits to delegated authority.

enforce these legal limits. Figure 3 illustrates two *alternative* versions of such a limit (J1, J2):

Figure 3: Presidential Initiative (with Legal Constraint)



Per Figure 3, existing law would in principle constrain the President’s latitude for unilateral action so long as it occupied a position to the left of CV (here, J1).¹²⁶ Justice Jackson’s concern, however, would lie with circumstances (J2) that permit a President to maintain a unilateral action (at CV) – perhaps despite the fact that the action is illegal in some technical sense.¹²⁷ (Imagine, for example, that the “true” legal limit was arguably at J1, but that standing doctrine, or deference to executive branch factfinding, meant that it could be enforced only at J2.) His *Youngstown* concurrence suggests that such scenarios will arise frequently, since Congress will not have acted and the Constitution will have imposed no judicially enforceable limits. The risk that the President would take advantage of such a situation would have been obvious to Justice Jackson – the whole

¹²⁶ J1 would limit unilateral action because it lies between the point at which Congress would accept a legislative proposal (CM) and the point at which it would overturn unilateral action (CV), which previously established the President’s outer bound.

A more leftward point would be more complicated. If J1 lay to the left of SQ, it would render illegal the existing state of affairs. If J1 lay between SQ and SM, the effect would be contingent on the nature of the constraint. Insofar as that J1 represents a statutory limit, Congress would in that situation prefer to enact a policy closer to the President’s position, so that existing law represents what is at best a temporary constraint. However, if that J1 were predicated on constitutional limits that the judiciary would enforce, then it would establish the outer bound for either unilateral or cooperative undertakings by the political branches.

¹²⁷ J2 represents a scenario in which existing law would permit the President greater latitude than would the pivotal veto player, meaning that Congress’ capacity for overturning the President’s action and withstanding his veto would comprise the true bound. J2 might be located at a more extreme position, to the right of P, so that existing law would accommodate even the President’s ideal policy, but in that case too the limit becomes what the present Congress would prefer, not what a prior Congress (or the Constitution) permitted.

impetus for the steel seizure conflict was President Truman's decision to act unilaterally, which then engendered post-hoc questions concerning the constitutional and statutory state of affairs.¹²⁸ Indeed, the Supreme Court might well have supposed that President Truman had acted first and considered legality later, an impression reinforced by the initial insistence by Administration lawyers that inherent presidential authority afforded them precisely that luxury.¹²⁹

Justice Jackson's framework offers a clever solution. His inquiry into whether a presidential measure is "incompatible with the . . . implied will of Congress"¹³⁰ asks about non-statutory activity, including congressional inaction, which is in turn an inquiry into a notional congressional median – the point representing congressional preference. His inquiry is not, however, precisely focused on the contemporary congressional median voter (CM), but rather attempts what we might depict as a judicial construction of a recent median from legislative history (JCM). As illustrated in Figure 4, Congress' failure to adopt a proposal to grant the President the requisite authority (JCM) may be more permissive than the existing median (CM),¹³¹ but may operate as a constraint when judicial enforcement of existing law (J1) would not¹³² – if and to the extent this new constraint is itself enforced by the judiciary.

¹²⁸ The Court's perceptions on this score are most directly evidenced in the majority's statement of the facts. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

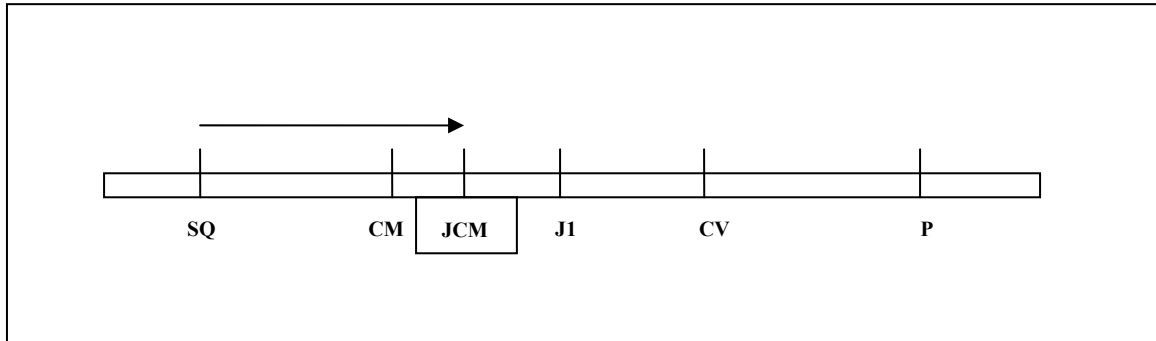
¹²⁹ See, e.g., MARCUS, *supra* note 3, at 111 (describing excessive emphasis on presidential authority in district court briefing); *id.* at 117-22 (describing oral argument before the district court, in which counsel for the government maintained that the executive powers of the President were not limited by the Constitution); *id.* at 124-25 (noting characterization of this position by White House staff as the "legal blunder of the century"); *id.* at 127-28 (noting repudiation of government position, characterized as relying solely on executive power, in the decision enjoining the seizure); see also Devins & Fisher, *supra* note 12.

¹³⁰ 343 U.S. at 635-38 (Jackson, J., concurring).

¹³¹ If it is not – and JCM occupied a position lying between SQ and CM – the President would prefer to pursue the adoption of legislation than suffer judicial enforcement of the JCM limit, barring considerations of the kind introduced in Part III.

¹³² If J1 lay to the left of JCM, there would no need to have recourse to the more controversial implied forms of lawmaking suggested by the *Youngstown* framework. J2 would perform the same function relative to JCM, and is eliminated in order to reduce clutter.

Figure 4: Presidential Initiative (with Category Three)



Thus reimagined, the *Youngstown* framework reflects an appreciation of the extra-constitutional authority necessary to counter the President's own. By giving legal effect to unorthodox forms of congressional action (and inaction), the framework just keeps pace with the reality of unorthodox presidential activities. If judges serve as umpires, as it is sometimes asserted, this employs the time-honored principle of making sure that the breaks given one side don't exceed those given the other.¹³³ Perhaps Justice Jackson deserves credit not only for a sophisticated understanding of presidential power, but also for establishing a bulwark that even contemporary political science has yet to appreciate.¹³⁴

To be sure, this depiction of congressional and presidential behavior remains highly stylized. If we took its assumptions seriously, we would see very few separation of powers controversies at all: the President might act once to initiate unilateral action, and in choosing how far to push his policy would anticipate the constraint imposed by Congress and the judiciary; if he chose his policy position wisely neither of the other branches would need to act at all, and Congress would not attempt action because it would be fruitless.¹³⁵ Everything is more complex, of course, if core assumptions like perfect information and low or absent transaction costs interactions are relaxed. If the

¹³³ Cf. Richard G. Graf, Brandon A. Yabko, & Niels P. Christensen, *Gender Effects in the Assessment of Technical Fouls Among High School Basketball Officials and Collegiate Proxies*, 32 J. SPORT BEHAV. 175, 175 (claiming that "the Holy Grail of basketball officiating is 'consistency,'" and citing standard exhorting that "[v]iolations, fouls and no-calls at one end of the floor are consistent with the same types of plays being called in the same manner at the other end of the floor").

¹³⁴ But cf. *supra* note 124 (noting possibility that Justice Jackson's own view might have been more indulgent of presidential authority in the realm of foreign affairs).

¹³⁵ Because, for example, the President would be in a position to veto a legislative remedy.

President miscalculates because of faulty information, for example, he may establish a position that poses no issue because it exploits none of his potential advantage. Alternatively, a miscalculation may cause him to overreach so that other institutions are called upon to act: conceivably the judiciary will strike down an overreaching act as inconsistent with prior law or implied congressional preferences, and Congress might override the President's policy by adopting legislation (and afterward, perhaps, override a presidential veto as well).

These and other assumptions may be defended as necessary for any parsimonious model, in part because once they are relaxed the interaction among the branches become far too difficult to describe systematically.¹³⁶ Nevertheless, Part III will explore a slightly more realistic view. In particular, it will relax an additional, critical assumption: the premise that the position adopted by the President is exogenous, rather than being sensitive to the modified judicial constraint that the courts, following Justice Jackson, have adopted.

III. FIGHTING THE FRAMEWORK: DYNAMIC REACTIONS

Notwithstanding the immanent rationale for his concurring opinion – and, more obviously, the repudiation by the Court as a whole of President Truman's seizure – Justice Jackson was not wildly optimistic about the decision's long-term potential. Near the close of his opinion, he cautioned that “I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress.”¹³⁷ Earlier drafts of his opinion better explained his skepticism. Congress was prone, Jackson warned, to dither and bicker, and if it did power would inevitably flow to

¹³⁶ See, e.g., HOWELL 2003, *supra* note 32, at 48-53 (discussing, in abstract fashion, how informational and other assumptions might be relaxed, but defending them as essential to the explanatory power of the unilateral politics model).

¹³⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

the President, “in spite of all the essays this Court can promulgate” – or, as he then put it, “whether this Court affirms or not.”¹³⁸

At first blush, Justice Jackson’s fatalism appears unwarranted. It seems possible that the Court’s affirmance could affect how Congress behaved – that is, that it might actually influence whether Congress *was* “wise and timely in meeting its problems” by assuring its members that legislative restrictions would be enforced. Equally important, the Court’s reasoning (and, conceivably, the mechanics of his own framework) might make a difference. The majority opinion, despite its wooden appearance, arguably had an inner rationality: Justice Black’s strict distinction between legislative and executive functions might be understood as “alarm-clock formalism,” by which an overly stringent rule (like setting the clock earlier than strictly necessary) is selected to prevent future courts (like drowsy sleepers) from reacting more indulgently to executive inroads on core legislative power.¹³⁹ The potential influence of Justice Jackson’s approach was more obvious: Congressional dithering and bickering might actually count for something, insofar as it evidenced informal congressional disapproval and resulted in greater scrutiny being applied to the President’s action. If Justice Jackson failed to see the potential, perhaps that is only because he did not realize that his concurrence would eventually prevail.

Might Jackson’s framework encourage Congress to recapture authority, or the executive branch to better respect the limits to its own authority? Possibly, but there is cause to be dubious. Indeed, if we assume with Jackson that Congress is not disposed to seize the initiative, his framework might hinder rather than help Congress’ cause.

¹³⁸ See White, *supra* note 30, at 1122-23. Jackson’s May 22 draft alluded to the demise of the Reichstag, and continued:

As crisis follows crisis, if Congress allows its attention to be diverted by trivia, its leadership of the Nation weakened by absorption in sectional tasks, its impact weakened by partisaned division, the weight of public opinion will surely shift effective power to a centralized Executive in spite of all the essays this Court can promulgate.

White, *supra* note 30, at 1123 (quoting 5/22 Draft at 28). He then edited this to read: “[Congress] does not rise to its occasions, if it is petty, partisan, or indecisive[,] power will gravitate to the Executive by force of public opinion whether this Court affirms or not.” *Id.*

¹³⁹ Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 365 (2000).

A. *The Strategic Component of Executive Branch Behavior*

While presidential studies amounted for many years to the study of personality, the last decade has seen an explosion of more formal empirical and theoretical work designed to test rational choice-based hypotheses concerning the presidency and its lawmaking functions.¹⁴⁰ One of the most canvassed areas concerns the study of executive orders.¹⁴¹ Without purporting to restate that entire literature,¹⁴² its core findings are helpful in evaluating Justice Jackson's framework.

It is common ground, to begin with, that presidents are not indifferent as to the form in which policy is adopted. Presidents typically show greater interest than Congress in promoting the long-term health of their institution, which may sometimes cause them to make short-term sacrifices – including, potentially, by insisting on defending the right to proceed unilaterally.¹⁴³ Nevertheless, their primary objective is to adopt policy, and they generally prefer to do so via legislation.¹⁴⁴ A statute not only reduces uncertainty as to whether Congress will countermand a presidential initiative (though Congress remains free to change its mind), but it also helps insulate that initiative against retrenchment by a

¹⁴⁰ See *supra* text accompanying note 32.

¹⁴¹ Regular contributors include William Howell and co-authors, see HOWELL 2003, *supra* note 32; WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007), Moe & Howell, *supra* note 117; William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417 (2005); William G. Howell & Jon C. Pevehouse, *Presidents, Congress, and the Use of Force*, 59 INT'L ORG. 209 (2005); WILLIAM G. HOWELL & DOUGLAS J. KRINER, *BENDING SO AS NOT TO BREAK: WHAT THE BUSH PRESIDENCY REVEALS ABOUT THE POLITICS OF UNILATERAL ACTION*, IN *THE POLARIZED PRESIDENCY OF GEORGE W. BUSH* (George C. Edwards III & Desmond S. King eds., 2007); George Krause and co-authors, see George A. Krause & Jeffery E. Cohen, *Opportunity, Constraints, and the Development of the Institutional Presidency: The Issuance of Executive Orders, 1939-96*, 62 J. POL. 88 (2000); George Krause & David B. Cohen, *Presidential Use of Executive Orders, 1953-1994*, 25 AM. POL. Q. 458 (1997); and Kenneth Mayer and co-authors, see MAYER, *supra* note 120; Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445 (1999); Kenneth R. Mayer & Kevin Price, *Unilateral Presidential Powers: Significant Executive Orders, 1949-1999*, 32 PRESIDENTIAL STUD. Q. 367 (2002).

For other leading works, see PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002); ADAM L. WARBER, *EXECUTIVE ORDERS AND THE MODERN PRESIDENCY: LEGISLATING FROM THE OVAL OFFICE* (2006); Christopher J. Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 POL. RES. Q. 767 (1999); Bryan W. Marshall, *Revisiting the Two Presidencies: The Strategic Use of Executive Orders*, 33 AM. POL. RES. 81 (2005); Richard Pious, *Why Do Presidents Fail?*, 32 PRESIDENTIAL STUD. Q. 724 (2002).

¹⁴² For one literature review, see Miner Peek Marchbanks III, *A Transaction Cost Approach to Unilateral Presidential Action* (Dec., 2005) (PhD. dissertation, Texas A & M).

¹⁴³ [Insert reference to Cheney/Addington.] See generally MAYER, *supra* note 120, at 29-31 (employing new institutional economics approach to address the use of unilateral authority to shape institutions and strategic contexts).

¹⁴⁴ See WARBER, *supra* note 141, at 17.

future administration. Permanence, in short, favors the pursuit of legislation, and administrative alternatives are second-best.¹⁴⁵

For a first wave of studies, it seemed to follow that presidents resort to executive orders primarily when they have no alternative.¹⁴⁶ If true, this would imply that the *Youngstown* framework's Category Two and Category Three are populated with instances in which a President has proceeded, nearly involuntarily, because legislative support could not be obtained. On this view, presidents are already so incentivized to seek legislative support that little further encouragement may be necessary.

It turned out that there was surprisingly little empirical support for any such demand-centered hypothesis. Rather, studies consistently found that presidents issue *fewer* executive orders when the legislature is dominated by the opposing party,¹⁴⁷ even though the prospect of legislative opposition should make it more attractive, *ceteris paribus*, for the President to resort to acting unilaterally.¹⁴⁸ The most obvious

¹⁴⁵ Elaborating a little on the virtues of administrative action, Paul Light's leading account of presidential agendas nevertheless indicated that it was an option pursued only when "the legislative channel is foreclosed":

[T]he President must decide between legislative and administrative action. If the legislative channel is foreclosed, executive action may be the only acceptable alternative. . . . The President may issue an executive order when administrative action is the logical alternative, when it is the simplest and most direct route. He may issue one in order to prevent a given program's being involved in congressional controversy. He may use it when the risk of congressional defeat is too great. Finally, the President may issue an executive order after testing the congressional path and finding failure.

PAUL C. LIGHT, *THE PRESIDENT'S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CLINTON* 108 (3rd ed. 1999); *id.* at 117-19 (describing practice of discounting executive orders relative to legislative achievements for reasons of "glamor," prominence, and permanence).

¹⁴⁶ For examples of this prediction, see HOWELL 2003, *supra* note 32, at 69-70 (noting "evasion hypothesis" according to which "presidents should act unilaterally precisely when they cannot get their legislative initiatives through Congress," whereas when they have congressional support they need not even act at all) (quoting LISA MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* (1999)); WARBER, *supra* note 141 (noting that, despite interest in avoiding controversy, "it is likely that chief executives will slightly increase the number of policy executive orders during divided government," as a means of "salvage[ing] part of its policy agenda . . . without aggressively overstepping Congress's constitutional authority to make laws"); MAYER, *supra* note 120, at 91 (citing "expectation about executive orders... that presidents will tend to issue more when (a) they lack the strong support in Congress, and (b) they experience low levels of popular support"); accord Mayer, *supra* note 141, at 453.

¹⁴⁷ The test for when government is divided in a bicameral system might vary, but it is generally sufficient if at least one house is at variance with the President's party.

¹⁴⁸ See, e.g., HOWELL 2003, *supra* note 32, at 85-96 (testing and confirming explanatory power of inverse relationship to divided government); MAYER, *supra* note 120, at 99-101 (noting impact of divided government even as to presidents facing both divided and unified governments during their terms); accord

explanation is that the same conditions of divided government that constrain the possibility of obtaining a statutory fix simultaneously reduce the prospect that a unilateral executive policy will survive subsequent legislative scrutiny¹⁴⁹ – and presidents plausibly prefer to avoid legislative repudiation, both because it is wasted effort and due to concern for institutional credibility and prestige.¹⁵⁰ The upshot is that executive orders may be least useful to the executive branch just when they start to get appealing – namely, under conditions of opposition.¹⁵¹ Presidents do, however, tend to pursue executive orders more frequently when conditions in Congress suggest that it is fragmented and unlikely to offer much opposition.¹⁵² The data suggests, in sum, a *reaction-oriented calculus* according to which a President will pursue unilateral action when there is insufficient opposition in Congress (because Congress will not gainsay it) but not when it is too supportive (because he will then seek legislation instead).

These analyses are substantial improvements in the folk wisdom of congressional-executive interactions. But their predictive capacity still depends on some unlikely assumptions, just as in the earlier spatial descriptions. For example, while presidents usually have an information advantage over Congress on matters of substance,¹⁵³ they do not have perfect information about congressional decision points (in Figure 4, represented as CM and CV) or even those constraints supplied by the judiciary (J and JCM).¹⁵⁴ As

Mayer, *supra* note 141, at 460-61; WARBER, *supra* note 141, at 64-65. *But see* Mayer & Price, *supra* note 141, at 378 (finding no systematic relationship between issuance of significant orders and divided government, but finding positive relationship between the number of executive orders and new presidents who have shifted party control of the White House and inverse relationship between the number of executive orders and presidential approval ratings).

¹⁴⁹ See HOWELL 2003, *supra* note 32, at 69-75 (incorporating party preferences into unilateral politics model).

¹⁵⁰ WARBER, *supra* note 141, at 64 (claiming that while presidents “want to build a policy record, it is also in their best interest to avoid entangling the executive branch in a major separation of powers battle with Congress over lawmaking responsibilities”).

¹⁵¹ See HOWELL 2003, *supra* note 32, at 70 (“Presidents, ironically, enjoy the broadest discretion to act unilaterally precisely when they have the weakest incentives to take advantage of it – during periods of unified government. It is possible, then, that the heightened incentives to act unilaterally are cancelled out by the losses in discretion to do so, nullifying any effect divided government might have on presidential policy making.”).

¹⁵² See HOWELL 2003, *supra* note 32, at 64 (hypothesizing that “the more fragmented Congress becomes, the more freedom the President has to act unilaterally, and hence, the more significant (i.e., policy-oriented) unilateral directives he issues”); *id.* at 85-96 (finding empirical support).

¹⁵³ See *infra* text accompanying note 161.

¹⁵⁴ *But see* HOWELL & KRINER, *supra* note 141, at 99 (“[T]he Bush Administration has proven remarkably adept at measuring the level of opposition it faces within Congress and adjusting accordingly.”).

the revised hypotheses about executive orders suggest, presidents are also not inclined to optimize the relative policy position at all costs. Like Congress, they have transaction costs,¹⁵⁵ and they may shrink from achieving marginal policy advantage if the tradeoff is an increased risk of repudiation and reputational injury; like Congress, they seek public approval, which may drive them to avoid confrontations for reasons extrinsic to the policy result in a particular controversy (or, for that matter, to use leverage outside the model to obtain results within it).¹⁵⁶

The models also have a relatively truncated understanding of the means by which the political branches act. For the President, executive orders may indeed be the next-best means of creating executive branch policy with legal effect – and it was, after all, an executive order that was at issue in *Youngstown*. (They also offer academics the enormous advantage of publicly-available, reasonably complete data, though judgments differ about how to redress the inevitable holes and how to avoid treating trivial and significant orders as equivalents.¹⁵⁷) The fact remains, though, that presidents have other alternatives, including presidential memoranda, presidential proclamations, national security directives, and the like; what these lack in terms of external legal effect may be offset in terms of flexibility, secrecy, and relative immunity from legislative and judicial review.¹⁵⁸

¹⁵⁵ For discussion of Congress' transaction costs, see Moe & Howell, *supra* note 117, at 146-47.

¹⁵⁶ And, to reiterate, the initial depiction of interests – in which the President's position (P) lies at the extreme position along the axis, presumably correlated with a policy outcome that favors the long-term institutional interests of the executive branch – reflects a simplifying assumption, and may in fact be subject to change depending on the mechanism employed. For example, the Obama Administration recently decided not to seek new congressional authorization for preventive detention. According to initial reports, the decision was based in part on the premise that the 2001 Authorization to Use Military Force, which had been regarded as sufficient for at least some such detentions (see *supra*), would continue to suffice; partly on the risk that Congress would decline to provide new authorization; and partly in anticipation that the process of pursuing additional authorization would be politically costly. But the executive branch, and certainly some civil liberty groups, also perceived a risk that Congress might inappropriately institutionalize executive branch authority – perhaps even giving the executive branch greater power than it sought for itself and its successors. See Peter Baker, Obama to Use Current Law to the Support Detentions, N.Y. Times, Sept. 23, 2009, at A23; Peter Finn, Administration Won't Seek New Detention System, Wash. Post, Sept. 24, 2009.

¹⁵⁷ See Mayer & Price, *supra* note 141, at 373-75 (describing selection of “significant” orders based on criteria of “press attention, congressional notice, scholarly treatment, presidential emphasis, litigation, or creation of institutions with substantive policy responsibilities”).

¹⁵⁸ See COOPER, *supra* (analyzing range of tools for “presidential direct administration”); e.g., *id.* at 104-14 (examining benefits and dangers of presidential memoranda relative to executive orders); *id.* at 114-15 (describing “substitution of memoranda for executive orders”); *id.* at 115-16 (describing recourse to “quasi-memoranda”); see also LIGHT, *supra* note 145, at 116 (noting that “executive action involves far

Congress also has more than formal statutory mechanisms up its sleeve – even putting to one side any additional informal tools, clearly relevant to any litigation, that *Youngstown* may create. While it is generally difficult for Congress to anticipate and avoid future conflicts by adopting effective *ex ante* controls,¹⁵⁹ it can increase the political costs of unilateral presidential action by holding hearings, establishing commissions, slashing budgets, or unleashing individual members to take its case to the public.¹⁶⁰ These options have not, it should be stressed, kept pace with those available to the executive branch, and that Congress is likelier to lack relevant information, suffer from transactions costs, and lack the President’s attention to safeguarding institutional power.¹⁶¹ Its deficits may also be particularly acute in foreign affairs – not merely because of the President’s advantages in terms of information and speed, which may be credited to the constitutional design, but also because individual legislators have a diminished stake in actions that bear less directly on their constituents.¹⁶²

Most important, while the political science literature has tested various political conditions (like divided government) as independent variables, and sometimes even introduced judicial intervention as a constraint, it has failed to appreciate the significance of variance in the background law – particularly the *Youngstown* framework. Several studies cite *Youngstown* not only as a data point about the success of executive orders, but also as an instructive and influential case for American courts.¹⁶³ At the same time,

more than the issuance of executive orders,” and noting alternatives); *accord* at 108; Howell, *supra* note 141, at 417 (noting alternatives of executive orders, executive agreements, proclamations, national security directives, or memoranda, and assuming that each “assume the weight of law without the formal endorsement of a sitting Congress”); STEVEN A. SHULL, *POLICY BY OTHER MEANS: ALTERNATIVE ADOPTION BY PRESIDENTS* (2006) (exploring, in addition to executive orders, presidential budgeting, executive agreements, and commitment of troops).

¹⁵⁹ See Moe & Howell, *supra* note 117, at 140, 141-43 (noting incentive of Congress to delegate broadly on some occasions, and its difficulty on other occasions in enforcing narrow delegations). For a more descriptive analysis of the limits of substantive legislation in checking presidential authority, see JAMES M. LINDSAY, *CONGRESS AND THE POLITICS OF U.S. FOREIGN POLICY* 88-97 (1994).

¹⁶⁰ See, e.g., HOWELL & KRINER, *supra* note 141, at 99 (suggesting that some of these tools have proven successful, including against Bush Administration initiatives).

¹⁶¹ See HOWELL 2003, *supra* note 32, at 102-108, 110-12.

¹⁶² See HOWELL 2003, *supra* note 32, at 108-10; see also CECIL V. CRABB, JR., *ET AL.*, *CONGRESS AND THE FOREIGN POLICY PROCESS* (2000); BARBARA HINCKLEY, *LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS* (1994); KOH, *supra* note 30, at 123-33; STEPHEN R. WEISSMAN, *A CULTURE OF DEFERENCE: CONGRESS’S FAILURE OF LEADERSHIP IN FOREIGN POLICY* 12-25 (1995). For a partial dissent on the strength of the electoral (dis)incentive, see LINDSAY, *supra* note 159, at 33-52.

¹⁶³ See, e.g., HOWELL 2003, *supra* note 32, at 149; WARBER, *supra* note 141, at 21.

much like Justice Jackson, they fail to analyze the *ex ante* effects of the *Youngstown* framework for executive branch and congressional strategies. Diametrically opposite reactions might be imagined. Category One might encourage presidents to seek legislation, since achieving legislation (or informal support) bolsters a presidential initiative's immunity from judicial review; one can easily imagine Justice Jackson thinking along these lines, even if it may have seemed to him too good to be true, and we should not lose sight of this salutary prospect. At the same time, if fear of repudiation is indeed significant in deterring presidents from issuing executive orders, Category Three enhances that risk by expanding the circumstances under which rejection by Congress will effectively serve as a constraint on unilateral presidential action.

We can model these potential effects. Recall that (per Figure 4), the *Youngstown* framework supposed that courts might, by reckoning a legislative preference based on legislative history, construct an additional constraint on executive unilateralism (JCM). The literature on executive orders, and the executive branch's sensitivity toward congressional repudiation, suggests that this might be effective; the same risk-averse approach would presumably apply to the prospect of *indirect* legislative repudiation via judicial enforcement of Category Three, such that the executive branch would be disposed to establish policy within the constraint established by JCM.

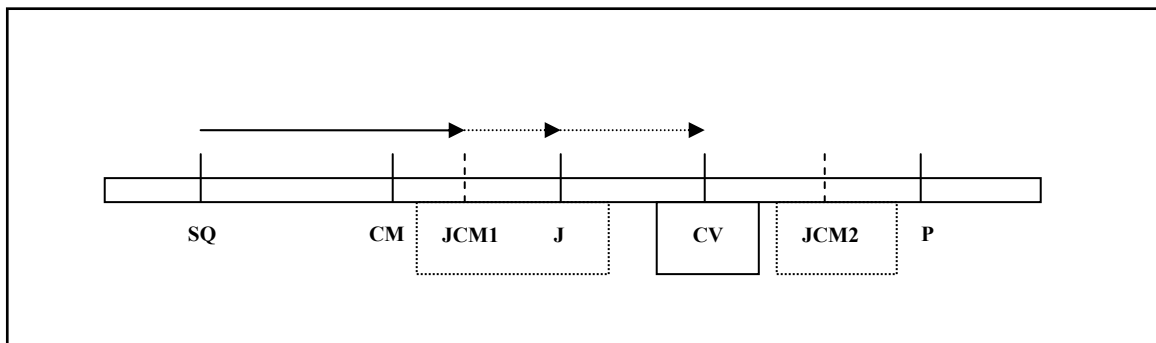
But presidents, again, have more tools at their disposal than legislative initiatives or executive orders. Once the *Youngstown* framework has been internalized, presidents have an incentive to avoid building cases against themselves – to eliminate, recalling Figure 4, the constraint imposed by JCM. While Category One may provide an incentive to establish favorable legislative history, as noted above, this assumes that JCM will be more permissive than CM (the point at which a contemporary legislature would support a statutory alternative) and, necessarily, not exceed CV (the point at which a contemporary legislature could sustain legislative repudiation of the President, and moot judicial review on any basis). It is not difficult to imagine that presidents could maintain control of the policy agenda through cooperative and unilateral measures – or, more negatively, “manipulate legislative behavior to their own advantage”¹⁶⁴ – and so optimize the

¹⁶⁴ Moe & Howell, *supra* note 117, at 145-46 (citing “textbook” analyses of presidential capacity to set legislative agenda, in addition to unilateral capabilities).

likelihood of a pro-presidential result. The fixed and exogenous character of any judicial restraint is also open to question. If, for example, a non-framework court might have constrained unilateral presidential action by holding that it encroached on Article I, the *Youngstown* framework might counsel in favor of *upholding* the action based on implicit congressional support – if implicit authorization lay outside the limit established by other judicial constraints. This suggests, in short, continued and perhaps even reinforced benefits to presidential unilateralism.

These tentative intuitions are amalgamated in Figure 5. As it reflects, a strategic President might undermine the creation of constraining legislative history (JCM1) – allowing the attainable policy position, illustrated as a dashed line, to creep rightward. A sufficiently adept President might even establish a favorable legislative history (JCM2) that would defeat the judicial constraint (J) – not incorporating Category Three – that was initially illustrated in Figure 3. The effect, all told, might be to revert to the minimal constraint – the veto pivot (CV) – that was evident in Figure 2, and which originally illustrated the advantages of unilateral action.

Figure 5: Presidential Initiative (and Strategy)



It is impossible to test these intuitions formally. Presidential initiatives other than executive orders are not compiled in any reliable way. And even if judicial outcomes may otherwise be studied and predicted, it would be exceedingly difficult to distinguish between preordained judicial constraints (J) and those imposed under the *Youngstown* framework (JCM1 or JCM2). Finally, in the absence of comprehensive information about presidential motivations, the influence of framework-anticipation cannot be evaluated systematically.

The better approach, for now, is to examine historical cases and, to the extent possible, develop plausible but non-comprehensive accounts of presidential behavior. There is certainly abundant room for strategic refinement. Based on the work to date, we can be reasonably confident that presidents will be tempted to use unilateral powers to avoid status quo policies as to which Congress is gridlocked.¹⁶⁵ Beyond that, it is useful to distill from the case studies some very tentative hypotheses about the dynamic strategies employed by the President and Congress in a world where *Youngstown* has been internalized.

B. Dynamic Effects on Executive Branch Behavior

It is probably unsurprising that the widest range of adaptive behaviors may be envisioned for the executive branch. After describing, based on anecdotal evidence, three hypotheses about presidential strategies, we will then return to a summary case study that allows us to witness all three being exhibited at once.

1. *Avoiding Category Three: don't ask, won't tell.* Just as trial attorneys are cautioned not to ask questions of witnesses when they don't know the answer, presidents may be schooled to avoid asking Congress for powers that may be denied them. The war power setting undergirding *Youngstown* is familiar in this regard. In the case at hand, President Truman's decision to use force without prior congressional authorization was probably not due to concerns that Congress would have denied permission outright.¹⁶⁶ (That is not to say, necessarily, that he was foolish to refrain from taking that risk.¹⁶⁷)

¹⁶⁵ See HOWELL 2003, *supra* note 32, at 53-54 (describing, in general terms, two scenarios in which the recourse to unilateral powers will likely be appealing). Howell also predicts that a President may use unilateral action in narrower circumstances, to offer a more modest concession that serves to defeat more sweeping congressional initiatives.

¹⁶⁶ His concern was rather that Congress would permit, but at a price. See *supra* text accompanying note 38.

¹⁶⁷ Thus, President Eisenhower's criticism of President Truman's failure to secure congressional support seems to have supposed that Truman's choice was simply between going to war alone or going with congressional support, as though the latter was a foregone conclusion. See 1957 PUB. PAPERS 11, quoted in LOUIS FISHER, HISTORICAL SURVEY OF THE WAR POWERS AND THE USE OF FORCE, IN THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 22 (Gary M. Stern & Morton H. Halperin eds., 1994) (quoting Dwight D. Eisenhower: "I deem it necessary to seek the cooperation of the Congress. Only with that cooperation can we give the reassurance needed to deter aggression."). Likewise, after President Clinton sent U.S. troops to Haiti, both the House and the Senate passed resolutions indicating that "the President should have sought and welcomed Congressional approval before deploying United States forces to Haiti." 140 CONG. REC. 28239 (1994) (S.J. Res. 229); *id.* at

More generally, though, presidents probably do weigh carefully the risk of rejection when deciding whether to seek legislative approval or instead to risk resting more heavily on independent constitutional authority.¹⁶⁸ A decision to avoid Congress may be indicated by any of a number of factors – time pressure,¹⁶⁹ a desire not to share credit,¹⁷⁰ confidence that public support will be sufficient to prevent (or overwhelm) any subsequent congressional backlash,¹⁷¹ or perhaps a genuine disagreement about legal authority¹⁷² – but the risk of disapproval is almost certainly a consideration. President

28565-78 (H.J. Res. 416); *id.* at 29223-24 (noting House assent to S.J. Res. 229). Of course the President might have welcomed congressional approval and, were it stipulated beforehand that it would be forthcoming, he might well have agreed that it should be sought – at least, insofar as it did not estop him from arguing on some future, more difficult occasion that permission was unnecessary.

¹⁶⁸ Cf. JAMES M. LINDSAY & RANDALL B. RIPLEY, *HOW CONGRESS INFLUENCES FOREIGN AND DEFENSE POLICY*, IN *CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 22-28* (Randall B. Ripley & James M. Lindsay eds., 1993) (noting congressional influence on executive branch foreign and defense policy both through substantive legislation and “anticipated reactions”).

¹⁶⁹ This is the functional basis for construing the right of the Commander-in-Chief authority to “repel sudden attacks” – whatever the precise scope of that authority may be. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 6-7 (1993).

¹⁷⁰ Jide Nzelibe, who argues in favor of this proposition and the converse, risk-spreading hypothesis, also cautions against the simple intuition that a President will “seek congressional approval for all uses of force,” noting among other things the risk of disapproval:

A president who seeks legislative consent before going to war may face other significant risks such as the legislative imposition of burdensome substantive and procedural restraints on how the actual war is conducted, premature disclosure of secret or confidential military plans by members of Congress, and the possibility of outright rejection of his request by Congress.

Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 *IOWA L. REV.* 993, 1013 (2006).

¹⁷¹ This might explain President Bush’s decision to proceed with virtually no advance notice – and afterward almost no congressional abreaction – in the case of military action in Panama. Eileen Burgin, *Congress, the War Powers Resolution, and the Invasion of Panama*, 25 *POLITY* 217, 234-41 (1992). Later, in the case of the first Gulf War, public support made taking the case to Congress relatively risk-free – in the sense that Congress was almost certain to support intervention, but also because President Bush was confident that the public would support him even if Congress did not. Bert A. Rockman, *Reinventing What for Whom? President and Congress in the Making of Foreign Policy*, 30 *PRESIDENTIAL STUD. Q.* 133, 149 (2000) (noting that “George Bush said he would have gone ahead with military force in the Persian Gulf regardless of what Congress chose to do.”). President Clinton, on the other hand, promised to give Congress a chance to be heard before sending U.S. troops to Bosnia, notwithstanding concrete indications that the answer might be negative. Jim Mann, *Clinton Now Faces Congress on Deployment*, *L.A. TIMES*, Nov. 22, 1995, at A1. The amount of political capital, in all events, seems to make a difference. See generally Jim Hoagland, *Don’t Do It*, *WASHINGTON POST*, Sept. 15, 1994, at A17.

¹⁷² In the context of the Haitian deployment, President Clinton represented that “Like my predecessors of both parties, I have not agreed that I was constitutionally mandated to get [congressional authorization.]” 2 *PUB. PAPERS* 1994 (1995) (statement at Aug. 3, 1994, press conference).

Clinton's decision to deploy troops into Haiti without congressional authorization seems to be a ready illustration.¹⁷³

The exercise of war powers is a prominent example, but not singular. The steel seizure illustrated the predicament in a slightly more universal context. As the strike drama unfolded, President Truman might have pursued congressional authorization to seize the steel mills – even prior to *Youngstown*, it was apparent that doing so would strengthen his political and legal position. But he appears to have rejected that option not only because the timing was inconvenient, but also because his staff estimated that the likelihood that Congress would in fact grant him seizure authority was remote.¹⁷⁴ Subsequently, Truman's strategy of inviting congressional participation, while carefully avoiding proposing anything in particular, suggested a strategy brilliantly tailored to the framework Justice Jackson had not yet announced.¹⁷⁵

To the extent these political calculations are already well motivated, they may be only marginally affected by operation of *Youngstown's* rule. Nevertheless, the Court's decision put the cost of a failed calculation, and the difficulty of making an appropriate assessment, in especially stark relief. As previously noted, Justice Jackson and several of his peers emphasized that Congress had at one critical juncture refused to amend the Taft-Hartley Act to provide specific authority for seizure.¹⁷⁶ The Justice Department took a different view, citing legislative history indicating that Congress wished only to avoid making such “a remedy . . . available as a routine remedy” for fear that doing so would frequently give one side an incentive to defeat collective bargaining.¹⁷⁷ The Court's

¹⁷³ Many have speculated that he proceeded that way because Congress would have rebuffed him. See, e.g., Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 59 (1995); Michael Kramer, *The Carter Connection*, TIME, Oct. 3, 1994, at 30.

¹⁷⁴ See MARCUS, *supra* note 3, at 78.

¹⁷⁵ See, e.g., 98 CONG. REC. 4192 (1952) (reprinting message from President Truman) (“[I]f the Congress wished to take action, I would be glad to cooperate in developing any legislative proposals the Congress might wish to consider . . . I do not believe the Congress can meet its responsibilities simply by following a course of negation. . . . The Congress may have a different judgment. If it does, however, the Congress should do more than simply tell me what I should not do. The Congress should pass affirmative legislation . . .”), cited in Brief for Petitioner at 19-20, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁷⁶ See *supra* text accompanying notes 43, 56, 107.

¹⁷⁷ Brief for Petitioner at 170-71, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (quoting 93 CONG. REC. 3835-3836). In his memoirs, President Truman maintained that he had faced the choice as to which of two procedures to use during the period leading up to the seizure – either the Taft-Hartley Act, which “had been designed primarily for peacetime labor problems,” or the Wage Stabilization

contrary conclusion indicated not only that executive branch officials should be prepared for more negative glosses on their interactions with Congress, but also that any *ex ante* consideration of going to Congress should be balanced with the risk that any failure could have negative repercussions in subsequent litigation.

While this point was clear enough from any of the concurring opinions, the *Youngstown* framework makes the argument for caution considerably starker. Trying to receive authorization, but failing, may literally be of categorical significance, in that an executive action that might otherwise have been considered to fall within Category One or Category Two might suddenly be considered to fall within Category Three. The risk-averse President may as a result be deterred from seeking permission in the first place. One may formulate this prospect in the following form:

Hypothesis 1: A President's reluctance to risk Category Three, and review at the "lowest ebb," will tend to discourage seeking congressional authorization at all.

To reiterate, there are preexisting bases for such reluctance having nothing to do with the *Youngstown* framework. There are also extrinsic limits on presidential avoidance: To put it mildly, the executive branch will not desire to go it alone each and every time it risks failure, but instead will choose the occasions for independence with caution and, presumably, reluctance. The point, rather, is that the *Youngstown* framework reinforces the same incentives for unlawful presidential initiatives to which the framework arguably reacts. President Truman, on this view, *might never have pursued amendments to Taft-Hartley in the first place* – at least, had he anticipated their potential relevance to the Korean conflict or some like occasion – and would thus have accomplished a categorical shift in how the Court perceived his case.

2. *Inhabiting Categories One and Two: ask quietly, if you must.* The desirability of avoiding Category Three is probably obvious. But the other elements of the

Board licensed by the Defense Production Act – and that Congress had understood these two as alternative, not cumulative, tracks. 2 HARRY TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 467 (1956). By extension, it might also have been argued, the limitations that Congress placed on the President's Taft-Hartley authority were independent of any other means, statutory or constitutional, that would otherwise be available to him.

framework seem, at least superficially, to make up for any adverse effect: while the executive branch may be motivated to avoid Category Three, it might be motivated in equal measure to seek out congressional authorization by the enticements of Category One. By analogy, focusing on a would-be wooer's fear of rejection while ignoring the concomitant upsides would get the analysis less than half right.

Yet Category One (and, in some circumstances, Category Two) pose similar, if less obvious, problems. The key in both instances is Jackson's solicitude for implied congressional action. His indulgence of implied *authorization* in Category One may be rationalized as a necessary complement to implied congressional *contraindication* in Category Three. If one takes seriously the claim that Congress cannot adequately react to exigent circumstances, including those in which the President may be inclined to act impulsively, it becomes important to show solicitude for all its implied preferences. But this complicates the modern case, sketched earlier, for enhancing Congress' prophylactic authority. Just as Congress cannot anticipate and foreclose presidential authority of every stripe – arguably warranting inferences about what would have displeased Congress – it also cannot anticipate all the circumstances under which it would *like* to consent to presidential power. Authorization, on this view, might also be more easily inferred.

The problems this creates were evident in *Dames & Moore v. Regan*.¹⁷⁸ Though *Dames & Moore* was the first real use by the Supreme Court of the *Youngstown* framework – Justice Rehnquist stated, half-apologetically, that its use seemed to be stipulated by the parties¹⁷⁹ – the Court also announced, in the same breath, that more nuanced categories might be necessary.¹⁸⁰ Evaluating the President's power to suspend claims pending in American courts, the Court acknowledged that nothing gave the

¹⁷⁸ 453 U.S. 654 (1981).

¹⁷⁹ *Id.* at 661 (reporting that “both parties agree [that Justice Jackson's concurring opinion in *Youngstown*] brings together as much combination of analysis and common sense as there is in this area”).

¹⁸⁰ As he explained:

[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

453 U.S. at 669.

President “specific” statutory authorization, but added that this did not mean that existing statutes were “entirely irrelevant to the question of the validity of the President's action,” since they were “highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action.”¹⁸¹ As the Court elaborated,

Although we have declined to conclude that the [International Emergency Economic Powers Act] or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. . . . Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially ... in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility” [citing the *Youngstown* framework]. At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.¹⁸²

The *Dames & Moore* Court's principal concern, probably, was to reject the kind of Category Three inference of a congressional negative that Justice Jackson himself indulged in *Youngstown*. Once that was accomplished, implied authorization – rather than a rejection of the *Youngstown* framework – was fairly easily surmised. It is only in the final passages that the Court tips its hand toward Category Two (more particularly, that subset in which acquiescence “may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility”¹⁸³) as opposed to Category One (that is, a claim that Congress had imparted implied authorization through the general tenor of its legislation). In either case, according to the Court, Congress had

¹⁸¹ *Id.* at 677.

¹⁸² *Id.* at 678-79.

¹⁸³ See *supra* notes 67-76.

done enough to signal authority to immunize the presidential action from judicial interference.

As previously noted, privileging implied authorization is not inherently hostile to Congress. Congressional delegation arguably facilitates a congressional preference to vest power in the executive branch. If Congress later decides otherwise, it can (in theory) always recover that authority. Arguably, even a congressional capacity to vest unrecoverable power would be an expression of its preferences.¹⁸⁴ The only problem, from this perspective, is that *Dames & Moore* deemed Congress to have conferred authority under circumstances in which the implication of authority was particularly faint.¹⁸⁵

But more systemic difficulties are also apparent. As others have noted, *Dames & Moore* encourages the President to act aggressively and to search for authorization later,¹⁸⁶ aware that in practice it will be difficult for Congress to adopt policies reversing course.¹⁸⁷ This problem preceded *Youngstown* and, apparently, survives it as well. The conventional wisdom that *Dames & Moore* misunderstood or somehow “inverted” the *Youngstown* framework, however, is mistaken,¹⁸⁸ at most, the end result is different insofar as it is permissive rather than prohibitive. The source of the problem, moreover, can be traced more precisely to the *relative* standing of implicit legislative behavior within each category. By equating implied and explicit authorization (to the extent that either may lodge review of a challenged presidential action in the airy reaches of

¹⁸⁴ See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

¹⁸⁵ For an argument that *Youngstown* and *Dames & Moore* erred equally, and that neither exemplifies the proper inquiry into congressional silence, see Matthew Baker, *The Sound of Congressional Silence: Judicial Distortion of the Legislative Executive Balance of Power*, 2009 BYU L. REV. 225 (2009).

¹⁸⁶ KOH, *supra* note 30, at 140 (“*Dames & Moore* sent the president the wrong message. In responding to perceived national crises, the Court suggested, the president should act first, then search for preexisting blank checks, rather than seek specific prior or immediate subsequent legislative approval of controversial decisions. Thus, *Dames & Moore* championed unguided executive activism and congressional acquiescence in foreign affairs over the constitutional principle of balanced institutional participation”).

¹⁸⁷ See, e.g., William N. Eskridge, Jr., and John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 554-56 (1992) (applying this reasoning to *Dames & Moore*).

¹⁸⁸ KOH, *supra* note 30, at 140 (suggesting that *Dames & Moore* “inverted the Steel Seizure holding” by finding approval in congressional inactivity); e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 191-92 (1994) (noting with approval criticisms that “the results in *Youngstown* and *Dames & Moore* cannot easily be squared,” and arguing that “*Dames & Moore* is best read as implicitly applying Chief Justice Vinson’s dissenting approach from *Youngstown*”).

Category One, or secure approval under Category Two), the *Youngstown* framework diminishes the President's incentive to seek explicit authorization. To cast the proposition in more general terms:

Hypothesis 2: The possibility that implied authorization may suffice to achieve Category One or Category Two status diminishes the President's incentive to seek explicit authorization.

As with the question of whether congressional authorization should be sought at all, the costs and benefits to the executive branch of seeking implied authorization depend on particular circumstances and, in large part, transcend *Youngstown*. Seeking explicit authorization is almost certainly more burdensome. On the other hand, implied authority is far less dependable in character. The key is recognizing that trying to achieve explicit license – and failing – may be even more costly, and that kind of failure is likely to be more conspicuous. Put simply, if either formal or informal authorization would suffice to secure nominally equivalent status within Category One or Two, and the *failure* to secure formal authorization is particularly likely to result in Category Three classification, the case for settling for implied authorization may be compelling.

* * *

Both of the hypotheses tendered to this point assume the significance of being placed in one category or another, and – whether or not Justice Jackson intended this result¹⁸⁹ – there is every indication this is substantial. Should presidential action be deemed to fall within Category One, it verges on immunity from judicial challenge, and nearly the same may thing may be said for any action falling within the acquiescence subclass of Category Two – with quite the opposite effect for Category Three, which is practically a death knell for executive branch action. There have been about 60 reported cases addressing the legitimacy of executive branch action under the *Youngstown* framework. Not a single one of those cases concluded that an action fell within Category

¹⁸⁹ Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown's Shadow*, 52 ST. LOUIS U. L.J. (forthcoming 2009) (“Jackson’s opinion . . . solves practically nothing. Even under Jackson’s trifurcation, the president can lose in category one, he can win in category three, and one is left to wonder just what category two means by ‘contemporary imponderables.’”).

One but was nonetheless unconstitutional; indeed, no cases even suggested that such an outcome was possible. Nor did any case conclude that an action fell within Category Three but could still be upheld.¹⁹⁰ The precondition, certainly, is invocation of the *Youngstown* framework in the first instance, and it is undoubtedly the case that some controversies that might be resolved under that framework are not – perhaps skewing the statistics considerably.¹⁹¹ Still, under the *Youngstown* framework, implicit congressional judgments are in effect determining the very availability and character of judicial review.

3. *Coping with Category Three: when in doubt, interpret it out.* Fortunately, the executive branch is not solely in charge of determining when Congress will legislate, or whether its intervention will be explicit or implicit in character. The presidency, moreover, changes hands every so often, so a prior inhabitant may make strategic concessions that risk haunting the successor in office. As a result, the executive branch will face statutes that attempt to limit presidential authority and, consequently, seem to dictate the application of Category Three.

It turns out, however, that the full-throated application of Category Three is not inevitable. At least where a statute arguably overreaches congressional authority or encroaches on executive branch authority, the President may attempt to inhibit its reach through various interpretive devices. The most conspicuous and most controversial is the use of signing statements, particularly those interpreting a statute based on the President's

¹⁹⁰ Indeed, I have been unable to find any instance in which a party to a lawsuit devotes serious attention to advancing the claim that, should the action be classified as Category One or Category Three – whichever classification least serves its interests – the same desired result obtains. See also Robert Bloom & William J. Dunn, *The Constitutional Infirmary of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 184 (2006) (describing the *Youngstown* categories as “largely outcome determinative once a presidential action is assigned”).

¹⁹¹ There are certainly instances, for example, in which executive branch enforcement of a statute violating the First Amendment has been struck down as unconstitutional, even though such a case might be deemed to fall within Category One and among those cases in which “the Federal Government as an undivided whole lacks power” (343 U.S. at 635) – presumably because it is not deemed to involve the kind of separation of powers conflict evident in *Youngstown*. See, e.g., *Kindhearts for Charitable Humanitarian Development, Inc. v. Geithner*, 2009 WL 2514057 at *15 (N.D. Ohio 2009). But cf. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 592 (2002) (Kennedy, J., concurring in judgment) (stating, in reference to a federal statute adopted following a holding that its predecessor violated the First Amendment, “Congress and the President were aware of our decision, and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment. For these reasons . . . the Judiciary must proceed with caution and identify overbreadth with care before invalidating the Act”).

perception of the Constitution.¹⁹² The President may accomplish much the same thing by adopting such an interpretation *sub silentio* or in memoranda or briefs.¹⁹³

These longstanding techniques have naturally adapted to Justice Jackson's framework. The war powers context is in some respects the best possible post-*Youngstown* setting for the executive branch. The President's Commander-in-Chief authority, whether plenary or not, is generally thought to co-vary with the anticipated difficulty of congressional intervention, which means that "measures on independent presidential responsibility" (and Category Two) may routinely be claimed.¹⁹⁴ And while Congress has attempted programmatic regulation via the War Powers Resolution (WPR),¹⁹⁵ one of its many accommodations of executive power is the requirement that the President "consult" with Congress before introducing U.S. forces into a situation where imminent hostilities are likely,¹⁹⁶ a hurdle perfectly tailored to Justice Jackson's permissive view of implied congressional authorization.¹⁹⁷

Nevertheless, the executive branch has sometimes had to use more ingenious means to skirt Category Three. As previously noted, President Clinton did not seek prior congressional authorization before sending troops to Haiti; he maintained that doing so was not "constitutionally mandated,"¹⁹⁸ despite arguments by legal scholars that he should "seek and obtain Congress' express approval" before doing so.¹⁹⁹ Above these bare constitutional bones, however, was appropriations legislation expressing Congress'

¹⁹² Compare, e.g., Bradley & Posner, *supra* note 29 (viewing signing statements favorably), with ABA, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Rep. with Recommendations 5 (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf (describing criticisms).

¹⁹³ The capacity to substitute these later behaviors for signing statements is one difficulty for those singling out the latter for criticism. See Bradley & Posner, *supra* note 29, at 310.

¹⁹⁴ Professors Barron and Lederman recently complained that scholars had almost completely overlooked the existence of Category Three problems in favor of Category Two analyses. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 699-704 (2008) [hereinafter Barron & Lederman I]; see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb --A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman II].

¹⁹⁵ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (2000)).

¹⁹⁶ *Id.* § 3, 87 Stat. at 555–56.

¹⁹⁷ See, e.g., DAVID LOCKE HALL, *THE REAGAN WARS: A CONSTITUTIONAL PERSPECTIVE ON WAR POWERS AND THE PRESIDENCY 195-96* (1991) (discussing application in connection with Grenada deployment).

¹⁹⁸ See *supra* text accompanying note 172.

¹⁹⁹ See Letter from Bruce Ackerman *et al.* to President William J. Clinton (Aug. 31, 1994), reprinted in 89 AM. J. INT'L L. 127 (1995).

sense that appropriated funds “should not be obligated or expended for United States military operations in Haiti” in the absence of either advance congressional authorization (which did not materialize) or specified exigent circumstances (which were not claimed).²⁰⁰ It did excuse that limitation in the event that the President made a specific report to Congress in advance of any intended deployment²⁰¹ – which the President in fact made.²⁰²

The Office of Legal Counsel eventually defended President Clinton’s deployment of troops to Haiti as either falling within Category One, due to the implied authorization of Congress, or Category Two, insofar as Congress had enabled or invited measures on independent authority.²⁰³ The appropriations legislation was cited as favoring this result, even though its reporting alternative was probably intended only for limited peacekeeping operations – such that it would have been fairer to imply congressional *disapproval* of the President’s more substantial initiative.²⁰⁴ The OLC memo also cited the WPR as lending authority to the President, insofar as it presupposed the right of the President to deploy U.S. armed forces into imminent or near-imminent hostilities²⁰⁵ – which, read in light of the President’s constitutional authority, supposedly meant that the President might use or threaten use of troops “to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.”²⁰⁶ OLC concluded, ultimately, that the Haiti deployment was “fully consistent . . . with the authority Congress reserved to itself under [the WPR]” to determine whether further affirmative legislation was required.²⁰⁷ In effect, the WPR – if read opportunistically and in light of presidential authority – reinforced the claim to Category One or Category Two treatment.

²⁰⁰ Pub. L. No. 103-139, § 8147(b), 107 Stat. 1418, 1474 (1993).

²⁰¹ *Id.* § 8147(c), 107 Stat. at 1475.

²⁰² Letter to the Speaker of the United States House of Representatives from the President (Sept. 18, 1994).

²⁰³ Deployment of United States Armed Forces into Haiti, 18 U.S. Op. Off. Legal Counsel 173, 174-75 (1994). The opinion took the form of a letter opinion responding to the inquiry by four U.S. Senators. For a rebuttal, see Damrosch, *supra* note 173, at 61-63.

²⁰⁴ See Damrosch, *supra* note 173, at 62-63; Letter from Bruce Ackerman et al., *supra* note 199, at 128-29.

²⁰⁵ 50 U.S.C. 1543(a)(1); see 18 U.S. Op. Off. Legal Counsel at 175-76.

²⁰⁶ *Id.* at 176.

²⁰⁷ *Id.* at 177.

Other war powers examples are to a similar effect. Regardless of whether the *Youngstown* framework is explicitly invoked,²⁰⁸ the potential negative of statutory constraints is often blunted by executive branch claims that they must be interpreted in light of powers reserved to Congress or to the President. In addressing the use of force in Kosovo, for example, OLC's discussion managed to get past both congressional reactions to the bombing campaign²⁰⁹ and the WPR,²¹⁰ each of which might have warranted Category Three treatment, by virtue of an interpretive principle reflecting concerns about the ability of one Congress to bind its successors.²¹¹ In other instances, presidents have signaled their approach through signing statements – not merely those that signal constitutional objections to what Congress has legislated (which might be regarded as dress rehearsals for a Category Three dispute), but also those urging that an enactment must be construed so as to avoid constitutional objections, which at least arguably elevate consideration to Category Two or higher.²¹² The war power context is not unique in this regard.²¹³

²⁰⁸ The OLC's quite lengthy opinion regarding the use of force in Kosovo, for example, did not cite the framework, despite a basis for concern that the WPR had specifically foreclosed presidential attempts to invoke appropriations legislation as a basis for inferring congressional authorization. *See infra* text accompanying notes 209-211.

²⁰⁹ The OLC memorandum noted that the House of Representatives had defeated a resolution declaring a state of war, defeated (by a tie vote) a concurrent resolution that would have authorized air operations, and blocked funding for ground troops, while (on the plus side) defeating a resolution that would have required the President to remove forces from the region – concluding that all of this was “ambiguous.” Authorization for Continuing Hostilities in Kosovo at 24, 2000 WL 33716980 (2000); *see also* Barron & Lederman II, *supra* note 194, at 1089. In other hands, this might have been regarded as more negative in character. *See, e.g.*, David Gray Adler, *The Clinton Theory of the War Power*, 30 PRESIDENTIAL STUD. Q. 155, 163 (2000) (deeming House votes to mean that Congress had denied President Clinton the legislative authorization for the use of force).

²¹⁰ The WPR prohibited the use of appropriations measures as authorizing military operations unless such a measure “states that it is intended to constitute specific statutory authorization within the meaning of this chapter.” 50 U.S.C. § 1547(a)(1).

²¹¹ Barron & Lederman II, *supra* note 194, at 1089 (describing this argument as “controversial”). With respect to congressional activity relative to the bombing campaign itself, the OLC memorandum considered the appropriations measure “[t]he only clear message that Congress sent regarding the continuation of military operations in Serbia.” Authorization for Continuing Hostilities in Kosovo at 24, 2000 WL 33716980 (2000). With regard to the WPR, the OLC memorandum construed it as establishing a background interpretive principle only, given the constitutional difficulties that might be raised by allowing the enacting Congress to inhibit the authority of future legislatures. *Id.*

²¹² *See, e.g.*, Barron & Lederman II, *supra* note 194, at 1079-80 (citing signing statement by President Reagan involving congressional authorization for the use of force in Lebanon); *id.* at 1086 (citing signing statement by President George H.W. Bush in connection with the Department of Defense Authorization Act of 1990, insofar as it apparently regulated the deployment of U.S. troops); *id.* at 1088 n. 616 (citing signing statement by President Clinton in connection with the Department of Defense

None of these incentives originated with the *Youngstown* framework,²¹⁴ and the impact is certainly at the margins. One may question, moreover, whether any particular presidential gambit is wholly successful in avoiding Category Three.²¹⁵ Nonetheless, these marginal effects may be significant and continuing,²¹⁶ and the case studies permitting the following tentative claim:

Hypothesis 3: Confronting expressions of congressional will that seem incompatible with executive branch activity, thus meriting Category Three, the President will seek to remove any incompatibility via interpretive techniques.

4. *The case of the Terrorist Surveillance Program.* The recent fracas over the Terrorist Surveillance Program (TSP) arguably illustrates all three hypotheses – the incentive to avoid seeking congressional authorization at all (for fear of rejection and Category Three), or at most to pursue implied authorization (because it is nearly as good, and less risky), and in any case to avoid an apparent conflict through interpretive techniques.

Appropriations Act of 1994, insofar as it arguably restricted the command and control of U.S. forces in Somalia).

²¹³ Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off Legal Counsel 123, 124-26 (1995).

²¹⁴ See, e.g., Barron & Lederman II, *supra* note 194, at 985 (citing signing statement by President Buchanan).

²¹⁵ See, e.g., Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, 14 No. 1 HUM. RTS. BRIEF 21 (2006) (arguing that “[t]he president is acting contrary to the will of Congress when he issues signing statements offering alternative interpretations of Congress’ unambiguous prohibition against torture,” and quoting Justice Jackson’s concurrence in support of the proposition that such a circumstance falls within Category Three). What is more, the very claim to such interpretive authority arguably offends another aspect of *Youngstown*, insofar as the President is assuming a role in lawmaking that is Congress’ alone. For an early articulation of this position, since made many times in criticisms of President George W. Bush’s practices, see Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 378-83 (1987); for an assessment of the general separation of powers objection, see Bradley & Posner, *supra* note 29, at 344-47.

²¹⁶ President Obama, shortly after assuming office, issued a measured appraisal of signing statements, but did not eschew them – and, with respect to interpretive declarations, seemed to indicate that they would be adopted when reasonable. See White House, Office of the Press Secretary, Memorandum for the Heads of Executive Departments and Agencies on Presidential Signing Statements (March 9, 2009), __ Fed. Reg. __ (FR Doc. E9-5442) (declaring that “I will announce in signing statements that I will construe a statutory provision in a manner that avoids a constitutional problem only if that construction is a legitimate one”). His subsequent use has not escaped controversy. See Charlie Savage, *Obama’s Embrace of a Bush Tactic Riles Congress*, N.Y. TIMES, Aug. 9, 2009, at A16.

Near the end of 2005, the New York Times revealed that the Bush Administration had established and conducted a wiretapping program (the TSP) notwithstanding the Foreign Intelligence Surveillance Act (FISA), which broadly regulated domestic electronic surveillance for foreign intelligence purposes and subjected it to a judicial authorization scheme.²¹⁷ There are exceptional circumstances in which a FISA court order need not be obtained, but none seemed to apply to the NSA program;²¹⁸ given the secrecy surrounding the program, it is impossible to say anything with complete confidence, but it seems unlikely that the program would be fully consistent with FISA's terms – a suspicion reinforced by the Bush Administration's declaration that FISA was fundamentally unworkable.²¹⁹ Rather, the main question was whether there was some separate statutory authority for the program, and whether that could be reconciled with a FISA provision that seemed to establish FISA's exclusive governance of the situation.²²⁰

If the TSP's legality under FISA as it stood was at least doubtful, what prevented the Bush Administration from seeking amendments to FISA (or some other satisfactory legislative authorization) back when the program was initiated? Ostensibly, the Administration elected instead to brief only "certain key members of Congress" because the program was so highly classified.²²¹ The decision not to do more, however, probably involved a more complex calculus. Some in the White House reportedly felt that the

²¹⁷ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, § 101, 92 Stat. 1783.

²¹⁸ At the relevant time, these were described in 50 U.S.C. §§ 1802(a)(1)(A); *id.* § 1805(f); *id.* § 1811. They are not immediately relevant to the discussion.

²¹⁹ See, e.g., Statement of Alberto R. Gonzales, Attorney Gen., Before the Comm. on the Judiciary, United States Senate, Concerning Oversight of the Department of Justice (July 24, 2007), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2842&wit_id=3936.

²²⁰ Title 18, § 2511(2)(f) states that the "procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f). At the same time, section 109 of FISA makes it unlawful to conduct electronic surveillance, "except as authorized by statute." 50 U.S.C. § 1809(a)(1). The question arises, consequently, whether that "statute" must take the form of amendments to FISA itself, or imposes some other restrictions on the form of authorization – for example, foreclosing the use of a joint resolution, or requiring particularly clear expression.

²²¹ Press Briefing, Alberto Gonzales, Attorney Gen., and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051219-1.html> [hereinafter Gonzalez-Hayden Briefing]. Initially only four members were briefed. See BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 153 (2008).

President should not ask for permission where it was not necessary – the better to preserve a theory of executive power.²²² But others suggested an inclination to seek the insurance of legislative legitimacy,²²³ only to conclude that the prospects of success were sufficiently doubtful that they were outweighed by the risk of disclosure – and the risk of such a defeat probably reinforced the concerns of those anxious to preserve presidential prerogatives. When Attorney General Gonzales was asked, shortly after the program’s disclosure, why he didn’t “seek a new statute that allowed something like this legally,” he replied:

We've had discussions with . . . certain members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be – that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And that – and so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program.²²⁴

²²² See, e.g., GELLMAN, *supra* note 221, at 153, 301.

²²³ See Interview by Melissa Block with Alberto Gonzales, NPR, Jan. 24, 2006, *available at* http://prairieweather.typepad.com/the_scribe/2006/01/12406_npr_us_at.html (posing question as to why the Administration pursued legislative authorization when it viewed that as unnecessary, and responding that “Our own view is that at a time of war it’s always best for the nation that the executive branch and legislative branch speak with one voice.”).

²²⁴ Gonzalez-Hayden Briefing, *supra* note 221; *see also id.* (“We have had discussions with Congress in the past – certain members of Congress – as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.”); GELLMAN, *supra* note 221, at 300-01 (describing Administration interest, subsequent to objection by Justice Department lawyers, in seeking legislative approval, and reporting exchange between Gonzales and Representative Harman as to the limited prospects); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 130 (2007) (describing calculation by Administration officials as to whether to seek an amendment to FISA as part of the Patriot Act, with the result being that “the administration decided that Congress was unlikely to simply exempt the National Security Agency from the traditional warrant procedure”); January 9 Scholars’ Letter, *supra* note 19, at 1367 (“Attorney General Alberto Gonzales has admitted that the administration did not seek to amend FISA to authorize the NSA spying program because it was advised that Congress would reject such an amendment”).

Others quarreled with this pessimistic view of the legislative odds. GELLMAN, *supra* note 221, at 302 (reporting judgment of Judge Royce Lamberth). Later Administration statements, moreover, appeared to place greater emphasis on the risk of “compromising the program.” *See* Dep’t of Homeland Security, Press Release, Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Alberto Gonzales on the USA Patriot Act (Dec. 21, 2005), *available at* http://www.dhs.gov/xnews/speeches/speech_0265.shtm (statement of Attorney General Gonzales) (“What I said, or what I surely intended to say, . . . is that we consulted with leaders in the congress about the feasibility of legislation to allow this type of surveillance. We were advised that it would be virtually impossible to obtain legislation of this type without compromising the program. And I want to emphasize the addition of, without compromising the program. That was the concern.”); *see also* DOJ Legal Authorities, *supra* note 19, at 1398 n.12 (emphasizing risk of disclosure). Both the risk of legislative

Which “authorities were there” already, and why they sufficed, are also questions of immediate relevance. If the Administration’s subsequent legal defense of the TSP accurately reflected its real-time assessment,²²⁵ there were several candidates, including (unsurprisingly) reliance on the President’s constitutional authority.²²⁶ One defense, mentioned in passing, was the assertion that “[l]eaders of the Congress were briefed on these activities more than a dozen times.”²²⁷ This point was echoed in later, much-controverted testimony by Attorney General Gonzales, who alluded to a process by which the Administration consulted with a hand-picked group of congressional leaders.²²⁸ Some participants in those discussions recalled that legislative leaders had agreed that receiving informal assent through this process obviated the need for any further

failure and the risk of compromising the program seem to have played roles, and it is difficult to assess which mattered more – particularly when concerns about disclosure tended to be crystallized into concerns about efficacy. See *Hearing Before the House Judiciary Committee, Department of Justice Oversight*, 109th Cong. (2006) (testimony of Alberto Gonzales) (reporting concern “that that process of pursuing legislation would comprise the effectiveness of th[e] program”); HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* 149-50 (2009).

²²⁵ YOO, *supra* note 17, at 104 (describing subsequent DOJ white paper as “defend[ing] [the TSP’s] legality and explain[ing] the DOJ’s legal thinking”); BRUFF, *supra* note 224, at 171 (suggesting that “the department’s original justification for the TSP was probably very similar to the way the white paper frames the issue”). *But see supra* text accompanying note 18 (noting IG report account that OLC memoranda evolved so as to incorporate *Youngstown*-based analysis); BRUFF, *supra* note 224, at 161 (suggesting also that DOJ white paper “may have added new arguments that intervening events suggested”).

²²⁶ Moschella Letter, *supra* note 19, at 1360-61; DOJ Legal Authorities, *supra* note 19, at 1379-83.

²²⁷ Moschella Letter, *supra* note 19, at 1360; DOJ Legal Authorities, *supra* note 19, at 1378.

²²⁸ *Hearing on the Oversight of the Dep’t of Justice Before the S. Comm. on the Judiciary*, 110th Cong. (July 24, 2007) (testimony of U.S. Attorney General Alberto Gonzales), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/gonzalez_transcript_072407.html (describing “an emergency meeting in the White House Situation Room” in 2004 involving “the bipartisan leadership of the Congress, both House and Senate, as well as the bipartisan leadership of the House and Senate Intel Committees, the gang of eight,” concerning the withdrawal of Justice Department approval from continuing “vitaly important intelligence activities despite the repeated approvals during the past two years of the same activities”). His testimony did not describe the consultations in detail, and several participants – including Representative Pelosi and Senators Rockefeller and Daschle – disputed his account. See GELLMAN, *supra* note 221, at 300-01 (describing contested accounts of the briefings); Unclassified IG Report, *supra* note 18, at 23 n.16. The accuracy of Gonzales’ oversight hearings testimony was referred to the Office of the Inspector General, *see* Letter from Senator Patrick Leahy to Inspector General Fine (Aug. 16, 2007), *available at* <http://leahy.senate.gov/press/200708/8-16-07%20PJL%20ltr%20to%20Glenn%20Fine-AG.pdf>; Letter from Inspector General Fine to Senator Leahy (Aug. 30, 2007), *available at* <http://leahy.senate.gov/press/200708/8-30-07%20fine%20to%20pjl.pdf> (accepting assignment in principle), but the unclassified report does not resolve the dispute – seemingly because no attempt was made to interview congressional leaders. Unclassified IG Report, *supra* note 18, at 23 n.16; *see also id.* at 16 (noting NSA claims to have conducted 17 briefings of legislative leaders prior to the public release of the program).

legislative approval.²²⁹ In internal discussions of the request for Attorney General’s re-authorization of the TSP, this was described as “a legislative remediation” that would resolve Justice Department objections that the program was illegal under FISA.²³⁰

A second candidate was the Authorization for Use of Military Force (AUMF),²³¹ which the Bush Administration construed to authorize warrantless communications intelligence as an incident of war.²³² It drew succor from the Supreme Court’s decision in *Hamdi v. Rumsfeld*,²³³ in which the plurality – without itself relying on the *Youngstown* framework, though Justice Thomas’s fifth vote in favor of the authority to detain did²³⁴ – concluded that the wartime detention of particular individuals was “so fundamental and accepted an incident to war” that it fell within the AUMF’s authorization of “necessary and appropriate force.”²³⁵ That implication was clouded somewhat by the subsequent decision in *Hamdan v. Rumsfeld*, in which some justices concluded that constraining provisions of the Uniform Code of Military Justice (UCMJ) established a Category Three case,²³⁶ while others considered that the subsequently-enacted AUMF made it fall within Category One.²³⁷ Nonetheless, in the TSP controversy, the Bush Administration argued not only that the AUMF qualified as the kind of law that authorized surveillance

²²⁹ As then-Speaker Dennis Hastert is said to have recounted, Vice President Cheney stated that “OK, we need your understanding to go forward. Does anybody have any objection? Do we need to do anything legislatively?” . . . *And everybody agreed: no, we don’t need to do this in legislation.*” STEPHEN F. HAYES, *CHENEY: THE UNTOLD STORY OF AMERICA’S MOST POWERFUL AND CONTROVERSIAL VICE PRESIDENT* 389 (2007) (emphasis added). Another, anonymous participant is reported to have said of the legislators participating: “It was their unanimous recommendation that we continue with the program and that we not seek legislative authorization.” *Id.* This version of events was at least implicitly controverted by those challenging the Gonzales testimony.

²³⁰ GELLMAN, *supra* note 221, at 303 (quoting reported statement by White House Counsel Gonzales).

²³¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²³² Moschella Letter, *supra* note 19, at 1361-62; DOJ Legal Authorities, *supra* note 19, at 1375, 1383-90.

²³³ 542 U.S. 507 (2004).

²³⁴ *Id.* at 584 (Thomas, J., dissenting).

²³⁵ *Id.* at 518, 519.

²³⁶ 548 U.S. 557, 638-39 (2006) (Breyer, J., concurring). Justice Stevens, for his part, seems to have assumed that Category Three applied, and somehow relied on Justice Jackson’s concurrence as resolving the question whether Congress had the power to override the exercise of presidential authority. *Id.* at 2774 n.23. Justice Jackson had done no such thing. See *supra* text accompany note 28; Vladeck, *supra* note 189, at 960.

²³⁷ *Id.* at 680-81 (Thomas, J., dissenting).

notwithstanding FISA prohibitions,²³⁸ but also that it functioned to elevate the President's action to Category One, where his power was its zenith.²³⁹

Neither argument was overpowering, to state it mildly, and each could be countered on the facts. With respect to legislative consultations, several individual members of Congress denied having been briefed on the TSP specifics.²⁴⁰ Senator Daschle, for his part, asserted that the Administration had in 2001 proposed specific language that would have encompassed the program, but that it had been rejected.²⁴¹ Everyone involved had substantial reason to dissemble, and little progress was made in reconciling the claims,²⁴² of course, the inability to get to the bottom of the matter just showed why the President might prefer being rejected informally over having a bill's failure evidenced in the Congressional Record.

With respect to the AUMF, the flaws in the Administration's case were more easily ascertained. Critics observed that (unlike the detention issue considered in *Hamdi*) Congress had specifically attempted to restrict intelligence gathering under FISA; what is more, title 18 indicated that Congress intended the electronic surveillance to be governed exclusively by other means.²⁴³ As compared to *Youngstown*, the argument against Category One, and in favor of Category Three, seemed compelling: For electronic surveillance, Congress had specifically provided that the statutory mechanism was exclusive (which was more than could be fairly said for the Taft-Hartley Act), and established criminal sanctions for anyone failing to respect that exclusive mechanism.

²³⁸ 50 U.S.C. § 1809(a)(1) (prohibiting any person from intentionally “engag[ing] . . . in electronic surveillance under color of law except as authorized by statute”); see Moschella Letter, *supra* note 19; DOJ Legal Authorities, *supra* note 19, at 1393.

²³⁹ Moschella Letter, *supra* note 19, at 1361 (“Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President’s ‘authority is at its maximum.’”) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), and *Youngstown*, 343 U.S. at 585); DOJ Legal Authorities, *supra* note 19, at 1374, 1389.

²⁴⁰ See *supra* text accompanying note 228.

²⁴¹ Richard W. Stevenson, *Congress Never Authorized Spying Effort, Daschle Says*, N.Y. TIMES, Dec. 24, 2005, at 12; see Tom Daschle, *The Power We Didn’t Grant*, WASH. POST, Dec. 23, 2005, at A21. *But see* YOO, *supra* note 17, at 116 (stating that Daschle’s claim “does not ring true”).

²⁴² See *supra* text accompanying note 18 (noting the failure to address in the unclassified IG report).

²⁴³ January 9 Scholars’ Letter, *supra* note 19; February 2 Scholars’ Letter, *supra* note 19, citing 18 U.S.C. § 2511(2)(f) (providing that FISA and the criminal code are the “exclusive means” for conducting electronic surveillance); *id.* § 2511 (criminalizing wiretapping except as “specifically provided in this chapter,” § 2511(1), or as authorized by FISA, § 2511(2)(e)).

Regardless, the Bush Administration's post-FISA conduct, and its rationalization, reflected a dangerous appreciation of the *Youngstown* framework's parameters. Its basic behavior reflected the pattern that Justice Jackson may be credited for anticipating – it acted unilaterally, and then discounted the value of seeking overt legislative authorization. (One critic, writing without any over reference to *Youngstown*, nonetheless put the matter just about perfectly: “[t]he administration, having the program in place, had little incentive to press for legislation that might restrict its activities.”²⁴⁴) From that same vantage, though, proceeding informally with Congress – even to the point of vetting proposed language with its members – ran less risk of shifting the standard of review to that for Category Three.

To be sure, the case study is not without its complexities, some of which cast doubt on the motivational significance of *Youngstown* described in the first two hypotheses. The upside of informality was eventually compromised by the subsequent dispute over whether implicit authorization had in fact been received – an inevitable risk of that approach – and it turned out that Congress was ultimately willing to endorse the Administration's policy; were all this understood, other contextual factors, like the need to preserve secrecy for purposes of national security, and the potential for that same secrecy and non-justiciability to keep any dispute out of the courts, loom larger. These same features, though, may speak more to the stringency of the conditions than to the hypotheses' potential. To choose another example, the Administration's other argument for implied authority, the AUMF, might have been plausible were it not for the fact that FISA anticipated such claims. Precisely because FISA was crafted in reaction to *previous* extravagant executive branch claims of authority, including implied authority, it created a hostile environment for claims of the type that were nonetheless made – and one might legitimately worry about how matters would play out in a less practiced setting.

The TSP controversy provided less contemporary evidence for (or against) the third hypothesis, because when the smoke eventually cleared the executive branch wound up getting much of what it wanted from Congress via the 2007 Protect America Act and

²⁴⁴ BRUFFE, *supra* note 224, at 158.

its amendments.²⁴⁵ In consequence, there was no particular cause for President Bush to qualify the legislation with a signing statement,²⁴⁶ and there has been as yet no evidence of any other *post-hoc* qualification. Yet kindred arguments were made relative to the original statute. Thus, in defending the TSP's consistency with FISA, the Justice Department emphasized that: (1) the AUMF must be considered an authorizing "statute" within the meaning of section 109 of FISA²⁴⁷ because, *inter alia*, Congress must be free to use general authorizing language in order to respect the President's constitutional authority to defend the United States from foreign attack;²⁴⁸ (2) section 109 of FISA must be read to permit authorization other than through revision to FISA itself, and section 111 of FISA²⁴⁹ (which authorized unfettered electronic surveillance for a limited period following a declaration of war) could not be read to establish the limits of electronic surveillance during wartime, because either reading would suppose a constitutionally problematic capacity of the FISA-enacting Congress to bind a succeeding legislature;²⁵⁰ and (3) both provisions, and relevant sections of Title 18,²⁵¹ should be read less restrictively in order to avoid the serious constitutional questions raised by encroaching on the President's powers to make tactical military decisions.²⁵²

²⁴⁵ For discussion of the 2008 amendments and how they changed the status quo - and how the status quo should be reckoned - *see, inter alia*, Marty Lederman, *The Privacy-Protective Components of the New FISA Law*, BALKIN, July 11, 2008, <http://balkin.blogspot.com/2008/07/privacy-protective-components-of-new.html>; David Kris, *A Guide to the New FISA Bill, part I*, BALKIN, June 21, 2008, <http://balkin.blogspot.com/2008/06/guide-to-new-fisa-bill-part-i.html>, *part II*, BALKIN, June 22, 2008, <http://balkin.blogspot.com/2008/06/guide-to-new-fisa-bill-part-ii.html>, & *part III*, BALKIN, June 25, 2008, <http://balkin.blogspot.com/2008/06/guide-to-new-fisa-bill-part-iii.html>.

²⁴⁶ Even so, some feared that one would be issued. *See* Jack Balkin, *The New FISA Law and the Construction of the National Surveillance State*, BALKIN, July 10, 2008, <http://balkin.blogspot.com/2008/07/new-fisa-law-and-construction-of.html>. The President's remarks on signing the legislation into law were benign in character. Press Release, Remarks by the President In Signing of H.R. 6304, FISA Amendments Act of 2008 (July 10, 2008), *available at* <http://www.usdoj.gov/archive/11/docs/fisa-amendments-act-2008.pdf>.

²⁴⁷ *See supra* text accompanying note 220.

²⁴⁸ *See* DOJ Legal Authorities, *supra* note 19, at 1397-98; *compare* Memorandum from David Kris, former Assistant Deputy Att'y Gen. 3-4 (Jan. 25, 2006), *available at* <http://balkin.blogspot.com/kris.fisa.pdf> (suggesting the likelier objective was to require that authorization be explicit).

²⁴⁹ 50 U.S.C. § 1811.

²⁵⁰ DOJ Legal Authorities, *supra* note 19, at 1394-95, 1399.

²⁵¹ 18 U.S.C. 2511(2)(e), (f); *see supra* text accompanying note 220.

²⁵² DOJ Legal Authorities, *supra* note 19, at 1401.

These arguments did not receive widespread endorsement.²⁵³ But the first two related directly to the question of which *Youngstown* category the President's activity occupied,²⁵⁴ while the third concerned whether *Youngstown* was differentiable for purposes of resolving a clash within Category Three²⁵⁵ and, less overtly, for purposes of construing FISA so as to wrench the dispute out of Category Three altogether.²⁵⁶ The upshot, certainly, was that not all is lost even when Congress has spoken.

C. *Dynamic Effects on Congressional Behavior*

Justice Jackson did not address the executive branch's adaptive behavior, but he did briefly signal his skepticism that Congress would ever change.²⁵⁷ It might have seemed hubristic for him to address in detail how Congress would react to his framework, let alone to celebrate its benefits, given that his was but one of many opinions. But now that history has deemed his approach the prevailing one, it is worth reexamining his appraisal in light of his own handiwork – and to start with his own experience.

1. *The (first) wiretapping controversy.* While the technology of modern electronic surveillance might surprise Justice Jackson, the nature of the TSP dispute would not in the least. Jackson was himself a key figure in FDR's domestic wiretapping program while he was Solicitor General and Attorney General.²⁵⁸ As if to deepen the connection, the Bush Administration cited FDR's wiretapping as precedent for the TSP program,²⁵⁹ just as the Truman Administration in *Youngstown* had invoked FDR's policies – also championed by Jackson – in support of seizure authority.

The precedent of FDR's wiretapping program was not necessarily redemptive. In a fair-minded appraisal of the Bush Administration argument, Neal Katyal and Richard

²⁵³ See February 2 Scholars' Letter, *supra* note 19, at 1416-22.

²⁵⁴ *E.g.*, DOJ Legal Authorities, *supra* note 19, at 1401 (concluding that, based on the appropriate interpretive presumptions, “[w]hen the President authorizes electronic surveillance against the enemy pursuant to the AUMF, he is therefore acting at the height of his authority under *Youngstown*”).

²⁵⁵ *Id.* at 1406-07.

²⁵⁶ *Id.* at 1407-08.

²⁵⁷ See *supra* text accompanying notes 137-138.

²⁵⁸ ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* (John Q. Barrett ed., 2003).

²⁵⁹ DOJ Legal Authorities, *supra* note 19, at 7-8, 16-17; Moschella Letter, *supra* note 19, at 3.

Caplan do not so much defend FDR's program as acknowledge that it, too, should be deemed to have fallen into Category Three and struck down.²⁶⁰ Jackson himself which showed little enthusiasm for the program or its legality; by his account, "[t]he only case that I recall in which [FDR] declined to abide by a decision of the Supreme Court was its decision that federal law enforcement officers could not legally tap wires."²⁶¹

The more interesting question, for instant purposes, is how the incident might have influenced Justice Jackson's perspective in *Youngstown*, particular concerning Congress. Jackson helped in an attempt to get legislation authorizing domestic wiretapping,²⁶² but Congress failed to act, despite some knowledge of ongoing abuses.²⁶³ Jackson also helped sculpt the Administration's message that wiretapping had been suspended because of an adverse Supreme Court decision. True to that message, Jackson did resist J. Edgar Hoover's campaigns to resume the program. Later, though, after being overruled by FDR, Jackson resuscitated legal defenses of the activity and told Congress simply that the Administration had not foreclosed the *possibility* of wiretapping – without acknowledging that it was already ongoing – and actually implied that the executive branch lacked authority in light of existing law.²⁶⁴

Jackson wound up blaming Congress, accusing its dawdling of driving FDR to issue his secret authorization.²⁶⁵ The conclusion seems unfair – Congress looked into the matter and refused to legalize the activity²⁶⁶ – but it probably reflects Jackson's mindset in *Youngstown*, and perhaps fueled his pessimistic remarks about congressional leadership. From Jackson's perspective, his framework probably established the best incentives that might be envisioned: If Congress was cautioned that its acquiescence might result in a more favorable judicial regard for the President's activities, as indicated by Category Two (and Category One), its members might be encouraged to share their views more overtly.

²⁶⁰ Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023 (2008).

²⁶¹ JACKSON, *supra* note 258, at 68.

²⁶² See Katyal & Caplan, *supra* note 260, at 1043-44, 1052-53.

²⁶³ *Id.* at 1047.

²⁶⁴ *Id.* at 1047-61.

²⁶⁵ JACKSON, *supra* note 258, at 48.

²⁶⁶ Katyal & Caplan, *supra* note 260, at 1052.

2. *Congress and categories.* Such a theory would not, however, have been especially robust. Justice Jackson was, as a general matter, skeptical about attempts to understand the legislative intent behind statutory text.²⁶⁷ His own experience with wiretapping legislation suggested that similar problems might beset attempts to understand congressional inaction (which might, for instance, connote either steadfastness or acquiescence). Nonetheless, his *Youngstown* framework required scrutinizing the presence or absence of particular reactions by Congress. When Congress acts in some regard, or instead fails to act, what is it communicating?

Speaking abstractly, Congress may authorize presidential action for a variety of reasons. First, it may want to assent to the President's decision on the merits, without regard to whether legislative endorsement is surplusage. Second, it may be uncertain as to whether the President otherwise has authority. Third, it may be dubious that the President otherwise has authority, so that congressional approval is essential. Fourth, it may regard the President's assertion of authority as plausible, and feel indifferent to its instant assertion – but wish to preserve the legislature's capacity to take a position in some future controversy (in which it might oppose a presidential initiative and withhold its assent) to the effect that the President lacks such power.

Needless to say, it is hard to say which view(s) Congress holds in any particular situation. One implication, though, is that we should not blithely conclude that congressional authorization adds to, or helps maximize, presidential authority in the Category One sense. Congress may desire to do nothing more than replicate the President's already-existing independent authority, or it may be differing – via its institutional capacity to construe the Constitution – with the assertion that the President *has* such an independent authority. Sometimes, accordingly, Category One will considerably overstate how much presidential authority should be enhanced by congressional approval.

²⁶⁷ Jackson was regarded at the time as a leading critic of the use of legislative history. *See, e.g.,* Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT'L L. 151 (2003); Jackson, *supra* note 114, 8 F.R.D. at 124-25; Note, *A Re-Evaluation of the Use of Legislative History in the Federal Courts*, 52 COLUM. L. REV. 125, 125 (1952). His ambivalence toward such inquiries was nearly matched by his skepticism about attempts to understand statutory text unaided, and his bottom line was that the courts – ideally, with the assistance of Congress – needed something like the federal rules for statutory interpretation. *See* Jackson, *supra* note 114, 8 F.R.D. at 124, 125-26.

Conversely, congressional *failure* to act – particularly its failure to adopt some proposed measure – may be variously explained. Congress may simply be attempting to withhold its assent (that is Justice Jackson’s supposition, save where more evidence can be found that of “inertia, indifference or quiescence”). But Congress may also fail to act, or withhold authority, because it perceives that the President *already has* sufficient authority. It might, for example, regard its intervention as unnecessary and a waste of scarce resources; it might be uncertain as to the political consequences, and desire to bide its time; it might anticipate various adverse consequences from making the authority plain.²⁶⁸ This means that some Category Two and Category Three cases will be misclassified. Even in declining to act and manifesting what may be construed as an implied negative, Congress may have behaved consistent with a belief that the President has sufficient authority; its reluctance, if anything, should be classified within Category Two, or perhaps even as the implied authorization species of Category One.

Accordingly, even if we can tell whether Congress was acting or failing to act – or behaving in any of the range of behaviors sketched in Category Two²⁶⁹ – understanding the significance of that behavior is no less difficult than the statutory interpretation questions that vexed Justice Jackson. This suggests a fourth and final hypothesis:

Hypothesis 4: Attributing categorical significance to congressional action (or inaction) – beyond assessing whether Congress has authorized or prohibited the executive branch activity – effectively substitutes judicial for congressional judgment.

Superficially, this is different in character from the earlier hypotheses, which involved the executive branch’s reaction to the *Youngstown* framework. Here, the issue more closely resembles one of *ex post* classification, not unlike any problem of statutory interpretation and legislative intent. *Ex ante* attempts by Congress to anticipate the *Youngstown* framework are much harder to evidence, perhaps because as a collegial body

²⁶⁸ The last point, for example, was emphasized – unsuccessfully – by the Solicitor General’s *Youngstown* brief to explain why Congress resisted adding seizure authority to the Taft-Hartley scheme: Supposedly, Congress thought doing so would create a too-ready, irresistible mechanism for thwarting collective bargaining, but did not oppose presidential reliance on more indirect legislative or inherent executive authority. See *supra* text accompanying note 177.

²⁶⁹ See *supra* text accompanying notes 75-76.

Congress is much less likely to incorporate any single legal expectation. Nevertheless, members of Congress are well aware of the *Youngstown* framework,²⁷⁰ and sometimes it is directly invoked. In enacting FISA, for example, Congress deleted a provision recognizing the President's inherent authority to conduct intelligence surveillance, and added language to the effect that the statutory scheme "shall be the exclusive means" by which covered activities were to be conducted – striking, in conference, the House's original preference for adverting to the exclusive "statutory" means.²⁷¹ The House Conference Report explained:

The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court. The intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the *Steel Seizure* case: "When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).²⁷²

Congress' apparent objective was to relegate review of any non-statutory presidential action to Category Three. The opposite may also be attempted. For example, a 2008 bill would have reauthorized the use of military force, and provided for significant ancillary powers, while indicating that nothing in the legislation was intended to encroach upon preexisting presidential authority.²⁷³ Somewhat more ambiguously, the preamble to the AUMF recalled that "the President has authority under the Constitution

²⁷⁰ See, e.g., *supra* text accompanying note 24.

²⁷¹ For discussion, see CONGRESSIONAL RESEARCH SERVICE, *supra* note 22, at 27-28.

²⁷² H. Conf. Rep. No. 95-1720, at 35, 1978 U.S.C.C.A.N. at 4064 (Oct. 5, 1978); see also S. Rep. No. 95-604(I) at 62-65, 1978 U.S.C.C.A.N. at 3964-66; S. Rep. No. 95-701 at 71-72, 1978 U.S.C.C.A.N. at 4040-41. Rather half-heartedly, the Justice Department's memo relating to the TSP noted this language and remarked that "[i]t is significant, however, that Congress did not decide conclusively to continue to push the boundaries of its constitutional authority in wartime," noting the provisions establishing a fifteen-day period in which the President could fail to comply with FISA requirements. DOJ Legal Authorities, *supra* note 19, at 1391-92.

²⁷³ Enemy Combatant Detention Review Act of 2008, S. 3401, § 2(a) (intr. July 31, 2008), (establishing "rule of construction" that "[t]he authority under this section shall not be construed to alter or limit the authority of the President under the Constitution of the United States to detain combatants in the continuing armed conflict with al Qaeda, the Taliban, and associated forces, or in any other armed conflicts"). A similar bill was simultaneously introduced in the House, see H.R. 6705 (intr. July 31, 2008); neither made it out of committee.

to take action to deter and prevent acts of international terrorism against the United States.”²⁷⁴ In the recent volleying over the TSP, the Bush Administration argued that this text contributed to a finding that the program should be reviewed within Category One.²⁷⁵

These unusually deliberate attempts by Congress to define the relationship between legislative and executive branch authority show the likely limits of such exercises. Doing so explicitly might be consistent with an overall objective of reclaiming authority from the executive branch (though perhaps it is also reclaiming ground from the judiciary, which may be resisted on constitutional grounds).²⁷⁶ But in the ordinary case, the initial question of whether Congress is even attempting to render a categorical decision – and, assuming it has, what constitutional judgment it has assumed as its background condition – is itself interpolated by the judiciary. It is hard to say whether what remains of authentically congressional judgment is consistent with the congressional authority that *Youngstown* purportedly secured.

Even when Congress is focused on the question, it is difficult for it to express a sufficiently distinct sense of the presidential authority it is either preserving or denying. If Congress nods toward Category One by acknowledging the President’s authority under the Constitution, its meaning almost inevitably depends on an independent examination of that authority by the judiciary, which Congress may or may not have perfectly anticipated. If Congress attempts to relegate an activity to Category Three, the same problem ensues, with the additional question as to whether Congress understood its authority (or any residual presidential authority) to be plenary in character. In consequence, the nuances of congressional expressions are largely wasted, and the judiciary’s construction of the constitutional backdrop against which Congress legislates makes all the difference.

3. *Youngstown goes abroad.* The Supreme Court’s recent decision in *Medellin v. Texas* makes all this abundantly clear.²⁷⁷ That case concerned the domestic

²⁷⁴ See AUMF, *supra* note 231.

²⁷⁵ DOJ Legal Authorities, *supra* note 19, at 1382-84.

²⁷⁶ See *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (invalidating congressional attempt to impose strict scrutiny standard for state laws burdening the free exercise of religion, in part on grounds that it encroached on the judicial function).

²⁷⁷ 128 S. Ct. 1346 (2008).

consequences for a death-row prisoner of a decision by the International Court of Justice (ICJ), which had held that the United States violated the Vienna Convention on Consular Relations.²⁷⁸ A separate treaty, the U.N. Charter, was acknowledged to create an international obligation to comply,²⁷⁹ but the question was whether it also established an obligation in domestic law that bound U.S. courts. The petitioner had two theories as to why it did: first, because the ICJ decision had legal force in and of itself; second, because that decision was binding by virtue of President Bush's order implementing it.²⁸⁰

The Court rejected both arguments, reasoning in effect that the failure of the first – because the U.N. Charter was non-self-executing, and the ICJ decision consequently did not bind U.S. courts²⁸¹ – doomed the second. But the parties also cast the issue of the President's authority in *Youngstown* framework terms. Defenders of the President's authority claimed that it was properly reviewed under Category One,²⁸² while those objecting depicted it as falling within Category Three.²⁸³ Neither camp offered particularly compelling reasons why its depiction was to be preferred, let alone why the framework was probative, but each regarded its depiction as pretty much decisive of the question of constitutional authority.

²⁷⁸ Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.), 2004 I.C.J. 12; *see* Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820.

²⁷⁹ U. N. Charter art. 94(1), 59 Stat. 1051, T.S. No. 993 (1945) (“[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party”). A third treaty vested the International Court of Justice with jurisdiction. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol or Protocol), Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820.

²⁸⁰ Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Attorney Gen. (Feb. 28, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

²⁸¹ 128 S. Ct. at 1358-61.

²⁸² Brief for Petitioner at 34-37, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) (indicating that the presidential memorandum should be reviewed according to Category One or, at worst, Category Two); Reply Brief for Petitioner at 12, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) (invoking Category One); Brief for the United States as Amicus Curiae Supporting Petitioner at 9-11, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) (invoking Category One, but noting novelty of treaty context); *id.* at 11 n.2 (stating that “[a]t an absolute minimum then, this case involves a valid Presidential action in the context of Congressional “acquiescence”).

²⁸³ Brief for Respondent at 16-17, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984).

Reacting to the Category One portrayal,²⁸⁴ the Court said that it fell to the treaty-makers in combination to establish a self-executing treaty, and then to Congress to implement a non-self-executing one. It elaborated:

A non-self-executing treaty . . . is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President-acting on his own-to achieve precisely the same result. . . . [G]iven the absence of congressional legislation, . . . the non-self-executing treaties at issue here did not "express[ly] or implied[ly]" vest the President with the unilateral authority to make them self-executing. . . . *Accordingly, the President's Memorandum does not fall within the first category of the Youngstown framework.*

Indeed, . . . the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so. When the President asserts the power to "enforce" a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. *His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second.*

The parties' invocation of the *Youngstown* framework, and the Court's conclusions on that topic, were nearly by analogy. It is far from clear that the President and Senate could, even if they so desired, establish the self-executing character of a treaty if the treaty as rendered by international negotiations for all parties had not²⁸⁵ – and, as Justice Breyer protested in his *Medellin* dissent, the question is one that treaties rarely address.²⁸⁶ Equally important, the Court's portrayal of the Senate's implicit

²⁸⁴ *Id.* at 1368 (noting claim that "because the relevant treaties 'create an obligation to comply with Avena,' they 'implicitly give the President authority to implement that treaty-based obligation'" such that "the President's Memorandum is well grounded in the first category of the *Youngstown* framework").

The Court separately addressed the President's argument that, in the alternative, the Memorandum should be evaluated under Category Two, but found it wanting under that analysis as well. *Id.* at 1370-71.

²⁸⁵ *But see, e.g.*, S. EXEC. REP. 110-12, Extradition Treaties with the European Union, 110th Cong., 2d Sess., at 9-10 (proposing declaration of self-execution in resolution of advice and consent). The problem has to do with the capacity of the President and Senate to make law independent of that dictated by an international agreement. For discussion, see Edward T. Swaine, *Non-Self-Execution and the Non-Separation of Powers* (draft on file with author).

²⁸⁶ 128 S. Ct. at 1380-1382, 1383 (Breyer, J., dissenting).

understanding was essentially made up. It was difficult to reconstruct the treaty-makers' understanding of whether Article 94 of the U.N. Charter was self-executing,²⁸⁷ and the Court seemed to impute its understanding to them.²⁸⁸

What was most significant, however, was that the Court not only guessed as to whether the treaty was regarded as self-executing when ratified, but also imputed to Congress its conception of *what it meant to be* non-self-executing. Prior to *Medellin*, the character of the non-self-executing determination was uncertain. Some thought it pertained only to whether a private party could enforce a treaty (an inquiry that the Court differentiated, not without reason).²⁸⁹ It was more plausible that even if a non-self-executing treaty stopped short of establishing federal law "by itself," it might achieve that status through non-statutory acts – such as by an executive order.²⁹⁰ The Court appeared to reject this possibility, however, by suggesting that the treaty's lack of "domestic effect" could be cured only by Congress. Certainly this outcome – which accentuated tensions with the Supremacy Clause's instruction that "all" treaties made by the United States "shall" be supreme law – might not fully have been appreciated by the President and Senate when ratifying the U.N. Charter several years prior to *Youngstown*. They may instead have envisioned that the treaty permitted (without necessarily delegating) a degree of presidential authority to ensure compliance with an internationally binding obligation that also appeared to bind the executive branch domestically.²⁹¹

At one level, this is just another instance of judicial misdirection: that is, the conventional problem that when the Court purports to be discovering congressional will,

²⁸⁷ The Court did cite evidence of the executive branch's understanding of the U.N. Charter, *see* 128 S. Ct. at 1359, but it misunderstood its import: in the cited passages, and in others to which the Court did not allude, the question was the character of the international legal obligation, not the domestic effect as law. *See* Swaine, *supra* note 37, at 374 n.226.

²⁸⁸ *See* Frederick L. Kirgis, *International Law in the American Courts - The United States Supreme Court Declines to Enforce the I.C.J.'s Avena Judgment Relating to a U.S. Obligation Under the Convention on Consular Relations*, 9 GERMAN L.J. 619, 629 (2008) ("[T]he Supreme Court majority's argument . . . is a classic case of bootstrapping: the Justices imputed to the Senate a conclusion the Court reached many years later in the case at hand, and the same Justices then relied on it to determine the Senate's original "implicit understanding." Congress, or in this instance the Senate, simply had no expressed or implied will on whether these provisions are or should be self-executing. Consequently the case fell within Justice Jackson's second category, not his third category.").

²⁸⁹ 128 S. Ct. at 1356 n.3; *contrast* David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000).

²⁹⁰ *See* Swaine, *supra* note 37, at 353-59.

²⁹¹ For a defense of this position, *see* Swaine, *supra* note 37.

particularly when going beyond statutory text, it is really expressing its own – usurping congressional authority even in the guise of protecting that authority against the executive branch.²⁹² Within the *Youngstown* framework, distinctly, such errors in discerning Congress’s implicit preferences make a categorical difference. Even by this standard, though, the effect in *Medellin* was striking. *Youngstown* rejected an attempt at presidential bootstrapping, insofar as Truman sought to capitalize on a situation involving his own use of force;²⁹³ in *Medellin*, the predicate for presidential implementation was a treaty that had received the advice and consent of the Senate, which the Court took to be the equivalent of a legislative act.²⁹⁴ Here, then, the sounder objection was that the decision occasioned *judicial* bootstrapping, given that the Court’s convictions were attributed to Congress and then exploited by the Court itself.²⁹⁵

IV. RE-SEIZING *YOUNGSTOWN*

Assume, for the sake of discussion, that one embraced the pro-congressional ends of the *Youngstown* framework, but accepted the force of the above criticisms: namely, that the framework established institutional incentives that might undermine those ends – perhaps only to the extent that tempered *Youngstown*’s virtues at the margins, or perhaps even to the point that it backfired. How might *Youngstown*, or at least its ultimate objectives, be redeemed? Equally important, could that be accomplished without undermining its signal attribute – its potential encouragement, via the judiciary, of cooperative endeavors between the political branches?

Fully elaborating a program for shoring up Congress’ functions, while preserving the constitutional prerogatives of the President and the judiciary, is quite beyond the scope of this Article, but it is worthwhile to indicate several possible types of approaches that might better reconcile the *Youngstown* framework’s operation with its ambitions. Probably the most modest solution would be to spur courts applying the framework to

²⁹² Cf. TRIBE, *supra* note 109, at 204-05.

²⁹³ Paulsen, *supra* note 2, at 216 (stating that “*Youngstown* holds that the President, as chief executive, may not ‘execute’ laws of his own making: the President of the United States may not constitutionally legislate on his own authority, ever”).

²⁹⁴ See Swaine, *supra* note 37, at 349-50 (exploring the anti-bootstrapping reading of *Youngstown*, and its qualified application to treaty-based situations).

²⁹⁵ See Kirgis, *supra* note 288, at 629.

resolve doubts in Congress's favor. The first major test of the framework, in *Dames & Moore*, did not auger well on that score; the framework's more fleeting influence in cases like *Crosby*,²⁹⁶ *Hamdi*,²⁹⁷ and *Hamdan*²⁹⁸ may be debated; and its manipulability is routinely demonstrated in the lower courts.²⁹⁹ Even its triumph in *Medellin*, in which the Court invalidated an executive branch action in an area dominated by the President, proved to be a mixed bag. Putting aside whether the Court correctly surmised the preferences of the Senate,³⁰⁰ or truly imagined itself as constraining the executive branch,³⁰¹ *Medellin* also suggests that the Court may be gun-shy in employing the *Youngstown* framework to constrain executive branch authority. Having determined that the President's Memorandum was best assessed under Category Three, Chief Justice Roberts added "insofar as [the President's asserted authority] is based on the pertinent non-self-executing treaties."³⁰² He then analyzed the President's separate assertion of independent foreign affairs authority to resolve claims disputes as something more like a

²⁹⁶ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000) (applying the *Youngstown* framework and Category One to establish that presidential policy had preemptive effect); *see supra* text accompanying note 72.

²⁹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Thomas, J., dissenting) (supporting authority to detain, and establishing majority with respect to that question, by invoking *Youngstown* framework and Category One); *see supra* text accompanying notes 15, 27, 233-235.

²⁹⁸ *Hamdan* 548 U.S. 557, 638-39 (2006) (Breyer, J., concurring) (identifying Category Three case); *id.* at 680-81 (Thomas, J., dissenting); *see supra* text accompanying notes 15, 27, 236-237.

²⁹⁹ For example, the en banc Fourth Circuit recently decided an important challenge to the classification of a U.S. resident alien as an enemy combatant and his detention on that basis; the principal concurring opinion to the per curiam order approached the executive branch determination as falling within Category Three, *see al-Marri v. Pucciarelli*, 534 F.3d 213, 248-49 (4th Cir. 2008) (Motz, J., concurring), whereas the dissents described it as a Category One case. *Id.* at 287 (Williams, J., concurring in part and dissenting in part); *id.* at 302-03, 312 (Wilkinson, J., concurring in part and dissenting in part).

³⁰⁰ *But see* S. EXEC. REP. 110-12, *supra* note 285, at 10 (stating that, contra *Medellin*, "in the committee's view, a strong presumption should exist against the conclusion in any particular case that the United States lacks the necessary authority in U.S. law to implement obligations it has assumed under treaties that have received the advice and consent of the Senate").

³⁰¹ The dynamic in that case – which pitched the executive branch not against Congress, but against the State of Texas, and in which it sought not to fulfill an autonomous policy preference but rather the judgment against it rendered by the ICJ in favor of Mexico – suggested the possibility that the Court was doing the President a favor by entertaining his good-faith request but refusing him. Indeed, the Court noted that the United States continued to disagree with the legal result, meaning that its only interest was in discharging (or, at least, trying earnestly to discharge) the judgment. *Medellin v. Texas*, 128 S. Ct. 1346, 1361 (2008). In that connection, the Court also indicated that the executive branch's understanding of the treaty in question – which lay at the heart of the Court's conclusion that the executive branch lacked implementing authority, as well as its conclusion that the ICJ decision lacked legal force in and of itself – was entitled to "great weight." *Id.* at 1361 (internal citations and quotations omitted).

³⁰² 128 S. Ct. at 1369.

Category Two issue.³⁰³ This is not how Justice Jackson proceeded – he did not suggest that the President’s authority was best analyzed under Category Three only insofar as it was based on some statute, then start afresh when it came to claims based on the Commander-in-Chief power – and perhaps lets slip misgivings about shortchanging the executive branch.³⁰⁴ In light of this experience, expecting the courts to right the course *sua sponte* may be a bit starry-eyed.

A second, more ambitious approach would be to supplement the *Youngstown* framework by adding to the congressional toolkit. For example, one might enhance Justice Jackson’s solicitude for informal congressional will by embracing legislative soft law. Within the framework itself, the reckoning of congressional preferences might be improved by distinguishing more carefully among possible indicia; for example, as others have argued, a concurrent resolution may be a better signal of congressional views than even a statute, since in the absence of presentment there is no need to incorporate the President’s preferences, and it is certainly more refined than legislative history.³⁰⁵ Outside the framework’s bounds, courts might invoke the more reliable species of soft law in interpreting statutes.³⁰⁶ Such tactics are hardly risk-free, of course, even putting aside constitutional and legal process objections. Soft law might just as easily enable presidential unilateralism: if the House or Senate choose to adopt a one-chamber resolution supporting presidential action, that might well count toward Category One, at least if the framework were made more amenable to soft law. Congress might also employ soft law measures as a less taxing alternative to adopting statutes, which might let it off the hook too easily – and, ultimately, diminish congressional constraints on the executive branch.³⁰⁷

At the opposite end of the spectrum, the framework might be reinforced through statutory fixes designed to put Congress on a better footing. Dean Koh’s proposal for

³⁰³ *Id.* at 1371.

³⁰⁴ *See also id.* at 1390-91 (Breyer, J., dissenting) (indicating misgivings about limiting executive branch authority in that area).

³⁰⁵ *See* Gersen & Posner, *supra* note 108, at 595-96.

³⁰⁶ *See* Gersen & Posner, *supra* note 108, at 607-20 (defending such use as constitutional and prudent).

³⁰⁷ *Compare* Gersen & Posner, *supra* note 108, at 588-91 (considering soft law as signals of future statutory action, but not directly addressing substitutability); *id.* at 597-99 (considering possible benefits of statutes over soft law, including bindingness, public notice, and presidential involvement).

restoring the National Security Constitution, for example, was an unabashed plea for hard legal fixes, albeit in the form of framework statutes.³⁰⁸ For reasons already discussed, Koh's confidence that the *Youngstown* framework is a constructive part of that constitution may be misplaced,³⁰⁹ and asking process-oriented statutes to realign the incentives of the Congress, the courts, and the President may be asking too much.³¹⁰ Nevertheless, such statutes might at the margins benefit from and help reinforce congressionally-initiated policymaking (Figure 1, *vice* Figures 2-5). Absent a transformative effect on the institutions involved, there is reason to doubt that they would fully cure the problems that *Youngstown* sought to fix, or for that matter cure *Youngstown's* own ills. Once framework statutes were enacted, the initial move in any policy context would remain the President's, who could act unilaterally yet again; the end result may be like issuing one (unenforceable) traffic citation after another for the same moving violation. A key ingredient would necessarily be a newly aggressive judiciary,³¹¹ which may encounter its own constraints in unilateral politics games.³¹²

A third, yet more radical approach would be to prune the *Youngstown* framework of its counterproductive elements. One could imagine, for example, a tripartite framework for evaluating challenges to executive branch action that took the following form:

1. The action may be sustained on the basis that it is authorized by statute or treaty, unless that authorization exceeds the power of the legislative branch or the power of the government as a whole.³¹³
2. The action may be sustained on the basis of the President's constitutional authority, unless that authority has lawfully been constrained by statute or treaty or exceeds the power of government as a whole.

³⁰⁸ *E.g.*, KOH, *supra* note 30, at 203-07.

³⁰⁹ *See id.* at 106-13 (describing the *Youngstown* framework as a salutary way in which the National Security Constitution has been "embroidered"); *id.* at 134-46 (describing and criticizing supplanting of *Youngstown* framework by courts favoring *Curtiss-Wright* and other pro-presidential precedent).

³¹⁰ *Id.* at 204.

³¹¹ KOH, *supra* note 30, at 134-44 (describing "the problem of judicial tolerance" at present).

³¹² HOWELL 2003, *supra* note 32, at 172-74 (explaining persistence of judicial conservatism in cases involving presidential initiatives).

³¹³ The last caveat is simply to recognize that the federal government may be prohibited from doing certain things for extrinsic reasons, including because of the Bill of Rights.

3. Any other basis for sustaining the action, or pretermittting an inquiry into its validity, is a question to be established by each relevant actor according to separate principles.

Aside from its obvious virtue – three parts – this stripped-down framework may seem to say very little; its other virtue, though, is that it clarifies what *Youngstown* does and should not do. Three differences are particularly worth highlighting.

First, the alternative framework does not attempt to impose the same approach, in its entirety, on every potential actor. As noted initially, Justice Jackson implied that his approach would be useful for both the executive branch and the judiciary,³¹⁴ but he never explained why his categories, with their additive and subtractive analyses, should be applied to address constitutional questions outside of court. Greater discrimination seems appropriate. To the extent Justice Jackson's concurrence, or an authoritative blending of the opinions in that case, supports the proposition that Congress may limit the President's Commander-in-Chief authority (or any other substantive proposition), it should of course inform any legal analysis. Any broader application of the existing framework by the President or Congress, however, seems problematic. As noted in Part III, internalizing the framework is likely to encourage the executive branch to avoid petitioning Congress for fear of rejection or, alternatively, to seek legislative authorization by a means less likely to establish a repudiation.

If the *Youngstown* framework continues to be applied in court, it is almost inevitable that executive branch lawyers will apply it as part of assessing litigation risk,³¹⁵ but it is doubtful that this tendency should be reinforced. The executive branch probably ought not dwell on whether its powers are at their maximum, minimum, or in some zone of twilight, as if what matters is the level of scrutiny as opposed to the best understanding

³¹⁴ See *supra* text accompanying notes 68-70.

³¹⁵ See, e.g., *supra* text accompanying note 239 (discussing use of the *Youngstown* framework in Justice Department memoranda related to the TSP and the use of force in Haiti); see also Office of Legal Counsel, U.S. Dept. of Justice, *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 2002 WL 34462401 *7 (Oct. 23, 2002) (suggesting that, even prior to enactment of the Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, Pub. L. No. 107-243, 116 Stat. 1498 (2002), that the President would be acting within Category One were he to initiate the use of force against Iraq).

of the Constitution;³¹⁶ if such an approach is warranted, it requires more careful exploration in terms of executive branch values than has hitherto been accomplished.³¹⁷ Limiting this advisory use of the framework would be inconsistent with recent criticisms of executive branch legal opinions that failed to cite *Youngstown*.³¹⁸ But those opinions' more profound flaws had to do with their understanding of particular constitutional, statutory, and treaty provisions, and it is in any event possible to incorporate some of *Youngstown*'s values – like deference to Congress and its preferences – without importing wholesale Justice Jackson's concurrence.

Second, unlike the *Youngstown* framework, the suggested framework makes no overt judgment about the significance of Congress's non-statutory gestures. If these are part of the otherwise-prevailing approach to statutory interpretation, that is another matter, and this Article does not purport to resolve the merits of their use in that broader enterprise.³¹⁹ It is doubtful, however, that existing doctrine makes them the equal of more explicit formal acts, as would appear to be the case under the *Youngstown* framework. Equally important, the *Youngstown* framework's attempt to convert implicit indications into a device for determining the standard of review for constitutional claims should be reexamined, or at least acknowledged as a fundamental form of constitutional lawmaking in itself.³²⁰

Third, and still more basically, the new framework does not differentiate between degrees of judicial scrutiny – nor, indeed, is there any attempt to establish a standard of scrutiny at all. As noted previously, Justice Jackson's categories effectively sort the circumstances of congressional behavior and reckon the standard of scrutiny to be applied

³¹⁶ Walter E. Dellinger *et al.*, *Principles to Guide the Office of Legal Counsel* (2004), reprinted in 54 UCLA L. REV. 1559 app. 2, at 1604, 1605 (stressing that the Office of Legal Counsel should provide “its best view of all legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action”).

³¹⁷ For a model of how this might proceed, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1220-28 (2006) (discussing OLC guidance relating to constitutional avoidance canons in terms both of judicial and executive branch values).

³¹⁸ See *supra* text accompanying note 17.

³¹⁹ See *supra* text accompanying note 108 (noting arguments for using congressional soft law in interpreting statutes).

³²⁰ As such, it is a curious inversion of the much-criticized tendency of recent Supreme Court case law to establish constitutional norms via clear-statement rules governing separation of powers (and other) disputes. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

within each category. Their most basic proposition, that courts should intervene in some of these cases and not in others, was not adequately defended, and sounds in principles of abstention that pose much broader issues. Of course, not all separation of powers disputes require judicial administration, but if it is appropriate for the courts to stay out of any particular dispute, the usual judicial tools remain.

The third prong of the alternative framework puts this succinctly. As it suggests, each branch may need to apply its own substantive and procedural doctrines as appropriate to its institutional function; for the judiciary, this may involve determining the threshold issues like whether a dispute is justiciable,³²¹ whether a constitutional question need be reached,³²² and of course the proper level of scrutiny.³²³ Judgments on these questions often differ, to say the least, and it is a mistake to bundle all of these ingredients into the framework's more specific undertaking – in part because it prevents these other doctrines from evolving apace.

CONCLUSION

Justice Jackson could not have anticipated the popularity of his “somewhat oversimplified grouping of practical situations”³²⁴ – nor, despite the ingenious way his framework responded to the capacity of the President for unilateral action, could he have guessed at the range of strategic behaviors that courts and the political institutions would exploit once they had internalized his framework. The techniques of positive political economy, and over fifty years of experience, give us a considerable advantage. The issue, it should be reiterated, is not merely one of analytic clarity or rhetorical appeal (two pursuits in which Justice Jackson is difficult to better), nor need there be concern for

³²¹ See, e.g., *Nixon v. United States*, 506 U.S. 224, 228 (1993) (“A controversy is nonjusticiable – i.e., involves a political question – where there is a ‘textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .’”) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

³²² See, e.g., *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (indicating that constitutional questions should be avoided if a case may be decided on narrower statutory grounds).

³²³ See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 667-71 (1943) (Jackson, J.) (citing James Bradley Thayer concerning judicial restraint); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148-56 (1893) (advocating judicial restraint in the absence of clear constitutional error by the political branches).

³²⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

the overall vitality of executive branch authority (one pursuit in which the *President* is difficult to better). The concern, rather, is that the *Youngstown* framework in important respects tends to disserve the institution it is thought to benefit – Congress – without fully justifying the choices that produce those perverse consequences. The end result, optimally, is to highlight and refine the leading virtue of *Youngstown*: the privileging of legislative over executive branch authority, to the (uncertain) extent that the latter is defeasible, and counteracting a tactical advantage the President holds even its exploitation is lawless. This legacy of Justice Jackson’s seems to be beyond re-seizing,³²⁵ and it may be the most essential piece of the puzzle.

³²⁵ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 n.23 (2006) (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, . . . (Jackson, J., concurring). The Government does not argue otherwise.”).