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TAKING CUES FROM CONGRESS:
JUDICIAL REVIEW, CONGRESSIONAL
AUTHORIZATION, AND THE EXPANSION
OF PRESIDENTIAL POWER

*David H. Moore**

ABSTRACT

In evaluating whether presidential acts are constitutional, the Supreme Court often takes its cues from Congress. Under the Court's two most prominent approaches for gauging presidential power—Justice Jackson's tripartite framework and the historical gloss on executive power—congressional approval of presidential conduct produces a finding of constitutionality. Yet courts and commentators have failed to recognize that congressional authorization may result from a failure of checks and balances. Congress may transfer power to the President against institutional interest for a variety of reasons. This key insight calls into question the Court's reflexive reliance on congressional authorization. Through this reliance, the Court overlooks failures of checks and balances and constitutionalizes the transfer of power to the President. Possible solutions include congressional or judicial development of a jurisprudence of independent presidential power, adoption of a presumption against authorization, and treatment of presidential power controversies that turn on congressional authorization as political questions. At a minimum, courts and commentators should be less sanguine about the leading approaches to assessing presidential power.

INTRODUCTION

Some of the Supreme Court's most significant cases address the scope of presidential power: Can the President indefinitely detain enemy combatants

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and try them by military commission?¹ Can the President unilaterally execute judgments of the International Court of Justice in preemption of state law?² Can the President require that claims filed in U.S. courts against a foreign state be brought in an international tribunal?³ In determining the scope of presidential power, the Court often takes its cues from Congress. Under the famous tripartite framework from Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court will uphold presidential action that is authorized by Congress.⁴ Under the analysis emanating from Justice Frankfurter's *Youngstown* concurrence, the Court may find that a history of congressional authorization has produced a gloss on the executive power vested in the President.⁵

On one hand, the Court's reliance on congressional authorization makes sense. If the President and Congress, who are also bound by the Constitution, clearly agree that the President is authorized to exercise a particular power, who is the judiciary to second guess, especially in areas like foreign affairs where the judiciary is a confessed second-rate player?⁶ On the other hand, courts and commentators have overlooked the fact that congressional authorization may result from a failure of the Constitution's canonical system of checks and balances. For various reasons, Congress may act against institutional interest to authorize the expansion of presidential power. When this occurs, judicial reliance on congressional authorization through the Court's accepted analyses aggravates a failure of checks and balances. Rather than correct, the Court piles on. The result—through court holding and foregone lawsuits against presidential actions authorized by Congress—is a troubling erosion of checks and balances with power accumulating in the President.

This Article exposes the trouble with the judiciary taking cues from congressional authorization in evaluating presidential power. Part I discusses the nature and prominence of the analyses emanating from *Youngstown*—Justice Jackson's three-part paradigm and Justice Frankfurter's historical gloss—highlighting the risk that each may build upon a failure of checks and balances. Part II describes the scholarship that has come closest to identifying

1 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion).

2 See *Medellín v. Texas*, 552 U.S. 491, 523 (2008).

3 See *Dames & Moore v. Regan*, 453 U.S. 654, 660, 675–88 (1981).

4 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

5 See *id.* at 610–11 (Frankfurter, J., concurring). These two approaches are not entirely discrete. Historical practice may be used to determine whether and to what extent presidential action has received congressional support. See *Dames & Moore*, 453 U.S. at 686; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 419–20 (2012).

6 See, e.g., *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (acknowledging that the “Court has little competence [to] determin[e] precisely when foreign nations will be offended by particular acts, and even less competence [to] decid[e] how to balance a particular risk . . . against the sovereign right[s] of the United States”).

the checks and balances problem with basing presidential power on congressional authorization—a recent article by Curtis Bradley and Trevor Morrison.⁷ The article identifies concerns with judicial reliance on passive congressional *acquiescence*, but does not detect problems with reliance on congressional *authorization*. Indeed, the article affirmatively endorses the probative value of congressional authorization, ultimately providing an example of scholarly buy-in to the practice this Article challenges. Part III briefly recounts the Constitution’s canonical system of checks and balances, while Part IV draws on relevant social science literature to identify various reasons why checks and balances may fail when Congress affirmatively approves presidential conduct. The focus in Part IV is on the shifting of foreign affairs power, which is particularly common. The theories and evidence of Part IV suggest a reduced role for reliance on congressional authorizations. Part V addresses counter-concerns to the thesis that the failure of checks and balances in congressional authorizations should lead to reduced reliance on such authorizations. Part VI discusses the implications of the failure of checks and balances for future judicial review of presidential power, exploring possible solutions to the problem exposed by this Article.

I. RELIANCE ON CONGRESSIONAL AUTHORIZATION

The Court’s two principal approaches for assessing presidential power ironically derive from the same case but not its majority opinion. In *Youngstown*, the Court concluded that President Truman acted unconstitutionally in seizing domestic steel mills to support the nation’s Korean War effort.⁸ While the majority looked for statutory authorization for the President’s actions,⁹ Justice Jackson’s and Justice Frankfurter’s separate concurrences proved more influential in establishing the Court’s reliance on congressional authorization. Although both opinions expressly referenced checks and balances,¹⁰ both raise the threat that the judiciary will constitutionalize presidential practices based on failures of checks and balances.

7 See Bradley & Morrison, *supra* note 5.

8 See *Youngstown*, 343 U.S. at 582–83, 589.

9 See *id.* at 585–87. The majority also failed to find support for the President’s seizure in the President’s enumerated constitutional powers. See *id.* at 587–89.

10 See *id.* at 593–94 (Frankfurter, J., concurring) (emphasizing the importance of the constitutional system of checks and balances to prevention of the consolidation of power); *id.* at 653–54 (Jackson, J., concurring) (noting that the President’s “prestige as head of state and . . . influence upon public opinion . . . exerts a leverage upon those who are supposed to check and balance [the President’s] power which often cancels their effectiveness”); see also *Medellin v. Texas*, 552 U.S. 491, 528 (2008) (concluding that presidential execution of a non-self-executing treaty violates checks and balances); *Dames & Moore*, 453 U.S. at 661–62, 668–88 (invoking both Justice Jackson’s framework and historical practice in an opinion noting that the Constitution “embodies some sort of system of checks and balances”).

A. *Justice Jackson's Three Categories*

Justice Jackson observed that federal branch powers are not understood in isolation, but in combination.¹¹ In particular, “[p]residential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.”¹² The President may stand in one of three rough categories in relation to Congress.¹³ When Congress has authorized presidential action—the first category—the President’s power “is at its maximum.”¹⁴ The President’s acts are “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”¹⁵ The judiciary might find the acts unconstitutional if the federal government as a whole lacks the power exercised; otherwise, the President will prevail.¹⁶ In the second category, the President acts in the absence of congressional approval or disapproval.¹⁷ In such situations, the President must rely on her own authority.¹⁸ However, the power the President exercises might be concurrent or its distribution unclear, such that “congressional inertia, indifference or quiescence may . . . invite,” “at least as a practical matter,” presidential action.¹⁹ Ultimately, the constitutionality of the President’s acts in this twilight zone is unpredictable *ex ante*.²⁰ In the third and final category, the President acts contrary to “the expressed or implied will of Congress.”²¹ The President’s “power [in such circumstances] is at its lowest ebb” and can be sustained only upon a conclusion that the power exercised is exclusive to the President.²²

Checks and balances problems may arise in each of these categories. Surprisingly, however, Justice Jackson’s first category—where the outcome is generally perceived as least controversial—is the most troubling. In the clearest category-one case, Congress has affirmatively authorized the President’s conduct. Authorization may come in compliance with the Constitution’s checks and balances. However, as explored below, authorization may also involve a failure of checks and balances. Regardless, congressional authorization is treated as conclusive. Only in the rare circumstance in

11 See *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

12 *Id.*

13 See *id.* at 635–38. Both Justice Jackson and the Court have noted that these categories are rough and that presidential power more accurately lies “along a spectrum.” *Dames & Moore*, 453 U.S. at 669; see *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (referring to the three categories as “a somewhat over-simplified grouping of practical situations”). Still, the Court has not abandoned the three categories. See, e.g., *Medellín*, 552 U.S. at 524–25 (summarizing “Justice Jackson’s familiar tripartite scheme”).

14 *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

15 *Id.* at 637.

16 *Id.* at 636–37.

17 *Id.* at 637.

18 *Id.*

19 *Id.*; see also *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (quoting the same).

20 See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

21 *Id.*

22 *Id.* at 637–38, 640.

which the federal government as a whole lacks the power exercised²³ is a category-one presidential act likely to be treated as unconstitutional. The result is that congressional authorization leads, almost inevitably, to presidential power.

Justice Jackson's second and third categories do not present the same risk of constitutionalizing a failure of checks and balances. In the second category, Congress's failure to act undoubtedly may result from a failure of checks and balances.²⁴ Moreover, the Court suggests that congressional inaction might invite presidential action. However, the Court is not as likely to find the President's acts constitutional in the face of congressional inaction. As noted, these cases reside in "a zone of twilight" where resolution will "depend on the imperatives of events and contemporary imponderables."²⁵ Consequently, in the second category, the risk that the Court will uphold presidential action, including by relying on a failure of checks and balances, is reduced.

In the third category, the risks of a failure of checks and balances and of Court endorsement of presidential power both diminish. In this category, Congress has opposed the President's actions. In other words, Congress has acted to check the President. While Congress may oppose the President's actions out of an improper desire to expand its own power, the Jackson framework is sensitive to that possibility. Notwithstanding congressional opposition, the Court will rule for the President if the power exercised is exclusively the President's. The Court will not rely solely on congressional opposition in fixing presidential power, thus reducing the threat of reliance on congressional overreaching. The result is that, while the second and third categories of Justice Jackson's framework may produce judicial reliance on failures of checks and balances, the risk of such reliance is greatest when the Court finds congressional authorization and a category-one situation.

B. Justice Frankfurter's Historical Gloss

Problematic reliance on congressional authorization may also occur under the presidential power paradigm stemming from Justice Frankfurter's *Youngstown* concurrence. Frankfurter believed that constitutional meaning could derive not only from constitutional text, but from practice.²⁶ In particular, he asserted that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may

23 The improbability of such a finding is underscored by Court statements such as, "Governmental power over external affairs is . . . vested exclusively in the national government." *United States v. Belmont*, 301 U.S. 324, 330 (1937). *But cf. Reid v. Covert*, 354 U.S. 1, 5–6, 16–19 (1957) (plurality opinion) (recognizing some Bill of Rights limitations on federal foreign affairs authority); *id.* at 49, 56 (Frankfurter, J., concurring) (recognizing the same); *id.* at 74–78 (Harlan, J., concurring) (recognizing the same).

24 See Bradley & Morrison, *supra* note 5, at 414–15, 440–44.

25 *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also *id.* at 639 (referencing "flexible tests available to the second category").

26 See *id.* at 610–11 (Frankfurter, J., concurring).

be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”²⁷ As this statement indicates, congressional *acquiescence* is sufficient to support this gloss.²⁸ However, affirmative *authorization* strengthens the case. Thus, as in Jackson’s category one, historical support from Congress buttresses (if it does not produce) the constitutionality of presidential action. And, as in category one, congressional approval may result from a failure of checks and balances.

C. *Prominence of Reliance on Congressional Authorization*

The risk that the Court might rest its constitutional conclusions on a failure of checks and balances under these approaches might not be so troubling if these doctrines were not so prominent and congressional authorizations so plentiful. However, Congress has authorized the President to address a host of foreign affairs issues²⁹ and the Supreme Court consistently relies on Jackson’s framework and Frankfurter’s historical gloss in evaluating the scope of presidential power.³⁰ As one commentator put it, *Youngstown* provides “the current dominant paradigm through which most important constitutional questions of war, foreign affairs, and separation-of-powers issues in general are understood and evaluated by Congress, the President, and the courts.”³¹ Consistent with this view, the Supreme Court, in its recent landmark decision in *Medellín v. Texas*, described “Justice Jackson’s familiar tripartite scheme [as] the accepted framework for evaluating executive action in [the foreign affairs] area.”³² After applying the framework to hold that President Bush acted unconstitutionally in attempting to unilaterally execute a judgment of the International Court of Justice contrary to state law, the Court also conducted a historical gloss analysis, concluding that the President’s action was not part of a longstanding practice in which Congress had acquiesced.³³ Rather, the action was “unprecedented.”³⁴

27 *Id.*; see also *Medellín v. Texas*, 522 U.S. 491, 531–32 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

28 See *Youngstown*, 343 U.S. at 613 (Frankfurter, J., concurring).

29 See, e.g., Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1252–69 (2008) (noting the topics and prevalence of international agreements entered by the executive pursuant to congressional authorizations).

30 The doctrines are also heavily invoked by academics. See, e.g., Bradley & Morrison, *supra* note 5, at 412, 417–21, 423 (describing Justice Jackson’s approach as “canonical” and noting judicial, executive, and academic reliance on historical gloss).

31 Michael Stokes Paulsen, *Youngstown Goes to War*, 19 *CONST. COMMENT.* 215, 220 (2002); see also *id.* (describing *Youngstown* as “one of the most significant constitutional decisions in our nation’s history”).

32 *Medellín*, 552 U.S. at 524; see also *Dames & Moore*, 453 U.S. at 661, 668 (noting parties’ agreement that Justice Jackson’s concurrence “brings together as much combination of analysis and common sense as there is in this area”).

33 See *Medellín*, 552 U.S. at 524–32.

34 *Id.* at 532 (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 29–30, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51, 04-10566)).

The Court has invoked the two doctrines in other prominent decisions as well.³⁵ For example, in *Hamdi v. Rumsfeld*, the plurality and Justice Thomas sustained presidential power to detain “a United States citizen on United States soil as an ‘enemy combatant’” because Congress sanctioned such detention through the post-9/11 Authorization for the Use of Military Force (AUMF).³⁶ Invoking both Justice Jackson’s framework and historical practice, the Court in *Dames & Moore v. Regan* similarly upheld presidential power to both nullify attachments of foreign assets securing U.S. nationals’ claims against a foreign state and suspend those claims pending resolution in an international tribunal.³⁷ Moreover, last term in *NLRB v. Noel Canning*, the Court relied heavily on historical practice to ascertain the scope of the President’s recess appointments power.³⁸ And if the D.C. Circuit’s opinion is prelude, the Court is likely to rely on historical practice this term to define

35 See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (concluding that the President could not try detainees by military commission in light of congressionally imposed restrictions); *id.* at 636–37 (Kennedy, J., concurring) (concluding the same); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–15 (2003) (concluding that “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution” generally recognizes the President’s preeminence in foreign affairs and specifically supports the constitutionality of executive agreements, including “executive agreements to settle claims”); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000) (citing the breadth of presidential authority in a “category one” situation to support preemption of state law interfering with that authority).

36 *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 517–19 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Starting with *Hamdi*, Harlan Cohen identifies a trend in the Supreme Court away from functionalism toward a formalism that tends to limit presidential power. See Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court* 6 (Univ. of Ga. Sch. of Law, Working Paper No. 2014-12, 2014), available at <http://ssrn.com/abstract=2412103> (“[T]he Roberts Court has jettisoned its traditional functionalism in favor of formalism.”); *id.* at 9 (“Where the Court earlier used functionalism to give the political branches and, in particular, the Executive, greater room to maneuver in a globalizing world, the Court now seems determined to rein them in.”); *id.* at 35–55. The claimed trend is subject to many qualifications. See, e.g., *id.* at 5, 15, 31, 57 (noting that functionalism does not inevitably support executive power); *id.* at 20, 40, 42 (noting that opinions often exhibit both functionalist and formalist dimensions). Moreover, Cohen acknowledges that the trend represents a pendulum swing rather than a departure, such that functionalism and receptivity to presidential power are likely to return. *Id.* at 23 (noting that “[t]he attraction of either formalist or functionalist approaches to foreign affairs law cases has waxed and waned over American history”); *id.* at 24–25 (noting that a trend toward functionalism was interrupted in the late 1990s, but resumed in the mid-2000s); *id.* at 64 (concluding that the trend to formalism is now well established “until the pendulum swings again”). In the meantime, there are still likely to be functionalist decisions, at least some of which will favor the executive. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (“put[ting] significant weight upon historical practice” in discerning the scope of the President’s recess appointments power) (emphasis omitted); Cohen, *supra*, at 61–63 (noting that the Supreme Court may resort to functionalism in especially delicate cases and that all courts might achieve functionalist goals by refusing adjudication on the merits, thereby avoiding the Court’s current formalism).

37 See *Dames & Moore*, 453 U.S. at 656–66, 668–88.

38 *Noel Canning*, 134 S. Ct. at 2559–60.

the nature of the President's recognition power.³⁹ In short, the Court routinely invokes the *Youngstown* framework and historical gloss, thereby taking its cues on presidential power from Congress.

II. PRIOR SCHOLARSHIP

Judicial reliance on congressional cues to fix presidential power has not entirely escaped scholarly attention. Bradley and Morrison recently addressed the prevalent invocation of historical practice in calibrating the separation of powers, especially between the President and Congress.⁴⁰ As Bradley and Morrison explain, the use of historical practice to understand the separation of powers is most commonly justified on the ground that the practice manifests acquiescence by "one branch in the actions of the other."⁴¹ Practice may not accurately reflect acquiescence, however, when the Constitution's system of checks and balances is not working.⁴² The contemporary relationship between the President and Congress departs from that system.⁴³ Congress, in particular, fails to check the President for a variety of reasons explored more fully below.⁴⁴ As a result, congressional inaction may not reflect intentional acquiescence but a failure of checks and balances.⁴⁵ In recognition of this fact, Bradley and Morrison argue that courts should be *more active* in assessing separation of powers issues rather than leaving them to the political branches.⁴⁶ And, in conducting that assessment, courts should be *more probing* in evaluating the evidence supporting congressional acquiescence, paying attention to such things as nonstatutory resistance to presidential power through hearings or public criticism.⁴⁷

Bradley and Morrison's thinking provides helpful background by identifying ways in which checks and balances fail and by exploring the implications of that failure for judicial involvement in, and resolution of, separation of powers issues. Their focus, however, is on problems arising from judicial reliance on congressional *acquiescence*, which may result from congressional

39 See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 205–11 (D.C. Cir. 2013) (relying on historical practice to conclude that the President's recognition power is exclusive), *cert. granted*, 134 S. Ct. 1873 (2014). The D.C. Circuit also invoked the *Youngstown* framework, but did not have to grapple with its application as "[b]oth parties agree[d] that th[e] case [fell] into [J]ackson's] category three." *Id.* at 204–05.

40 See Bradley & Morrison, *supra* note 5, at 412–13.

41 *Id.* at 414.

42 See *id.* (noting that "[c]laims about [congressional] acquiescence are typically based on a Madisonian conception of interbranch competition . . . that . . . does not accurately reflect the dynamics of modern congressional-executive relations").

43 *Id.* at 414–15.

44 *Id.* at 414–15, 485; see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 117, 123–33 (1990) (exploring why Congress acquiesces to the President).

45 See Bradley & Morrison, *supra* note 5, at 414–15 (describing reasons why Congress fails to check the President).

46 *Id.* at 415.

47 See *id.* at 450–52, 484.

failure to *defend* against presidential intrusion.⁴⁸ They fail to see the trouble in the Court's well-worn reliance on congressional *authorization*. Indeed, they expressly endorse reliance on affirmative *authorization* in adjudicating separation of powers questions.⁴⁹ As a result, their article exemplifies the problem this Article exposes—the enigma of uncritical reliance on congressional authorization.

Bradley and Morrison are not alone among scholars in endorsing reliance on congressional authorization. Harold Koh, for example, laments congressional acquiescence in the vigorous assertion of presidential power.⁵⁰ At the same time, he praises *Youngstown* for “foster[ing] . . . consensus between the Congress and the president about substantive foreign-policy ends.”⁵¹ In short, the most relevant foray into congressional departure from checks and balances as well as other leading scholarship endorses the practice of taking cues from congressional authorization in setting the bounds of the President's power.⁵²

This Article exposes for the first time that reliance on congressional authorization raises serious checks and balances concerns leading to accumulation of power in the President. In so doing, it calls into question what might otherwise be the least controversial aspects of the Supreme Court's two principal approaches to executive power: Justice Jackson's category one, in which the President is found to act constitutionally as a result of congressional authorization, and historical gloss grounded in affirmative congressional support.

III. THE CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES

Identifying failures of checks and balances requires an understanding of the constitutional checks and balances regime. The canonical view of consti-

48 *But cf. id.* at 444–45 (briefly noting that “an extensive array of legislative delegations of power” to the President evidences a failure of checks and balances in contemporary relations between Congress and the executive).

49 *See id.* at 449 (asserting that “[t]he President's power is rightly understood to be at its apex” when Congress has authorized the President's acts) *see also* Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 72 & n. 65 (2007) (asserting—and collecting sources supportive of the assertion—that “reliance on second-order interpretive strategies, especially congressional authorization, [to answer separation of powers questions] has been praised for good reason”).

50 *See* KOH, *supra* note 44, at 117, 123–33.

51 *Id.* at 136; *see also id.* at 139–40 (criticizing the Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), for not “demand[ing] more specific legislative approval for the [P]resident's far-reaching measures”); *cf.* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 65–66 (1991) (noting that most scholars and some Justices treat Coasean bargains by which the federal branches trade power as innocuous).

52 *But cf.* Robert F. Nagel, *A Comment on the Rule of Law Model of Separation of Powers*, 30 WM. & MARY L. REV. 355, 359 (1989) (briefly noting that “[c]onsent to inappropriate merging of [the federal branches'] functions . . . is consent to an unconstitutional arrangement”).

tutional checks and balances appears in Madison's *Federalist No. 51*.⁵³ Under this account, power is divided first between state and federal governments and then, within each government, apportioned among departments.⁵⁴ "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."⁵⁵ To secure the necessary motive, "[t]he interest of the [official] must be connected with the constitutional rights of the place."⁵⁶ In this way, the "several constituent parts may . . . be the means of keeping each other in their proper places,"⁵⁷ the better to preserve individual liberty.⁵⁸

A linchpin in this system of checks and balances is that the interests of individual officials must align with the powers of the institution in which they serve.⁵⁹ A failure of checks and balances occurs when official action is motivated by interests that do not align with the institution's interest in its own power.⁶⁰ Unfortunately, the system of checks and balances does not operate to its ideal; failures are common.⁶¹ The interests of government officials do not always align with those of their institutions.⁶² Congress, in particular, does not live up to the classical model; Congress often fails to *defend* itself against presidential encroachment.⁶³ The reasons for the failure to defend are several.

First, the structural hurdles Congress faces in enacting legislation to counteract presidential action are high and may include a supermajority veto override.⁶⁴ Those hurdles are increased by things such as Congress's com-

53 THE FEDERALIST NO. 51, at 317 (James Madison) (Clinton Rossiter ed., 2003); see Bradley & Morrison, *supra* note 5, at 438–39 (noting that the concept of checks and balances can be traced to *Federalist No. 51*).

54 THE FEDERALIST NO. 51, *supra* note 53, at 320 (James Madison).

55 *Id.* at 264.

56 *Id.*

57 *Id.* at 263.

58 *Id.* (asserting that the "separate and distinct exercise of the different powers of government [is] to a certain extent . . . admitted on all hands to be essential to the preservation of liberty").

59 See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1157–60, 1175 (2000). The alignment of interests is particularly key in separation of powers visions that emphasize balancing power among the federal branches over separating the legislative, executive and judicial power. See *id.* at 1157–60, 1179.

60 See *id.* at 1176 (noting that measures that dilute the loyalty of an officer to her department hinder competition "and potentially permit or promote interdepartmental collusion").

61 See, e.g., Bradley & Morrison, *supra* note 5, at 439.

62 See Magill, *supra* note 59, at 1166–67 (noting that it is not obvious why "individuals in functionally-differentiated institutions will have the same level of loyalty—akin to the allegiance one might have for her own social class—to the institution in which they find themselves").

63 Bradley & Morrison, *supra* note 5, at 439, 447.

64 *Id.* at 440–41.

mittee structure and the (now circumscribed)⁶⁵ Senate filibuster.⁶⁶ Congress also faces the collective action problem that protecting against presidential overreach benefits the institution more than individual members so that members may not be motivated to take defensive action.⁶⁷ Some of these structural constraints on Congress were undoubtedly intended.⁶⁸ To the extent they prevent Congress from appropriately checking the President, however, they exceed the mark.⁶⁹

Second, members of Congress lack incentive to check the President not only for structural reasons, but for substantive reasons as well. The desire for reelection focuses members of Congress to varying degrees “on the views and interests of their local constituents, who are concerned more with specific policy outcomes than congressional power.”⁷⁰ In addition, members of Congress identify more with their party than with their institution such that they are more likely to support a copartisan occupying the White House than to safeguard congressional power.⁷¹ Third, “[t]he complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have [motivated] broad delegations of authority to the executive branch[,]” even as “the rise of omnibus legislation and appropriations riders,” as well as nonstatutory tools like oversight hearings and information disclosure, have slackened some of the erosion of congressional authority.⁷²

These factors help explain why checks and balances may fail when Congress must *defend* its institutional turf. But they do not suggest that checks and balances are operational when Congress *affirmatively authorizes* presiden-

65 See Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html (noting that “Senate Democrats took the dramatic step . . . of eliminating filibusters for most nominations by presidents”).

66 Bradley & Morrison, *supra* note 5, at 440.

67 *Id.* at 440–41.

68 *Id.* at 441.

69 See *id.* (“Madison and others envisaged a constitutional system in which the legislative and executive branches would be positioned and motivated to check each other effectively.”).

70 *Id.* at 442.

71 See, e.g., *id.* at 443; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2315–16, 2323, 2326–27, 2329–30, 2336–42, 2351–52 (2006) (reconceiving separation of powers as a separation not of branches but of influential political parties in which unified party control of the executive and legislature leads to cooperation, undermining the assumptions of the *Youngstown* framework); W.R. Mack et al., *Foreign Policy Votes and Presidential Support in Congress*, 9 FOREIGN POL’Y ANALYSIS 79, 91–92 (2013) (confirming that congressional “support for the [P]resident’s position” increases with the “number of seats held by the [P]resident’s party”).

72 Bradley & Morrison, *supra* note 5, at 444–45; see also Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 185, 267 (2009) (noting that change in the United States’ global role precipitated congressional delegation of authority to the President).

tial action.⁷³ Affirmative approval is different than inaction in that it involves overcoming the hurdles to lawmaking. But overcoming lawmaking hurdles does not necessarily produce legislation consistent with checks and balances.⁷⁴ Congress may affirmatively support the expansion of presidential power in contravention of checks and balances. Indeed, the risk that Congress might do so is particularly acute in the area of foreign affairs. Taking foreign affairs as the focus, the next Part illustrates how congressional authorizations may embody a failure of checks and balances.

IV. CONGRESSIONAL AUTHORIZATION AND THE FAILURE OF CHECKS AND BALANCES

Congressional authorization of presidential action is common in the foreign affairs arena. Recent political science research demonstrates that Congress tends to support the President more on international than domestic matters. Professors Mack, DeRouen, and Lanoue studied key congressional votes over the fifty-year period from 1953 to 2003 and found that the President received nine to ten percent more votes from the Senate and House on international issues—“foreign aid, defense spending, Vietnam, the United Nations, refugee issues, and international trade”—than on domestic ones.⁷⁵ Consistent with this phenomenon, Congress has also been more willing to delegate foreign affairs discretion to the President.⁷⁶

As highlighted above, the principal constitutional tests for evaluating the President’s foreign affairs power rely on these congressional authorizations. If these authorizations reflect failures of checks and balances, the constitutional tests that govern the separation of powers build on a problem that is particularly widespread in foreign affairs. And there are certainly reasons to believe that Congress authorizes foreign affairs actions by the President against institutional interest. Drawing largely on the social science literature, this Part identifies four interrelated⁷⁷ theories why Congress authorizes

73 Cf. Bradley & Morrison, *supra* note 5, at 444–45 (identifying the mass of modern legislative delegations to the President as inconsistent with checks and balances).

74 *But cf.* Sidak, *supra* note 51, at 67–69 (suggesting that the transaction costs of complying with constitutional lawmaking formalities decrease the prospect of Coasean bargains to shift power between the federal branches).

75 Mack et al., *supra* note 71, at 90, 91–92. *But cf.* Lee Sigelman, *A Reassessment of the Two Presidencies Thesis*, 41 J. POL. 1195, 1199–1205 (1979) (finding that, while the power pendulum undoubtedly swings, between 1957 and 1978, Congress supported presidential requests only slightly more in foreign versus domestic matters).

76 See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 197–206 (1999); Bryan W. Marshall & Richard L. Pacelle, Jr., *Revisiting the Two Presidencies: The Strategic Use of Executive Orders*, 33 AM. POL. RES. 81, 82, 94, 98 (2005).

77 John McGinnis’s institutional rational choice model of the actual operation of separation of powers illustrates how the proffered theories may interrelate. Under his model, separation of powers in practice results from “implicit bargains and accommodations” among the branches based on “the [branches’] interests and capacities.” John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 294 (1993). Con-

expanded presidential power in contravention of checks and balances.⁷⁸ The discussion includes concrete examples, or the results of empirical testing, that support these complementary models.

A. *Present, Political Incentives Theory*

Several of the reasons for Congress's failure to *defend* against presidential encroachment can also explain Congress's *affirmative authorization* of the expansion of presidential power.⁷⁹ Members of Congress care about reelection, which they face every two to six years.⁸⁰ Reelection concerns may lead them to focus on immediate gains that improve their political standing rather than the long-term institutional interests of Congress.⁸¹ Foreign pol-

gress's relative disadvantages in overseeing foreign affairs as well as members' interest in reelection, for example, may lead Congress to bargain away foreign affairs powers to the executive. *Id.* at 305–06. As this example demonstrates, in relying on both “interests and capacities,” *id.* at 294, McGinnis's model combines elements of the functionalist and present, political incentives theories. *See infra* Sections IV.A, IV.B. McGinnis departs from the present, political incentives theory, however, in describing members' interest in reelection as an institutional interest, rather than as an individual interest that may not align with Congress's institutional interest in preserving its power. *See* McGinnis, *supra*, at 306.

78 In so doing, this Part does not attempt to identify all the reasons why Congress might affirmatively delegate power to the President in violation of checks and balances, but to identify some of those reasons in order to illustrate the problem of relying on congressional delegations in defining the scope of presidential authority. Other reasons for delegation exist. For example, members of Congress might support a particular delegation on the hope that the Supreme Court will declare the delegation unconstitutional, thereby limiting similar, future delegations. *See* EPSTEIN & O'HALLORAN, *supra* note 76, at 229 (asserting that certain members of Congress voted for the line-item veto to obtain the benefits of having supported the innovation while expecting that the Supreme Court would declare the veto unconstitutional). Also rare, but possible, Congress might delegate authority to the President based on false information from the executive. *See* John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 888–91 & n.56 (1990) (discussing such arguments with regard to the infamous Gulf of Tonkin Resolution). For a discussion of other reasons why Congress might engage in delegation, see, for example, Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21–26, 32–37, 55–62 (1982); Levinson & Pildes, *supra* note 71, at 2356–64; Marshall & Pacelle, *supra* note 76, at 86.

79 *See* Brandice Canes-Wrone et al., *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 J. POL. 1, 6, 14 (2008) (noting that “first-mover advantages, informational differences, and electoral pressures” lead Congress through inaction and action to give power to the President).

80 *See, e.g.*, EPSTEIN & O'HALLORAN, *supra* note 76, at 9; Bradley & Morrison, *supra* note 5, at 442; Randall B. Ripley & James M. Lindsay, *Foreign and Defense Policy in Congress: An Overview and Preview*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 3, 12 (Randall B. Ripley & James M. Lindsay eds., 1993) [hereinafter CONGRESS RESURGENT].

81 *E.g.*, Barbara Sinclair, *Congressional Party Leaders in the Foreign and Defense Policy Arena*, in CONGRESS RESURGENT, *supra* note 80, at 207, 230 (noting that “[t]he dictates of protecting the prerogatives of the institution . . . can conflict with the dictates of furthering the members' immediate policy and election goals”).

icy questions generally do not promise immediate political gains. As Professors Epstein and O'Halloran assert, it is hard to channel benefits to constituents in the foreign policy arena, while "the risks of [making] ill-informed policy [are] great."⁸² Perhaps for the same reasons, voters tend not to focus on foreign policy in electing members of Congress. "[F]oreign policy is persistently a major factor in presidential elections," but "not as large a factor in congressional elections."⁸³ As one member of Congress said, "I have no constituency in foreign policy."⁸⁴ In this environment, congressional delegation of authority to a copartisan President can secure desirable foreign policy outcomes and allow members of Congress to benefit both from their copartisan President's successes and from the opportunity to concentrate on matters of greater concern to their voting constituents.⁸⁵ Moreover, the resulting harm to Congress's interests is divided among members of Congress and felt fully only in the future, rendering institutional harm a less weighty concern.⁸⁶

Congressional focus on reelection by constituents who, like members of Congress, may care more about immediate policy than long-term congressional victories may explain the massive expansion in the use of congressional-executive agreements. The United States enters international agreements of four types: Article II treaties (which require supermajority Senate approval); executive agreements pursuant to these Article II treaties; congressional-executive agreements (which involve congressional approval by

82 EPSTEIN & O'HALLORAN, *supra* note 76, at 203; *see also id.* at 213 (finding "that legislators are . . . less willing to [delegate discretion] in those areas where many competing groups vie for influence"); Marshall & Pacelle, *supra* note 76, at 86 (noting that "in the realm of foreign policy, where constituency concerns tend to be far removed, Congress has a great incentive to delegate its authority to the executive").

83 Canes-Wrone et al., *supra* note 79, at 5 (citing research to this effect). Relatedly, interest groups, who both help Congress overcome information deficits and influence voters, are less numerous in the foreign, versus domestic, policy sphere. *See id.* at 5–6.

84 STEPHEN R. WEISSMAN, *A CULTURE OF DEFERENCE* 14 (1995) (quoting Oklahoma Congressman Dave McCurdy) (internal quotation marks omitted); *see* Ripley & Lindsay, *supra* note 80, at 12 (noting "that constituents often do not follow foreign affairs").

85 *See* Bradley & Morrison, *supra* note 5, at 442–43 (noting that members of Congress have incentives to focus on matters of concern to their constituents and avoid tarnishing their party label by attacking a co-partisan President); Canes-Wrone et al., *supra* note 79, at 6 (asserting that "members [of Congress] have reason to delegate [foreign policy] decisions" "[s]ince foreign policy is not as large a factor in congressional elections as is domestic policy"). Delegation on domestic matters may occur for the same reason—to permit members of Congress to focus on "errands" that constituents care most about. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131 (1980) (noting that "[m]uch of the typical representative's time is consumed, not with considering legislation, but rather with running errands (big and small) for his or her constituents").

86 *See* Bradley & Morrison, *supra* note 5, at 440 (stating that "each individual member [of Congress] has relatively little incentive to expend resources trying to . . . defend congressional power, since he or she will not be able to capture most of the gains"); Hathaway, *supra* note 72, at 185 (noting how cumulative delegations that may be relied on increasingly as times change sacrifice "the power of congresses twenty, thirty, and fifty years later").

simple majority in each house); and sole executive agreements (which are made by the President independent of Congress).⁸⁷ The congressional-executive agreement is by far the most common. Between 1980 and 2000, for example, the United States entered approximately 375 Article II treaties and roughly 3,000 congressional-executive agreements.⁸⁸ The vast majority of congressional-executive agreements were negotiated and concluded by the President based on an *ex ante* authorization from Congress.⁸⁹ Professor Hathaway asserts that the growth in *ex ante* delegations of authority for the President to enter executive agreements resulted in part from incremental delegations to Presidents of the same party that freed members to focus on more pressing constituent interests.⁹⁰ Of course, such delegations harmed Congress institutionally, but the harm from any particular delegation was spread among members and the aggregate felt fully only by future Congresses.⁹¹

B. *Functionalist Theory*

Functionalist reasoning may also induce Congress to empower the President to take actions in foreign affairs. The demands of foreign relations are great. As indicated, between 1980 and 2000, the United States entered thousands of international agreements,⁹² and entering agreements is only a portion of what is required by foreign affairs. It would be demanding for Congress to participate enthusiastically in all these activities. Moreover, foreign affairs are generally perceived as complex and unpredictable.⁹³ The President is arguably better suited to handle these extensive and shifting demands.⁹⁴ As has been recognized since the Founding, the President, in

87 See U.S. CONST. art. II, § 2, cl. 2; 11 FOREIGN AFFAIRS MANUAL § 723.2 (2006); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 & cmt. a (1987); Hathaway, *supra* note 29, at 1239, 1254–55.

88 Hathaway, *supra* note 29, at 1258, 1260 & n.53.

89 See *id.* at 1256.

90 Hathaway, *supra* note 72, at 145–46, 184–85. The transfer of authority was compounded by the Supreme Court’s decision in *INS v. Chadha*, 462 U.S. 919 (1983), invalidating the legislative veto as a method of congressional oversight, and by Congress’s subsequent decisions to continue prior delegations without legislative vetoes. Hathaway, *supra* note 72, at 194–205. *But cf.* McGinnis, *supra* note 78, at 322–23 (noting how the President and Congress may skirt *Chadha* by agreeing, outside of legislation, to legislative vetoes); Sidak, *supra* note 51, at 65 (same).

91 See Hathaway, *supra* note 72, at 146, 185.

92 See *supra* note 88 and accompanying text.

93 See, e.g., *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (noting that foreign policy decisions “are delicate, complex, and involve large elements of prophecy”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (describing foreign affairs as a “vast external realm, with . . . important, complicated, delicate and manifold problems”).

94 See, e.g., Sinclair, *supra* note 81, at 230 (noting that the argument “that a united front is essential in a dangerous world” is every “[P]resident[’s] favorite argument for congressional deference to executive leadership”).

comparison to Congress, is better able to act quickly, uniformly, with secrecy, and based on information gathered from far-flung diplomatic and military agents.⁹⁵ The functional advantages of executive leadership in foreign affairs, especially in times of crisis,⁹⁶ have led members of Congress⁹⁷ to delegate foreign affairs authority to the President.⁹⁸ These delegations have often included significant discretion in light of the unpredictability of for-

95 See, e.g., *Curtiss-Wright*, 299 U.S. at 320–21 (discussing functional advantages of the President in conducting foreign affairs); Canes-Wrone et al., *supra* note 79, at 3–6 (discussing the President’s informational advantage which motivates “Congress to delegate foreign policy authority to the [P]resident”); David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 626–28 (2012) (discussing the Founding-era decision to include the President in, and exclude the House of Representatives from, treaty-making given presidential functional advantages not possessed by the House). *But cf.* Hathaway, *supra* note 72, at 230–39 (arguing that the President’s purported advantages in international lawmaking are overcome by other considerations, including the need for political support for implementation of international commitments, the fact that the nation’s interest may be better served by a constrained negotiator, and the President’s potential lack of information about American citizens’ interests).

96 See, e.g., James M. Lindsay, *Congress and Foreign Policy: Why the Hill Matters*, 107 POL. SCI. Q. 607, 611 (1992) (noting that “the inherent advantages of the presidency . . . are greatest in national security affairs, and especially in crisis situations”); James M. Scott & Ralph G. Carter, *The Not-So-Silent Partner: Patterns of Legislative–Executive Interaction in the War on Terror, 2001–2009*, 15 INT’L STUDS. PERSP. 186, 193–203 (2014) (asserting, and confirming through a case study of executive-legislative relations post-9/11, that crisis tends to generate legislative support for the executive that may erode into competition and confrontation). This Article provides structural reasons (designed to protect individual liberties) for skepticism of the consensus of crisis; that skepticism is shared by civil libertarians as well. See, e.g., David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1229–30, 1345, 1349–50 (2008) (discussing how emergency generates consensus that threatens the civil liberties of minority groups).

97 The public similarly views the President “as the leader in foreign and defense policy,” which may explain why congressional support for presidential positions increases when the public perceives “international issues as the most important problems facing the country.” Mack et al., *supra* note 71, at 84, 92; see also Lindsay, *supra* note 96, at 612 (noting that members of Congress try to avoid being blamed by a public that tends to “believe[] in the need for strong presidential leadership”).

98 See, e.g., JOHN ROURKE, CONGRESS AND THE PRESIDENCY IN U.S. FOREIGN POLICYMAKING 203 (1993) (endorsing the view of many scholars that Congress delegated foreign affairs authority to the President on the conviction “that legislative bodies are inherently ill-suited to deal with foreign policy in the modern age”); Canes-Wrone et al., *supra* note 79, at 4 (“Aware of their institution’s deficiencies, members of Congress often grant the [P]resident considerably more authority, funding, and administrative power in foreign than domestic affairs.”); cf. Sinclair, *supra* note 81, at 207, 209 (noting that during World War II and immediately thereafter party leaders in Congress were loyal to the President, even if of a different party, on the “perception that in a dangerous world the [P]resident must and does play the dominant role” in foreign affairs). These same functional considerations may lead judges to uphold broad delegations in the area of foreign affairs. See, e.g., Aranson et al., *supra* note 78, at 18–19.

ign relations.⁹⁹ Indeed, as Professors Epstein and O’Halloran found, foreign policy statutes rank among the statutes authorizing the highest levels of executive discretion.¹⁰⁰

Epstein and O’Halloran likewise found support for the functionalist explanation for these authorizations. The two hypothesized “that the more informationally intense a [congressional] committee’s issue area, the more discretionary authority is delegated to the executive in bills emerging from that committee.”¹⁰¹ Measuring the complexity of issues handled by a committee by reference to “the average number of hearings” the committee holds as well as “the average number of oversight hearings,” “the average percent of oversight hearings,” and “the scope of [the] committee’s issue domain,”¹⁰² Epstein and O’Halloran found that issue complexity correlates with the level of delegation to the executive.¹⁰³ At the same time, committees conduct oversight of delegated authority.¹⁰⁴ As a result, members of Congress do not appear merely to be avoiding complex issues (as continuing oversight requires the development of some expertise) or responsibility for adverse consequences in policy areas under their jurisdiction (which might motivate delegation without oversight).¹⁰⁵ Legislators are arguably taking advantage of the executive’s relative competence to deal with complex issues of the sort common in foreign affairs, which may make sense from a functionalist, but not checks and balances, perspective.¹⁰⁶

C. *Collective Action Theory*

Collective action problems may also motivate congressional authorizations of presidential power. As previously noted, Congress faces a collective

99 See *Curtiss-Wright*, 299 U.S. at 321–22 (noting that foreign relations requires a greater degree of statutory discretion than domestic affairs); James M. Lindsay & Randall B. Ripley, *How Congress Influences Foreign and Defense Policy*, in CONGRESS RESURGENT, *supra* note 80, at 17, 23 (noting that “[i]n passing legislation, Congress typically delegates tremendous power to the executive branch . . . on the grounds that the [P]resident needs flexibility when conducting foreign affairs”).

100 EPSTEIN & O’HALLORAN, *supra* note 76, at 197–206.

101 *Id.* at 206.

102 *Id.* at 207 (emphasis omitted).

103 See *id.* at 213, 230. More specifically, the “number of hearings, number of oversight hearings, and issue scope . . . each [had] a tangible substantive impact on discretion as well as a statistically significant one.” *Id.* at 213. “[T]he percentage of oversight hearings” correlated positively with discretion, but the correlation was not statistically significant. *Id.*

104 *Id.* at 213.

105 See *id.* at 213, 216.

106 See *id.* at 216, 218 (finding, when analyzing the correlation between complexity and delegation to the executive by issue category, some support for the conclusion that “Foreign Policy Resolutions” involved the delegation of more discretion). *But cf. id.* at 237–38 (arguing that delegation checks the power of legislative committees in the legislative process and thereby protects individual liberty); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326–27 (2000) (questioning whether limits on delegation truly serve liberty interests).

action problem in defending its institutional prerogatives from presidential encroachment.¹⁰⁷ Individual members receive only a fraction of the benefit from defensive efforts, with much of the benefit accruing in the future, and therefore lack incentive to protect the institution.¹⁰⁸ Collective action problems likewise lead to affirmative transfers of authority to the President. For example, in situations in which each member of Congress has an incentive to secure a particular benefit for her state or district, Congress might engage in political logrolling to the detriment of the United States as a whole.¹⁰⁹ To avoid this result, Congress might delegate to the President discretion to distribute benefits.¹¹⁰ The President, whose constituency is national, will then make decisions that leave the nation and perhaps members of Congress, but not Congress's institutional power share, better off than under the logrolling scenario.¹¹¹

Trade policy illustrates.¹¹² Assuming that the nation as a whole benefits from liberal trade, individual members of Congress may be motivated to secure the benefits of liberal trade generally but to protect industries located in their states or districts by way of exception.¹¹³ Pursuit of these motivations might result in logrolling that yields a protectionist policy detrimental to the whole.¹¹⁴ Authorizing the President to draw the boundaries of protection subverts these fragmented motivations and produces a policy that is more beneficial nationally.¹¹⁵ Upon delegation, members of Congress and/or their constituents might still lobby the President for protection while enjoying the benefits of free trade in products produced in other states or

107 See *supra* text accompanying note 67.

108 See *supra* text accompanying note 86.

109 See EPSTEIN & O'HALLORAN, *supra* note 76, at 222–23, 230; Susanne Lohmann & Sharyn O'Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 INT'L ORG. 595, 598–99 (1994).

110 See EPSTEIN & O'HALLORAN, *supra* note 76, at 223; Lohmann & O'Halloran, *supra* note 109, at 599.

111 See, e.g., Lohmann & O'Halloran, *supra* note 109, at 599. *But see* Jide Nzelibé, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 122–23 (2006) (arguing that the notion of a consistently nationalist President and parochial Congress crumbles when the focus shifts from individual members of Congress to the median member and when the consequences of presidential election through the electoral college are considered).

112 For an example from tax policy, see EPSTEIN & O'HALLORAN, *supra* note 76, at 228–29.

113 See Lohmann & O'Halloran, *supra* note 109, at 598–99 (stating that “each individual member [of Congress] weighs the marginal benefits and cost for his or her own district when proposing a trade policy measure, but ignores the negative externalities” imposed nationally).

114 *Id.*

115 Lohmann and O'Halloran posit that the delegation will be more constrained in cases of divided government to minimize the President's use of discretion to benefit districts or states supporting the President's party. *Id.* at 599–600.

districts.¹¹⁶ And members of Congress, through the delegation, may both escape interest group pressure and avoid blame for distributional decisions adverse to constituents.¹¹⁷

The collective action theory may explain the difference in the nature of the 1930 Smoot-Hawley Tariff Act and the 1934 Reciprocal Trade Agreements Act (RTAA).¹¹⁸ The Smoot-Hawley Act was a product of congressional logrolling; it “revised tariffs on 3,221 items” and produced “the highest tariff rates of the twentieth century.”¹¹⁹ By contrast, the RTAA secured more liberal trade by authorizing “the president to unilaterally cut tariff levels by up to 50 percent in bilateral negotiations with other countries.”¹²⁰

Of course, presidential decisionmaking will not necessarily be superior; Congress might yet produce the better policy outcome.¹²¹ Furthermore, the Constitution may assign the particular question to Congress. The Constitution, for example, explicitly grants Congress the power “[t]o regulate Commerce with foreign Nations.”¹²² The Supreme Court has described this

116 See A QUESTION OF BALANCE 26–27 (Thomas E. Mann ed., 1990) (noting that congressional delegation of trade authority to the President after the Smoot-Hawley Act helped liberalize trade while allowing members of Congress to clamor for protection for the industries in their state or district).

117 See, e.g., *id.* at 26–27, (characterizing Congress’s post-Smoot-Hawley Act delegation of trade authority to the President as motivated by a desire to avoid “domestic political pressure for trade restrictions”); ELY, *supra* note 85, at 131–32 (noting the blame-shifting motivation behind delegation); EPSTEIN & O’HALLORAN, *supra* note 76, at 32–33 (citing both support for and arguments in tension with the blame-shifting thesis); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 4, 8–9, 14, 55 (1993) (noting the blame-shifting motivation behind delegation); Aranson et al., *supra* note 78, at 7, 56–57 (same). *But cf.* Lohmann & O’Halloran, *supra* note 109, at 598 (developing a collective action model of delegation that does not rely on “the desire . . . to shift . . . blame”).

118 See EPSTEIN & O’HALLORAN, *supra* note 76, at 223; see also Jide Nzelibe, The Myth of the Free Trade Constitution 1–2 (unpublished paper) (on file with author) (describing the collective action view of the RTAA as the conventional narrative). *But see id.* at 1–11 (arguing that legislative delegations to the President have been made to favor both protectionist and free trade policies, that the RTAA was the product of interest group politics not an effort to avoid the same, and that the RTAA reduced the discretion of protectionist Presidents); Nzelibe, *supra* note 111, at 1270–71 (arguing that the RTAA resulted from congressional desire to benefit exporters in ways that Congress could not do alone because it lacks power to negotiate reductions in foreign import barriers).

119 EPSTEIN & O’HALLORAN, *supra* note 76, at 223.

120 *Id.*

121 See Nzelibe, *supra* note 111, at 1222 (“argu[ing] that the collective wisdom of [Congress’s] parochial legislators will often produce policy outcomes that are more national and public-regarding than those produced by any single elected official”); *id.* at 1245 (noting that congressional logrolling itself may produce “more efficient or public-regarding legislation”); *id.* at 1273 (noting that “in the international trade context, Congress often plays a key role in mobilizing the right kinds of interest groups against the wrong ones, thus making public-regarding policies politically sustainable”).

122 U.S. CONST. art. I, § 8, cl. 3.

power as “plenary,” “complete,” “exclusive and absolute,”¹²³ and has recognized congressional supremacy over the executive in foreign commerce.¹²⁴ Congressional authorization of presidential action in foreign commerce alters this hierarchy as a practical matter, elevating the President arguably because the interests of members of Congress do not align with those of their institution as contemplated by checks and balances.

D. *Societal Conflict Theory*

Not only might Congress, on the theories developed above, shift power to the President by statute, but Congress may attempt to alter constitutional understanding to the President’s advantage. The notion that Congress would not intentionally shift constitutional power relies on the assumption that partisan actors ultimately lack the incentive or ability to undermine checks and balances to their benefit.¹²⁵ This assumption has traction when it comes to the distribution of constitutional powers generally. It is widely believed that politicians cannot predict how shifts in the distribution of constitutional power will affect long-term political outcomes and that they therefore refrain from trying to adjust the distribution.¹²⁶

Whatever the merits of this belief generally, Jide Nzelibe has recently argued that the distribution of foreign affairs powers can be, and is, manipulated by politicians representing societal interest groups.¹²⁷ The Constitution’s foreign affairs powers are more susceptible to partisan manipulation than other constitutional powers for two reasons.¹²⁸ First, judicial doctrine governing foreign affairs powers is relatively sparse and indeterminate, leaving room for interpretation.¹²⁹ Relatedly, courts are sometimes reluctant to

123 *Buttfield v. Stranahan*, 192 U.S. 470, 492–93, 496 (1904). *But cf. id.* at 496–97 (upholding a delegation of authority to the Secretary of the Treasury to execute statutory policies relating to foreign commerce).

124 *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 324–31 & nn.22, 30 & 32 (1994) (refusing to preempt a state law regulating foreign commerce, notwithstanding both executive and foreign opposition to the law, because Congress manifested a “willingness to tolerate” the law, and Congress, not the executive, is the nation’s voice in foreign commerce). *But cf. id.* at 328–30 & nn.30 & 32 (recognizing both that executive opposition to the state law was not constant, and that “Congress may ‘delegate very large grants of its power over foreign commerce to the President’” (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948))).

125 *See* Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 MINN. L. REV. 838, 905 (2013).

126 *See id.* at 839, 854–55.

127 *See id.* at 839, 855.

128 *See id.* at 841–42.

129 *Id.* at 841, 856–57; *see* McGinnis, *supra* note 77, at 300, 305 (noting that the absence of clear constitutional guidance concerning certain foreign affairs powers leaves room for “implicit bargaining and accommodation among the branches”).

adjudicate foreign affairs disputes, reducing the threat that the judiciary will upend any particular partisan interpretation.¹³⁰

Second, foreign affairs powers and processes tend to be more discrete and therefore can be manipulated to achieve specific policy ends.¹³¹ When the same constitutional power or process is used to address a wide range of policy issues, it is difficult to manipulate the power or process to partisan advantage.¹³² For example, the legislative process is used to address such diverse issues as gun control, welfare benefits, drug trafficking, and immigration.¹³³ It is unclear how the process could be altered in a way that would increase the probability of liberal or conservative outcomes across these issue areas.¹³⁴ In the foreign affairs context, these hurdles are reduced. The power and process of making war, for example, are distinct in many ways from the power and process of making treaties.¹³⁵ And manipulation of these powers and processes can secure more consistently liberal or conservative outcomes.¹³⁶ Increased executive power over war making, for example, is likely to produce more hawkish, or (nowadays)¹³⁷ conservative, military outcomes.¹³⁸ A presumption in favor of treaty self-execution—rendering more treaties immediately enforceable in U.S. courts—would promote U.S. compliance with international law, including left-leaning international human rights.¹³⁹ The result is that societal conflicts over foreign policy may incentivize the political branches to adopt particular visions of the distribution of constitutional foreign affairs powers. Or, to state it another way, partisan politics incentivize the alteration of constitutional checks and balances in the area of foreign affairs. As a result, judicial reliance on congressional

130 Nzelibe, *supra* note 125, at 841. *But cf.* *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1426–27, 1430 (2012) (concluding that a disagreement between the President and Congress concerning Jerusalem’s status as Israel’s capital did not pose a political question).

131 *See* Nzelibe, *supra* note 125, at 841–43, 856.

132 *See id.* at 841–42.

133 *See id.* at 841–42 & n.10.

134 *See id.* at 841–42.

135 *See id.* at 842–43.

136 *See id.*

137 *See id.* at 845, 874–77, 880, 883 (noting that Democrats were “the war party during the 1950s”).

138 *See id.* at 840–42; *see also id.* at 845, 870–99 (discussing—through the lens of the societal conflicts model—post-World War II struggles over war powers, including recent examples that arguably depart from the model’s predictions). This does not mean that conservatives will inevitably favor an expansive executive war-making power, as such a power might, for example, yield a tax burden felt disproportionately by business and the wealthy. *See id.* at 845, 871, 877, 879–80, 886, 899.

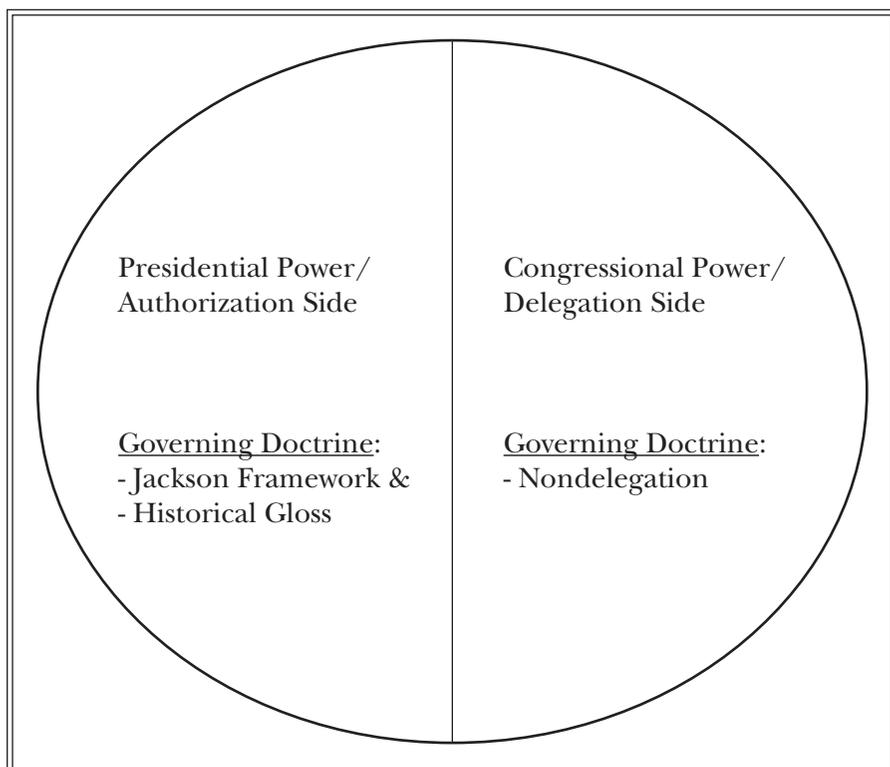
139 *See id.* at 842–43; *cf. id.* at 861–70 (discussing post-World War II debates regarding “human rights treaties and customary international law” through the lens of the societal conflict model). This statement is decidedly hypothetical as the Court in *Medellín* endorsed a broad notion of non-self-execution rather than a presumption in favor of self-execution. *See, e.g.,* David H. Moore, *Medellín, the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT’L L. 485, 488–91 (2010).

authorization, or Congress's constitutional perspective, to find presidential power raises serious checks and balances concerns.

V. A COUNTER-CONCERN: THE NONDELEGATION DOCTRINE

Yet reliance on congressional authorization to find presidential power is arguably uncontroversial from a closely related angle. As suggested by Figure 1, evaluation of presidential power by reference to congressional approval is only one side—what I term the presidential power or authorization side—of a single issue: the distribution of power between Congress and the President. On the presidential power side of this issue, the relevant question is whether the President may constitutionally take a challenged action. Jackson's framework and Frankfurter's historical gloss look to congressional authorizations to guide the answer. On the other side—the congressional power or delegation side—the question is whether Congress may constitutionally delegate power to the executive.¹⁴⁰ The answer on this side is governed by the largely toothless nondelegation doctrine.

FIGURE 1



140 See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.”).

Under the nondelegation doctrine, Congress must provide “an intelligible principle to which the person or body authorized to [act] is directed to conform,” but the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹⁴¹ If the doctrine were not anemic enough, the Court has held that delegation faces even less restraint when the President has independent power relating to the issue delegated, a common scenario in foreign affairs especially under an expansive view of presidential foreign affairs power.¹⁴²

Foreign affairs delegations might also be subject to reduced scrutiny under a foreign affairs exceptionalism that derives from the need for discretion to respond to foreign affairs exigencies. In *Curtiss-Wright*, the Court found that a delegation that might be invalid “if it were confined to internal affairs” was constitutional because it addressed foreign affairs which require greater presidential discretion.¹⁴³ There are reasons to believe, however, that this exceptionalism has lost some of its vitality. First, while Justice Jackson categorized the delegation in *Youngstown* as a domestic one, Jackson’s framework applies to both foreign and domestic authorizations and trimmed the broad view of executive power expressed in *Curtiss-Wright*.¹⁴⁴ Second, the distinction between foreign and domestic has faded such that delegations related to foreign affairs may also have significant domestic impact and may

141 See *id.* at 472, 474–75 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) (alteration in original). Indeed, the Court has not struck a legislative delegation to the executive on nondelegation grounds since 1935, although there have been opportunities to do so. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 55–56 (2010); Sunstein, *supra* note 106, at 318–19. The Court has cited the doctrine to support more narrow statutory interpretations that avoid nondelegation concerns. See *Indus. Union Dep’t., ALF-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974); *Aranson et al.*, *supra* note 78, at 12–13.

142 See *Loving v. United States*, 517 U.S. 748, 772–73 (1996).

143 See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315, 319–22, 329 (1936); see also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (citing *Curtiss-Wright*, 299 U.S. at 324, for this proposition).

144 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2, 642, 644 (1952) (Jackson, J., concurring) (noting the internal nature of the presidential action in question); *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (explaining that “Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in [the foreign affairs] area”); *infra* text accompanying notes 164–73 (discussing how *Youngstown* stands as a counterpoint to *Curtiss-Wright*’s broad view of executive power). *But cf.* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (stating, post-*Youngstown*, that “because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas,” though “[t]his does not mean that . . . it can grant the Executive totally unrestricted freedom of choice”).

best be treated like domestic delegations.¹⁴⁵ Third, with the development of international law and organizations as well as the accessibility of foreign information, foreign affairs arguably are more predictable than they once were, such that the President may not need the high level of discretion previously required.¹⁴⁶

If, for these reasons, foreign affairs delegations no longer qualify for exceptional treatment, they nonetheless remain governed by the very lax nondelegation doctrine that controls analysis on the congressional power side. Under this doctrine, delegation is always (or nearly always) acceptable.

There is no question that the motivating insight of this Article—that congressional authorizations may reflect a failure of checks and balances—has implications for both sides of the congressional-executive relationship. Although not the focus of this Article, on the congressional power side, this insight counsels in favor of a more robust nondelegation doctrine. Counter-intuitively, this may be especially true in the area of foreign affairs, where Congress delegates more readily and completely, where (as the “present, political interests” and “societal conflict” theories suppose) the failure of checks and balances may be particularly acute, and where vague notions of presidential power lead to uncritical findings of constitutionality.¹⁴⁷ To the extent that the nondelegation doctrine found new life generally or in the foreign affairs context in light of the failure of checks and balances, there would be ample room to argue for less unthinking reliance on congressional authorization on the presidential power side as well.

But there need be no revival of the nondelegation doctrine for there to be greater scrutiny of congressional authorizations on the presidential power side. Notwithstanding “the familiar refrain” “that the nondelegation doctrine is dead,” Cass Sunstein has documented that the doctrine survives in certain canons of statutory construction which he terms “nondelegation canons.”¹⁴⁸ The Court does not enforce the nondelegation doctrine given the operational difficulty of identifying when a delegation transfers too much discretion,¹⁴⁹ but concerns underlying the doctrine remain influential and have spawned canons that are easier for courts to administer. For example, courts invoke canons that agencies may not apply U.S. law extraterritorially, retroactively, or in ways that raise significant constitutional questions absent

145 See Hathaway, *supra* note 72, at 218 (noting the blurring of foreign and domestic).

146 See David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1029 (2014). These two considerations may also undermine the related principle that the need for judicial deference to “a consistent administrative construction of [a] statute” is particularly compelling in the arena of foreign affairs, given the volatility of that arena. *Haig v. Agee*, 453 U.S. 280, 291–92 (1981).

147 *But cf.* Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 124–39 (2002) (arguing that there is no reason to interpret delegations of foreign affairs authority more circumspectly than delegations of domestic power).

148 Sunstein, *supra* note 106, at 315–16; *see id.* at 315–17, 328, 330–42; *see also* Loshin & Nielson, *supra* note 141, at 20–23, 53, 57–61, 68 (identifying an additional nondelegation canon).

149 See Magill, *supra* note 59, at 1193; Sunstein, *supra* note 106, at 321, 326–27, 338.

clear congressional authorization.¹⁵⁰ In a similar vein, even if the nondelegation doctrine remains weak on the congressional side of the issue, the active concerns underlying the doctrine might be realized through greater skepticism of congressional authorization on the subtly different presidential power side.

As noted the key question asked, and the corresponding role played by congressional authorization, are slightly different on the presidential side than on the congressional side of the congressional-executive relationship.¹⁵¹ This was not always the case. In *Curtiss-Wright*, notwithstanding a brief detour on presidential power for which the opinion has become so famous,¹⁵² the focus was on the constitutionality of the congressional delegation at issue. Both the parties and the Court concentrated on whether the delegation was valid, thus approaching the case from the congressional perspective.¹⁵³ Justice Jackson's opinion in *Youngstown*, by contrast, concentrated on the scope of presidential power, approaching the case from the presidential side.¹⁵⁴ *Dames & Moore* did so as well, asking whether "the actions of the President . . . implementing [an] Agreement with Iran were beyond [the President's] statutory and constitutional powers" and concluding that the President acted constitutionally in light of congressional authorization or acceptance.¹⁵⁵

As these two opinions illustrate, from the presidential power perspective, the Court does not now ask whether delegations to the President are *constitutional*. Rather, the Court asks whether authorization for the President's acts *exists*. Arguably, on the presidential power side, the Court is simply deferring to congressional judgments about what the President should be able to do in foreign affairs.¹⁵⁶ The Court does not question the propriety of the authori-

150 See Sunstein, *supra* note 106, at 315–17, 328, 330–36, 338, 342.

151 Cf. Bellia, *supra* note 147, at 139 (noting the difference between searching for implied congressional intent under Justice Jackson's framework and applying "ordinary delegation principles").

152 See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21 (1936).

153 See *id.* at 306–11, 314–15, 319–29.

154 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). *But cf. id.* at 636 n.2 (describing *Curtiss-Wright* as a category-one presidential power case where the authorizing statute was challenged as an improper delegation of congressional authority).

155 See *Dames & Moore v. Regan*, 453 U.S. 655, 654, 667, 674, 677–88 (1981).

156 See, e.g., *id.* at 668 (noting that in Justice Jackson's category two, "the validity of the President's action . . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action"); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of . . . foreign relations.'" (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring))). One might argue that Justice Frankfurter's approach leads to a constitutional conclusion about the scope of presidential powers, while Justice Jackson's analysis leads merely to a statutory conclusion. See Bellia, *supra* note 147, at 144. Yet it is not clear that the two approaches can be distinguished so easily. Both may rely on express congressional authorizations. Justice Frankfurter's approach requires

zation, even under lax delegation standards, but simply cites the authorization to find the President's actions constitutional.

Taking congressional authorization as evidence of constitutional structure gives too much credit to Congress's actions. Congressional authorizations may not reflect a constitutional judgment on Congress's part, much less a good-faith, neutral judgment of the sort that one might hope for in constitutional interpretation. As explained above, an authorization might be evidence of Congress's sense of the functionally ideal distribution of authority or of how to solve collective action problems,¹⁵⁷ but it is far from clear that Congress's sense on such issues is a constitutional one, or should control constitutional interpretation. To illustrate, functionalism may not be the appropriate, or at least the sole, consideration in deciding the constitutional question. To be sure, the Framers were influenced by functional considerations in allocating foreign affairs authority.¹⁵⁸ For example, they sought to obtain the functional advantages that a unitary President could bring to treaty-making.¹⁵⁹ Yet they balanced those functional benefits against concerns for the concentration of power and thus did not assign treaty-making to the executive alone.¹⁶⁰ As a result, Congress's functional judgment in any particular delegation may contravene other judgments embedded in the Constitution. Similarly, congressional authorization that is wrought to solve collective action problems should not control the separation of powers where, for example, the delegation produces an increased threat to the individual rights protection that separation of powers is designed to secure. Nor should congressional interests in reelection control the contours of constitutional structure. In short, congressional authorizations or constitutional perspectives should not be given dispositive weight in the constitutional calculus when they reflect the many reasons Congress might act outside the system of checks and balances.¹⁶¹ Consequently, even though the nondelegation doc-

more extended proof of Congress's position, but the requirement of more extensive proof does not change the target of the proof. And if proof of congressional approval establishes constitutionality in one context, it is not clear that it does anything less in the other. Accordingly, it seems fair to say that under both approaches, the Court is relying on Congress for constitutional judgments about the propriety of challenged presidential action.

157 See *supra* Sections IV.B–C.

158 See *supra* note 95 and accompanying text.

159 See Moore, *supra* note 95, at 627.

160 See U.S. Const. art. II, § 2, cl. 2; Moore, *supra* note 95, at 627.

161 See John O. McGinnis, *Is Judicial Deference Part of the Originalist Method?* 7–9 (Oct. 27, 2014) (unpublished manuscript) (on file with author) (arguing that, under an epistemic view of judicial deference, courts should only defer to the political branches' judgment that legislation is constitutional "if the political branches have actually deliberated on the constitutional issues"); *id.* at 48 (noting that the original understanding of judicial deference to the legislature did not vary with degree of deliberation, but also does not "rule[] out considering the amount of deliberation" today). This conclusion is in tension with the highly deferential version of judicial review endorsed by James Thayer. In Thayer's view, courts should not strike a statute as unconstitutional unless the unconstitutionality of the law "is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144, 148 (1893). Thayer's

trine has floundered on the congressional power side of the analysis, there are reasons and room on the presidential power side for a different approach to judicial review.

VI. IMPLICATIONS FOR FUTURE JUDICIAL REVIEW

The realization that congressional authorizations of presidential conduct may result from the failure of checks and balances has significant implications for judicial review of presidential power.

A. *Undermining Existing Precedent*

The insight immediately calls into question the Supreme Court's most prominent approaches for determining the constitutionality of presidential conduct: Justice Jackson's tripartite paradigm and reliance on historical gloss. Interestingly, *Youngstown* is often hailed as a strong checks-and-balances opinion. Justice Kennedy, for example, described *Youngstown* as a case "preserving separation of powers and checks and balances."¹⁶² Similarly, commentators have described Justice Jackson's particular opinion as "the very cornerstone of the anti-unilateral-power, checks and balances approach," an approach that permits "overlapping, concurrent jurisdictions among the branches" while seeking "to ensure that no one branch is vested with too much unilateral power."¹⁶³ Certainly, there is truth in these assertions.

position relies on the following postulates: the legislature has the initial and final power to make constitutional decisions unless and until a lawsuit is brought, *id.* at 135–38; the courts have long endorsed this limited form of judicial review, *id.* at 138–42, 144–46, 151, 155; the legislature is a co-equal branch to which should be ascribed "virtue, sense, and competent knowledge," *id.* at 149–50, 154–55; and a more aggressive review would involve the courts in exercising the legislative power and impair the functioning of the government, *id.* at 140, 150, 152, 156. Even Thayer, however, recognized that legislators might leave constitutional questions to the courts and need to be reminded of their constitutional duties. *See id.* at 155–56. At a minimum, the various reasons identified in this Article why Congress may legislate power to the President weaken confidence that Congress will engage in thoughtful constitutional analysis meriting the sort of deference Thayer endorses. For a critique of Thayer's work as "a product of the jurisprudence of his time rather than that of the Founding period," see McGinnis, *supra*, at 6, 49–52, 61.

162 United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

163 H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on the Line Item Vetoes and Separation of Powers*, 42 DUKE L.J. 1171, 1202, 1207 (1998); *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 62 (2002) ("Despite the numerous opinions issued in *Youngstown* upholding the importance of a system of checks and balances, Justice Jackson's concurrence may have been the most important."); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1921, 1962, 1969, 1971, 1974, 1977 (2012) (celebrating the Supreme Court's post-9/11 use of *Youngstown* to promote congressional involvement, and resist executive unilateralism, in national security).

Youngstown stands as a counterpoint to the Court's decision in *Curtiss-Wright*.¹⁶⁴ The Court in *Curtiss-Wright* recognized a role for Congress in foreign affairs. Indeed, the case concerned the constitutionality of a congressional delegation of authority to the President.¹⁶⁵ Yet the Court spoke broadly of both the federal government's and the President's foreign affairs powers.¹⁶⁶ The President, the Court said, possesses a "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."¹⁶⁷ Moreover, Congress can and must be able to delegate to the President with the breadth and discretion that foreign affairs demand.¹⁶⁸ The opinion in *Curtiss-Wright* is so favorable to executive authority that "it has come to be known as the [executive's] *Curtiss-Wright*, so I'm right cite."¹⁶⁹

Youngstown, by contrast, highlighted separation of powers limitations on the President's power. The majority opinion, for instance, stated that "[t]he President's power, if any, to issue the [seizure] order [in question] must stem either from an act of Congress or from the Constitution itself."¹⁷⁰ Similarly, Justice Jackson in concurrence grounded his tripartite regime on the observation that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."¹⁷¹ Congressional disapproval can check presidential action and render it unconstitutional in areas of shared authority.¹⁷² And the courts have a role in policing the separation of powers.¹⁷³ Consistent with these separated powers sentiments, Jackson went so far as to recognize some of the factors that threaten checks and balances: "The tendency . . . to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic,"¹⁷⁴ the President's special standing as a nationally elected figure in whom the public rests its "hopes and expectations," the President's "access to the public mind through modern methods of communications," and the "rise of the party system" that extends the President's power "into branches of government other than his own" and enables him to "win, as a political leader, what he cannot command under the Constitution."¹⁷⁵

164 *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

165 *See id.* at 314, 319–20.

166 *See id.* at 315–21.

167 *Id.* at 320.

168 *See id.* at 320–22.

169 KOH, *supra* note 44, at 94 (internal quotation marks omitted).

170 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

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

172 *See id.* at 637–38.

173 *See id.* at 638, 654–55.

174 *Id.* at 634. While Justice Jackson recognized this tendency, he noted its applicability to the judiciary and executive, not Congress. *See id.*

175 *Id.* at 653–54.

Yet Jackson's opinion did not fully consider the import of these checks and balances threats for the tripartite scheme. When it comes to reliance on congressional authorization, the checks and balances which Justice Jackson invokes can be more formal than real. Completion of the constitutional law-making process may suggest compliance with checks and balances. However, as illustrated above, statutory authorizations might materialize in contravention of classical checks and balances. This fact calls into question the most predictable component of Justice Jackson's paradigm: category-one analysis, which relies on congressional authorization to find presidential acts constitutional. It likewise casts doubt on situations where the historical gloss on executive power results from congressional authorization. Recognizing that congressional authorization may reflect a distortion of constitutional checks and balances that is overlooked by the current paradigms, what is to be done?

B. *A Congressional Jurisprudence of Presidential Power*

One solution might proceed from Congress: the development of a congressional jurisprudence of presidential power. If it were clear that Congress had, in consideration of its institutional interests, developed an understanding of the constitutional distribution of congressional and executive power and enacted authorizations consistent with that understanding, judicial reliance on congressional authorization might be justified. The courts could stay the course with the current methods of assessing presidential power. Yet prospects for such a development are slim. Some of the same incentives that motivate Congress to delegate power to the President or alter constitutional meaning would likely prevent Congress from either completing the task or doing so in a way that appropriately takes into account Congress's institutional interests.

The Court might prod Congress to this end by refusing to credit authorizations that do not include congressional findings addressing how an authorization comports with the preservation of congressional power.¹⁷⁶ This could lead over time to a body of accepted conditions under which authorization is consistent with Congress's institutional interests. However, prodding members of Congress to consider institutional interests does not ensure that members will act consistent with those interests. The risk is strong that the conditions in which Congress delegates will emanate from motives, like those discussed above, that depart from checks and balances so that the resulting congressional jurisprudence—like bare delegations devoid of findings—would not reflect congressional checks and balances judgments.

176 The Court might also strengthen Congress's ability to oversee the President's exercise of delegated power by retreating from *INS v. Chadha*, 462 U.S. 919 (1983), and its invalidation of legislative vetoes. Such a course, however, is both unlikely and arguably meets a failure of separation of powers—congressional authorizations resulting from a failure of checks and balances—with a departure from the separation of powers regime of bicameralism and presentment.

C. *Judicial Review for Consistency with Checks and Balances*

In light of this risk, the judiciary might be more aggressive. In response to judicial reliance on congressional *acquiescence*, where acquiescence may also reflect a failure of checks and balances, Bradley and Morrison suggest a more searching judicial review.¹⁷⁷ Ideally, this would be the answer in the context of congressional authorizations as well. The courts would assess whether any particular delegation manifests a departure from checks and balances. That is, the courts would ask whether Congress acted against institutional interest in enacting a particular authorization.

Unfortunately, there is little promise that the judiciary would succeed in such an endeavor. While it is easy to identify why Congress might expand rather than check presidential power, it is difficult to identify any particular authorization that does so.¹⁷⁸ Checks and balances are not meant to produce paralysis, so congressional authorization alone does not signal a failure of checks and balances.¹⁷⁹ The text of a statute is unlikely to provide clues of a failure, and legislative history will likely be inconclusive, if not fundamentally unreliable, as well. Moreover, Congress may craft an authorization so as to secure congressional oversight or executive consideration of congressional preferences, at a minimum mitigating the transfer of power wrought by an otherwise suspect authorization.¹⁸⁰ As a result, neither courts nor commentators are likely to be able to identify with certainty whether any given authorization contravenes checks and balances.¹⁸¹

177 See *supra* text accompanying notes 46–47.

178 See Levinson & Pildes, *supra* note 71, at 2317 (observing that “it has never been clear exactly how the Madisonian machine was supposed to operate”); cf. Sunstein, *supra* note 106, at 321, 326–28 (noting lack of judicial competence to identify delegations that go too far as a barrier to revival of the nondelegation doctrine). The difficulty lays both in identifying the constitutional baseline that checks and balances imposes and in determining whether any particular authorization contravenes that baseline.

McGinnis argues that deference to the legislature is appropriate when the judiciary, after thorough effort, “cannot come to a stable and clear judgment that the Constitution should be interpreted to invalidate [contested] legislation.” McGinnis, *supra* note 161, at 2; see also *id.* at 52, 58 (“If the Constitution as a matter of fact contains provisions of such ambiguity or vagueness that they do not admit of clarification through the application of rules of interpretation, judges should then defer to the Congress’s judgment”); *id.* Parts III, IV (providing support for this thesis).

179 Indeed, some argue that delegation is “a necessary counterbalance to the concentration of power in the hands of [congressional] committees.” EPSTEIN & O’HALLORAN, *supra* note 76, at 237–38.

180 See, e.g., Lindsay, *supra* note 96, at 617–22; Lindsay & Ripley, *supra* note 99, at 28–32; Sharyn O’Halloran, *Congress and Foreign Trade Policy*, in CONGRESS RESURGENT, *supra* note 80, at 283–84, 287–96, 303.

181 In light of the effect political parties may have on interbranch competition, Levinson and Pildes suggest that courts might interpret statutory ambiguity against authorization in times of unified government and in favor of authorization in times of divided government, but they are ultimately skeptical that courts will have “the capacity and inclination . . . to apply” such an approach. Levinson & Pildes, *supra* note 71, at 2354–56.

Even if judges could identify a failure of checks and balances, judicial review might not correct the problem. Reconsider the societal conflict theory, with its partisan manipulation of constitutional powers.¹⁸² Judges adjudicate under the influence of cultural biases, if not partisan motives, that may reproduce the preferences of the political branches who appoint them.¹⁸³ As a result, judicial review may simply confirm one rather than another partisan view of the constitutional distribution of foreign affairs power.¹⁸⁴ More searching judicial review of congressional authorizations is thus unlikely to solve the checks and balances problem. Yet two judicial efforts might mitigate it.

D. *A Judicial Jurisprudence of Presidential Power*

First, the courts might develop a jurisprudence of presidential power that does not rely on Congress. This is no easy task. The scope of presidential power, which turns on such things as the meaning of the clause vesting executive power in the President,¹⁸⁵ is hotly contested.¹⁸⁶ The Supreme Court has avoided this difficult issue by turning to evidence of Congress's position vis-à-vis presidential action.¹⁸⁷ Indeed, Justice Jackson himself embraced congressional cues in his tripartite paradigm after characterizing source material relevant "to concrete problems of executive power" as "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."¹⁸⁸ Even within Justice Jackson's framework, the Court stretches to fit cases into categories one or three where the outcome, based on congressional approval or disapproval, is generally clear.¹⁸⁹ The Court relies on congressional acquiescence, for example, to help escape the uncertainty of category two.¹⁹⁰ Development of a judicial sense of the scope of indepen-

182 See *supra* Part IV.D.

183 See Nzelibe, *supra* note 125, at 843–45; see also Levinson & Pildes, *supra* note 71, at 2355. Judges may also have an institutional incentive to uphold broad delegations as such delegations make "room for 'creative' judicial intervention in reviewing agency actions" and thus increase the judicial "role in the public policymaking process." Aranson et al., *supra* note 78, at 55, 66.

184 See Nzelibe, *supra* note 125, at 843–45.

185 U.S. CONST. art. II, § 2, cl. 1.

186 See, e.g., Bellia, *supra* note 147, at 114–20, 120 n.157 (summarizing arguments favoring (a) congressional and (b) presidential primacy in foreign affairs).

187 See, e.g., *id.* at 95, 146 (noting in several Court decisions "a desire to avoid, wherever possible, resting presidential conduct on constitutional rather than statutory authority").

188 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); see also Bellia, *supra* note 147, at 146–47 (identifying in Justice Jackson's concurrence additional evidence of "this reluctance to give content to the President's constitutional powers").

189 See Bellia, *supra* note 147, at 93 (noting that "courts tend to avoid exploring the President's constitutional foreign affairs powers . . . instead finding congressional authorization in questionable circumstances or simply assuming that presidential action should stand as long as Congress is silent"); *id.* at 125 (to the same effect).

190 See *Dames & Moore v. Regan*, 453 U.S. 654, 677–88 (1981).

dent presidential power would provide grounds to resolve many cases without reference to congressional authorization. It would not, however, provide a complete solution, for if congressional authorization can increase presidential discretion, there will certainly be cases challenging presidential actions beyond the President's independent power but within the power Congress has approved.

E. *A Presumption Against Authorization*

A second partial solution would be to adopt a presumption against authorization. Even if courts cannot identify authorizations that violate checks and balances, the judiciary can partially safeguard checks and balances through a presumption that limits findings of authorization.¹⁹¹ Reliance on congressional authorization is problematic, but reliance on implied authorization is worse. In such circumstances, the court takes an authorization that might have resulted from a failure of checks and balances and amplifies it. A presumption against authorization would obstruct this practice.

Such a presumption might have changed the outcome in prominent cases like *Dames & Moore* and *Hamdi*. The Court in *Dames & Moore* found that no statute specifically authorized the President to suspend claims filed in U.S. courts against Iran, but nonetheless upheld the suspension after looking to "the general tenor of Congress' legislation in th[e] area."¹⁹² In *Hamdi*, the Court upheld the President's authority to detain "a United States citizen on United States soil as an 'enemy combatant.'"¹⁹³ The plurality reasoned that although the Authorization for the Use of Military Force (AUMF) passed after 9/11 "does not use specific language of detention," it authorizes "the use of 'necessary and appropriate force'" and that includes detention since "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."¹⁹⁴ Under a presumption against authorization, the plurality may not have read so much into the AUMF.¹⁹⁵

A presumption against authorization would also pressure the Court to address the boundaries of the President's independent power, for if the presumption were not overcome, the President's actions would survive only on

191 Adoption of such a presumption would parallel the creation of nondelegation canons to achieve some of the goals of the difficult-to-enforce nondelegation doctrine. See *supra* text accompanying notes 148–50.

192 *Dames & Moore*, 453 U.S. at 675–88.

193 *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 517–19 (2004) (plurality opinion); see *id.* at 587 (Thomas, J., dissenting).

194 *Id.* at 519 (plurality opinion); see also *id.* at 587 (Thomas, J., dissenting) (agreeing that the AUMF authorized executive detention).

195 Technically, *Hamdi* asked whether the AUMF satisfied a prior statute that prohibited the detention of U.S. citizens in the absence of congressional authorization. *Id.* at 517–19. The Court might have held that this statute did not impose a presumption against authorization leading it to conclude, as it did, that the statute was satisfied. As a result, it is not entirely clear that a presumption against authorization would have changed the result.

independent authority. Notwithstanding its advantages, a presumption against authorization suffers from overbreadth. Imprecision in authorization does not necessarily correlate with a failure of checks and balances. As a result, the presumption might disable authorizations that cohere with checks and balances.

F. Presidential Power Based on Congressional Authorization as Political Question

A final solution might be to treat challenges to presidential acts pursuant to congressional authorization as political questions. Not a political question in the sense that the Court will treat the political branches' determination as binding¹⁹⁶—that is essentially what happens under Justice Jackson's framework and historical gloss analysis. Rather, the suggestion is that the Court invoke the political question doctrine to abstain from deciding such cases.

At first blush, this seems to be no solution at all. Absent judicial review, the failure of checks and balances will control rather than potentially be corrected. However, this course is better than the status quo. Under the *Youngstown* framework, judicial review of presidential acts authorized by Congress almost inevitably leads to a holding of constitutionality. The Court essentially defers to the political branches' constitutional views.¹⁹⁷ Applying the political question doctrine would at once increase the degree of deference shown by refusing any judicial review of the political branches' actions, while ironically diminishing the problem of reliance on congressional authorization.¹⁹⁸ Judicial review for constitutionality can lead members of Congress to forego their own analysis of constitutionality.¹⁹⁹ Abstention may thus be another way of encouraging Congress to develop a jurisprudence of presidential power. Yet, as discussed above, prospects for congressional success in such an endeavor are slim.²⁰⁰ Abstention under the political question doctrine would nonetheless be beneficial as it would leave the congressional authorization to stand as political precedent without giving it the judiciary's constitutional blessing.²⁰¹ The power shift to the President would exist as a matter of

196 See, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890) (explaining that “[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges”).

197 See Bradley & Morrison, *supra* note 5, at 429–30, 434, 436, 451 (recognizing that judicial reliance on “the political branches’ longstanding practices” may be seen as a form of judicial deference).

198 See *id.* at 430 (noting that “the only difference between political question dismissals and deference to historical practice may be the extent of the deference”).

199 See, e.g., Thayer, *supra* note 161, at 155–56 (“[E]ven in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.”).

200 See *supra* Section VI.B.

201 Justice Jackson made a similar argument in *Korematsu v. United States*, 323 U.S. 214, 244–48 (1944) (Jackson, J., dissenting). In rejecting the notion that the Court must enforce as constitutional a military order that is supported by “reasonable military grounds,” he observed that the Court is in no position to assess military reasonableness. *Id.* at 244–46. In such a situation, to bless the order as constitutional “is a far more subtle blow

political, not judicial, common law.²⁰² At a minimum, this would allow future Congresses to contest the constitutionality of the authorization when debating whether to retain the relevant statute or whether to enact similar authorizations.²⁰³ The President would not be emboldened nor Congress restrained by the judiciary's prior imprimatur.

CONCLUSION

In assessing the constitutionality of presidential action, the Supreme Court has been drawn to congressional authorization. Under the Court's two principal analyses—Justice Jackson's tripartite scheme and historical gloss—the Court takes its cues from congressional authorizations to find presidential power. Notwithstanding widespread acceptance of this practice, this Article reveals that congressional authorizations may result from the failure of checks and balances. For a variety of reasons, members of Congress may expand presidential power contrary to the institutional interests of Congress. The result is a judicially sanctioned transfer of power from Congress to the President. Like many constitutional difficulties, this problem is not easily solved. Congress might assist—if not on its own then with judicial prodding—by developing a sense of presidential power informed by congressional interests. Yet the motivations that call congressional authorizations into question obstruct the likely success of such an effort. The courts might solve the problem by policing power shifts that result from a failure of checks and balances, but the courts lack competence to identify such shifts. The judiciary may mitigate, however, by developing a jurisprudence of indepen-

to liberty than the promulgation of the order itself." *Id.* at 245–46. The "military order . . . is not apt to last longer than the military emergency," but the constitutional holding "lies about like a loaded weapon" to justify successive assertions of expanding authority. *Id.* at 246. *But cf.* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1159–66 (1985) (arguing that application of the political question doctrine can "confer [] legitimacy on an unconstitutional executive or legislative action" unless "the court . . . explain[s] that constitutional limitations on the challenged conduct do exist but that judicial review is not appropriate").

202 *But cf.* Lindsay & Ripley, *supra* note 99, at 18 (noting that the Court's "frequent invocation of the [political question] doctrine . . . has favored the [P]resident at the expense of Congress").

203 *Cf.* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 830 (2014) ("[Judicial reliance on historical practice may] reduce Congress's ability to resist assertions of presidential authority . . . by instantiating Executive practice into judicial doctrine."); Bradley & Morrison, *supra* note 5, at 457 n.197 ("Allowing the law to develop through practice [rather than judicial review] can make it easier for it to respond over time to changing conditions."); McGinnis, *supra* note 77, at 308 (noting that if "the Court has not put its imprimatur on a substantive allocation of rights . . . Congress may more readily use its own powers to take concrete action against the executive" and thus communicate to the judiciary Congress's sense of how rights ought to be allocated). For example, had the Court not already found that the AUMF authorized the President to take certain steps in the war on terror, *see supra* text accompanying note 36, Congress might more easily resist presidential reliance on the AUMF (or future authorizations) through means short of eliminating the authorization.

dent presidential power, imposing a presumption against authorization, or invoking the political question doctrine. Regardless of the solution pursued, in light of this previously overlooked problem, judges and scholars should be less sanguine about the current approaches to presidential power.

