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## The Elusive Zone of Twilight

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# THE ELUSIVE ZONE OF TWILIGHT

MICHAEL COENEN  
SCOTT M. SULLIVAN

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# THE ELUSIVE ZONE OF TWILIGHT

MICHAEL COENEN\*  
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**Abstract:** In his canonical concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson set forth a “tripartite” framework for evaluating exercises of presidential power. Regarding the middle category of that framework, Justice Jackson famously suggested that presidential actions undertaken “in absence of either a congressional grant or denial of authority” implicate “a zone of twilight,” within which “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” Since the articulation of this idea some seventy years ago, the Supreme Court has furnished little additional guidance as to how courts should evaluate presidential actions that implicate the “zone of twilight,” thus leaving it largely to the lower courts to translate Justice Jackson’s “contemporary imponderables” into workable doctrinal commands. Taking that observation as its starting point, this Article canvasses the small but important body of lower court opinions that have grappled with Justice Jackson’s zone of twilight. Its investigation yields two important takeaways. First, these opinions reveal a varied, ad hoc, and sometimes-inconsistent set of approaches to reviewing twilight-zone actions, as lower courts have failed to converge on a single methodological approach to evaluating presidential action against a backdrop of formal legislative silence. And second, the opinions reflect a longstanding and steadfast reluctance to engage with the twilight zone’s substance, as lower courts have frequently found ways to *avoid* concluding that plausible instances of twilight-zone action give rise to the “contemporary imponderables” that Justice Jackson himself invoked. We hypothesize that these two features of contemporary twilight-zone opinions—their doctrinal haphazardness and their sporadic incidence—may exist in something of a positive feedback loop, with the uncertain and amorphous state of “twilight-zone doctrine” deterring lower courts from assigning presidential action to Justice Jackson’s middle category, and with the relative paucity of twilight-zone opinions impeding the development of a coherent and streamlined decisional methodology. We thus conclude this Article by proposing a simple but flexible method of *two-dimensional* twilight-zone analysis—an approach that might help to break this cycle of avoidance and amorphousness and thus render Justice Jackson’s zone of twilight a more useful and active venue for the resolution of separation-of-powers cases.

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## INTRODUCTION

Justice Robert Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* has given rise to one of the most well-known tests for adjudicating separation-of-powers disputes in U.S. constitutional law.<sup>1</sup> The test employs a “tripartite” framework for evaluating the constitutionality of challenged executive actions, with each challenged action falling into one of three distinct categories depending on the statutory backdrop against which it proceeds.<sup>2</sup> Specifically, where the President acts “pursuant to an express or implied authorization of Congress,” the action is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”<sup>3</sup> Conversely, where the President’s actions are “incompatible with the expressed or implied will of Congress,” the President’s power reaches “its lowest ebb” and “must be scrutinized with caution.”<sup>4</sup> And, between those two extremes, where “the President acts in absence of either a congressional grant or denial of authority,”<sup>5</sup> there exists a middle “zone of twilight,” within which “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>6</sup>

As this summary presentation makes clear, Justice Jackson’s concurrence sets forth relatively straightforward doctrinal prescriptions for actions that fall within Category One (authorized by Congress) and Category Three (disap-

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<sup>1</sup> See 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>2</sup> *Id.* at 635; see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) (“In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from *Youngstown* . . .” (citing *Youngstown*, 343 U.S. at 635–38)).

<sup>3</sup> *Youngstown*, 343 U.S. at 635–37.

<sup>4</sup> *Id.* at 637–38.

<sup>5</sup> *Id.* at 637. A small terminological point: it is somewhat unclear whether Justice Jackson understood the “zone of twilight” to encompass the entire category of *Youngstown*-type cases involving congressional silence, or the overlapping (but not coextensive) category of cases involving the concurrent powers of the legislative and executive branch. See *id.* (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”). Notwithstanding this ambiguity, we are here using the phrase to encompass the former category of cases—i.e., all of those cases in which the President is deemed to have acted “in absence of either a congressional grant or denial of authority.” See *id.* This is in accordance with the understanding that subsequent courts and commentators have embraced. See, e.g., *Zivotofsky*, 135 S. Ct. at 2084 (noting that “‘in absence of either a congressional grant or denial of authority’ there is a ‘zone of twilight in which he and Congress may have concurrent authority’” (emphasis added) (quoting *Youngstown*, 343 U.S. at 637)); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 419 (2012) (“Under [Jackson’s] framework, the President’s power is at its zenith when supported by express or implied congressional authorization, at its nadir when expressly or implicitly opposed by Congress, and in an intermediate ‘zone of twilight’ when Congress has neither supported nor opposed presidential action.”).

<sup>6</sup> *Youngstown*, 343 U.S. at 637.

proved of by Congress) of its tripartite framework.<sup>7</sup> But the same cannot be said of Category Two (congressional silence), whose operative prescriptions are famously open-ended and vague.<sup>8</sup> What is more, whereas the Supreme Court and its Justices have occasionally identified challenged executive actions as falling within Categories One and Three (and subsequently evaluated such actions in accordance with each category's respective principles),<sup>9</sup> the Court has offered only limited and indirect elaboration on the nature of Category-Two analysis in separation-of-powers cases.<sup>10</sup> Neither Justice Jackson's concurrence itself nor subsequent Supreme Court applications of the *Youngstown* framework have thus provided much guidance as to how courts should decide Category-Two cases.<sup>11</sup>

All of this is well known and well understood. What is less well known and well understood is the manner in which *lower courts* have gone about navigating the "zone of twilight" when applying the Jackson framework for themselves. The Supreme Court, after all, is not the only judicial institution that

<sup>7</sup> See *id.* at 635–38.

<sup>8</sup> See, e.g., Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 733 (2013) (noting that Justice Jackson's guidance regarding the resolution of twilight-zone cases "is simultaneously inspiring and useless"); Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 870 (1983) (contending that "Justice Jackson's analysis is of no help in deciding cases" within the zone of twilight because it "provides almost no guidance as to how these cases should be decided").

<sup>9</sup> See, e.g., *Zivotofsky*, 135 S. Ct. at 2084 ("Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be 'scrutinized with caution,' and he may rely solely on powers the Constitution grants to him alone." (quoting *Youngstown*, 343 U.S. at 638)); *Medellin v. Texas*, 552 U.S. 491, 527 (2008) (concluding that "[the President's] assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is . . . within Justice Jackson's third category, not the first or even the second"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 639 (2006) (Kennedy, J., concurring in part) ("While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson's third category, not the second or first."); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000) (noting that the "express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the Government of Burma . . . recalls Justice Jackson's observation that . . . '[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate'" (quoting *Youngstown*, 343 U.S. at 635)); *Dames & Moore v. Regan*, 453 U.S. 654, 673–74 (holding that a presidential order calling for the nullification of judicial attachment orders involving Iranian assets "was taken pursuant to specific congressional authorization" and thus fell within the first category of Justice Jackson's framework).

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> As the Texas Court of Criminal Appeals observed in 2006, "What Justice Jackson proclaimed in his concurrence in *Youngstown Sheet & Tube Company* fifty-four years ago—that the judiciary 'may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves'—resonates with us today." *Ex parte Medellin*, 223 S.W.3d 315, 335 (Tex. Crim. App. 2006) (footnote omitted) (quoting *Youngstown*, 343 U.S. at 634), *aff'd sub nom.* *Medellin v. Texas*, 552 U.S. 491 (2008).

confronts cases about presidential power. The Court's own separation-of-powers decisions typically arrive by way of the federal courts of appeals.<sup>12</sup> And, more importantly, the district and circuit courts are regularly confronted with separation-of-powers cases that the Court either declines or is unable to decide. Over the nearly seventy years that have elapsed since *Youngstown*, lower courts have published the vast majority of opinions applying and engaging with the framework that Justice Jackson's concurrence sets forth.<sup>13</sup> Thus, any effort to understand the real-world significance of Justice Jackson's "zone of twilight" would do well to bring those lower court decisions into the fold.

That is what this Article attempts to do. Its analysis is based on a comprehensive survey of the federal courts' engagement with Justice Jackson's framework in separation-of-powers cases. Specifically, it focuses on the different ways in which those courts have attempted to impose order within this notoriously loose and unstructured doctrinal domain.

Two challenges in particular have been at the center of our attention: First, and most obviously, is the challenge of evaluating presidential action in the face of congressional silence, or what we call the challenge of *twilight-zone engagement*. When faced with presidential action about which the relevant congressional statutes evince neither formal approval nor formal disapproval, courts will sometimes have no choice but to translate the twilight zone's "contemporary imponderables" into a concrete legal ruling. And, not surprisingly, the existing Category-Two analyses we have found reveal important variations, with different opinions articulating different types of reasons on behalf of their respective conclusions. Some opinions, for instance, have appeared to equate Category-Two action with Category-One action, extending the same strong presumption of constitutional validity that flows from an explicit act of congressional authorization.<sup>14</sup> Other opinions have treated Congress's extended (or sometimes even short-term) failure to prohibit the challenged action as an indicator of congressional "acquiescence" and have thereupon cited to that acquiescence as a reason to uphold what the President has done.<sup>15</sup> Other opinions have gone further, scouring the legislative record for *informal* signs of Congress's attitude toward the action under review and treating legislative materials of indirect relevance to the issue at hand as effectively dispositive of the constitutional question.<sup>16</sup> And still other opinions have focused squarely on Article II, asking whether an ostensible Category-Two action sufficiently implicates core presidential prerogatives as to pass constitutional muster whenever

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<sup>12</sup> But see generally *Medellin*, 552 U.S. 491, *aff'g Ex parte Medellin*, 223 S.W.3d 315.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See *infra* Part II.C.

er Congress has failed to speak.<sup>17</sup> Some of these opinions, of course, do more than just one of these things, mixing and matching, for instance, context-specific arguments about congressional acceptance or acquiescence with abstract arguments about inherent Article II authority.<sup>18</sup> But none of these opinions employs anything akin to a structured doctrinal analysis of the issue at hand. Indeed, if there is one shared feature of the universe of Category-Two opinions we have found, it is the fluid, amorphous, and largely ad hoc nature of the analyses they set forth.

This universe of opinions is interesting and revealing in its own right. But it does not tell the entirety of our story. In addition to the challenge of engaging with legal questions that fall within the zone of twilight, there also exists the antecedent challenge of identifying such questions in the first place. And, as the relatively small number of explicitly Category-Two opinions should itself make clear, courts have frequently managed *not to declare* that a challenged presidential action falls within the twilight zone at all. Sometimes, of course, this is an unsurprising and unremarkable result.<sup>19</sup> But, at other times, the absence of Category-Two analysis looks more like the product of a deliberate judicial choice, with courts actively circumventing the middle category by way of a practice that we call *twilight-zone avoidance*. In particular, we document several ways in which courts have managed to dispose of Category Two-like cases without ever wrestling with the “contemporary imponderables” that Justice Jackson himself invoked. Whether it is through strained statutory constructions that manage to extract some congressional guidance from ostensibly silent statutes,<sup>20</sup> the application of rule-like substitutes for the twilight zone’s open-ended instructions,<sup>21</sup> or the strategic invocation of justiciability-based grounds for dismissal,<sup>22</sup> courts often find ways to steer clear of the zone of twilight in cases that arguably fall within its scope.

These two phenomena that we describe—the courts’ confused and haphazard approach to twilight-zone engagement and their frequent recourse to methods of twilight-zone avoidance—are not unrelated. Indeed, the two phenomena are in some sense mutually reinforcing. The less that courts say about what twilight-zone analysis entails, the less attractive the zone of twilight be-

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<sup>17</sup> See *infra* Part II.D.

<sup>18</sup> See, e.g., *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800 (1st Cir. 1981) (emphasizing both a past history of congressional acquiescence to the presidential action under review and a superseding practical need to allow the action to move forward).

<sup>19</sup> When Congress has indeed “spoken” to the validity of what the President has done, courts have no sound basis for invoking Justice Jackson’s middle category and instead properly situate their analyses within either Category One or Category Three.

<sup>20</sup> See *infra* Part III.A.

<sup>21</sup> See *infra* Part III.B.

<sup>22</sup> See *infra* Part III.C.



comes as a venue for constitutional decision-making. And the less attractive that twilight-zone analysis becomes, the more often that courts will manage to avoid engaging in it. A thin and murky precedential backdrop begets judicial circumvention, which in turn preserves that precedential backdrop's thin and murky form.

And that is largely where things stand today. Justice Jackson's *formally* tripartite analysis has come to assume a largely *bipartite* form: Categories One and Three absorb the lion's share of cases that implicate the *Youngstown* framework, while Category Two continues to languish in defunct and shapeless form. We thus conclude our analysis by imagining what a more coherent and better-structured style of twilight-zone analysis might look like, proposing a method of engagement that would streamline and simplify the constitutional inquiry while remaining faithful to the middle category's contextual and functionalist spirit. In particular, we propose a method of twilight-zone engagement that scrutinizes presidential conduct along two separate and largely independent constitutional dimensions: (1) "congressional receptiveness" (i.e., the extent to which Congress, though formally silent about the merits of the President's conduct, appears to have informally communicated its acceptance or non-acceptance of that conduct), and (2) *Article II appropriateness* (i.e., the extent to which the conduct aligns with independent executive branch powers, functions, and responsibilities). Actions that measure high along both axes should generally pass muster, actions that measure low along both generally should not, and actions that register conflicting results will require the most difficult judgment calls. There is, in other words, no escaping the possibility of hard cases and we do not pretend (nor would we want) to have made twilight-zone analysis a mechanical and thoughtless exercise. But we do think our two-dimensional conception of the twilight-zone's contours at least helps to frame those cases in a manner that places the relevant separation-of-powers considerations squarely before the reviewing court and the broader public as well.

Here, then, is how the remainder of the Article proceeds. Part I revisits the *Youngstown* decision itself, tracing the origins of Justice Jackson's *Youngstown* concurrence and underscoring the increasingly prominent place it has assumed within modern separation-of-powers jurisprudence. Part II then canvasses instances of "twilight-zone engagement" from federal court cases, highlighting both the limited number of genuine, twilight-zone decisions and the substantial variability in these decisions' methods of analysis. Part III then catalogues the related set of "twilight-zone avoidance" cases, identifying the different ways in which courts have managed to sidestep the vagaries of Justice Jackson's middle category by characterizing plausible "twilight-zone" cases as instead implicating some other set of doctrinal commands. Part IV then presents our prescriptive suggestions as how future instances of twilight-zone analysis can and should proceed.

Before proceeding further, we pause to acknowledge that some readers might greet this topic with skepticism, questioning whether anything valuable remains to be said about a nearly seventy-year-old concurrence about which much has already been written. To that objection, we offer two responses. Our first response is to resist the suggestion that everything useful has already been said: that is, notwithstanding the aged and canonical status of Justice Jackson's concurrence, we believe that both courts' and commentators' understanding of the tripartite framework (and, in particular, its middle category) remains underexamined and incomplete.<sup>23</sup> This is, admittedly, a point for which the reader must now take our word, but we hope that our ensuing analysis will provide reason enough for thinking that a sustained focus on both actual and would-be twilight-zone cases can still yield useful insights regarding the real world application of the Justice Jackson framework itself.

Our second response, meanwhile, is simply to emphasize the continued, if not increased, practical significance of the Justice Jackson framework to contemporary separation-of-powers disputes. As Professors Lisa Manheim and Kathryn Watts have shown, recent presidencies, and especially that of Donald Trump, have seen a "surge" in federal challenges to executive orders—challenges that implicate not the familiar and well-established *administrative law* limits that govern the work of administrative agencies, but rather, the hazier and still developing *constitutional* limits that govern presidential power itself.<sup>24</sup> If this recent history is a harbinger of things to come, then *Youngstown*-like questions will continue to arise. And the more frequently litigated those questions become, the more important it is that courts apply the Justice Jackson framework in a manner that reflects a full and conceptually sound understanding of *all* its constituent categories.

## I. THE TWILIGHT ZONE'S EMERGENCE

### A. *The Origins of Justice Jackson's Concurrence*

At the close of 1951, the United Steelworkers of America and steel-industry management had been unable to consummate a new agreement, and as a result, the labor union declared a nationwide strike to commence on April

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<sup>23</sup> Indeed, although there are many articles about Justice Jackson's *Youngstown* framework as a whole, this is, to the best of our knowledge, the first full-length article to examine the zone of twilight in its own right.

<sup>24</sup> Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1746–47, 1789 (2019).

9, 1952.<sup>25</sup> Meanwhile, thousands of U.S. troops were involved in fighting in the Korean War, a conflict with no end in sight.<sup>26</sup> On the eve of the pending labor strike, and in the absence of any specific congressional authorization, President Truman issued an executive order instructing the Secretary of Commerce “to take possession” of designated steel manufacturing plants, so as to prevent a “work stoppage [that] would immediately jeopardize and imperil our national defense.”<sup>27</sup> Litigation ensued. In late April, the U.S. District Court for the District of Columbia preliminarily enjoined enforcement of the order, finding that the President lacked the constitutional authority to order the seizure.<sup>28</sup> The D.C. Circuit subsequently stayed the district court’s order,<sup>29</sup> and from there the case headed to the Supreme Court.<sup>30</sup> After hearing oral argument in May, the Court issued its decision in June, holding that the President’s seizure of the steel mills violated constitutional separation-of-powers requirements.<sup>31</sup>

The immediate holding of *Youngstown* was crystal clear, but the reasoning behind it was not.<sup>32</sup> The case generated multiple opinions.<sup>33</sup> The majority opin-

<sup>25</sup> See MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 58–80 (1994) (providing a detailed account of the labor relations circumstances that preceded President Truman’s announcement of the seizure).

<sup>26</sup> Phillip E. Stebbins, *Truman and the Seizure of Steel: A Failure in Communication*, *THE HISTORIAN*, Nov. 1971, at 11. At the time of Truman’s announcement, the armed conflict in Korea had fallen into a stalemate. *Id.* at 11 & n.22 (“Though casualty figures kept rolling in, large scale offensive operations virtually stopped by 1952.”).

<sup>27</sup> Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 8, 1952). The President accompanied this order with a message to Congress that communicated his willingness to “cooperate in developing any legislative proposals [for handling the strike] which the Congress may wish to consider,” while also making clear his determination “to do all that is within [his] power to keep the steel industry operating” in the absence of congressional action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 677 (1952) (Vinson, C.J., dissenting) (quoting 98 CONG. REC. 3912 (1952)). Twelve days later, the President restated his willingness to abide by any congressionally prescribed solution to the work stoppage, including a statute calling for the restoration of the seized properties. *Id.* Congress did not enact any legislation in response. *Id.*

<sup>28</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576 (D.D.C.), *aff’d*, 343 U.S. 579 (1952).

<sup>29</sup> *Sawyer v. U.S. Steel Co.*, 197 F.2d 582, 585 (D.C. Cir. 1952).

<sup>30</sup> *Youngstown*, 343 U.S. at 584 (majority opinion).

<sup>31</sup> *Id.* at 588–89.

<sup>32</sup> See Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 *DUKE L.J.* 679, 691 (1997) (“The six Justices in the *Youngstown* majority did not agree on a single rationale explaining the holding.”).

<sup>33</sup> In addition to Justice Jackson, Justices Douglas, Burton, Clark, and Frankfurter also issued concurring opinions. Aside from Justice Jackson’s concurrence, Justice Frankfurter’s has likely been the most influential in subsequent separation-of-powers jurisprudence, particularly with respect to its suggestion that “a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned” should be treated as a “gloss on ‘executive Power’ vested in the President.” *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring); see also Bradley & Morrison, *supra* note 5, at 413 (discussing the impact and doctrinal consequences of the Frankfurter opinion in *Youngstown*). Jack Goldsmith and John Manning have noted, however, that Chief Justice Frederick

ion, authored by Justice Hugo Black, attempted to draw bright lines between the respective responsibilities of the President and Congress. “The President’s power, if any, to issue the order,” Justice Black explained, “must stem either from an act of Congress or from the Constitution itself,”<sup>34</sup> and here, according to the opinion, neither Congress nor the Constitution had given the President the power to act.<sup>35</sup> Thus, for instance, as an “internal” act, the seizure of the steel mills was insufficiently connected to a “theater of war” to be justified as an exercise of the President’s powers as Commander in Chief.<sup>36</sup> Similarly, the seizure was too “legislative” in nature to derive authorization from either Article II’s Vesting Clause or its Take Care Clause.<sup>37</sup> In short, as one commentator has put it, Justice Black demanded and found lacking “a clear constitutional basis for executive action or a clear legislative grant of authority to the executive by Congress.”<sup>38</sup>

Justice Black’s opinion was straightforward enough on its own terms. Yet the five Justices who joined it all chose to write separately as well, outlining analyses of the case that expanded upon and in some instances deviated from what the majority opinion had said.<sup>39</sup> This was especially true of Justice Jackson’s opinion, which, in contrast to the majority opinion’s formalism, embraced a more functionalist method of review.<sup>40</sup> Recognizing that “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context,” Justice Jackson instead embraced the view that presidential powers “are not fixed but fluctuate, depending upon

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Vinson’s dissenting opinion has itself experienced “a partial vindication” over time. See Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

<sup>34</sup> See *Youngstown*, 343 U.S. at 585.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 587; *id.* at 641 (Jackson, J., concurring).

<sup>37</sup> *Id.* at 587–88 (majority opinion); see U.S. CONST. art. II, § 1, cl. 1 (Vesting Clause); *id.* art. II, § 3 (Take Care Clause).

<sup>38</sup> Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson’s Youngstown Taxonomy* by Hamdan and Medellin, 58 AM. U. L. REV. 665, 670 (2009).

<sup>39</sup> Elizabeth Bahr & Josh Blackman, *Youngstown’s Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 552 (2010) (“The six Justices in the majority did not agree on a single rationale, though they designated Justice Black’s opinion as the opinion of the Court.”); see *Youngstown*, 343 U.S. at 589 (Frankfurter, J., concurring) (noting that “the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice Black has written,” and that “[e]ven though such differences in attitude toward this principle may be merely differences in emphasis and nuance, they can hardly be reflected by a single opinion for the Court”).

<sup>40</sup> See, e.g., William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 23–24 (1998); see also Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 394 (2015) (“Functionalism . . . is at the heart of Justice Jackson’s influential concurrence in *Youngstown*, now often read as the central opinion in that case.”).

their disjunction or conjunction with those of Congress.”<sup>41</sup> And that recognition prompted him to develop “a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers,” and to “distinguish[] roughly the legal consequences of this factor of relativity.”<sup>42</sup>

Justice Jackson defined his groupings by reference to the relationship between the President’s conduct and congressional will.<sup>43</sup> Into one category (Category One) fell presidential actions taken “pursuant to an express or implied authorization of Congress.”<sup>44</sup> For these actions, Justice Jackson maintained, presidential “authority is at its maximum,” and any finding of constitutionally invalidity would typically depend on a determination that “the Federal Government as an undivided whole lacks power.”<sup>45</sup> Into another category (Category Three) fell actions that were “incompatible with the expressed or implied will of Congress.”<sup>46</sup> For these actions, the President’s “power is at its lowest ebb” and “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”<sup>47</sup>

But that did not exhaust the full range of possibilities, as Jackson also pointed to an intermediate category (Category Two) of presidential actions that bore neither the stamp of congressional approval nor the badge of congressional rejection.<sup>48</sup> More specifically, Justice Jackson explained:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>49</sup>

Beyond this paragraph, Justice Jackson did not elaborate much further on what the appropriate constitutional analysis within the “zone of twilight” ought to look like. That was so because, having presented his three categories, Justice

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<sup>41</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 635–38.

<sup>44</sup> *Id.* at 635.

<sup>45</sup> *Id.* at 635–37.

<sup>46</sup> *Id.* at 637.

<sup>47</sup> *Id.* at 637–38.

<sup>48</sup> *Id.* at 637.

<sup>49</sup> *Id.*

Jackson then went on to conclude that Congress had “not left seizure of private property an open field” but instead had “covered it by three statutory policies inconsistent with” the President’s actions.<sup>50</sup> Thus, Truman’s seizure order could be “justified only by the severe tests under the third grouping.”<sup>51</sup> The remainder of the concurrence would go on to explain why the order failed those “severe tests.”<sup>52</sup>

Justice Jackson’s concurrence was not met with immediate and universal acclaim.<sup>53</sup> But over time, the concurrence—and, in particular, the tripartite framework it prescribed—would come to occupy a central place in the federal courts’ separation-of-powers jurisprudence. Beginning in the early 1970s,<sup>54</sup> lower court judges began to rely on the Jackson framework as the analytical vehicle for determining the outcome of various presidential power cases.<sup>55</sup> By 1981, a majority of Justices had characterized the Jackson framework as “analytically useful,”<sup>56</sup> and by 2008, the Court had declared that “Justice Jackson’s familiar tripartite scheme provides the accepted framework” for presidential

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<sup>50</sup> *Id.* at 639.

<sup>51</sup> *Id.* at 640.

<sup>52</sup> *Id.* at 640–55.

<sup>53</sup> See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 265 & n.6 (2010) (citing several negative reactions to Justice Jackson’s concurrence and concluding that Jackson’s “contemporaries were not bowled over”).

<sup>54</sup> Prior to 1971, Justice Jackson’s framework appears to have only been used by the lower courts twice but not as reflecting binding law or as the analytical vehicle for determining the outcome of a case. See, e.g., *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953) (quoting Justice Jackson’s “lowest ebb” language in addition to the majority’s assertion that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker” (first quoting *Youngstown*, 343 U.S. at 587 (majority opinion); and then quoting *id.* at 637 (Jackson, J., concurring))); *Zemel v. Rusk*, 228 F. Supp. 65, 70 (D. Conn. 1964) (quoting Justice Jackson’s zone-of-twilight language in pointing to the existence of concurrent powers).

<sup>55</sup> See, e.g., *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136, 149 (D.C. Cir. 1974) (Leventhal, J., dissenting) (applying the Jackson framework in a case involving President Nixon’s effort to limit steel importations from other countries); *Massachusetts v. Laird*, 451 F.2d 26, 32–34 (1st Cir. 1971) (applying the Jackson framework in evaluating the justifiability of a challenge to the President’s initiation of military actions in Vietnam); *Contractors Ass’n of E. Pa. v. Sec’y of Lab.*, 442 F.2d 159, 171 (3d Cir. 1971) (applying the Jackson framework in upholding an executive order concerning the hiring practices of federal contractors).

<sup>56</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). The Court in *Dames & Moore* did caution against an unduly rigid application of the framework, noting that “it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.” *Id.* Nevertheless, the Court’s subsequent applications of the Jackson framework have tended to treat the three categories as discrete and bounded domains rather than mere shorthand references to points along a continuum. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 527 (2008) (concluding, with respect to a particular theory of congressional authorization, that a form of presidential action was “within Justice Jackson’s third category, not the first or even the second”).

power cases.<sup>57</sup> Most recently, the Jackson framework has factored into the judges' analyses of high-profile legal disputes involving, among other things: President Trump's travel ban,<sup>58</sup> the issuance—and subsequent rescission—of the Deferred Action on Childhood Arrivals (DACA) program,<sup>59</sup> executive orders designed to punish “sanctuary” jurisdictions,<sup>60</sup> and the use of military commissions to try terrorism suspects.<sup>61</sup> From humble beginnings as the organizing principle for a non-binding, one-Justice concurrence, the Jackson framework has grown into “an enduring and popular method for evaluating separation-of-powers questions.”<sup>62</sup>

### *B. Post-Youngstown Guidance*

Popular as Justice Jackson's framework has become, its middle category remains shrouded in mystery. Courts most frequently find that a challenged presidential action falls within either Category One or Category Three, and few opinions on the books both explicitly assign a challenged action to Category Two and evaluate that action by reference to the category's open-ended standards.<sup>63</sup>

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<sup>57</sup> *Medellin*, 552 U.S. at 524. Just two years prior to *Medellin*, Professor Michael Gerhardt had identified *Youngstown* (and in particular the Jackson concurrence) as a sort of “super precedent” to which Supreme Court Justices “for years have given special deference.” Michael J. Gerhardt, Essay, *Super Precedent*, 90 MINN. L. REV. 1204, 1217 (2006); see Swaine, *supra* note 53, at 269 (“Over the long haul, but with a flurry near the end, Justice Jackson's framework has been transformed into the *Youngstown* majority.”).

<sup>58</sup> See, e.g., *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 287 (4th Cir.), *vacated*, 138 S. Ct. 2710 (2018) (mem.).

<sup>59</sup> See, e.g., *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 962 (9th Cir. 2017) (regarding initial establishment of DACA by President Obama); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 423 (E.D.N.Y. 2018) (regarding rescission of DACA by President Trump), *vacated*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

<sup>60</sup> See, e.g., *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018).

<sup>61</sup> See, e.g., *Al Bahlul v. United States*, 792 F.3d 1, 27 (D.C. Cir. 2015) (Henderson, J., dissenting), *aff'd on reh'g en banc*, 840 F.3d 757 (2016).

<sup>62</sup> Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 619 (2018).

<sup>63</sup> It is, of course, difficult to quantify the relative frequency with which courts and individual judges have assigned different actions to each one of Jackson's three categories. Nonetheless, in an attempt to pin down a rough indicator of Category Two's popularity, we conducted a comprehensive survey of all decisions from the federal courts that included at least one citation to *Youngstown* itself. Of these decisions, we identified approximately one hundred as involving applications of the Jackson framework. And out of those applications of the framework, we identified no more than fifteen (including those within individual concurrences or dissents) that could at least arguably be construed as engaging with Justice Jackson's middle category. Several of these fifteen, moreover, did so only obliquely—mentioning the middle category only in dicta, see, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 49 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc)—relying on it as an alternative ground for decision, see, e.g., *Barquero v. United States*, 18 F.3d 1311, 1314–16 (5th Cir. 1994) (finding presidential action authorized under Category One and alternatively authorized under Category Two as well), or incorporating it into a discussion of the political question doctrine, see, e.g.,

Part II of this Article will survey in detail the collection of Category-Two analyses that we have found within the lower courts' own case law.<sup>64</sup> But before considering those cases further, we begin with a brief survey of the zone of twilight's own limited development at the Supreme Court. There are, in particular, three post-*Youngstown* decisions in which the Court has at least indirectly offered guidance as to what a Category-Two analysis might entail.

### 1. *Dames & Moore v. Regan*

In *Dames & Moore v. Regan*, the Court rejected a separation-of-powers challenge to two executive actions related to the Iran Hostage Crisis.<sup>65</sup> Relevant for our purposes is the second of the two actions, an order that suspended the adjudication of claims against Iran pending in U.S. courts and transferred those claims to a specially constituted international tribunal for binding arbitration.<sup>66</sup> In an opinion by then-Justice Rehnquist, the Court upheld that order. And it did so while at the same time acknowledging that neither of the statutes on which the government had relied—the International Emergency Economic Powers Act (IEEPA) and the Hostage Act—“constitute[d] specific authorization of the President’s action.”<sup>67</sup>

How was the Court able to uphold a form of executive action that lacked “specific authorization” from Congress? Its key move was to emphasize “inferences to be drawn from the character of the legislation Congress has enacted in the area . . . and from the history of acquiescence in executive claims settlement.”<sup>68</sup> Specifically, although neither the IEEPA nor the Hostage Act could be read to yield “specific authorization of the President’s action suspending claims,” both statutes remained “highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case.”<sup>69</sup> What is more, Congress had also passed another statute, the International Claims Settlement Act (ICSA), which “creat[ed] a procedure to implement future settlement agreements” and thus “placed [Congress’s] stamp of approval on such agreements,”<sup>70</sup> and it had

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Massachusetts v. Laird, 451 F.2d 26, 26 (1st Cir. 1971). For further discussion of the Category-Two opinions we have located, see *infra* Part II.

<sup>64</sup> See *infra* Part II.

<sup>65</sup> See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>66</sup> See *id.* at 665–67. The first of those actions involved the nullification of attachment orders directed at designated Iranian assets. *Id.* at 669. The Court upheld that order as a Category-One measure, finding that it “was taken pursuant to specific statutory authorization.” *Id.* at 674 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

<sup>67</sup> *Id.* at 677.

<sup>68</sup> *Id.* at 686.

<sup>69</sup> *Id.* at 677.

<sup>70</sup> *Id.* at 680.



subsequently amended the ICSA “to provide for particular problems arising out of settlement agreements, thus demonstrating Congress’s continuing acceptance of the President’s claim settlement authority.”<sup>71</sup> All of this had occurred, moreover, against the backdrop of “a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.”<sup>72</sup> Quoting Justice Jackson’s earlier observation that “the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ measures on independent presidential responsibility,”<sup>73</sup> the Court thus concluded that this was just such a case.

Thus, although the Court in *Dames & Moore* never explicitly characterized the suspension order as a form of Category-Two action,<sup>74</sup> its acknowledgment that the order lacked “specific authorization,” coupled with its direct

<sup>71</sup> *Id.* at 681.

<sup>72</sup> *Id.* at 679.

<sup>73</sup> *Id.* at 678 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); see Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 567 (2005) (noting that the Court in *Dames & Moore* “aggregated delegations of statutory authority to find a power that it could not trace to any individual authorization, or even to any interlocking set of authorizations”). To be clear, the Court’s suggestion that the “general tenor” of the statutory backdrop evinced congressional acceptance of the President’s actions was by no means uncontroversial. As several commentators have noted, the relevant statutes might well have been construed differently, so as to reveal either congressional ambivalence regarding the President’s actions or perhaps even congressional *disapproval* instead. See, e.g., Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1161 (2006) (“One might even conclude in light of explicit congressional approval in the past, Congress’s failure to authorize the executive agreements should be read as congressional disapproval, putting the act not in Category One, but in Category Three.”). What is more, and as others have noted, by both conceding to a lack of “specific authorization” from Congress while at the same time highlighting Congress’s “acceptance” of what the President had done, the Court in *Dames & Moore* seemed to be muddling the doctrinal boundaries between Categories One and Two, effectively collapsing them both into a single, catch-all presumption in favor of the President. See, e.g., Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1752 (2006) (noting that *Dames & Moore* might be read as “collaps[ing] Jackson’s tripartite classification into a two-tiered inquiry—shifting the Iranian hostage crisis into Jackson category one . . . rather than Jackson category two”); Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 83 n.116 (2002) (“[I]n *Dames and Moore*, the Court signaled that the burden of proof should be shifted away from the president and to the Congress.”); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1310 (1988) (contending that the Court in *Dames & Moore* “elevat[ed] the President’s power from the ‘twilight zone’ . . . to its height in Jackson Category One”); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 933, 948–49 (2007) (“In finding clear statutory acquiescence in President Carter’s actions in a statute that was, at best, ambiguous, Justice Rehnquist effectively vitiated Jackson’s taxonomy—or, at least, turned it on its head.”).

<sup>74</sup> See Bybee & Samahon, *supra* note 73, at 1752 (noting that “Rehnquist never says under which of the Jackson categories the President’s suspension of the claims actually falls”); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1957 (2015) (“[T]he Court did not even clearly assign the case to one of the three *Youngstown* categories.”).

invocation of Justice Jackson's reference to "measures on independent presidential responsibility," left little doubt as to where within the framework the Justices understood the order to fall.<sup>75</sup> The suspension order implicated the Jackson framework's middle category.<sup>76</sup> And it passed muster within that category because a group of loosely on-point statutes together signaled Congress's "acquiescence" to a "longstanding practice" to which the order itself belonged.<sup>77</sup>

## 2. *American Insurance Association v. Garamendi*

Some twenty-two years after *Dames & Moore*, the Court once again—albeit quite tentatively—wandered into the twilight zone's murky territory. *American Insurance Association v. Garamendi* addressed whether a California statute was preempted by federal law, based upon the statute's perceived incompatibility with executive agreements between the United States and the governments of Austria, France, and Germany.<sup>78</sup> The statute, of course, could only be preempted if the executive agreements themselves were valid, and the Court thus began its analysis by explaining why they were. Citing to *Dames & Moore*, Justice Souter's majority opinion noted that "our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress."<sup>79</sup> That practice, the Court continued, "goes back over 200 years, and has received congressional acquiescence throughout its history."<sup>80</sup> Consequently, there was not "any question" that the President had the authority to consummate the agreements with which the California law was said to conflict.<sup>81</sup>

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<sup>75</sup> *Dames & Moore*, 453 U.S. at 677–78.

<sup>76</sup> At least one set of commentators has suggested otherwise, understanding the Court to have upheld the suspension order directly under Category One. See Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 810 (2016) (noting that "the Court placed the suspension of claims in Justice Jackson's first category"). But in our view, and as several other commentators have recognized, this portion of *Dames & Moore* is better understood as involving a Category-Two analysis. That follows from both the Court's express reliance on Jackson's own description of Category-Two cases, and its concession that Congress had never "authoriz[ed]" the action under review. See, e.g., Bahr & Blackman, *supra* note 39, at 567 (asserting that "[w]ith respect to the suspension of the claims, the Supreme Court found that the action fell into the Tier Two zone of twilight because it was not explicitly authorized by Congress"); E. Garrett West, *A Youngstown for the Administrative State*, 70 ADMIN. L. REV. 629, 643 (2018) (noting that the Court in *Dames & Moore* "analyze[d] the question under Category II"); Turner, *supra* note 38, at 678 (noting that "the Court placed the suspension of claims into the 'zone of twilight' category").

<sup>77</sup> *Id.* at 678–79.

<sup>78</sup> 539 U.S. 396, 413 (2003).

<sup>79</sup> *Id.* at 415 (quoting *Dames & Moore*, 453 U.S. at 679, 682–83).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 414.

In one sense, *Garamendi* has very little to do with Justice Jackson's concurrence; the Court in *Garamendi* never actually described the tripartite framework, and it certainly never made reference to the middle category in particular. At the same time, however, the case relied heavily on *Dames & Moore*, and in that sense, as Doug Kysar and Bernadette Meyler have noted, "*Youngstown* . . . could be seen as lurking in the background."<sup>82</sup> Most importantly, like Rehnquist's opinion in *Dames & Moore*, Justice Souter's majority opinion in *Garamendi* treated informal indicators of congressional acquiescence as sufficient to sustain forms of presidential action that Congress had not explicitly authorized.<sup>83</sup>

Indeed, *Garamendi* might if anything have managed to expand *Dames & Moore*'s reach.<sup>84</sup> In *Dames & Moore*, it was not mere congressional silence that supported the Court's inference of acquiescence, but rather a "general tenor" of congressional acceptance—reflected in thematically related congressional enactments—that helped to justify what the President had done.<sup>85</sup> In *Garamendi*, by contrast, the Court did not even bother to highlight any congressional enactments that seemed to evince even indirect receptiveness to the agreement under review.<sup>86</sup> Put differently, whereas the Court in *Dames & Moore* had pointed to discrete congressional *actions* as validating Congress's acceptance of the President's claim-suspension agreement, the Court in *Garamendi* pointed only to mere absence of congressional opposition as affirming a much broader authority to enter into executive agreements more generally. Congressional silence and historical practice thus together sufficed to validate a form of unilateral executive action that Congress had neither approved of nor rejected in any formal way.<sup>87</sup>

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<sup>82</sup> Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1645 (2008).

<sup>83</sup> *Id.* (characterizing Justice Souter's opinion as holding that, "[b]ecause Congress had responded to prior presidential efforts to settle Americans' claims against foreign governments with 'inertia, indifference or quiescence,' the Court was entitled to assume that the president's actions represented a legitimate exercise of power within the 'zone of twilight'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))); see *Dames & Moore*, 453 U.S. at 678–79 (same).

<sup>84</sup> Further, as Brannon Denning and Michael Ramsey have noted, *Garamendi* did not in any way acknowledge the "limiting language" in *Dames & Moore* that "disclaimed an intent to establish the broad proposition that the President can settle its citizens' claims by executive agreement." Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 895 (2004).

<sup>85</sup> *Dames & Moore*, 453 U.S. at 678.

<sup>86</sup> See 539 U.S. at 414 (noting that the Constitution gives the president "a degree of independent authority" to conduct foreign affairs).

<sup>87</sup> *Id.* at 414–15.

### 3. *Medellin v. Texas*

The Court's most recent encounter with the zone of twilight, in *Medellin v. Texas*, was also indirect.<sup>88</sup> The petitioner in that case sought to invalidate a state criminal conviction, claiming that Texas had secured the conviction while acting in disregard of an International Court of Justice (ICJ) decision concerning U.S. treaty obligations under the Vienna Convention and the United Nations Charter.<sup>89</sup> In the wake of the ICJ judgment, President George W. Bush had issued a memorandum indicating that the United States would "discharge its international obligations" and instructing state courts to "give effect to the decision."<sup>90</sup> But Texas ignored the instruction, contending that neither the ICJ decision on its own terms nor the President's subsequent memorandum required it to revisit the petitioner's case.<sup>91</sup> That claim implicated the Jackson framework insofar as it hinged on Texas's position that the President lacked the authority to effectuate the ICJ's judgment on his own.<sup>92</sup>

Writing for the majority in *Medellin*, Chief Justice John Roberts began his analysis of the presidential power question by reciting the Jackson framework and describing its three categories.<sup>93</sup> He then considered whether, as the United States had attempted to argue, the treaties at issue in the ICJ judgment—which had been ratified by the Senate—constituted a form of congressional authorization that would implicate Category One.<sup>94</sup> They did not, according to the Chief Justice, because the relevant treaty provisions were "non-self-executing" and thus lacked "domestic effect of [their] own force."<sup>95</sup> In fact, Chief Justice Roberts continued, the non-self-executing nature of the treaties did more than merely fail to authorize the President to enforce the ICJ judgment against Texas; they also "implicitly prohibit[ed] him from doing so," because any unilateral attempt by the President to make the judgment binding on domestic courts would be "in conflict with the implicit understanding of the ratifying Senate."<sup>96</sup> The President's actions, then, ultimately fell "within Justice Jackson's

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<sup>88</sup> 552 U.S. 491 (2008).

<sup>89</sup> *Id.* at 497–98.

<sup>90</sup> *Id.* at 498.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 525–26.

<sup>93</sup> *Id.* at 524–25. In an eerie web of twilight-zone coincidences, Chief Justice Roberts had served as then-Justice Rehnquist's law clerk during the term in which *Dames & Moore* was decided, just as Rehnquist had served as Justice Jackson's law clerk during the term in which *Youngstown* was decided. See Bybee & Samahon, *supra* note 73, at 1737 (noting that Justice Rehnquist clerked for Justice Jackson during that term); Koh, *supra* note 73, at 1161 (noting that Chief Justice Roberts assisted in drafting the *Dames & Moore* opinion when he was a clerk to Justice Rehnquist).

<sup>94</sup> *Medellin*, 552 U.S. at 525.

<sup>95</sup> *Id.* at 527.

<sup>96</sup> *Id.*

third category, not the first or even the second.”<sup>97</sup> And that in turn rendered the question of congressional acquiescence irrelevant because, “[u]nder the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President’s action falls within the second category”—a category that the Chief Justice’s earlier analysis had already ruled out.<sup>98</sup>

Having ruled out the “second category” in relation to the government’s treaty-enforcement argument, Chief Justice Roberts then turned to an “argument . . . of a different nature than the one rejected above.”<sup>99</sup> According to that argument, the President’s power to require compliance with the ICJ judgment derived not from the treaties that the memorandum purported to enforce, but rather from “an independent source of authority” recognized in the past “claims-settlement cases”—that is, *Garamendi*, *Dames & Moore*, and their earlier, pre-*Youngstown* predecessors.<sup>100</sup> Those cases, Chief Justice Roberts acknowledged, did establish that “‘a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,’ can ‘raise a presumption that the [action] had been [taken] in pursuance of its consent.’”<sup>101</sup> But the cases had no relevance here,<sup>102</sup> as the Government had not

identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State’s police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.<sup>103</sup>

Consequently, although Chief Justice Roberts never expressly characterized this theory of presidential authority as dependent on an interpretation of Justice

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 528. Chief Justice Roberts also argued in the alternative that, even if pertinent, such acquiescence had not been shown, finding that the “authority expressly conferred by Congress in the international realm cannot be said to ‘invite’ the Presidential action at issue here.” *Id.* at 530 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); see Swaine, *supra* note 53, at 330 n.239 (characterizing this part of the *Medellin* opinion as “separately address[ing] the president’s argument that, in the alternative, the memorandum should be evaluated under Category Two”).

<sup>99</sup> *Medellin*, 552 U.S. at 528, 530–31.

<sup>100</sup> *Id.* at 531–32; see also *United States v. Pink*, 315 U.S. 203, 229 (1942) (noting that “[t]he powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees”); *United States v. Belmont*, 301 U.S. 324, 327 (1937) (noting that “no state policy can prevail against [an] international compact”). Again, the Court never explicitly invoked Justice Jackson’s concurrence during the course of this discussion, but its reliance on *Dames & Moore* can at least be read as indirectly implicating *Youngstown*.

<sup>101</sup> *Medellin*, 552 U.S. at 531 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

<sup>102</sup> See *id.* at 532 (describing the presidential action at issue as “unprecedented”).

<sup>103</sup> *Id.*

Jackson's Category Two,<sup>104</sup> he would ultimately conclude that the asserted power "to settle international claims disputes pursuant to an executive agreement" could not "stretch so far" as to encompass the "unprecedented action" that the memorandum had purported to undertake.<sup>105</sup>

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As guidance about the twilight zone's contours, these three cases add up to not a whole lot. *Dames & Moore*—the only one of the three to acknowledge explicitly the Category-Two nature of the action it considered—suggests that a "general tenor" of congressional support can suffice to sustain Category-Two action, particularly where that action has a longstanding historical pedigree.<sup>106</sup> *Garamendi* suggests that inferences of acquiescence to longstanding forms of action might sometimes be drawn even in the absence of such indirectly relevant legislation.<sup>107</sup> And *Medellin* suggests that, at other times, similar inferences cannot be so easily drawn.<sup>108</sup> Those three instructions—all concerning the same particular type of presidential action—hardly amount to a recipe for clear and coherent twilight-zone analysis and thus leave many important questions unresolved. As far as the Court's own case law is concerned, the "contemporary imponderables" that apply to twilight-zone action remain very much in place. Let us now then see whether the lower courts have managed to shed any additional light.

## II. TWILIGHT-ZONE ENGAGEMENT

As the previous Part demonstrated, the Supreme Court's own engagement with the twilight zone has been sporadic and shallow, leaving much unresolved about the middle category's substance and contours.<sup>109</sup> But the Court is not the only judicial institution that considers questions of presidential power; the lower federal courts sometimes confront these questions as well. In so doing,

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<sup>104</sup> There remains one puzzle that Chief Justice Roberts did not, in our view, adequately resolve: If, as Roberts had earlier concluded, the relevant treaties "implicitly prohibited" any executive branch attempt to give them domestic effect, why would the President have been able to rely on some alternative source of power to do the same thing? *See id.* at 527. That is, having earlier found that the President was operating within Category Three for treaty-enforcement purposes, Chief Justice Roberts seemed to dispense with that finding when analyzing whether the memorandum might alternatively be justified as a (presumably) Category-Two measure instead. But how could the memorandum in any sense be regarded as a Category-Two measure if there already existed a form of federal law—i.e., the non-self-executing treaties—that "implicitly prohibited" the President from issuing the memorandum itself? *See id.*

<sup>105</sup> *Id.* at 532.

<sup>106</sup> *Dames & Moore*, 453 U.S. at 678.

<sup>107</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003).

<sup>108</sup> *Medellin*, 552 U.S. at 527–28.

<sup>109</sup> *See supra* Part I.

the lower courts often taken guidance from the *Youngstown* framework and sometimes, as we will see, attempt to navigate their own way through the middle category's murky waters.

This Part thus presents an overview of efforts in the lower courts to evaluate presidential action within the zone of twilight. The analysis yields two primary takeaways. The first takeaway relates to the relative *paucity* of acknowledged Category-Two cases. What we are presenting here is not so much a representative sample of Category-Two opinions, but rather the vast majority (if not the entirety) of cases in which lower courts have conducted their separation-of-powers analyses within the twilight zone's domain. That this body of cases can be so comprehensively summarized and discussed within a single section of a law review article is itself an indicator of how few Category-Two decisions have been rendered over time.

The second takeaway relates to the relative *variability* of the opinions themselves—opinions that go about engaging with the zone of twilight in different and sometimes conflicting ways. With one important exception that we discuss in Part III,<sup>110</sup> Justice Jackson's zone of twilight has thus far proven resistant to any significant forms of "rulification" or "specification" that would yield uniform application across cases. This finding might at first glance seem unsurprising; why, after all, would one expect a test expressly predicated on "contemporary imponderables" to yield a consistent set of outcomes over time? But the takeaway is at least somewhat noteworthy given that courts often manage to devise concrete and consistent instructions to guide their application of even the most open-ended doctrinal commands.<sup>111</sup> That no such development has occurred in connection with the *Youngstown* framework helps to underscore the unusually high degree of fluidity and flexibility across cases. Indeed, nearly seventy years after its original articulation, the test remains open-ended, unconstrained, and still amenable to a variety of different interpretations and analyses.

Indeed, and as the discussion below uncovers, the lower courts' applications of the *Youngstown* framework reveal at least four different approaches to evaluating the constitutionality of presidential actions within the middle category. The first automatically infers from Congress's silence an implied acceptance of the challenged conduct, effectively erasing the distinction between Justice Jackson's first two categories. The second treats congressional silence in a more contextual manner, understanding such silence to signal acquiescence to the President's conduct where, for instance, Congress has repeatedly

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<sup>110</sup> See *infra* Part III.B.ii.

<sup>111</sup> See Michael Coenen, *Rules Against Rulification*, 124 *YALE L.J.* 644, 674–80 (2014) (cataloguing substantive domains within which the Court and lower courts have collaboratively worked to give content and specification to originally quite open-ended doctrinal commands).

declined or failed to stop the sort of conduct under review. The third approach places emphasis on *informal* indicators of congressional acceptance (or non-acceptance), using the legislative record and only indirectly on-point laws to draw inferences about Congress's overall attitude toward the action under review. And the fourth approach trains its focus directly on Article II, asking, in effect, whether the Category-Two action comports with the President's distinctive constitutional responsibilities.

### A. Silence as Authorization

One method of Category-Two engagement treats the presence of congressional silence as functionally no different from the presence of congressional authorization, thus treating the second category as effectively no different from the first.

Consider in this respect the Third Circuit's 1971 opinion in *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*.<sup>112</sup> This case concerned an executive order that, in effect, required bidders on federal or federally assisted construction contracts to utilize affirmative action programs in their hiring practices.<sup>113</sup> Challengers to the program contended that the President lacked the authority to implement this policy unilaterally, and the court treated their claim as squarely implicating the *Youngstown* framework.<sup>114</sup> Applying that framework, the court then highlighted the federal government's "vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects."<sup>115</sup> And it further explained that

when the Congress authorizes an appropriation for a program of federal assistance, and authorizes the Executive branch to implement the program by arranging for assistance to specific projects, in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests.<sup>116</sup>

The court thus seemed headed toward a Category-One conclusion,<sup>117</sup> set to justify the President's actions by reference to whatever appropriations stat-

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<sup>112</sup> 442 F.2d 159 (3d Cir. 1971).

<sup>113</sup> *Id.* at 162–63.

<sup>114</sup> *Id.* at 167–68.

<sup>115</sup> *Id.* at 171.

<sup>116</sup> *Id.*; see Stack, *supra* note 73, at 566 n.138 (describing the court's analysis in *Contractors* as "concluding that the president's executive orders were authorized unless they were prohibited by statute").

<sup>117</sup> For other decisions about this order that chose not to invoke Category Two, see, for example, *United States v. N.O. Pub. Serv., Inc.*, 553 F.2d 459, 466, 467 n.8 (5th Cir. 1977) (finding that "[a]t



utes had conferred on the President the authority to issue the order under review. But its analysis then took a surprising turn; having suggested that the President's actions could be upheld as authorized by Congress, the court then asserted that "[i]f such action has not been authorized by Congress (Justice Jackson's first category), at the least it falls within the second category."<sup>118</sup> And it was no less valid under the second category because "[i]f no congressional enactments prohibit what has been done, the Executive action is valid."<sup>119</sup> The remainder of the court's separation-of-powers analysis thus proceeded to demonstrate that no federal statutes did in fact impose such a prohibition.<sup>120</sup> Consequently, as a form of non-prohibited executive action within either Category One or Two, the executive order could stand.

A similar blending of Categories One and Two appears the United States District Court for the Central District of California's 2003 opinion, *Anderman v. Federal Republic of Austria*.<sup>121</sup> There, the plaintiffs sought to recover damages (and other remedies) from the Austrian government for its complicity in Nazi-era property confiscations.<sup>122</sup> Their efforts would ultimately founder on political-question grounds, but not without first implicating a *Youngstown* analysis of prior presidential action. Specifically, the defendants had pointed to a 2001 executive agreement between the United States and Austria as precluding the plaintiffs' demand for judicial relief, and the plaintiffs had responded by arguing that the President had lacked the authority to enter into the agreement in the first place.<sup>123</sup> Thus, in order to determine, for political-question purposes, whether the plaintiffs' case threatened to "embarrass and undermine the Executive's authority in foreign affairs,"<sup>124</sup> the court needed first to determine, essentially on the merits, whether that authority had been properly exercised in the first place.

And on that question, the District Court's conclusion was straightforward. Simply put, in formulating the 2001 agreement, "the Executive did not act in

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the least, there has been implied congressional approval" and that the action thus "[fell] within the first category of executive power—that of maximum power—which Justice Jackson identified in his concurring opinion in *Youngstown*"), *vacated*, 436 U.S. 942 (1978) (mem.), and *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 172 n.13 (4th Cir. 1981) (finding the order invalid because it was *not authorized* by Congress and citing to Justice Black's majority opinion in *Youngstown* for the proposition that the President lacks "inherent powers" to undertake "legislation action . . . in the absence of any delegation of lawmaking power by the Congress").

<sup>118</sup> *Contractors*, 442 F.2d at 171.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 171–76.

<sup>121</sup> 256 F. Supp. 2d 1098 (C.D. Cal. 2003).

<sup>122</sup> *Id.* at 1101–02.

<sup>123</sup> *Id.* at 1115–17.

<sup>124</sup> *Id.* at 1115.

contravention to Congressional will.”<sup>125</sup> Consequently, the “Executive acted at least at the second [*Youngstown*] level, and . . . no authority suggests that Congress would have disapproved of the Executive Agreement.”<sup>126</sup> And with no indicator of congressional disapproval before it, the Court could “not find that the Executive branch acted outside its authority in entering into the 2001 Executive Agreement.”<sup>127</sup>

In short, both the *Contractors* and *Anderman* decisions appeared to treat Category-Two actions as enjoying the same level of presumptive constitutional validity as their Category-One counterparts. To the judges deciding both cases, it did not matter whether the relevant executive action fell within Justice Jackson’s first or second category because, either way, the absence of a prohibiting statute was in itself sufficient to establish that action’s constitutional validity.<sup>128</sup> (Hence the ability of both courts to characterize the challenged actions as falling “at least” within the second category, without having to conclude definitively whether the actions did or did not enjoy actual congressional authorization.<sup>129</sup>) To be sure, more might well have been going on beneath the surface; perhaps both courts had good reason to conclude that the particular *types* of actions before them should have enjoyed Category-One-like status even when placed against a backdrop of congressional silence.<sup>130</sup> (Conversely, one similarly might imagine other circumstances in which the presence of congressional silence is, for all intents and purposes, equivalent to a Category-Three-

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<sup>125</sup> *Id.* at 1116.

<sup>126</sup> *Id.* at 1117. Throughout this discussion, the court attributed the tripartite framework to the Court’s decision in *Dames & Moore* rather than to *Youngstown* itself. *Id.*

<sup>127</sup> *Anderman*, 256 F. Supp. 2d at 1117.

<sup>128</sup> See, e.g., *Contractors Ass’n of E. Pa. v. Sec’y of Lab.*, 442 F.2d 159, 171 (3d Cir. 1971) (“If no congressional enactments prohibit what has been done, the Executive action is valid.”). This willingness to equate congressional silence with congressional authorization was also hinted at in the court’s suggestion in the *Contractors* case that Justice Jackson’s second category encompasses “action in which the President has implied power to act in the absence of congressional preemption.” *Id.* at 168.

<sup>129</sup> *Anderman*, 256 F. Supp. 2d at 1117; see also *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338, 344 (M.D. Tenn. 1981) (noting that the court in *Contractors* held that the executive order “fell within Justice Jackson’s first two categories” (citing *Contractors*, 442 F.2d at 170–71)).

<sup>130</sup> For instance, in *Contractors*, the court did note that its valid-unless-prohibited conclusion was rendered “[p]articularly” true by the fact that “Congress, aware of Presidential action with respect to federally assisted construction projects since June of 1963, ha[d] continued to make appropriations for such projects.” 442 F.2d at 171. And the court in *Anderman* did say, albeit without further elaboration, that “no authority suggests that Congress would have disapproved of the Executive Agreement,” thus perhaps alluding to some additional considerations beyond the mere presence of congressional silence. 256 F. Supp. 2d at 1117. Thus, charitably read, both opinions might still prove compatible with the somewhat weaker proposition that Category-Two action is valid if it is accompanied by a lengthy history of congressional acquiescence. See *infra* Part II.B.

like finding of congressional prohibition.<sup>131</sup>) But in terms of the actual opinions themselves, both courts appeared to treat the so-called zone of twilight as involving not much twilight at all.<sup>132</sup>

### *B. Silence as Acquiescence*

A second approach to twilight-zone analysis shares with the first approach its tendency to accord a strong presumption of validity to presidential action undertaken in the face of legislative silence. But, unlike the first approach, this approach arrives at that presumption by means of a particularized and context-specific *inference* about congressional intent. In particular, this approach builds on the suggestion of Justice Jackson himself that, within the zone of twilight, “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”<sup>133</sup> Put differently, congressional silence might sometimes create space for executive action that, over time—and on account of that silence—assumes increased constitutional legitimacy. Although Congress’s attitude might not rise to the level of “implied authorization” sufficient to implicate Category One directly, it might still reveal enough “indifference or quies-

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<sup>131</sup> Consider in this respect a district court opinion from 1994, in the case of *Mille Lacs Band of Chippewa Indians v. Minnesota*. 853 F. Supp. 1118 (D. Minn. 1994), *aff’d*, 124 F.3d 904 (8th Cir. 1997), *aff’d*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The court there considered the validity of an 1850 Executive Order (issued by then-President Zachary Taylor) that purported to terminate the usufructuary rights conferred by an 1837 treaty between the United States and several Bands of Chippewa Indians. The court rejected that claim, holding that the 1850 order was invalid because it had never been authorized by Congress. *See id.* at 1142–43. What is more, and in contrast to the decisions in *Contractors* and *Anderman*, the court went on to explain why, with respect to the particular claim before it, the demonstrated lack of congressional authorization was in and of itself sufficient to resolve the separation-of-powers question. That was so, the court explained, because “the Constitution did not provide President Taylor with the power to revoke treaty rights” and “[u]nder the Constitution, Congress has plenary authority over Indian affairs.” *Id.* at 1142. Here, in other words, Congress’s silence on the subject had the same functional effect as a direct prohibition: a lack of express congressional authorization to override the terms of the duly ratified treaty itself made clear that the President had acted beyond the scope of his constitutional authority. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 828 (D. Minn. 1994) (“Although the President has the ‘power, by and with the consent of the Senate, to make treaties’, Congress has plenary authority over Indian affairs. Only Congress can abrogate an Indian treaty right by expressing that intention clearly and plainly. Ratification of the 1837 treaty was not a clear and plain expression of Congressional intent to allow the President to remove the Chippewa without their consent, particularly because the treaty does not even mention removal.” (citations omitted) (quoting U.S. CONST. art. II, § 2)), *aff’d*, 124 F.3d 904 (8th Cir. 1997), *aff’d*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>132</sup> *See, e.g., Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 791–92 n.40 (D.C. Cir. 1979) (expressing disagreement with the Third Circuit’s conclusion in *Contractors* that the President had “acted within his ‘implied authority’” and emphasizing that “much uncertainty attends any claim of ‘implied’ or ‘inherent’ presidential authority under the Constitution”).

<sup>133</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

cence” to tip the scale in the President’s favor within Category Two itself. Silence implies constitutional validity because that silence, understood in context, seems to indicate that Congress is on the President’s side.

Consider in this respect the Fifth Circuit’s decision in *Barquero v. United States*.<sup>134</sup> The United States and Mexico had entered into a Tax Information Exchange Agreement (TIEA), pursuant to which each country would share with the other certain types of tax-related records.<sup>135</sup> The challenger contended that the (U.S.) President lacked constitutional authority to enter into this agreement. But the court disagreed, finding in two sections of the Internal Revenue Code “specific congressional authorization for the President’s decision to enter into the challenged TIEA.”<sup>136</sup> That passage in and of itself presaged a Category-One holding. But the court from there went on to note that, even if its Category-One analysis was wrong, the President’s action would still have been valid under Category Two.<sup>137</sup> And that was so in part because “there exists a history, albeit a short one, of congressional acquiescence in the President’s concluding TIEAs with non-beneficiary countries, and Congress has not questioned the power of the President to conclude such agreements.”<sup>138</sup> In particular, the Court pointed out that the President had recently signed TIEAs with other countries “without any indication of congressional disapproval.”<sup>139</sup> Put differently, the issue had already been teed up before Congress, and Congress had chosen not to act. And its inaction in the face of an easy opportunity to object thus helped to bolster the conclusion that the President had acted with Congress’s implied consent.<sup>140</sup>

Acquiescence-based logic of this sort also guided the D.C. Circuit’s decision in *American International Group, Inc. v. Islamic Republic of Iran*,<sup>141</sup> a pre-*Dames & Moore v. Regan* decision concerning the same claims-suspension

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<sup>134</sup> 18 F.3d 1311, 1313–16 (5th Cir. 1994).

<sup>135</sup> *Id.* at 1313.

<sup>136</sup> *Id.* at 1315.

<sup>137</sup> *Id.* at 1314–15.

<sup>138</sup> *Id.* at 1315.

<sup>139</sup> *Id.* at 1315 n.13.

<sup>140</sup> The Court’s Category-Two analysis did not rest exclusively on this conclusion. The Court also held that a recent amendment to the Internal Revenue Code has also signaled “‘implicit approval’ for the President’s actions” and thus “constitute[d] an ‘invitation’ . . . to enter into TIEAs with non-beneficiary countries.” *Id.* at 1315 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In addition, and somewhat puzzlingly, the Court also noted that “the Senate appears to have given its explicit approval to the TIEA at issue when it ratified the United States–Mexico comprehensive income tax convention in November 1993.” *Id.* at 1315–16. The court thus seemed to imply that the Senate’s ratification of an Article II treaty, though perhaps insufficient to bring the President’s actions into Category-One analysis, still sufficed to support a finding that Category-Two action was constitutionally valid.

<sup>141</sup> 657 F.2d 430 (D.C. Cir. 1981).

order that the Court would later uphold.<sup>142</sup> As far as the D.C. Circuit was concerned, that suspension order “was an example of a continual executive practice in which the Congress has, at the very least, acquiesced.”<sup>143</sup> Specifically, the Court pointed to “a long-standing practice of settling private American claims against foreign governments through executive agreements,”<sup>144</sup> that was “fortified by the statements of distinguished judges through the years.”<sup>145</sup> What was more, and “[o]f especial significance in this ‘zone of twilight,’” was the limited and subject-specific manner in which Congress had previously voiced its opposition to prior claim-settlement agreements.<sup>146</sup> In particular, the court pointed to an earlier instance in which Congress had passed a law requiring the President to renegotiate a claim-settlement agreement with Czechoslovakia.<sup>147</sup> That law showed that Congress knew how to show its opposition to claims-settlement agreements when it wanted to do so, thus supporting the inference that Congress had “apparently chosen not to act” in response to the President’s agreement with Iran.<sup>148</sup>

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<sup>142</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 657–88 (1981).

<sup>143</sup> *Am. Int’l Grp.*, 657 F.2d at 439.

<sup>144</sup> *Id.* at 444. In highlighting this point, the D.C. Circuit referenced Justice Frankfurter’s separate *Youngstown* opinion and its suggestion that “[d]eeply embedded traditional ways of conducting government . . . [can] give meaning to the words of a text or supply them.” *Id.* at 443 (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)).

<sup>145</sup> *Id.* at 445.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* Notably, and in contrast to the agreement with Iran, the Czechoslovakia agreement on its own terms was conditioned on congressional approval. See R.B. Lillich, Editorial Comment, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT’L L. 837, 840 (1975) (noting that the agreement was “conditioned upon the U.S. granting most-favored-nation treatment and other economic benefits to Czechoslovakia, the bestowal of which by the Executive requires prior congressional authorization” and that the President “had little choice . . . but to seek such authorization” (footnote omitted)). Thus, the circumstances presented in that case were somewhat more conducive to congressional intervention than were the circumstances presented in *American International* and the other Iran-agreement cases. Whether that distinction should have made a difference was a question that the D.C. Circuit never discussed.

<sup>148</sup> *Am. Int’l Grp.*, 657 F.2d at 445. One final example of this reasoning is illustrated by a subsequently withdrawn Ninth Circuit opinion that addressed the validity of a presidentially initiated policy of denying official recognition to “an ‘Armenian Genocide.’” See *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1056, 1060 (9th Cir. 2009), *withdrawn*, 629 F.3d 901 (9th Cir. 2010). Specifically, Congress had on several occasions initiated work on legislative resolutions that would have officially recognized the Armenian genocide, on each occasion “[t]he President and his senior officials [had] lobbied Congress, privately and publicly” against it, and “[e]ach time, Congress deferred to the President’s authority, and did not bring the Resolution to a vote.” *Id.* at 1060. Under these circumstances, the lack of formal legislative guidance actually counted as a form of “congressional acquiescence” that “infuse[d] the President’s authority to act with additional support.” *Id.* Thus, to the extent the policy “implicated a power shared by the President and Congress, Congress’s documented deference in this case lends the presidential policy additional authority.” *Id.*

### C. “General Tenor” Analysis

A third method of twilight-zone analysis also blurs the boundaries between Categories One and Two. But whereas the first two methods do so by treating congressional silence as akin to authorization, this method relies on affirmative (though sometimes quite subtle) indicators of congressional approval (or disapproval) that appear within the legislative record itself. These indicators might not be strong enough to demonstrate the sort of “implied authorization” that would traditionally implicate Category One, but, the argument goes, they still carry enough weight to tip the scale in favor of the President *within* Category Two itself. What this form of Category-Two analysis relies on, in other words, is not so much a single, hard indicator of actual legislative authorization, but rather a set of soft indicators of a receptive congressional posture.

The “general tenor” approach is perhaps best embodied by the Court’s own opinion in *Dames & Moore*, which, as we have already seen, pointed to multiple congressional enactments as informally signaling Congress’s “acceptance of a broad scope for executive action in circumstances such as those presented in this case.”<sup>149</sup> It also bears some resemblance to the suggestion offered by Chief Justice Vinson in his *Youngstown* dissent that Congress had instituted a number of “legislative programs,” the “successful execution” of which “depends upon continued production of steel and stabilized prices for steel.”<sup>150</sup> And the approach has surfaced within lower court opinions as well.

Consider, for instance, the First Circuit’s decision in *Massachusetts v. Laird*,<sup>151</sup> one of several Vietnam-era cases challenging the President’s constitutional authority to prosecute the war.<sup>152</sup> The *Youngstown* analysis in *Laird* appeared in the midst of a political-question-based holding, with the court treating the apparent constitutional appropriateness of the President’s military engagement as a reason to avoid reaching the merits of the plaintiff’s claims.<sup>153</sup> Put dif-

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<sup>149</sup> 453 U.S. 654, 677 (1981).

<sup>150</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 672 (1952) (Vinson, C.J., dissenting); see Goldsmith & Manning, *supra* note 33, at 2285 (noting that “Vinson thought the President possessed a residual capacity to take the steps necessary to carry out Congress’s program, even if Congress itself had not provided for those specific steps”).

<sup>151</sup> 451 F.2d 26 (1st Cir. 1971).

<sup>152</sup> See, e.g., *Mottola v. Nixon*, 464 F.2d 178, 183 (9th Cir. 1972) (holding that the plaintiffs lacked standing to challenge the President’s actions); *Orlando v. Laird*, 443 F.2d 1039, 1043–44 (2d Cir. 1971) (upholding dismissal on political question grounds); *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (same). See generally Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 RUTGERS L. REV. 407, 483–500 (2011) (discussing the Vietnam-era presidential authority cases).

<sup>153</sup> *Laird*, 451 F.2d at 30–31. The court, to be clear, was quite frank about its intermingling of merits-based and justiciability-based issues. See *id.* at 31 (noting that, in order to determine whether the dispute involved a “textually demonstrable constitutional commitment” of authority to a coordinate constitutional branch, it needed to “identify the scope of the power which has been committed”);

ferently, the court somewhat confusingly reached the merits of a *Youngstown*-type question in the course of explaining why it lacked the power to do what it had just done.

More specifically, the First Circuit saw the case as presenting “a situation of shared powers, the executive acting and the Congress silent,” that thus implicated Justice Jackson’s middle category.<sup>154</sup> And within that middle category, the court found it significant that Congress had chosen to continue appropriating money to the Department of Defense while fully aware of the Department’s engagement in the Vietnam conflict.<sup>155</sup> These appropriations statutes, to be clear, were not necessarily “equivalent” to a declaration of war, or even to “express or implied ratification” of that war, but they still managed to demonstrate “Congressional support of executive activities.”<sup>156</sup> And given this “steady Congressional support,” the court was willing to conclude that “the Constitution has not been breached.”<sup>157</sup> Thus, much as in *Dames & Moore*, a collection of congressional statutes of only indirect relevance to the question at hand sufficed to show that Congress stood behind the President’s own initiatives—enough so, at least, to justify the action as an apparently valid (though ultimately unreviewable) Category-Two measure.

Another example of this sort of “general tenor” analysis comes from a recent district court decision in *Indigenous Environmental Network v. Trump*, a case involving the Keystone XL pipeline.<sup>158</sup> The plaintiffs sought to enjoin the issuance of permits to construct a cross-border segment of the pipeline, arguing, among other things, that then-President Donald Trump lacked the authority to grant those permits on his own.<sup>159</sup> Having recited the *Youngstown* framework, the court acknowledged a general lack of precedent on “the question of whether the President possesses the inherent authority to permit cross-border pipelines.”<sup>160</sup> But in considering the question for itself, the court placed weight on two congressional actions that, in its view, showed a “tug and pull between Congress and the Executive branch when it comes to authority over cross-border pipelines.”<sup>161</sup> First, in 2011, Congress had passed a statute requiring the

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*see also id.* at 33–34 (“[W]e are aware that while we have addressed the problem of justiciability in the light of the textual commitment criterion, we have also addressed the merits of the constitutional issue. We think, however, that this is inherent when the constitutional issue is posed in terms of scope of authority.”).

<sup>154</sup> *Id.* at 34.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> 428 F. Supp. 3d 296 (D. Mont. 2019).

<sup>159</sup> *Id.* at 308.

<sup>160</sup> *Id.* at 310–11.

<sup>161</sup> *Id.* at 311.

President and the State Department to issue a permitting decision regarding the pipeline within sixty days.<sup>162</sup> And second, in 2015, “Congress attempted to assert additional authority” by attempting to pass the Keystone XL Pipeline Approval Act, which would have authorized construction of the pipeline on Congress’s terms, had it not been vetoed by Trump’s predecessor, President Barack Obama.<sup>163</sup> These enactments, coupled with President Obama’s pushback, had helped to reify a form of “presidential-congressional interplay” that President Trump had problematically chosen to “ignore[.]”<sup>164</sup> Thus, the court concluded, the plaintiffs had plausibly alleged that the President’s actions were “*ultra vires*, or outside the bounds of his legal authority.”<sup>165</sup>

#### D. “Inherent Powers” Analysis

A fourth method of Category-Two engagement eschews context-specific analyses of the relevant legislative materials in favor of more abstract musings about the nature of presidential power. Courts applying this approach have resolved zone-of-twilight questions by scrutinizing the connection between the presidential action under review and the “inherent powers” enjoyed by the President under Article II.<sup>166</sup>

Then-Judge Brett Kavanaugh offered a Category-Two analysis along these lines in an opinion concurring in the D.C. Circuit’s denial of rehearing en

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<sup>162</sup> *Id.* at 302. Following enactment of this statute, the Obama administration promptly denied the permit application. *Id.*

<sup>163</sup> *Id.* at 311.

<sup>164</sup> *Id.* at 311–12.

<sup>165</sup> *Id.* at 312.

<sup>166</sup> Although it was not technically a “Category-Two” decision, the United States Court of Appeals for the Second Circuit’s opinion in *Padilla ex rel. Padilla v. Rumsfeld* employed a form of “inherent powers” analysis that in some ways proceeded along similar lines. See 352 F.3d 695 (2d Cir. 2003) (holding that the district court lacked jurisdiction), *rev’d*, 542 U.S. 426 (2004). Specifically, in considering whether the President could permissibly detain a U.S. citizen captured on U.S. soil as an “enemy combatant,” the court first took pains to explain why the President lacked the “inherent authority” to do so unilaterally. *Id.* at 699–701, 712. And, having answered that question in the negative, the court then concluded that “express congressional authorization” was necessary to validate the action under review. *Id.* at 715 (“The Constitution’s explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the Third Amendment, to Congress is a powerful indication that, absent express congressional authorization, the President’s Commander-in-Chief powers do not support Padilla’s confinement.”). From there, however, the Court went on to conclude that, far from authorizing such detentions, Congress had flatly forbidden them, by means of the 1971 Non-Detention Act. *Id.* at 718–19. That “congressional ‘denial of authority’” thus placed the President in “*Youngstown*’s third category,” within which the detention obviously could not withstand constitutional scrutiny. *Id.* at 712. In other words, by considering the *necessity* of congressional authorization prior to evaluating its *presence*, the court managed to suggest that the President’s actions *would have been invalid* within the zone of twilight, while ultimately holding that the President’s actions were in fact prohibited under Category Three.



banc in *Al-Bihani v. Obama*.<sup>167</sup> The en banc petition in that case raised the question of whether the *Charming Betsy* canon—which provides for the resolution of statutory ambiguities so as to avoid violations of international law—should govern courts’ interpretation of the 2001 Authorization for the Use of Military Force (AUMF).<sup>168</sup> The court denied the rehearing petition on the ground that the panel decision’s treatment of that issue was not necessary to the case’s outcome.<sup>169</sup> But Judge Kavanaugh used the occasion to outline his own views on the matter, contending in a lengthy separate opinion that the *Charming Betsy* canon had no bearing on the AUMF’s meaning and that, in any event, the statute was best read to authorize certain actions that international law itself purported to forbid.<sup>170</sup>

Having maintained that the AUMF conferred Category-One status on the (allegedly international law-violating) executive action under review, Kavanaugh then went on to offer an argument in the alternative: Even assuming the AUMF had “not authorize[d] the President to take actions that are prohibited by international law,” this would merely have meant that the challenged presidential actions fell “into Category Two of Justice Jackson’s *Youngstown* framework, not Category Three.”<sup>171</sup> And that fact mattered greatly, because, as Judge Kavanaugh went on to contend, “[t]he proper Category Two analysis in these circumstances supports the President.”<sup>172</sup> Why? Because

when the President acts extraterritorially against non-U.S. citizens in self-defense of the Nation, especially in support of a war effort that Congress has authorized . . . the President possesses broad authority under Article II, as Chief Executive of the Nation and Commander in Chief of the Armed Forces, that does not depend on specific congressional authorization.<sup>173</sup>

In other words, it “would make little difference whether the AUMF incorporates international-law norms as a limit on the scope of the President’s statuto-

<sup>167</sup> See 619 F.3d 1, 9–53 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc).

<sup>168</sup> *Id.* at 9–10.

<sup>169</sup> *Id.* at 1 (Sentelle, C.J., concurring in denial of rehearing en banc).

<sup>170</sup> *Id.* at 37 (Kavanaugh, J., concurring in denial of rehearing en banc) (“[W]hen Congress has broadly authorized the President to take certain actions, and that broad authorization encompasses actions that might in turn violate international law, courts have no legitimate basis to invoke international law as a ground for second-guessing the President’s interpretation.”).

<sup>171</sup> *Id.* at 49. In other words, the AUMF’s failure to authorize violations of international law would have constituted a form of congressional silence on the question. If, by contrast, the AUMF had specifically prohibited the President from violating international law, then the court would have found itself in “a Category Three situation.” *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 50.

ry authorization, because Article II would still independently authorize the President's action."<sup>174</sup> Thus, to the extent that the challenged presidential action implicated Justice Jackson's zone of twilight, its constitutional validity was readily demonstrated by that action's close connection to core Article II responsibilities.<sup>175</sup>

A similar form of "inherent powers" analysis was at least hinted at in a recent dissenting opinion from the United States Court of Appeals for the Armed Forces.<sup>176</sup> *United States v. Jones* raised the question of whether the President had the authority to designate certain forms of conduct prohibited by the "catch-all" provision of Article 134 of the Uniform Code of Military Justice (UCMJ) as "lesser included offenses" of other specific offenses defined elsewhere in the UCMJ.<sup>177</sup> The majority said no, emphasizing that Congress and only Congress had the authority to define criminal offenses, including within the UCMJ.<sup>178</sup> But Judge Baker, in dissent, understood the issue in a somewhat different light. Although Article 134 by its own terms did not authorize the President to delineate offenses and/or lesser-included offenses, neither did the provision prohibit the President from doing so.<sup>179</sup> Thus, as far as Article 134 offenses were concerned, "the President acts in the gray zone of Category II."<sup>180</sup>

How, then, to resolve the Category-Two issue? Some of Judge Baker's analysis incorporated acquiescence-based reasoning—in particular, he placed emphasis on the fact that the President had "exercised this authority for sixty years," throughout which time Congress had "tolerated and acquiesced to such a practice."<sup>181</sup> But other portions of the analysis placed weight on the President's Article II status as Commander in Chief of the armed forces.<sup>182</sup> There were, in short, key "constitutional distinctions between civilian law and practice and military law and practice," owing to "the President's independent au-

<sup>174</sup> *Id.* at 52.

<sup>175</sup> See *Olegario v. United States*, 629 F.2d 204, 226–27 (2d Cir. 1980) (upholding, "[i]n the absence of a statutory mandate or express prohibition," an executive-branch decision to revoke a Vice Consul's naturalization authority because it involved "a seemingly delicate foreign affairs matter" and was "based on policy considerations traditionally, although not exclusively, associated with the executive branch").

<sup>176</sup> *United States v. Jones*, 68 M.J. 465, 473–79 (C.A.A.F. 2010) (Baker, J., dissenting).

<sup>177</sup> *Id.* at 472. Article 134 is a sort of catch-all provision, which covers, among other things, "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934.

<sup>178</sup> *Jones*, 68 M.J. at 471 (majority opinion).

<sup>179</sup> *Id.* at 476 (Baker, J., dissenting).

<sup>180</sup> *Id.* at 478.

<sup>181</sup> *Id.* at 474, 477.

<sup>182</sup> See, e.g., *id.* at 475–77.

thority as commander in chief.”<sup>183</sup> If nothing else, that role gave the President “some measure of authority to maintain good order and discipline within the military,” which had to be counterbalanced against Congress’s own Article I power “[t]o make Rules for the Government and Regulation of the land and Naval Forces.”<sup>184</sup> All told, the fact that “[m]ilitary discipline is an area of concurrent authority between Congress and the President” bore special significance when considering the longstanding history of congressional acquiescence to the President’s role “in clarifying the meaning of Article 134.”<sup>185</sup> And those facts together should have supported the conclusion that the President’s actions passed muster under Category Two.<sup>186</sup>

Consider finally the First Circuit’s Category-Two analysis in *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*, yet another dispute arising from the Iran claims suspension order.<sup>187</sup> There, the First Circuit chose to “approach the President’s order in terms of whether he had inherent power under the Constitution to take such action.”<sup>188</sup> Having framed the question in these terms, the court went on to reference past examples of executive agreements involving the suspension of claims,<sup>189</sup> along with prior Supreme Court decisions treating this “settlement power” as “incidental to the President’s position as the nation’s representative in the arena of international affairs.”<sup>190</sup> And with a nod to Justice Jackson’s suggestion that Category-Two cases should “depend on the imperatives of events and contemporary imperatives rather than on abstract theories of law,” the court cited to the “imperative need to preserve a presidential flexibility sufficient to diffuse an international crisis, in order to prevent the crisis from escalating or even leading to

<sup>183</sup> *Id.* at 474.

<sup>184</sup> *Id.* at 471 (majority opinion); *id.* at 477 (Baker, J., dissenting) (quoting U.S. CONST. art. I, § 8).

<sup>185</sup> *Id.* at 477 (Baker, J., dissenting).

<sup>186</sup> *Id.* The President’s foreign affairs power was also emphasized in a decision from a California appeals court, which held that a state-law method of tax apportionment was invalid because it was preempted by federal policy regarding international trade and taxation. See *Barclays Bank Int’l Ltd. v. Franchise Tax Bd.*, 275 Cal. Rptr. 626, 627 (Ct. App. 1990), *rev’d*, 829 P.2d 279 (Cal. 1992) (en banc). That policy, which derived from an order of the President, was challenged by the state as falling outside the scope of the President’s executive power. *Id.* at 642. In evaluating this claim, the court conceded that “the executive action here aligns with Justice Jackson’s second category.” *Id.* at 643. But the court went on to hold that policy implicated the “field” of “foreign policy . . . in which the executive possesses substantial power of its own.” *Id.* The order, in short, involved “a critical foreign policy issue on which the executive has affirmatively acted and the Congress has not,” and that was enough to sustain it against a separation-of-powers attack. *Id.* at 644–45.

<sup>187</sup> 651 F.2d 800 (1st Cir. 1981).

<sup>188</sup> *Id.* at 810.

<sup>189</sup> *Id.* at 811.

<sup>190</sup> *Id.* at 811–13 (citing *United States v. Pink*, 315 U.S. 203 (1942)).

war.”<sup>191</sup> In the First Circuit’s view, “the President ha[d] acted to resolve what was indisputably a major crisis in the foreign relations of this country,” and his suspension order—at least as applied to the plaintiffs before the court—was “a necessary incident to the resolution of a dispute between our nation and another.”<sup>192</sup> That was enough to show that “the executive power extends so far as to permit the accord reached here.”<sup>193</sup>

### III. TWILIGHT-ZONE AVOIDANCE

As the discussion thus far should illustrate, judicial engagement with the zone of twilight happens only infrequently. In and of itself, this conclusion might seem unremarkable. Historically speaking, direct challenges to presidential action have been relatively uncommon, thus restricting the overall number of cases in which the Justice Jackson framework might plausibly apply.<sup>194</sup> In addition, in our present-day “age of statutes,”<sup>195</sup> within which administrative agencies assume significant responsibilities in implementing federal law,<sup>196</sup> many would-be *constitutional* challenges to presidential authority instead ended up taking the

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<sup>191</sup> *Id.* at 812–13 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

<sup>192</sup> *Id.* at 814.

<sup>193</sup> *Id.* A 1970 U.S. district court decision arguably offers another example of inherent powers analysis within the context of a Category-Two inquiry. In *Narenji v. Civiletti*, the U.S. District Court for the District of Columbia held unlawful a Justice Department regulation—issued at the behest of the President—that required Iranian student-visa holders to report to INS offices for immediate examination of their immigration status. 481 F. Supp. 1132 (D.D.C.), *rev’d*, 617 F.2d 745 (D.C. Cir. 1979). Somewhat puzzlingly, although the court found that the regulation violated the students’ Fifth Amendment rights, it still went out of its way to explain why the President had not breached *separation-of-powers* requirements by acting in this way. Specifically, the court noted “that there has not been what could be quantified as an express or implied Congressional authorization or denunciation of executive actions like those taken by the defendants here,” which in turn meant that “Justice Jackson’s ‘zone of twilight’ must be the focus of the Court’s consideration.” *Id.* at 1142–43. And, the court went on to suggest, there was good reason to think that “the ‘imperative of events and contemporary imponderables,’ as well as certain constitutional precepts, lend more than a modicum of support to defendants’ assertions of authority.” *Id.* at 1143 (quoting *Youngstown*, 343 U.S. at 637). The President had pursued the challenged action in connection with ongoing efforts to negotiate an end to the hostage crisis in Iran, and his efforts thus reflected the President’s “awesome responsibility for protecting our national interest in seeing that the inviolability of this nation’s diplomatic missions is respected.” *Id.* But all of that, the court concluded, was ultimately a moot point, given that the regulation abridged the Fifth Amendment and given that the President lacked the authority to violate constitutional rights. *Id.* In other words, the question of whether the President had the constitutional *power* to act unilaterally was rendered moot by the fact that the President’s actions ran afoul of a separately conferred rights-based limit.

<sup>194</sup> See Manheim & Watts, *supra* note 24, at 1770–72.

<sup>195</sup> See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

<sup>196</sup> See, e.g., Mila Sohoni, *The Idea of “Too Much Law,”* 80 FORDHAM L. REV. 1585, 1597–98 (2012) (charting the post-New Deal growth of the administrative state).

form of statutory challenges to agency authority—challenges that are generally subject to a different set of procedural and substantive rules.<sup>197</sup>

But even if these and other factors are at least partially responsible for the relative scarcity of Category-Two opinions, we think that the doctrinal amorphousness of the twilight zone itself has also played a causal role. The primary basis for this supposition has as much to do with the existing universe of opinions that *engage* with the zone of twilight as it does to an adjacent category of opinions that manage to *avoid* entering its territory at all. More specifically, we have located several opinions addressing presidential actions that appear ripe for Category-Two analysis and yet manage not to say anything about the twilight zone's scope or substance. We cannot, of course, enter the minds of the judges that rendered these opinions, and we cannot therefore know the extent to which the twilight zone's amorphousness might have induced them to stay away from it.<sup>198</sup> But the cases provide strong circumstantial evidence that the lack of meaningful guidance for twilight-zone cases bears at least some of the responsibility for the middle category's relative desuetude.

As this Part helps to show, *twilight-zone avoidance* can proceed in at least three different ways.<sup>199</sup> First, a court might strategically construe an arguably

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<sup>197</sup> See Manheim & Watts, *supra* note 24, at 1748 (noting that, “until recently, [the] absence of a well-developed framework to guide judicial review of presidential orders did not prove particularly problematic” given that “litigants tended to wait to challenge agency action rather than the presidential orders themselves”).

<sup>198</sup> Perhaps the most direct acknowledgment of a judge's desire to avoid the middle category comes from Justice Breyer's dissenting opinion in *Medellin v. Texas*. See 552 U.S. 491, 564–66 (2008) (Breyer, J., dissenting). In contrast to the majority, Justice Breyer would have found that the relevant treaty obligations were self-executing and thus required Texas to reopen the judgment at issue in the case. *Id.* at 541–63. But he declined to consider in the alternative whether, in the face of a non-self-executing treaty, the President's memorandum requiring adherence to the ICJ judgment could have validly bound Texas to do the same. *Id.* at 566. In that case, Breyer explained, the President's exercise of power would fall within “that middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question.” *Id.* at 564. But, in lieu of “the Court's comparative lack of expertise in foreign affairs,” “the importance of the Nation's foreign relations,” “the difficulty of finding the proper constitutional balance among state and federal, executive and legislative, powers in such matters,” and “the likely future importance of this Court's efforts to do so,” Justice Breyer was inclined to “very much hesitate before concluding that the Constitution implicitly sets forth broad prohibitions (or permissions) in this area.” *Id.* at 565–66. Thus, rather than reach a conclusion about the validity of the memorandum itself, Justice Breyer chose to “leave the matter in the constitutional shade from which it has emerged.” *Id.* at 566.

<sup>199</sup> In outlining these three methods of twilight-zone avoidance, we do not mean to present an exhaustive taxonomy. Other methods may sometimes be available. To offer just one additional example, courts might also sidestep difficult twilight-zone questions by relying on alternative opinions from *Youngstown* itself—most notably Justice Black's majority opinion—in cases that involve congressional silence.

Such a move was arguably reflected in the U.S. District Court for the Western District of Pennsylvania's decision in *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774 (W.D. Pa. 2014). *Juarez-Escobar* concerned President Obama's Deferred Action for Parents of Americans and Lawful Perma-

*silent* statutory framework in a manner that divines sufficient congressional will to nudge the challenged presidential action into either Category One or Three of the *Youngstown* framework.<sup>200</sup> Second, the court might rely on *precedent-based shortcuts* to sidestep both the explicit recognition of a Category-Two action and an active engagement with open-ended, context-sensitive analysis that Justice Jackson’s framework prescribes.<sup>201</sup> Finally, courts can avoid the middle category by altogether forgoing a judgment on the merits, relying instead on justiciability-based grounds for dismissal.<sup>202</sup>

### A. Strategic Category Assignments

Applying the Jackson framework begins with statutory interpretation. A judge enters the twilight zone by finding that Congress has neither authorized nor denied the presidential act in question—in other words, that Congress is silent. As a result, the most obvious means by which courts can avoid the twilight zone is by finding that Congress has in fact expressed its legislative will. There are, to be sure, many cases in which readily identifiable statutory language unambiguously lends itself to an articulation of congressional will.<sup>203</sup> But there are also many cases in which that is not the case. And when that latter type of case arises, judges seeking to avoid the zone of twilight will still sometimes strain to make the statutory backdrop speak.<sup>204</sup>

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ment Residents (DAPA) program, which allowed for the granting of deferred-action status to eligible undocumented parents of children with U.S. citizenship. *Id.* at 786. Concluding that DAPA exceeded constitutional separation-of-powers requirements, the district court made short shrift of the argument that “Congressional inaction” with respect to DAPA recipients furnished a sufficient justification for DAPA itself. *Id.* at 785–86. In so doing, however, the court said nothing about Category Two or the Justice Jackson framework more generally. Instead, relying heavily on Justice Black’s *Youngstown* opinion, the District Court characterized DAPA as an act of “lawmaking power” that “effectively change[d] the United States’ immigration policy.” *Id.* at 786. An acknowledged instance of congressional silence thus failed to implicate the middle category because the district court chose to analyze the case through the lens of a different *Youngstown* opinion. And under that framework, the court concluded, DAPA’s invalidity stemmed from the simple fact that it looked too much like an exercise of “lawmaking power.” *Id.* (noting that that “[t]his Executive Action ‘cross[ed] the line’” because it constituted “legislation”).

<sup>200</sup> See *infra* Part III.A.

<sup>201</sup> See *infra* Part III.B.

<sup>202</sup> See *infra* Part III.C.

<sup>203</sup> See, for example, *Zivotofsky ex rel. Zivotofsky v. Kerry*, where the Court was presented with a statute that sought “to override the [executive action] by allowing citizens born in Jerusalem to list their place of birth as ‘Israel.’” 135 S. Ct. 2076, 2082 (2015).

<sup>204</sup> See, e.g., Neal Kumar Katyal, *The Supreme Court 2005 Term—Comment*, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) (noting that, when applying the *Youngstown* framework, a court “can toggle between categories depending on its stinginess or generosity with any given statute and how it reads legislative silence”); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1141–42 (2009) (“In a world of multiple and very vague statutory delegations bearing on national security, foreign relations, and emergency

Consider, for instance, then-Judge Alex Kozinski's dissent from a denial of rehearing en banc in *Arizona Dream Act Coalition v. Brewer*.<sup>205</sup> A Ninth Circuit panel had preliminarily enjoined enforcement of an Arizona policy that would have refused driver's licenses to individuals participating in the federal Deferred Action for Childhood Arrivals program (DACA).<sup>206</sup> The panel had avoided an explicit assessment of DACA's constitutionality and instead characterizing the Arizona policy as generally incompatible with existing delegations of immigration-related powers to the President.<sup>207</sup> But Judge Kozinski disagreed with this conclusion, contending that the panel's conclusion on this point "finds no support in the actual text of the [Immigration and Nationality Act]," a statute that did not effectuate any delegation of authority to the President to implement a DACA-like program.<sup>208</sup> Intuitively, such a conclusion would have seemed to support the idea that DACA amounted to a form of twilight-zone action and the focus would naturally have turned to whether the President could still pursue the policy in the *absence* of congressional authorization. But that is not where Judge Kozinski went. In his eyes, the zone of twilight was inapplicable because Congress had "repeatedly declined to act" to endorse DACA, as evidenced by Congress's *failure to pass* a statute that would have authorized it.<sup>209</sup> Thus, by *not* authorizing presidential action, Kozinski maintained, Congress had effectively signaled its disapproval of that action.<sup>210</sup> And it had thereby placed the President's power at its "lowest ebb."<sup>211</sup>

Another Ninth Circuit opinion, *City & County of San Francisco v. Trump*, reflects a similar statutory move.<sup>212</sup> This case concerned a challenge to President Trump's "'sanctuary' cities" order, which directed the withholding of federal financial assistance to jurisdictions that refused cooperation with federal efforts to detain and deport undocumented immigrants.<sup>213</sup> The Ninth Circuit

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powers, judges have a great deal of freedom—not infinite freedom, of course—to assign *Youngstown* categories to support the decisions they want to reach, rather than reach decisions based on the *Youngstown* categories.”).

<sup>205</sup> 855 F.3d 957, 957 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of rehearing en banc).

<sup>206</sup> *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 963 (9th Cir. 2016), *amended and superseded*, 855 F.3d 957 (9th Cir. 2017).

<sup>207</sup> *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966–68 (9th Cir. 2017).

<sup>208</sup> *Id.* at 961 (Kozinski, J., dissenting).

<sup>209</sup> *Id.* at 962 n.7 (“We are not in the ‘zone of twilight,’ where the distribution of presidential and congressional power is uncertain. Congress has repeatedly declined to act—refusing time and time again to pass the DREAM Act—so the President is flying solo.” (citation omitted) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 962.

<sup>212</sup> 897 F.3d 1225 (9th Cir. 2018).

<sup>213</sup> *Id.* at 1231. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (“Enhancing Public Safety in the Interior of the United States”).

identified the case as one raising separation-of-powers issues and specifically endorsed the Jackson framework as the “operative test.”<sup>214</sup> After quoting Justice Jackson for the proposition that presidential power is at its “lowest ebb” when reflecting action “incompatible with the expressed or implied will of Congress,” the court then held that the non-exercise of congressional power was itself sufficient to locate the President’s executive order within Justice Jackson’s third category.<sup>215</sup> Specifically, “because Congress has the exclusive power to spend and has not delegated authority to the Executive to condition new grants [as set out in the challenged executive order] the President’s ‘power is at its lowest ebb.’”<sup>216</sup> In other words, Congress’s non-utilization of an enumerated power demonstrated not mere congressional silence, but active congressional disapproval.<sup>217</sup>

This argument, of course, can go the other way as well: just as the absence of specifically on-point legislation might evince a sufficient degree of congressional disapproval as to implicate Category Three, so too might it signal a sufficient degree of *approval* to push in favor of Category One. For example, *United States v. Groos*, a 2008 decision from the U.S. District Court for the Northern District of Illinois, involved an individual facing charges for violating Export Administration Regulations (EAR) that had been promulgated under authority granted by Congress through the Export Administration Act (EAA).<sup>218</sup> The EAA, however, had lapsed under a statutory sunset provision at the time of the defendant’s acts.<sup>219</sup> In the face of the lapsed statute, President George W. Bush issued an executive order that purported to extend the President’s export control authority and the EAR specifically, pursuant to the IEEPA.<sup>220</sup> Consistent with IEEPA’s requirement for a presidential declaration of emergency, President Bush’s executive order included a determination that the lapsing of the EAA—i.e., an action caused by Congress’s *inaction*—had “constitute[d] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”<sup>221</sup> In short, “the President, by Executive Order, continued export controls enacted under the EAA by ordering

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<sup>214</sup> *City & County of San Francisco v. Trump*, 897 F.3d at 1233.

<sup>215</sup> *Id.* at 1233–34 (quoting *Youngstown*, 343 U.S. at 637–38).

<sup>216</sup> *Id.* (quoting *Youngstown*, 343 U.S. at 637).

<sup>217</sup> *See id.* at 1234 & n.4 (stating that “Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order” and citing several failed pieces of legislation with restrictions similar to those enshrined in the challenged EO).

<sup>218</sup> 616 F. Supp. 2d 777, 780 (N.D. Ill. 2008).

<sup>219</sup> *Id.* at 784.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (quoting Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 17, 2001)).



them ‘carried out’ under the IEEPA, and explicitly extended the EAR as though issued under the IEEPA.”<sup>222</sup>

But did the President have the constitutional authority to do this? The District Court began its analysis of this question by acknowledging that “[t]he enforcement of regulations in the absence of an authorizing statute is troubling”<sup>223</sup> and that existing doctrine made clear that regulations promulgated pursuant to a statute do not extend beyond the lifetime of that statute.<sup>224</sup> Nevertheless, the court concluded that the EAR remained valid in light of two important facts. First, the court emphasized the relevance of congressional inaction. Congress had been “aware that the President invoke[d] the IEEPA to stop-gap the EAA, yet it ha[d] never acted to change the language of the EAA or the IEEPA to bar such behavior.”<sup>225</sup> In other words, Congress’s failure to *stop* the President was suggestive that the President’s actions were in fact consistent with congressional will.<sup>226</sup> Second, although “[t]he IEEPA d[i]d not expressly grant the President the authority to continue EAA or EAR in times of emergency,” the statute did “empower the President to act in furtherance of broad national security goals.”<sup>227</sup> Thus, faced with an executive action that: (a) fell outside the sunset period of a specific statutory authorization; and (b) bore an uncertain relationship to a more general statutory authorization, the court decided to resolve these decidedly mixed statutory signals in the President’s favor, channeling its analysis into Category One rather than Category Two (or even, perhaps, Category Three).<sup>228</sup>

The above-discussed opinions all reveal an irony: in their efforts to *avoid* invoking Justice Jackson’s zone of twilight, the opinions all utilized tools, inferences, and arguments that could just as easily have been deployed within the twilight zone itself. Thus, for instance, rather than cite to Congress’s failure to authorize DACA as equivalent to a statutory prohibition on DACA, Judge Kozinski in *Brewer* might instead have simply acknowledged Congress’s silence with respect to DACA and then—within Category Two—pointed to Congress’s unsuccessful efforts to ratify the program as reflective of a “general

<sup>222</sup> *Id.* at 785.

<sup>223</sup> *Id.* This seems to put it mildly.

<sup>224</sup> *Id.* at 786–87.

<sup>225</sup> *Id.* at 785.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 788. Specifically, the court noted that the IEEPA “explicitly delegates authority to regulate exports, issue regulations, and impose criminal penalties, all of which are similar to provisions in the lapsed EAA.” *Id.*

<sup>228</sup> *Id. Contra, e.g., Miceo Int’l v. Dep’t of Com.*, 613 F.3d 1147, 1153–54 (D.C. Cir. 2010) (holding that President Bush’s executive order failed to effectively extend EAA provisions enabling jurisdiction to challenge Department of Commerce sanctions).

tenor” of congressional nonacceptance.<sup>229</sup> So too in *City & County of San Francisco*: rather than point to Congress’s “exclusive” power over federal spending as indicative of Congress’s non-approval of President Trump’s sanctuary cities order, the Ninth Circuit might instead have simply acknowledged an absence of clear statutory guidance one way or the other and then—within Category Two—have explained why Congress’s constitutional primacy with respect to federal spending decisions (and the President’s corresponding lack of inherent authority with respect to those decisions) militated strongly against upholding the President’s withholding of funding to “sanctuary cities.” And so too in *Gross*: rather than fall back on the IEEPA’s *general* tendency to favor the President’s achievement of “broad national security goals” as somehow managing to preserve a statutory authority that Congress had explicitly let lapse, the court might instead have simply concluded that the President had moved from Category One to Category Two but that—again, within Category Two itself—the IEEPA and Article II still provided ample reason for letting the President move forward. There was, in other words, no shortage of twilight-zone tools that the judges deciding these cases could have chosen to utilize. But, perhaps owing to the overall uncertainty and opaqueness of the *doctrine* they confronted, these judges instead ended up trying to fit square pegs into round holes—finding creative ways to insist that Congress had spoken when the legislative backdrop more plausibly signaled silence instead.

### B. Precedent-Based Shortcuts

A second potential method of twilight-zone avoidance relies on the use of what we call “precedent-based shortcuts.” When a court confronts presidential action undertaken in the face of congressional silence, that court might circumvent direct application of Justice Jackson’s framework by citing to prior, on-point precedents that on their own suffice to dispose of the issue at hand.<sup>230</sup> If the challenged action sufficiently mirrors (or sufficiently contrasts with) a prior presidential action that the court has already declared valid, then the court need not engage directly with the tripartite framework, much less its middle

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<sup>229</sup> See *supra* Part II.C. In this context, to be sure, Judge Kozinski would still have needed to explain why Congress’s repeated failure to *act at all* in the face of DACA was not in fact reflective of congressional acquiescence to what the President had done. Kozinski’s claim, in other words, would have been a “general tenor”-type argument that drew a line from Congress’s refusal to authorize DACA to a conclusion that Congress was resistant to DACA. But one might alternatively have argued that by failing to prohibit a challenged form of Presidential action (in this case DACA), Congress had simply acquiesced to it, as, for instance, lower courts had held in the *Barquero* and *American International Group* cases. See Part II.B *supra*.

<sup>230</sup> See *supra* notes 38–40 and accompanying text (characterizing the Supreme Court’s resolution of *Dames & Moore* and *Garamendi* as examples of this phenomenon).

category. Rather, it can validate (or invalidate) the action by reference to the on-point precedential instruction while leaving unmentioned the precedent's own twilight-zone credentials.

Suppose, hypothetically, that in an earlier *Case A*, a court conducted an exhaustive twilight-zone analysis that resulted in the conclusion that presidential *Action A* passed constitutional muster. And suppose that the court now confronts in *Case B* a new form of presidential action, *Action B*, about which Congress has provided no legislative guidance. In deciding *Case B*, the Court might choose to evaluate *Action B* in much the same way that it had evaluated *Action A*—namely, by reciting Justice Jackson's framework, assigning *Action B* to the middle category, and then working through the twilight zone's "contemporary imponderables" in arriving at the bottom-line constitutional conclusion. But if the two actions are sufficiently similar to one another, the court can instead simply declare that *Action B* is in all material respects analogous to *Action A* and, without ever mentioning the twilight zone at all, rely on the authority of *Case A* to dictate the result.

To be clear, there is nothing necessarily manipulative or untoward about this sort of doctrinal move. If the prior, post-*Youngstown* precedent on its own suffices to dictate the resolution of a present-day case, recourse back to the *Youngstown* framework would amount to an unnecessary waste of time. But one can see in this maneuver the seeds of another potential method of twilight-zone avoidance. Specifically, if a reviewing court strives to avoid a direct encounter with the zone of twilight, it might strain to construe a prior, middle-category precedent more broadly than that precedent itself would justify. In so doing, the Court would at least arguably be departing from the methodological spirit of the Justice Jackson framework. If faithful application of the framework requires a fact-sensitive and case-specific investigation of twilight-zone action, then any attempt to "rulify" the framework through broad and categorical readings of prior decisions would reflect a departure from the analysis that the framework prescribes.<sup>231</sup> Courts can "avoid" the zone of twilight by treating as settled an actually unsettled question of law.

Obviously, the extent to which this maneuver reflects a clear-cut example of twilight-zone avoidance will often lie in the eye of the beholder. A genuine act of avoidance occurs only to the extent that the present-day decision overextends the precedent on which it relies. If, by contrast, the prior precedent *really does cover* the new case at hand, then it becomes much harder to maintain that the reviewing court is doing anything other than faithfully applying the law. Put differently, a court does not engage in avoidance simply by fol-

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<sup>231</sup> See Coenen, *supra* note 111, at 661 (defining "rulification" as the process whereby subsequent judicial glosses on a legal standard "materially increase[] the specificity of a controlling legal norm").

lowing the clear instructions that a binding precedent tells it to follow; the avoidance occurs only when the court manages to stretch the import of a precedent to cover a fact-pattern to which that precedent might not have originally applied. Distinguishing instances of the former from instances of the latter is not always easy to do.

With that caveat in mind, however, we still think it is at least arguable that “precedent-based” avoidance of the twilight zone has emerged in connection with at least one category of executive-power cases—namely, those involving sole executive agreements involving the settlement of claims.<sup>232</sup> The story here begins with *Dames & Moore v. Regan*, which, as we have already seen, featured an extensive twilight-zone analysis of an executive action undertaken pursuant to a sole executive agreement.<sup>233</sup> Consistent with Justice Jackson’s own description of the twilight zone’s doctrinal criteria, the Court took pains to “[e]mphasize the narrowness” of its holding, highlighting its fact-specific nature and expressly declining to hold “that the President possesses plenary power to settle claims.”<sup>234</sup> But by the time the Court decided *American Insurance Association v. Garamendi*, that “cautious approach” to the zone-of-twilight analysis had been, as Brannon Denning and Michael Ramsey have put it, “casually swept away.”<sup>235</sup> There, the Court cited to *Dames & Moore*—along with two other pre-*Youngstown* cases—as standing for the broad proposition “that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress,” including “executive agreements to settle claims of American nationals against foreign governments.”<sup>236</sup> Thus, *Garamendi* treated what had in fact been a narrow and fact-specific twilight-zone analysis of *one particular* sole executive agreement as yielding a categorical rule that supported the validity of a *wide*

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<sup>232</sup> Although we focus on this form of twilight-zone avoidance as it relates to sole executive agreements, the method is not substantively limited. This type of avoidance is perhaps the most difficult form to identify, as courts can effectuate it with subtlety and without any invocation of *Youngstown* or the Justice Jackson framework at all.

<sup>233</sup> See *supra* Part I.B.i.

<sup>234</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

<sup>235</sup> See Denning & Ramsey, *supra* note 84, at 921.

<sup>236</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003) (citing *Dames & Moore*, 453 U.S. at 679, 682–83). To be sure, the Court in *Garamendi* also cited to two pre-*Youngstown* cases—*United States v. Pink*, 315 U.S. 203, 223 (1942), and *United States v. Belmont*, 301 U.S. 324, 330–31 (1937)—as further supporting the existence of a broad claims-settlement authority. But, as Denning and Ramsey note, although the Court “in some places worded its decisions [in *Belmont* and *Pink*] quite broadly,” it also took care to “emphasiz[e] the specific context of the agreement” under review. Denning & Ramsey, *supra* note 84, at 919. Those decisions, together with *Dames & Moore*, “had not established a general theory of executive agreements, but rather had identified specific instances in which they might be used, without explaining their outer boundaries.” *Id.* at 920.

range of such agreements.<sup>237</sup> And in so doing, it gave lower courts an easy opportunity to circumvent Justice Jackson's middle category in future executive-agreement cases.

And, indeed, several lower courts have seized on this opportunity, treating *Garamendi* as establishing that, when Congress is silent, the President has robust authority to act pursuant to agreements with other nations. For instance, in *Roeder v. Islamic Republic of Iran*, the D.C. Circuit cited to *Garamendi* for the proposition that "[t]he authority of the President to settle claims of foreign nationals through executive agreements is clear."<sup>238</sup> Similarly, in *La Réunion Aérienne v. Socialist People's Libyan Arab Jarmahiriya*, the U.S. District Court for the District of Columbia rejected the plaintiff's contention that President George W. Bush lacked the authority to enter into a claims-settlement agreement with Libya, citing to both *Garamendi* and *Dames & Moore* as establishing the validity of the President's "power to settle such claims without explicit congressional authorization."<sup>239</sup> In *Whiteman v. Dorotheum GmbH & Co. KG*, the Second Circuit characterized *Garamendi* and *Dames & Moore* as together establishing that "[t]he President's power to settle claims through . . . executive agreements" with foreign nations "has long been recognized by courts . . . and acquiesced to by Congress."<sup>240</sup> Notably, none of these opinions included even a citation to Justice Jackson's concurrence, let alone any other opinion from the *Youngstown* decision. Far from wrestling with the "contemporary imponderables" of the twilight zone, then, these and other opinions could render a swift, affirmative constitutional judgment on a form of *middle category* presidential action by relying on a simple and categorical rule.

Again, the point of this discussion is not to cast doubt on the validity or soundness of the idea that the President has authority to pursue a wide range of sole executive agreements against a backdrop of legislative silence. That is, in effect, what *Garamendi* said, and lower courts should hardly be faulted for following *Garamendi*'s lead. Rather, our point is simply to suggest that, whether intentionally or not, the Court in *Garamendi* both engaged in and enabled another form of twilight-zone avoidance by endorsing a "rulified" gloss on *Dames & Moore*'s more tentative and fact-specific holding. The upshot of the decision was to take a set of presidential actions that satisfy all the triggering criteria of Justice Jackson's middle category—i.e., claims-settlement

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<sup>237</sup> Denning & Ramsey, *supra* note 84, at 831 (noting that *Garamendi* "contains broad and unreflective language endorsing executive agreements").

<sup>238</sup> 333 F.3d 228, 235 (D.C. Cir. 2003) (citing *Garamendi*, 539 U.S. 396).

<sup>239</sup> 867 F. Supp. 2d 30, 32 (D.D.C. 2011); *id.* at 33 (first citing *Garamendi*, 539 U.S. at 415; and then citing *Dames & Moore*, 453 U.S. at 679–83).

<sup>240</sup> 431 F.3d 57, 72 (2d Cir. 2005) (citations omitted) (first citing *Garamendi*, 539 U.S. at 415; and then citing *Dames & Moore*, 453 U.S. at 680–82).

agreements that Congress has neither approved nor prohibited—and to treat them as presumptively valid. With that presumption on the books, there exists little need for twilight-zone analysis in future claims-settlement cases.

### C. Justiciability-Based Dismissals

A final method of twilight-zone avoidance proceeds by circumventing the merits of presidential-power questions. More specifically, this avoidance technique relies on justiciability doctrines as the basis for dismissing presidential power disputes that might otherwise give rise to zone-of-twilight questions.

At one level, this suggestion should hardly raise eyebrows. Across many different areas of doctrine—including but not limited to separation-of-powers doctrine—commentators have detailed how rules of Article III standing, the political question doctrine, and other judicial glosses on the “case or controversy” requirement often enable judges to sidestep issues they would rather not decide.<sup>241</sup> Our claim here, however, is stronger: in particular, we want to suggest that twilight-zone cases are *especially amenable* to justiciability-based avoidance techniques, on the theory that a defining feature of the twilight zone—namely, the absence of congressional guidance regarding the appropriateness of a challenged presidential action—can be and sometimes has been treated as the central reason for deeming a case nonjusticiable.<sup>242</sup>

Perhaps the most suggestive opinion in this respect comes from Justice Powell’s concurrence in the judgment in *Goldwater v. Carter*.<sup>243</sup> *Goldwater* concerned a constitutional challenge to President Carter’s unilateral termination of a defense treaty with Taiwan, predicated on the claim that the President lacked the authority to abrogate a duly ratified Article II treaty in the absence of congressional approval.<sup>244</sup> On the merits, the question plausibly implicated Justice Jackson’s middle category: neither the treaty itself nor any other congressional statute provided any instructions regarding the means of the treaty’s rescission.<sup>245</sup> But the Court never reached the merits in *Goldwater*, as a majori-

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<sup>241</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115–27 (1962); see also Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1410–18 (1999) (detailing judicial use (and non-use) of justiciability doctrines based on judges’ assessment of the “foreign relations effects” of deciding the case).

<sup>242</sup> Cf. Eichensehr, *supra* note 62, at 620 (“Many of the separation-of-powers disputes to which the *Youngstown* framework applies do not end up before courts due to problems of standing or justiciability, among others.”).

<sup>243</sup> 444 U.S. 996, 996–97 (1979) (Powell, J., concurring in judgment).

<sup>244</sup> *Id.* at 997–98.

<sup>245</sup> See, e.g., Catherine Amirfar & Ashika Singh, *The Trump Administration and the “Unmaking” of International Agreements*, 59 HARV. INT’L L.J. 443, 453–54 (2018) (noting that “[a]ny truly unilateral termination in the absence of action by Congress necessarily resides in the *Youngstown* II ‘zone of

ty of Justices favored a disposition on justiciability-based grounds instead. Four of those Justices relied on the political question doctrine, reasoning that the question fell altogether outside the cognizance of Article III courts.<sup>246</sup> But Justice Powell favored a more limited and contingent basis for dismissal. Invoking prudential, ripeness-based limits, Justice Powell reasoned that the case was not fit for judicial resolution because Congress had not (yet) “taken action asserting its constitutional authority” with respect to the challenged treaty withdrawal.<sup>247</sup> And because Congress had not yet acted, there existed no “actual confrontation” between the political branches and the dispute merely presented “differences” that “turn[ed] on political rather than legal considerations.”<sup>248</sup> The better course, according to Powell, was simply for the Court to stay its hand, adhering to the general principle that “[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress *until the political branches reach a constitutional impasse*.”<sup>249</sup> Put another way, “[i]f the Congress chooses not to confront the President,” it was not the Court’s “task to do so.”<sup>250</sup>

Notably, lower courts have sometimes cited to Justice Powell’s *Goldwater* opinion in defending their own decisions not to reach the merits of disputes that lacked an “actual confrontation” between the branches.<sup>251</sup> For example, in *Doe v. Bush*, the plaintiffs sought an injunction against President George W. Bush’s initiation of military hostilities in Iraq, contending that the contemplated action conflicted with the force authorization statute that Congress had en-

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twilight’: the President takes independent action to terminate an international agreement, ‘in absence of either a congressional grant or denial of authority’” and characterizing *Goldwater* as presenting such a case (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

<sup>246</sup> *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring in judgment). Citing the political question doctrine, Justice Rehnquist asserted that the Constitution was “silent” as to whether legislative involvement in the abrogation of an Article II treaty was required and that such silence indicated that the issue would “surely be controlled by political standards.” *Id.* at 1003 (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

<sup>247</sup> *Id.* at 997 (Powell, J., concurring in judgment).

<sup>248</sup> *Id.* at 997, 998.

<sup>249</sup> *Id.* at 997 (emphasis added); see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 206 (2012) (Sotomayor, J., concurring in part and concurring in judgment) (noting that “it may be appropriate for courts to stay their hand in cases implicating delicate questions concerning the distribution of political authority between coordinate branches until a dispute is ripe, intractable, and incapable of resolution by the political process”).

<sup>250</sup> *Goldwater*, 444 U.S. at 998.

<sup>251</sup> Powell’s requirement of “actual confrontation” goes beyond the ordinary ripeness standard, which requires only that there be a live dispute between the parties. As Bradley and Morrison have noted, this “political ripeness” standard is “a requirement that is rarely if ever satisfied.” Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1110 (2013).

acted just a few months earlier.<sup>252</sup> But the First Circuit declined to adjudicate the claim. Prudential ripeness principles militated against judicial intervention, the court explained, because “there [was] a day to day fluidity in the situation that [did] not amount to resolute conflict between the branches,” and because “[t]he purported conflict between the political branches may disappear.”<sup>253</sup> Thus, the issues presented by the plaintiffs’ claim were not yet fit for judicial resolution and could become so only if a clear and unambiguous conflict between Congress and the President were to emerge.<sup>254</sup>

Nor have Justice Powell’s intuitions been confined to ripeness doctrine alone. In *Kucinich v. Bush*, for instance, the U.S. District Court for the District of Columbia declined on political question grounds to adjudicate a dispute in which thirty-two members of Congress had challenged President George W. Bush’s unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty.<sup>255</sup> As the District Court explained, it would be inappropriate to “rule on the claim . . . that President Bush ignored the constitutional role of Congress in the treaty termination process, when Congress itself has not even asserted that it has been deprived of any constitutional right.”<sup>256</sup> In other words, a judgment on the merits would problematically “express[] [a] lack of the respect due to the coordinate branches of government,” because it would involve “resolving an issue that neither the House nor the Senate has yet deemed worth asserting.”<sup>257</sup> Similarly, in *United States ex rel. New v. Rumsfeld*, the U.S. District Court for the District of Columbia held that adjudicating a challenge to President Clinton’s deployment of troops to Macedonia would similarly evince the “lack of respect

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<sup>252</sup> 323 F.3d 133, 134 (1st Cir. 2003).

<sup>253</sup> *Id.* at 137, 139.

<sup>254</sup> *Id.* at 143 (“In th[e] zone of shared congressional and presidential responsibility, courts should intervene only when the dispute is clearly framed.”). To be sure, neither *Goldwater* itself nor *Doe* qualifies as an obviously “Category-Two” case. The latter case in particular seems more plausibly located within Category Three given that the plaintiffs there had expressly accused the President of violating an identified set of statutory limits. *See id.* at 139 (contending that Congress had authorized only those forms of military actions that were sanctioned by the United Nations Security Council and that, because the Security Council had not approved of the President’s actions, those actions ran afoul of a limit within the statute itself). Even so, it is not difficult to see how these cases’ ripeness-based prescriptions would end up applying *a fortiori* within the Category-Two context. If ripeness-based principles demand judicial forbearance where an apparent interbranch conflict has not yet become concrete, then they would surely do the same when the conflict itself has not yet even become apparent. To the extent that courts demand an actual “clash” between the President and Congress as a precondition to resolving a separation-of-powers dispute, Category-Two cases would seem especially vulnerable to a justiciability-based dismissal.

<sup>255</sup> 236 F. Supp. 2d 1, 18 (D.D.C. 2002). The district court also concluded that the plaintiffs lacked standing to bring the challenge, *id.*, and that “under Justice Powell’s analysis [in *Goldwater*] the case is not ripe for judicial resolution,” *id.* at 17 n.12.

<sup>256</sup> *Id.* at 17.

<sup>257</sup> *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).



due coordinate branches of government,” given that “[t]here [was] . . . no conflict between the branches on this matter” and that “no contingent of Congress ha[d] ever . . . suggested that [the President] had to seek the approval of Congress before proceeding.”<sup>258</sup> In these and other cases, courts have thus cited to the presence of congressional inaction as a reason for circumventing, rather than engaging with, the “contemporary imponderables” of the twilight zone.<sup>259</sup>

Consider finally in this respect the First Circuit’s Vietnam-era decision in *Massachusetts v. Laird*.<sup>260</sup> In that decision, as we have already seen,<sup>261</sup> the court in one sense engaged with the twilight-zone directly, by quoting the relevant language from Justice Jackson’s concurrence and by noting that, even though Congress had not formally ratified the Vietnam war, “the complaint reveal[ed] a long period of Congressional support” for the President’s military actions.<sup>262</sup> But the court in *Laird* ultimately disposed of the case on political-question grounds, noting that “[b]ecause the branches are not in opposition, there is no necessity of determining boundaries.”<sup>263</sup> Thus, as the court saw it in *Laird*, the lack of conflict between Congress and the President served both to validate the President’s actions within the zone of twilight and to militate against the issuance of a full-scale decision about the zone of twilight. The same feature of the legislative backdrop—i.e., “the absence of any conflicting

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<sup>258</sup> 350 F. Supp. 2d 80, 97 (D.D.C. 2004) (quoting *Baker*, 369 U.S. at 217).

<sup>259</sup> See, e.g., *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 194 (S.D.N.Y. 2017) (dismissing a Foreign Emoluments Clause-based challenge to Donald Trump’s investments and business practices on the ground that, as in *Goldwater*, “Plaintiffs’ suit implicates a similar concern regarding a conflict between two co-equal branches of government that has yet to mature” (citing *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring))), *vacated*, 953 F.3d 178 (2d Cir. 2020), *vacated and remanded as moot*, *Trump v. Crew*, No. 20-330, 2021 WL 231541 (Jan. 25, 2021); *Smith v. Obama*, 217 F. Supp. 3d 283, 301 (D.D.C. 2016) (dismissing as nonjusticiable a challenge to the legality of Operation Inherent Resolve, a military campaign against ISIL because “the Court in this case is not presented with a dispute between the two political branches regarding the challenged action”), *vacated and dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018); see also *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985) (affirming the dismissal of a complaint alleging unlawful deployment of cruise missiles, in part on the ground that the allegations asserted by congressional plaintiffs were not ripe for decision (citing *Goldwater*, 444 U.S. at 997–98 (Powell, J., concurring))). It is perhaps also noteworthy in this respect that the Court more recently has cited to the *presence of an active congressional-executive conflict* as a reason *not* to dismiss a case as nonjusticiable. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (“The existence of a statutory right . . . is certainly relevant to the Judiciary’s power to decide *Zivotofsky*’s claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, *Zivotofsky* requests that the courts enforce a specific statutory right. . . . This is a familiar judicial exercise.”).

<sup>260</sup> 451 F.2d 26 (1st Cir. 1971).

<sup>261</sup> See *supra* notes 151–157 and accompanying text.

<sup>262</sup> *Laird*, 451 F.2d at 34.

<sup>263</sup> *Id.*

Congressional claim of authority”—that rendered the middle category applicable was also a feature that rendered a merits judgment unnecessary.<sup>264</sup>

Again, the point here is not to suggest that either Justice Powell in *Goldwater* or any of the lower courts who followed his lead were consciously seeking to avoid the murky doctrinal dictates of Justice Jackson’s middle category. Quite likely, some, if not all, of these decisions stemmed from genuine legal convictions that justiciability principles really did preclude adjudication on the merits. Even so, these cases at least illustrate a close conceptual connection between a defining feature of twilight-zone cases and an often-utilized basis for treating, either as a prudential matter or under Article III itself, disputes as nonjusticiable. And as long as that connection exists, justiciability-based doctrines will remain a readily available vehicle for getting rid of disputes that might otherwise implicate the zone of twilight. Thus, although we cannot say with certainty that judges are issuing justiciability-based holdings for the purposes of twilight-zone avoidance, the easy availability of such a maneuver nonetheless supports, if only indirectly, our suspicion that this form of avoidance sometimes occurs.<sup>265</sup>

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<sup>264</sup> *Id.* To be sure, *Laird* itself is not a good example of “twilight zone avoidance.” If anything, the court made the opposite move, reaching out to offer an explicit, merits-based analysis—located within the zone of twilight—even where its ultimate disposition of the case rendered such an analysis unnecessary to the result. *Contra id.* at 33–34 (insisting that the merits and justiciability-based issues were inextricably interlinked). Even so, the case provides a nice example of how easily twilight-zone-type conclusions can closely overlap with conclusions regarding a case’s nonjusticiability. And for courts less inclined to reach the merits of twilight-zone cases, *Laird*’s parallel analyses offer a straightforward roadmap towards that goal. *See, e.g., Doe v. Bush*, 323 F.3d 133, 137 (1st Cir. 2003) (suggesting that the district court had appropriately relied on *Laird* in concluding that the absence of a “resolute conflict between the branches . . . argue[d] against an uninformed judicial intervention” (citing *Doe v. Bush*, 240 F. Supp. 2d 95, 96 (D. Mass. 2002), *aff’d*, 323 F.3d 133)).

<sup>265</sup> The idea that courts can “avoid” twilight-zone decisions by deeming the cases before them nonjusticiable presupposes that at least some twilight-zone cases are in fact appropriately addressed on the merits. But this is not the only possible interpretation of Justice Jackson’s middle category. Indeed, much to the contrary, Professor Laura Cisneros has recently suggested that because “[t]he vocabulary of category two is decidedly non-legal and instead describes a political reality devoid of legal rules and guidance,” the category is best conceptualized as “identif[y]ing an area beyond legitimate judicial decision-making (i.e., an area of non-justiciability).” Laura A. Cisneros, *Youngstown Sheet & Tube v. Sawyer: A Story of Judicial Ethos and the (Un)Fastidious Use of Language*, 115 W. VA. L. REV. 577, 589 (2012); *see id.* at 592 (noting that, in twilight-zone cases, “Congress has neither acted nor indicated it has ceded the issue to the executive branch, leaving the Court, at least temporarily, with no means to fashion a ruling”); *id.* at 594 (noting that “[t]he value of the zone of twilight . . . lies in its capacity to,” among other things, “remind the Court that some questions of presidential authority fall outside its jurisdiction, at least until Congress acts and fills the legal void with an applicable statute”); *see also* Swaine, *supra* note 53, at 282 (highlighting the possibility that Justice Jackson’s opinion sets forth not so much “an approach to constitutional interpretation” in Category-Two cases, but rather “a theory of judicial abstention”). This is an intriguing possibility, for which Professor Cisneros offers a powerful defense. Cisneros, *supra*, at 594. But it is, as Cisneros herself acknowledges, not consistent with the Court’s own decisions in *Dames & Moore* and *Medellin*, both of which operated from the presumption that twilight-zone cases are at least sometimes within courts’ power to

#### IV. THE TWILIGHT ZONE'S TWO DIMENSIONS

We now turn from the descriptive to the prescriptive. Part II catalogued the hodgepodge of tools and techniques thus far deployed by judges when evaluating presidential action within the zone of twilight.<sup>266</sup> And Part III provided some reason to suppose that the lack of a coherent methodology sometimes induces judges to avoid Category-Two analysis altogether.<sup>267</sup> Combined together, those two Parts suggest that further specification of what Justice Jackson's middle category entails would help both to regularize opinions that engage with the zone of twilight and reduce the number of opinions that avoid it.

In this Part, we propose a method of twilight-zone analysis that would help to further these goals. More specifically, our aim is to prescribe a means of working through Category-Two cases that, although still flexible and context-sensitive, manages to channel and streamline the relevant constitutional considerations in a consistent and coherent way. We harbor no illusions that our proposed specification would make hard cases easy to decide, nor for that matter do we think that that *ought* to be the ultimate goal. Too much doctrinal simplicity, after all, would end up compromising the "functionalist" ambitions of the framework itself.<sup>268</sup> Nevertheless, we do think that a more structured and streamlined approach to twilight-zone analysis would help to demystify the adjudication of Category-Two questions, while also ensuring greater judicial attention to, and transparency about, the key constitutional variables that ought to drive the resolution of such questions.

We begin developing our approach by revisiting the various forms of twilight-zone engagement we considered in Part II. With one important exception,<sup>269</sup> that body of opinions homed in on at least one of two different features

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decide. *See* Cisneros, *supra*, at 595 (noting that, in both cases, "the Court transformed Jackson's zone of twilight into an area of justiciability by infusing it with legal rules and standards in a way that mischaracterizes the text of Jackson's opinion"). Thus, as a matter of modern Supreme Court doctrine, one cannot fall back—at least categorically—on the suggestion that all twilight-zone cases are nonjusticiable as a definitional matter. As plausible as that reading of Justice Jackson's concurrence might be, it is a reading that the Court itself has explicitly rejected.

<sup>266</sup> *See supra* Part II.

<sup>267</sup> *See supra* Part III.

<sup>268</sup> *See, e.g.,* Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 89 (2002) ("Many who study the balance of congressional and presidential power, especially in the area of foreign affairs, view Justice Jackson's concurrence in *Youngstown* as providing a sensible framework for resolving the conflicting claims of the two branches and decry this framework's alleged erosion in subsequent case law." (footnote omitted)).

<sup>269</sup> We are referring here to the two opinions that seemed to treat Category-Two action as constitutionally indistinguishable from Category-One action. These opinions treat the absence of congressional disapproval as *per se* sufficient grounds for extending the same presumption of validity to the challenged action that would otherwise be triggered by a showing of formal statutory approval. *See*

of the action under review. First, several of the opinions we considered either sought to infer acquiescence from congressional silence,<sup>270</sup> or to identify a “general tenor” of congressional approval or disapproval from the relevant legislative materials.<sup>271</sup> An important shared feature of these opinions, therefore, was the way they linked the validity of twilight-zone action to the variable of *congressional receptiveness*, treating signals of congressional acquiescence/acceptance (or non-acquiescence/non-acceptance) as a reason to uphold (or not uphold) the action under review. This is, at first glance, a counterintuitive maneuver. What triggers the Category-Two analysis, after all, is an “absence of either a congressional grant or denial of authority,”<sup>272</sup> and one would thus expect Congress’s own attitudes to play a limited, if not non-existent, role once a determination of congressional silence has been made. Nevertheless, these twilight-zone opinions still found a way to make Congress matter, seizing on “softer” indicia of congressional approval or disapproval as bearing on their bottom-line constitutional results.

The second variable of relevance to at least some of the opinions we considered was the relationship between the challenged executive action and the President’s constitutional role. More specifically, and as we saw in Part II, a few twilight-zone opinions treated the absence of formal congressional guidance as an invitation to consider more abstractly the *Article II appropriateness* of the action under review. Then-Judge Kavanaugh’s concurring opinion in *Al-Bihani v. Obama*, for instance, placed weight on the fact that the President was acting “extraterritorially against non-U.S. citizens in self-defense of the Nation”—a “realm” within which “the President possesses broad authority under Article II.”<sup>273</sup> Similarly, Judge Baker’s dissenting opinion in *United States v. Jones* drew a similar connection between the unilateral presidential action he would have deemed controlling and the President’s Article II authority as Commander in Chief.<sup>274</sup> These opinions thus gestured toward the intuition that, when Congress is silent, the President should have more constitutional leeway to do those things that more closely relate to the institutional prerogatives of the presidency. And, having demonstrated that the relevant Category-Two actions fell on the high end of the “Article II appropriateness” spectrum, both

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*supra* Part II.A. For reasons we have already identified, we do not believe that this type of analysis is consistent with the overall structure of the Justice Jackson framework.

<sup>270</sup> See *supra* Part II.B.

<sup>271</sup> See *supra* Part II.C.

<sup>272</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>273</sup> *Al-Bihani v. Obama*, 619 F.3d 1, 50 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc).

<sup>274</sup> *United States v. Jones*, 68 M.J. 465, 477 (C.A.A.F. 2010) (Baker, J., dissenting).

opinions proceeded to treat this conclusion as a powerful reason for upholding the actions against constitutional attack.

In our view, each of these two variables—the *congressional receptiveness* variable and the *Article II appropriateness* variable—capture important and relevant considerations that ought to carry weight within the zone of twilight. An evaluation of “congressional receptiveness” rightly rejects the proposition that a congressional failure to place the President’s action within Category One or Three necessarily implies total congressional apathy or ambivalence about that action’s appropriateness. It can and should be possible for Congress to communicate *some sort of view* concerning what the President has done without ever generating legislation that formally authorizes or prohibits the action in question. And the “Article II appropriateness” variable jibes with the straightforward idea that the President should generally have more leeway to do those things that comport with the President’s own institutional role. But, whereas many of the Category-Two opinions that we considered seemed to emphasize one of these variables over the other, we think that the *best* approach to twilight-zone analysis is one that brings both variables together, predicating the ultimate constitutional result on the interplay between Congress’s own input and Article II’s own priorities.

We call this a *two-dimensional* approach to twilight-zone analysis.<sup>275</sup> Using this approach, a court confronting twilight-zone action would first consider the extent to which Congress has manifested informal signals of receptiveness or non-receptiveness toward that action’s validity. For example, a high level of congressional receptiveness might be inferred by a prolonged period of congressional inactivity in response to a series of visibly high-profile presidential

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<sup>275</sup> The approach we offer here bears some similarity to Roy Brownell’s attempt to reconcile the *Youngstown* concurrence with the Court’s earlier suggestion, in *United States v. Curtiss-Wright Export Corp.*, that the President’s powers in international relations were “plenary and exclusive.” See Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 20 (2000) (emphasis omitted) (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936)). Professor Brownell’s proposed reconciliation involves a bifurcation of each of Justice Jackson’s three categories to form *six* operative categories of executive branch action, that, proceeding from the least to most constitutionally problematic, are: (i) “national security” action authorized by Congress; (ii) “domestic” actions authorized by Congress; (iii) “national security” actions not authorized by Congress; (iv) “domestic” actions not authorized by Congress; (v) “national security” actions prohibited by Congress; and (vi) “domestic” actions prohibited by Congress. See *id.* at 64. Insofar as one regards Brownell’s so-called “national security” actions as scoring higher on the “Article II appropriateness” spectrum, we think our model is generally compatible with Brownell’s model. But ours, we think, carries the important advantage of eschewing a binary (and often, rather indeterminate and manipulable) distinction between “domestic” actions and “national security” actions in favor of a more holistic assessment of the relationship between a presidential action and the President’s own Article II responsibilities.

acts,<sup>276</sup> or perhaps by a “holistic” reading of several indirectly legislative statutes that together highlight a posture of congressional deference toward the executive. Conversely, a low level of congressional receptiveness might be most strongly supported by the passage of a bill through both Houses of Congress that ultimately failed to receive the President’s signature, or, less robustly, by the passage of a bill by one House of Congress coupled with a failure by the other House to formally weigh in. A low level of congressional receptiveness could even be inferred from various forms of “soft law” that unofficially communicate Congress’s concerns about what the President has done.<sup>277</sup> Genuine congressional apathy or ambivalence, meanwhile, might be inferred from the passage of conflicting bills by each house, the complete absence of statutes with any bearing on the President’s underlying action, or a short-term period of silence in the face of a relatively unprecedented presidential act.

But whatever the nature of the court’s receptiveness finding, the inquiry would not yet be over. Rather, the court would then proceed to evaluate the challenged action in relation to the President’s own constitutional role. Thus, a judge might distinguish between the presidential regulation of “domestic affairs,” which would register a lower level of Article II appropriateness, and the President’s regulation of “foreign affairs,” which would generally register a higher level of Article II appropriateness. Similarly, the Court might treat purportedly temporary presidential action in the face of a pressing emergency as enjoying a higher degree of Article II appropriateness than purportedly permanent presidential action undertaken in the absence of an emergency. And so forth.<sup>278</sup> Obviously, the better the case for concluding that the President is tack-

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<sup>276</sup> In advocating for this proposal, we do not mean to suggest that courts’ own past attempts to equate congressional silence with “congressional acquiescence” have been on the mark, and we think there is much to be said against an approach that *automatically* equates congressional inaction in response to executive action as a sign that Congress has no objections to what the President is doing. See, e.g., Bradley & Morrison, *supra* note 5, at 448 (contending that “[t]he Madisonian model’s descriptive shortcomings” require “much greater care and precision in making and evaluating . . . claims” about congressional acquiescence); Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 740 (2016) (noting that, although “[a]cquiescence is subject to deep and unappreciated critiques . . . [m]any of them can be overcome if we recognize and respond to them when assessing past practice”).

<sup>277</sup> See, e.g., Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 603 (2008) (noting that “[t]he soft statute should be the preferred mechanism for articulating congressional views” within the zone of twilight).

<sup>278</sup> Indeed, one of the virtues of focusing attention on a *scalar* variable of Article II appropriateness, rather than a binary question of whether “Article II does or does not allow” the President’s action, is that it allows us to recognize that different types of presidential action bear different types of relationships to what Congress has done. Thus, for instance, Professor Abner Greene has distinguished among five different types of presidential powers: (1) powers “granted to the President’s sole discretion by Article II”; (2) power that is presumptively available to the President, “subject to either an ex ante or ex post act of Congress forbidding such action”; (3) power that “is regulable through

ling issues within the President's Article II domain (as opposed to undertaking an initiative more closely related with one of the other two branches), the stronger the finding of "Article II appropriateness" should be.

Finally, having evaluated the challenged action along both of the identified analyses, a court employing our approach would attempt to reconcile the results. Where both congressional receptiveness and Article II appropriateness are high, the twilight-zone analysis ought to come out in the President's favor. Likewise, where both variables are low, the analysis ought to come out the other way. And where the variables point in different directions, the reviewing court has no choice but to balance the competing findings against one another. In so doing, the court must grapple with difficult questions as to whether the Article II appropriateness of a presidential act is sufficiently high to overcome the identified signals of congressional non-receptiveness, or whether the congressional receptiveness is sufficiently high to overcome a relatively weak showing of Article II appropriateness.

At this point, of course, the utility of additional abstract guidance starts to run out. The reviewing court, as is often the case, will face a hard judgment call as to which of two conflicting considerations ought to prevail. But even under those circumstances, we think our approach has the virtue of clarifying the *framing* of the underlying analysis without oversimplifying it. Consequently, even in tough, judgment-call-type cases, the *two-dimensional* approach has the additional virtue of forcing the court to acknowledge and engage with the conflicting constitutional signals in a fully transparent way.

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congressional action short of an Article I, Section 7 law"; (4) power that "the President may wield, but only after Congress has delegated [it] through law"; and (5) power that "isn't available at all." Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 191–93 (1994). These various subcategories of presidential action (and perhaps further subcategories as well) can be usefully arrayed along the "Article II appropriateness" axis, moving in descending order from "very high" all the way down to "very low."

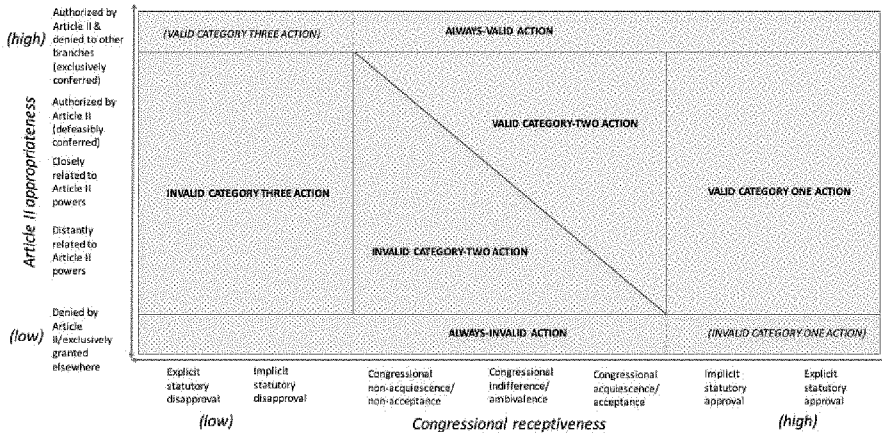


Figure 1: “Two-Dimensional” Twilight-Zone Analysis in Relation to the Other Two *Youngstown* Categories<sup>279</sup>

A further benefit of our approach, we think, is that it creates conceptual unity across all three categories of Justice Jackson’s framework. As illustrated by Figure 1, considerations of congressional receptiveness already play an important role in guiding the threshold determination of which of the framework’s categories applies. And considerations of *Article II* appropriateness remain relevant even where Categories One and Three are at issue. Thus, for example, even a presumptively valid Category-One action might violate the separation-of-powers insofar as Congress purports to authorize executive action that Article I flatly forbids.<sup>280</sup> And even presumptively invalid Category-Three actions might withstand a separation-of-powers attack insofar as the action relates *so* closely to core Article II duties as to belong exclusively to the President.<sup>281</sup>

<sup>279</sup> Because not all platforms reproduce graphics, the figure is also available at [https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/62-3/coenen\\_sullivan\\_graphic.pdf](https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/62-3/coenen_sullivan_graphic.pdf) [<https://perma.cc/679U-E463>].

<sup>280</sup> This is, for instance, the basic idea underlying the nondelegation doctrine, which prohibits Congress from conferring on the President (and other executive branch officials) a “lawmaking” authority that goes beyond the Article II power to “execute the law.” See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935) (“Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.”).

<sup>281</sup> Recall, for instance, *Zivotofsky ex rel. Zivotofsky v. Kerry*, in which the Court upheld a form of Category-Three executive action on the theory that Article II conferred on the President the exclusive power to “recognize” foreign governments. 135 S. Ct. 2076, 2095 (2015) (“If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.”).



Put somewhat differently, Categories One and Three both attach rule-like presumptions to presidential actions that rank either especially high or low on the “congressional receptiveness” scale, treating Category-One action as presumptively valid unless its Article II appropriateness falls below a preset floor, and treating Category Three as presumptively invalid unless its Article II appropriateness exceeds a preset ceiling. Our *two-dimensional* approach to twilight-zone analysis, meanwhile, calls for a more calibrated weighing of these two variables under circumstances in which the congressional receptiveness variable fails to cut decisively in either direction.<sup>282</sup>

Perhaps the most significant constitutional obstacle to implementing our prescribed approach is the Court’s decision in *INS v. Chadha*.<sup>283</sup> There, in disallowing the use of a “one-House” veto of executive branch action, the Court made clear that Congress lacked the power to make law outside of the “single, finely wrought and exhaustively considered[] procedure” set forth by Article I, Section 7.<sup>284</sup> Our approach is at least arguably inconsistent with *Chadha* insofar as it continues to accord significance to the variable of congressional receptiveness under circumstances in which Congress has not formally (i.e., legislatively) spoken. To the extent receptiveness (or non-receptiveness) manifests itself within the middle category, it will do so by means of congressional actions that do not satisfy Article I’s bicameralism and presentment requirements, such as prohibitory legislation that met with a presidential veto, authorizing legislation that cleared the House but was filibustered in the Senate, or simply a form of total congressional inaction that, under the totality of the circumstances, might be construed to signal unofficial acquiescence. Under our prescribed approach, all of these indicia would carry potentially decisive constitutional weight, particularly with respect to presidential actions whose “Article II appropriateness” falls toward the lower end of the spectrum. And that fact, under *Chadha*, presents a potential problem, as it would essentially empower

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<sup>282</sup> Our model is also consistent with the Supreme Court’s largely ignored instruction in *Dames & Moore* that executive action will not fall “neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.” *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). Although the *Dames & Moore* Court describes “congressional will” in a manner akin to our articulation of “congressional receptiveness,” it fails to identify that presidential power operates along a similarly dynamic range. A recognition of calibration in considering “Article II appropriateness” is similarly implicit in the Court’s holding statement in *Loving v. United States* that delegations “call[ing] for the exercise of judgment or discretion that lies beyond the traditional authority of the President” are more likely to violate the separation of powers. 517 U.S. 748, 772 (1996).

<sup>283</sup> 462 U.S. 919 (1983).

<sup>284</sup> *Id.* at 951, 952.

Congress to enable or disable presidential action through means that circumvent the bicameralism and presentment requirements of Article I.<sup>285</sup>

But although it is true that certain types of *Chadha*-noncompliant activities could sometimes “make a difference” within our prescribed framework, we think it would do so only in an evidentiary sense. There is an important distinction between the conclusion that Congress has passed a law that authorizes or prohibits presidential action (thus implicating either Category One or Category Three) and the conclusion that, in the absence of operative law that points one way or the other, Congress has suggested a particular viewpoint on what the President has pursued (thus carrying relevance within Category Two). We can all agree that *Chadha* would, for instance, preclude the Court from treating the attempted but unsuccessful repeal of a statute authorizing the President to undertake *Action X* as grounds for removing *Action X* from Category One. (Any other conclusion, after all, would give official, law-like status to a *Chadha*-noncompliant action and thus run afoul of Article I’s bicameralism and presentment requirements.) But that is different from simply concluding, in the absence of formal statutory guidance in either direction, that Congress as an institution likely favors or opposes what the President is doing and then taking that fact into account when deciding to permit an action of borderline constitutional validity. “In this scenario,” as Jake Gersen and Eric Posner have put it, “legislative sentiments, expressed in nonbinding mechanisms, are taken as inputs in the decision-making processes of other institutions—the courts—that themselves generate binding rules.”<sup>286</sup>

## CONCLUSION

The zone of twilight is “elusive” both in the sense that its doctrinal import remains frustratingly difficult to pin down and that its demarcated doctrinal territory is often and easily evaded. Both forms of elusiveness, moreover, are mutually reinforcing: the more often courts avoid the zone of twilight, the less light they shed on its still-uncertain contours; and the less light they shed, the more reason courts have to avoid it. That, at least, is what the lower courts’ own sporadic work with the middle category suggests.

At the same time, the current, unsatisfactory state of twilight-zone jurisprudence need not remain its permanent state. Our proposed re-conception of

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<sup>285</sup> Cf. Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211, 1219 (2013) (highlighting *Chadha* as a “constitutional barrier to relying on silence or inaction” within the *Youngstown* context); Swaine, *supra* note 53, at 288 (“Attaching legal consequence to nonstatutory action, or even inaction, is in tension with constitutional principles requiring that Congress attend to legislative formalities.”).

<sup>286</sup> Gersen & Posner, *supra* note 277, at 604.

the middle category offers a potential way out of the existing doctrinal morass. At its best, the twilight zone enables courts to evaluate congressional receptiveness relative to Article II appropriateness—thus engaging contextually with the two doctrinal variables that carry salience across the entirety of Justice Jackson’s framework. Our hope is that, having embraced that understanding, courts will gain enough comfort and familiarity with twilight-zone analysis to break the cycle of avoidance and amorphousness that currently besets the doctrine. And that in turn should yield enhanced consistency, coherence, and transparency across the difficult and highly consequential disputes over executive power that show no sign of abating. That is not to say, of course, that an openly *two-dimensional* approach to Category-Two cases will render previously difficult questions of presidential power easy to solve. But, in helping to highlight and streamline the relevant constitutional considerations at play, the approach promises to make the zone of twilight a little less dim.

