YOUNGSTOWN GOES TO WAR

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I. THE ENDURING SIGNIFICANCE OF *YOUNGSTOWN*

In the spring of 2001—before the war came—the student editors of the *Minnesota Law Review* were casting about ideas for a symposium topic for 2002. I suggested an issue commemorating the fiftieth anniversary of *Youngstown Sheet & Tube Co. v. Sawyer*,[1] the famous "Steel Seizure Case" decided by the Supreme Court on June 2, 1952. A quizzical e-mail came back, asking, "Why does *Youngstown* matter? Where is it taking us?"

I laughed sadly, not quite sure whether to be disappointed at the student editors' ignorance of *Youngstown*'s historical and ongoing significance, angry at their constitutional law professors' failure to communicate that significance to them, or simply amused as the naivete and short-term perspective of second-year law students looking for immediate "hot topic" relevance at a time when constitutional issues of foreign policy, war powers, national security, and separation of powers were not foremost in people's minds.

A lot has changed since then. In the world after September 11, 2001, there can no longer be any doubt: *Youngstown Sheet & Tube Co. v. Sawyer* is one of the most significant Supreme Court decisions *of all time*. The decision resolved a major constitutional crisis, and it did so during time of war and at a crucial juncture in the nation's political history. It resolved the crisis *correctly*, with both immediate and long-term important effect. *Youngstown*'s holding—that the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency—and equally so the analysis the Court's majority and principal concurring opinions have proven enduringly rele-

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1. 343 U.S. 579 (1952).

vant to nearly every constitutional issue of war and peace, foreign policy, domestic legislative power, presidential power, and even judicial power that has confronted the United States in the past fifty years. *Youngstown* is one of the truly "great" cases—in every sense of the word—in the American constitutional law canon.

Consider for a moment what the decision did: *Youngstown* holds that the President, as chief executive, may not "execute" laws of his own making: the President of the United States may not constitutionally legislate on his own authority, ever. The President is not a legislator except in the limited capacities in which Article I and Article II authorize his participation in the legislative process via the veto, the discretion to recommend measures, and the power to adjourn Congress in case of disagreement between the two houses with respect to the time of adjournment. He may not enact domestic legislation unilaterally, by executive decree, but may only carry into effect enactments of the legislature or execute his own constitutional powers—which pointedly do not include any general legislative powers. And this remains true even in the case of war or national emergency.

This is a huge constitutional principle, and one that is absolutely foundational to American constitutional government. It is a principle that seems perfectly obvious today. But it was one that was at some risk in the immediate post-World War II era, in the aftermath of the rise of the New Deal's "administrative state" and in the dawn of the incipient "national security state" created by nuclear weaponry and the Cold War. *Youngstown* strangled, at a crucial moment in our nation's history, the shocking assertion—and this was precisely President Harry S Truman's assertion—that the President possesses inherent domestic legislative power during time of (unauthorized) war initiated by the President. Had *Youngstown* gone the other way—had it gone wrong and Truman's claim of unilateral presidential legislative power prevailed—we would be living under a significantly different, more dangerous, constitutional regime than the one we have today.

Further, *Youngstown* holds, by necessary implication, that the President is not and cannot be the sole judge of the scope of his own constitutional and statutory powers. The Supreme Court can and will (sometimes) rule on such constitutional questions. And it can and will (sometimes) rule *against the President of the United States, even in times of war or national emergency.*

This significant and seemingly obvious point is obvious today only because *Youngstown* was in fact decided by the Supreme Court fifty years ago, because of the *way* in which it was decided (against President Truman's seizure of the nation's steel mills), and because Truman acquiesced in the Court's ruling. Thus, the judiciary's view prevailed in a major constitutional confrontation with the President of the United States concerning the scope of presidential power.

None of this was at all obvious or inevitable in 1952. Indeed, each of these features of *Youngstown* is rather remarkable. *Youngstown* showed that the judiciary will not (necessarily) abstain from decision of constitutional questions concerning the scope of the President's constitutional powers, even in matters touching on war, foreign affairs, national security, and national emergency. This is a principle of tremendous significance, even though it has been compromised and abandoned—sporadically, selectively, and inconsistently—over the course of the past half-century, through the vehicle of the Court's "political question" doctrine.

The fact that the Court was willing, arguably for the first time in our Nation's history, not only to issue a ruling on the merits but to rule *against* the President of the United States on a question of the scope of the President's constitutional powers makes *Youngstown* of singular importance. *Youngstown* is to executive power what *Marbury v. Madison*[2] is to legislative power, only more so. *Marbury* was, at most, a weak assertion of judicial power over the legislature, and not at all an assertion of judicial supremacy over the other branches of the federal government.[3] The Court in *Marbury* pointedly refrained from asserting any general constitutional control of executive actions,[4] asserting (but not actually exerting) authority over executive branch officials only in the most limited context of non-discretionary "ministerial" actions.[5] *Youngstown*, in contrast, is a bold assertion of judicial power over the conduct of the President in matters concerning the scope of the President's constitu-

2. 5 U.S. (1 Cranch) 137 (1803).

3. See generally Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L.J. 217, 241-45, 257-62 (1994); Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337, 1349-59 (1999).

4. *Marbury*, 5 U.S. (1 Cranch) at 170 (explicitly denying the existence of judicial power to "intermeddle with the prerogatives of the executive").

5. *Marbury*, 5 U.S. (1 Cranch) at 171 (holding that mandamus was proper to compel performance of a purely "ministerial" act).

tional authority. It is probably the Supreme Court's first genuine assertion *and exercise of* the Court's modern claim of constitutional interpretive supremacy over the actions of the President of the United States, in a case where such a claim really mattered.[6] The claim of judicial supremacy was not made in express terms, as the Court would come to make it six years later, in *Cooper v. Aaron*, and repeatedly in cases in the five decades since *Youngstown*.[7] Rather, the claim of supremacy in *Youngstown* was implicit in the Court's action: it upheld an injunction against the enforcement of the President's orders, nullifying a presidential executive order in time of war.

And the nullification stuck. This is perhaps the most significant feature of the case of all. *Youngstown* is remarkable in that President Truman accepted and obeyed the Court's decision, even though he apparently disagreed with it quite strongly, establishing the political precedent of judicial supremacy through presidential acquiescence in the Supreme Court's interpretations of the Constitution.[8] Again, this is a commonplace today. But it is a commonplace, I submit, only because of *Youngstown Sheet & Tube Co. v. Sawyer* and Truman's acquiescence. No prior Supreme Court decision genuinely claimed judicial supremacy over

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6. See Paulsen, 83 Minn. L. Rev at 1339 n.10 (cited in note 3).

7. See, e.g. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution"); *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) (referring to the "responsibility of this Court as ultimate interpreter of the Constitution"); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution"); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (again describing the Court as "ultimate interpreter of the Constitution"); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 868 (1992) (Court claiming to be "invested with the authority to . . . speak before all others" on the meaning of the Constitution); *United States v. Morrison*, 529 U.S. 598, 616 & n. 7 (2000) ("[S]ince *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

8. David McCullough, in his Pulitzer Prize-winning biography of Truman, relates Truman's incredulity at the district court opinion against him, his statement that he would be "'terribly shocked, disappointed and disturbed'" if the Supreme Court were to decide against him, and his anger at the ultimate decision. David McCullough, *Truman* 900-01 (Simon & Schuster, 1992). McCullough then recounts Justice Hugo Black's fence-mending invitation of President Truman and the Justices to a party at Black's home in Old Town Alexandria. "At the start of the evening, Truman, though polite, seemed 'a bit testy,' remembered William O. Douglas. 'But after the bourbon and canapes were passed, he turned to Hugo and said, "Hugo, I don't much care for your law, but, by golly, this bourbon is good."'" Id. at 901.

In his memoirs, former President Truman wrote that "[w]hatever the six justices of the Supreme Court meant by their differing opinions, [the President] must always act in a national emergency . . . . The President, who is Commander in Chief and who represents the interest of all the people must [be] able to act at all times to meet any sudden threat to the nation's security." Harry S. Truman, 2 *Memoirs: Years of Trial and Hope* 478 (Doubleday, 1956).

the President in matters involving interpretation of the President's constitutional powers and prerogatives. No prior judicial confrontation with the executive resulted in so complete a victory for the Court.[9]

Judicial triumphs tend to beget more judicial triumphs—and sometimes judicial triumphalism and hubris. It is probably only a slight exaggeration to say that if there had been no *Youngstown* there would have been no *Brown v. Board of Education*,[10] no *Cooper v. Aaron*,[11] no Warren Court criminal procedure and civil rights revolution, no *United States v. Nixon*,[12] no *Roe v. Wade*[13] and *Planned Parenthood v. Casey*.[14] Still more, had *Youngstown* played out differently in the end—had Truman resisted or evaded the Court's judgment against his seizure of the steel industry—the aftermath of the Nixon Tapes case might have played out differently, too. Had Truman successfully held on to the steel mills in the face of an adverse decision, Nixon probably would have held on to the tapes, too, no matter what the Court said. And perhaps the Court would not even have tried to order Nixon to produce the tapes in the first place. Finally, if *Youngstown* had been decided the other way, *The Pentagon Papers Case*[15] probably would have played out differently, too. The federal government probably would have won in court the power to enjoin a newspaper's publication of materials the government deems detrimental to national security (or affirmance of an executive order banning such publication).[16] Or, had *Youngstown* been decided as it was but Truman successfully defied the judgment, Nixon might have seized the printing

9. In stark contrast, compare Chief Justice Taney's writ of habeas corpus directed at President Lincoln, at the outset of the Civil War, in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). Lincoln ignored the writ. For that story, see Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993).

10. 347 U.S. 483 (1954).

11. 358 U.S. 1 (1958).

12. 418 U.S. 683 (1974).

13. 410 U.S. 113 (1973).

14. 505 U.S. 833 (1992).

15. *New York Times Co. v. United States*, 403 U.S. 713 (1971) ("*The Pentagon Papers Case*").

16. Id. In *The Pentagon Papers Case*, the Court rejected, 6-3, the government's application for an injunction against publication of classified government documents describing the history of the government's decision-making process with respect to involvement in the war in Vietnam, with several concurring justices (whose votes were necessary to the judgment) relying in substantial part on *Youngstown*. See 403 U.S. at 740 (White, J., with whom Stewart, J., joins, concurring); id. at 742, 745-46 (Marshall, J., concurring).

presses of *The New York Times* and *The Washington Post* and ignored any judicial decrees to the contrary.[17]

In short, *Youngstown* in no insubstantial measure accounts for the modern reality of judicial supremacy in constitutional interpretation; for presidential, congressional, and popular acquiescence to that reality; for the resultant possibility of the results in *Brown*, *Nixon*, and *The Pentagon Papers Case* and possibly many others; for the fact that presidential war powers remain constitutionally limited and that such limitations are, at least in substantial part, honored even in an era of nuclear weapons and even under conditions of emergency; and for the current dominant paradigm through which most important constitutional questions of war, foreign affairs, and separation-of-powers issues in general are understood and evaluated by Congress, the President, and the courts. That is a lot to say for one case.[18]

The enduring significance of *Youngstown* may have been underplayed in the years between the denouement of the Cold War in (roughly) September 1991 and the beginning of the present war almost exactly ten years later, in September 2001. A child of the 1990s—and law students at the turn of the twenty-first century—might be forgiven for not immediately grasping why a case about temporary presidential seizure of steel mills during the Korean War remains relevant today. (It is a bit harder to forgive their constitutional law professors.) In the world after September 11, however, it is clear that *Youngstown*, in addition to being one of the most significant constitutional decisions in our nation's history, is also directly and proximately relevant to some of the most important constitutional issues confronting the United States government on *Youngstown*'s fiftieth anniversary, at a time when our nation is once again at war.

In the remainder of this essay, I will answer the student editor's compound question—"Why does *Youngstown* matter? Where is it taking us?"—with specific reference to the world in which we find ourselves after September 11, 2001. Specifically, I

17. David McCullough's biography of President Truman reports that Truman, asked at a press conference in advance of the *Youngstown* decision whether his rationale for seizing the steel mills might equally sustain seizing the presses, answered that, "[u]nder similar circumstances, the President of the United States has to act for whatever is best for the country." Quoted in McCullough, *Truman* at 900 (cited in note 8).

18. As Professor Bellia notes in her contribution to this symposium, it is therefore quite ironic that *Youngstown* initially was greeted by confident dismissals of the decision as containing shallow analysis unlikely to be of much continuing significance. Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 Const. Comm. 87, 87-90 (2002).

will address *Youngstown*'s relevance to *war*, and especially to presidential power to conduct the present War on Terrorism.

My thesis is that *Youngstown* is highly relevant to war powers, supplying the proper paradigms for applying the Constitution's overlapping allocations of war power to Congress and the President. Both Justice Black's majority opinion and Justice Jackson's more celebrated concurrence state sound principles of law, completely consistent with each other, that properly guide present interpreters in evaluating the Constitution's division of powers concerning war and peace. Properly viewed, *Youngstown* creates a paradigm of *three*-branch constitutional interpretation with respect to these issues, an approach consonant with the Constitution's separation-of-powers generally. The scope of presidential war power depends on *the President's* interpretation of the scope of his constitutional powers in this area; on *Congress's* interpretation of the scope of the President's constitutional powers in this area (in addition to its specific delegations of power to the President); *and* on the judiciary's interpretation of the scope of the President's and Congress's constitutional powers in light of the interpretation of these powers by those other branches.[19]

On this view, the War Powers Resolution of 1973 (the "WPR")[20] and the September 18, 2001 "Authorization for Use of Military Force" (which I will call "The 9-18-01 Resolution")[21] are critical acts of congressional constitutional interpretation with important implications for evaluating the scope of presidential war power. The War Powers Resolution is in many respects a highly contestable congressional constitutional interpretation of the scope of presidential war powers in the absence of a decla-

19. In this respect, I believe *Youngstown* is consistent with a position I have argued in greater detail in other writing: that the power of constitutional interpretation is a divided, shared power of all three branches of the federal government, not the sole and exclusive province of the courts. See Paulsen, 83 Georgetown L.J. at 217 (cited in note 3); Paulsen, 83 Minn. L. Rev. at 1337 (cited in note 3).

20. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555-559, codified at 50 U.S.C. §§ 1541-1548 (1994 and Supp. V 1999).

21. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The resolution was passed by Congress on September 14, 2001, and signed by President Bush on September 18, 2001. Some commentators have referred to this enactment as Congress's "September 14 Joint Resolution Authorizing the Use of Force." Curtis A Bradley and Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 249, 252 & n.18 (2002). Which date is correct turns on whether one thinks that congressional legislation authorizing the President to use military force, including declarations of war, must comply with Article I section 7's requirement of presentment to the President. See J. Gregory Sidak, *To Declare War*, 41 Duke L.J. 27, 81-86 (1991).

ration of war or functionally-equivalent congressional authorization of war. Some features of the War Powers Resolution are obviously unconstitutional.[22] But in at least one respect the War Powers Resolution is plainly legitimate and fits neatly within the three-category paradigm established by Justice Jackson's *Youngstown* concurrence.[23] The War Powers Resolution establishes a rule of construction concerning congressional action and inaction that effectively excludes what I will call, borrowing from Justice Jackson's taxonomy, "Category II wars"—that is, wars that might otherwise be thought legally justified by implicit presidential war-making authority resulting from "congressional inertia, indifference, or quiescence."[24] The War Powers Resolution says, almost in so many words, that insofar as legitimate presidential war-making power might be thought to depend on an *inference* from congressional action or inaction, Congress has adopted a standing statutory rule specifically repudiating any such inference. As far as Congress is concerned, there are to be no more "Category II wars" thought to be impliedly authorized by treaty provisions, appropriations acts, or any other legislative action (or inaction) short of specific authorization.[25] Moreover, to the extent the President would interpret the Constitution as permitting him to introduce armed forces into combat situations on his own authority, Congress's interpretation is that the Constitution does not authorize such unilateral action—and certainly not beyond sixty days.[26]

In this respect, the September 18, 2001 "Authorization for Use of Military Force" constitutes a major paradigm shift—a watershed constitutional event. While the 9-18-01 Resolution is, in form, an authorization purporting to fit within the parameters of the War Powers Resolution,[27] the Resolution creates very nearly

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22. I discuss the "legislative veto" provisions of the War Powers Resolution below. See infra p. 246.

23. In briefest terms, Justice Jackson thought presidential power to fluctuate depending on where it falls along a continuum from "Category I" (legislatively authorized presidential action) to "Category II" (unclear legislative action in an area of uncertain allocation of constitutional power between the President and Congress) to "Category III" (legislative denial of authorization to the President, such that the President's action is proper only if it lies within the President's constitutional powers that exist independent of legislative action). *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring). For further elaboration of this paradigm, see infra at pp. 224-225.

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

25. War Powers Resolution, 50 U.S.C. § 1547(a).

26. 50 U.S.C. §§ 1541, 1547(a). I discuss below the effect of sections 1542-1546 of the War Powers Resolution as creating a *de facto* "safe harbor" for unilateral presidential action. See infra pp. 247-249.

27. Authorization for Use of Military Force, § 2(b)(1), 115 Stat. at 224 ("Consistent

plenary presidential power to conduct the present war on terrorism, through the use of military and other means, against enemies both abroad and possibly even within the borders of the United States, as identified by the President, and without apparent limitation as to duration, scope, and tactics. The September 18 Resolution has both "*Youngstown* Category I" and "*Youngstown* Category II" elements, and triggers broad presidential constitutional power under both heads. The President is specifically authorized (Category I) and delegated power in broad terms to use force against persons, nations, or organizations he determines planned, authorized, committed or aided the attacks of September 11, 2001, or who harbor such persons or organizations. That is a sweeping delegation of the war power. Moreover, the Resolution declares, in its final "whereas" clause, that "the President *has authority under the Constitution* to take action to deter and prevent acts of international terrorism against the United States."[28] This near-unanimous congressional interpretation of the Constitution[29] essentially authorizes the President to conduct, in *Youngstown* terms, a "Category II war" on terrorism going beyond even the sweeping terms of the specifically-authorized "Category I war" against those the President determines are responsible for, or assisted, the attacks of September 11, 2001. Indeed, given how sweeping and unequivocal this congressional endorsement of presidential constitutional power is, one might well refer to this aspect of the 9-18-01 Resolution as recognizing presidential power to wage a "Category I½ War."

Part II of this essay discusses the majority and principal concurring opinions in *Youngstown* and defends the proposition that these opinions can be seen as establishing a consistent paradigm of three-branch constitutional interpretation in matters of war and foreign affairs. Part III then looks at the War Powers Resolution of 1973 and the 9-18-01 Resolution as different applications of this paradigm, with important implications for the present War on Terrorism and for our understanding of war powers generally.

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with section 1547(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."); § 2(b)(2) ("Nothing in this resolution supercedes any requirement of the War Powers Resolution.").

28. Authorization for Use of Military Force, 115 Stat. 224 (2001) (emphasis added).

29. The Senate vote on S.J. Res. 23 (became Pub. L. No. 107-40) was 98-0. Vote 281 (available at <http://senate.gov/legislativevote1071/vote-00281.html>). The House vote on H.J. Res. 64 (became Pub. L. No. 107-40) was 420-1. Vote 342 (available at <http://clerkweb.gov/cgi-bin/vote.exe?year=2001&rollnumber=342>).

II. *YOUNGSTOWN* AS THREE-BRANCH CONSTITUTIONAL INTERPRETATION

Everybody seems to agree that *Youngstown* established the dominant paradigm for evaluating disputes between Congress and the President over the scope of their respective constitutional powers. Ironically, though, nobody seems to agree on what that paradigm is.

It has become fashionable for some academic commentators, and even for the Court itself, to note the eclipse of Justice Hugo Black's majority opinion by Justice Robert Jackson's concurrence, in terms of influence in establishing the governing paradigm.[30] To be sure, Jackson's concurrence is marvelous. The opinion is characteristically lucid, full of the grace and sophistication that makes Jackson's writing so persuasive and enjoyable to read. Its analysis is (in the main) cautious and precise. The opinion provides the tremendously influential and useful three-category framework that offers a workable and simple, but not grossly oversimplified, general approach to separation of powers issues involving presidential versus congressional authority. To greatly compress: Under Jackson's analysis, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress"[31] and thus fall along a continuum, roughly marked by three broad categories of congressional action: "Category I" consists of situations where Congress has authorized presidential action, triggering the President's core Article II "executive power" to carry into effect legislative action in addition to whatever unilateral, independent constitutional powers the President possesses.

30. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981); *Nixon v. Adm'r of Gen. Serv.* 433 U.S. 425, 443 (1977) ("[T]he unanimous Court [in *United States v. Nixon*, 418 U.S. 683 (1974)] essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown*. . . ."); Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* 342 (Foundation Press, 14th ed. 2001) ("Of all the opinions in the Steel Seizure Case, Justice Jackson's has been the most widely relied on in later decisions."); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. Legis. 1, 62 (2002) ("Despite the numerous opinions issued in *Youngstown* upholding the importance of a system of checks and balances, Justice Jackson's concurrence may have been the most important . . . ."); Harold H. Bruff, *Judicial Review & the President's Statutory Powers*, 68 Va. L. Rev. 1, 11-12 (1982) ("It is Justice Jackson's famous concurring opinion in *Youngstown* that has most influenced subsequent analysis.") (citation omitted); Paul Gerwirtz, *Realism in Separation of Powers Thinking*, Wm. & Mary L. Rev. 343, 352 ("Today it is almost universally believed that the more narrowly framed concurring opinions in that case [*Youngstown*] capture what it really stands for.") See also Bellia, supra note 18 at 89 n. 11.

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

"Category II" consists of situations where the Constitution's allocation of power between Congress and the President is, as applied to the situation at hand, uncertain or indeterminate (the famous "zone of twilight"[32]) *and* where the existence or extent of Congress's legislative authorization, approval, or acquiescence (to move, progressively, from stronger to weaker claims of legislative action triggering enhanced executive power) is also unclear.[33] Finally, Jackson's "Category III" consists of situations where the President takes action inconsistent with Congress's legislative directions (which Jackson expands, less helpfully, to legislative actions "expressed or implied"[34]), in which case the President must possess independent constitutional power that fully justifies his action irrespective of what Congress says.[35]

Justice Jackson's opinion is more comprehensive, possesses greater subtly, and has broader explanatory power than does Justice Black's majority opinion. But it is a mistake to suggest (as some do) that Justice Jackson's concurrence and Justice Black's majority opinion are inconsistent with one another. The two opinions are perfectly harmonious: Jackson's analytic approach is right—and so is Black's.

Justice Black's opinion for the Court is straightforward, direct, and elegant—a masterpiece of textual and formal analysis. In its own, different way, it is as great a work of judicial art as Jackson's concurrence. It has the simplicity and beauty of a pefectly-reasoned four-line proof of some proposition of Euclidian geometry: A president's power to act must stem from either an act of Congress (the "executive Power") or from his independent constitutional powers. No congressional act authorized this presidential action. Nor could President Truman's order be sustained under any independent presidential power: The military power of Commander-in-Chief does not include a power to conscript private resources; that "is a job for the Nation's lawmakers, not its military authorities."[36] The "executive" power is a power to carry into execution laws passed by Congress, not a freestanding legislative power of the President.[37] Past practice to the contrary certainly does not alter the Constitution's funda-

32. Id. at 637 (Jackson, J., concurring).
33. Id.
34. Id.
35. Id. at 638.
36. Id. at 587.
37. Id. at 587-88.

mental allocation of powers.[38] Nor does a claim of exigency.[39]

Black's majority opinion is not quite that short, but it almost is. The tone is flat, dry, prosaic. It is elegant but not eloquent. It is complete in itself but certainly not a comprehensive treatment of its subject matter. Nowhere to be found is any extended discussion of hypothetical situations, exceptions, limitations, contingencies, doubtful cases, or broad categories. In this respect, it differs markedly in style from the concurrence of Justice Jackson. But it does not differ markedly in substance. Justice Jackson's more grand concurrence simply addresses a broader range of circumstances implicated by the Court's discussion of presidential versus congressional power. But these circumstances were not actually presented by the facts of the case before the Court.

Interestingly, Justice Black's opinion for the Court can be seen as fitting almost perfectly into Jackson's Category I-II-III analysis, but without using that terminology—and without falling into the small lapses in analytic rigor in Jackson's concurrence (and the somewhat more serious lapses in Justice Frankfurter's).[40] When Black writes that "[t]he President's power, if any, to issue the order [seizing the steel mills] must stem either from an act of Congress or from the Constitution itself,"[41] he is engaging in category-talk, without the label. There must either be legislative authorization for the President's action (Category I) or there must be independent presidential power (Category III).

Category II is not excluded either, at least not entirely. Rather, for Black, such a category appears to be a subset of the broader category of legislative authorization, where authorization is implied rather than express: "There is no statute that expressly authorizes the President to take possession of property as he did here," Black's opinion says. But he turns to Category II-type analysis in the very next sentence: "Nor is there any act of Congress . . . from which such a power can fairly be *implied*."[42] This is a quintessential Category II inquiry. Can congressional

38. Id. at 588 ("Congress has not . . . lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution").

39. Id. at 589 ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.").

40. I discuss these presently. See infra pp. 227-228. See also infra at pp. 234-236 (addressing flaws in Jackson's general approach).

41. *Youngstown*, 343 U.S. at 585.

42. Id. (emphasis added).

action—or inaction—be construed as authorization or acquiescence sufficient to permit the President to act? Black considers this possibility and rejects it on the facts of the case. First, he notes the Government's concession that neither the Selective Service Act of 1948 nor the Defense Production Act of 1950 justified the steel seizure. Next, he discusses the fact that the "seizure technique" was "not only unauthorized" but that Congress, after considering creating such a power, "refused to adopt that method of settling labor disputes" in its enactment of the Taft-Hartley Act. (The concurrences make a bit more of this datum, but not to improved effect, as I discuss presently.)[43] Black's conclusion from congressional consideration and non-enactment of a seizure power is straightforward: "[T]he plan Congress adopted in that Act did not provide for seizure under any circumstances."[44] In short, Congress's failure to authorize such presidential action should be construed as, well, *not authorizing* such presidential action. Thus, Congress had not by legislative action created express or "implied" presidential authority.

This is "Category II" analysis, similar in the topics it addresses to Justice Jackson's discussion within that category. Indeed, in certain respects it is *better* Category II analysis than that of the concurring opinions: it is simpler, plainer, and avoids the obvious analytic error of Justice Frankfurter's concurrence (in which Justice Jackson concurred)[45] of treating Congress's consideration of but failure to enact a provision as the equivalent of an affirmative statutory *prohibition* of such action.[46]

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43. Id. at 586; see infra notes 45-46 and accompanying text.

44. *Youngstown*, 343 U.S. at 586.

45. Id. at 639 n.8 (Jackson, J., concurring) (embracing Justice Frankfurter's concurrence on this point).

46. Id. at 602-603 (Frankfurter, J., concurring) ("The authoritatively expressed purpose of Congress to disallow such power to the President and to require him . . . to put the matter to Congress and ask for specific authority from it, *could not be more decisive if it had been written into* §§ 206-210 of the Labor Management Relations Act of 1947. . . . Grafting upon the words [of the Act] a purpose of Congress thus unequivocally expressed is the regular legislative mode for defining the scope of an Act of Congress. . . . By the Labor Management Relations Act of 1947, Congress said to the President, 'You may not seize. . . .'") (emphasis added); see id. at 660 (Burton, J., concurring) (committing similar error of treating non-enactment as apparent equivalent of prohibition).

Frankfurter's approach seems utterly indefensible. Congress's "purpose" of not allowing the seizure technique *of course* could have been more authoritatively expressed if it had been written into §§ 206-210 of the Taft-Hartley Act *as a prohibition*. Congress did *not* say to the President 'You may not seize.' Congress said 'You may do this and this and this.' To be sure, if one's baseline rule is that the President has no legitimate authority to "execute" anything more than what Congress has legislated, then the effect of a failure to enact is to withhold authority, whether or not Congress considered and voted up-or-down on the proposed power not enacted. But that is Justice Black's preferred

The only thing even arguably missing from Justice Black's majority opinion is discussion of what to do if the Constitution's allocation of powers between Congress and the President is, as applied to a certain question, uncertain or indeterminate, and whether indicia of congressional "inertia, indifference, or quiescence" (to use Justice Jackson's language) might be construed more generously in favor of presidential authority under such circumstances. But such discussion was not truly "missing" because such a situation was not presented on the facts of the *Youngstown* case. As construed by Black (for the majority), the Constitution's allocation of power concerning the seizure of domestic industries was not at all uncertain: The Commander-in-Chief power is not a power to seize domestic industries or otherwise to conscript people or resources. That is a legislative power.[47] The "executive Power" is only a power to execute laws, not to make or enlarge them.[48] Nor does the President possess a general, non-textual emergency power to legislate: "The Founders of this Nation entrusted the lawmaking power to the Congress alone in good and bad times."[49] *Youngstown* did not in-

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constitutional baseline and (apparently) not Justice Frankfurter's or Justice Jackson's, despite their willingness to sign on to the majority opinion. Under Black's analysis, it appears sufficient that Congress did not affirmatively enact seizure authority; Congress either authorized presidential seizure of industry or it did not. (Of course, like any good opinion-writer, Black notes the additional fact in favor of his view, that Congress *rejected* a proposal to include such seizure authority." Id. at 586 & nn.3-5.) Frankfurter's mistake (and Jackson's, following him) is believing that congressional authorization sometimes can be inferred from something less than an enactment passed in accordance with the procedure set forth in Article I, section 7 of the Constitution. Since, under such an approach, *authorization* can come from something *less* than enactment, *repudiation* of such authority requires something *more* than non-enactment. Thus, Frankfurter (and Jackson) need to ratchet-up legislative history to the level of a specific statutory prohibition in order for the President *not* to have such authority. Black's approach does not require this. The President lacks authority if it has not been given to him.

(It is little wonder that a subsequent Court that wished to find implicit authorization for or consent to presidential action would be inclined to emphasize the approach of the *Youngstown* concurrences, rather than the majority opinion. See, e.g., *Dames & Moore*, 453 U.S. at 660-61, 668-69, 674-78, 686.)

47. *Youngstown*, 343 U.S. at 587 ("This is a job for the Nation's lawmakers, not for its military authorities."). As Justice Jackson's concurrence amplifies, it is Congress, not the President, that has the power to raise and support armies and provide and maintain a navy; nor does the power of Commander-in-Chief "*of the Army and Navy*" make the President Commander-in-Chief *of the Nation*. Id. at 641-43 (Jackson, J., concurring).

48. Id. at 587-88. On this point, Justice Black's simpler analysis is far more coherent and persuasive than Justice Jackson's elaborate, convoluted disavowal of "the rigidity dictated by a doctrinaire textualism" in preference for according enumerated powers "the scope and elasticity afforded by what seem to be reasonable, practical implications," id. at 640 (Jackson, J., concurring), while simultaneously rejecting a broad interpretation of the general grant of "the executive Power" because of the subsequent textual enumeration of certain specific powers.

49. Id. at 589.

volve any question of uncertain distribution of constitutional power. It was a Category *III* case, pure and simple. President Truman was legislating a seizure of domestic industry, and such legislation was not authorized by any Article II power or by any congressional delegation of power.

But if *Youngstown* did not truly present a case where the Constitution's distribution of powers was uncertain, what should be the approach where such uncertainty *does* exist—as is often the case in matters of war and foreign affairs? Justice Black's majority opinion omits any discussion of this situation, probably because it was not presented by the facts of the case and any such discussion would have been dicta inappropriate for the Opinion of the Court as a whole.

It was left to Justice Jackson's concurrence (and the other concurrences) to supply such dicta. Jackson's approach does not contradict Black's. Rather, it can be understood as stating a further—and I submit correct—*second-order* rule for separation-of-powers disputes, applicable where the Constitution's allocation of powers between Congress and the President is, as applied to a given situation, unclear, or indeterminate, or involves overlapping spheres of authority. Jackson's Category II can best be seen as a rule of *(i) judicial deference (ii) to an authoritatively-expressed congressional constitutional interpretation of the scope of presidential power, (iii) where the Constitution's allocation of power between Congress and the President on the matter in question falls within a legitimate range of uncertainty or its application to particular circumstances is unclear.* It is a rule that recognizes that the Court's interpretation of the scope of presidential power should, in doubtful cases, take into account the President's and Congress's interpretations of the scope of such presidential power.

Jackson's concurrence does not quite express the principle this way. It is not cast in terms of congressional "interpretation" of the Constitution but, more generally and diffusely, about drawing inferences from congressional action or inaction. In addition (as I will discuss presently), it imposes no discipline for determining when Congress's views have been *authoritatively* expressed. But the famous Jackson opinion *is* all about how interpretation of the Constitution, in uncertain cases involving separation of powers between Congress and the President, should be affected by the views of the actors themselves as reflected in their actions. Jackson's opinion is quintessentially

about the legitimate and proper effect on the judiciary of the constitutional interpretations of the political branches.

I call this a "second-order" rule. It is second-order in the sense that it is not a rule of direct constitutional interpretation, but a rule concerning what to do where inquiry under first-order principles of interpretation (such as consideration of the Constitution's text, structure, and historical evidence of original meaning) fails to yield a sufficiently determinate answer, or yields a range of legitimate answers none of which is sufficiently preferable to the others in terms of first-order interpretive principles that it can be called the "right" answer.[50]

Youngstown's "Category II" is best understood as a category that consists of such questions. It is a rule of decision—a "default rule"—about what a court should do on a separation of powers question involving the line between presidential and congressional power where the "right" answer is not satisfactorily clear even after careful study of constitutional text, structure and history. It is a rule of judicial deference, not terribly unlike other such rules of interpretive deference.[51] In short, Category II is properly a second-order decision rule for the judiciary in cases that concern the scope of presidential constitutional power

50. Vasan Kesavan and I have argued elsewhere that the Constitution should be interpreted according to the meaning the words and phrases employed would have had, considered in historical context and within the context of the document as a whole, to an ordinary, reasonably-informed reader or speaker of the English language at the time the text was adopted as law. Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal. L. Rev. 293, 398-99 (2002); Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History* (unpublished manuscript on file with the authors) (forthcoming 2003). This basic proposition can be refined and qualified in a number of ways, but this statement is sufficient to illustrate what I mean by "first-order" principles of constitutional interpretation. (There are, obviously, other, competing approaches to first-order constitutional interpretation.) "Second-order" rules are rules governing how to interpret or apply the Constitution when first-order principles fail to yield tolerably clear answers, or produce a range of legitimate answers none of which fairly can be privileged over the others.

51. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Michael Stokes Paulsen, 83 Georgetown L.J. at 333 (cited in note 3):

> The presumption of constitutionality and the *Chevron* deference principle suggest a more general rule of judicial restraint: A court should not substitute its interpretation of a text for that of the political branches (acting within their proper spheres) when more than one interpretation is possible, there is no principled rule supplied by test, history, structure, and precedent that privileges one reading over the other, and the political branches have acted pursuant to one such reading.

There are a number of other rules of alleged interpretive deference, some of which are of highly dubious validity. But that is a topic for another occasion. See generally Michael Stokes Paulsen, *Activist Judicial Restraint* (unpublished manuscript on file with the author) (forthcoming 2003).

vis-a-vis Congress, where there exists a sufficiently clear *congressional* interpretation of the scope of the President's constitutional power and that interpretation supports the President. Specifically, where Congress agrees with the President's interpretation of the scope of his constitutional and statutory powers, the courts should defer to that position, unless it is wrong as a matter of direct constitutional interpretation. The courts should not lightly invalidate, on separation of powers grounds involving congressional versus presidential power, presidential action that Congress concedes to be within the president's domain. Only if it can be said, with a sufficient degree of confidence, on first-order constitutional interpretive principles, that the president's action *is unconstitutional*—unconstitutional irrespective of whatever Congress thinks—should a court invalidate it.

This makes sense, on two grounds. The first has to do with what it means in the first place for a court to say that some presidential action (or some act of Congress) is "unconstitutional." Practically by definition, it means that the President's (or Congress's) action *is contrary to*—in irreconcilable variance with—some rule of law supplied by the text of the Constitution.[52] What happens when the Constitution is unclear? If there is no rule supplied by the text, how is a Court to decide? In many cases, the answer will be simply that the Constitution fails to supply a legal rule or principle that invalidates the action taken by the political body (Congress, the President, state legislatures or governors). Accordingly, the action of the political body stands, because it cannot be said to be *un*constitutional.

This principle is a bit harder to apply in separation-of-powers cases, where the question is *which* political body has governing authority under the Constitution.[53] If the contention

52. This is the core of the reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803) and of Federalist 78 (Hamilton), in Garry Wills, ed. *The Federalist Papers* 388 (Bantam Books, 1982). The power of judicial review takes as its premise that the Constitution is a species of law of a higher order than the acts of the legislature or of the executive (or of the judiciary, I would add). Because courts are charged with applying the law, they must give effect to the law of superior rather than inferior obligation. Thus, where the Constitution supplies a rule of law contrary to the rule specified by a legislative enactment, courts must apply the Constitution rather than the statute. If the Constitution does *not* supply such a rule of law, the rationale for judicial review set forth in *Marbury* and Federalist 78 evaporates.

53. *Morrison v. Olson*, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting):

> Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of

in a case challenging presidential action is that the President's act violates the Constitution's separation of powers by invading the province of Congress, then, if the Constitution's allocation of powers in this regard is genuinely uncertain or its application to the particular situation unclear, there needs to be some rule for deciding how to resolve the legal challenge to the President's action. One possible such rule would be to uphold the presidential action on the theory that the president's action cannot be said to violate the Constitution if it is not clear that he lacks the power at issue. Another possible rule would be just the opposite: invalidate the presidential action, on the theory that the president only has power where the Constitution clearly bestows it, or where Congress has granted it by legislation. The former default rule favors presidential power at the expense of Congress; the latter favors congressional power at the expense of the President. Each has something to say for it and each has a plausible textual argument in its favor.[54]

But if it is unclear which of these dueling default rules should prevail, at least it should be clear that where the Constitution's precise allocation of power between Congress and the President is uncertain or indeterminate the judiciary should defer to a congressional constitutional interpretation that itself defers to presidential power. For in that case, both alternatives converge in favor of the same result. Thus, when the two political branches are in accord as to how the Constitution's ambiguous allocation of powers between them should play out in a given context or situation, the Court should accept –indeed, *must* accept—the political branch's agreed judgment, for in such a case, the Constitution supplies no rule of law invalidating the President's action and the Congress agrees that the President's action lies within the scope of his power.

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powers, and the political branches are (as here) in disagreement, neither can be presumed correct.

54. The pro-executive view might be thought to flow from the existence of a residual or interstitial "executive power," or some other presidential power under Article II. The pro-congressional view might be thought to flow from the Necessary and Proper Clause, U.S. Const. Art. I, § 8, cl. 18, if one construes that clause to constitute an *exclusive* assignment of the interstitial or implied powers vested by the Constitution "in the Government of the United States, or in any Department or Officer thereof," preclusive of, and pre-emptive of, action by such Departments or Officers regardless of whether Congress has acted or not—in effect, a "dormant" Necessary and Proper Clause *implied prohibition* on actions by coordinate branches, where such actions would fall within the scope of Congress's (unexercised) Necessary and Proper Clause legislative power. U.S. Const. Art. I, § 8, cl. 18.

The second reason why it is appropriate for courts to accept Congress's constitutional interpretation in support of presidential power is that the Constitution does not vest interpretive exclusivity with respect to the Constitution's allocation of powers in the courts in the first place. Rather, it appears to contemplate more of a three-branch model for construing and applying the allocation. As James Madison wrote in *The Federalist No. 49*, "[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[55] The application of separation-of-powers principles to the power of constitutional interpretation—and especially constitutional interpretation concerning allocation of powers among the branches—very strongly suggests a *three*-branch approach, in which courts accord substantial deference to a common constitutional view embraced by both Congress and the President that falls within the range of meaning afforded by an indefinite or overlapping allocation of constitutional power between them.[56]

All of this may be seen as consistent with Justice Jackson's description of "Category II" constitutional issues, with certain small differences and refinements. Jackson put the principle this way:

> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[57]

Jackson's general statement of the principle is, overall, very good. There are certain areas where the Constitution's distribution of authority is uncertain, or concurrent. (As I shall argue presently, the war power is one of them.) In such areas, it should

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55. Federalist 49 (Madison) 254, 255 (cited in note 52).

56. For a systematic defense of the principle of co-ordinate, co-equal constitutional interpretive power in all three branches, see Paulsen, 83 Georgetown L.J. at 217 (cited in note 3); Paulsen, 83 Minn. L. Rev. at 1347-59 (cited in note 3).

57. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (footnote omitted).

matter, and matter greatly, what Congress has said and done (or not done) concerning the scope of the President's powers.

This begs a further question: What should *count* as authoritative congressional interpretation of the Constitution? Here, Justice Jackson's approach becomes analytically vulnerable. Indeed, Jackson's concurrence becomes almost hopelessly fuzzy when it comes to describing what might count as evidence of congressional "inertia, indifference or quiescence" sufficient to constitute Congress having "enable[d]" or "invite[d]" the exercise of "independent presidential responsibility."[58] As noted earlier, Jackson appears to fall victim to the same analytic error as Justice Frankfurter: the willingness to construe Congress's *non-enactment* of specific authority as sometimes the equivalent of a *prohibition* on the exercise of such authority (as in *Youngstown* itself, in the case of seizure authority) and, apparently, sometimes as the equivalent of implied *authority* (or at least enabled or invited action) arising from Congress's inertia, indifference, or quiescence.

This error is similar to the one that has fueled today's debates over the use of legislative history in statutory interpretation. The only thing Congress actually enacts into law is the text of the statute itself. While it might sometimes be legitimate to look to legislative history in order to ascertain the meaning the words of the statute had, in context, to those who were using them (discounted by the fact that such legislative history is now frequently created precisely to "spin" statutory interpretation, and by its possible unreliability in other respects), surely the *least* legitimate use of such legislative history is to generate non-enacted authority or prohibitions, or effectively to repeal or alter provisions actually enacted.

The same is true when it comes to interpreting congressional non-enactment for purposes of evaluating the scope of the President's delegated or constitutional authority to act. Congress acts only by passing bills that become law. Thus, with respect to statutorily delegated power, Congress's refusal to grant seizure authority is not a prohibition of such authority; it is simply a failure to grant such authority. Likewise, Congress's grant of certain statutory authority and failure specifically to prohibit other exercises of power surely does not imply a further grant, or concession, of such non-enacted authority to the Presi-

58. Id.

dent.[59] Nor does anything *not* enacted by Congress tell us anything authoritative about Congress's constitutional interpretations of presidential power.

The better approach, I submit, is as follows. Congress may grant statutory authority by enacting it into the text of a statute. Where Congress has not so granted statutory authority, statutory authority does not exist. Whether the President possesses such authority anyway, as a matter of Article II presidential constitutional power, is a different question logically unaffected by the presence or absence of a grant of statutory authority. Where the President's independent constitutional power is clear, the presence of statutory authority merely confirms or clarifies such existing presidential constitutional authority. Where presidential constitutional authority is uncertain, however, Congress's constitutional interpretation of the scope of the President's constitutional powers matters much more. An interpretation supportive of presidential power reinforces the President's constitutional position while an interpretation repudiating the President's position weakens it. But Congress's constitutional interpretations cannot properly be divined from non-enactments, any more than can statutory grants (or prohibitions) of authority. Just as Congress may legislate authority (or prohibitions) only by passing laws pursuant to the Article I, section 7 process, so too Congress may authoritatively express its constitutional views only by passing laws pursuant to the Article I, section 7 process. In short, statutes count; inferences from non-enactments or from legislative history do not.[60]

Once Congress has acted in a properly authoritative manner by enacting a statute, such enactments should have considerable force *as acts of constitutional interpretation.* Indeed, Congress's enacted constitutional interpretations should enjoy the same status as authoritative constitutional interpretations of the legislative branch as judicial decisions have as the authoritative constitutional interpretations of the judicial branch. A statute em-

59. The reasoning of *Dames & Moore*, 453 U.S. 654 (1981), is, of course, inconsistent with my analysis here.

60. In addition, the Senate may authoritatively interpret the Constitution—on behalf of the Senate alone—in the course of exercising its share of any power that it exercises independent of the House of Representatives. Thus, the Senate's final judgments in cases of impeachment; its consent to treaties; and its approval or rejection of an appointment, each could become the occasion for the Senate authoritatively expressing its constitutional views. Similarly, the House may be able to express its constitutional views with respect to impeachment in the course of its decisions to bring or not bring certain charges.

bodying a constitutional interpretation should be viewed as analogous to a judicial decision or precedent interpreting the Constitution. The branches have simply acted in the respective ways in which they are authorized by the Constitution to act—Congress by exercising the legislative power of passing laws and the courts by exercising the judicial power of deciding cases.[61]

The President's authoritative constitutional interpretations may come in the context of performing any of the Presidency's myriad independent and shared constitutional powers: vetoing bills, issuing pardons, executing laws, recommending measures, conducting foreign affairs, commanding the nation's armed forces, or—as with Truman's order in the *Youngstown* case—issuing executive orders purporting to have the force of law.[62] Jackson's Category I-II-III paradigm is properly viewed as addressing the degree of deference to be accorded presidential constitutional interpretation, at least by the Courts. Somewhat restated, the framework can be summarized as follows. Category I: Where the President's interpretation is in accord with Congress's interpretation of the President's constitutional powers, that agreement has the strongest claim to judicial deference. In such a case, a court may invalidate the President's action only if it can be said, unequivocally, that the constitutional judgment of both the President and Congress is *wrong*. The President's constitutional interpretation, supported by Congress's constitutional interpretation, would be (to borrow Justice Jackson's language) "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."[63] Category II: Where it is unclear whether, or the extent to which, Congress has embraced the President's constitutional position, the judiciary is left without any helpful assistance in considering the underlying, first-order issue of the constitutional validity of the President's action. Reading the tea-leaves of Congress's lack of authoritative interpretive action does not further the enter-

61. I believe that the authoritative constitutional interpretations of Congress and of the courts (and of the President) also should have the same status vis-a-vis *each other*. See generally Paulsen, 83 Georgetown L.J. at 217 (cited in note 3). But that controversial point is not necessary to my position here. My claim here is only that *whatever* power of constitutional interpretation Congress possesses, it is exercised by passing legislation, just as the courts' power of constitutional interpretation is exercised by deciding cases.

62. See id. at 241-84 (arguing that the President possesses a power of constitutional legal review parallel to the judiciary's power of constitutional legal review, and setting forth the contexts in which it properly might be exercised).

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

prise of constitutional interpretation in a particularly meaningful way. Category III: Where Congress has adopted, by affirmative legislative enactment within the scope of its constitutional powers, the negative of the President's interpretive position (as it has in some respects with regard to the war power, for example, in the War Powers Resolution), the President's interpretive position should enjoy no judicial presumption of validity, or deference. The President's position is right only if it is *right*, as a matter of constitutional law. The Court is forced to choose between the constitutional positions asserted, respectively, by the President and by the Congress.[64]

How do these principles apply to the power to wage war? Interpreting the Constitution's allocations of power with respect to war is one of the most significant, recurrent, and historically troubled fields of constitutional law. *Youngstown Sheet & Tube* did not specifically address itself to, and does not answer, this question. But it does supply a valuable way of thinking about it. In that respect, *Youngstown* is arguably the most important decision ever rendered by the Supreme Court on the question of constitutional war powers, even though that was not the question before the Court.

III. *YOUNGSTOWN* GOES TO WAR

The Constitution's allocation of power with respect to war is simple enough in the abstract, but notoriously ambiguous and uncertain in its application. To compress the debate drastically: Traditionally, the "executive power" was understood at the time of the framing as including the power of war and peace, and all external relations of the nation.[65] The founding generation so understood this traditional arrangement, embraced in various forms by Locke, Blackstone, Montesquieu, and others,[66] but feared concentration of power and therefore re-assigned to the Congress the powers to "declare War";[67] to "raise and support Armies [and]... provide and maintain a Navy";[68] to "make Rules for the Government and Regulation of the land and naval

64. Cf. *Morrison*, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting) (cited in note 53).

65. For an excellent, comprehensive treatment of the text and historical understanding of the Constitution on this point, see Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231 (2001).

66. See id. at 265-72.

67. U.S. Const. Art. I, § 8, cl. 11.

68. U.S. Const. Art. I, § 8, cl. 12; U.S. Const. Art. I, § 8, cl. 13.

Forces";[69] and to "define and punish . . . . Offences against the Law of Nations."[70] In addition, the Framers gave Congress the wonderfully indefinite and enduringly controversial Sweeping Clause power to "make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[71] Finally, the Senate was given the power to advise and consent on ambassadorial (and other) appointments and (by two-thirds vote) treaty formation.[72]

But the President was left with whatever remained of the traditional "executive power" in matters of war, peace, and foreign affairs, diminished to a significant extent, but not completely, by the re-allocation of some very important, traditionally executive, powers to Congress.[73] The President was to retain the traditional executive power over foreign affairs, qualified by the Senate's check on appointments and shared power in making any treaty that would have force as United States law.[74] In addition, the President was specifically made "Commander in Chief of the Army and Navy of the United States."[75] Finally, history very strongly suggests—and the Constitutional Convention's debate over and adoption of a congressional power "to *declare* War" as distinguished from a power "to *make* War" tends to confirm—that the "executive" power was understood at the time to include a power to defend the nation when attacked or in imminent danger of attack and that Congress's constitutional power "to declare war" was not meant to displace this traditional executive power (and duty).[76]

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69. U.S. Const. Art. I, § 8, cl. 14.
70. U.S. Const. Art. I, § 8, cl. 10.
71. U.S. Const. Art. I, § 8, cl. 18.
72. U.S. Const. Art. II, § 2, cl. 2.
73. See generally Prakash and Ramsey, 111 Yale L.J. at 231 (cited in note 65).
74. U.S. Const. Art. I, § 2, cl. 2.
75. U.S. Const. Art. I, § 2, cl. 1.
76. Prakash and Ramsey, 111 Yale L.J. at 285 (cited in note 65); Louis Fisher, *Presidential War Power* 6-8 (U. Press of Kansas, 1995).

The President is also charged by oath to "preserve, protect, and defend" the Constitution of the United States, a duty that might well be thought to impose an obligation to defend the *existence* of the nation whose Constitution it is, with military force if necessary, against external and internal enemies who seek to destroy or dismember the nation, and that this duty exists whether Congress has declared war or not. President Abraham Lincoln thought of the oath in such terms. Letter to Albert Hodges (Apr. 4, 1864) reprinted in Abraham Lincoln, 2 *Speeches & Writings, 1859-1865* at 585 (Library of America, 1989) ("I did understand, however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law.")

The several constitutional provisions suggest a clear but crude division of power: Congress has the power to *initiate* or *create* a state of war and the President *does not*. The President has the remainder of the "executive" power with respect to war—and Congress *does not*. This includes the Commander-in-Chief power to *conduct* war: the power to "execute," as it were, any authorized war; the power to decide whether, when, and how to employ the Nation's armed force in carrying out Congress's authorization to use such force; and the power to decide when to cease such use of force. In addition, the President has the traditional executive power to defend the Nation against sudden attacks and respond to such attacks or imminent threats as will not admit of delay. Congress does not possess any of these executive war powers.[77]

The obvious problem is that the respective constitutional war powers of Congress and the President overlap. How they apply to particular instances is, therefore, not always clear. Where, for example, does the President's traditional executive power to defend the nation and repel attacks leave off and Congress's power "to declare War" begin? May a President initiate military hostilities against another nation, for the purpose of defending the United States against an *anticipated* attack? Or is such exercise of force essentially offensive, falling within Congress's exclusive power to declare war? Similarly, how does the Commander-in-Chief power to *wage* a congressionally-authorized war interact with Congress's control of the scope of authorization? May Congress limit the objectives or means of war? Or is this an interference with the President's exclusive power to direct and command the use of military force?

The Presidential Oath Clause does not appear, at least in form, to be a *grant* of power to the President. Probably the better understanding is that it imposes a *duty* with respect to the exercise of a power granted elsewhere—as in the clause vesting "the executive Power" in the President—and is an allusion to that power. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 14 (1993) (noting that Presidential Take Care and Oath clauses "are simply expressions of the constitutional nature of 'The executive Power'").

77. If the power to defend the nation against sudden attacks lies outside Congress's power to declare war and wholly within the residual "executive Power" of the President, Congress may not seek to control the President's exercise of that exclusively presidential power. Congress's legislative power under the Necessary and Proper Clause may be used to pass laws that assist the President in carrying out his constitutional duties; or that purport to restrict him to the bounds on his power established by the Constitution (the latter being Congress's way of interpreting and seeking to enforce the Constitution). But Congress may not enact laws that operate to inhibit the President's exercise of a power that is legitimately within the scope of the President's constitutional powers under Article II of the Constitution.

It is precisely for issues of this type—issues of separation of powers and overlapping of powers—that the opinions in *Youngstown Sheet & Tube* provide useful paradigms. The approach of Justice Black's majority opinion is exactly the right place to start when considering the President's power to employ military force. To paraphrase Black's opinion: The President's power, if any, to employ military force must stem either from congressional authorization or from the Constitution itself (that is, from the President's independent Article II constitutional powers). Some cases are easy: Where Congress has declared war on an enemy nation or entity, the President has clear constitutional power to employ military force against that enemy. (In Jackson's taxonomy, this is a "Category I" war power situation. The President's power is at its apex, because he is acting pursuant to explicit congressional authority to execute all the constitutional powers of Congress with respect to this matter, plus whatever independent constitutional powers the President possesses with respect to the matter.[78])

Absent such congressional authorization, the President's authority to employ military force must be found in some provision of the Constitution.[79] As noted, the Constitution divides the war power between Congress and the President. Each allocation of power must be given effect. A construction that would permit Congress to control the conduct of military hostilities—the execution of war—or disable the President from exercising the residual executive power of defending the Nation against attack is not consistent with the Constitution. Equally, however, a construction of the Constitution that would give the President the entire power with respect to war—the decision whether to initiate military hostilities with another nation or enemy entity—is not consistent with the Constitution. It is thus also an easy case under the Constitution (however much this constitutional principle historically has been honored in its breach) that the President does not possess legitimate legal authority to *initiate* hostilities between the United States and another nation of a magnitude and intensity sufficient to constitute "war" without congressional authorization, absent a situation of sudden or imminent attack. (In Jackson's terms, this is the "Category III" war power situation: the President's power is at its lowest, and unilateral presidential action can be sustained only if the Presi-

78. See *Youngstown*, 343 at 635-36 (Jackson, J., concurring).
79. Id. at 585, 587 (majority opinion).

dent has independent constitutional power to take the Nation to war.) Just as President Truman did not have legitimate constitutional power to seize the nation's steel mills without congressional authorization, the President does not have legitimate constitutional power to *take* the nation to "war"—to initiate hostilities, as opposed to repelling sudden or imminent attacks on the United States—without congressional authorization.[80]

But there are also hard cases—"Category II" war power cases—where the President and Congress "may have concurrent authority, or in which its distribution is uncertain."[81] Justice Jackson's *Youngstown* concurrence supplies a valuable paradigm for determining how the war power applies in these situations. Because presidential and congressional war powers overlap, it matters greatly how Congress, through actual legislative enactments, has interpreted the Constitution with respect to the President's constitutional authority to employ military force. Where Congress has granted the President authority, by formal declaration of war or by comparable statutory authorization or delegation, the question is chiefly one of the meaning and legal effect of its enactment, when coupled with the President's constitutional powers. Where Congress by legislation has *enacted a view or interpretation* of the branches' respective constitutional war powers, either in connection with authorizing the President's use of military force in a specific context (as I shall argue is the case with the 9-18-01 Resolution) or as freestanding legislation (as with the War Powers Resolution of 1973), the question is whether Congress's enacted constitutional interpretation reinforces, resists, or simply does not affect, the President's claim of constitutional authority to act and how such congressional reinforcement, resistance, or neutrality with respect to the Presi-

80. Employing the paradigms of *Youngstown*, the conclusion seems unavoidable—notwithstanding how hard the Court in *Youngstown* worked to avoid it—that President Truman's commitment of U.S. forces to the Korean War was unconstitutional. See, e.g., id. at 587 (majority opinion) (rejecting "Commander in Chief" power as justification for seizure without addressing constitutionality of Korean War); id. at 643 (Jackson, J., concurring) ("I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance argument based on it."). There is not much room for doubt that the Korean War was, if not at its inception very shortly thereafter, a "war" within the meaning of the Constitution. Congress did not declare war or authorize military action in any way. Truman purported to be acting pursuant to authority conferred by the United Nations, but nothing in the U.N. treaty committed the United States to military action other than through the nation's constitutional processes and the United States constitutional process was never employed to authorize use of military force. See Fisher *Presidential War Power* at 84-91 (cited in note 76).

81. *Youngstown*, at 637 (Jackson, J., concurring).

dent's claimed authority should affect the constitutional calculus in such doubtful war powers cases.

It would be foolish to attempt (not to mention impossible to accomplish), in this short article, a review of the constitutional lawfulness under this paradigm of the hundreds of arguably "Category II war power" situations that have occurred in our nation's history.[82] Instead, I will limit myself here to discussing the two most important acts of congressional constitutional interpretation in this area in the past thirty years: The War Powers Resolution of 1973 and the 9-18-01 Resolution authorizing military force in the present war. Both are extant, legally operative, authoritative congressional interpretations of the scope of presidential war powers, and each can be seen as fitting into *Youngstown*'s paradigms.

A. THE WAR POWERS RESOLUTION AS CONSTITUTIONAL LAW

Consider first the War Powers Resolution, passed by Congress and enacted into law over President Richard Nixon's veto in 1973. As noted at the outset of this article, the War Powers Resolution was and remains a highly contestable congressional constitutional interpretation of the scope of presidential war powers in the absence of a declaration of war or equivalent congressional authorization of presidential use of military force. Whatever the validity of some of the WPR's *commands* to the President—some of which are certainly unconstitutional and others of which are highly dubious[83]—Congress's *constitutional interpretation* of the branches' respective powers stands on its own as a legitimate legislative enactment of Congress's constitutional views. The WPR explicitly begins, in section 2(a), with constitutional interpretation. "It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States," the resolution announces, "and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[84] After then

82. I hope to address these issues at greater length in a forthcoming book on the war power.

83. I discuss these aspects of the War Powers Resolution presently. See infra pp. 246-249.

84. War Power Resolution, 50 U.S.C. § 1541(a) (1994 and Supp. V 1999). I will hereinafter use the Public Law section numbers when discussing the War Powers Resolu-

reciting, in subsection 2(b), Congress's power under the Necessary and Proper Clause to pass laws "for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof,"[85] the WPR proceeds, in subsection 2(c), to provide Congress's interpretation of the scope of the President's constitutional power as Commander-in-Chief:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[86]

As an act of constitutional interpretation of the Constitution's allocation of the war power, this is not bad. It conforms reasonably closely to what I have described above as the respective spheres of presidential and congressional power in this area, including the President's power to defend the Nation against sudden or imminent attack. It is simultaneously a congressional *recognition of*, and *limitation of*, a class of situations involving legitimate presidential use of military forces outside of Category I wars. It is a recognition of the reality of Category II war power situations. But it is also an enacted statutory description of the limits of Congress's "inertia, indifference or quiescence" with respect to such situations: Neither the President nor the courts should construe Congress as conceding, through silence or inaction, unilateral presidential constitutional power to act, if it does not fall within one of the three described circumstances.

The other bookend of the War Powers Resolution is section 8, which, while entitled "Interpretation of joint resolution," actually prescribes rules of interpretation not merely for the WPR but for *other* congressional enactments, and for U.S. treaties as well, as they might be thought to affect questions of presidential authority to use the armed forces in situations of actual or probable hostilities. Section 8 imposes strict limits on how congressional enactments and treaties are to be construed with respect to the issue of whether the President has been given statutory or

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tion in the text, and use the parallel U.S. Code citations in the footnotes.

85. 50 U.S.C. § 1541(b).

86. Id. § 1541(c).

treaty authority to use military force. Section 8(a) provides that "[a]uthority to introduce United States Armed Forces" into hostilities "*shall not be inferred*" from "any provision of law . . ., including any provision contained in any appropriations Act" unless such provision "*specifically authorizes*" such introduction "*and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.*"[87] Similarly, such authority is not to be inferred "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation *specifically authorizing*" the President to use military force and that *states* that it is intended to constitute such specific authorization within the meaning of the WPR.[88] Finally, after setting forth certain narrow exceptions to this rule[89] and reciting that nothing in the WPR "is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties,"[90] section 8(d) concludes with a directive that the WPR itself not be construed as conferring any statutory authority on the President:

> Nothing in this chapter . . . (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.[91]

In terms of *Youngstown*'s paradigms, section 8 of the WPR is a collection of prohibitions of inferences that otherwise might be asserted to support a claim of Category II war power by the President. Indeed, it is a rather clear, muscular repudiation of any such inferences. No "inertia, indifference, or quiescence" here: section 8 excludes, by clear congressional directive, any middle ground of "Category II wars" lawfully being waged on the claimed authority of debatable inferences from congressional enactments or treaties. Either the President has delegated Article I war power pursuant to an *explicit* congressional enactment, labeled as such, or he does not; if not, he must rely only on his independent Article II war powers (the scope of which Congress has sought to define in section 2's enactment of Congress's constitutional interpretation of the Commander-in-Chief clause).

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87. Id. § 1547(a)(1) (emphasis added).
88. Id. § 1547(a)(2) (emphasis added).
89. Id. § 1547(b).
90. Id. § 1547(d)(1).
91. Id. § 1547(d)(2).

The effect is to make the question of presidential war power rather more categorically black-and-white—like Justice Black's majority opinion in *Youngstown*—by forcing what otherwise might be Category II war power situations into either Category I or Category III. If *Youngstown* is right, this clear congressional policy must be given effect. If the legislative enactments (and non-enactments) discussed in *Youngstown* were insufficient to support a claim of delegated power to seize the steel mills, all the more clearly, under section 8's rules of construction, comparably non-specific legislative actions touching on matters of war power but not explicitly delegating power to employ military force are insufficient to sustain a claim of legislatively-delegated presidential war authority. The legal reasoning of the *Dames & Moore* case[92]—sustaining presidential authority on the basis of a tradition of congressional deference to unilateral presidential action settling claims combined with congressional legislation in the neighborhood of granting the President such authority but not in fact granting it—has no place in war powers, at least not so long as the WPR's provisions remain the law. In sections 2 and 8 of the War Powers Resolution, Congress formally has enacted into law an explicit *lack* of deference to any tradition of unilateral presidential war authority and an explicit *rejection* of the propriety of inferring authority from legislation in the neighborhood of granting the specific authority at issue but not in fact granting it.

Section 8's inference-prohibitions are, if anything, even more clearly appropriate exercises of Congress's constitutional powers than section 2's interpretation of the scope of the President's constitutional power. Congress is the master of its own statutes and can prescribe rules of interpretation governing its own statutes as surely as it may alter or amend the statutes directly.[93] Similarly, with respect to treaties, Congress has power to modify or repeal their effect as a matter of U.S. domestic law, by passing statutes that accomplish such changes.[94] Moreover, this type of expression of legislative will is explicitly what Justice

92. 453 U.S. 654, 675-88.

93. Professor Prakash and I develop this proposition in forthcoming work. Michael Stokes Paulsen and Saikrishna Prakash, *The Judicial Activism Abolition Act* (provisional title) (unpublished manuscript on file with the author). For a fascinating defense of Congress's power to prescribe rules of federal statutory interpretation, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002).

94. *Chae Chin Ping v. United States*, 130 U.S. 581 (1889) ("*The Chinese Exclusion Case*").

Jackson's Category II contemplates: Congress's position—"inertia, indifference, or quiescence"—matters to interpretation of the extent of presidential power in a given context. It is thus unquestionably appropriate for Congress to *disclaim* inertia, indifference, or quiescence and prescribe standing rules forbidding construction of statutes and treaties from being so understood.

Between the bookends of section 2's constitutional interpretation and section 8's Category II inference-prohibitions are the substantive requirements of the War Powers Resolution—the direct "shall" provisions that purport to force the President to take or not take specific actions with respect to the introduction of military forces into situations of actual or imminent armed conflict. As suggested above, these provisions are far more constitutionally problematic. Section 3 directs the President to consult with Congress before introducing armed forces into situations that are likely to involve such forces in hostilities.[95] Section 4 requires that the President provide written reports and other information in such circumstances.[96] And section 5 directs the President to terminate use of such armed forces in a situation where such report was required within sixty days, unless Congress has acted affirmatively or the President has submitted a certification that an additional thirty days are needed.[97] In addition, section 5(c) provides that Congress may by "concurrent resolution" (that is, without presentment to and approval by the President) direct the President to remove armed forces from such described situations.[98]

This last provision clearly cannot be given operative effect consistently with the reasoning of *INS v. Chadha*, the case in which the Supreme Court recognized the unconstitutionality of legislative "vetoes" of the exercise of otherwise valid legislative delegations of authority to the executive branch.[99] Beyond the legislative veto problem, it is arguable that *all* of the substantive provisions of the WPR unconstitutionally interfere with the President's constitutional power as Commander-in-Chief of the nation's military, *if*—and this is a big "if"—that power is legitimately being exercised by the President in the first place. Put differently: If the President's military action falls within the scope of his independent constitutional powers and outside Con-

95. 50 U.S.C. § 1542.
96. Id. § 1543.
97. Id. § 1544(b).
98. Id. § 1544(c).
99. 462 U.S. 919 (1983).

gress's power "to declare war," it is unconstitutional for Congress to direct, control, or regulate the President's action in any way that would interfere with his independent constitutional prerogative to act.

On the other hand, if the President in fact is acting *ultra vires* in employing military force—that is, if he is exceeding his legitimate executive and Commander-in-Chief constitutional powers—these provisions of the War Powers Resolution (with the exception of section 5(c)'s procedurally-defective "legislative veto" provision) are entirely legitimate congressional prohibitions of unconstitutional presidential action. In effect, they direct the President to stop acting unconstitutionally. Such a requirement—a statutory command to another branch that it not act in an unconstitutional manner, exceeding the scope of its true constitutional powers—certainly falls within the scope of Congress's power to pass laws necessary and proper for carrying into execution the (legitimate) powers of that branch.[100] To be sure, such a command is in a sense redundant of what the Constitution supposedly commands already (so that the statute's prohibitions are merely cumulative, duplicating the Constitution's) and perhaps futile if the President persists in his unlawful action (or holds, in good faith, a different interpretation of the Constitution's allocations of power), but that does not make Congress's enactment *improper*. The most that can be said is that it might make Congress's enactment superfluous, or ineffectual—useless howling in the wind.

But in a constitutional regime in which congressional and presidential war powers are recognized as overlapping and in some respects concurrent, one must also recognize that the lawfulness of presidential military action in a given situation is affected by Congress's constitutional interpretation of the scope of the President's authority. In this respect, the War Powers Resolution operates, somewhat ironically and probably unintentionally, to provide a constitutional "safe harbor" for certain unilateral presidential actions involving the use of military force—a zone of nearly unchallengeable exercise of presidential power

100. For a defense of such an understanding of the Necessary and Proper Clause power, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L.J. 1535 (2000). For an attack on this view, see Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 Const. Comm. 191 (2001). For a reply and further defense, see Michael Stokes Paulsen, *Lawson's Awesome (Also Wrong, Some)*, 18 Const. Comm. 231 (2001).

within the zone of twilight marked by the overlap of congressional and presidential war powers, where Congress has by statute explicitly chosen to accept presidential military initiatives, and where it is not clear that the Constitution of its own force renders such presidential action unlawful.

Consider sections 3, 4, and 5 of the War Powers Resolution in such light. These provisions can be understood less as effective, self-executing legal commands to the President than as part of Congress's constitutional interpretation of the scope of the President's constitutional power, consistent with the general view expressed in section 2. Specifically, these provisions collectively establish the situations when presidential use of military force will fall within a safe harbor of arguable consistency with Congress's interpretation of presidential power under the Constitution as set forth in section 2 of the WPR. While the WPR does not *authorize* presidential action within the sixty-day window of section 5(b)—recall section 8(d)(2)'s directive that nothing in the WPR "shall be construed as granting any authority to the President" with respect to use of military forces—and while presidential action within the sixty-day window is not *necessarily* consistent with Congress's general view of the scope of the President's constitutional power as Commander-in-Chief set forth in section 2, the specific substantive commands and prohibitions of the WPR's middle sections can be understood as marking the *de facto* boundaries of Congress's "quiescence" in presidential exercises of Category II war power.

Similarly, while Congress might not legitimately be able to command the President to remove troops from a given situation (or as a practical matter might not be able to secure presidential compliance with such a directive), Congress properly may declare, prospectively, that certain presidential military orders are, in Congress's view, *unconstitutional.* That view is not wholly without effect: As a legitimate congressional enactment into law of its constitutional interpretation, that view necessarily will affect the judicial calculus in such a "Category II war" situation, in the event such a question could come before a court. And it should affect the executive branch's calculus in such a situation as well: As noted, if *Youngstown*'s paradigms are sound understandings of how the Constitution applies in such separation-of-powers situations, they are sound understandings of the Constitution that ought to bind and constrain the executive branch

whether or not they are enforceable against the executive by the courts.[101]

The substantive provisions of the War Powers Resolution thus may be understood as part and parcel of the Resolution's overall force as an act of congressional constitutional interpretation: In enacting the War Powers Resolution, Congress has said that insofar as presidential war-making power might be thought to depend on an inference from congressional action or inaction, Congress as a standing rule has specifically repudiated any inference of authorization, quiescence, or indifference as being contrary to its intention. As far as Congress is concerned, there are to be no Category II wars "authorized" by inference from treaties, appropriations acts, or any other legislative action or inaction short of specific authorization.[102] Moreover, to the extent the President would interpret the Constitution as permitting him to introduce armed forces into combat situations on his own authority, Congress's interpretation is that the Constitution does *not* authorize presidential military action outside of the three circumstances described in section 2(c)—declaration of war, specific statutory authorization, or a national emergency created by attack upon the United States or its armed forces.[103] And the President *clearly* lacks legitimate constitutional authority unilaterally to employ military force outside the *de facto* sixty day "safe harbor" period marked by the WPR's substantive provisions.

Has Congress's apparent inability to enforce the War Powers Resolution against the executive waived its constitutional position? No. Just as the only authoritative way in which Congress can assert its constitutional position is by passing legislation, so too the only authoritative way in which Congress can retreat from or alter that position is by passing legislation. The War Powers Resolution, to the extent it stands as Congress's constitutional interpretation and as Congress's set of instructions as to

101. This is true no matter whether the executive branch or the judicial branch is interpreting the Constitution. If *Youngstown*'s approach is a sound, correct interpretation of the Constitution, it is a sound, correct interpretation of the Constitution whether or not the issue at hand is, or ever could be made, the subject of a lawsuit. See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907, 916 (1994) ("A constitutional violation is no less a constitutional violation simply because of the absence of a judicial ruling to that effect. The President takes an oath to uphold the Constitution. That duty exists whether the courts are able to act on a matter or not. The Constitution is binding law for the executive branch as well as for the courts.")

102. 50 U.S.C. § 1547.

103. Id. § 1541.

how other statutes and treaties are to be construed, is not, by the fact of being (allegedly) *violated*, somehow thereby *repealed*.

But Congress of course may *amend* the WPR's constitutional interpretation by enacting subsequent legislation embodying a new, modified, or expanded constitutional interpretation of presidential war power. It is in this respect (among others) that the September 18, 2001 "Authorization for Use of Military Force"—the Resolution that governs the present war on terrorism—constitutes a major constitutional event in the history of war powers. The 9-18-01 Resolution changes everything.

B. THE 9-18-01 RESOLUTION AS CONSTITUTIONAL LAW

The September 18 Resolution has both "*Youngstown* Category I" and "*Youngstown* Category II" war power elements, and triggers broad presidential constitutional authority under both categories. The resolution, structured as a series of "Whereas" statements followed by the specific substantive authorization, merits quotation in full:

PL 107-40
September 18, 2001
AUTHORIZATION FOR USE OF MILITARY FORCE

Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the theat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitu-

tion to take action to deter and prevent acts of international terrorism against the United States: Now therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS—

(1) SPECIFIC STATUTORY AUTHORIZATION—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

This is a sweeping congressional enactment with respect to war powers. In section 2(a), the President is specifically authorized, and delegated power in broad terms, to use force against not only "nations," but also "*organizations or persons*" that "*he determines*" "planned, authorized, committed *or aided*" the September 11 attacks "*or harbored*" such organizations or persons. This is a sweeping delegation of "Category I" war power to the President. It is not limited to specific nations or organizations. The President is given substantial discretion to identify transgressors and thus targets of military action, including "organizations" and "persons." In addition, the Resolution contains no instruction as to the standard of proof, or degree of connectedness

to the September 11 attacks, that is to limit the President's exercise of discretion. The targets are the ones "he determines" were involved in some way in those attacks, including those that "aided" the attacks and even those who "harbor[ ]" those who "aided" the attacks. This is not a standardless delegation, nor a blanket unqualified delegation of the entirety of the war power. It states an "intelligible standard" for the President to apply, and is thus constitutionally legitimate under any modern conception of the limits of Congress's authority to legislate in very general terms.[104] But it is an extraordinarily broad delegation—arguably the broadest congressional delegation of war power in our nation's history. The President of the United States—President Bush and his successors— is under no time limit. The authority to use military force appears to exist until the President runs out of (what he determines to be) legitimate targets.[105] Section 2(a) of the 9-18-01 Resolution constitutes a truly extraordinary congressional grant to the President of extraordinary discretion in the use of military power for an indefinite period of time.[106]

In addition, the 9-18-01 Resolution's final "whereas" clause constitutes an extraordinarily sweeping congressional recognition of independent presidential *constitutional* power to employ the war power to combat terrorism. The Resolution declares Congress's view that "the President *has authority under the Constitution* to take action to deter and prevent acts of international terrorism against the United States."[107]

It is worth pausing, briefly, to let this sink in: Congress has embraced the "inherent presidential authority" view of the war power, at least with respect to international terrorism. And it

104. *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001); *Mistretta v. United States*, 488 U.S. 361, 372-74, 378-79 (1989). A different question might be presented were Congress to declare war against "all of America's enemies, present or future," and delegate to the President the authority to decide who should be deemed an enemy. (I owe this hypothetical to my colleague Dan Farber.)

105. The last clause of Section 2(a) recites that this authority is granted "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." It is unclear whether this clause broadens, narrows, or does not affect the scope of authority granted in the preceding clauses. Most likely, it simply establishes a *purpose* for which the grant of authority is conferred, but is neither an enlargement of that grant nor a limitation on its exercise.

106. It is also remarkable that the congressional vote was nearly unanimous. The vote was 420-1 in the House, vote 342 (available at <http://clerkweb.gov/cgi-bin/vote.exe?year=2001&rollnumber=342>), and 98-0 in the Senate, vote 281 (available at <http://senate.gov/legislativevote1071/vote-00281.html>).

107. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Pub. L. No. 107-40 (Sept. 18, 2001) (emphasis added).

has embraced this position whole hog: The President may take pre-emptive action to combat terrorism.

This is a new congressional interpretation of the scope of presidential war powers. In effect, this clause of the 9-18-01 Resolution appears to revise and amend—more specifically, to *expand*—the WPR's described categories of constitutionally permissible presidential use of military force to include a *fourth* category of presidential constitutional authority: Beyond declaration of war; beyond specific statutory authorization; beyond even national emergency created by an attack on the United States or its armed forces; the President *"has authority under the Constitution"* to *"take action to deter and prevent acts of international terrorism against the United States."*[108] This near-unanimous congressional interpretation of the Constitution essentially recognizes constitutional power in the President to conduct, in *Youngstown* terms, a "Category II War"on terrorism going beyond even the sweeping terms of the specifically-authorized Category I War against those nations, organizations or persons the President determines are responsible for, or assisted, the attacks of September 11, 2001. The 9-18-01 Resolution thus gives the President sweeping Category I war power plus an equally sweeping congressional constitutional interpretive "penumbra" of a zone of independent presidential constitutional power surrounding it. Indeed, given the breadth of Congress's recognition of Category II war authority in the President to combat terrorism, and the breadth of Section 2's explicit authorization, one could well speak of the Resolution as conferring Category I authority plus recognizing "Category I ½" war authority in the President.

There is nothing at all constitutionally improper about this. Indeed, in many respects it seems a perfect illustration of *Youngstown*'s paradigms. As extraordinary as the 9-18-01 Resolution is, this broad grant-plus-concession-of-power combination

108. Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (2001) (emphasis added). While the "Whereas" clauses do not themselves have the force of a legal requirement and are not, strictly speaking, part of Congress's *authorization* for the use of force, they are part of the legislation Congress has enacted into law, just as is section 2 of the War Powers Resolution (containing Congress's declaration of "Purpose and Policy"). One can accept the traditional canon that preambles and whereas clauses constitute no part of the substantive legislative enactment following the enacting clause, Singer, ed., *Sutherland Statutory Construction* 123 (West Group, 2002), yet still recognize that statements of legislative *understandings* embodied in such provisions are part of the overall enactment. As such, they constitute valid, authoritative expressions, enacted into statutory law, of Congress's interpretation of the Constitution.

is constitutionally appropriate. As noted, Congress may delegate its war power so long as it supplies an intelligible standard to guide the President's exercise of his discretion.[109] And, as argued above, Congress's constitutional interpretations in support of presidential power, in a genuine "Category II war power" situation of overlapping congressional and presidential authority, should be treated as dispositive of any separation-of-powers legal challenge to the President's actions, unless it can be said that Congress and the President are both *wrong* as a matter of constitutional law.

It is hard to say that Congress's position in support of presidential power, embraced in the 9-18-01 Resolution, is not within the range of legitimate interpretation of the Constitution's allocation of war power. If ever there was a cluster of situations falling within the "zone of twilight" marked out by the Constitution's division of the war power, it would seem to be the situation described in the last "whereas" clause of the 9-18-01 Resolution: constitutional authority "to take action to deter and prevent acts of international terrorism against the United States." The President's traditional executive power to defend the Nation against sudden or imminent prospective attack would appear to cover such cases, but not clearly or absolutely so. The more such presidential "action" to "deter and prevent" terrorism tends to become pre-emptive and anticipatory; and the more it involves offensive use of military force within the territory of and against the forces of other nations for a sustained period of time, the more strongly it also would appear to fall within Congress's constitutional power "to declare War." At the same time, in most imaginable real-world instances of presidential military action to deter and prevent international terrorism against the United States it is genuinely hard to say that constitutional authority to act lies *exclusively* within the province of Congress's power to declare war, such that Congress's and the President's agreed understanding is contrary to a fixed rule of law supplied by the Constitution. Across a broad range of circumstances, Congress's interpretation of the Constitution in support of presidential constitutional power —its view, enacted as part of the 9-18-01 Resolution that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States"—is a legitimate and constitutionally proper one.

109. See note 104.

When taken together with the broad "Category I" authorization for use of force, this expansive congressional "Category I ½" interpretation of presidential constitutional power answers most separation-of-powers legal questions concerning war authority directed against terrorism, for the indefinite future. As this article goes to print, one of the important issues of the current war is whether the President already possesses legal authority to take military action against Saddam Hussein and Iraq.[110] Under the 9-18-01 Resolution, it probably would not be difficult for the President to determine that offensive military action against Iraq is justified under the 9-18-01 Resolution, either because of a sufficient "aiding" or "harboring" connection between the present Iraqi regime and persons, groups, or nations who planned, authorized, committed, or aided the attacks of September 11, 2001 (under section 2(a)'s specific authorization), *or* because the President deems such action necessary "to deter and prevent" future acts of terrorism (under the last "whereas" clause) because of evidence of development or attempted development of chemical, biological or nuclear weapons and evidence of an intention to facilitate terrorist attacks against the United States involving such weapons.

In short, under the legal paradigm within which we now operate, President George W. Bush appears to possess full constitutional authority to take whatever "action" he deems necessary, including (but not necessarily limited to) the use of military force, against Iraq and Saddam Hussein—or against any other nation, organization, or person that he determines poses a legitimate threat of terrorism directed against the United States. Such authority is explicit ("Category I") in the case of nations, organizations, and persons involved in some way, direct or indirect, in the September 11 attacks. Such authority is implicit ("Category II" or "Category I ½") in the case of nations, organizations, and persons not involved in the September 11 attacks but posing a demonstrable risk of terrorism directed against the United States, by virtue of the agreed constitutional interpretations of the President and Congress concerning presidential con-

110. Congress recently passed further, specific authority for the President to use military force against Iraq. Authorization for use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (Oct. 16, 2002). The implications of this sweeping authorization are an important topic in their own right, but must await another day.

stitutional authority to act affirmatively to deter and prevent future terrorist aggression.[111]

Such congressional endorsement of presidential authority would appear to extend beyond use of military force. The last whereas clause of the 9-18-01 Resolution speaks broadly of the President's constitutional power to "take action." This could fairly be understood to include such things as covert actions, economic measures, and even authority to "try" and punish international terrorists for "crimes" under the rubric of the war power rather than the domestic criminal justice system. Thus, for example, insofar as President Bush's November 13, 2001 Order authorizing the establishment of military commissions might

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111. Section 2(b)(2) of the 9-18-01 Resolution states that "[n]othing in this resolution supercedes any requirement of the War Powers Resolution." Might this provision be understood to *negate* Congress's endorsement of independent presidential constitutional power to act against terrorism in the final "whereas" clause? Almost certainly not: Nothing in the 9-18-01 Resolution, including the final "whereas" clause, is inconsistent with anything that the War Powers Resolution purports to require. Section 1541 of the WPR describes Congress's constitutional interpretation of the President's Commander-in-Chief clause powers, but does not purport to impose any statutory "requirement." It states the constitutional interpretation on which the requirements of subsequent sections are based. The 9-18-01 Resolution appears to supplement and expand upon the WPR's constitutional interpretation, but it does not purport to supersede any of the WPR's actual "requirement[s]".

Section 1544 of the WPR purports to state actual "requirements," but, as argued above, those provisions are constitutionally valid and operative only where the President is acting beyond the scope of his constitutional power—begging the whole question at issue: Does the President have constitutional power to act, in this zone of uncertainty, where Congress in the 9-18-01 Resolution has adopted a broad construction of independent presidential power? To the extent section 5's provisions are properly viewed as a "safe harbor" within which presidential action is deemed consistent with Congress's interpretation of the scope of the President's independent constitutional power, the 9-18-01 Resolution's endorsement of broad presidential power to combat terrorism does not appear to supersede a requirement of the War Powers Resolution. It merely modifies Congress's present constitutional interpretation of the scope of independent presidential power.

Another legitimate interpretive issue is whether such a broad reading of the 9-18-01 Resolution's final "whereas" clause contradicts the interpretive canon of section 1547(a) of the War Powers Resolution itself. Section 1547(a) states that "[a]uthority to introduce United States Armed Forces into hostilities . . . shall not be inferred (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution) . . . unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution." 50 U.S.C. § 1547(a). The short answer is that the 9-18-01 Resolution's "whereas" clause does not purport to constitute statutory *authorization* for the President to act; it is technically not part of the substantive enactment conferring presidential authority. Rather, the clause is a congressional *interpretation* of the President's *constitutional* powers. While the WPR's interpretive canon probably forecloses reading the 9-18-01 "whereas" provision as *conferring* statutory authority, nothing in the WPR forecloses Congress from modifying, and later expressing, its constitutional interpretations of the scope of legitimate independent presidential power.

be thought to pose separation-of-powers issues of presidential versus congressional authority (as opposed to issues arising under the Fifth or Sixth amendments), the 9-18-01 Resolution appears to resolve them in favor of presidential authority.[112]

None of this is meant to constitute a normative judgment of the wisdom of such a broad grant-plus-concession of presidential war power. I mean only to describe what I believe is a dramatic, watershed constitutional enactment with respect to the constitutional allocation of the power to wage war, and how it fits within the paradigms of *Youngstown Sheet & Tube*. There are arguments strongly in favor of such an assignment of power to the executive—the traditional arguments of unity, secrecy, initiative, and dispatch in the conduct of foreign affairs and military operations. There are also arguments against such an assignment, including the difficulty of revoking such power once granted, the broad terms in which the power is granted, and its indefinite duration. Whether Congress may one day regret having written the Presidency so blank a check is a question for history. But the existence of the blank check is, for now, a fact of law.

IV. CONCLUSION

Youngstown Sheet & Tube has proven a remarkably durable decision providing durable paradigms for interpreting the Constitution's allocations of power between Congress and the President in the areas of foreign affairs, war powers, and domestice legislative authority. The holding of *Youngstown* is of enduring significance: the President's executive and Commander-in-Chief powers do not entail a unilateral presidential legislative power in time of war, and the Constitution is a self-executing prohibition of presidential usurpation of such power enforceable by the judiciary. The success of the *Youngstown* Court in enforcing this principle fifty years ago, at a crucial point in our nation's history, has been vital to the endurance of freedom in the United States for half a century.

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112. The November 13, 2001 Order cites the 9-18-01 Resolution as part of the legal authority for the order authorizing military commissions. See 66 Fed. Reg. 57833. For an argument against the validity of the November 13, 2001 Order, see Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002) (arguing, among other things, that President Bush's order lacks adequate congressional authorization). For a persuasive response to this particular argument, see Bradley and Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag at 249 (cited in note 21).

Moreover, the analysis of *Youngstown* offers enduring paradigms of constitutional interpretation for a text whose genius with respect to allocation of the war power in particular is that it answers some questions clearly and leaves the resolution of others uncertain, to be answered perhaps differently by different generations, as a function of the interaction of the views of different branches armed with different aspects of a divided power. *Youngstown*, as applied to the war power, reinforces the conclusion that the President's executive and Commander-in-Chief powers do not entail a unilateral presidential constitutional power to initiate war. Rather, the war power is divided between Congress and the President, with a good many of its applications falling within a zone of twilight in which the branches have concurrent authority, the precise distribution of which is uncertain. In such cases, the constitutional interpretations of Congress and the President properly make a difference as to the degree to which the Constitution may be thought to pose a restriction on presidential action.

This, too, is a formula for enduring freedom. It preserves flexibility for presidential action in times of crisis, but does so without stating a rule of plenary presidential emergency power. It permits the President to exercise great power in defense of the nation. As the framers understood, there are times when the ability of the government to exercise great power can be as vital to freedom as the existence of restrictions on such power.[113] At the same time, the formula withholds clarity and certainty from the President's assertion of power where Congress has declined to supply it. And it leaves presidential action of yet more doubtful constitutional legitimacy where Congress has by authoritative legislative action—the passing of statutes—staked out a constitutional position against that of the President.

All of this is as it should be. Those who claim plenary, unilateral presidential war power do not have the support of the Constitution. Those who claim entire congressional power over the President in matters of national defense and the use of military force do not have the support of the Constitution either. The Constitution of War is, like the Constitution in other impor-

113. Federalist 1 (Hamilton) 4 (cited in note 52) ("[T]he noble enthusiasm of liberty is too apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotton, that the vigour of government is essential to the security of liberty[.]); Federalist 23 (Hamilton) 111, 112 (cited in note 52) (defending position that "there can be no limitation of that authority, which is to provide for the defence and protection of the community in any matter essential to its efficary").

tant respects, one of division, separation, and blending of—and thus competition over—power.