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Chevron Meets Youngstown: National Security and the Administrative State

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CHEVRON MEETS *YOUNGSTOWN*: NATIONAL SECURITY AND THE ADMINISTRATIVE STATE

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The past several years have witnessed a burst of scholarship at the intersection of national security and administrative law. Many supporters of this approach endorse a heightened, "super-strong" brand of Chevron *deference to presidential decisionmaking during times of emergency. Believing that the Executive's comparative advantage in expertise, access to information, and accountability warrant minimal judicial scrutiny, these* Chevron*-backers advance an Executive-centric view of national security powers. Other scholars, by contrast, dispute* Chevron*'s relevance to national security. These* Chevron*-detractors argue for an interventionist judiciary in national security matters. Both camps criticize the Supreme Court's scaling of deference to the Executive after 9/11:* Chevron*-backers argue that the Court failed to accord sufficient deference to the President, while* Chevron*-detractors argue that the Court failed to clarify the scope of individual liberties. However, neither side appreciates the role that Justice Jackson's seminal* Youngstown *concurrence has played in the Court's resolution of recent national security cases.* Youngstown *makes congressional legislation – not Executive power or individual rights – the central judicial concern in cases pitting individual liberty against Executive power. The post-9/11 Supreme Court, following Justice Jackson, has used judicial review to catalyze congressional action by remanding to Congress policy questions lacking joint political branch support. This dual-branch theory of governance preserves a critical rule-of-law basis for judicial review of national security decisionmaking that* Chevron*'s backers and its detractors overlook.*

INTRODUCTION

The past several years have witnessed a burst of scholarship at the intersection of administrative law and national security.[1] Many supporters of

[1] *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1173 (2007) ("[C]ourts should generally draw on established principles of administrative law to permit executive interpretations of ambiguous statutory terms to overcome the international relations doctrines."); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2672 (2005) ("In war no less than in peace, the inquiry into presidential authority can be organized and disciplined if it is undertaken with close reference to standard principles of administrative law."); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1101 (2009) (recognizing the development of "theories urging that emergency action by the executive should be subjected to ordinary administrative law, rather than remaining as a separate sphere governed at most by military rules and practices"); John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2281 (2009) ("Administrative law scholarship has generally passed over the study of the military in favor of the domestic agencies. This is an oversight, because the armed forces are arguably the most important of all of the elements of the administrative state."); *see also* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 651 (2000) ("Much can be gained, I argue, by considering foreign affairs law from the perspective of the *Chevron* doctrine in administrative law."); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST.

an administrative law approach to national security argue that courts should apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* to the national security context.[2] *Chevron* requires judicial deference to reasonable Executive Branch interpretations of ambiguous statutory language,[3] and *Chevron*-backers argue that times of emergency call for "super-strong" *Chevron* deference based on a combination of the Executive's institutional expertise and the President's independent constitutional commander-in-chief powers.[4] While the post-9/11 period has produced "decisions that can well be understood as administrative law rulings,"[5] the Supreme Court has not endorsed a wholesale theory of deference (or non-deference) where presidential power is concerned. Rather than apply *Chevron*,[6] the Court has invoked Justice Jackson's seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[7] as the critical framework for scaling deference to the Executive's preferred security policies.

While *Chevron*'s advocates have frequently promoted the application of broad deference rules even in the absence of congressional legislation,[8]

COMMENT. 179, 195-97 (2006) (arguing that the Supreme Court should have applied *Chevron* deference to the President's interpretations of statutes and treaties in *Hamdan*).

[2] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3] *Id.* at 842-43.

[4] *See, e.g.*, Sunstein, *supra* note 1, at 2671 (arguing that, after 9/11, the President should receive "the kind of super-strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities").

[5] STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY 29 (6th ed. 2006); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 529-34 (2004) (applying Mathews v. Eldridge, 424 U.S. 319, 335 (1976), to determine the extent of due process rights afforded to a U.S. citizen "enemy combatant"); *cf. id.*, 542 U.S. at 575 (Scalia, J., dissenting) (chiding the *Hamdi* plurality for resolving the due process question by resort to "a case involving . . . *the withdrawal of disability benefits!*"); Corrected Brief for Respondent Addressing Pending Preliminary Motions at 51, Bismullah v. Gates, 514 F.3d 1291 (D.C. Cir. 2008) (Nos. 06-1197, 06-1397) (arguing that review under the Detainee Treatment Act of 2005 "evokes this Court's familiar function of reviewing a final administrative decision based upon the record before the agency").

[6] *See* Vermeule, *supra* note 1, at 1128-29 (finding it "significant" that courts deciding national security cases after 9/11 "often do not so much as advert to *Chevron*"); *id.* at 1128 (stating that the Supreme Court decided "issues of statutory authorization (in *Hamdi*) and statutory prohibition (in *Hamdan*) without offering direct instruction on the relevance of *Chevron*").

[7] 343 U.S. 579 (1952).

[8] Posner & Sunstein, *supra* note 1, at 1199 (calling for deference even when "there is no interpretation of a statutory term but simply a policy judgment by the executive"); *id.* at 1205 ("[I]n the domain of foreign relations, the approach signaled in *Chevron* should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications."); *id.* at 1177 (arguing that courts should "play a smaller role . . . in interpreting statutes that touch on foreign relations").

scholars at the opposite end of the spectrum question *Chevron*'s application to the national security context.[9] According to these *Chevron*-detractors, even when national security policies are the product of joint political branch decisionmaking, the Supreme Court should "say what the law is"[10] and override the collective wisdom of the political branches when necessary.[11] While *Chevron*-backers and *Chevron*-detractors provide important insights into the role of administrative law as a source of decisionmaking in national security cases, both camps ignore *Youngstown* at their peril.[12]

Under Jackson's framework in *Youngstown*, presidential powers are at their apogee when backed by congressional authorization and their "lowest ebb" when contrary to congressional will.[13] In between these two extremes are "zone of twilight" cases in which the President lacks a clear constitutional foundation or a basis in congressional authorization.[14] The post-9/11 decisions, following *Youngstown*, have focused less on the issue of deference as such and more on the shared responsibility of the political branches to create legislative schemes regarding national security policy.[15] Where Congress has

[9] *See* Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y.L. SCH. L. REV. 119, 133, 138 (2011) (questioning the appropriateness of analogizing *Chevron* to the foreign affairs context); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 836-42 (2011) (questioning the role of *Chevron* deference in foreign affairs and arguing for a strong judicial role in deciding rights claims raised in national security cases).

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[11] *See* Flaherty, *supra* note 9, at 122 (arguing that the post-9/11 Court did not "go far enough . . . to afford the 9/11 judgments the security they need to prevent a rollback and still less to permit the judiciary to assume its intended role in a globalized age"); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1029, 1032, 1092 (2008) (positing that the recent national security decisions prior to *Boumediene* "resulted in a great deal of process, and not much justice" and that "so little seems to have been decided" after 9/11 because the Court "left the final, substantive outcome of the cases at bar uncertain"); *see also* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1684 (2009) (questioning the premise that the *Boumediene* decision was "a rebuke to the Executive's claims of outsized authority, and . . . a reassertion of the supremacy of law"); David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 7 CATO SUP. CT. REV. 47, 61 (2008) (arguing that the protection of human rights "requires . . . the robust intervention of unelected courts"); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235 (2006) (faulting the Supreme Court "for doing less than it should have" in resolving constitutional questions of individual liberty).

[12] With the exception of the brief discussion of Justice Black's majority opinion in *Youngstown* discussed *infra* notes 35-38, this Article uses "Jackson's framework" and "*Youngstown*" or "*Youngstown* framework" interchangeably.

[13] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

[14] *Id.* at 637.

[15] *See infra* Part III.B.

responded by providing the Executive with a delegation concerning a particular security need, courts have typically construed those statutes deferentially.[16] However, where Congress has remained silent, courts have generally invoked *Youngstown* to catalyze greater inter-branch dialogue,[17] *remanding* issues to the political branches for additional legislative input. This process-oriented approach captures the Court's recent decisions more accurately than its apparent commitment to deference or non-deference where Executive power is concerned. By applying *Youngstown*, the Court has tamed *Chevron*'s imperialistic aspirations, using judicial intervention as a way of resetting the proper institutional balance between Congress and the Executive.

The post-9/11 decisions, understood through the lens of *Youngstown*, demonstrate congruities between national security cases and non-emergency administrative law rulings. In both domains, the Supreme Court has underscored the significance of congressional delegations for the scaling of judicial deference to the Executive Branch. By exploring cases in both the domestic and national security contexts, this Article indicates the importance of legislative authorization as a predicate for deference across different substantive arenas. By highlighting the intersection of "ordinary" administrative law decisions on the one hand, and recent national security cases on the other, it calls attention to an emerging middle-ground solution courts have used in national security cases that is consistent with, if not anchored squarely within, foundational principles of administrative law.

This Article proceeds in three Parts. Part I frames the discussion by comparing and contrasting *Youngstown* and *Chevron* and detailing the argument, made by a growing chorus of scholarly voices, that *Chevron* should be applied directly, or by analogy, to the national security context. It then contrasts the *Chevron*-in-national-security argument with *Chevron*'s more recent domestic law interpretations. As this Part indicates, those who favor applying *Chevron* to national security often rely on an interpretation of the doctrine that is largely out of step with its more recent domestic law interpretations.

Part II underscores why *Youngstown* has been, and continues to be, a foundational case of national security, reflected most recently in the Supreme Court's post-9/11 national security decisions. Indeed, as this Part notes, four Supreme Court cases decided between *Rasul v. Bush*[18] and *Boumediene v. Bush*[19] evidence *Youngstown*'s continued vitality. These cases underscore the importance of dual-branch approaches to national security questions – rejecting complete deference to the Executive on the one hand or judicial activism on the other. Where Congress has delegated authority to the President to act, the Court has accorded deference to the political branches. However, where

[16] *See infra* notes 232-36, 265-72 and accompanying text.

[17] *See infra* notes 256-64 and accompanying text.

[18] 542 U.S. 466 (2004).

[19] 553 U.S. 723 (2008).

national security legislation has been lacking, the Court has refused to grant the Executive anything close to the kind of deference called for by *Chevron*-backers.

Part III largely defends the post-9/11 Court's approach as a proper application of both *Youngstown* and *Chevron*. While *Chevron*-backers such as Eric Posner and Cass Sunstein would resolve ambiguity about the existence of a delegation through a simpler, cleaner, and arguably more reliable test that expands executive power through a broad interpretation of *Chevron* deference, their theory oversimplifies and, more seriously, eliminates a core delegation requirement within administrative law that accords with *Chevron*'s doctrinal foundation, a point that is revealed in recent emergency and non-emergency decisions. At the same time, the argument by *Chevron*'s critics overstates the role of courts in overruling policy decisions reached through joint political branch deliberation. Rather than adhere to a single-branch theory of governance based purely in Executive prerogative or judicial activism, the post-9/11 decisions employ *Youngstown* to promote an interactive role for the political branches that supplies an important rule-of-law basis for judicial review of national security law.

I. *CHEVRON* V. *YOUNGSTOWN*

The Constitution says very little about the political branches' respective national security powers.[20] Article II makes the President Commander in Chief of the Armed Forces[21] and vests him with an indefinite "executive Power"[22] but specifies few additional enumerated powers in foreign affairs.[23] Congress has the power "to declare War,"[24] to "raise and support Armies,"[25] and the power of the purse.[26] Beyond this, the precise boundaries and balance

[20] Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 90 (2002) (observing that national security is an arena in which "the Constitution says little, controversies are frequent, judicial resolutions are few, and the stakes are high").

[21] U.S. CONST. art. II, § 2, cl. 1.

[22] *Id.* § 1, cl. 1. Article II also vests the President with the power to make treaties with the consent of two-thirds of the Senate and to appoint and receive ambassadors and other public ministers. *Id.* § 2, cl. 2.

[23] *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1282 (1988) (observing that the Constitution's text vests few foreign affairs powers in the president).

[24] U.S. CONST. art. I, § 8, cl. 11.

[25] *Id.* cl. 12.

[26] *Id.* Congress also has the power to "define and punish . . . Offences against the Law of Nations," *id.* cl. 10, "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14, and to "provide for the common Defence and general Welfare of the United States," *id.* cl. 1. Furthermore, Congress has the power to "regulate Commerce with foreign nations." *Id.* cl. 3. The Constitution further authorizes Congress to "define and punish Piracies and Felonies committed on the high Seas," as well as "make Rules concerning Captures on Land and Water." *Id.* cl. 10. Finally, the Constitution provides for

of power between the Congress and the President are left largely undefined,[27] eliminating any "really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[28] Hence, courts and commentators have often looked beyond the text[29] for institutionally grounded, dual-branch solutions to questions regarding government power where national security is concerned.[30] *Youngstown* and *Chevron* each provide a process-oriented framework to ground presidential "authorities that Congress has expressly or impliedly delegated to him by statute."[31]

A. *Two Frameworks for National Security*

While many national security scholars have routinely praised *Youngstown* as the gold standard of emergency law jurisprudence,[32] others have heralded *Chevron* as a highly influential ruling[33] that has application to the national

the suspension of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." *Id.* § 9, cl. 2.

[27] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 863 (1997) ("In contrast to the Commerce Clause, no clause in the Constitution provides the federal government with a general 'foreign relations' power."); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 66-68.

[28] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[29] Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 236-37 (2001) (observing that scholars "who agree on little else" often look beyond the Constitution's text in grounding the government's national security powers); *see also id.* at 235 (commenting on the "repeated denial" by foreign affairs scholars "that the Constitution's text can provide much meaningful guidance in allocating foreign affairs powers").

[30] Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004) (stating that in cases pitting liberty against security "the courts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts").

[31] *See* Koh, *supra* note 23, at 1263 & n.32.

[32] Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) ("*Youngstown*'s framework has become the gold standard . . . ."); *see also id.* at 99 ("Both then-Judge Roberts and then-Judge Alito professed extreme reverence for the [*Youngstown*] framework at their confirmation hearings."); Ku & Yoo, *supra* note 1, at 179 (acknowledging "the long-term significance" of *Youngstown*); Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 242 n.2 (2000) (deeming Jackson's *Youngstown* concurrence "the greatest single opinion ever written by a Supreme Court justice").

[33] *See* BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 5, at 247 (suggesting that

security context.[34] Yet, depending on one's interpretations of these respective frameworks, the selection of *Chevron* or *Youngstown* can have a dramatic effect upon the scaling of judicial deference to the Executive.

1. The *Youngstown* Framework

Youngstown involved an executive order by President Truman directing the Secretary of Commerce to take control of the steel industry to aid the country's defense needs in the Korean War after a threatened strike by the steelworkers' union.[35] Steel mill owners challenged the executive order, and the Supreme Court invalidated it as an arrogation of executive power without proper congressional authorization.[36] Justice Black's majority opinion reasoned that presidential emergency powers must derive "from an act of Congress or from the Constitution itself."[37] Finding that there was no statute that explicitly or implicitly authorized the President's seizure of the mills, nor an inherent Article II power to take such action, the Court struck down the order.[38]

All of the Justices joining Justice Black's majority opinion wrote separate concurrences, and of those concurrences Justice Jackson's has emerged as the enduring framework outlining the proper relationship among the three branches during times of national emergency.[39] Jackson, like Black, viewed the executive order as contrary to Congress's intention – an example of the

Chevron is "the most influential case in the history of American public law"). Until recently, *Chevron* was thought to be the single most-cited decision in all of American law, though its status as most-cited case may have been eclipsed, or may soon be overtaken, by the sea change in civil procedure doctrine wrought by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). For more discussion of *Chevron*'s impact, see Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399, 399 (Peter L. Strauss ed., 2006) (stating that *Chevron* is "the most frequently cited case in administrative law" and, at the time of publication, was the most frequently cited case of all behind *Erie Railroad Co. v Tompkins*, 304 U.S. 64 (1938)); Thomas W. Merrill, *The Story of* Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 165 n.2 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011) (noting that as of June 2009, *Chevron* had "been cited in 9,888 federal cases, which exceeds the citation count for other leading cases discussing aspects of the standard of review of agency action"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 189-90 (2006) ("*Chevron* has had a fundamental impact on areas as disparate as taxation, labor law, environmental protection, immigration, food and drug regulation, and highway safety.").

[34] *See generally supra* note 1; *infra* notes 63-104 and accompanying text.

[35] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

[36] *Id.* at 585-89.

[37] *Id.* at 585.

[38] *Id*. at 585-89.

[39] *Id.* at 635-38 (Jackson, J., concurring).

President acting at the lowest ebb of his power[40] – and he articulated a tripartite framework for judicial review of Executive Branch activity during times of national emergency that reinforces the textualist and delegation-based rationales in Justice Black's majority opinion. Jackson divided presidential emergency action into three categories. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[41] Such action under Category One, taken with consent of Congress, "would be supported by the strongest of presumptions" when subject to judicial review.[42] Next, Jackson discussed presidential action "in [the] absence of either a congressional grant or denial of authority."[43] In these cases falling under Category Two, the President, relying exclusively "upon his own independent powers," acts within "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[44] When this type of presidential action is challenged, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[45] Finally, under Category Three, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[46] Courts entertaining challenges to such "preclusive" presidential action "must . . . scrutinize[] such presidential action with caution, for what is at stake is the equilibrium established by our constitutional system."[47]

2. The *Chevron* Framework

While *Youngstown* enjoys a storied place as a definitive framework for resolving complex cases involving the clash between individual liberty and executive power,[48] commentators have recently turned to *Chevron* as the proper starting point "for understanding and controlling deference in what is an otherwise very amorphous area."[49] *Chevron* was an environmental law case in which the Court held that industrial plants would be allowed to consolidate their various pollution-generating entities by upholding the EPA's

[40] *Id*. at 640.

[41] *Id.* at 635.

[42] *Id.* at 637.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See id.* at 638.

[48] *See supra* note 32 and accompanying text.

[49] Bradley, *supra* note 1, at 674; *see also* Ku & Yoo, *supra* note 1; Posner & Sunstein, *supra* note 1; Sunstein, *supra* note 1; Yoo, *supra* note 1.

interpretation of the word "source" in the Clean Air Act to mean an entire plant as opposed to a single pollution-emitting device.[50] In deciding whether it should defer to the agency's interpretation, the Court announced a two-step inquiry to determine legitimate Executive Branch interpretations of statutory authority. Under *Chevron* Step One, the reviewing court decides whether the statute speaks directly to the issue; if so, there is no need for any further interpretation and the matter is resolved at the first step.[51] However, where the statutory meaning is ambiguous, the court moves to Step Two – asking whether the agency's interpretation of the statute is a "permissible construction of the statute."[52] If the interpretation is deemed reasonable, Step Two is satisfied and there is no further inquiry for the court to make into the law's meaning.[53]

Chevron's two-step process appeared to bring important clarity to the judicial role in assessing agency statutory interpretations by reining in a loose assortment of tests that courts had previously applied to such questions.[54] The ruling rests on two foundational principles. On the one hand, *Chevron* relies on Congress's authorization of executive action. This formal, delegation-based aspect of *Chevron* reinforces a dual-branch basis for administrative law in which the Executive acts as the agent of Congress.[55] On the other hand, *Chevron* recognizes that the Executive's technical specialization, expertise, and political accountability provide additional reasons for judicial deference, especially on matters in which courts lack sufficient expertise. These formal

[50] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 851-66 (1984).

[51] *See id*. at 842-43.

[52] *Id*. at 843.

[53] *See id*. at 843-44.

[54] *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370-82 (1986); Orin S. Kerr, *Shedding Light on* Chevron, 15 YALE J. ON REG. 1, 52 n.193 (1998) ("Before *Chevron* was decided, there was a fairly broad scholarly consensus that judicial review doctrine was chaotic and unpredictable, if not nonexistent."); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) ("[*Chevron*] was . . . revolutionary because it eliminated significant ambiguity in the law and cast substantial doubt upon several well-established doctrines that had sometimes permitted courts to overturn agency interpretations."); *cf.* Negusie v. Holder, 555 U.S. 511, 529 (2009) (Stevens, J., concurring in part and dissenting in part) ("Judicial deference to agencies' views on statutes they administer was not born in [*Chevron*,] nor did the 'singularly judicial role of marking the boundaries of agency choice' die with that case." (citation omitted) (quoting Young v. Cmty. Nutrition Inst., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting))).

[55] *See* Peter L. Strauss, Essay, *"Deference" Is Too Confusing – Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012) ("'*Chevron* space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints – that is, its delegated or allocated authority.").

and functional bases for deference make possible an increasingly complex world of administrative lawmaking and law interpretation.[56]

Chevron also brought a level of simplicity to the law by instructing lower courts to credit the Executive's superior competencies in law interpretation and application whenever Congress has delegated the Executive authority to act. This theory of a transfer of interpretive power from the Judiciary to the Executive is a critical feature of *Chevron*. As Justice Scalia has explained, "*Chevron* . . . if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[57] On the one hand, it allows the Executive Branch to bring its expertise, access to information, and democratic accountability to bear on questions courts are less equipped to decide.[58] On the other hand, *Chevron* leaves it to Congress to delegate authority to the Executive. After *Chevron*, "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency . . . ."[59] Because Congress always retains the power to amend a statute to override a particular agency interpretation with which it does not agree, the *Chevron* framework gives fealty to the principle of legislative supremacy.

3. From *Youngstown* to *Chevron*

There are important congruities between *Youngstown* and *Chevron* that make both potentially useful in addressing the issue of judicial review in national security. First, both tests place importance on congressional authorization of executive action. In the case of *Youngstown*, however, it is often difficult to determine whether presidential invocation of a statute of questionable relevance is undertaken with "implicit" congressional backing (triggering the most deferential review under *Youngstown* Category One) or without congressional backing (triggering a more cautious *Youngstown* Category Two review). *Chevron* is equally replete with its own gray areas that, properly understood, leave open many questions about how it should be applied in cases of congressional silence. To be sure, *Chevron* held that agencies should receive deference to reasonable interpretations of ambiguous

[56] Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1296 (2008) (arguing that *Chevron* deference rests on a "pragmatic consensus" of theories, including those based on congressional delegation and executive expertise); Katyal, *supra* note 32, at 106 ("Historically, when courts decide whether to award deference to an executive interpretation, they have considered three factors: expertise, whether there has been a delegation from Congress, and political accountability.").

[57] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

[58] *See Chevron*, 467 U.S. at 865-66.

[59] Scalia, *supra* note 57, at 517.

statutory provisions, but the Court left open many questions about the scope and breadth of agency deference. As Justice Stevens explained, "'[t]he power . . . to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress'" within a particular statute.[60] But precisely what is meant by "fill any gap" is a question that has caused considerable debate among judges and commentators. Namely, it can be hard for a court to defer to an agency claiming interpretative authority according to a statute that only ambiguously grants that agency the power to act in the first place. Accordingly, courts have puzzled over questions such as the proper scope of an agency's gap-filling role and the implications of a broad or narrow understanding of that interpretive function.[61] Scholars have also debated these questions,[62] and the controversy extends to *Chevron*'s application to the context of national security as well.

B. *The* Chevron-*in-National-Security-Law Argument*

The first article to apply *Chevron* to foreign affairs was Curtis Bradley's *Chevron Deference and Foreign Affairs*.[63] On the one hand, Bradley advances functionalist arguments for *Chevron* deference in national security, noting that *Chevron* "pushes 'interpretive lawmaking' to government entities that have more expertise and democratic accountability than courts" and "centraliz[es] . . . lawmaking in the executive branch rather than in a diffuse court system . . . [thereby] promot[ing] uniformity in the law."[64] On the other hand, he identifies the importance of the formal basis for *Chevron* deference, observing that "[t]he linchpin of the *Chevron* doctrine . . . is not realism or

[60] *Chevron*, 467 U.S. at 843 (second omission in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[61] *See, e.g.*, Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1500 ("The Supreme Court has yet to resolve whether *Chevron* deference should apply when an agency is interpreting the reach of its own jurisdiction . . . ."). *Compare* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 381-83 (1988) (Scalia, J., concurring in the judgment) (concluding that *Chevron* applies to disputes about the scope of an agency's jurisdiction), *with id.* at 386-87 (Brennan, J., dissenting) (disagreeing and asserting that *Chevron* does not apply to such disputes).

[62] *Compare* Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 958 (1994) (arguing that *Chevron* deference should apply in situations where an agency is interpreting an ambiguous statute to expand the scope of its delegation), *with* Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 993-94 (1999) (arguing for "peripheral jurisdiction" limitations on the application of *Chevron* deference for agency actions beyond the core delegation of power and zone of authority in which an administrative agency operates).

[63] *See* Bradley, *supra* note 1.

[64] *Id.* at 673.

democratic theory, but rather a theory of delegation."[65] These formal foundations within the *Chevron* doctrine imply "a number of built-in limitations" to its reach.[66] As Bradley points out:

> The delegation theory of *Chevron* requires that, in order to receive deference, the agency must be charged with administering the law in question. This "administration" requirement is part of the textual basis for the presumed delegation, and it serves as a form of notice to Congress concerning which statutes will be subjected to the presumption.[67]

The idea of giving deference only when there has been a clear delegation "limits both the number of laws subject to *Chevron* deference and the number of executive branch entities entitled to this deference."[68] Consequently, Bradley notes that "litigating positions . . . 'wholly unsupported by regulations, rulings, or administrative practice' are not entitled to *Chevron* deference."[69] These limitations on "the form of the agency's interpretation" mean that courts applying the *Chevron* rationale will not defer "to the executive branch's ad hoc litigating positions, something that has been a particular concern in the foreign affairs area."[70]

Despite his acknowledgment of these limitations, Bradley still sees room for an expanded *Chevron* doctrine in certain contexts, arguing for vast executive power to resolve questions about the scope of agency authority under a particular statute. Although, as a formal matter, "it might seem unreasonable to presume that Congress intended to delegate interpretive authority over *that* issue to the agency,"[71] Bradley notes that "the line between interpretation of substantive provisions and interpretation of scope of authority is often unclear, and, in any event, agencies may have *Chevron*-relevant expertise concerning the latter issue."[72] On the one hand, he recognizes that this broad interpretation of the scope of executive authority is in some tension with the delegation

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[65] *See id*. at 670; *id.* at 673 ("[*Chevron*] purports to preserve Congress's role as the lawmaker. Courts defer to agencies because Congress has presumptively delegated lawmaking power to those agencies."); *id*. at 672 (rejecting the idea that *Chevron* "is a purely fictional label attached to functional considerations; in a variety of ways the Court limits the presumed delegation to situations in which there is a formal basis for concluding that Congress has transferred lawmaking authority"); *id.* at 672 n.87 ("It is . . . not correct to say, as many commentators have said casually, that the delegation is based simply on an ambiguity in the law that the agency is interpreting. It is not the ambiguity by itself that creates the presumed delegation – it is also the fact that Congress has charged the agency with administering the law in question.").

[66] *Id.* at 674.

[67] *Id.* at 674-75 (footnote omitted).

[68] *Id.* at 675.

[69] *Id.* (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996)).

[70] *Id.*

[71] *Id.* at 682.

[72] *Id*.

requirement, for he argues that agency self-expansion cannot take place in the absence of any statutory language effectuating executive power.[73] On the other hand, Bradley argues that concerns of an imperialistic *Chevron* doctrine can be put aside when national security is at issue. Hence, "regardless of how this [scope-of-authority] issue should be resolved in general, there are particular reasons to apply *Chevron* deference to scope-of-authority issues in the foreign affairs context."[74] These reasons have to do with "[c]hanging world conditions and the executive branch's unique access to foreign affairs information."[75] To support this claim, Bradley invokes substantive decisions of national security, which support the idea of broad deference to the Executive. As he notes, "when Congress delegates foreign affairs authority to the executive branch, it often 'must of necessity paint with a brush broader than that it customarily wields in domestic areas.'"[76] Furthermore, Bradley highlights that, where national security is concerned, congressional delegations "may overlap with the executive branch's independent lawmaking powers."[77] Hence, concerns over an enlarged *Chevron* doctrine "have less force in the context of foreign affairs law – an area characterized long before *Chevron* by exceedingly broad executive branch power and sweeping deference by the courts."[78] Whatever danger may exist of expanding *Chevron* to give the Executive more power than Congress intended in other realms, "foreign affairs law poses substantially less danger of centralizing power in the executive branch than does applying it to other areas of law."[79]

Eric Posner and Cass Sunstein also apply *Chevron* to the national security context,[80] though their more expansive interpretation is centered on the functional bases for deference, especially the Executive's policy expertise, which, they argue, makes the Executive a superior actor in resolving statutory ambiguity.[81] Posner and Sunstein celebrate *Chevron* as a useful device to "greatly simplify current law"[82] and "allocate authority to the executive, which is in the best position to balance the competing interests" between liberty and security.[83] In their view, "courts should play a smaller role than they currently

[73] *Id.* at 676-78.

[74] *Id.*

[75] *Id*.

[76] *Id.* at 682-83 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

[77] *Id.* at 683.

[78] *Id.* at 673.

[79] *Id.*

[80] Posner & Sunstein, *supra* note 1.

[81] *See id.* at 1176; *see also* Ku & Yoo, *supra* note 1, at 202 ("Agencies which possess greater expertise over a complex and technical statute are less likely to depart from Congressional intent in their interpretations of those statutes, especially [in their interpretation of] ambiguous provisions in those statutes.").

[82] *See* Posner & Sunstein, *supra* note 1, at 1173.

[83] *Id.*; *see also id.* at 1176 (stating that courts must "generally defer to the executive on

do in interpreting statutes that touch on foreign relations,"[84] while "the executive branch should be given greater power than it currently has to decide whether the United States will violate international law."[85]

Posner and Sunstein seem to agree with Bradley that *Chevron* deference should apply to scope-of-authority questions and that "a grant of authority to the executive in the domain of foreign affairs ought generally to include a power of interpretation."[86] Yet while Bradley identifies constraints that the delegation requirement can place on *Chevron* deference, Posner and Sunstein's interpretation is far more expansive. Rather than attempt to ground *Chevron* in a formal, delegation-based foundation, they question that foundation, remarking that "Congress hardly ever states its instructions on the deference question with clarity, and thus *Chevron* cannot be grounded on an explicit or implicit legislative instruction on that question."[87] Indeed, they argue, "It is because statutes are often unclear that our argument, no less than *Chevron* itself, should have broad implications."[88] Posner and Sunstein's view would in fact eliminate the role of Congress, at least insofar as national security is concerned, for they argue that in cases where the legislature has had no involvement in the policy matter at issue – that is, where "there is no interpretation of a statutory term but simply a policy judgment by the executive, the courts should defer as well, using *Chevron* as an analogy."[89] In short, their brand of *Chevron* welcomes its "imperialistic aspirations."[90]

Hence, while Bradley accepts an expansive view of scope-of-authority questions where national security is concerned, implying more modest limitations on *Chevron*'s delegation requirement, Posner and Sunstein offer a retreat from the delegation requirement altogether, rejecting the idea that such procedural barriers should get in the way of judicial deference when national security is concerned. While Posner and Sunstein take comfort in the idea that *Chevron*'s Step Two reasonableness requirement will prevent the Executive

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the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments").

[84] *Id.* at 1177.

[85] *Id.*

[86] *See id*. at 1198.

[87] *Id.* at 1194.

[88] *Id.* at 1178.

[89] *See id*. at 1199; *see also id*. at 1205 ("[I]n the domain of foreign relations, the approach signaled in *Chevron* should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications.").

[90] *Accord* Sunstein, *supra* note 1, at 2672 ("In war no less than in peace, the inquiry into presidential authority can be organized and disciplined if it is undertaken with close reference to standard principles of administrative law. These principles accord the President a great deal of discretion to interpret congressional authorizations for the use of force, subject only to the limits of reasonableness. In short, *Chevron* has imperialistic aspirations.").

Branch from suppressing civil liberties,[91] they acknowledge in the same breath that Step Two invalidations, which "are rare in the domestic sphere . . . should be rare [within foreign affairs cases] as well."[92] On their view, *Chevron* is no longer a dual-branch framework for resolving complex national security cases; rather, it is a single-branch theory of governance that favors the more-expert Executive Branch.

In a separate article, Sunstein applies this same functionalist interpretation of *Chevron* directly to the post-9/11 context and the cases decided during this period.[93] He begins by highlighting the idea that administrative law provides the best "body of principles" to consider the President's powers under the Authorization for Use of Military Force (AUMF)[94] – the 2001 joint congressional resolution authorizing military action in Afghanistan.[95] Viewing *Chevron* as the ideal test for scaling judicial review regarding executive decisions made pursuant to the AUMF, Sunstein finds "broad authority" within *Chevron* for the President "to construe ambiguities as he sees fit,"[96] as well as permission for the Executive Branch to fill voids during times of legislative inertia. As he puts it: "When Congress has not spoken, interpretations must depend, at least in part, on assessments of the consequences of one or another approach; agencies are in a comparatively good position to make such assessments."[97] Believing as he does that Congress will step in to address through direct legislation any particular agency interpretation with which it disagrees,[98] Sunstein argues that the Executive Branch should be free to take the first step in determining national security policies.

Sunstein anchors this argument in a doctrinal understanding of *Chevron* and a series of incentive-based arguments. First, he argues that a formal delegation from Congress is not a necessary condition for broad *Chevron* deference and that "the grant of authority to act with the force of law is a sufficient but not a necessary condition for finding a grant of power to interpret ambiguous terms."[99] As far as Congress's incentives are concerned, he argues that the

[91] *See* Posner & Sunstein, *supra* note 1, at 1198.

[92] *See id.* at 1198-99.

[93] *See* Sunstein, *supra* note 1.

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

[95] *See* Sunstein, *supra* note 1, at 2663 ("Is there a body of principles that can help to evaluate the legality of these actions under the 2001 Authorization for Use of Military Force (AUMF)? I suggest that there is, and that it can be found in a single area: administrative law.").

[96] *Id.* at 2665; *see also id*. at 2663-64 ("[P]residential action under the 2001 AUMF, or any imaginable AUMF, should be subject to the principles that have emerged in the wake of the Supreme Court's extraordinarily influential decision in *Chevron* . . . . As we shall see, the logic of *Chevron* applies to the exercise of executive authority in the midst of war.").

[97] *Id.* at 2667.

[98] *Id.* at 2666 ("Congress knows that the President will construe any authorization to use force, and it has every incentive to limit his discretion if it so wishes.").

[99] *Id*.

advantage of applying *Chevron* to national security is that it allows Congress to trump any executive interpretations it does not like through subsequent legislative enactments.[100] Moreover, because "Congress knows that the President will construe any authorization to use force . . . it has every incentive to limit his discretion if it so wishes."[101] In cases where Congress does not limit presidential discretion, courts should assume an implicit decision by the legislature not to cabin executive power.[102] This means that, in the context of the AUMF, the resolution should be "taken, by its very nature, as an implicit delegation to the President to resolve ambiguities as he (reasonably) sees fit."[103] Such a position adheres to "Congress's likely expectations, to the extent that they exist . . . [and] imposes exactly the right incentives on Congress, by requiring it to limit the President's authority through plain text if that is what it wishes to do."[104]

C. Chevron*'s Limitations*

While the *Chevron*-in-national-security argument provides a potentially attractive and rather simple solution to the vexing problems caused by gaps within statutory authorizations or in cases where Congress fails to delegate authority to the President, the argument tends to depart from recent doctrinal developments in both the domestic and national security contexts. Those cases undermine the arguments of *Chevron*-backers that their approach provides a compelling, practical solution for the national security context, especially during times of congressional inertia. Two questions that have arisen in the domestic context have particular salience where the argument for *Chevron* deference in national security is concerned. Both involve the potential expansion of *Chevron* where legislative intent is unclear. The first question concerns the power of agencies to decide their zone of authority under a given piece of enabling legislation,[105] and the second concerns the kinds of agency

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[100] *Id.*

[101] *Id.*

[102] *See id.*

[103] *Id.*

[104] *Id.* A number of other scholars have made the *Chevron*-in-national-security argument as well. *See e.g.*, Ku & Yoo, *supra* note 1, at 194-95. Yoo and Ku discuss *Chevron*'s recognition of

> two institutional characteristics that make [the Executive] superior to courts in the interpretations of certain kinds of laws. First, executive agencies usually possess expertise in the administration of certain statutes, particularly those in complex areas. Second, the executive branch is subject to greater political accountability than the judiciary, and the electorate could ultimately change unwanted interpretations.

Id. at 201.

[105] There are, of course, numerous shades of gray in this analysis that include the "distance between an agency's core jurisdiction and the proposed extension of its authority," the importance of the issue, and whether another agency also has responsibility in the field in question. Gellhorn & Verkuil, *supra* note 62, at 1015-16.

decisions – formal versus informal; rules versus adjudications – that call for *Chevron* deference in the first place. While these issues can overlap – for instance, an agency might expand its jurisdiction so far that it regulates activity it has not been delegated the power to regulate – courts have generally treated these questions separately.

1. Step One Deference to Agency Self-Expansion

One important question *Chevron* did not address explicitly is whether courts should defer when an agency self-expands and regulates activity that appears to fall beyond the scope of the zone of authority in which it operates. This problem arose in *Dole v. United Steelworkers of America*,[106] a case decided six years after *Chevron*. *Dole* held that the Office of Management and Budget (OMB) exceeded the scope of its authority under the Paperwork Reduction Act when it rejected Department of Labor (DOL) standards imposing various disclosure requirements on manufacturers intended to protect employees from exposure to hazardous chemicals.[107] Under the Paperwork Reduction Act, federal agencies are prohibited from adopting regulations imposing paperwork requirements on the public where the information is not available to the agency from another source within the federal government.[108] Citing its power to regulate "information collection requests" under the Paperwork Reduction Act, OMB disapproved of the DOL provisions, claiming that they lacked required exemptions and applied to scenarios in which the disclosures did not benefit employees.[109] However, the Court found that the Paperwork Reduction Act was intended to apply to "information-gathering rules," not "disclosure rules," and therefore did not clearly grant the OMB statutory authority to countermand agency regulations requiring disclosure by regulated entities directly to third parties.[110] Finding that OMB engaged in improper self-expansion, the Court refused to defer, and it reinstated the DOL rule.[111]

In their disagreement over the scope of the OMB's regulatory authority, *Dole*'s majority and dissenting Justices clashed on the broader question regarding agency "peripheral jurisdiction" over scope-of-authority questions. While the Court majority looked to the statute's language, history, and structure to determine that OMB exceeded the reach of its delegation under the plain text of the statute,[112] the dissenting Justices asserted that the majority's analysis upended *Chevron* by engaging in needless statutory analysis.[113] Rejecting the majority's dissection of "numerous statutory provisions and

[106] 494 U.S. 26 (1990).

[107] *Id.* at 42-43.

[108] Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3521 (2006).

[109] *Dole*, 494 U.S. at 30-31.

[110] *Id.* at 34-35.

[111] *Id.* at 43-44.

[112] *Id.* at 41.

[113] *Id.* at 43-44 (White, J., dissenting).

legislative history" that were themselves inconclusive as to whether OMB could regulate disclosure rules, Justice White's dissenting opinion concluded that the statute's patent ambiguities required the Court to move immediately to *Chevron* Step Two, where the OMB's interpretation was easily validated under *Chevron*'s "reasonableness" prong.[114]

The issue of peripheral jurisdiction resurfaced ten years later when the Court decided *FDA v. Brown & Williamson Tobacco Corp.*, another example of the Court rejecting broad agency self-expansion when the FDA sought to regulate the advertising and sale of certain tobacco products.[115] Having been authorized by Congress to regulate "drugs" and "devices" under the Food, Drug, and Cosmetic Act of 1938 (FDCA),[116] the FDA argued that the nicotine found in cigarettes qualified as a "drug" and that cigarettes were themselves "drug delivery devices."[117] Accordingly, the FDA argued that the regulation of tobacco products fell within its delegated authority. The Court took the alternate view that the FDCA, which was silent on the subject of tobacco, implicitly restricted the FDA from regulating tobacco and that the FDA's effort to regulate it constituted improper agency self-expansion.[118] The Court reached its holding without taking a position on the broader question of peripheral jurisdiction and instead considered the particular question of agency power through the lens of *Chevron* Step One, as it had done in *Dole*.[119] Justice O'Connor, writing for a five-member majority, held that the statute, understood in the proper context of other federal legislation, precluded the FDA from regulating tobacco.[120] While the FDA had "exhaustively documented" its findings that "'tobacco products are unsafe,' and 'dangerous,'"[121] allowing the FDA to ban tobacco products would undermine legislative intent, given that Congress had "addressed the problem of tobacco . . . on six occasions since 1965" and "stopped well short of ordering a ban."[122] Hence, the Court struck down the FDA's expansion of its own jurisdiction as an impermissible construction of the statute at Step One.[123]

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[114] *Id.* at 53.

[115] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[116] 21 U.S.C. § 301 (2006).

[117] *Brown & Williamson*, 529 U.S. at 131.

[118] *Id.* at 132-43.

[119] *Id.* at 132. The Fourth Circuit, by contrast, had explicitly held that expansions of agency jurisdiction should not generally receive *Chevron* deference. Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 161-62 (4th Cir. 1998).

[120] *Brown & Williamson*, 529 U.S. at 161.

[121] *Id.* (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,632-33 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897)).

[122] *See id.* at 137-39.

[123] *Id.* at 161.

2. *Chevron* Step Zero

A closely related issue concerns whether courts should apply *Chevron* in cases where it remains unclear if an agency is acting with statutory authorization in the first place, or when it is unclear if the agency's decision, even though the product of a delegation, actually carries the force of law.[124] One example involves the use of informal agency procedures. In *Christensen v. Harris County*,[125] the Court rejected the idea that an informal agency opinion letter issued by the Department of Labor should be analyzed under the *Chevron* framework.[126] The Court held that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."[127] Instead, such interpretations are entitled to the lesser *Skidmore*[128] deference and will be upheld based upon their "power to persuade."[129]

In *United States v. Mead*,[130] the Court applied a similar analysis to hold that informal Customs ruling letters do not warrant *Chevron* deference. At issue in *Mead* were letters that are routinely issued by the Customs Service at ports of entry, assigning tariff rates to individual goods. *Mead* held that those letters, which are not subject to notice and comment (though "made 'available for public inspection'"[131]), did not trigger *Chevron* deference, as the agency interpretation was not promulgated in the exercise of congressionally delegated authority.[132]

The *Mead* Court squarely took on the theoretical question about whether resort to *Chevron* is ever appropriate in cases where the particular agency action might not be the product of a legislative delegation. On this question,

[124] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (recognizing that, in some cases, the question remains "whether courts should turn to the *Chevron* framework at all").

[125] 529 U.S. 576 (2000).

[126] *Id.* at 587.

[127] *Id.*

[128] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[129] *Id.* at 40. Justice Scalia, who concurred in the judgment in *Christensen*, agreed with the holding but disagreed with the majority's *Chevron* analysis. He argued that "*Skidmore* deference to authoritative agency views is an anachronism" and that the DOL position "warrants *Chevron* deference if it represents the authoritative view of the Department of Labor." *Christensen*, 529 U.S. at 589, 591 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia would have found the viewpoint of the DOL opinion letter "authoritative" based on the fact that it was signed by the Acting Administrator of the Wage and Hour Division but not a "reasonable" interpretation under Step Two of *Chevron*. *Id.*

[130] 533 U.S. 218 (2001).

[131] *Id.* at 223 (quoting 19 U.S.C. § 1625(a) (2006)).

[132] *Id.* at 227. The case was vacated and remanded for a determination whether the letters should be upheld under *Skidmore*. *Id.*

often known as "*Chevron* Step Zero,"[133] the Court held that the critical question is whether Congress appears to have "delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[134] Where the agency is exercising such authority, *Chevron* deference is appropriate; where it is not, courts should apply deference regimes (such as *Skidmore*) that give less weight to the agency decision.[135] Importantly, the *Mead* Court refused to provide a clear definition of what, exactly, indicates a congressional delegation. Rather, the Court stated that a "[d]elegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[136] Deciding whether an agency is taking action carrying the force of law pursuant to a legislative delegation varies with the circumstances, with courts "look[ing] to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position"[137] to determine the amount of deference owed to the agency. While the Court observed that, on occasion, *Chevron* might apply "even when no such administrative formality" is apparent, it did not delve further into when, exactly, those formalities could be set aside.[138] Hence, while *Mead* indicates that the Court will reserve stronger *Chevron* deference for agency action bearing a greater quantum of procedural formality, the Court did not speak with unmistakable clarity to the necessary conditions that trigger *Chevron* deference.

To be sure, *Mead* provides some expression of the idea that agency decisions that are *not* the product of formal administrative procedures can still qualify for *Chevron* deference.[139] Hence, on a certain reading of *Mead*, courts could expand dramatically the domain of Executive Branch decisions that are eligible for *Chevron* deference. But this Executive-friendly interpretation of *Mead* is not borne out in the case law. After *Mead*, the Supreme Court generally cabined *Chevron*'s expansion at the Step Zero phase.[140] For example, in *Gonzales v. Oregon*,[141] the Court employed *Mead* to reject the Attorney General's effort to regulate activities generally under the purview of

[133] *See generally* Sunstein, *supra* note 33.

[134] *Mead*, 533 U.S. at 226-27.

[135] *Id.*

[136] *Id.* at 227.

[137] *Id*. at 228 (footnotes omitted).

[138] *Id.* at 231.

[139] *Id.* ("[W]e have sometimes found reasons for *Chevron* deference even when no administrative formality was required and none was afforded.").

[140] *See* Katyal, *supra* note 32, at 108 (pointing out that *Mead* "established that rules made pursuant to delegated powers are entitled to comprehensive deference under *Chevron*, but that interpretations issued outside that scope receive more skepticism").

[141] 546 U.S. 243 (2006).

Health and Human Services (HHS). The case involved Oregon's assisted suicide program that allowed physicians to administer fatal drugs to terminally ill patients.[142] When former Attorney General John Ashcroft issued an interpretive rule construing the Controlled Substances Act to restrict the use of these substances for physician-assisted suicide,[143] the Court held that Ashcroft's ruling was not entitled to *Chevron* deference under the principles outlined in *Mead*.[144] Justice Kennedy, writing for the majority, found that the interpretive rule was not promulgated pursuant to congressionally delegated authority, and thus *Chevron* did not apply.[145] Looking to the language of the Controlled Substances Act, Justice Kennedy found that the Attorney General was not granted such broad authority to promulgate rules where legitimate medical practice and state-authorized treatment of patients were concerned.[146] Instead, the statute limited the Attorney General's role to promulgating rules involving the regulation and control of controlled substances and "the efficient execution of his functions" under the statute.[147] The Court observed that the Controlled Substances Act consistently delegates medical judgments to the Secretary of HHS, not the Attorney General, and the Attorney General's powers are explicitly limited on the face of the statute.[148] Because the interpretive rule went beyond the scope of the Attorney General's authority under the statute, the Court found only *Skidmore* deference to be appropriate,[149] and the Court rejected the Attorney General's interpretation under that test because "the statute manifests no intent to regulate the practice of medicine generally."[150]

More recently, in *Negusie v. Holder*,[151] the Court again engaged in a narrower reading of *Chevron*. *Negusie* involved an interpretation by the Board of Immigration Appeals (BIA) of the "persecutor bar" under the asylum provisions of the Immigration and Nationality Act.[152] The persecutor bar restricts asylum relief for certain asylum seekers who have participated in the

[142] *Id.* at 248-49.

[143] Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306).

[144] *Gonzales*, 546 U.S. at 258.

[145] *Id.* at 258-68.

[146] *Id.* at 258.

[147] *Id.* at 259-61 (citing 21 U.S.C. § 871(b) (2006)).

[148] *Id.* at 265-68.

[149] *Id.* at 268.

[150] *Id.* at 270.

[151] 555 U.S. 511 (2009).

[152] The persecutor bar, which was enacted as part of the Refugee Act of 1980, precludes asylum or withholding of removal relief for foreign nationals who previously "assisted . . . or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2006).

persecution of others,[153] and in *Negusie*, the BIA interpreted the statutory language "persecutor of others" to apply to an individual who had been forced by the Eritrean government to persecute prisoners on the basis of their national origin.[154] In denying Negusie's application for asylum and withholding of removal,[155] the agency relied on an earlier Supreme Court decision, *Fedorenko v. United States*,[156] which held that a similar bar contained within the Displaced Persons Act of 1948 (DPA)[157] – a law designed to provide relief to displaced refugees from World War II[158] – did not contain a duress exception.[159] But the *Negusie* Court rejected the BIA's reliance on *Fedorenko*.[160] The Court found that the design of the statute at issue in *Negusie* deviated from the purpose of the legislation at issue in *Fedorenko*[161] and refused to give the BIA's statutory construction *Chevron* deference, as the government had argued.[162] In an interpretation of *Chevron* reflective of other cases limiting the doctrine's scope, the *Negusie* Court recognized that although the BIA was empowered under *Chevron* to exercise its "interpretive authority" on the admittedly ambiguous statute,[163] its reliance on prior case law (here, *Fedorenko*) fell outside the type of interpretive matters contemplated by *Chevron*.[164] Accordingly, the Court ordered that the case be sent back to the BIA for a redetermination of the statutory interpretation question.[165]

[153] *See id.*

[154] *Negusie*, 555 U.S. at 516.

[155] Negusie was granted a limited form of relief under the Convention Against Torture, which contains no similar bar to relief for those who have engaged in the persecution or torture of others. *Id.* at 536 n.6 (Stevens, J. concurring in part and dissenting in part); *id.* at 540-42 (Thomas, J., dissenting).

[156] 449 U.S. 490 (1981).

[157] Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (originally codified at 50 U.S.C. app. §§ 1951-1965 (1952)).

[158] *Fedorenko*, 449 U.S. at 495.

[159] *Id.* at 512.

[160] *Negusie*, 555 U.S. at 520-23 ("*Fedorenko*, which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar.").

[161] *Id.* at 520 ("Unlike the DPA, which was enacted to address not just the post war refugee problem but also the Holocaust and its horror, the Refugee Act was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons.").

[162] Brief for the Respondent at 10-11, *Negusie*, 555 U.S. 511 (No. 07-499) ("Because this case raises questions 'implicating an agency's construction of a statute which it administers,' principles of *Chevron* deference control." (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999))).

[163] *Negusie*, 555 U.S. at 522.

[164] *Id.* at 522-23.

[165] *Id.* at 523.

D. *Squaring* Chevron *with Domestic Law*

It is important to keep in mind that the *Chevron* Court considered a comprehensive statutory scheme in which both the statute and legislative history contained strong evidence that Congress intended the EPA to regulate a fairly specific class of emissions generated by "stationary sources," leaving to agency discretion only the technical definition of a particular term.[166] The agency was clearly vested with policymaking authority to reduce the production of certain harmful emissions.[167] In the Court own words, *Chevron* involved an administrative agency's filling of a legislative gap, not its enactment of an entire scheme or its expansion of authority into a realm not plainly included within the original delegation.[168] Because the statutory term was ambiguous, the only remaining question was the reasonableness of the EPA's definition.[169]

This context behind *Chevron*'s holding, however implicit it might be to the language of the actual opinion, is reflected in *Mead* and its progeny, which clarify the importance of a congressional delegation of law-interpreting authority as a condition for agency deference. While *Chevron* and *Mead* both recognize the possibility of agency policymaking based on an "implicit authority,"[170] the decision does not support unbounded deference where the agency regulates matters falling outside its specialized expertise. Indeed, "the more significant the question and the greater the impact that expansion of the agency's jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency."[171]

To the extent that *Chevron* and *Mead* leave room for doubt, subsequent cases reaffirm the point. For example, the *Brown & Williamson* Court placed limits on the FDA's self-expansion of regulatory power over tobacco, a "major segment of the economy"[172] that was not clearly contained within the FDA's delegated authority. The *Gonzales* Court similarly refused to defer to the DOJ's self-expansion to regulate matters outside its delegation that fell under

[166] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

[167] *Id.* at 846. The Court, after examining the statutory language and legislative history and employing traditional canons of statutory construction, found no conclusive evidence that Congress ever intended the term to carry a particular meaning. *Id.* at 864.

[168] *Id.* at 843-44.

[169] *Id.* at 864.

[170] *See id.* at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *see also* United States v. Mead, 533 U.S. 218, 227 (2001) ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking . . . .").

[171] Gellhorn & Verkuil, *supra* note 62, at 1008.

[172] *Id.* at 1009.

the authority of HHS.[173] These rulings are clearly motivated by the goal of effectuating congressional intent and avoiding the unleashing of a broad and unbounded agency power that prevails unless and until Congress reverses the agency through new legislation.

While Sunstein identifies these limitations to *Chevron*'s reach in the domestic context,[174] he engages in a creative reinterpretation of post-*Chevron* doctrine to substantiate the brand of "super-strong" *Chevron* deference he has in mind for national security law. For example, Sunstein argues that despite *Mead*'s preference that an agency "'engage in adjudication or notice-and-comment rulemaking'"[175] as a basis for according *Chevron* deference, other language within *Mead* supports broad deference where a Court can find "'some other indication of a congressional comparable intent.'"[176] Sunstein takes the argument even further by arguing that *Chevron* deference is appropriate "for informal decisions, and even for those lacking the force of law, if Congress is best read as calling for such deference in light of 'the interpretive method used and the nature of the question at issue.'"[177] Referring to *lower court* decisions that defer to agency interpretations lacking *Mead*'s formal procedures, Sunstein turns *Mead*'s analysis on its head: "Under *Chevron* and *Mead*, the real question is what were Congress's instructions, and the grant of authority to act with the force of law is a sufficient but not a necessary condition for finding a grant of power to interpret ambiguous terms."[178]

Posner and Sunstein make a similar argument in their co-authored article. While they recognize that, ordinarily, "the executive should be entitled to *Chevron* deference under the terms of existing doctrine because it will be acting pursuant to formal procedures or other channels that trigger *Chevron*," they argue that courts should apply *Chevron* even when "no such [formal] mechanisms are involved."[179] Their view requires neither a delegation nor formal procedural mechanisms to trigger broad *Chevron* deference. But this view of *Chevron* is hard to square with *Mead*, which specified the need for "comparable congressional intent" to a formal delegation as a condition for *Chevron* deference.[180] The *Mead* Court noted that such intent could be discerned where an agency "provides for a relatively *formal* administrative

[173] Gonzales v. Oregon, 546 U.S. 243, 250 (2006).

[174] *See* Posner & Sunstein, *supra* note 1, at 1176.

[175] Sunstein, *supra* note 1, at 2665 (quoting *Mead*, 533 U.S. at 227).

[176] *Id.* (quoting *Mead*, 533 U.S. at 227).

[177] *Id.* at 2666 (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

[178] *Id.*; *cf.* Vermeule, *supra* note 1, at 1125 ("Roughly speaking, the requisite congressional intent to delegate law-interpreting power to the agency can be evidenced by the agency's authorized use of formal proceedings, although procedural formality is arguably neither necessary nor sufficient for finding a congressional intent to delegate.").

[179] Posner & Sunstein, *supra* note 1, at 1198.

[180] *See* Mead, 533 U.S. at 227.

procedure,"[181] as such requirements "tend[] to foster the fairness and deliberation that should underlie a pronouncement of such force."[182] Indeed, rather than provide mechanisms for the Executive to bypass the delegation requirement, *Mead* reaffirms it, all the while acknowledging the possibility of alternative mechanisms that, *owing to their formality*, could be accorded the same weight as a formal delegation. It is hard to square this language in *Mead* with the type of "super-strong" deference called for by *Chevron*-backers, a point reinforced by more recent Supreme Court interpretations.

To the extent that *Chevron*-backers acknowledge this trend, they argue that the national security context provides an exception on account of the Executive's constitutional powers under Article II, which strengthen the case for deference where national security is concerned. Hence, for *Chevron*-backers, the standard requirements for *Chevron* deference "have less force in the context of foreign affairs law – an area characterized long before *Chevron* by exceedingly broad executive branch power and sweeping deference by the courts."[183] But, inasmuch as *Chevron*-backers tend to present a view of administrative law that discounts *Mead* in order to pursue an imperialistic *Chevron* doctrine, their view of national security law relies on an equally idealized account of that field, for their Executive-friendly interpretations of national security law tend to disregard *Youngstown* and the constraints it has placed on broad presidential powers.

E. *Squaring* Chevron *with National Security Law*

While many *Chevron*-backers acknowledge that they stretch the boundary of *Chevron* beyond its traditional limits, they argue that an expanded *Chevron* doctrine in national security makes sense in light of the Court's national security precedents. Here, they invoke *United States v. Curtiss-Wright Export Corp.* as a paradigm case that accords with a broad reading of *Chevron*.[184] In *Curtiss-Wright*, the Supreme Court upheld an arms embargo passed by congressional joint resolution and ordered by President Roosevelt. Justice Sutherland's majority opinion celebrated the President's "very delicate,

[181] *Id.* at 227, 230 (emphasis added).

[182] *Id*. at 230.

[183] Bradley, *supra* note 1, at 673; *see also* Posner & Sunstein, *supra* note 1, at 1176 (arguing that "courts should generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments").

[184] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); *see also* Pearlstein, *supra* note 9, at 794. As Pearlstein explains, "strong notions of judicial deference to the executive in foreign relations matters are traced most commonly to *United States v. Curtiss-Wright Export Corp.*, a peacetime case in which the Court embraced the President's reading of a statute delegating authority to the executive to place an embargo on arms sales to certain countries." *Id.*

plenary and exclusive power"[185] in national security, which he enjoyed by virtue of being "the sole organ of the federal government in the field of international relations."[186] For Sutherland, these vast powers did not depend on a grant of legislative authorization; rather, they were derived from non-textual sources of authority that inhered in the Executive itself.[187]

For many foreign affairs scholars, *Curtiss-Wright* ushered in an extended period of tremendous judicial deference to presidential discretion on matters of national security.[188] Harold Koh argues that *Curtiss-Wright*'s expansive interpretation of Executive power was the "touchstone of the Court's foreign affairs jurisprudence" from the period between World War II through Vietnam and into the post-Cold War era.[189] David Gray Adler notes that even when *Curtiss-Wright*'s "sole organ" concept has "not been invoked by name, its spirit, indeed its talismanic aura, has provided a common thread in a pattern of cases that has exalted presidential power above constitutional norms."[190] On this view, *Curtiss-Wright* ushered in an "increased deference across the spectrum of foreign affairs doctrines"[191] and quickly outpaced *Youngstown* as the leading judicial pronouncement on deference to executive decisionmaking in national security law.[192] For Koh, this period was marked by a disregard for *Youngstown*, in which the Supreme Court "threw its weight toward *Curtiss-Wright*, which has now reemerged as the touchstone of the Court's foreign affairs jurisprudence."[193]

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[185] *Curtiss-Wright*, 299 U.S. at 320.

[186] *Id.*

[187] *Id.* (stating that the President's vast power did "not require as a basis for its exercise an act of Congress").

[188] The Court has discussed the importance of broad deference to the political branches in the realm of foreign affairs on other occasions. *See, e.g.*, Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

[189] *See* Koh, *supra* note 23, at 1309.

[190] David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 25 (David Gray Adler & Larry N. George eds., 1996).

[191] Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 123, 126 (2009).

[192] *See, e.g.*, *id.* at 125 n.247 ("The prominent exception to special deference during this period is, arguably, the Steel Seizure Case.").

[193] Koh, *supra* note 23, at 1309; *see also* Adler, *supra* note 190, at 19 ("The unmistakable trend [has been] toward executive domination of U.S. foreign affairs in the past sixty years . . . ."); Prakash & Ramsey, *supra* note 29, at 238 ("The practice of the last

Many national security scholars argue that *Curtiss-Wright*'s triumph over *Youngstown* can be traced to *Dames & Moore v. Regan*, a case decided forty-five years after *Curtiss-Wright*.[194] In *Dames & Moore*, the Supreme Court vindicated an executive order by President Carter at the culmination of the Iran Hostage Crisis. The order nullified all attachments against Iranian assets and directed that those assets be transferred to Iran.[195] More controversially, it suspended all pending lawsuits against Iran in U.S. courts, transferring them to an international tribunal.[196] While the *Dames & Moore* Court upheld the President's broad power to nullify and suspend lawsuits as part of a larger negotiation to end the hostage crisis, it resolved the case on statutory as opposed to constitutional grounds. The Court held that Congress had implicitly delegated the President power to nullify attachments and direct that the underlying funds be redirected to the government of Iran.[197] Although the source of legislative power, the International Emergency Economic Powers Act (IEEPA), was silent regarding the suspension of in personam actions,[198] Chief Justice Rehnquist, writing for a unanimous Court, noted that this statute, operating in combination with the 1868 Hostage Act, "indicat[ed] congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case"[199] and supported a general mandate for the presidential action at issue.

Most foreign affairs scholars treat *Dames & Moore* as the statutory-interpretation equivalent of *Curtiss-Wright*, and there is certainly some language in *Dames & Moore* that supports such an interpretation. As then-Associate Justice Rehnquist stated, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act,"[200] and the mere "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of

century and an array of judicial opinions support the idea of presidential primacy.").

[194] Dames & Moore v. Regan, 453 U.S. 654 (1981).

[195] *Id.* at 660.

[196] *Id.*

[197] *Id.* at 669-86.

[198] *Id.* at 675 ("We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question.").

[199] *Id.* at 677.

[200] *Id.* at 678.

action taken by the Executive."[201] The majority pointed to the lack of any statement by Congress opposing the measure. Finding no explicit disapproval for the order, the Court upheld it.

In a certain sense, *Dames & Moore*'s analysis of the issue of congressional inaction suggests a potential retreat from *Youngstown*. Hence, as Martin Sheffer argues, "The decision in *Dames & Moore* underscored the same principle articulated almost a half-century earlier in *Curtiss-Wright* – the President was the primary governmental authority over matters of foreign policy."[202] On this view, *Dames & Moore* illustrates the *Curtiss-Wright* principle that "the anarchic nature of the world requires the President to do what is necessary to protect the nation's interests, including exercising authority that the law does not appear to grant him."[203] Harold Koh echoes this sentiment, arguing that *Dames & Moore* "dramatically alter[ed] the application of *Youngstown*'s constitutional analysis in foreign affairs cases."[204] Hence, while *Dames & Moore* "talks like *Youngstown*" by requiring a statutory delegation for the President's actions at the end of the Iran Hostage Crisis, it "walks like *Curtiss-Wright*"[205] by giving the President an expanded national security power during times of emergency.[206]

But this apparent link between *Dames & Moore* and *Curtiss-Wright* seems overstated. While the *Dames & Moore* Court upheld presidential power, it did not wax rhapsodic over inherent executive powers or adopt Justice Sutherland's plenary-powers rationale in *Curtiss-Wright*. On the contrary, *Dames & Moore* emphasized limits on executive power by couching the President's authority within legislative authorization.[207] Indeed, from the

[201] *Id.* (alteration in original) (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).

[202] MARTIN S. SHEFFER, THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS 136 (1999); *see also* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 947 (1993) ("Justice Rehnquist's opinion makes more sense under *Curtiss-Wright* than it does under the Steel Seizure opinion . . . .").

[203] *See* Knowles, *supra* note 191, at 127.

[204] *See* Koh, *supra* note 23, at 1310-11.

[205] *See* Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J.L. & POL. 1, 68 (2000).

[206] Koh argues that "the Court has built on *Dames & Moore* to construct a *Curtiss-Wright* orientation toward statutory construction that now challenges *Youngstown*'s vision of institutional and constitutional balance." Koh, *supra* note 23, at 1311; *see also* Knowles, *supra* note 191, at 125 ("The *Curtiss-Wright* brand of special foreign affairs deference became firmly entrenched during the Cold War under a cloud of Soviet expansionism and the risk of nuclear conflict.").

[207] Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 51-52 (1993) (recognizing *Dames & Moore* as "an important illustration of the" idea that "[s]tatutes constitute the main source of presidential authority to invade private rights in the foreign affairs context").

perspective of *Curtiss-Wright*, the discussion of executive power in *Dames & Moore* looks far more constrained:

> [W]e re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[208]

Hence, it may stretch the argument too far to interpret *Dames & Moore* as a statutory proxy for *Curtiss-Wright*'s apparent constitutionalizing of plenary executive powers. Indeed, *Dames & Moore*'s theory of law, if not its outcome, can be squared with *Youngstown*.

Although the underlying theory of deference in *Curtiss-Wright* cannot be reconciled with *Youngstown*, its outcome is consistent with Jackson's framework – a point Jackson *himself* noted. Jackson placed *Curtiss-Wright* within Category One of his framework, in which "the President acts pursuant to an express or implied authorization of Congress" and in which "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[209] As Jackson explained, to the extent dicta in *Curtiss-Wright* "intimated that the President might act in external affairs without congressional authority,"[210] the decision did not go so far as to claim the President "might act contrary to an Act of Congress."[211] If Justice Sutherland's dicta are treated as just that – dicta – *Curtiss-Wright* and *Youngstown* diverge less on their theories of executive power and more on factual differences. In one, executive policy was grounded in congressional authorization and therefore valid (*Curtiss-Wright*), and in the other, the

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[208] Dames & Moore v. Regan, 453 U.S. 654, 688 (1981).

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

[210] *Id.* at 635 n.2.

[211] *Id.*; *see also, e.g.*, Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1244 n.346 (1987); Harold Hongju Koh & John C. Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 733 n.74 (1992) ("Thus, Jackson read *Curtiss-Wright* not as a constitutional decision, raising the broad 'question of the President's power to act without congressional authorization,' but as a case that fell into the first of his three categories, involving 'his right to act under and in accord with an Act of Congress.'" (quoting *Youngstown*, 343 U.S. at 635-36 n.2 (Jackson, J., concurring)); Lawrence M. Reich, *Foreign Policy or Foreign Commerce?: WTO Accessions and the U.S. Separation of Powers*, 86 GEO. L.J. 751, 765 n.96 (1998) ("Justice Jackson noted that *United States v. Curtiss-Wright Export Corp.* fell within his first category, because in that case the Court upheld a presidential decision prohibiting foreign arms sales that had been endorsed by Congress.").

Executive lacked a delegation from the legislature, and was therefore invalid (*Youngstown*).[212] And if it is possible to validate *Curtiss-Wright* on *Youngstown*'s institutional process grounds, precisely as Justice Jackson was able to do, *Dames & Moore*'s statutory approach is less about vindicating boundless executive power and more about vindicating a delegation-based theory of governance in the national security context. Indeed, there is plenty of room to argue that *Dames & Moore* is closer to *Youngstown* than it is to *Curtiss-Wright*.

While many discussions of national security deference tend to frame the relevant doctrinal development through the lens of *Curtiss-Wright*,[213] there are a few notable exceptions. Samuel Issacharoff and Richard Pildes have argued, contrary to conventional accounts, that courts resolving complex national security cases have historically followed an approach akin to Jackson's *Youngstown* framework. As they explain, courts have developed, both in the past and the present, "a process-based, institutionally-oriented (as opposed to rights-oriented) framework"[214] for resolving cases pitting individual rights against executive power. Through these decisions, "courts have sought to shift the responsibility . . . toward the joint action of the most democratic branches of the government."[215]

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[212] Placed in context, *Curtiss-Wright*'s constitutional analysis can also be understood through the lens of the Court's general unease with delegations. *Curtiss-Wright* was decided long before the growth of the modern administrative state and only one year after the Supreme Court struck down poultry regulations in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), and invalidated the National Industrial Recovery Act in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935). Given the skepticism toward administrative delegations, the Court's decision to constitutionalize executive power rather than uphold it as a valid statutory delegation is understandable. Yet, with the pending rise of the administrative state and an increasingly textualist approach to constitutional interpretation, courts would begin to rely more squarely on delegations as an important basis (if not the sine qua non) for deference in national security cases.

[213] *See supra* notes 202-06 and accompanying text. Many scholars who place *Dames & Moore* closer to *Curtiss-Wright*'s broad theory of plenary executive power note other, parallel developments in contemporaneous national security decisions, including the extension of political question doctrine during the 1930s and early 1940s, *see* United States v. Pink, 315 U.S. 203, 231 (1942); United States v. Belmont, 301 U.S. 324, 330-33 (1937), the judicial validation of Executive Branch military commissions, *see* Johnson v. Eisentrager, 339 U.S. 763, 791 (1950); *In re* Yamashita, 327 U.S. 1, 25-26 (1946); *Ex parte* Quirin, 317 U.S. 1, 20-21, 28 (1942), dicta in Cold War and post-Cold War decisions that Executive Branch interpretations of treaties were entitled to "great weight," *see* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961), and the further extension of political question doctrine in the 1960s, *see* Baker v. Carr, 369 U.S. 186, 229 (1962). For other developments along these lines, see Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986), Regan v. Wald, 468 U.S. 222 (1984), and Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981).

[214] *See* Issacharoff & Pildes, *supra* note 30, at 5.

[215] *Id.*; *see also id.* at 9-19; Daryl J. Levinson & Richard H. Pildes, *Separation of*

More recent Supreme Court cases bear out that institutionally oriented framework. As discussed in Part II, in the decade since 9/11, the Supreme Court has tended to return to the ordinary administrative law requirement of a delegation as a necessary condition of judicial deference. Despite arguments for *Curtiss-Wright*- or *Chevron*-style deference, the Court rejected efforts by the Executive Branch to read statutory provisions beyond Congress's likely intent. Hence, while *Chevron*-backers have argued that courts should "play a smaller role . . . in interpreting statutes that touch on foreign relations,"[216] the Court has met them only part way, "appl[ying] the *Youngstown* framework in deciding critical post-9/11 cases concerning the war on terror."[217] When the Executive has been delegated the requisite powers to act, courts have deferred to the President. However, where neither the Constitution nor Congress provided the necessary authorization, the Court, following the logic of *Youngstown* and ordinary principles of administrative law, has remanded the matter to Congress for a second pass at the question.

II. *YOUNGSTOWN* ASCENDANT

Since 9/11, the Executive Branch has argued on numerous occasions that the Supreme Court should defer to its preferred security policies, either because the President had inherent Article II powers or because of his authority to read congressional statutes broadly.[218] But the Court has rejected these arguments,

Parties, Not Powers, 119 HARV. L. REV. 2311, 2350 (2006) ("[C]ourts typically have sought to tie the constitutionality of presidential action to the requirement of congressional authorization. When there is sufficiently broad political agreement that both the legislature and the Executive endorse a particular liberty-security tradeoff, the courts have generally accepted that judgment. When the Executive has acted without legislative approval, however, the courts have applied close scrutiny and, even during wartime, have sometimes invalidated those actions. This process-oriented jurisprudential framework, which finds its most eloquent expression in Justice Jackson's famous concurring opinion in *Youngstown*, dates back at least to the Civil War.").

[216] *See* Posner & Sunstein, *supra* note 1, at 1177.

[217] Levinson & Pildes, *supra* note 215, at 2350.

[218] *See, e.g.*, Brief for Respondents at 19, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-0184) [hereinafter *Hamdan* Respondents' Brief] ("This Court has recognized that courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war."); *id.* at 18 (arguing that "Article 36 of the [Uniform Code of Military Justice] . . . grants the President broad discretion in establishing the rules for proceedings before military commissions, expressly providing that the President may adopt rules that depart from 'the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,' when 'he considers' application of those rules to be not 'practicable'" (quoting 10 U.S.C. § 836(a) (2006))); Brief for Respondents at 24 n.9, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) ("The determination whether captured enemy combatants are entitled to POW privileges under the [Geneva Conventions] is a quintessential matter that the Constitution . . . leaves to the political branches and, in particular, the President.").

repeatedly requiring, as a condition of deference, legislative endorsement of executive action. The Court frequently referenced *Youngstown* as relevant authority for its decisions, rejecting the kind of "super-strong" deference promoted by *Chevron*-backers that would collapse national security decisionmaking into a single-branch enterprise. Remarkably, the Court has been able to insert itself into the equation without making *itself* the center of attention. Rather than providing definitive resolutions to questions about the scope of individual rights and executive power, the Court has often remanded those questions for further deliberation by the political branches.

A. Rasul *and Statutory Habeas*

One week after 9/11, Congress passed the AUMF, a joint resolution authorizing President George W. Bush to use all "necessary and appropriate force" against those he determined "planned, authorized, committed or aided" the September 11, 2001, attacks as well as those who harbored such persons or groups.[219] In January 2002, as the Bush Administration began to transfer individuals for detention at the Guantánamo Bay Naval Base, questions surfaced whether the AUMF authorized the President to detain terror suspects and try them for war crimes in military commissions. The Bush Administration, relying on its inherent constitutional powers and the language of the AUMF, argued that it had broad authority to take necessary action in response to the war on terror.[220] While the President could plausibly point to language within the AUMF that supported his power to take various forms of action against members of al-Qaeda and the Taliban, courts refused to grant complete deference when he invoked the AUMF to greatly expand his authority. Through its decisions, the Court prevented its national security and administrative law doctrines from becoming instruments of wholesale deference to the Executive.

Rasul v. Bush concerned the question whether statutory habeas corpus protections applied at Guantánamo Bay.[221] The Bush Administration argued that any ambiguity regarding the extraterritorial application of the federal habeas statute, 28 U.S.C. § 2241, should be construed against the detainees.[222]

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[219] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (allowing President George W. Bush "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"). The AUMF was followed by a November 13, 2001, Executive Order authorizing executive detention of non-citizens. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[220] Pearlstein, *supra* note 9, at 804.

[221] Rasul v. Bush, 542 U.S. 466, 470 (2004).

[222] The government noted in its brief that "[s]ince *Eisentrager*, this Court . . . has

It further argued that executive deference had "'special force when . . . construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.'"[223] The President relied on the Supreme Court's decision in *Johnson v. Eisentrager*,[224] which denied habeas protections to non-citizens outside U.S. territory. *Eisentrager* and its progeny supplied the Bush Administration with an eminently "reasonable" doctrinal basis for its interpretation of the habeas statute.[225] Still, the Court ruled against the government, holding that the detainees could bring petitions because Guantánamo,[226] which by contract operated under the exclusive "jurisdiction and control" of the United States, was a de facto part of U.S. territory.[227]

Although *Rasul* vindicated the detainees' statutory right to habeas, it was not a broad judicial ruling and hardly a model of judicial activism. The majority left undecided many large and important questions regarding the content of habeas and what, if any, substantive rights the detainees could invoke in their proceedings.[228] By leaving these questions to the political branches (or, in the absence of legislation, future litigation), *Rasul* reflects a judicial preference for narrow resolutions of cases pitting individual liberty against executive power that are neither purely deferential to the Executive nor

repeatedly emphasized its reluctance to presume that Congress intends a federal statute to have extraterritorial application." Brief for the Respondents at 19, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343).

[223] *Id.* (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936))); *see also id.* ("'Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested' . . . ." (quoting *Sale*, 509 U.S. at 188)).

[224] 339 U.S. 763 (1950). In *Eisentrager*, the Supreme Court rejected claims brought by German citizens who were tried and convicted in military commissions for continuing to wage war against the United States after the close of World War II. *Eisentrager* held that non-citizens located outside the United States were not entitled to bring writs of habeas corpus in U.S. courts to challenge their convictions. *Id.* at 785.

[225] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 271-72 (1990) (holding that a warrantless search and seizure of a foreign national's property in Mexico, though orchestrated within the United States, was considered to have taken place outside the United States and therefore did not amount to a Fourth Amendment violation).

[226] *Rasul*, 542 U.S. at 483-84.

[227] *Id.* at 480-84.

[228] *Id.* at 485 (leaving for further adjudication "[w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims"); *see also* Martinez, *supra* note 11, at 1028 ("In *Rasul*, the Supreme Court held that the federal courts had statutory jurisdiction to hear the habeas corpus petitions filed by detainees at the U.S. military base in Guantanamo Bay, Cuba, but three years later it was still unclear whether those detainees had a constitutional right to habeas or indeed any enforceable rights at all.").

purely non-deferential.[229] *Hamdi v. Rumsfeld*,[230] decided the same day as *Rasul*, sheds further light on that approach.

B. Hamdi *and Detention*

The *Hamdi* Court held that although the President had the power to detain, possibly indefinitely, Yaser Hamdi, a U.S. citizen who was seized during operations in Afghanistan, he retained due process rights to a meaningful hearing before a neutral decisionmaker.[231] The plurality decision, written by Justice O'Connor, upheld the President's detention authority based on a reading of the AUMF that accorded deference to the President's reasonable interpretation of the statutory language while refusing him complete deference to expand his authorization beyond the statute's acceptable limits. On the one hand, the Court held that Hamdi's detention was proper because it was based on the battlefield capture of an individual who was alleged to have fought against the United States in an active theater of war.[232] As to battlefield captures, the AUMF authorized the use of force by the President – and "force" reasonably includes the power to detain.[233] Yet the Court indicated possible limitations on the scope of executive power to detain individuals beyond "the

[229] Similarly, four years later, the Court ruled against the government's arguments for broad deference to its interpretation of the habeas statute in a decision that was hardly a vindication of the rights of habeas petitioners. In *Munaf v. Geren*, 553 U.S. 674 (2008), the Court held that two U.S. citizens who were accused of committing crimes in Iraq and held under international authority by U.S. military personnel acting as part of a multinational military coalition could proceed with habeas corpus petitions in the United States. *Id.* at 680. The men were to be transferred from U.S. to Iraqi custody for prosecution before an Iraqi court, and they brought habeas corpus petitions to stop their transfer. *Id.* at 681-82. A unanimous Supreme Court held that U.S. citizens located beyond U.S. shores could invoke the writ, but the Court denied the petitions on the merits. *Id.* at 680. The *Munaf* Court, like the *Rasul* Court, had to construe the extraterritoriality of the domestic habeas statute and, just as in *Rasul*, rejected the government's argument for deference to its interpretation of the statute. The Bush Administration argued that "[t]he exercise of habeas jurisdiction in these cases would interfere with the Executive Branch's international commitments, as well as its ability to carry out its military and foreign policy objectives," *see* Brief for the Federal Parties at 25, *Munaf*, 553 U.S. 674 (Nos. 07-394, 06-1666), but the Court rejected the premise that U.S. citizens held at the behest of U.S. military forces were barred from invoking the Writ to challenge their transfer. The Court observed that "Omar and Munaf are American citizens held overseas in the immediate physical custody of American soldiers who answer only to an American chain of command." *Munaf*, 553 U.S. at 685 (internal quotation marks omitted). In light of this, the "Government's argument . . . [was] not easily reconciled with the text of § 2241(c)(1)." *Id.* at 686. Although the Court took jurisdiction over the case, the ultimate ruling was a defeat for the petitioners, as the Court held that they could not invoke habeas to prevent their transfer to Iraq to face prosecution. *Id.* at 692.

[230] 542 U.S. 507 (2004).

[231] *Id.* at 521, 533 (plurality opinion).

[232] *Id.* at 518.

[233] *Id.*

limited category [of detainees] we are considering"[234] – i.e., battlefield captures.[235] As far as the much broader range of individuals being held at Guantánamo was concerned, the Court indicated that additional, more definitive congressional authorization might be required.

Rather than ground the President's detention power within his inherent Article II powers, policy expertise, or democratic accountability, the Court looked to the President's reasonable interpretation of a statute – specifically, his view that the AUMF's "use of force" permitted the detention of battlefield captures such as Hamdi.[236] In finding a statutory basis for the President's detention powers, the plurality rejected carte-blanche presidential authority for indefinite detention. Rather than provide the President broad latitude to interpret the AUMF however he wanted, the Court held him to a modest reading of the resolution, pointing to implicit durational parameters on those powers as well:

> [W]e understand Congress' grant of authority [in the AUMF] for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.[237]

While the plurality accepted the government's argument that the AUMF incorporated some amount of detention power, the Court implied a congressional responsibility to monitor, and update if necessary, the President's detention authority in the wake of ensuing events in the war against terror.

The *Hamdi* Court was deeply divided, producing four separate opinions reflecting a range of different positions regarding the deference owed to the

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[234] *Id*.; *see also id*. at 516 ("We therefore answer only the narrow question before us: whether the detention of citizens falling within [the government's narrow] definition is authorized."); *id.* at 517 (concluding that the AUMF "is explicit congressional authorization for the detention of individuals in the narrow category" of battlefield combatants). Indeed, the government was actually detaining a much broader range of individuals – including many who were not captured on the battlefield, not affiliated with al-Qaeda or the Taliban, and not involved in the 9/11 terrorist attacks. The majority in *Boumediene* left the question of the Executive's broader detention authority undecided as well. *See* Boumediene v. Bush, 553 U.S. 723, 788 (2008) (bracketing questions regarding the propriety of "the indefinite detention of 'enemy combatants'" and "the Department's definition of enemy combatant").

[235] The plurality was satisfied that the detention at issue was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi*, 542 U.S. at 518 (plurality opinion).

[236] The Court recognized that "longstanding law-of-war principles" and international "agreement and practice" permit the detention of a combatant to prevent his "return to the battlefield," and that such a power is "a fundamental incident of waging war" falling under the larger umbrella of "force" authorized by the AUMF. *See id*. at 518-21.

[237] *Id.* at 521.

Executive. Justice Souter, in a partial concurrence and dissent joined by Justice Ginsburg, accepted the premise that Congress could authorize such detentions but rejected the plurality's decision to defer to the President's interpretation of the AUMF.[238] Justice Souter argued that the AUMF lacked any specific authorizing language legitimizing indefinite detention, and, in the absence of more detailed statutory language, Hamdi's detention violated the Non-Detention Act, which requires direct and specific congressional authorization to detain U.S. citizens.[239] Justice Scalia also dissented, and his opinion, joined by Justice Stevens, argued that, absent congressional suspension of the writ of habeas corpus, the government would either have to charge Hamdi with a crime or release him.[240] Only Justice Thomas's dissent accepted the more expansive notion of deference, pressed by the Bush Administration, that the President possessed inherent authority to detain a wide range of individuals with a more attenuated (if any) connection to the 9/11 attacks. Justice Thomas invoked *Curtiss-Wright*'s apparent support for the notion that the President should be "free from interference" by the Court on questions involving national security.[241] For Thomas, Hamdi's "detention [fell] squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."[242]

The *Hamdi* plurality, having upheld detention, next decided what, if any, due process rights it would accord U.S. citizen "enemy combatant" detainees. Here, again, the Court rejected the government's request for deference by refusing to credit a two-page affidavit the government supplied that purported to demonstrate Hamdi's affiliations with a Taliban unit captured by Northern Alliance forces in Afghanistan.[243] The government argued that the Court should accept the contents of the affidavit under a minimal level of judicial review – the deferential "some evidence" standard – which the government asserted was the appropriate test for evaluating the government's proof of Hamdi's alleged terrorist connections.[244] While the plurality accepted a range of other government-friendly procedural regimes – including a rebuttable presumption in favor of the government's evidence, the use of hearsay, and the

[238] *Id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[239] *See id*. at 542-46 (citing 18 U.S.C. § 4001(a) (2000)). According to Justice Souter, the AUMF "never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States" beyond the "the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Id.* at 547.

[240] *Id.* at 573 (Scalia, J., dissenting).

[241] *Id.* at 581-82 (Thomas, J., dissenting).

[242] *Id.* at 579.

[243] *Id.* at 526-28, 537 (plurality opinion).

[244] *Id.* at 527.

use of non-Article III tribunals – it rejected the government's proffered "some evidence" standard as "extreme,"[245] stating that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."[246] Citing *Youngstown*, the Court noted that the government's position would "serve[] only to *condense* power into a single branch of government," and that the ongoing "state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[247]

C. Hamdan *and Military Commissions*

After the 2004 *Rasul* and *Hamdi* decisions, Congress attempted to reverse *Rasul* by stripping federal court jurisdiction over statutory habeas claims in the Detainee Treatment Act (DTA).[248] The DTA permits detainees to seek limited review in the D.C. Circuit to challenge decisions by (1) Combatant Status Review Tribunals (CSRTs), which determined the propriety of one's detention at Guantánamo,[249] and (2) military commissions, which determined a detainee's guilt.[250] Under that "DTA Review" process, the D.C. Circuit would consider whether the Executive followed its own standards and procedures and whether the procedures were consistent with the Constitution (assuming it applies at Guantánamo).[251] From a certain perspective, this review mechanism, which mirrors the Hobbs Act by creating procedures for the review of a final Executive Branch decision in a federal court of appeals, places a layer of administrative law review over the Guantánamo proceedings.[252]

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[245] *See id.* at 527, 535-36.

[246] *Id.* at 537.

[247] *See id.*

[248] Detainee Treatment Act of 2005, Pub L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2741-43 (amending 28 U.S.C. § 2241 (2000)).

[249] After *Boumediene* restored habeas corpus review, the D.C. Circuit held detainees could no longer avail themselves of the judicial review provisions of the DTA and would henceforth be required to proceed through habeas corpus petitions in district court. Bismullah v. Gates, 551 F.3d 1068, 1072-73, 1075 (D.C. Cir. 2009).

[250] Detainee Treatment Act of 2005 § 1005(e)(2)-(3).

[251] *Id*. With regard to CSRT determinations, the D.C. Circuit could consider (1) whether any particular CSRT "was consistent with the standards and procedures" put in place by the Defense Department at Guantánamo, and (2) "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C). As far as military commissions are concerned, the D.C. Circuit could consider whether (1) "the final decision was consistent with the [government's] standards and procedures" and (2) "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(3)(D).

[252] The Hobbs Act, Pub. L. No. 87-301, § 106, 75 Stat. 650, 651-53 (1961), which

In *Hamdan v. Rumsfeld*, the Court first held that habeas remained available for individuals, such as Hamdan, who filed habeas petitions prior to the enactment of the DTA.[253] Hamdan sought to challenge the legality of the military commission used to try him, and the government moved to dismiss the suit on the grounds that the DTA manifested a clear intent on the part of Congress to eliminate district court habeas jurisdiction over all claims filed by Guantánamo detainees – including those already pending in federal court.[254] However, the *Hamdan* Court, interpreting the DTA, held that the text of the statute, which replaced habeas corpus with a limited form of judicial review within the D.C. Circuit, did not strip habeas jurisdiction for cases pending at the time the DTA went into effect.[255] As to Hamdan's habeas petition (and petitions by others who, like Hamdan, filed prior to the enactment of the DTA), habeas corpus proceedings could proceed.

Reaching the issue of the commissions' legality, the Court refused to grant the President's use of military commissions the same deference it would accord an ordinary administrative agency, and the difference may have been due to the lack of congressional endorsement of the Guantánamo tribunals. After all, while the DTA created a statutory *judicial review* mechanism, it did not actually create the tribunals or expressly delegate the President authority to do so. It merely spelled out the D.C. Circuit's limited review mechanism of the *President's* CSRTs and military commissions. This explains *Hamdan*'s more skeptical approach toward the government's argument that military commissions were a creature of statute. The Court rejected the government's proffered statutory bases for the President's military commissions at Guantánamo, finding that neither the AUMF,[256] nor the DTA,[257] nor the

governs review of decisions by other administrative agencies, places appellate review exclusively in the courts of appeals.

[253] Hamdan v. Rumsfeld, 548 U.S. 557, 576-85 (2006).

[254] *Id.* at 574.

[255] *Id.* at 584.

[256] The Court refused to treat the AUMF as a framework statute triggering broad and vast agency-style powers to establish a system of military commissions outside the procedures already prescribed in the Uniform Code of Military Justice. While "the AUMF activated the President's war powers, and [] those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." *Id.* at 594 (citations omitted).

[257] The Court rejected the government's attempt to equate recognition of military commissions with their authorization, noting that "[t]he DTA obviously 'recognize[s]' the existence of the Guantanamo Bay commissions in the weakest sense because it references some of the military orders governing them and creates limited judicial review of their 'final decision[s].'" *Id*. (alterations in original) (citations omitted) (quoting *Hamdan* Respondents' Brief, *supra* note 218, at 15; Detainee Treatment Act of 2005 § 1005(e)(3)). However, "the DTA cannot be read to authorize this commission. Although the DTA . . . was enacted after the President had convened Hamdan's commission, it contains no language authorizing that

Uniform Code of Military Justice (UCMJ)[258] provided the necessary statutory mandate. Absent clear authorization from Congress, the commissions could not proceed.[259] In that sense, *Hamdan*, like *Hamdi*, noted the need for a clearer expression of statutory authority as a basis for broad deference.

Although the Court rejected all bases supplied by the Bush Administration as authorization for its commissions, four Justices specifically noted that Congress could authorize them via statute. In perhaps the clearest articulation of this point, Justice Kennedy pointed out in his concurrence that Congress could, "after due consideration," alter the law if it were to "deem[] it appropriate to change the controlling statutes."[260] Justice Breyer also noted in his concurrence that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[261] These opinions reinforce the importance of congressional delegations, both during times of heightened national security as well as during ordinary circumstances.

Justice Kennedy's *Hamdan* concurrence relies specifically on Jackson's *Youngstown* framework,[262] articulating the importance of congressional backing such "that when military tribunals are established, full and proper authority exists for the Presidential directive."[263] For Kennedy, these delegations are not only important in their own right, but serve to reflect more deliberative norms that inhere to the lawmaking process. As he explains:

> Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is

tribunal or any other at Guantanamo Bay." *Id*.

[258] The Court held that the procedures used in military commissions at Guantánamo had to be consistent with the dictates of the UCMJ, with exceptions only in cases where "such uniformity proves impracticable." *Id.* at 620. The Court rejected the President's "'practicability' determination . . . [as] insufficient to justify variances from the procedures governing courts-martial." *Id*. at 622. The Court noted two separate "practicability" determinations, and while it assumed it owed "complete deference" to the President's determination not to apply the rules of criminal cases to military commissions under 10 U.S.C. § 836(a), it refused to defer to the President's position regarding the second practicability requirement, requiring the use of courts-martial procedures unless impracticable. *Id*. at 622-23 ("Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.").

[259] *Id.* at 594-95.

[260] *Id.* at 637 (Kennedy, J., concurring in part).

[261] *Id.* at 636 (Breyer, J., concurring).

[262] *Id.* at 638 (Kennedy, J., concurring in part) ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578 (1952).").

[263] *Id.*

> best preserved by reliance on standards tested over time and insulated from the pressures of the moment.[264]

Congress did not fail to heed the Court's call for a statutory delegation. Within a few months of *Hamdan*, it passed the Military Commissions Act (MCA),[265] which created a framework statute for military commissions.[266] While the Supreme Court has yet to consider the legitimacy of these newly created military commissions, one lower court upheld them after passage of the MCA.[267] Once Congress had authorized the commissions, the government brought a new trial against Hamdan, who challenged the legality of the commission by seeking injunctive relief in federal court. Judge Robertson, who had initially granted Hamdan's writ of habeas corpus in the case that reached the Supreme Court,[268] refused to put a stop to the commissions once they had a basis in legislation.[269] Although Judge Robertson expressed concerns about the constitutionality of the commissions' procedures, including the codification of crimes that were not unlawful at the time Hamdan committed them, he deferred to the commission system Congress had put in place, noting the "significant improvements" codified by the MCA.[270] Hence, in the wake of the MCA, at least one federal judge who had previously put a stop to a military commission, and whose ruling was largely upheld by the Supreme Court in *Hamdan*, was now prepared to let that commission proceed. In that significant case, Congress's legislative response supplied the basis for judicial deference.

D. Boumediene *and Executive Branch Procedures at Guantánamo*

In addition to providing statutory authorization for Guantánamo military commissions, the MCA amended the habeas corpus statute to eliminate federal

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[264] *Id.* at 637; *see also* Boumediene v. Bush, 553 U.S. 723, 738 (2008) (describing the clear-statement requirement as an "interpretive rule [that] facilitates a dialogue between Congress and the Court").

[265] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

[266] 10 U.S.C. § 948a-m (2006).

[267] Hamdan v. Gates, 565 F. Supp. 2d 130 (D.D.C. 2008).

[268] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004). Judge Robertson's 2004 ruling striking down the military commissions was vindicated by the Supreme Court in *Hamdan*.

[269] *Hamdan*, 565 F. Supp. 2d at 136.

[270] *Id.* at 132 (citing 10 U.S.C. §§ 949d(b), (e) (2006)). On October 16, 2012, the D.C. Circuit vacated Hamdan's conviction for material support for terrorism. Hamdan v. United States, 696 F.3d 1238, 1240 (D.C. Cir. 2012). Taking note of "a serious Ex Post Facto Clause issue," *id.* at 1241, the court interpreted the Military Commissions Act not to retroactively punish new crimes and found that Hamdan's conviction for material support for terrorism could not stand because material support for terrorism was not a crime triable by military commission under U.S. law at the time the conduct occurred.

jurisdiction over claims brought by detainees.[271] After the MCA's enactment, the review mechanisms in the D.C. Circuit created by the DTA[272] were the sole mechanism for challenging detention decisions and judgments by military commissions. While some detainees invoked the DTA review mechanism to challenge their classification as enemy combatants, others pressed the argument that the MCA worked an unconstitutional suspension of the constitutional Writ of Habeas Corpus, a question the Supreme Court considered in *Boumediene v. Bush*.[273] In *Boumediene*, the Supreme Court held, first, that the Constitution's Suspension Clause applied at Guantánamo Bay[274] and, second, that the judicial review procedures created by the DTA regarding CSRT detention determinations[275] were an inadequate substitute for habeas corpus.[276]

In one sense, the policies challenged by the *Boumediene* detainees were the product of joint political branch decisionmaking.[277] After all, the jurisdiction-stripping provisions of the MCA were consistent with, if not a full endorsement of, the Bush Administration's litigation position that Guantánamo detainees lacked access to habeas corpus rights. In a deeper sense, however, political branch agreement may have been more apparent than real. Pre-*Boumediene* decisions required that Congress and the President do more than merely assent to the same proposition. Rather, the Supreme Court's decisions in cases such as *Hamdi* and *Hamdan* spoke of the need for authorizing legislation, if not a comprehensive framework, for enemy combatant status tribunals and military commissions. Such lack of statutory authorization became apparent immediately before and during the *Boumediene* oral argument, when the government, in an apparent attempt to persuade the Court to uphold the DTA process as an adequate replacement for habeas, pressed a reading of the DTA's judicial review provisions that seemed to contradict the plain terms of the statute.

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[271] Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241(e) (2006)).

[272] *See supra* notes 249-51 and accompanying text.

[273] 553 U.S. 723 (2008).

[274] *Id.* at 771.

[275] *See supra* notes 249-51 and accompanying text.

[276] *Boumediene*, 553 U.S. at 787-92. Although the government may create alternative mechanisms to habeas, any replacement would have to be an "adequate and effective substitute." The Court reviewed the mechanisms provided by the DTA and, finding them lacking, restored district court habeas as the appropriate mechanism for reviewing claims that detainees were improperly held at Guantánamo. *Id*. at 798.

[277] *Id*. at 801 (Roberts, C.J., dissenting) ("Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. . . . The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date.").

While the MCA did supply a framework creating military commissions, there was no indication within that statute, other than its jurisdiction-stripping language, of an explicit endorsement of the CSRT process governing the detention and status determinations of enemy combatants. Hence, while the government tried to argue that the judicial review mechanisms of the DTA were the product of precisely the type of deliberative process between the political branches that the Court had required in prior decisions,[278] it was unclear whether Congress had ever considered – much less validated through a considered debate – the propriety of the CSRTs.

Despite the government's effort to establish before the Court that the MCA reflected a joint political branch decision, it remained the case that Congress had not explicitly endorsed the CSRT review procedures (or delegated the executive power to act in the first place). Another problem for the government was that, by the time of *Boumediene*, the Court had abundant evidence of flaws in the government's implementation of the process it created for reviewing enemy combatant determinations. It became clear during the DTA litigation that the formalized process to review the combatant status of enemy combatant detainees at Guantánamo had not been implemented according to the Government's plan.[279] Retired Rear Admiral James M. McGarrah, who served as Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC)[280] for nearly two years, testified that the Guantánamo tribunals, which were supposed to review "reasonably available information in the possession of the U.S. government"[281] through the assistance of the "Recorder" – a military officer[282] charged with obtaining and

[278] Citing the Court's prior rulings, the government argued that the MCA and DTA "represent[ed] an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate 'the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.' And the laws reflect precisely the kind of consultation between the President and Congress that 'strengthens the Nation's ability to determine – through democratic means – how best' to confront national security threats during an ongoing military conflict." Brief for Respondents at 10-11, *Boumediene* (Nos. 06-1195, 06-1196) (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring); Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004)) (internal citations omitted).

[279] *See, e.g.*, Bismullah v. Gates, 514 F.3d 1291, 1295 n.5 (D.C. Cir. 2008) (citing the Declarations of James M. McGarrah, Rear Admiral (Retired), U.S. Navy, and Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, which describe the procedural deficiencies in the CSRTs at Guantánamo).

[280] OARDEC's mission was to prepare for and conduct the CSRT hearings, for which it had a staff of more than 200. Declaration of James M. McGarrah, Rear Admiral (Retired), U.S. Navy ¶ 2, Bismullah v. Gates, 501 F.3d 178 (D.C. Cir. 2007) (Nos. 06-1197, 06-1397).

[281] *See* Memorandum from the Sec'y of the Navy Gordon England, enclosure 1, § E(3) (July 29, 2004) [hereinafter England Memorandum] (available at http://www.defense.gov/news/jul2004/d20040730comb.pdf).

[282] Under the Department of Defense's standards and practices, the Recorder was a

reviewing the relevant evidence possessed by the various agencies and supplying that information, along with exculpatory evidence, to the tribunals[283] – did not consider the entire scope of agency materials that were available.[284] Stephen Abraham, a Lieutenant Colonel in the U.S. Army Reserve who participated in the operation of the CSRT process as a member of OARDEC, confirmed these irregularities.[285] His testimony pointed to serious gaps in the entire evidence-gathering process at Guantánamo and to pressures placed on OARDEC leadership and other officials to validate "enemy combatant" determinations, regardless of the merits.[286] In addition to these deficiencies in evidence gathering, detainees were routinely denied access to many of the promised procedures that would allow them to prepare a defense.[287]

military officer and an attorney who is appointed to obtain and present all relevant evidence to the CSRT and prepare the CSRT record. *Id.*, enclosure 1, § C(2).

[283] The Recorder aided the Tribunal's creation of a record of the proceedings by canvassing evidence from all federal agencies, culling through that information (known as the "government information") for inculpatory and exculpatory evidence, and providing each CSRT panel with that portion of the government information that was relevant to each detainee's status as an enemy combatant (known as the "government evidence"). England Memorandum, *supra* note 281, enclosure 1, §§ (C)(2), H(4); *id.* enclosure 2, §§ B(1), C(1), C(6).

[284] *See* Declaration of Rear Admiral (Retired) James M. McGarrah, *supra* note 280, ¶¶ 10-13. Rather than consider the full scope of available information, the Recorder limited the inquiry to certain Defense Department and military databases and, within those databases, excluded certain additional information due to its "sensitivity." It also turned out that much of the Recorder's work was farmed out to a team of lower-level contractors who appeared to lack the requisite expertise to cull the relevant information. *See id.* ¶¶ 4, 12, 13 (noting that, beginning September 1, 2004, the Recorder did not "personally collect[] the Government Information"; withheld from the tribunals exculpatory information if in its view it was "duplicative" or "if it did not relate to a specific allegation being made against the detainee"; and, contrary to Defense Department policy, did not actually draft the unclassified summary of the evidence).

[285] *See generally* Declaration of Stephen Abraham, *Bismullah*, 501 F.3d 178 (Nos. 06-1197, 06-1397).

[286] *See id.* ¶¶ 5-24. He also testified that "on a number of occasions" his request that an originating agency provide "a written statement that there was no exculpatory evidence . . . [was] summarily denied"; that the people "preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others"; that "the case writer or Recorder, without proper experience or a basis for giving context to information, often rejected some information arbitrarily while accepting other information without any articulable rationale"; and that the case writers did not have access to the most updated and relevant intelligence. *See id*. ¶¶ 12, 16, 17, 18.

[287] *See* Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?* 2-3 (Seton Hall Law Sch., Pub. Law & Legal Research Paper No. 951245, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245.

While these procedural irregularities may have supplied an important basis for the Court's willingness to consider the *Boumediene* case and, eventually, replace the flawed system at Guantánamo with Article III habeas courts,[288] it was the unilateral nature of the tribunals that sealed their doom. The CSRTs were not a creature of statute, and the very narrow judicial procedures Congress did create provided an insufficient substitute for a habeas court. Congress provided no explicit mechanism – through habeas or otherwise – through which a federal court could order the release of a wrongfully held detainee. Hence, the *Boumediene* majority's concern that "congressional *silence*" regarding "most, if not all, of the legal claims [the petitioners sought] to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely" left it to the Bush Administration to resort to a single-branch solution for the Guantánamo procedures.[289] From this perspective, the government's efforts to breathe new life into the DTA by suggesting a more detainee-friendly interpretation of the statute, including the suggestion that the DTA *implicitly* provided for "a remedy of release,"[290] misjudged the Court's broader concern with the lack of institutional buy-in from Congress. Giving "proper deference . . . to the political branches"[291] required that the Court not accept the government's last-ditch effort to trumpet a broad interpretation of the judicial review provisions of the DTA nowhere contained within the statute. The *Boumediene* Court rejected this single-branch approach to resolving the complicated matter of enemy combatant designations.[292] Having remanded the issue to Congress without success, the Court restored habeas corpus review in Article III courts.

III. GUARDING *CHEVRON*'S BORDERS IN NATIONAL SECURITY LAW

Chevron-backers, as one might expect, lament the past decade's lack of "super-strong" deference to the Executive. Posner and Sunstein argue that "*Hamdan* [wa]s simply wrong"[293] and that Justice Thomas's dissent, which "reli[ed] on the principle of executive deference, based on the President's institutional advantages, is very much in the spirit of our argument that foreign relations should be *Chevron*ized."[294] Similarly, John Yoo and Julian Ku, in

[288] *See* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 694 (2009) ("*Boumediene* . . . restored collateral review for a procedurally defective DTA process within the more trusted institution of federal habeas courts.").

[289] Boumediene v. Bush, 553 U.S. 723, 788 (2008) (emphasis added).

[290] *Id.*

[291] *Id.* at 796.

[292] *Cf.* Pearlstein, *supra* note 9, at 806 n.118 ("One most easily reads Justice Kennedy[in *Boumediene*] as understanding the deference obligation to go to Congress *and* the President – not to the executive alone.").

[293] Posner & Sunstein, *supra* note 1, at 1225.

[294] *Id.* at 1225 n.181; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 716-20 (2006)

their article promoting *Chevron* deference in national security, argue that "the executive's interpretations of the UCMJ provisions [in *Hamdan*] deserved substantial deference under the *Chevron* doctrine"[295] and that such "non-deference . . . is the most surprising and disturbing aspect of the Court's decision."[296] But the suggestion that 9/11 ushered in a renewed assertion of judicial non-deference mischaracterizes the import of these rulings. After all, the decisions leave unanswered as many questions (if not far more) than they resolve – including matters such as the content of individual rights and scope of executive power during times of emergency. At the same time, the rulings reflect a taming of *Chevron* consistent with its interpretation in the domestic context. By guarding *Chevron*'s borders,[297] the Court has preserved its relevance to the national security context.

A. *9/11 and Political Branch Deliberation*

The Supreme Court's post-9/11 decisions, taken as a whole, promote the norm of political branch deliberation by vindicating Executive Branch policy authorized by statutory law and rebuffing Executive Branch policies lacking congressional authorization. In *Hamdi*, for example, the Court accepted constraints on individual liberty provided they were grounded within a statute. The Court interpreted the AUMF to place few limitations on the President's authority to detain a U.S. citizen alleged to have been captured on the battlefield in Afghanistan.[298] At the same time, the Court rejected an expansive interpretation of presidential authority to detain a broader category of individuals, including those who were not battlefield captures, indicating that it might require Congress to authorize those additional powers before the Court would be in a position to validate them.

Hamdan promoted the same norm by refusing to accept military commissions that were the product of a single branch.[299] In addition to the Court's concerns about a lack of horizontal deliberation, commentators have noted that the commissions also suffered from an absence of deliberation

(Thomas, J., dissenting).

[295] Ku & Yoo, *supra* note 1, at 196.

[296] *Id.* at 180; *see also id.* at 194 (arguing that "Justice Stevens's opinion [in *Hamdan*] barely acknowledges the existence or relevance of [deference] doctrines much less justify his departure from them.").

[297] Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) ("The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice.").

[298] *See supra* Part II.B.; *see also* Levinson & Pildes, *supra* note 215, at 2350 ("[*Hamdi*] rested on the conclusion, under the *Youngstown* framework, that Congress had authorized executive detention in such circumstances in the 2001 [AUMF].").

[299] *See supra* Part II.C; *see also* Katyal, *supra* note 32, at 97 (observing that the *Hamdan* Court rejected the government's argument "that the President's interpretations of statutory and treaty law were entitled to extreme deference").

within the administrative arms of the Executive Branch. As Neal Katyal has pointed out, the "[Bush] Administration, when it designed the commissions, ignored Secretary of State Colin Powell and National Security Adviser Condoleezza Rice and their staffs. It was also well known that the commission plan was pushed through over the disagreement of members of the military's top brass."[300] Hence, *Hamdan* can be understood not only as a rejection of presidential action without congressional authorization, but also of "executive action taken without the prior involvement of experts."[301] From this perspective, the problem with the commissions stemmed from a vertical deliberation deficit when internal Bush Administration experts were not consulted or given sufficient attention.

Boumediene also provides an example of the Court's emphasis on dual-branch solutions to national security policy. During the litigation, the Bush Administration offered the Supreme Court an interpretation of the DTA that was considerably more detainee-friendly than what it had advanced in the lower courts.[302] But that interpretation – including the argument that the DTA's exceedingly limited judicial review provisions somehow allowed for judicial invalidation of the government's enemy combatant determinations – strained any fair reading of the statute and could not be squared with (or fill a gap created by) Congress's silence. From the standpoint of Jackson's *Youngstown* concurrence, the government's civil-libertarian reading of the DTA was an illustration of the President acting at his "lowest ebb" of power by pressing a reading of a statute – albeit in the hope of salvaging it – that undermined its purpose. The *Boumediene* Court, following *Youngstown*, refused to credit the Solicitor General's eleventh-hour attempt to persuade the Court to adopt a generous interpretation of the DTA that conflicted with congressional intent, even if such a reading was the only way to preserve the constitutionality of the MCA's stripping of habeas corpus.[303]

The failure of political branch deliberation is also evident in *Boumediene*'s treatment of Congress's efforts to strip habeas jurisdiction in the MCA. After *Hamdan*'s methodical interpretation of the DTA, including the Court's determination that habeas jurisdiction remained available for those detainees who brought their habeas petitions prior to the passage of the statute,

[300] *See* Katyal, *supra* note 32, at 109; *see also id.* at 110 (noting the strong opposition by experts to the Administration's interpretation of Common Article 3 of the Geneva Conventions).

[301] *Id*. at 109.

[302] *See supra* note 290 and accompanying text; *see also* Transcript of Oral Argument at 37, Boumediene v. Bush, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196) ("[I]f what the Constitution requires to make the DTA to be an adequate substitute is the power to order release, there is no obstacle in the text of the DTA to that."); *id*. at 52-53 (arguing that, under the DTA, detainees could challenge the breadth of the definition of "enemy combatant").

[303] *Boumediene*, 553 U.S. at 788.

Congress's response fell flat. While one could argue that, by simply cutting off judicial review altogether, Congress did *something*, the Court saw "[n]othing in [*Hamdan* that could] be construed as an invitation for Congress to suspend the writ."[304] Congress's decision merely to eliminate federal jurisdiction, rather than actually create a procedural system that was the product of joint political branch input, undermined "[t]he usual presumption [] that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one."[305] Its lack of involvement in creating any alternative mechanism for the Guantánamo detention tribunals seemed to contradict "the care Congress ha[d] taken throughout our Nation's history to preserve the writ and its function."[306]

B. *Congressional Remands After 9/11*

Once the post-9/11 decisions are understood through the lens of the Court's preference for dual-branch solutions to national security problems, *Chevron*'s absence becomes more understandable. Rather than adopt a default rule of deference to reasonable Executive Branch interpretations of statutes that do not actually delegate power to the Executive to act with the force of law, the Court has required collective political branch assessment of the underlying merits of the Executive's preferred policies. In this way, the Court has attempted, whenever possible, to elevate presidential decisionmaking from *Youngstown* Category Two to Category One.[307] But the political branches have not always responded to the Court's overtures. While the AUMF speaks only generally to a use of force against al-Qaeda and the Taliban,[308] it has served as the primary statutory basis for the Executive Branch's policymaking regarding domestic and international detention, surveillance, and military commissions. Yet, the AUMF provides at best vague indications of the President's national security powers and little clarity on questions such as the definition of those persons the President may detain at Guantánamo, the length of those detentions, the conditions of those detentions, and the substantive rights and remedies cognizable in habeas challenges. While courts have resolved subsidiary elements of these questions, the Supreme Court has mainly adopted a policy of

[304] *Id*. at 735.

[305] *Id*. at 738.

[306] *Id*. at 773.

[307] *See* Levinson & Pildes, *supra* note 215, at 2355-56 ("If courts were less inclined to read ambiguous legislation as affirmative authorizations of executive action, the President would be forced to press Congress to address the merits of the administration's antiterrorism strategy. A default rule against latitudinous interpretations in support of executive power during unified government could be an action-forcing mechanism to press . . . Congress to share responsibility for these difficult choices – or at least give them a serious airing.").

[308] *See supra* note 219 and accompanying text.

remanding these questions to Congress for clarification through statutory delegations, and Congress has generally avoided those calls.[309]

While the resulting statutes contain some important procedural improvements,[310] Congress has generally refrained from legislating on numerous other matters concerning Executive Branch national security powers. *Hamdan*'s requirement for a clear legislative mandate authorizing the President's commissions led to a "quick and inevitably messy quilting bee in Congress" culminating in the MCA.[311] The most recent National Defense Authorization Act, which addresses a few of the questions raised by the Guantánamo litigation, leaves the lion's share of those matters unanswered.[312] Because Congress, when it has acted, generally has done so through broad, vague, and at times sweeping national security legislation, often with little debate and with few (if any) indications of the limits of executive implementation,[313] a number of important issues have been left for judicial development.[314]

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[309] *See* BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 1 (2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf ("Congress could have legislated with respect to these questions and sought to define the rules, but it has not done so to date.").

[310] Those improvements include the following procedural enhancements in military commissions: (1) military judges preside at trials; (2) ex parte evidence is not permitted; (3) evidence extracted through torture or other coercive treatment is excluded; and (4) appeals from the commissions can be taken first to the D.C. Circuit and, eventually, the Supreme Court. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1802-1804, 123 Stat. 2190, 2574-614 (amending scattered sections of 10 U.S.C.); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

[311] *See* Katyal, *supra* note 32, at 106; *id.* at 84-85 ("Working with allies in Congress, the President [] pushed through legislation that attempted to divest or delay federal jurisdiction over cases brought from Guantánamo Bay. This legislation was introduced and passed in the days following the Court's grant of certiorari in *Hamdan*, and the Solicitor General used it as the basis of his motion to dismiss the case from the Supreme Court." (footnote omitted)).

[312] *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298. With the exception of one key provision affirming the President's detention authority, *id.* § 1021(a), the legislation provides little clarity regarding many of the issues courts have struggled to address in a decade's worth of Guantánamo litigation. Other provisions of the legislation only create tension between Congress and the President by explicitly forbidding the latter from transferring Guantánamo detainees for continued confinement in the United States or repatriating detainees to the United States. *Id.* §§ 1026, 1027.

[313] Katyal, *supra* note 32, at 115 ("Instead of engaging in a sober debate about the meaning of constitutional text, history, and precedent, Congress rushed the MCA through without much thought to the constitutional consequences. Congress hoped, as Senator Specter memorably put it, that despite the MCA's 'patently unconstitutional' provisions, the

It should be noted that, since 9/11, Congress has not refrained from enacting detailed framework statutes when it wants to do so. After *Hamdan*, Congress authorized military commissions,[315] and at least one court that had initially rejected the commissions approved them after Congress acted.[316] Other post-9/11 statutes, such as the USA PATRIOT Act, also speak clearly and specifically to national security detention issues by, for example, prescribing clear limits to Executive Branch detention authority in the absence of formal criminal charges or the initiation of removal proceedings.[317] Notably, those provisions have so far survived constitutional scrutiny.[318] But in the post-9/11 arena, clear delegations to the President have been lacking, and the kind of "super-strong" deference championed by *Chevron*-backers has consequently been absent.

C. Chevron*'s Detractors*

While the Supreme Court has rejected Executive Branch decisions lacking in congressional endorsement, the rulings do not necessarily validate the view of those who reject the idea of Executive Branch deference where national security is concerned. For scholars such as Deborah Pearlstein, Jenny Martinez, David Cole, and Martin Flaherty, courts should resolve rights questions at the core of national security disputes by articulating bright-line rules regarding the scope of individual liberty on questions concerning detention, conditions of confinement, surveillance, military commissions, renditions, and the like.[319] Some of these scholars argue, further, that the post-9/11 decisions, while not going far enough to protect the principles of liberty at stake, nonetheless demonstrate a commitment to a civil libertarian jurisprudence that indicates the decline, if not demise, of *Chevron*. But a fair reading of the doctrine is not consistent with such sweeping conclusions.

For Pearlstein, the post-9/11 decisions epitomize the decline of *Chevron* and the ascendancy of the *Marbury v. Madison* principle "to say what the law is" on critical issues of individual liberty and executive power.[320] In the major

courts would 'clean it up.'") (citing Editorial, *Profiles in Cowardice*, WASH. POST., Oct. 1, 2006, at B6).

[314] *See generally* WITTES, CHESNEY & BENHALIM, *supra* note 309.

[315] *See supra* notes 265-66 and accompanying text.

[316] *See supra* notes 267-70 and accompanying text.

[317] *See* 8 U.S.C. § 1226a(a)(5) (2006).

[318] In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), the Court, by a six-to-three vote, upheld the material-support provisions of the PATRIOT Act against an as-applied constitutional challenge. This ruling may suggest that, where Congress legislates with clarity on national security issues – even in the sensitive area of speech – the Court may be more likely to defer. *See generally* Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 445 (2012).

[319] *See supra* notes 9-11 and accompanying text.

[320] Pearlstein, *supra* note 9, at 784-86, 822-23.

post-9/11 Supreme Court decisions, "the Court has swept aside vigorous arguments by the executive that it refrain from engagement . . . . Moreover, the Court has scarcely noted any doctrinal tradition of interpretive 'deference' on the meaning of the laws."[321] Hence, for Pearlstein, "on descriptive and normative grounds, the events of the past decade have called the prevailing account [of foreign affairs exceptionalism] into question."[322] Other civil libertarian scholars have echoed this view.[323] Martin Flaherty argues that "in every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch, even when supported by Congress."[324] As he sees it, the Supreme Court "reclaim[ed] its primacy in legal interpretation" in the post-9/11 decisions, which "represent a stunning reassertion of the judiciary's proper role in foreign relations."[325]

While the post-9/11 decisions do assert some role for courts in deciding national security cases, *Chevron*-detractors overstate the case for civil libertarianism. *Hamdi* and *Boumediene* are, in some respects, civil libertarian rulings, for in both cases the Court rejected the premise that the Executive possessed unlimited powers to detain indefinitely enemy combatants. But the cases provide very little content regarding the scope of individual rights, leading many civil libertarian theorists to critique the decisions as devoid of substantive content or clarity.[326] Moreover, *Hamdi* provides *Chevron*-style support for the President's interpretation of the AUMF, at least insofar as the detention of battlefield captures is concerned.[327] The Court had other, firmer civil libertarian bases upon which to decide that case, not least Justice Scalia's

[321] *Id*. at 785-86; *see also id.* at 785 ("[E]vents of the past decade have called the prevailing account into question. . . . [I]n a series of decisions involving national security, the Court has been anything but deferential to the executive's interpretation of the relevant statute or treaty.").

[322] *Id.* at 785.

[323] *See, e.g.*, Flaherty, *supra* note 9, at 122 ("At critical points, moreover, each of these rejections involved the Court reclaiming its primacy in legal interpretation, an area in which advocates of judicial deference have appeared to make substantial progress. The Court nonetheless rejected deference in statutory construction in *Rasul v. Bush*. It took the same tack with regard to treaties in *Hamdan v. Rumsfeld*. It further rejected deference in constitutional interpretation in both *Hamdi v. Rumsfeld* and *Boumediene v. Bush*." (footnotes omitted)).

[324] *Id.*

[325] *Id.*

[326] *See* Martinez, *supra* note 11, at 1014-15 ("Why is it that litigation concerning the alleged enemy combatants detained at Guantanamo and elsewhere has been going on for more than six years and almost nothing seems to have actually been decided?"); David Cole, *After September 11: What We Still Don't Know*, N.Y. REV. BOOKS, Sept. 29, 2011, at 27, 28 ("The Court's [post-9/11] decisions were in truth quite limited. Two decisions addressed only whether Guantánamo detainees could be heard in court, but said nothing about the law that would apply once their claims were adjudicated.").

[327] *See supra* notes 232-36 and accompanying text.

dissenting opinion that Hamdi, a citizen, deserved all of the protections of criminal procedure.[328] Instead, the Court took a middle-ground approach, siding largely with the Bush Administration regarding its power to detain, at least in that case. Both the plurality and Justice Souter's partial concurrence and dissent – six Justices in all – agreed Congress could delegate such detention powers to the President, rejecting Justice Scalia's civil-libertarian claim that the government was required to charge Hamdi with a crime or release him.[329] Hence, the decisions are hardly major victories for advocates of civil libertarianism.[330]

Deborah Pearlstein argues further that the Supreme Court's recent national security and domestic decisions evidence *Chevron*'s "less-than-transformative impact" on decisionmaking[331] and lack of "doctrinal stability."[332] Citing recent empirical scholarship assessing judicial citations to *Chevron* across a range of fields,[333] Pearlstein claims that "*Chevron* has exerted anything but a defining hold on Supreme Court treatment of agency interpretation of federal laws"[334] and that the academic enthusiasm for *Chevron* is simply out of step with broader doctrinal trends within administrative law. As she explains:

> It is perhaps more than a little ironic that *Chevron* has gained interest from foreign relations scholars at the same time that scholars of administrative law have been demonstrating with increasing persuasiveness how limited the impact of *Chevron* has been in cases reviewing agency statutory interpretation. . . . Indeed, to the extent it is possible to tell a unified, qualitative story about the trajectory of the Court's major administrative law cases since 1984, it is mostly a story that sees the Court narrowing the range of agency decisions to which *Chevron* might apply and insisting upon the significant interpretive power the Court retains even within the *Chevron* regime. More, it shows a Court chafing against the sometimes awkward limits *Chevron* seems to

[328] Hamdi v. Rumsfeld, 542 U.S. 507, 573-75 (2004) (Scalia, J., dissenting); *see also supra* note 240 and accompanying text.

[329] *See* Sunstein, *supra* note 1, at 2670 ("The *Hamdi* plurality . . . did not question Justice Souter's claim that a clear statement was required. It concluded instead that the AUMF provided that statement, because the detention of 'enemy combatants,' at least for the duration of the conflict in which the capture occurred, 'is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.'" (quoting *Hamdi*, 542 U.S. at 518 (plurality opinion))).

[330] *See* Martinez, *supra* note 11, at 1092 (arguing that the pre-*Boumediene* decisions "resulted in a great deal of process, and not much justice").

[331] Pearlstein, *supra* note 9, at 811.

[332] *See id.* at 809; *id.* at 787 ("*Chevron* is not nearly as doctrinally stable as its advocates suggest.").

[333] *See generally* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).

[334] Pearlstein, *supra* note 9, at 787.

> impose on why executive views might matter and when they may be taken into interpretive account.[335]

Pearlstein's belief in the diminishing importance of *Chevron* in the domestic context leads her to conclude that *Chevron* "seems a less than ideal candidate for resolving how the courts and the executive should share interpretive power in the law of foreign relations."[336]

There is an interesting symmetry between the descriptive accounts by *Chevron*-detractors, who cast the post-9/11 decisions as non-deferential, and *Chevron*-backers, who take the contrary view. For, despite their differences, both camps rely on the premise that the post-9/11 cases reflect a doctrinal break from a more deferential past, an argument that not only misconstrues the importance of congressional delegations in prior national security cases but disregards *Youngstown*'s continued centrality in the post-9/11 decisions. To the extent that recent cases reflect a change from the past, the shift is reflected in the greater clarity with which the Court has promoted joint political branch decisionmaking as a predicate for deference. That norm, couched as it is in the requirement of congressional delegations, is reflected in the recent non-emergency cases of administrative law as well.[337]

D. Chevron, Youngstown, *and Congressional Delegation*

Surely one of the advantages of the *Chevron* doctrine is that it appears to replace *Youngstown*, which scholars have found to be an imprecise and malleable framework,[338] with a simpler and cleaner two-step process in which courts either follow clear statutory language or, in ambiguous cases, defer to reasonable presidential action.[339] But the effort by *Chevron*-backers to expand the doctrine has placed the case on a collision course with its underlying delegation-based foundation in a way that undermines a series of post-*Chevron* cases in the domestic context.[340]

Those who back *Chevron* in national security argue that legislative silence is mere "ambiguity" that should "count as [an] implicit delegation[]"[341] in a

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[335] *Id.* at 810-11.

[336] *Id.* at 810.

[337] *See supra* Part I.C.

[338] *See, e.g.*, Katyal, *supra* note 32, at 99 (observing how the "all-things-to-all-people quality" of Justice Jackson's concurrence "can provide arguments favoring any branch of government under many circumstances"); Martinez, *supra* note 11, at 1076 ("[W]hen a court wants to uphold the substance of government action, it does so by pushing the case into *Youngstown* categories one or two (finding congressional authorization), and when it wants to strike an action down, it pushes the case into category three."); *cf.* Bellia, *supra* note 20, at 94 ("[T]he language in the [*Youngstown*] concurrences is sufficiently open-ended to support a number of different outcomes in any given case.").

[339] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

[340] *See supra* Part I.C.

[341] Sunstein, *supra* note 1, at 2666-67.

court's "attempted reconstruction of congressional will."[342] In making this claim, *Chevron*-backers repackage cases of congressional silence, which belong in Jackson's Category Two – the "zone of twilight" – into a consolidated super-Category One. Their expanded Category One includes executive decisionmaking based on legislative authorization as well as circumstances in which the legislature remains silent. While such efforts to reconstruct legislative intent may be possible where delegations are apparent, the argument goes too far when it effectively becomes a substitute for the legislative process. Put differently, leaving it to the Executive to craft the policies of its choosing without legislative parameters simply cannot be squared with even a generous reading of *Chevron*, a point that is reinforced by recent cases in the domestic context. In the case of legislative silence, and in the absence of a theory of plenary Executive Branch powers where national security is concerned,[343] *Chevron* cannot fill the gap. This explains why the Court, finding itself within the "zone of twilight," often remanded questions to Congress for legislative clarification as opposed to following the approach called for by *Chevron*-backers.

For Jackson, presidential action taken in the context of vague legislation should be analyzed through the prism of Category Two, leaving the policy susceptible, at least potentially, to judicial invalidation. To the extent that *Chevron*-backers overstate the role of the Executive's institutional competence and understate the role of congressional delegations, they stretch *Chevron* beyond the appropriate boundaries that courts have established in the domestic context.[344] Their reading of the doctrine would eliminate *Youngstown*'s "zone of twilight," effectively replacing Justice Jackson's three categories with only two, obscuring – indeed, erasing – a critical analysis about legislative silence that is critical to the *Chevron* Step Zero inquiry.

The distinction between legislative ambiguity and legislative silence may at times be hard to define, but this difference remains important, as it informs much of the debate about *Chevron* Step Zero and Jackson's *Youngstown*'s Category Two. Simply calling for especially "generous" statutory constructions because national security is concerned finesses the question in ways that are neither doctrinally accurate nor normatively appealing. Sunstein argues, for example:

> Insofar as the AUMF is applied in a context that involves the constitutional powers of the President, it should be interpreted generously. In this domain, the President receives the kind of super-

[342] *Id.* at 2667.

[343] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 516-17 (2004) (plurality opinion) (refusing to endorse the government's claim "that no explicit congressional authorization [for detention] is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution").

[344] *See supra* Part I.C.

> strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities.[345]

But where those constitutional powers are themselves a gray area,[346] it is improper to claim that *Chevron* – a case about statutory interpretation – can serve as a one-way ratchet for Executive deference simply because the Court finds itself interpreting presidential decisions falling within the national security domain. The post-9/11 decisions resist that idea by requiring Congress to engage the legislative process, producing, if not a conversation between the President and Congress, "a dialogue between Congress and the Court."[347]

While *Chevron*-backers tend to use administrative law deference norms to collapse the government's shared national security powers into a single branch, *Chevron*-detractors overstate the appropriate judicial response to national security crises, both descriptively and normatively.[348] *Chevron*'s detractors, for their part, push zone-of-twilight cases into a super Category Three, in which executive power is at its lowest ebb and where courts would accord no deference to the Executive. While it may be true to some degree that "the Court's recent foreign relations cases challenge traditional accounts of judicial deference,"[349] the notion that 9/11 changed everything overstates the extent of judicial activism during the past decade. The decisions between *Rasul* and *Boumediene*, rather than reflecting a newfound assertion of judicial power, demonstrate continuity with recent domestic law interpretations of *Chevron* by deferring to policies that are the result of joint political branch decisionmaking while treating more skeptically policies that lack a statutory foundation. By relying on the *Youngstown* framework, the Court's post-9/11 decisions have engaged a process-oriented methodology that avoids the polls of executive unilateralism and civil libertarianism.[350]

E. Chevron, *Executive Unilateralism, and Civil Libertarianism*

Although certain *Chevron*-backers in theory call for a statutory, not constitutional, solution to national security problems, they advocate deference even when "there is no interpretation of a statutory term[,] but simply a policy judgment by the executive."[351] This expansive theory of *Chevron* not only

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[345] Sunstein, *supra* note 1, at 2671; *see also* Bradley, *supra* note 1, at 673.

[346] *See, e.g.*, *supra* note 343.

[347] Boumediene v. Bush, 553 U.S. 723, 738 (2008).

[348] *See supra* notes 320-30 and accompanying text.

[349] Pearlstein, *supra* note 9, at 809.

[350] *See generally* Issacharoff & Pildes, *supra* note 30.

[351] Posner & Sunstein, *supra* note 1, at 1199. While Curtis Bradley argues that the concern of an overly deferential *Chevron* doctrine has "less force in the context of foreign affairs law – an area characterized long before *Chevron* by exceedingly broad executive branch power and sweeping deference by the courts," Bradley, *supra* note 1, at 673, this argument, too, relies on certain premises about national security doctrine that are called into

rests on a dubious doctrinal foundation[352] but is at times virtually indistinguishable from a theory of unilateral executive power that disregards entirely *Youngstown*'s centrality to national security law. As *Chevron*-backers such as Posner and Sunstein explain, "in the domain of foreign relations, the approach signaled in *Chevron* should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications," a point that is strengthened by "considerations of constitutional structure [that] argue strongly in favor of deference to the executive"[353] and that "makes the argument for deference stronger than in *Chevron* itself."[354] By advocating a vast policy space for the Executive that supplants congressional legislation whenever statutory authority is absent, their argument comes closer to the brand of pure and unalloyed executive unilateralism that the Court has rejected throughout the post-9/11 decisions.[355] Their enthusiasm for single-branch approaches causes them to espouse a theory outside the mainstream understanding of *Chevron* that undermines the "realistic and middle-ground alternative" that an administrative law approach can bring to the polarized debate between executive unilateralists and civil libertarians.[356]

Perhaps it should not be surprising, then, that some *Chevron*-backers also support broader theories of executive unilateralism. For example, John Yoo, who has argued for a model of foreign affairs law based on executive unilateralism,[357] also makes the case for *Chevron* deference in national security

question not only in the post-9/11 context, but in seminal doctrines such as *Youngstown*.

[352] *See supra* Part I.C.

[353] Posner & Sunstein, *supra* note 1, at 1205.

[354] *Id.*

[355] Executive unilateralism is a theory about the President's constitutional powers based upon constitutional interpretation and the relative institutional competencies of the three branches. Adherents of this view maintain that judicial review should, at most, determine whether the appropriate decisionmaker (namely, the Executive) took appropriate action. Assuming that the answer to that question is yes, no further review by a court would be necessary. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 488 (2002) ("We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the nation in its foreign relations, to use military force abroad, especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States."). Its adherents argue that the Executive Branch, rather than courts, has unique institutional advantages when responding to national security emergencies that the more deliberative legislative and judicial branches lack.

[356] Bradley, *supra* note 1, at 674 (presenting a *Chevron*-based theory as a middle ground position between the polls of civil libertarianism, which takes a "*Marbury* perspective," and executive unilateralism, which seeks "blanket judicial deference").

[357] *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005). Proponents of executive unilateralism have critiqued the Supreme Court's post-9/11 decisions for their lack of deference as well. For example, Yoo critiques *Boumediene* as an exercise of "judicial imperialism of the highest order." John

jurisprudence.[358] While *Chevron*-backers often resist the comparison of their administrative law theory of national security jurisprudence with executive unilateralism,[359] the lack of any strict delegation requirement, and the replacement of that requirement with strong deference to the Executive on functionalist grounds, begs the question *Chevron* was meant to solve in the first place through legislative delegations. Hence, it seems entirely reasonable to draw parallels between the advocacy of *Chevron*, at least in its most extreme articulation, with an argument favoring the consolidation of all national security powers into a single branch.

The risks are especially apparent when *Chevron*-backers push their argument for broad deference from the realm of statutory *ambiguity* – where there is at least plausible (if contested) justification for agency or presidential self-expansion – to cases of legislative *silence*. Although *Chevron*-backers argue that "[t]he executive is in the best position to reconcile the competing interests at stake, and in the face of statutory *silence* or ambiguity, Congress should therefore be presumed to have delegated interpretive power to the executive,"[360] this purely functional understanding of *Chevron* disregards its formal foundation. Given Congress's apparent disinterest in authorizing, much less reversing, executive national security policy through legislation since 9/11,[361] the *Chevron*-in-national-security argument, as a practical matter, collapses into a theory of single-branch governance.

These problems would be severely lessened if *Chevron*-backers grounded their view of deference in arguments about legislative supremacy, or if they highlighted the importance of procedural formalities (such as notice-and-comment rulemaking or formal adjudications) that administrative law doctrine takes as an indication of such a delegation.[362] But to the extent that *Chevron*-backers countenance single-branch decisionmaking, it is hard to square their view either with the underlying delegation requirement of administrative law

Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23.

[358] *See* Ku & Yoo, *supra* note 1.

[359] Cass Sunstein points out he is "not assuming that the President has clear constitutional power to do as he proposes. Under that assumption, the AUMF would be irrelevant. The question here is how the AUMF should be construed when there is a plausible claim – not a holding – that the President has the constitutional power to act." Sunstein, *supra* note 1, at 2671 n.67.

[360] Posner & Sunstein, *supra* note 1, at 1204 (emphasis added).

[361] *See, e.g.*, Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 526-27 (2011) (observing "Congress's acquiescence in the growth of executive power [and] general refusal to counter executive aggrandizement"); Levinson & Pildes, *supra* note 215, at 2352 ("[T]he most glaring institutional fact about the war on terror so far is how little Congress has participated in it. The President has resolved most of the novel policy and institutional challenges terrorism poses with virtually no input or oversight from the legislative branch.").

[362] *See supra* notes 130-38 and accompanying text.

or with the Supreme Court's interpretations of *Chevron* in the domestic context.

The Court's invocation of *Youngstown* has often resulted in seemingly non-deferential rulings. This is because "the *Youngstown* framework assumes that Congress will be actively involved in making the difficult policy decisions required during wartime and will provide the oversight of Executive-initiated action that courts feel ill-suited to offer through first-order rights adjudication."[363] But the opinions have been geared less toward restraining the Executive or vindicating certain conceptions of civil liberties, and more toward revitalizing Congress and involving the courts in the process of restoring that institutional balance. Once the post-9/11 decisions are understood to require congressional delegations to authorize executive action, it is hard to see the rulings as either purely deferential or non-deferential. Rather, the cases reflect a more practical inquiry that recalls "the imperatives of events and contemporary imponderables"[364] that define Jackson's "zone of twilight."[365]

Instead of adopting a broad view of civil libertarianism or executive unilateralism, Supreme Court majorities of the past decade have engaged in a more focused, *Youngstown*-based inquiry. This pragmatic approach, which has implications for security-related questions beyond the post-9/11 habeas decisions addressed in this Article,[366] avoids the polls of pure deference or complete non-deference. It shifts the emphasis away from any single branch of government toward a collective responsibility of the political branches to engage one another on policy, promoting an inquiry that turns less on whether the Executive should "win" and more about the terms on which courts vindicate executive policies or individual liberties. By resetting the proper institutional balance, Jackson's framework clarifies the proper scope of judicial review during times of emergency, providing an important rule-of-law basis for judicial review of national security policy.

F. Chevron, Youngstown, *and the Rule of Law*

One critic of such a rule-of-law framework for national security is Adrian Vermeule who, in a recent article, argues that national security cases expose

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[363] Levinson & Pildes, *supra* note 215, at 2351.

[364] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[365] *Id.*

[366] *See, e.g.*, Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 562-72 (2012) (discussing CIA covert activities such as drone strikes, secret detentions, and the use of CIA-trained proxy forces). Notably, the form and content of the inter-branch dialogue could vary based on the particular policy issue involved. *See id.* at 588-89 (examining certain requirements that information be shared with particular congressional committees in the context of various CIA covert activities).

the lack of any rule-of-law basis to administrative law.[367] Vermeule rejects the idea that *Chevron*'s delegation-based foundation can provide a taming influence on national security doctrine. For Vermeule, administrative law has, at its core, legal holes that, during times of emergency, inevitably lead to judicial abdication. Some of these holes (which he calls "black holes") are "themselves created by law"[368] and exempt executive policy decisions from judicial review.[369] Other holes (which he calls "grey holes") include open-ended standards[370] that courts can "dial up" or "dial down" as needed.[371] Vermeule asserts that these holes account for the lack of any "real" judicial review of emergency-law questions because they allow courts to dial down review entirely, at which point judicial review becomes more apparent than real.[372] He argues that these holes evidence the impossibility "that executive action arising from war or emergency be governed by 'ordinary' administrative law, as opposed to some extraordinary law applicable during emergencies."[373]

Vermeule highlights *Chevron* as an example of a gray hole, asserting that "the inquiries at *Chevron* Steps One and Two at least sometimes function as adjustable parameters, whose intensity is dialed up or down as perceived emergencies come and go."[374] In such cases, "judges purporting to review agency action for conformity with statutes adjust the intensity of review sharply downwards in times of perceived emergency, creating cases in which apparent judicial oversight becomes insubstantial."[375] In this way, "ordinary principles of interpretation are bent or mutated in ways that favor upholding administrative decisions. Judicial review on questions of law becomes less and less demanding, a process that taken to its limit produces a legal gray hole. This process can happen under *Chevron*, or without *Chevron*."[376]

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[367] *See generally* Vermeule, *supra* note 1.

[368] *See also id*. at 1102; *see id.* at 1096 ("Legal black holes arise when statutes or legal rules 'either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude[] judicial review of executive action.'" (footnotes omitted) (quoting DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3, 42 (2006))).

[369] Vermeule, *supra* note 1, at 1096. For examples of situations in which executive or administrative action can be excluded from the reach of the Administrative Procedure Act (APA) during times of emergency, see *id*. at 1107-16.

[370] *See id*. at 1096 ("Grey holes, which are 'disguised black holes,' arise when 'there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases.' Grey holes thus present 'the façade or form of the rule of law rather than any substantive protections.'" (footnotes omitted) (quoting DYZENHAUS, *supra* note 368, at 42)).

[371] Vermeule, *supra* note 1, at 1118.

[372] *Id.* at 1119.

[373] *Id.* at 1102.

[374] *Id.* at 1127.

[375] *Id.*

[376] *Id*. at 1130.

However, in both the domestic and national security contexts, the Supreme Court has resisted any apparent temptation to "dial down" review in the ways Vermeule describes. The Court, by invoking *Youngstown*, has tamed *Chevron* doctrine from becoming precisely the type of legal hole Vermeule attributes to the administrative law response to emergencies. While Vermeule considers only Circuit-level decisions,[377] where one finds many examples of broad deference to the Executive Branch,[378] the Supreme Court cases are not so easily ignored.[379] Importantly, the decisions between *Rasul* and *Boumediene* discussed in this Article constitute Supreme Court *reversals* of Circuit-level rulings that might otherwise be used to illustrate the gray holes Vermeule attributes to national security jurisprudence.[380] While Vermeule is certainly correct that *Chevron* (and other tests of administrative law) can be subject to dynamic interpretations across different cases, he rejects any possibility of the kind of rule-of-law framework that has taken hold in the post-9/11 context. Rather than expose gray holes of administrative law, the post-9/11 decisions have invoked *Youngstown* as a way to bring important structure to national security, a field of law that is often bereft of clear procedural and substantive guidelines.

While there is more to be written about the intersection between a properly scaled *Chevron* doctrine and the types of rule-of-law doctrines Vermeule

[377] *Id.* at 1097 (arguing that circuit court rulings are more important than Supreme Court law for understanding how the law "actually operates").

[378] *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (upholding government-friendly procedures in habeas proceedings brought by a Guantánamo detainee), *cert. denied*, 131 S. Ct. 1814 (2011); Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (determining that federal courts did not have jurisdiction to consider the petitions for habeas corpus brought by detainees at Bagram Air Force Base in Afghanistan); Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) (holding that district courts could not require the government to provide counsel thirty days' notice prior to effecting a detainee's transfer from Guantánamo where the detainee feared torture); Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (holding that the district court could not order detainees to be released into the United States), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S.Ct. 1631 (2011).

[379] *Cf.* Cole, *supra* note 326, at 27-28 (arguing that while it "would be wrong to say that the Supreme Court was the only, or even the principal, checking mechanism" after 9/11, "[o]ne of the most important lessons of the past decade may be that the rule of law, seemingly so vulnerable in the . . . aftermath [of 9/11], proved far more resilient than many would have predicted"); *id*. (pointing out that the post-9/11 period demonstrates that "the values of the rule of law are more tenacious than many cynics and 'realists' thought, certainly than many in the Bush administration imagined").

[380] *See* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd and remanded*, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *vacated and remanded*, 542 U.S. 507 (2004); Al Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003), *rev'd and remanded*, Rasul v. Bush, 542 U.S. 466 (2004).

rejects in the national security context – a matter for future inquiry – it is clearly the case that, during the post-9/11 period, the Supreme Court has kept legal holes at bay by requiring the political branches to engage one another over critical questions at the intersection of individual liberty and executive power. By emphasizing *Youngstown*'s prioritization of dual-branch solutions to questions of national security, the Supreme Court's recent national security decisions have been catalytic rather than preclusive, promoting clash, conversation, and dialogue within the political branches. Those decisions are remarkably consistent with the development of deference doctrines in the ordinary administrative law context, pointing to a vital interplay between the national security and domestic cases that highlights the vitality of inter-branch solutions to questions in both legal domains.

CONCLUSION

While the question of the appropriate level of judicial deference to the Executive dominates contemporary scholarship about the aftermath of 9/11, scholars have yet to consider how the Court's recent decisions restore *Youngstown*'s delegation requirement to national security law. The Court's invocation of *Youngstown* sheds important light on the *Chevron* debate, which remains caught in a polarized clash between those who would expand the case beyond recognition and those who would jettison the framework entirely. The Supreme Court's insistence on meaningful dual-branch solutions to national security preserves a mainstream reading of *Chevron* that keeps the case in line with its recent domestic interpretations. Indeed, *Chevron* has important significance to national security, though not in the way that many of its backers have argued. The Court must guard *Chevron*'s borders to ensure Congress's meaningful participation in the lawmaking process rather than allow Congress to "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[381] Doing so upholds critical rule-of-law values within the national security domain.

[381] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).