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TEXTUALISM IN THE "ZONE OF TWILIGHT" UNDERSTANDING TEXTUALISM'S EFFECTS ON *YOUNGSTOWN* CASES

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INTRODUCTION

Under the three-part framework first set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, the validity of executive action in the realm of national security and foreign affairs depends substantially on statutory language and, thus, statutory interpretation. This article examines textualism's effects on cases in this area of law and on the area of law itself. I begin by providing an overview of *Youngstown* and textualism. Then, focusing on Supreme Court cases that have interacted directly with the *Youngstown* framework, I examine how three categories of legislative history have been employed in *Youngstown* cases and conclude that one of these categories has a strong tendency to benefit Congress. Next, I distinguish my argument that textualism operates to eliminate a congressional advantage in *Youngstown* cases from the unsupported and mistaken notion that textualism has an inherent proexecutive tilt. I conclude by discussing textualism's effects on national security and foreign affairs law more broadly.

I. THE *YOUNGSTOWN* FRAMEWORK AND THE RISE OF TEXTUALISM

In April 1952, President Truman issued an executive order directing his Secretary of Commerce to seize most of the nation's steel mills. Employees of the mills had threatened a nationwide strike, and the President believed the seizures necessary to ensure that the U.S. military would have the steady supply of steel it needed to maintain the war effort in Korea. But Congress had not authorized these seizures, and the steel mills challenged them on the ground that the President had no constitutional power to effectuate them absent a statute giving him the authority to do so. President Truman disagreed, asserting that the sum of his powers under the Constitution enabled him to meet the threat posed by the labor dispute regardless of whether Congress had explicitly authorized the seizures. The lawsuit, styled *Youngstown Sheet & Tube Co. v. Sawyer*, quickly made its way before the Supreme Court of the United States. In one of the most significant judicial decisions ever to address the separation of powers within the federal government, the Court held the seizures unlawful and

1 Associate, Gibson, Dunn & Crutcher LLP. Yale Law School, J.D. 2012. Thanks to Samina Bharmal and the editorial staff of the National Security Law Brief for their excellent editorial work, to Daniel Suhr and Tommy Traxler for providing helpful feedback during the drafting process, and to my wife Amanda for her endless support and encouragement.

affirmed an order enjoining them.[2]

But the opinion of the Court in *Youngstown* was cursory and, from a precedential standpoint, not exceedingly helpful for deciding future disputes implicating the President's national security and foreign affairs powers. Perhaps this is to be expected: when it comes to allocating these powers between the political branches, the Constitution itself is fairly opaque. On the one hand, the Constitution vests "[a]ll legislative powers" in Congress,[3] including the power to "declare War," "regulate Commerce with foreign Nations," and "raise and support Armies."[4] On the other hand, the Constitution provides that "the executive Power shall be vested in a President of the United States of America"[5] who not only shall "take Care that the Laws be faithfully executed,"[6] but who also shall be "Commander in Chief"[7] of the armed forces and who possesses important foreign affairs powers, including the power to make treaties (with the advice and consent of the Senate)[8] and the power to receive ambassadors.[9] Indeed, the aggregate of the President's powers has led the Court to refer to the President as the "sole organ of the federal government in the field of international relations."[10]

In an effort to provide a straightforward approach to the nebulous and tension-fraught area of national security and foreign affairs law, Justice Jackson authored a concurring opinion in *Youngstown* setting forth a three-part framework for determining the constitutional legitimacy of executive action. It was summarized as follows by Chief Justice Roberts in 2008:

> 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." Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." [11]

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

3 U.S. Const. art. I, § 1.

4 *Id.* art. I, § 8.

5 *Id.* art. II, § 1.

6 *Id.* art. II, § 3.

7 *Id.* art. II, § 2.

8 *Id.*

9 *Id.* art. II, § 3.

10 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (quoting 6 Annals of Cong. 613 (1800)).

11 Medellín v. Texas, 552 U.S. 491, 524–25 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 637–38 (1952) (Jackson, J., concurring)) (alterations in original) (citations omitted). My use of the terms "Category I," "Category II," and "Category III" in this article refers to the categories identified in the quoted language above.

Simple but insightful, this framework has now been adopted by the Court[12] and has only increased in importance since the time it was penned.[13] New threats to the United States' security and interests have led modern Presidents to become increasingly bold in exercising national security and foreign affairs authority,[14] and as Congress has occasionally sought to curb that trend through legislation,[15] the result has been an increase in significant "*Youngstown* cases"[16] reaching the Court.[17]

Meanwhile, as *Youngstown* was reshaping the way in which courts conceptualized the validity of executive action in the realm of national security and foreign affairs, an intellectually robust brand

12 *See, e.g., id.* at 524 ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

13 *See* Michel Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 215 (2002) ("In the world after September 11, 2001, there can no longer be any doubt: *Youngstown Sheet & Tube Co. v. Sawyer* is one of the most significant Supreme Court decisions of all time.").

14 With respect to national security decisions, conflicts initiated and sustained by the President without express congressional authorization are too numerous to list in detail here but have been summarized elsewhere, including RICHARD F. GRIMMETT, CONG. REASEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2012). The Korean War (1950–1953) was the first large-scale operation of that nature. CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 234 (3d ed. 2009). Recent drone strikes continue to raise questions about the scope of congressional authorization to be found in the Authorization for Use of Military Force ("AUMF") passed in 2001, Pub. L. No. 107-40, 114 Stat. 224 (2001). *See Congress Looks To Limit Drone Strikes*, CBSNEWS, Feb. 5, 2013, http://www.cbsnews.com/8301-250_162-57567793/congress-looks-to-limit-drone-strikes/. As for the realm of foreign affairs and international relations, several modern examples of executive action in this area are discussed later in this article.

15 *See, e.g.*, *Congress Looks To Limit Drone Strikes*, *supra* note 14. One major way in which Congress sought to curb the increase in unilateral foreign affairs and national security action taken by the President was passing the War Powers Resolution over the President's veto in 1973. *See* Pub. L. No. 93-148, 87 Stat. 555, 559–60 (1973). However, the result has been a tension-filled legal atmosphere in which both Congress and the President assert constitutional justification for their respective positions in principle even as they rely in fact upon the terms of the War Powers Resolution. Thus, recent Presidents of both major political parties have sought to justify exercises of executive power by arguing, for example, that commitments of U.S. troops abroad were not made into "hostilities" within the meaning of the War Powers Resolution. *See, e.g.,* GRIMMETT, *supra* note 14 (describing recent presidential compliance with the War Powers Resolution); Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011) *available at* http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all (describing President Obama's argument that the War Powers Resolution was inapplicable to operations in Libya because the situation there did not amount to "hostilities" within the meaning of the War Powers Resolution). All the while, however, these Presidents have been asserting that the Commander-in-Chief power is sufficient to justify their decisions. *See* GRIMMETT, *supra* note 14, at 2 ("[S]ince the War Powers Resolution's enactment over President Nixon's veto in 1973, every President has taken the position that it is an unconstitutional infringement by the Congress on the President's authority as Commander in Chief."). Indeed, even when the President provides reports to Congress as the War Powers Resolution provides, such reports are made "consistent with," not "pursuant to," the War Powers Resolution. *E.g., id.* at 1 (describing President Obama's reports to Congress on the situation in Libya and on counterterrorism actions by the U.S. military).

16 The term "*Youngstown* cases" is used throughout this article to refer to cases requiring that Justice Jackson's *Youngstown* framework be applied—i.e., cases implicating the lawfulness of executive action in the realm of national security and foreign affairs.

17 Since 2000, the Supreme Court has decided five cases in which the Justices have interacted directly and substantially with the *Youngstown* framework. *See* Medellín v. Texas, 552 U.S. 491 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

of textualism began reshaping the way in which judges conceptualized statutory interpretation.[18] The defining characteristics of this "new textualism" are by now well-known: ascertaining the meaning of the enacted text of the statute at issue, jettisoning the pursuit of congressional intent via legislative history, and utilizing canons of construction to assist in the interpretational effort.[19] But when textualism was first gaining acceptance in the courts, it represented a significant departure from what had been the prevailing norm. With legislative history more readily available than in previous generations, judges in the mid-twentieth century often relied heavily upon it in their efforts to ascertain and give effect to Congress's apparent purpose or intent in passing a given statute. As textualism gained traction in the 1980s, however, citations to legislative history by the Court waned considerably, reaching their lowest post-1950 levels in 2004.[20] While the debate over methods of statutory interpretation still continues,[21] it is now safe to say that textualism has fundamentally altered the modern landscape of statutory interpretation.[22] Indeed, one commentator has written that "textualists have been so successful discrediting strong purposivism, and distinguishing their new brand of 'modern textualism' from the older, more extreme 'plain meaning' school, that they no longer can identify, let alone conquer, any remaining territory between textualism's adherents and nonadherents."[23]

This seismic shift in statutory-interpretation methodology usually manifests itself on a case-by-

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18 In this article, "textualism" is used to refer only to the theory of statutory interpretation. The principles of textualism can be applied in other contexts as well. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A Matter of Interpretation: Federal Courts and the Law 37 (Amy Gutmann ed., 1998) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)) (describing how textualism can be used when interpreting the Constitution); *Medellín*, 552 U.S. at 506–23 (2008) (examining the treaty's text to determine whether or not it is self-executing).

19 For a discussion of textualism's substance and theory, see generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70 (2006); and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989). For a more thorough discussion of textualism's history, see generally Eskridge, Jr., *supra*; and Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 5–29 (2006).

20 An empirical study of the Supreme Court's statutory-interpretation cases reveals that, beginning in the mid-1980s, the Court's use of legislative history dropped precipitously. *See* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 Wm. & Mary L. Rev. 1653, 1715 (2010) ("[F]rom the 1950s through the early 1970s, the Court became increasingly enamored of legislative history. . . . [L]egislative history usage hit its overall peak of nearly 70% twice—once in 1973 and again in 1984. By the mid-1990s, however, it had dropped sharply. . . . By the 2004 term, legislative history usage had reached its nadir, with only 11.1% of the Justices' statutory interpretation opinions making reference to legislative history."). Other empirical studies and anecdotal evidence confirm this trend. *See* Molot, *supra* note 19, at 32 & nn.135–137.

21 *See, e.g.*, Annie Sweeney, *Scalia Wages War of Words with Federal Appeals Judge in Chicago*, Chi. Trib., Sept. 19, 2012, http://articles.chicagotribune.com/2012-09-19/news/ct-met-posner-scalia-scuffle-20120919_1_textual-originalism-scalia-interpretation-of-legal-texts (describing Justice Scalia's public debate with Seventh Circuit judge Richard Posner, which covered, among other things, Justice Scalia's textualist approach to statutory interpretation).

22 *See* Molot, *supra* note 19, at 36 (noting that neither textualism's adherents nor its nonadherents have recognized "just how thoroughly modern textualism has succeeded in dominating contemporary statutory-interpretation"); s*ee generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750 (2010) (explaining textualism's role in prompting and shaping statutory interpretation debates taking place within the states).

23 Molot, *supra* note 19, at 2.

case basis as textualist judges interpret statutes differently than their nontextualist colleagues. And since the linchpin of Justice Jackson's *Youngstown* framework[24] is whether and how Congress has already legislated in the area at issue, these case-specific effects are certain to be evident in *Youngstown* cases. But textualism's effects on national security and foreign affairs law extend beyond influencing the outcomes of individual cases. *Youngstown* cases are unique in that regardless of the litigants' identities, the real parties in interest are always the two branches of government responsible for passing the very legislation that determines how national security and foreign affairs powers will be allocated between them—namely, Congress and the President. This means that the real parties in interest in *Youngstown* cases possess both the ability to influence the application of the *Youngstown* framework and a strong incentive to use that ability. But while Congress and the President both have important roles to play in enacting statutes, only Congress can directly shape the content of these statutes' unenacted legislative histories.[25] By exploring how Congress exercises that power, this article explains textualism's impact on *Youngstown* cases and its effects on national security and foreign affairs law more broadly.

II. TEXTUALISM'S EFFECTS ON *YOUNGSTOWN* CASES

One key feature of all theories of statutory interpretation is that they define the realm of statutory-interpretation "evidence" that judges may permissibly consider when interpreting stat-utes. Thus, nontextualist theories embrace legislative history as an important source of evidence relevant to the statutory-interpretation enterprise, whereas textualism does not. This distinction between textualist and nontextualist theories may have important implications for national security and foreign affairs law.[26] If legislative history in *Youngstown* cases tends to favor allocating national security and foreign affairs power to Congress over the President, then by precluding recourse to that evidence textualism would operate to level the legal playing field for the President.[27] Put another way, if non-

24 The term "*Youngstown* framework" is used in this article to refer to the three-part framework set forth in Justice Jackson's *Youngstown* concurrence, not to any other aspect of the opinion.

25 Although presidential signing statements could be considered a type of "legislative history," most non-textualists focus on ascertaining and giving effect to congressional intent. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 105–07 (2007) (Stevens, J., concurring) (emphasizing "the importance of remaining faithful to Congress' intent"); *see also* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987) (arguing that presidential signing statements should not be used in interpreting statutes, even if they purport to be discussing Congress's intent); Note, *Context Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 599–600 (2006) (explaining that courts rarely rely on presidential signing statements when interpreting statutes and arguing that they should not be considered part of the legislative history).

26 Of course, excluding legislative history from the statutory-interpretation calculus is not the only defining characteristic of textualism; theoretically one can refuse to consider legislative history and still be a thoroughgoing nontextualist. But since nontextualist theories often reference legislative history in an effort to ascertain legislative intent or purpose, and since textualism generally eschews reference to legislative history, examining how legislative history tends to be employed in *Youngstown* cases is a convenient and fair way to assess whether and how textualism would impact legal analysis in these cases.

27 It bears briefly noting that a nontextualist might resist this characterization and argue that if a certain category of legislative history tends to favor one branch over the other, then the disfavored branch is *improperly benefitting* from

textualist judges tend to find support for Congress when examining legislative history in *Youngstown* cases, then textualism's exclusion of legislative history from the statutory-interpretation calculus could indirectly serve to consistently disadvantage Congress in *Youngstown* cases when compared to a nontextualist baseline.

This observation is worth exploring in detail, and to do so I divide legislative history into three broad categories: (1) the failure of Congress to enact legislation, often in the face of new or altered circumstances ("non-enactment legislative history"); (2) the drafting history of a bill as it moves through each house of Congress; and (3) statements contained in the congressional record and in committee reports (collectively referred to as "congressional debates and reports" for simplicity's sake). The first two categories of legislative history might be considered circumstantial evidence of a statute's meaning. Like a fingerprint on a doorknob, these categories of statutory-interpretation evidence require nontextualist judges to draw inferences from objective facts that did not spring into being for the purpose of answering the question presented to the court.[28] The third category is more analogous to direct testimonial evidence. Just as a witness may offer testimony that directly answers the question before the court, so legislators use debates and reports as an opportunity to address themselves to interpretational questions that courts may face.[29]

By examining the role that each category of legislative history plays in the nontextualist opinions issued by members of the Court in *Youngstown* cases,[30] the following discussion shows that the circumstantial evidence categories of legislative history have no noticeable tendency to support one branch over the other, whereas the testimonial evidence of congressional debates and reports strongly benefits Congress. For that reason, textualism can be expected to have the effect of eliminating the advantage that nontextualist theories have given Congress, thereby benefitting the President overall.

A. Excluding Non-Enactment Legislative History

Non-enactment legislative history is often cited in *Youngstown* cases to demonstrate congressional acquiescence to (or disapproval of) exercises of executive power. By inferring a particular intent from Congress's failure to enact legislation, nontextualist judges use this type of legislative history

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a textualist judge's refusal to consider that legislative history. But regardless of how the phenomenon is characterized, the result is the same: in *Youngstown* cases, the branch of government whose ability to exercise national security and foreign affairs powers is favored by nontextualist judges' views of the legislative history would have a more difficult time defending those interests in a textualist legal landscape than in a nontextualist one.

28 *See* BLACK'S LAW DICTIONARY 636 (9th ed. 2009) (defining "circumstantial evidence" to mean "[e]vidence based on inference and not on personal knowledge or observation").

29 *See id.* at 636–37 (defining "direct evidence" to mean "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption").

30 These cases are *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Two case omitted from this list, *Medellín v. Texas*, 552 U.S. 491 (2008), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), do not rely on legislative history in the context of their *Youngstown* analyses and therefore are not discussed here.

to either strengthen or weaken "gloss[es]" on executive power.[31] The circumstantial nature of non-enactment legislative history suggests that its use in *Youngstown* cases should have no tendency to support the allocation of national security or foreign affairs powers to one branch of government over the other. When Congress declines to enact legislation that would limit the President's ability to exercise a national security or foreign affairs power, non-textualists might say that Congress is acquiescing to the President's previous exercises of such power and thereby allowing—perhaps even encouraging—that power to become a gloss upon the President's constitutionally explicit powers. In other situations, however, Congress may consider and decline to enact statutory language that would authorize the President's exercise of a national security or foreign affairs power, thereby buttressing Congress's own authority in that area relative to the President's. The cases bear out the prediction that non-enactment legislative history has no tendency to favor one branch of government over the other.

The President has often benefitted from non-enactment legislative history. In *Youngstown*, for example, Chief Justice Vinson relied upon non-enactment legislative history to justify the President's power to seize industrial plants when the necessities of war required it, and to support his view that the Taft-Hartley Act was not intended to be an exclusive procedure for dealing with labor disputes.[32] Non-enactment legislative history also supported the President in *American Insurance Ass'n v. Garamendi*.[33] Writing for the majority, Justice Souter found as a preliminary matter that Congress had not authorized California (or any other state) to pass its own statute designed to assist Holocaust survivors in securing recompense from German business and governmental entities.[34] This meant that there was "no need to consider" the President's power to enter into executive agreements that might conflict with such congressionally supported statutes[35]—the President was operating in *Youngstown* Category II. Having avoided a Category III inter-branch clash, Justice Souter upheld the President's ability to enter into preemptive executive agreements, supporting his conclusion by noting that

31 *See Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

32 *See id.* at 695–96, 706–07 (Vinson, C.J., dissenting) (citations omitted).

33 539 U.S. at 429. The factual background of this case gives helpful context to the legal issues involved. In an effort to ensure that Jewish Holocaust survivors were able to collect restitution for, among other things, insurance policies that had either been confiscated or dishonored under the Nazi regime, the Clinton Administration entered into an executive agreement with Germany in 2000 setting up a dispute resolution system. See Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.–Ger., July 17, 2000, T.I.A.S. No. 13104. Essentially, the German government and German companies agreed to set up a fund that would be used to satisfy their obligations to victims of the Holocaust, and the United States agreed to use its best efforts to funnel litigation related to these Holocaust-era claims out of American courts and into the dispute-resolution mechanism established in connection with the fund. However, California enacted its own legislation to assist Jewish individuals in securing recompense, including a law that required California insurance companies to disclose information about all policies sold in Europe between 1920 and 1945 by the company or by anyone related to the company. *See* Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE §§ 13800–13807; *Am. Ins. Ass'n*, 539 U.S. at 401–12; *see also id.* at 430–34 (Ginsburg, J., dissenting).

34 Although one of the relevant statutes stated that "'[t]he business of insurance' shall be recognized as a subject of state regulation," 539 U.S. at 427 (majority opinion) (quoting McCarran-Ferguson Act, 15 U.S.C. § 1012(a) (2000)), and that such regulation would not be preempted by federal legislation that did not "specifically relate[] to the business of insurance," *id.* at 428 (quoting 15 U.S.C. § 1012(b)), the purpose of those provisions was to limit potential preemption by Congress's commerce powers, not by "executive conduct in foreign affairs," *id.* at 428.

35 *Id.* at 427 (citation omitted).

Congress had considered and refused to enact legislation similar to California's and therefore "ha[d] done nothing to express disapproval of the President's policy."[36] Finally, in *Dames & Moore v. Regan*, Justice Rehnquist's opinion for the Court held that the President could unilaterally suspend private claims pending in U.S. courts against foreign entities as a tool of diplomacy.[37] This conclusion was based in part on the fact that "Congress ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure with the [President's action]."[38] Although Justice Rehnquist conceptualized the *Youngstown* framework as a "spectrum" rather than a tripartite scheme,[39] his opinion represented a *Youngstown* Category II win for the President.

But *Youngstown* itself contains two clear examples of the fact that non-enactment legislative history can be used to support allocating national security and foreign affairs power in Congress's favor as well. First, Justice Frankfurter relied heavily upon non enactment legislative history to show that, in the context of the Taft-Hartley Act, Congress had twice considered and ultimately declined to enact a provision that would have maintained the President's ability to seize industrial plants when the public health or safety required it.[40] In Justice Frankfurter's view, Congress's failure to enact such a provision was strong evidence that the Taft-Hartley Act forbade the President from exercising that seizure power. Similarly, Justice Clark relied on non-enactment legislative history to conclude that Congress had rejected giving the President a unilateral seizure power,[41] and instead "had prescribed methods to be followed by the President in meeting the emergency at hand."[42] Since neither Justice Frankfurter nor Justice Clark believed that President Truman had the constitutional power to disregard these procedures when seizing plants or other facilities for the public health or safety, their use of non-enactment legislative history led them to conclude that the President lost in Category III.

These cases illustrate that non-enactment legislative history does not consistently benefit one branch of government over the other when employed by nontextualists in *Youngstown* cases. Thus, by declining to give effect to any particular instance of congressional failure to pass legislation,[43] textualism is not likely to impact national security and foreign affairs law beyond individual cases.

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36 *Id.* at 429.

37 453 U.S. 654, 686 (1981).

38 *Id.* at 687.

39 *Id.* at 669 ("[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."). Later opinions reverted to the tripartite framework. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 524–25 (2008).

40 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 599–601 (1952) (Frankfurter, J., concurring) (citations omitted). The President's wartime seizure powers had terminated earlier. *See id.* at 599.

41 *See id.* at 663 & n.9 (Clark, J., concurring in the judgment) (citing non-enactment legislative history); *see also id.* at 664 & n.11 ("The legislative history of the Act demonstrates Congress' belief that the 80-day period would afford it adequate opportunity to determine whether special legislation should be enacted to meet the emergency at hand.").

42 *Id.* at 662.

43 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 390 (2000) (Scalia, J., concurring in the judgment) (arguing that "the nonenactment of . . . proposed legislation" is not a reliable indication of what Congress—i.e., "a majority of both Houses of Congress"—intended in passing a statute).

B. Excluding Drafting History

Occasionally, nontextualist judges compare differing versions of the same bill and infer congressional intent from the changes made. As with non-enactment legislative history, the circumstantial nature of such changes makes them unlikely to operate to the net benefit of either Congress or the President in *Youngstown* cases. To the extent that a reliable inference can be drawn from the drafting history of a bill, the factors shaping that inference would be numerous and would include the bill's original contents, the committee(s) to which it was initially assigned, the overall political composition of each house of Congress, the party affiliation of the President, and the extrinsic circumstances surrounding the passage of the bill. Nothing about the nature of drafting and revising national security or foreign affairs statutes makes it likely that the exclusion of their drafting histories would consistently benefit either Congress or the President in *Youngstown* cases.

This intuitive statement is demonstrated by two of the Court's *Youngstown* cases. In *Dames & Moore*, Justice Rehnquist's nontextualist opinion cites an early, unenacted version of the "Hostage Act" as evidence that the enacted statute,[44] which accorded the President greater discretion in choosing how to respond to hostage situations than the unenacted version,[45] should be read as a broad authorization of presidential action. The statute's drafting history therefore supported an allocation of foreign affairs power to the President. In *Hamdi v. Rumsfeld*, however, Justice Souter found that the Non-Detention Act's drafting history supported allocating national security power to Congress because an unenacted version of that statute only prohibited imprisonment unauthorized by Title 18 (i.e., the Criminal Code)—and thus arguably applied only to criminal detention—whereas the enacted statute prohibited imprisonment "except pursuant to an Act of Congress."[46] Justice Souter believed that the linguistic change showed that "Congress was aware that [the enacted version of the Non-Detention Act] would limit the Executive's power to detain citizens in wartime to protect national security, and it is fair to say that the prohibition was thus intended to extend . . . to statutorily unauthorized detention by the Executive for reasons of security in wartime."[47] Since Hamdi was a U.S. citizen and since Justice Souter did not believe that Hamdi had been detained pursuant to the Authorization for Use of Military Force ("AUMF") enacted in the aftermath of the attacks of September 11, 2011, he concluded that the President should lose in *Youngstown* Category III.[48]

These two *Youngstown* cases illustrate the commonsense notion that the changes made to national security and foreign affairs bills during the drafting process are too situational to consistently favor allocating power to either Congress or the President. The method of statutory interpretation em-

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44 *See* 22 U.S.C. § 1732 (1976) (providing that any time a U.S. citizen was unjustly deprived of liberty by a foreign government, the President should, after an unsuccessful demand of release, "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release").

45 Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (noting that the original version of the statute authorized the President to either "suspend trade with a foreign country" or "arrest citizens of that country in the United States" in retaliation for unjustly depriving a U.S. citizen of liberty).

46 Hamdi v. Rumsfeld, 542 U.S. 507, 545–46 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing H.R. REP. NO. 92-116, at 4 (1971)); *see also* H.R. 234, 92d Cong. (as introduced Jan. 22, 1971) (original bill); Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (enacted bill).

47 *Hamdi*, 542 U.S. at 546-47.

48 *Id.* at 552.

ployed by judges is therefore unlikely to make a difference beyond individual cases.

C. Excluding Congressional Debates and Reports

Whereas both non-enactment legislative history and drafting history constitute circumstantial evidence of a statute's meaning for nontextualists, congressional debates and reports are akin to trial testimony in that they purport to provide direct answers to the questions at issue. And just as litigants who take the stand in their own cases can phrase their testimony in such a way as to encourage favorable dispositions, so members of Congress—to the virtual exclusion of the President—can use congressional debates and reports to guide nontextualist judges toward a preferred interpretation of a statute. These debates and reports may represent genuine discussions of the proper scope of executive power, or they may be contrived attempts to encourage the judiciary to limit ambiguous grants of executive power in favor of a congressman's party or the institution of Congress as a whole. Regardless, one would expect that citations to congressional debates and reports by nontextualist judges overwhelmingly favor allocating national security and foreign affairs power to Congress rather than the President. Once again, the cases bear this out.

Consider, for example, Justice Frankfurter's nontextualist concurring opinion in *Youngstown*. To show that Congress intended to maintain control over industrial plant seizures in the context of the Taft-Hartley Act, he cited the Senate Labor Committee's chairman, who said that the committee thought it better to address labor issues by passing ad hoc legislation than by granting emergency seizure powers to the President.[49] Similarly, in the context of the Defense Production Act of 1950, Justice Frankfurter found particularly relevant a statement by a member of the Committee on Banking and Currency announcing that Congress would only recess for "very limited periods of time" while the country was at war and, therefore, would be "readily available to pass such legislation as might be needed to meet the difficulty" of labor disputes that could hamper the war effort.[50] To Justice Frankfurter, these statements assuring Congress's availability to pass labor-related legislation made Congress's views absolutely clear: the President was not authorized to unilaterally seize domestic manufacturing plants.[51]

Similarly, Justice Souter in *Hamdi* cited a committee report stating that by strictly limiting the detention of citizens to situations in which Congress had authorized detention, Congress could assure itself that "no detention camps can be established without at least the acquiescence of the Congress."[52] He also cited a back-and-forth debate between a bill sponsor and another congressman

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49 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 600 (1952) (Frankfurter, J., concurring).

50 *Id.* at 606 (quoting 96 CONG. REC. 12275 (1950) (statement of Sen. Irving Ives)) (internal quotation marks omitted).

51 *See id.* at 609 ("It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress.").

52 *Hamdi*, 542 U.S. at 546 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting H.R. REP. NO. 92-116, at 5) (internal quotation marks omitted).

to similar effect.[53] Relying heavily on these citations, Justice Souter concluded that "Congress was aware that [the relevant provision of the Non-Detention Act] would limit the Executive's power to detain citizens in wartime to protect national security."[54]

Finally, in *Dames & Moore*, Justice Rehnquist cited the congressional record to show that the Hostage Act was not passed to authorize the President to respond to the type of hostage situation at issue in the case.[55] Relying on this determination, Justice Rehnquist concluded that the President's actions did not fall into *Youngstown* Category I.

All of the above citations to congressional debates and reports support allocations of national security and foreign affairs power to Congress. Of course, there are times at which members of Congress find it to be in the country's best interest to allocate national security and foreign affairs power to the President. At such times, statements in congressional debates and reports would be likely to reflect that interest. However, it does not follow that these statements cancel out those that favor Congress and thereby render this category of legislative history neutral between the branches. There are two reasons that consideration of congressional debates and reports still benefits Congress over the President.

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First, from Congress's perspective, congressional debates and reports constitute a uniquely valuable method of influencing judicial statutory interpretation. The President has nothing like them since nontextualist judges do not find presidential signing statements to be imbued with nearly as much persuasive force as congressional debates and reports.[56] And unlike the circumstantial categories of legislative history, which are situational and rely on judicial inference drawing, members of Congress have virtually full control over the substantive conclusions that judges draw from congressional debates and reports. Thus, the very fact that nontextualist judges are willing to consider this category of legislative history serves to give Congress a significant leg up on the President—even when individual congressional statements actually support allocating national security or foreign af-

53 *Id.* ("In order to prohibit arbitrary executive action, [the bill] assures that no detention of citizens can be undertaken by the Executive without the prior consent of Congress." (quoting 117 CONG. REC. 31,551 (1971) (statement of Rep. Railsback)) (internal quotation marks omitted)).

54 *Id.*

55 Dames & Moore v. Regan, 453 U.S. 654, 676 (1981) (citing a statement in the congressional record for the proposition that the Hostage Act was passed to respond to situations in which foreign countries "refus[ed] to recognize the citizenship of naturalized Americans traveling abroad" and would seek to "repatriat[e] such citizens against their will," and not to respond to situations like the November 1979 hostage crisis in Iran (quoting CONG. GLOBE, 40th Cong., 2d Sess. 4331, 4354 (1868))).

56 *See supra* note 25 and accompanying text.

fairs powers to the President.

The second reason that Congress benefits when congressional debates and reports are factored into the *Youngstown* calculus is that nontextualist judges rely much more heavily upon congressional debates and reports when they support Congress than when they support the President. In the three *Youngstown* cases in which citations to congressional debates and reports support presidential power,[57] not a single Justice disagreed about the proper understanding or application of the statutes at issue in the *Youngstown* analysis, and none of the citations did much independent work in the opinions.[58] Indeed, Justice Scalia, joined by fellow textualist Justice Thomas, wrote separately in *Crosby v. National Foreign Relations Council* to point out that each proposition for which the Court majority had cited legislative history was "perfectly obvious on the face of the statute" at issue in the case.[59] Although different explanations for the asymmetrical utility of this category of legislative history are possible, the best is that while congressional debates and reports may well reflect a widespread desire to curb the President's power beyond what the enacted text would suggest, it would be much more unusual for the legislative history to reflect a widespread desire to give the President more power than is given in the enacted text. The reason is simple: where there is a threat of a presidential veto—as there often is when majorities of both houses of Congress seek to pass legislation limiting the President's ability to act in the realm of national security and foreign affairs—members of Congress are more apt to pass a vague statute and hope that the legislative history (which cannot be vetoed) communicates their aims.[60] This is one method of attempting to circumvent what Professor Koh has called

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57 *See* Crosby v. Nat'l Foreign Relations Council, 530 U.S. 363, 375 n.9, 376–78 nn.11–13, 380 n.15, 382 n.17, 385 n.23 (2000) (citations omitted); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 at 696 & nn.61–63, 697–98 & nn.69–71 (1952) (Vinson, C.J., dissenting) (citations omitted); *Dames & Moore*, 453 U.S. at 677–78 (citations omitted).

58 In both *Crosby* and *Dames & Moore*, the Court was unanimous on the *Youngstown* analysis. *See Crosby*, 530 U.S. at 375–76; *id.* at 389 (Scalia, J., concurring in the judgment); *Dames & Moore*, 453 U.S. at 671–72, 674. And while Chief Justice Vinson cited congressional debates in his dissent in *Youngstown*, the statute being discussed in that legislative history was not specifically at issue in the case. Instead, Chief Justice Vinson cited those statements to show that Congress had long acquiesced to exercises of executive power such as President Truman's seizure of the mills. As Chief Justice Vinson put it, the statements helped to show that "Congress . . . ha[s] consistently recognized and given [its] support to such executive action," which "indicates that such a power of seizure has been accepted throughout our history." *Youngstown*, 343 U.S. at 700 (Vinson, C.J., dissenting).

59 *Crosby*, 530 U.S. at 388–90 (Scalia, J., concurring in the judgment). Although the congressional debates and reports in *Dames & Moore* were not quite so superfluous, the opinion makes clear that they were not very influential in helping Justice Rehnquist arrive at his conclusion that the President's actions were authorized. *See Dames & Moore*, 453 U.S. at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."); *id.* at 686 ("In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294.").

60 It is widely acknowledged that legislators may rely on legislative history to achieve results that would be politically unattainable if explicitly provided for in the text of the statute at issue. *See, e.g.,* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (en banc) (Kozinski, J., concurring in the judgment); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397–98 (1992). And it is clear that the President's veto power plays an important role in establishing what is politically attainable for a given statute, particularly in the realm of national security and foreign affairs. *See, e.g.,* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*,

the "one-way 'ratchet effect'" of the Court's jurisprudence in this area.[61] Where, however, Congress desires to give the President broad authorization to act in the realm of national security and foreign affairs,[62] it need not hide that fact in the legislative history for fear of a veto. In any event, if citations to legislative history that favor the President are unnecessary in arriving at the proper interpretation of a statute, then the method of statutory interpretation applied in interpreting that statute is not likely to make much practical difference.

By causing judges to disregard congressional debates and reports that are likely to either favor allocating power to Congress or to superfluously favor allocating it to the President, textualism operates to eliminate a category of evidence in *Youngstown* cases that is most often and most effectively used to benefit Congress. Textualism would therefore tend to level the legal playing field for the President and to disadvantage Congress across *Youngstown* cases when compared to a nontextualist baseline.

D. Summary

The above-cited cases demonstrate that by prohibiting substantive consideration of the categories of legislative history akin to circumstantial evidence, textualism equally affects Congress and the President. But by excluding testimonial-type legislative history from the statutory-interpretation calculus, textualism eliminates a category of legislative history that has tended to benefit Congress. Thus, by renouncing the use of legislative history as an aid to statutory interpretation, textualism's net effect on *Youngstown* cases when compared to nontextualist theories of statutory interpretation is to favor the President's interests.

III. TEXTUALISM'S EFFECTS, NOT PREFERENCES

In recent years, some commentators have challenged textualism as being little more than a pretext for allowing the judge's personal—and allegedly conservative[63]—proclivities to predetermine the

40 ADMIN. L. REV. 209, 216 (1988) ("The constitutional authority to veto legislation also provides the President with considerable legislative influence, which goes well beyond the obvious surface power to reject bills passed by a majority of Congress. The threat of a veto can have a major effect in shaping the legislative product."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988) (arguing that the President's veto power and the Supreme Court's jurisprudence combine to create "a one-way 'ratchet effect'" that makes it difficult for Congress to limit the President's national security and foreign affairs powers via statute); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 356 n.95 (2001) ("[T]he President can shape the foreign affairs laws Congress passes by use of the veto."); John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 548 (2008) ("[T]he mere threat of a veto provides [the President] with significant political advantage in influencing legislation.").

61 *See* Koh, *supra* note 60, at 1311.

62 *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); International Economic Emergency Powers Act, Pub. L. No. 95-223, § 203, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1702).

63 *See, e.g.*, Paul Killebrew, Note, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1899–1901 (2007) (noting that most adherents to textualism are conservative, due primarily to the fact that textualism embraces a minimal role for judges); Law & Zaring, *supra* note 20, at 1654 (stating that, as a statistical matter, "liberal Justices are generally more likely than conservative Justices to cite legislative history").

outcome of a case or even to shift an entire area of the law.[64] It is critical to distinguish my argument from those arguments and from similar ones charging textualism or textualist judges with an intrinsic ideological bias. This article focuses on understanding textualism's effects on national security and foreign affairs law when compared to nontextualist methodologies. I argue that textualism tends to operate in the President's favor across *Youngstown* cases when compared to nontextualist methods of statutory interpretation. I do not argue that judges who use methods of statutory interpretation consistent with textualism tend to vote in the President's favor in *Youngstown* cases when compared to judges using nontextualist methods of statutory interpretation. Indeed, the cases bear out the commonsense notion that there is nothing inherent in textualism that predetermines the political branch with which a judge will ultimately side in *Youngstown* cases.

Hamdi v. Rumsfeld [65] was a 2004 national security case addressing the practice of detaining U.S. citizens as enemy combatants. There is no single majority opinion in *Hamdi*; rather, one majority of Justices held that the AUMF provided the executive branch with at least some authority to detain citizens who were enemy combatants,[66] while another majority held that any such detainee had the right to a hearing which would afford him the opportunity to present evidence that he was not an enemy combatant at the time of his capture. Since Yaser Esam Hamdi's right to challenge his detention was (successfully) asserted under the Constitution and did not involve the interpretation or application of any statute,[67] I focus here only on the question of the President's authority to detain him.

Justice O'Connor wrote an opinion for a plurality of the Court in which she heavily emphasized historical and judicial precedent with respect to executive power in the realm of national security. Her text-based[68] understanding of the AUMF, combined with her understanding of the relevant precedent, led her to the conclusion that Congress had authorized the detention of enemy combatants who were also U.S. citizens,[69] thereby satisfying a preexisting statute called the Non-Detention Act that precluded U.S. citizens from being "imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[70] This conclusion put the President in *Youngstown* Category

64 *See, e.g.*, Steven G. Gey, *A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation*, 19 Ariz. St. L.J. 587, 587–88 (1987) (arguing that textualism "tends to produce a highly conservative jurisprudence" based on a "simplistic and tendentious linguistic method" that is "inextricably linked to the restrictive objectives that the doctrine's proponents advocate"); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 Vill. L. Rev. 93, 100–21 (1995) (accusing Justice Scalia of engaging in "selective and tortured use of rules" in certain cases to arrive at results more consistent with conservative ideals); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 Lewis & Clark L. Rev. 825, 826 (2010) (arguing that the Supreme Court "has used the judicial method of interpretation known as textualism . . . to reinvent statutes, abandon precedent, and create its own norms in the field of arbitration").

65 542 U.S. 507 (2004).

66 *See Hamdi*, 542 U.S. at 516–19; *id.* at 587 (Thomas, J., dissenting).

67 *Cf. id.* at 534 n.2 ("[W]e hold that Hamdi is constitutionally entitled to the process described above . . . .").

68 For purposes of this discussion, an opinion that interprets relevant statutory texts by focusing on their ordinary meaning in context and that avoids citing legislative history as part of the interpretive endeavor may be considered textualist in nature. *Cf. supra* note 26.

69 In Justice O'Connor's view, detention is an incident of war and thus part of the "necessary and appropriate force" referred to in the AUMF. *See Hamdi*, 542 U.S. at 518–19.

70 *Id.* at 515 (quoting 18 U.S.C. § 4001(a) (2000)) (internal quotation marks omitted).

I, and Justice O'Connor therefore upheld the President's ability to detain Hamdi. Justice Thomas agreed with the plurality opinion that the AUMF authorized the President to detain citizens acting as enemy combatants,[71] but dissented from the plurality's decision to remand the case, arguing that the Constitution permitted the President to deny Hamdi's habeas claim.[72] To the relatively small extent that his opinion interacted with the AUMF, it was also textualist in nature.[73] Finally, Justice Scalia disagreed with both Justice O'Connor's and Justice Thomas's opinions in spite of the fact that Justice Scalia also approached the case from a textualist perspective. In his view, the AUMF did not constitute clear enough congressional authorization to justify detention of a citizen, especially in light of the specific language of the Non-Detention Act.[74]

In the subsequent case of *Hamdan v. Rumsfeld*, the Court addressed the validity of the military commissions set up by the President to hear petitions from Guantánamo detainees.[75] A majority of the Court concluded that the commissions were unlawful.[76] Justice Kennedy's concurring opinion and Justice Thomas's dissenting opinion both utilized analysis consistent with textualist principles to arrive at diametrically differing results on the merits. Justice Kennedy—who had joined Justice O'Connor's text-based opinion in *Hamdi* upholding the President's detention authority—set forth his own text-based[77] opinion in *Hamdan* interacting explicitly with the *Youngstown* framework and agreeing with the majority that the President's actions fell into *Youngstown*'s third category because, in spite of the President's belief to the contrary, the tribunals were not "uniform insofar as practicable," as required by the Uniform Code of Military Justice (UCMJ).[78] Justice Thomas, joined in

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71 Indeed, the language of his opinion indicates he likely would have upheld detention even if Congress had explicitly prohibited the detention at issue and the President were operating in Category III. *See id.* at 587 (Thomas, J., dissenting) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.").

72 *Id.* at 579.

73 *Id.* at 587 (grounding his conclusion that Congress authorized the President to detain U.S. citizens serving as enemy combatants in the enacted language of the AUMF).

74 *Id.* at 573–74 (Scalia, J., dissenting). In his view, Hamdi's continued detention could be justified only if Congress suspended the writ of habeas corpus or if criminal charges were brought against him. *Id.* at 554. Since no one contended that Congress had suspended the writ, and since criminal charges were not forth-coming, Justice Scalia would have reversed and had Hamdi released. *Id.*

75 548 U.S. 557, 572 (2006); *cf. Hamdi*, 542 U.S. at 538 (suggesting that a military tribunal could meet the standards articulated by the *Hamdi* Court).

76 Justice Stevens, writing for the majority, ruled against the President in Category III. *Hamdan*, 548 U.S. at 612–13; *see also id.* at 593 n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").

77 The opinion's text-based nature is evidenced by a common textualist move: citation to a dictionary, in this case to determine the meaning of the word "practicable" in the UCMJ. *See Hamdan*, 548 U.S. at 640–41 (Kennedy, J., concurring). Although Justice Kennedy concurred with Justice Stevens's majority opinion (which was nontextualist on the whole), the portions of both opinions that deal with the *Youngstown* framework are consistent with textualist principles.

78 10 U.S.C. § 836(b) (2006); *see Hamdan*, 548 U.S. at 636–37 (Kennedy, J., concurring) ("This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on

this case by Justice Scalia, disagreed with Justice Kennedy and authored a textualist dissent arguing that the UCMJ should be read in conjunction with the AUMF to give the President broad Category I power,[79] and that in any event the President's practicability determination was entitled to strong deference.[80]

The fractured nature of the text-based opinions in *Hamdi* and *Hamdan* belies the notion that textualism itself dictates results favoring one branch of government over the other in *Youngstown* cases. Moreover, the opinions offer no support for the idea that the Justices have used textualism as a pretext enabling them to arrive at such a result. Justice Scalia opposed the President's position in 2004 but supported that same President in 2006, whereas Justice Kennedy subscribed to Justice O'Connor's 2004 opinion favoring the President's position but ruled for Hamdan in 2006 by applying principles consistent with textualism. And while Justice Thomas deferred to the President in both *Hamdi* and *Hamdan*, he believed he was doing so with the clear support of the statutory text and precedent in both opinions; he did not use textualism to foster ambiguity and thereby justify deference.[81] Ultimately, each of these opinions was at least consistent with textualist principles, and the Justices' views of independent factors—history and precedent in *Hamdi*; the scope of the AUMF, the law of war, and a treaty in *Hamdan*—largely explain their differing positions.

Textualism in the *Youngstown* context thus operates as any theory of statutory interpretation should: it provides a neutral framework within which to understand the statutes relevant to the case at hand. A judge's understanding of the Constitution may well shape her views on the proper division of national security and foreign affairs powers between Congress and the President, but the *Youngstown* cases lend no support to the notion that textualism has merely served as a pretext for impermissible deference to one branch or the other in cases implicating these areas of law.[82]

IV. Textualism's Effects on National Security and Foreign Affairs Legislation

In any area of law, textualism's focus on the enacted text of statutes naturally incentivizes Congress to (1) increase the precision with which it drafts statutes, and (2) place greater emphasis on having potentially problematic issues resolved within the political (rather than judicial) process. These closely related effects are particularly likely to be displayed in national security and foreign affairs law for several reasons. First, this area of law is exceptionally important, meaning that members of Congress are apt to ensure that statutes in this area are interpreted in conformity with their de-

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the President's authority.").

79 *See Hamdan*, 548 U.S. at 682 (Thomas, J., dissenting).

80 *See id.* at 682–83, 712–14.

81 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 584 (2004) (Thomas, J., dissenting) (agreeing with the plurality's understanding of the AUMF); *id.* at 519 (plurality opinion) ("Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."); *Hamdan*, 548 U.S. at 680–81 (Thomas, J., dissenting) (arguing that the AUMF contemplates "a heavy measure of deference" to the President's decisions to try enemy combatants before military tribunals); *id.* at 710–12 (arguing that the majority's restrictive reading of the UCMJ was unsustainable in light of the Court's interpretation of the UCMJ's predecessor).

82 *Cf.* Law & Zaring, *supra* note 20, at 1655 ("[L]egislative history usage is not correlated with more ideological decision making. Although the decision to use legislative history is influenced by ideological factors, the actual use of legislative history does not make it more likely that a Justice will arrive at his or her preferred outcome.").

sires (whether those desires are in favor of executive power or against it). More importantly, though, unfavorable decisions for Congress in *Youngstown* cases not only affect the specific facet of national security or foreign affairs policy at issue in the case, but could also affect Congress's continuing ability to exercise control over that policy area at all. While the damage done to congressional authority by such decisions is not likely to be permanent unless Congress wants it to be, the fact remains that the institutional stakes are higher for Congress in *Youngstown* cases than in cases implicating other areas of law. It is therefore useful to examine more closely how textualism's interaction with the *Youngstown* framework is likely to affect national security and foreign affairs law.

The first effect is that members of Congress will likely pay closer attention to ensuring that statutes implicating the President's non-exclusive national security and foreign affairs powers are as precisely worded as politically possible. This is not to say that all aspects of those powers will be governed by detailed statutes, or that the statutes that are enacted will always be crystal clear. Even in the absence of inter-branch friction, Congress often deems it best to remain silent on a given issue or to enact pliable standards governing executive action rather than attempt to "cover"[83] the area. But to the extent that Congress intends to maintain control over an area of national security or foreign affairs that the Constitution permits it to regulate, textualism's currency in the courts should cause Congress to place a high priority on clearly defining its relationship with the President in the enacted text of statutes implicating that policy area. And as limitations on executive power become more clearly articulated in the enacted text of statutes, the boundaries of *Youngstown* Category II (and thus Categories I and III) should become clearer to judges too. Congress need not risk losses in the twilight zone of Category II if it does not want to.

Increased efforts at ensuring statutory clarity tend toward a second systemic effect: *Youngstown* battles occurring in the Capitol rather than at the courthouse. Congress always legislates under the shadow of the President's veto pen and must be especially mindful of the President's views when submitting national security and foreign affairs legislation to his desk.[84] But with the ascendancy of textualism in the judiciary, a Congress jealously guarding its own national security and foreign affairs powers should be less willing than before to gamble on receiving a favorable interpretation of ambiguous statutory language from the courts. Rather than rely on a private party to challenge executive action, a Congress operating in a textualist legal regime should be more willing to engage directly with the President before enacting legislation and even to push back when necessary. The resulting statute, refined by the fire of intense inter-branch negotiation, is likely to reflect thoughtful considerations of each branch's proper constitutional role in the particular aspect of national security or foreign affairs policy at issue. Such a statute would command strong respect from both political branches of government. Of course, the political realities of the situation may be such that a text riddled with the vague language of compromise is the best that can be achieved. Even so, the increase in thoughtful political debate would be a welcome change to an area of law that seems increasingly characterized by retrospective arguments about the meaning of statutory texts and the

83 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 639 (1952) (Jackson, J., concurring).

84 That said, this is one area of law in which the institutional dynamics between Congress and the President may make a legislative override of a veto more likely to occur than in other areas. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 559–60 (1973) (overriding President Nixon's veto).

propriety of particular instances of executive action.

To the extent that the political branches are able to work out potential problems ahead of time and respect the agreements they reach, they will achieve another important result: reducing the need for judges to pass upon extremely difficult separation-of-powers issues that are closely entwined—if not quite inseparably entangled[85]—with delicate, complex, and important national security and foreign policy questions. The entanglement problem is one that Justice Jackson himself recognized in *Youngstown*:

> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.[86]

Of course, textualism seeks to respond to this concern by foreclosing the possibility of mining the legislative history for support of a given viewpoint. But when the laws at issue are hopelessly ambiguous or silent on the pivotal issue, the demand that judges separate politics from law inevitably becomes difficult because the line between policy and law is blurred. Thus, to the extent that textualism succeeds in encouraging clear statute-writing from the outset, it assists judges in their endeavor to focus on the precise legal questions involved in the case and to "say what the *law* is."[87]

But none of these political-process-promoting outcomes is likely to occur unless the policy-making branches understand that, should a dispute end up in court, the judiciary will hold them to their enacted word. As long as courts continue to give credence to *ex post*, legislative-history-based arguments about the intent behind a statute whose meaning may well have been unsettled or controversial at the time of its passage, there is little incentive for change. In short, a prerequisite to actualizing the effects described above is that textualism must become so wide-spread in the federal judiciary—at least in the context of *Youngstown* cases—as to require Congress not only to be aware of its existence, but also to account for its eventual and inevitable application. The twentieth-century practice of referring to legislative history as an authoritative guide to statutory interpretation has undermined the perception that such planning is necessary in virtually any area of law. Textualists have therefore decried its use.[88] Fortunately for them—and for anyone who would prefer to see the Constitution's equivocality on national security and foreign affairs powers be interpreted by elected officials engaging in public dialogue—the trend of the past thirty years has been strongly in the

85 *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1425 (2012) (holding that the political-question doctrine did not bar a suit implicating competing foreign affairs policies between a statute and a State Department manual).

86 *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

87 *Zivotofsky*, 132 S. Ct. at 1427–28 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (emphasis added) (internal quotation marks omitted).

88 *See, e.g.,* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 391 (2000) (Scalia, J., concurring in the judgment) (objecting to the majority's "irrelevant," "wasteful," and "harmful" use of legislative history).

textualists' favor,[89] so a more complete embrace of textualism in *Youngstown* cases and its attendant benefits for this area of law is perhaps more likely than ever.

CONCLUSION

This Article has demonstrated that the recent rise of textualism has significant practical implications for the complex and important field of national security and foreign affairs law. Since congressional debates and reports tend to favor Congress when employed in *Youngstown* cases (and since other categories of legislative history are circumstantial in nature and exhibit no noticeable tendency to favor either political branch), textualism operates to the relative detriment of Congress vis-à-vis nontextualist methodologies by excluding legislative history from judicial consideration. Far from being problematic, this result benefits representative democracy by incentivizing the political branches to avoid retrospective *Youngstown* skirmishes in the courtroom and to map out the contours of their respective powers in a more fitting and constitutionally appropriate venue: the political arena.

89 *See* Law & Zaring, *supra* note 20, at 1715–16; John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1307–09 (2010) (explaining that the debate on legislative history at the Court has arrived at a "middle ground").