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## Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin

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# Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin

## **Abstract**

This Comment argues that the Court's holding in *Medellin* modifies Jackson's tripartite taxonomy by effectively eliminating the "zone of twilight." By requiring a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," the Court is essentially extending the first category—executive action with the express or implied authorization of Congress—to cover the middle "zone of twilight," at odds with the very purpose of the zone. Additionally, the Comment argues that *Hamdan* establishes Congress's "disabling" power in the third category, which, combined with *Medellin*'s interpretation, creates a new standard for Jackson's taxonomy, one more similar to Justice Black's formalist majority opinion in *Youngstown* than Justice Jackson's functionalist concurring opinion.

Part II will give a background to Jackson's concurrence in *Youngstown*, and the effect that his tripartite taxonomy has had on separation of powers issues, particularly focusing on the Court's adoption and interpretation of the taxonomy in *Dames & Moore v. Regan*. Part III will analyze the Court's treatment of the taxonomy in *Hamdan* and *Medellin* and argue that the two cases create a new standard, one that extends the first category to include a longstanding history of congressional acquiescence, eliminates the "zone of twilight," and forecloses executive action in the third category. Part IV analyzes potential ramifications of this new standard on the executive's foreign affairs and war powers, and Part V concludes by calling for the Supreme Court to clarify whether the new standard established by *Hamdan* and *Medellin* was intentional or inadvertent.

## **Keywords**

Zone of Twilight, executive power, Justice Jackson, *Hamdan*, *Medellin*, *Youngstown*

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# FADE TO BLACK: THE FORMALIZATION OF JACKSON'S *YOUNGSTOWN* TAXONOMY BY *HAMDAN* AND *MEDELLIN*

MICHAEL J. TURNER\*

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## INTRODUCTION

Like many landmark cases, *Youngstown Sheet & Tube Co. v. Sawyer*<sup>1</sup> has become more important with age, the plaudits and critiques building a body of literature as influential as the case itself.<sup>2</sup> However, with every nuance dissected by generations of law students and scholars, the real world relevance of these cases can sometimes be lost, at least until the next big case that applies them. *Youngstown* is no exception, and despite being one of the most cited and celebrated cases in American jurisprudence,<sup>3</sup> two recent Supreme Court cases have quietly, and perhaps unintentionally, altered<sup>4</sup> what is arguably the most famous aspect of *Youngstown*:<sup>5</sup> Justice Jackson's separation of powers framework for executive action.<sup>6</sup>

There are relatively few Supreme Court cases that directly address executive power,<sup>7</sup> and before *Youngstown* there were very few that directly restricted executive action, at least where the Commander in

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

2. See Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 88–90 (2002) (detailing the many casebooks and legal articles analyzing *Youngstown* and the various legal theories formulated to explain it).

3. See David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 156 (2002) (finding *Youngstown* a landmark case “assured of immortality in the annals of constitutional jurisprudence”); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 215, 217 (2002) (arguing that *Youngstown* is one of the most important cases of all time and comparing the case positively to *Marbury v. Madison* in terms of influence); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 753 (1986) (describing *Youngstown* as a “very important constitutional case”).

4. See *Medellin v. Texas*, 128 S. Ct. 1346, 1371–72 (2008) (changing the “zone of twilight” category for executive action by requiring a lengthy history of congressional support); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (holding that in Jackson’s third category the President cannot disregard congressional limitation on his power); *infra* Part III (analyzing the two cases and distilling a new standard for Jackson’s taxonomy).

5. See, e.g., Paulsen, *supra* note 3, at 224 (explaining that Justice Jackson’s concurrence has overshadowed Justice Black’s majority opinion in the eyes of legal scholars).

6. See *infra* notes 12–14 and accompanying text (describing Justice Jackson’s taxonomy).

7. See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 510 (2008) (pointing out that the powers of the other two branches of the federal government have received much more judicial inquiry); cf. Thomas A. O’Donnell, *Illuminating or Eliminating the Zone of Twilight: Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U. CIN. L. REV. 95, 96 (1982) (portraying the Supreme Court as being “reluctant to examine the President’s implied powers vis-a-vis Congress” for fear of touching on “political questions”).

Chief power was concerned.<sup>8</sup> *Youngstown* is famous for being both an implicit assertion of judicial review of executive action<sup>9</sup> and an explicit defense of congressional supremacy in legislative and domestic affairs.<sup>10</sup> However, it is Justice Jackson's classification of the strength of executive power based on congressional action or inaction, his tripartite taxonomy, that dominated subsequent separation of powers jurisprudence.<sup>11</sup>

Justice Jackson broke his framework into three categories. The first category applies when the President "acts pursuant to an express or implied authorization of Congress;" then his authority is at its apogee, essentially representing the federal government as an undivided whole.<sup>12</sup> The second category is applicable when the President "acts in absence of either a congressional grant or denial of authority" and there is a "zone of twilight in which he and Congress may have concurrent authority."<sup>13</sup> The third category is relevant when the President "takes measures incompatible with the expressed or implied will of Congress;" in that situation he may rely "only upon his constitutional powers minus any constitutional powers of Congress."<sup>14</sup> Although not initially adopted by the Court, Jackson's taxonomy is now recognized as the appropriate framework for analyzing nearly all executive action,<sup>15</sup> and accordingly a change in the application of the taxonomy could affect the treatment of executive powers in future cases.

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8. See, e.g., Adler, *supra* note 3, at 157 (remarking that the case was one of the few times the Supreme Court refuted presidential power in a time of war (citing Louis Fisher, *Foreword* to MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER*, at ix (Duke Univ. Press 1994))); Heather J. Enlow, Note, *Inward v. Outward: The Limits of Presidential War Powers in the Domestic Sphere*, 4 GEO. J.L. & PUB. POL'Y 483, 484 & n.6 (2006) (citing *Ex Parte Merryman* as the only major example where a court restricted executive power before *Youngstown*).

9. See Adler, *supra* note 3, at 157 (asserting that *Youngstown* is, among other things, remembered for the Court's assertion of its authority to "review the legality of an executive action").

10. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (insisting that Congress is the sole legislator and that the President is obligated to "execute[]" the law).

11. See *infra* note 15 (citing two Supreme Court cases that explicitly adopt Jackson's taxonomy as the appropriate lens to view executive action); *infra* note 64 and accompanying text (explaining that Jackson's concurrence is primarily known for his tripartite taxonomy).

12. *Youngstown*, 343 U.S. at 635–36 (Jackson, J., concurring).

13. *Id.* at 637.

14. *Id.*

15. E.g., *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action."); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[W]e have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful.").

The recently decided case of *Medellin v. Texas*<sup>16</sup> is the latest Supreme Court case to affirm Justice Jackson's three-part test as the appropriate framework to analyze executive power.<sup>17</sup> *Medellin* is possibly better known for the Court's characterization of the Optional Protocol to the Vienna Convention on Consular Relations<sup>18</sup> ("Optional Protocol") as a non-self-executing treaty,<sup>19</sup> and for the emergence of a new legal standard regarding treaties and their domestic effect.<sup>20</sup> The majority's other holding was just as important,<sup>21</sup> although less controversial: that the President did not have the power, either through treaty<sup>22</sup> or his inherent foreign affairs power,<sup>23</sup> to compel the state of Texas to give more judicial process to convicted Mexican nationals who did not receive consular access as required by the Vienna Convention on Consular Relations ("VCCR").<sup>24</sup> This holding is interesting not for the result but instead for the way that the majority applied Jackson's taxonomy to analyze the President's power.

The Court in *Medellin* applied Jackson's taxonomy to hold that the President's attempt to enforce the decision of the International Court of Justice ("ICJ") against Texas—based on authority granted by the Optional Protocol—fell into Jackson's third category, which is applicable when the President takes an action contrary to Congress's

16. 128 S. Ct. 1346 (2008).

17. *Id.* at 1368 (reiterating that Jackson's taxonomy is the correct lens with which to view assertions of executive power).

18. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

19. *Medellin*, 128 S. Ct. at 1357.

20. *See id.* at 1381 (Breyer, J., dissenting) (commenting that the new standard, which requires explicit statements from Congress that a treaty is self-executing, erects barriers to future treaties); Jordan J. Paust, *Medellin, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 328 (2008) (asserting that the majority uses the wrong test for self-executing treaties and ignores its own precedent).

21. *Cf. Medellin*, 128 S. Ct. at 1390 (arguing that holding that the President does not have the power to enforce the International Court of Justice ("ICJ") decision has "broader implications than the majority suggests").

22. *Id.* at 1371 (majority opinion).

23. *Id.* at 1372.

24. *See* Vienna Convention on Consular Relations art. 36, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (requiring that a signatory party notify nationals of other signatory parties of their rights to consular access "without delay" after arrest). The ICJ held that the United States violated its obligations under the VCCR and ordered it to "provide, by means of its own choosing, review and reconsideration of the convictions and sentence" of the Mexican nationals. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 73 (Mar. 31). President Bush attempted to enforce this decision on Texas through his Memorandum for the Attorney General of February 28, 2005. Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

expressly or impliedly legislated will.<sup>25</sup> Underlying the Court's holding is the principle that when Congress and the President take incompatible courses of action, Congress wins<sup>26</sup> (a reasoning that confirms a similar assertion in *Hamdan v. Rumsfeld*,<sup>27</sup> another recent Supreme Court case applying Jackson's taxonomy).<sup>28</sup> In addition, the Court in *Medellin* rejected the argument that the President's foreign affairs power allows him to give domestic effect to the ICJ decision, holding instead that action in Jackson's "zone of twilight" is only applicable when there is a long and confirmed history of congressional acquiescence to the specific executive action.<sup>29</sup>

This Comment will argue that the Court's holding in *Medellin* modifies Jackson's tripartite taxonomy by effectively eliminating the "zone of twilight." By requiring a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,"<sup>30</sup> the Court is essentially extending the first category—executive action with the express or implied authorization of Congress—to cover the middle "zone of twilight." This interpretation is at odds with the very purpose of the "zone of twilight," which applies to situations not falling into categories one or three.

In addition, this Comment will argue that *Hamdan* establishes Congress's "disabling" power in the third category, which, combined with *Medellin*'s interpretation, creates a new standard for Jackson's taxonomy, one more similar to Justice Black's formalist majority opinion in *Youngstown* than Justice Jackson's functionalist concurring opinion.<sup>31</sup> Formalism can be described as "insisting upon a firm textual basis in the Constitution for any governmental act"<sup>32</sup> and maintaining clear constitutional roles for the branches of

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25. *Medellin*, 128 S. Ct. at 1371.

26. See *infra* notes 151–153 and accompanying text (discussing Chief Justice Robert's holding).

27. 548 U.S. 557 (2006).

28. See *id.* at 593 n.23 (2006) (placing President Bush's military commissions into Jackson's third category where it automatically fails in the face of congressional disapproval (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring))); see also Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 960–61 (2007) (arguing that Justice Stevens's majority opinion in *Hamdan* "skipped a few steps" by assuming that Congress automatically wins in third category).

29. *Medellin*, 128 S. Ct. at 1372.

30. *Id.* at 1371–72 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

31. See *infra* text accompanying note 169 (discussing Justice Black's standard).

32. Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523 (1991). See generally *id.* at 1523–29 (describing, comparing, and analyzing formalist and functionalist arguments and cases).

government,<sup>33</sup> while functionalism allows governmental branches to share some responsibilities as long as they do not “interfere[] with the core functions of another” branch.<sup>34</sup> Justice Black’s opinion insists on a clear constitutional basis for executive action or a clear legislative grant of authority to the executive by Congress, while Justice Jackson’s “zone of twilight” recognizes that in some cases the executive can take action without either.<sup>35</sup> This Comment will argue that the new standard resembles Justice Black’s opinion more than Justice Jackson’s.<sup>36</sup>

Part II will give a background to Jackson’s concurrence in *Youngstown*, and the effect that his tripartite taxonomy has had on separation of powers issues, particularly focusing on the Court’s adoption and interpretation of the taxonomy in *Dames & Moore v. Regan*.<sup>37</sup> Part III will analyze the Court’s treatment of the taxonomy in *Hamdan* and *Medellin* and argue that the two cases create a new standard, one that extends the first category to include a longstanding history of congressional acquiescence, eliminates the “zone of twilight,” and forecloses executive action in the third category. Part IV analyzes potential ramifications of this new standard on the executive’s foreign affairs and war powers, and Part V concludes by calling for the Supreme Court to clarify whether the new standard established by *Hamdan* and *Medellin* was intentional or inadvertent.

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33. See Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 690 (1997) (maintaining that a formalist rubric assigns a certain function to a branch—such as legislative, executive, or judicial—and then all powers deriving from one of these functions are automatically and exclusively assigned to that branch).

34. Brown, *supra* note 32, at 1527; see *id.* at 1527–28 (stressing that functionalism fosters greater “interdependence” between the branches and greater judicial discretion to decide such cases).

35. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (majority opinion) (“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”), with *id.* at 635–37 (Jackson, J., concurring) (postulating that the Constitution bestows on the branches “separateness but interdependence, autonomy but reciprocity” and that in this interdependence there is a “zone of twilight” in which the President and “Congress may have concurrent authority, or in which its distribution is uncertain”).

36. See *infra* Part III.B (remarking that the new two-part standard for executive power is more similar to Justice Black’s requirement of a statute or a textually based constitutional power for executive action rather than Justice Jackson’s three part test recognizing implied executive powers).

37. 453 U.S. 654, 668 (1981). Although previous Supreme Court cases had cited Jackson’s concurrence, *Dames & Moore* was the first to explicitly adopt his tripartite taxonomy. See O’Donnell, *supra* note 7, at 99 (explaining that the Supreme Court had “ignored” Jackson’s tripartite framework until *Dames & Moore*); Charles Tiefer, *War Decisions in the Late 1990s By Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 17 (1999) (opining that Jackson’s concurrence received “authoritative” acceptance in *Dames & Moore*).



I. BACKGROUND OF JACKSON'S CONCURRENCE IN *YOUNGSTOWN*  
AND ITS EFFECT ON SEPARATION OF POWERS DOCTRINE

In *Medellin*, Chief Justice Roberts authoritatively stated that “[t]he President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’”<sup>38</sup> This quote traces its origins to Justice Black’s majority opinion in *Youngstown*, perhaps the most famous separation of powers case in history,<sup>39</sup> and stands for the unassuming notion that executive power has definitive limits.<sup>40</sup> That Justice Black needed to make the statement at all reflects the great difficulty in defining the scope of the President’s powers<sup>41</sup> and the historical tendency of the executive branch to assert the broadest possible interpretation of its powers.<sup>42</sup> On June 2, 1952, the Supreme Court famously announced one limit on executive power: President Truman could not, as an extension of his inherent Commander in Chief powers, seize private property in a way that directly contravenes procedures enacted by Congress.<sup>43</sup> That this assertion seems unexceptionable now demonstrates the power and continuing effect of *Youngstown*.<sup>44</sup>

A. The “Steel Seizure” Case

On April 8, 1952, President Truman told the nation that he was ordering Secretary of Commerce Charles Sawyer to seize the nation’s steel mills.<sup>45</sup> The undeclared war in Korea was raging on, and the fear was that an impending steel workers strike would hinder the war

38. *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) (quoting *Youngstown*, 343 U.S. at 585).

39. See, e.g., Adler, *supra* note 3, at 156 (stating that, after *Youngstown*, “all other [separation of powers] cases pale into insignificance”); Paulsen, *supra* note 3, at 215–17 (arguing that *Youngstown* has influenced “nearly every constitutional issue of war and peace, foreign policy, domestic legislative power, presidential power, and even judicial power” occurring in the last fifty years).

40. See, e.g., Adler, *supra* note 3, at 157 (emphasizing that *Youngstown* “reaffirmed the principle of presidential subordination to the rule of law”).

41. See *id.* at 163 (asserting that the issue of presidential inherent emergency power has “long been the subject of debate”).

42. See, e.g., Marshall, *supra* note 7, at 506 (arguing that presidential power “has been expanding since the Founding,” in part because of the nature of the executive branch).

43. *Youngstown*, 343 U.S. at 588–89.

44. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) (citing Jackson’s concurrence for support of the separation of powers nature of the Constitution); *Munaf v. Geren*, 128 S. Ct. 2207, 2220 (2008) (citing *Youngstown* to support a decision to rule on the merits because of the time-sensitive nature of the foreign policy issues in the case).

45. See MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 80–84 (1977) (explaining that President Truman announced his intentions in a national radio address while concurrently signing Executive Order 10340).

effort.<sup>46</sup> Declaring that the closure of the steel mills would be a national emergency, the President cited his inherent powers as Commander in Chief<sup>47</sup> and explained that the measures Congress had enacted<sup>48</sup> were not sufficient to meet the emergency.<sup>49</sup> The next day, attorneys for The Youngstown Sheet & Tube Company filed a motion for a temporary restraining order of the President's Executive Order.<sup>50</sup> Less than two months later the Supreme Court decided *Youngstown*,<sup>51</sup> a remarkable decision containing seven opinions, five of them concurrences.<sup>52</sup>

Justice Black, writing for the majority, penned a brisk and formalistic opinion categorically rejecting President Truman's authority to seize the steel mills.<sup>53</sup> After dealing with a non-constitutional procedural issue, Justice Black began by framing the limits of executive power in terms of delegation by statute or explicit constitutional grant of authority.<sup>54</sup> Justice Black found no statutory support for the seizure of the steel mills and stated that the legislation that authorized executive seizure of private property delineated conditions not met by President Truman's Executive Order.<sup>55</sup> Similarly, President Truman could not rely on his

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46. *Id.* at 80.

47. *See id.* at 84 (observing that the Executive Order cited the President's authority as based on "the Constitution . . . and as President of the United States and Commander in Chief"); *id.* at 119 (stating that the government's reasoning was more fully explained as being based on "Sections 1, 2 and 3 of Article II . . . and whatever inherent, implied or residual powers may flow therefrom").

48. *See id.* at 122-23 (remarking that the President cited the Taft-Hartley Act, the Selective Service Act, and the Defense Production Act).

49. *See id.* at 80 (explaining that the President feared that measures under the Taft-Hartley act would have taken too long, and that there would have been a short interruption in steel production).

50. *Id.* at 102-03.

51. *See id.* at 83-84, 195 (relating that President Truman signed Executive Order 10340 on April 8, 1952, and the Supreme Court released its ruling on June 2, 1952).

52. *See generally* Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 401-21 (2002) (listing the seven opinions and analyzing the majority, concurring, and dissenting opinions). Justice Black wrote the opinion of the Court, with Justices Frankfurter, Jackson, Douglas, and Burton joining in the opinion and writing separate concurrences. *Id.* Justice Clark joined in the judgment, but not the opinion, and also penned his own decision. *Id.* Justice Vinson wrote the dissenting opinion, joined by Justices Reed and Minton. *Id.* The opinions of Justices Clark, Douglas, Burton, and Vinson have had a minimal impact and are not analyzed in this Comment.

53. *See Brown*, *supra* note 32, at 1523, 1527 & nn.55, 59 (using Justice Black's opinion in *Youngstown* as an example of formalism and contrasting it with Justice Jackson's functionalist concurrence); Fitzgerald, *supra* note 33, at 691 & n.28 (labeling Justice Black's opinion as an "exaggerated" and "stark" example of formalism). *But cf.* Paulsen, *supra* note 3, at 225-26 (insisting that Justice Black's opinion, although short, is a "masterpiece," and completely compatible with Justice Jackson's longer opinion).

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

55. *Id.* at 585-86.

constitutional powers because the Executive Order seizing the steel mills was a legislative act that only Congress could take.<sup>56</sup> Justice Black boiled executive power down to a two-part test: does the President have the authorization of Congress, and if not, does he have power derived from a textual grant of the Constitution?<sup>57</sup>

Justice Frankfurter wrote a concurring opinion, in part because he felt that Justice Black's opinion was too simplistic.<sup>58</sup> While Justice Black appeared to view the situation in stark terms—either the President had the power or he did not—Justice Frankfurter refused to consider whether President Truman would have had the power to seize the steel mills had Congress never legislated on the subject.<sup>59</sup> What was crucial for Justice Frankfurter was that Congress had, at least in his opinion, legislated on the subject, and the President could not ignore the law.<sup>60</sup>

The majority and concurring opinions range from formalistic (Justice Black) to relatively functional (Justice Frankfurter).<sup>61</sup> What united the Justices in the majority is the fact that Congress had legislated on the issue, and the President was compelled, at least in this case, to follow its wishes.<sup>62</sup> Justice Jackson agreed with this basic

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56. See *id.* at 587–89 (examining and rejecting the government's constitutional arguments for an implied power based on an "aggregate of [President Truman's] powers" under Article II of the Constitution because the executive order was an Article I legislative act); Fitzgerald, *supra* note 33, at 691–92 (explaining that regardless of the source of the power Justice Black perceived President Truman's usurpation of both policy and method as an inherently legislative, not executive, action).

57. See *Youngstown*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

58. See *id.* at 589 (Frankfurter, J., concurring) ("[T]he principles of the separation of powers seem . . . more complicated and flexible than . . . what Mr. Justice Black has written.").

59. *Id.* at 597. Justice Frankfurter appeared to want to limit the impact of *Youngstown* to the issue at hand, and his most influential statements have a functionalist and situation specific feel; see *id.* ("The great ordinances of the Constitution do not establish and divide fields of black and white." (citing *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))); *id.* at 610–11 ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as gloss on 'executive Power.'"); see also MARCUS, *supra* note 45, at 203 (relating that "Frankfurter approached the merits of the case more narrowly" and resolved to "make no sweeping statement on presidential power").

60. See, e.g., Bellia, *supra* note 2, at 105 (positing that despite Frankfurter's apparent disagreement with Black over the presence of implied presidential powers the dispositive fact was that Congress had legislated on the subject).

61. See Fitzgerald, *supra* note 33, at 692–94 & n.33 (portraying Justice Douglas's concurring opinion as being almost as formalistically "stark" as Justice Black's but that the other majority opinions possessed varying degrees of flexibility).

62. See, e.g., Bellia, *supra* note 2, at 99 (arguing that the case was decided not on whether the seizure was "a legislative act or on a rejection of broad presidential powers" but on the "perception that the President's action . . . conflicted . . . with . . . Congress"); Fitzgerald, *supra* note 33, at 696–98 (summarizing that all the justices in

assertion, and the reason his opinion became the one most celebrated in both courtrooms and classrooms alike<sup>63</sup> was that, quite simply, he came up with a system.<sup>64</sup>

*B. Justice Jackson's Concurring Opinion*

Justice Jackson prefaced his taxonomy by emphasizing the elastic nature of executive power.<sup>65</sup> This concept, seemingly at odds with Justice Black's rigid characterization of executive power, is placed in the context of a federal government that "disperse[s] [its] powers into a workable government."<sup>66</sup> His taxonomy should thus be analyzed with the mindset that the powers of the executive and legislative branches are not "'hermetically' sealed"<sup>67</sup> but instead have an inter-relational nature, a concept that becomes most apparent in the "zone of twilight."

Justice Jackson's first category placed the President at the apex of his powers when acting with the "express or implied authorization of Congress."<sup>68</sup> Jackson explained that in these situations the President represents the federal government as a unified body, and in order for the judiciary to overrule executive action it must decide that the government itself lacks the power.<sup>69</sup> Jackson finished his description by stating that executive action under this category would be given the "widest latitude of judicial interpretation" and "supported by the strongest of presumptions."<sup>70</sup>

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the majority agreed that "the Constitution gives Congress alone the power" to seize the steel mills, and that by taking "legislative" action Congress pre-empted President Truman).

63. See Bellia, *supra* note 2, at 89 n.11 (citing a number of distinguished legal scholars who state that Jackson's concurrence is the preferred jurisprudential lens with which to view separation of powers); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 62 (2002) (remarking that of all the opinions in *Youngstown*, "Justice Jackson's concurrence may have been the most important"); *supra* notes 15, 17 and accompanying text (listing court cases following and applying Jackson's concurrence).

64. See, e.g., Bryant & Tobias, *supra* note 52, at 410 (explaining that although Jackson's concurrence is important for many reasons, it is "principally renowned" for his tripartite taxonomy).

65. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

66. See *id.* (declaring that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity" and cannot be based on "isolated clauses or even single Articles torn from context").

67. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)).

68. See *Youngstown*, 343 U.S. at 635 (stating that in the first category the President's "authority is at its maximum" because it "includes all he possesses in his own right plus all that Congress can delegate").

69. *Id.* at 636-37.

70. *Id.* at 637.

The third category in Jackson's taxonomy showed the President's power at its "lowest ebb"<sup>71</sup> when the Executive takes an action that is clearly against the "express or implied" will of Congress.<sup>72</sup> Jackson speculated that the Supreme Court would have to reject Congress's power to act in the disputed area in order to "sustain exclusive Presidential control," and that any claim to exclusive control must be carefully examined.<sup>73</sup> Significantly, Jackson did not assume that Congress would always win in category three,<sup>74</sup> although the examples he cited for presidential supremacy hinge on textual grants of power to the President in the Constitution rather than the implied powers at issue in the case.<sup>75</sup>

Finally, Jackson's second, or "zone of twilight," category references the first and third categories by analyzing executive action "in [the] absence of either a congressional grant or denial of [executive] authority."<sup>76</sup> In these situations, the President must have some basis for independent constitutional power, but there also exists a "zone of twilight" where the President and Congress have overlapping or indistinct powers.<sup>77</sup> In these situations, Jackson stated that a lack of congressional action may necessitate executive action.<sup>78</sup> In addition, Jackson insisted that implementation of executive power in the "zone of twilight" would "depend on the imperatives of events and contemporary imponderables" as opposed to "abstract theories of law."<sup>79</sup> Although there are many opinions as to the exact meaning and application of the "zone of twilight,"<sup>80</sup> it is, at a minimum,

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71. See *id.* (insisting that the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter").

72. *Id.*

73. *Id.* at 637–38.

74. See Vladeck, *supra* note 28, at 960 (remarking that Justice Jackson spent many pages of his opinion on whether President Truman's actions might trump Congress's statutes).

75. See *Youngstown*, 343 U.S. at 638 n.4 (using the President's "exclusive power of removal in executive agencies" as an example (citing *Myers v. United States*, 272 U.S. 52 (1926))).

76. *Id.* at 637.

77. *Id.*

78. See *id.* (theorizing that "congressional inertia, indifference or quiescence" could "enable, if not invite measures on independent presidential responsibility").

79. *Id.*

80. See O'Donnell, *supra* note 7, at 112 (insisting that "zone of twilight" acquiescence requires "actual notice" to Congress of the President's intentions and an opportunity for Congress to respond); Paulsen, *supra* note 3, at 230 (describing Jackson's "zone of twilight" as a default rule when the line between presidential and congressional power is not clear); Rebecca A. D'Arcy, Note, *The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 310 (2003) (arguing that precedent shows a "zone of concurrent authority" for which there is no legal standard or "clearly articulated principle"). The difficulty in defining a clear standard for the "zone of twilight" was foreseen by

defined by the absence of congressional action, positive or negative, and the presence of some constitutional basis for presidential power.<sup>81</sup> Put a slightly different way, resorting to a “zone of twilight” analysis should occur only after an analysis under categories one and three is inconclusive.<sup>82</sup>

Jackson applied his taxonomy to the facts of *Youngstown* and immediately dismissed the possibility of the steel seizure falling into first category because Congress had never authorized it.<sup>83</sup> Jackson eliminated President Truman’s action from the “zone of twilight” category because Congress had legislated in that area; President Truman chose a method inconsistent with the statutes passed by Congress and could not claim that his actions were “necessitated or invited” from the absence of congressional legislation.<sup>84</sup> This left the steel seizure in the “severe tests” of the last category, where Jackson found no basis for presidential supremacy in the face of explicit congressional disapproval.<sup>85</sup>

Like the other Justices siding with the majority in *Youngstown*, Justice Jackson essentially held that President Truman was unable to seize the steel mills in the face of contrary legislation.<sup>86</sup> What was revolutionary about his opinion was that he took what *Youngstown* stood for—a restriction of unbridled executive power and an affirmation of the separation of powers doctrine—and gave it a flexible matrix to apply to future cases.<sup>87</sup> That *Youngstown* and Jackson’s taxonomy would be so important was by no means immediately clear,<sup>88</sup> but thirty years after the Supreme Court decided

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Jackson when he said that any test will rely on “the imperatives of events” rather than on “abstract theories of law.” *Youngstown*, 343 U.S. at 637; see also Bellia, *supra* note 2, at 146 (referring to the preceding quote and remarking “[i]f Justice Jackson’s statement was purely predictive, he was right”).

81. Cf. Paulsen, *supra* note 3, at 230–31 (interpreting the “zone of twilight” as a rule of judicial deference applied when executive action is not unconstitutional but an analysis of the first and third categories does not provide an answer).

82. See *Youngstown*, 343 U.S. at 637 (explaining that “[w]hen the President acts in absence of either a congressional grant or denial of authority” he acts in a “zone of twilight”).

83. *Id.* at 638.

84. *Id.* at 639.

85. See *id.* at 640–55 (exploring and rejecting the government’s textual and implied powers arguments for the steel seizure).

86. *Id.* at 639–55 (placing President Truman’s Executive Order into the third category where it fails in the face of contrary legislation).

87. See *id.* at 635 (describing his taxonomy as an “over-simplified” but “practical” grouping for executive power).

88. See, e.g., Adler, *supra* note 3, at 157 (“It is doubtful that even the most prescient of soothsayers could have foreseen the emergence of a landmark case . . .”); Bellia, *supra* note 2, at 88 (reporting that the case seemed “destined to be ignored” (quoting Glendon A. Schubert, Jr., *The Steel Case: Presidential Responsibility and Judicial Irresponsibility*, W. POL. SCI. Q. 61, 65 (1953))); Paulsen, *supra* note 3, at

*Youngstown*, Jackson's taxonomy would take center stage in *Dames & Moore v. Regan*.<sup>89</sup>

C. *Dames & Moore and the Application of Jackson's Tripartite Taxonomy*

In the years after *Youngstown*, Jackson's taxonomy had been analytically useful in lower court opinions,<sup>90</sup> but in *Dames & Moore*, the Supreme Court explicitly adopted Jackson's taxonomy, which until then was only dicta.<sup>91</sup> The Supreme Court—in an opinion penned by then Associate Justice Rehnquist—applied Jackson's taxonomy to analyze the balance of power between the President and Congress and unanimously upheld executive orders nullifying, voiding, suspending, and transferring U.S. claims against Iranian interests to the Iran-United States Claims Tribunal.<sup>92</sup>

The Court first held that the executive orders authorizing the nullification of attachments to Iranian property and the transfer of that property overseas fell into the first category of Jackson's taxonomy because they were explicitly authorized by statute.<sup>93</sup>

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217 (explaining that the remarkable impact of *Youngstown* was not "obvious or inevitable in 1952").

89. 453 U.S. 654 (1981).

90. See, e.g., *Olegario v. United States*, 629 F.2d 204, 224 (2d Cir. 1980) (applying Jackson's taxonomy for the proposition that the President must rely on his own constitutional powers for any action taken that does not have the express or implied authorization of Congress); *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 392 (D.C. Cir. 1978) (citing Jackson's third category for the concept that Supreme Court jurisprudence does not support deference to executive actions when they contravene congressional statutes); *Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Comm'n*, 598 F.2d 759, 775 (3d Cir. 1976) (stating that the government's actions did not fall into Jackson's "zone of twilight" because Congress had clearly legislated to the contrary).

91. See *Dames & Moore*, 453 U.S. at 661, 669 (pronouncing that Jackson's concurrence "brings together as much combination of analysis and common sense as there is in this area" and that the Court found "Justice Jackson's classification of executive actions . . . analytically useful"); see also O'Donnell, *supra* note 7, at 99 (stating that the Supreme Court had "ignored" Jackson's taxonomy until *Dames & Moore*); Mark S. Rosen, *Revisiting Youngstown: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and Commander-in-Chief*, 54 UCLA L. REV. 1703, 1711 n.22 (2007) (insisting that *Dames & Moore*, which adopted Jackson's taxonomy, did not undermine its reasoning).

92. *Dames & Moore*, 453 U.S. at 669, 688. Before getting to the substance of the opinion, Justice Rehnquist remarked generally about the purpose and scope of Jackson's taxonomy, stating that there was a "spectrum" of executive action—running from unambiguous "congressional authorization" to unequivocal "congressional prohibition"—that was particularly appropriate when dealing with an international emergency that Congress could not have anticipated. *Id.* at 669. This declaration echoes the functionalist outlook of Justices Jackson and Frankfurter in *Youngstown*. See *supra* notes 59, 65–66 (quoting functionalist language in Justices Frankfurter's and Jackson's *Youngstown* opinions).

93. *Dames & Moore*, 453 U.S. at 669–75 (citing the International Emergency Economic Powers Act, 50 U.S.C. § 1702(a) (Supp. III 1976)). Despite legislative history that suggested Congress did not intend to give the President such "extensive power," the Court held that the plain language of the statute gave the President the

However, the Court did not find congressional authorization for the President to “suspend” claims pending in court and therefore this action could not fall into the first category.<sup>94</sup> Instead, the Court placed the suspension of claims into the “zone of twilight” category, arguing that the “general tenor” of congressional action indicated “acceptance of a broad scope for executive action” in these situations.<sup>95</sup> The Court interpreted the entire history of congressional approval of executive claims settlement as tantamount to “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” which “may be treated as a gloss on ‘Executive Power.’”<sup>96</sup> The Court drew this conclusion despite the fact that the Court cited no prior instances of the specific action taken by the President, the suspension of claims pending in federal district court.<sup>97</sup>

Legal scholars have criticized *Dames & Moore* for blurring the lines between Jackson’s three categories by “allowing congressional opposition . . . to be interpreted as congressional silence; or allowing congressional silence . . . to be interpreted as congressional approval.”<sup>98</sup> This was viewed as betraying the very purpose of *Youngstown*, the restriction of executive power, by giving the President too much latitude.<sup>99</sup> In addition, at least one scholar argued that the Court adopted a section of Frankfurter’s concurrence—“a systematic, unbroken, executive practice, long pursued to the knowledge of the

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very power that he was claiming. See *id.* at 672 (“We . . . refuse to read out of § 1702 all meaning to the words ‘transfer,’ ‘compel,’ or ‘nullify.’”).

94. *Id.* at 675. The Court also distinguished several arguments to the effect that suspending claims pending in court actually falls into Jackson’s third category. See *id.* at 681–86 (arguing that, despite the limiting and contradictory language of several congressional statutes, Congress had accepted presidential authority to settle claims).

95. *Id.* at 677–78. First, the Court argued that just because the relevant statutes did not specifically approve suspension of claims, this did not mean that Congress disapproved, especially in the “areas of foreign policy and national security.” *Id.* at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)). Next, the Court asserted that the long history of congressional acquiescence and delegation in the area of international claims settlement shows that “Congress has implicitly approved the practice of claims settlement by executive agreement.” *Id.* at 680. Finally, the Court pointed to a series of statutes where Congress had either not questioned the President’s authority to settle claims disputes or explicitly authorized future settlements. *Id.* at 680–83.

96. *Id.* at 686 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

97. See, e.g., 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, 1165 (2008) (contending that the Court cited all pre-FSIA cases for congressional acquiescence and could show no previous instances of “presidential suspension of pending lawsuits”).

98. Bellia, *supra* note 2, at 145.

99. See D’Arcy, *supra* note 80, at 293–94 (describing *Dames & Moore* as a “politically motivated aberration” rather than a “clear application of *Youngstown*”).



Congress and never before questioned”<sup>100</sup>—as the definition of actions in the “zone of twilight.”<sup>101</sup> The Court, however, appears to have used this quote as representative of congressional acquiescence of executive claims settlement agreements, rather than as a definition of “zone of twilight” situations.<sup>102</sup>

Despite the controversial nature of the Court’s opinion in *Dames & Moore*, it remained the most exhaustive application of Jackson’s taxonomy until *Medellin*, and although subsequent Supreme Court cases have cited *Dames & Moore*, none challenged its interpretation of Jackson’s tripartite taxonomy.<sup>103</sup>

## II. *HAMDAN* AND *MEDELLIN* CREATE A NEW FORMALISTIC STANDARD FOR JACKSON’S TAXONOMY THAT ELIMINATES THE “ZONE OF TWILIGHT” CATEGORY

In the years following *Dames & Moore*, legal scholars remarked on the use of Jackson’s taxonomy to expand executive power, pointing out the dichotomy of using a seminal case restricting presidential power to enlarge it.<sup>104</sup> Recently, however, the Court has applied Jackson’s taxonomy to restrict the use of executive power; first in *Hamdan* and then in *Medellin*.<sup>105</sup> This Part will argue that the Court’s application of Jackson’s taxonomy in *Hamdan* and *Medellin* creates a new standard for analyzing executive power that effectively eliminates the “zone of twilight” and requires the President to rely on a statutory

100. *Youngstown*, 343 U.S. at 610–11.

101. See, e.g., O’Donnell, *supra* note 7, at 111 (arguing that Justice Frankfurter’s concurrence helps to define Justice Jackson’s “zone of twilight” taxonomy). Although not the only interpretation of *Dames & Moore*, O’Donnell’s argument is prescient because Chief Justice Roberts appears to adopt this standard in *Medellin*; the crucial distinction is that while O’Donnell believed this standard would *allow* almost unlimited executive action, Chief Justice Roberts appears to use it to *restrict* most executive action. See *infra* Part III.B (arguing that Chief Justice Roberts uses Justice Frankfurter’s language to bar actions in the “zone of twilight” not based on a longstanding history of congressional acquiescence).

102. See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (detailing evidence supporting the executive orders and positively comparing it to the Frankfurter quote). This interpretation is supported by the fact that Justice Rehnquist went through great pains to stress that *Dames & Moore* had been decided “on the narrowest possible ground,” which militates against the implementation of a general “zone of twilight” standard. *Id.* at 660, 688.

103. Cf. D’Arcy, *supra* note 80, at 293 & n.9 (stating that *Dames & Moore* has become “part of the mainstream executive-powers jurisprudence” and listing a number of cases following it).

104. See, e.g., 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) (insisting that *Dames & Moore* “undercuts *Youngstown*’s vision of a balanced national security process”).

105. See *infra* Part III.A–B (observing that *Hamdan* held against President Bush’s military commissions and *Medellin* refused to enforce President Bush’s Memorandum).

grant of authority or a textual grant of power in the Constitution, a standard that more closely resembles Justice Black's formalist opinion than Justice Jackson's functionalist approach.<sup>106</sup>

A. Hamdan Implements a "Disabling" Congress Standard in the Third Category of Jackson's Taxonomy

*Hamdan*<sup>107</sup> reveals a new understanding of Jackson's third category by assuming that when Congress and the President disagree, Congress prevails.<sup>108</sup> Jackson himself did not assume that when Congress and the President disagree that Congress necessarily wins, "disabling" executive action.<sup>109</sup> Nevertheless, scholars have asserted that this assumption must follow from the structure of the Constitution and the relative roles of the executive and legislative branches,<sup>110</sup> at least where constitutional powers are not involved.<sup>111</sup>

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106. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (majority opinion) ("The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself."), with *id.* at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.").

107. The facts of *Hamdan* are briefly as follows: The petitioner, Salim Ahmed Hamdan, was an enemy combatant captured in Afghanistan in 2001 and held by the U.S. military at the prison in Guantanamo Bay, Cuba. *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006). In 2003, Hamdan was charged with conspiracy to commit various offenses and tried by a military commission convened by President Bush. *Id.* Hamdan brought habeas corpus and mandamus petitions asserting that President Bush lacked the authority to convene military commissions, and that the military commissions "violate[d] the most basic tenets of military and international law." *Id.* at 567. The district court granted Hamdan's writ of habeas corpus, but the court of appeals reversed, and Hamdan appealed to the Supreme Court. *Id.*

108. See *infra* notes 126–132 and accompanying text (analyzing *Hamdan* and concluding that the principle of a disabling Congress is the most straightforward interpretation of *Hamdan's* application of Jackson's third category).

109. See *supra* note 74 and accompanying text (explaining that Jackson himself spent many pages discussing whether President Truman's justifications trumped congressional will).

110. See Rosen, *supra* note 91, at 1703, 1714–16 (explaining that most scholars seem to accept a "categorical congressional supremacy," a similar terminology to a "disabling" Congress).

111. See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 88 (2d ed. 1996) (describing various presidential powers, primarily rooted textually in the Constitution, over which Congress has no authority). For instance, it is universally accepted that Congress could not tell the President where to move his troops during a war or enter into treaty negotiations against the will of the President. See U.S. CONST. art. II, § 2, cl. 1 ("The President Shall be Commander and Chief of the Army and Navy of the United States . . ."); U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."); HENKIN, *supra*, at 88 (emphasizing that even "champions of maximum Congressional authority" would not dispute the President's treaty making or commander in chief powers).

The Supreme Court appears to adopt this interpretation of Jackson's third category in *Hamdan*.<sup>112</sup>

The Court in *Hamdan* did not attempt a thorough application of Jackson's taxonomy, and *Hamdan* itself, particularly the majority opinion, is arguably better viewed as primarily a statutory interpretation case and not as a discourse on separation of powers.<sup>113</sup> Indeed, although the concurring opinions provide more substance to the constitutional issues in the case, Justice Stevens's majority opinion only directly refers to Jackson's taxonomy in a footnote.<sup>114</sup>

At issue in *Hamdan* was whether procedures enacted by President Bush for military commissions trying enemy combatants violated federal and international law.<sup>115</sup> A majority of the Court held that the military commissions were unlawful because their "structure and procedures violate both the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions,"<sup>116</sup> placing the commissions in Jackson's third category despite the fact that it was not clear that Congress intended to restrict executive action in this way.<sup>117</sup>

The question behind all of this is whether President Bush, as Commander in Chief, had the authority to convene military commissions regardless of contrary or inconsistent congressional legislation.<sup>118</sup> Justice Stevens treated the debate as a minor, and apparently long-resolved, issue, devoting only a small footnote and

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112. See Rosen, *supra* note 91, at 1709 (admitting that the theory of a disabling Congress may have been "settled" in part by *Hamdan*); Vladeck, *supra* note 28 at 939 (stating that the "elegant simplicity" of the disabling Congress theory is "thematically at the heart of the *Hamdan* opinions of Justices Stevens, Kennedy, and Breyer"). But see *id.* at 940 (suggesting that it may be "too simplistic" to read *Hamdan* this way).

113. See Vladeck, *supra* note 28, at 957–58 (emphasizing that the majority never decided any "constitutional question," but instead focused on the procedures enacted by Congress); cf. Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 11 (2006) (stating that Justice Stevens's majority opinion "purported to adhere closely to the text, context, and history of the relevant provisions" rather than demanding an explicit congressional authorization for the military commissions).

114. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006).

115. See also *id.* at 567 (remarking that the most important issue was whether "a defendant must be permitted to see and hear the evidence against him").

116. *Id.*

117. See Vladeck, *supra* note 28, at 959–60 (suggesting that the evidence that the procedures enacted for military commissions were intended to be exhaustive was less persuasive than in previous executive powers cases). This interpretation makes *Hamdan* a kind of anti-*Dames & Moore*. See *supra* text accompanying note 98 (explaining that the criticism leveled at *Dames & Moore* was that the Court was willing to interpret legislation that was arguably restricting presidential power as actually enabling executive action in the first and second categories of Jackson's taxonomy).

118. See Vladeck, *supra* note 28, at 957 (stating that "*Hamdan* thus squarely raised the question of whether congressional limits on presidential authority were enforceable").

one citation to it.<sup>119</sup> Justice Stevens asserted that “the President . . . may not disregard limitations that Congress has . . . placed on his powers,” and cited Jackson’s concurrence in *Youngstown*.<sup>120</sup> This citation to Jackson’s concurrence assumes that Jackson himself viewed the third category as a “disabling zone” where Congress necessarily wins, which is by no means apparent.<sup>121</sup>

Because Justice Stevens devotes such a small space to such a big topic, it would be tempting to write it off as dicta, but this point is a necessary part of the Court’s argument and thus has precedential value.<sup>122</sup> Although Justice Kennedy’s concurring opinion embarked on a more generous application of Jackson’s taxonomy,<sup>123</sup> it also assumed that because President Bush acted in the third category, he had no choice but to follow Congress’s guidelines.<sup>124</sup> Justice Breyer’s short concurring opinion contained no discussion of Jackson’s taxonomy but did explicitly affirm Congress’s disabling power over the President.<sup>125</sup>

The most straightforward interpretation of *Hamdan*’s application of Jackson’s taxonomy is that where Congress and the President disagree, Congress always wins, except perhaps where the President

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119. See, e.g., *Hamdan*, 548 U.S. 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.” (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))); see also Vladeck, *supra* note 28, at 935–36, 940 (suggesting that *Hamdan*’s apparent support of the congressional disabling theory was merely re-affirming the Supreme Court view prevalent before the rise of Jackson’s *Youngstown* concurrence).

120. *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown*, 343 U.S. at 637 (1952) (Jackson, J., concurring)).

121. See *supra* note 74 and accompanying text (explaining that Jackson did not make this assumption in *Youngstown*). But see Rosen, *supra* note 91, at 1705–06 (arguing the opposite: that in the third category Jackson assumed that the “president is categorically bound to follow what Congress lays down”).

122. See Rosen, *supra* note 91, at 1710 n.21 (arguing that without this assumption the Court could not state that the military commissions were constrained by contrary statute). This view was also supported by the concurring opinions of Justices Kennedy and Breyer. See *infra* notes 123–125 (concluding that both Justice Kennedy and Justice Breyer found statutes conflicting with President Bush’s military commissions, and both held that the statutes prevailed).

123. See *Hamdan*, 548 U.S. at 638–39, 643–44, 652–55 (Kennedy, J., concurring) (affirming Jackson’s taxonomy as “[t]he proper framework for assessing whether Executive actions are authorized” before concluding that the military commissions violated several provisions of the UCMJ and was thus in the third of Jackson’s categories, where it presumptively failed).

124. See *id.* at 643, 653 (asserting that the “special military commission . . . must satisfy Common Article 3[]” and “we must apply the standards Congress has provided”).

125. *Id.* at 636 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here.”).

can find a textual grant of power in the Constitution.<sup>126</sup> This would apply both when Congress can point to a textual grant, as in *Hamdan*,<sup>127</sup> and where the President and Congress have concurrent and relatively undefined powers, most noticeably in the foreign affairs and war powers fields.<sup>128</sup> In addition, it would have been easy for the majority and concurring opinions in *Hamdan* to link Congress's disabling power to its constitutional grants of power,<sup>129</sup> but not one of them directly did. Justices Kennedy and Breyer did not even discuss Congress's source of power to make legislation in the field of military justice, apparently relying on Justice Stevens's opinion.<sup>130</sup> These bald statements of congressional supremacy make this interpretation the most obvious conclusion, arguably supported by the weight of scholarship.<sup>131</sup> Finally, at least one circuit court judge appears to cite *Hamdan* for this interpretation.<sup>132</sup>

126. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 737–38 (2008) (citing *Hamdan*'s footnote 23 and its assertion that Congress has a "virtually irrebutable presumption of supremacy" over the President in a dispute over war powers and suggesting that this supremacy might not apply to some executive power grounded in Article II); *supra* note 111 and accompanying text (pointing out that textually based constitutional powers are presumably unfringeable).

127. U.S. CONST. art. I, § 8, cl. 10 ("To define and punish . . . Offenses against the Law of Nations . . ."); U.S. CONST. art. I, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces . . ."); see *Hamdan*, 548 U.S. at 591–92 (majority opinion) (counterbalancing congressional textual war powers against presidential textual war powers).

128. See HENKIN, *supra* note 111, at 87 ("In foreign affairs, much of the authority of the federal government is not explicitly allocated to either branch, and even the explicit division of power between President and Congress conforms to no 'natural' separation of executive from legislative powers . . .").

129. See *supra* note 127 (citing the relevant constitutional provisions to congressional power in *Hamdan*).

130. See *Hamdan*, 548 U.S. at 653 (Kennedy, J., concurring) ("I see no need to consider several further issues addressed in the plurality opinion by Justice Stevens . . .").

131. See *supra* note 110 and accompanying text (asserting that most scholars support the basic assumption that Congress wins a conflict with the President). But see Vladeck, *supra* note 28, at 9 (suggesting that another way to analyze *Hamdan*'s treatment of Jackson's third category is to vary Congress's disabling power on a sliding scale according to the source of the legislative power). In the case of *Hamdan*, the congressional power to pass the legislation in question was drawn from textual grants in the Constitution and so would represent an absolute case of congressional supremacy. *Id.* Where power between the President and Congress is concurrent and undefined, the assumption of congressional supremacy might not be as strong. *Id.* Although a more flexible theory, the lack of a de facto winner where there is no "textual prerogative" to either side still leaves questions, and the statements of the majority and concurring opinions in *Hamdan* do not seem to recognize such fine distinctions. See *supra* notes 119, 123–125 and accompanying text (citing the majority and concurring opinions and showing they give Congress a categorical disabling power). Finally, because most executive war powers are implied, a hypothetical case where implied executive power defeats implied congressional power in the third category suggests an executive implied power

*Hamdan* suggested a new standard for Jackson's third category but did not explore the "zone of twilight" at all, although Justice Stevens's majority opinion left open the possibility that President Bush might have had the power to establish military commissions absent congressional legislation.<sup>133</sup> In addition to being widely supported by legal scholars,<sup>134</sup> the disabling Congress theory articulated by *Hamdan* might not have been, by itself, a dramatic alteration of Jackson's taxonomy because it was already difficult for the executive branch to overcome a congressional mandate.<sup>135</sup> *Medellin*, however, embarked on the most extended application of Jackson's taxonomy by the Supreme Court since *Dames & Moore*. In the end, *Medellin* establishes a new standard for presidential power in the "zone of twilight," or at least severely restricts its use, and combined with *Hamdan* heralds a more formalistic application of Jackson's taxonomy.<sup>136</sup>

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supremacy for which there is no clear support. See Barron & Lederman, *supra* note 126, at 736 n.144 (arguing that a sliding scale disabling theory has no real jurisprudential basis).

132. See *ACLU v. NSA*, 493 F.3d 644, 717–19 (6th Cir. 2007) (Gilman, J., dissenting) (citing footnote 23 in *Hamdan* for the proposition that Congress's enactment of FISA and Title III disables President Bush's warrantless wiretapping program absolutely).

133. See *Hamdan*, 548 U.S. at 592–93 & n.23 (majority opinion) (remarking that "[w]hether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions 'without the sanction of Congress' . . . is a question this Court . . . need not answer today," and continuing later, "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions," he must follow explicit congressional guidelines). Presumably, presidential enactment of military commissions "absent congressional authorization" would fall into the "zone of twilight." *Id.* at 593 n.23.

134. See, e.g., Barron & Lederman, *supra* note 126, at 949 (arguing that history supports the assertion that the President is compelled to abide by legislative restrictions).

135. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (relating that the Court would have to disable Congress from acting on the measure entirely). But see Barron & Lederman, *supra* note 126, at 693–94 (arguing that the most important issues in separation of powers jurisprudence will revolve around Jackson's third category).

136. See *infra* Part III.B (asserting that *Medellin* eliminates the "zone of twilight" and, with a third category that disables Congress, resembles Justice Black's test).

B. *Medellin Eliminates the “Zone of Twilight” By Requiring Longstanding Congressional Support for Executive Action*

*Medellin*<sup>137</sup> establishes a new interpretation of Jackson’s taxonomy by requiring a longstanding practice of congressional acquiescence to a specific executive action before it can exist in the “zone of twilight.”<sup>138</sup> Chief Justice Roberts<sup>139</sup> prefaced his analysis by quoting Justice Black’s majority opinion, that “[t]he President’s authority to act . . . ‘must stem either from an act of Congress or from the Constitution itself.’”<sup>140</sup> This formalist quote provides the appropriate lens through which to view the rest of Chief Justice Roberts’s application of Jackson’s taxonomy.

After reaffirming Jackson’s tripartite taxonomy as the “accepted framework for evaluating executive action in this area,”<sup>141</sup> Chief Justice Roberts broke the analysis into two separate parts, focusing on the two claimed sources of presidential power—the “treaty power” and the “dispute- resolution” power—to enforce the ICJ ruling.<sup>142</sup> The first part eliminated the possibility of President Bush’s Executive Memorandum—obligating the states to follow the ICJ decision—

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137. The facts of *Medellin* are briefly as follows: Jose Ernesto Medellin, the petitioner in the case, was convicted in Texas state court for murder. *Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008). In violation of the VCCR, Medellin, a Mexican national, was not given consular access after he was arrested. *Id.* at 1352. In 2004, the ICJ ruled that the United States was obligated by the VCCR to give Medellin and fifty other Mexican nationals “review and reconsideration of their state-court convictions.” *Id.* In 2005, President Bush issued an Executive Memorandum stating that under his authority the United States would honor the ICJ ruling by obligating state courts to “give effect to the decision.” *Id.* at 1353 (internal quotations omitted). Texas state courts refused to honor both the ICJ decision and the President’s Memorandum, in part because Medellin had not timely raised the Vienna Convention claim at trial, and because neither the ICJ nor the President has the authority to set aside state procedural rules. *Id.* at 1356. Medellin appealed to the Supreme Court. *Id.* at 1353.

138. See *infra* Part III.B (analyzing Chief Justice Roberts’s application of Jackson’s taxonomy).

139. In an aside, it is fitting that Chief Justice Roberts wrote the most exhaustive application of Jackson’s taxonomy since *Dames & Moore*, because Roberts clerked for Justice Rehnquist when Rehnquist penned *Dames & Moore*. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Oct. 18, 2008) (explaining that Roberts clerked for Rehnquist during the 1980 term, the same term that *Dames & Moore* was decided). This occurrence is even more remarkable for the fact that Rehnquist himself clerked for Justice Jackson when Jackson wrote his *Youngstown* concurrence. See Rehnquist, *supra* note 3, at 752–53 (relating that he was very familiar with *Youngstown* because he clerked for Justice Jackson when the case was decided).

140. *Medellin*, 128 S. Ct. at 1368 (quoting *Youngstown*, 343 U.S. at 585).

141. *Id.*

142. See *id.* (recounting how the United States argued that (1) the “relevant treaties give the President the authority to implement the *Avena* judgment and that Congress has acquiesced [to] such authority” and (2) that the President had a separate “international dispute-resolution” authority “wholly apart” from those “based on the pertinent treaties”).

falling into Jackson's first category and the second part eliminated the possibility of the Memorandum falling in the "zone of twilight" by restricting valid "zone of twilight" situations.

1. *Medellin's application of Jackson's Taxonomy to President Bush's authority to issue the Memorandum from "relevant treaties"*

The first argument advanced by the United States was that certain treaties give the President the authority to enforce the ICJ decision.<sup>143</sup> Essentially, the United States argued that the President was authorized to issue his Memorandum by the Optional Protocol and the United Nations Charter, either in Jackson's first category or in the "zone of twilight," because the treaties gave the President an implied power to implement the ICJ decision.<sup>144</sup> Roberts rejected these arguments, placing the Memorandum firmly in Jackson's third category.<sup>145</sup>

First, Roberts stated that Congress alone has the power to convert a non-self-executing treaty into a self-executing one; the President cannot rely on implied powers to take an action that is reserved for Congress alone.<sup>146</sup> Because the Court had already held that the relevant treaties were "non-self-executing"<sup>147</sup> the President could not rely on them to place his Memorandum in the first category,<sup>148</sup> having the "express or implied authorization" of Congress.<sup>149</sup> As Chief Justice Roberts explained, if a treaty is ratified with "the understanding that it is not to have domestic . . . force," one can hardly expect to use it as congressional support for giving it domestic force.<sup>150</sup>

Following this logic, Chief Justice Roberts further held that the President's Memorandum could not fall into the "zone of twilight," both because unilaterally enforcing a non-self-executing treaty would be against the "implied will" of Congress, and because there was no history of congressional acquiescence "remotely involv[ing] transforming an international obligation into domestic law and

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143. *Id.*

144. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) [hereinafter Brief for the United States]).

145. See *id.* at 1368–69 (rejecting the United States's assertion that the President's Memorandum falls within the first category of the *Youngstown* structure).

146. *Id.* at 1369.

147. *Id.* at 1357.

148. *Id.* at 1369.

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

150. *Medellin*, 128 S. Ct. at 1369.



thereby displacing state law.”<sup>151</sup> Thus the President’s Memorandum falls into the third category, where it presumptively fails.<sup>152</sup> Chief Justice Roberts concluded the “treaty power” analysis by stating that although the President might have the responsibility of complying with the treaty, he must find another way to do it.<sup>153</sup>

Chief Justice Roberts’s insistence on a history of acquiescence for the “zone of twilight” confirms the “‘longstanding practice’ of congressional acquiescence” standard more explicitly stated in Chief Justice Roberts’s analysis of the dispute resolution power.<sup>154</sup> Similarly, Chief Justice Roberts’s requirement that any history of acquiescence be of the exact kind at issue in *Medellin*—namely, congressional acquiescence of presidential domestic enforcement of ICJ decisions—presages his rejection of the claims settlement cases as valid precedent. In both arguments the government tried to show congressional acquiescence of a more generalized power, either

151. *Id.* at 1368, 1370.

152. *Id.* at 1369. Chief Justice Roberts argues not only that Congress’s inherent power to execute “non-self-executing” treaties trumps any inherent powers that the President might have in this area, but by implication that the President has *no* inherent powers in this area. *See id.* at 1371 (“[T]he Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect.”). *But see* HENKIN, *supra* note 111, at 226–27 (emphasizing that several Supreme Court cases allow for executive domestic execution of international agreements). Theoretically, this absolves a need to apply Jackson’s taxonomy at all as any action by the President along these lines would require “the express or implied authorization of Congress” found in the first category. *Cf.* HENKIN, *supra* note 111, at 94–95 (pointing out that Jackson’s taxonomy does not address a case where Congress has exclusive power and the President has no authority to act).

153. *But see Medellin*, 128 S. Ct. at 1369 (“[T]he terms of a non-self-executing treaty can become domestic law only . . . through passage of legislation by both Houses of Congress.”). Congress has yet another opportunity to take action in this case, although it is too late to benefit Jose Medellin. *See* Request for Interpretation of the Judgment of 31 March 2004 In the Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.) (Order of July 16, 2008), at 1, 3, 19, *available at* <http://www.icj-cij.org/docket/files/139/14639.pdf> (last visited Dec. 26, 2008) (ordering the United States to stay the execution of five Mexican nationals pursuant to its *Avena* holding and suggesting that Congress could pass legislation to comply with its international obligations); James C. McKinley, Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, at A19 (reporting that Texas executed Jose Medellin after the Supreme Court rejected a last minute request for a stay of execution). *See generally* Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/world-court-seeks-to-block-us-executions/> (July 16, 2008, 12:21 EST) (detailing the new developments in the *Avena* case).

154. *See Medellin*, 128 S. Ct. at 1372 (finding that the President’s Memorandum did not meet the requirement of “particularly longstanding practice” of congressional acquiescence for Presidential action in the “zone of twilight” to succeed); *see also infra* Part III.B (analyzing Chief Justice Roberts’s treatment of the claimed “dispute resolution” power). Although Chief Justice Roberts focuses on congressional “quiescence,” he ignores “inertia” and “indifference,” also parts of Jackson’s “zone of twilight” definition. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

treaty or dispute resolution, but in both cases Roberts required prior congressional acquiescence of a specific action.<sup>155</sup>

2. *Medellin's application of Jackson's Taxonomy to President Bush's authority to issue the Memorandum from "inherent" dispute resolution powers*

In arguing for an executive "dispute resolution" power, the government looked to the claims settlement cases<sup>156</sup> for the proposition that the President has an independent foreign affairs authority to settle international disputes.<sup>157</sup> Chief Justice Roberts analyzed this claim exclusively within the "zone of twilight"<sup>158</sup> and held that this "independent source of authority" does not support the President's actions in this case.<sup>159</sup> In doing so, Chief Justice Roberts established a new standard for "zone of twilight" situations, theoretically restricting executive action either to Jackson's first category or to when the President can point to a textual source of power in the Constitution.

Chief Justice Roberts cited *Dames & Moore* for the premise that the claims settlement cases were "based on the view that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned'" could "raise a presumption that the [presidential] [action] had been [taken]" with its consent.<sup>160</sup>

155. See *Medellin*, 128 S. Ct. at 1370–72 (requiring that the executive action be accomplished using an executive memorandum to transform an international obligation into a domestic obligation that displaces state law). As the dissent points out, there are examples of congressional acquiescence to presidential authority "transforming an international obligation into domestic law and thereby displacing state law," just not based on an ICJ opinion. *Medellin*, 128 S. Ct. at 1370–71, 1390–91 (Breyer, J., dissenting) (citing *United States v. Pink*, 315 U.S. 203, 223, 230–31, 233–34 (1942); *United States v. Belmont*, 301 U.S. 324, 326–27 (1937)).

156. *Medellin*, 128 S. Ct. at 1371 (majority opinion) (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003)); *Dames & Moore v. Regan*, 453 U.S. 654, 679–80 (1981); *Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330).

157. *Id.*; see Brief for the United States, *supra* note 144, at 16 (insisting that the President has an "established authority to resolve disputes with a foreign government over the claims of individuals").

158. *Medellin*, 128 S. Ct. at 1368 (emphasizing before beginning the analysis of President Bush's Memorandum that "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area"). For the "treaty power" analysis, Chief Justice Roberts evaluates all three of Jackson's categories; for the "dispute resolution" power, he only appears to examine congressional acquiescence, the catchword for the "zone of twilight" and the basis for the claims settlement cases. *Id.* at 1371–72.

159. *Id.* at 1371.

160. *Id.* at 1371–72 (alterations in original) (internal quotations omitted). This premise is debatable, in part because two of the four cases cited by the Court, *Pink*, 315 U.S. 203 and *Belmont*, 301 U.S. 324, drew from the President's textually based "recognition power" as opposed to just an implied dispute settlement power. Cf. HENKIN, *supra* note 111, at 227 (stating that the decisions in *Belmont* and *Pink* did not appear restricted to just recognition situations). In addition, executive agreements

Chief Justice Roberts continued, stating that because President Bush's Memorandum was "not supported by a 'particularly longstanding practice' of congressional acquiescence"—that it was in fact unprecedented—it was not like a claims settlement case and could not take the force of law.<sup>161</sup>

As it is unlikely that Chief Justice Roberts intended this strained interpretation, a better view is that in order to enable executive action in the "zone of twilight," as the claims settlement cases did, the action would have to be "supported by a 'particularly longstanding practice' of congressional acquiescence."<sup>162</sup> Put another way, the presidential action would need to be "based on . . . 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.'"<sup>163</sup> If accurate, this standard for presidential action in the "zone of twilight" would eliminate virtually all executive action not based on congressional acquiescence stretching back for however long "long pursued" means.<sup>164</sup> Additionally, Chief Justice Roberts's insistence that the specific actions taken by the President have a history of congressional acquiescence suggests that finding this history will be difficult, especially where the President is responding to new or unforeseen situations.<sup>165</sup>

The advent of this new standard for the "zone of twilight," coupled with the "disabling" Congress standard suggested by *Hamdan*, reveals

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taking the force of domestic law only date back to *Belmont* itself, which affirmed the relatively new concept of foreign relations supremacy over state law as the basis for its decision, not that Congress had acquiesced to the Executive's action. See *Belmont*, 301 U.S. at 331 ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."); HENKIN, *supra* note 111, at 226–27 (stating that *Belmont* rejected the assertion that executive agreements did not take the force of domestic law and that both *Belmont* and *Pink* appeared to assert a generalized foreign policy supremacy).

161. *Medellin*, 128 S. Ct. at 1372. This is a peculiar line of reasoning as the government was not arguing that *Medellin* was an actual claims settlement case, but rather that it was similar to the claims settlement cases in that it drew upon the President's foreign affairs power to resolve disputes with other nations based on an international agreement. See Brief for the United States, *supra* note 144, at 12–16 (analogizing President Bush's Memorandum to the claims settlement cases but actually arguing that the instant case represented less of a unilateral exercise of executive power—a "modest implementation authority"—than the claims settlement cases).

162. *Medellin*, 128 S. Ct. at 1372 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003)).

163. *Id.* at 1371–72 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

164. See *Am. Ins. Ass'n*, 539 U.S. at 415 (explaining that in the claims settlement cases congressional acquiescence was for "over 200 years").

165. See *supra* note 155 and accompanying text (pointing out that although there was a history of executive action transforming international obligation into domestic law, Chief Justice Roberts refused to analogize that power to President Bush's Memorandum).

a taxonomy less related to Jackson's functionalist concurrence than to Justice Black's starkly formalistic majority opinion. In order to fall within the "zone of twilight," the President must show a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," a standard that looks like the "implied authorization" located in the first category.<sup>166</sup> The standard squeezes the first and third categories much closer together, practically touching, with the President only able to act independently of Congress where he can point to a textual source of power from the Constitution.<sup>167</sup>

Instead of Jackson's three categories, the analysis could look more like this: When the President acts with the express or implied authorization of Congress—including the implied blessing of a 'particularly longstanding practice' of congressional acquiescence—his power is at its maximum; otherwise, he cannot act unless he can point to a textual source of power in the Constitution.<sup>168</sup> This certainly seems to resemble Justice Black's brisk refutation of presidential implied powers, in which he stated "[t]he President's [authority] . . . [to act] must stem either from an act of Congress or from the Constitution itself."<sup>169</sup>

Neither Jackson's concurrence in *Youngstown* nor its subsequent application in *Dames & Moore* support such a stark and demanding standard for Jackson's taxonomy. Displaying his functionalist mindset, Jackson himself refused to set a definitive standard, remarking that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables,"<sup>170</sup> and in addition to congressional "quiescence" also listed "inertia" and "indifference" as enabling presidential action.<sup>171</sup> Jackson, along with a majority of his colleagues, left open the possibility that President Truman might have had the power to seize the mills in the absence of congressional action, an Executive action that does not have a "particularly longstanding practice."<sup>172</sup> Additionally, examples that Jackson gave for "zone of twilight" situations were several Civil War

166. *Medellin*, 128 S. Ct. at 1371–72.

167. See *supra* note 111 and accompanying text (relating examples of executive power based on constitutional text).

168. But see, e.g., Bellia, *supra* note 2, at 92 & n.25 (listing scholars who posit that when the President acts in foreign affairs in the face of congressional inaction—the "zone of twilight"—his actions are presumptively valid).

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

170. *Id.* at 637 (Jackson, J., concurring).

171. *Id.*

172. See HENKIN, *supra* note 111, at 377–78 n.15 (supposing that a majority of justices would have upheld executive action had there not been conflicting legislation).

cases where President Lincoln suspended habeas corpus in the face of “judicial challenge and doubt.”<sup>173</sup> Although Congress eventually ratified President Lincoln’s actions, a President unilaterally suspending habeas was unprecedented, let alone a “particularly longstanding practice.”<sup>174</sup>

*Dames & Moore* also does not support this interpretation of the “zone of twilight.” Justice Rehnquist repeatedly emphasized both the narrowness of *Dames & Moore*’s holding<sup>175</sup> and the elasticity of Jackson’s tripartite taxonomy, particularly in situations “involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.”<sup>176</sup> A standard requiring a “particularly longstanding practice” does not seem especially elastic. As mentioned above, while the Court in *Dames & Moore* quotes Frankfurter’s concurrence, it appears to do so as a standard reflective of claims settlement cases and *sufficient* for the “zone of twilight,” but not necessarily *requisite*.<sup>177</sup>

Because major separation of powers cases are relatively rare, and bona fide “zone of twilight” cases even rarer, it remains to be seen whether, or how soon, this new standard will have a real world effect. The next section will attempt to assess a few possible ramifications of this new standard, particularly as it applies to the executive foreign affairs and war powers.

### III. RAMIFICATIONS OF THE NEW STANDARD ON SEPARATION-OF-POWERS ISSUES AND EXECUTIVE ACTION

Although the Supreme Court has rarely ruled on significant separation of powers issues between Congress and the President,<sup>178</sup> it has recently shown a much greater willingness to both check presidential power and uphold Congress’s legislative mandate.<sup>179</sup> In

173. *Youngstown*, 343 U.S. at 637 n.3.

174. *Id.*

175. *Dames & Moore v. Regan*, 453 U.S. 654, 660, 688 (1981).

176. *Id.* at 669.

177. See *supra* note 102 and accompanying text (arguing, among other points, that *Dames & Moore* was a narrow holding focused on the facts at issue and was not attempting to set a specific “zone of twilight” standard).

178. See *supra* notes 7–8 and accompanying text (citing various legal scholars remarking on the relative dearth of Supreme Court opinions rejecting executive assertions of power in the foreign affairs arena); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732–33 (1996) (recounting that the Supreme Court has historically rarely ruled on separation of powers cases but that such rulings “accelerated” with the Reagan administration, generally in the favor of executive power).

179. See *Medellin v. Texas*, 128 S. Ct. 1346, 1368–69 (2008) (holding that the legislative power to execute a non-self-executing treaty is solely Congress’s and that President Bush cannot violate this separation of powers principle); *Hamdan v.*

this way Jackson's tripartite taxonomy, as the "accepted framework for evaluating executive action,"<sup>180</sup> may become more important and influential than it already is. It follows, then, that a change in the "accepted framework" could profoundly affect the outcome of future cases.

The new standard for Jackson's taxonomy is applicable to any separation of powers dispute between Congress and the President, and indeed Jackson's concurrence has been cited in such diverse opinions as *Clinton v. New York*,<sup>181</sup> *Mistretta v. United States*,<sup>182</sup> *Morrison v. Olson*,<sup>183</sup> *INS v. Chadha*,<sup>184</sup> and *Nixon v. Administrator of General Services*.<sup>185</sup> However, it is particularly applicable to foreign affairs and war powers cases.<sup>186</sup> The powers of Congress and the President in domestic affairs are "allocated explicitly and according to an expressed principle," but in "foreign affairs, much of the authority . . . is not explicitly allocated to either branch, and even the explicit division of power between President and Congress conforms to no 'natural' [principle]." <sup>187</sup> Many of the Supreme Court cases explicitly applying Jackson's taxonomy have been either foreign affairs<sup>188</sup> or war powers<sup>189</sup> cases, suggesting that in these types of cases, where power is mostly implied and mostly shared, Jackson's taxonomy is especially useful.

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Rumsfeld, 548 U.S. 557, 616 (2006) (insisting that the President cannot contravene various "requirements" legislated by Congress); see also Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2352 (2006) (claiming that *Hamdan* was the first step in reversing a trend of unremitted executive power aggrandization set into motion by the Bush Administration); Seth Weinberger, *Restoring the Balance: The Hamdan Decision and Executive War Powers*, 42 TULSA L. REV. 681, 692 (2007) (arguing that *Hamdan* served as a check on executive power and restored the balance between congressional and presidential war powers).

180. *Medellin*, 128 S. Ct. at 1368.

181. 524 U.S. 417, 435 (1998) (Breyer, J., dissenting).

182. 488 U.S. 361, 381 (1989).

183. 487 U.S. 654, 694 (1988).

184. 462 U.S. 919, 962 (1983) (Powell, J., concurring).

185. 433 U.S. 425, 443 (1977).

186. See *infra* notes 187–189 and accompanying text.

187. HENKIN, *supra* note 111, at 87.

188. See *Medellin v. Texas*, 128 S. Ct. 1346, 1371–72 (2008) (applying Jackson's taxonomy to hold that neither the relevant treaties nor the executive foreign affairs powers allow the President to enforce the ICJ decision on the states); *Dames & Moore v. Regan*, 453 U.S. 654, 675, 686 (1981) (adopting Jackson's taxonomy and holding that the actions of Presidents Carter and Reagan were valid pursuant to the executive foreign affairs powers and fell either into the first category or the "zone of twilight").

189. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–93 & n.23 (2006) (citing Jackson's concurrence for the assertion that congressional legislation overrides use of the executive war power); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641–43 (1952) (Jackson, J., concurring) (holding that the President's war powers do not allow him to seize steel mills in the face of contrary legislation).

A. *The New Standard and War Powers*

The new standard for Jackson's taxonomy established by *Hamdan* and *Medellin* will likely affect war powers disputes less than foreign affairs disputes. As one author notes, Congress has for the most part moved war powers issues from the "zone of twilight" into Jackson's third category by passing comprehensive legislation.<sup>190</sup> Even before *Hamdan* it was difficult for the President to succeed in the third category, as the Court would have to "disabl[e] the Congress from acting upon the subject."<sup>191</sup> Apparently, the United States did not even argue this point in *Hamdan*.<sup>192</sup> However, one interesting outcome of *Hamdan* is the effect it could have on the War Powers Resolution of 1973 or another similar provision.<sup>193</sup>

The War Powers Resolution was passed after President Nixon continued bombing Cambodia after Congress repealed the Gulf of Tonkin Resolution, which had given President Nixon the original authority to bomb Cambodian territory.<sup>194</sup> The War Powers Resolution placed much of the President's war powers into the third of Jackson's categories,<sup>195</sup> requiring the President to "consult"<sup>196</sup> with and "report"<sup>197</sup> to Congress before and after introduction of troops into battle. Additionally, it required the President to withdraw troops from battle after sixty days unless Congress has declared war or passed a joint resolution authorizing the conflict.<sup>198</sup> President Nixon vetoed the War Powers Resolution, claiming it was unconstitutional,<sup>199</sup> but Congress passed the law despite his objection.<sup>200</sup> Despite the clear intent of Congress to check presidential power through the War

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190. See HENKIN, *supra* note 111, at 105 (stating that legislation passed by Congress after the Vietnam war left presidential war powers in Jackson's third category); Daniel J. Freeman, Note, *The Canons of War*, 117 YALE L.J. 280, 283 (2007) (arguing that executive action in this area now comes down to a statutory interpretation analysis).

191. *Youngstown*, 343 U.S. at 637–38.

192. *Hamdan*, 548 U.S. 557, 593 n.23.

193. 50 U.S.C. §§ 1541–1548 (2006).

194. See Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons From the Vietnam War*, 53 WAYNE L. REV. 943, 983–84 (2007) (explaining that the War Powers Resolution was intended to "rein in" executive war powers).

195. HENKIN, *supra* note 111, at 105.

196. 50 U.S.C. § 1542.

197. 50 U.S.C. § 1543(a).

198. 50 U.S.C. § 1544(b). See generally HENKIN, *supra* note 111, at 105–11 (describing the motivations for, and criticisms of, the War Powers Resolution, and its subsequent effect on executive action).

199. E.g., Weinberger, *supra* note 179, at 689 (asserting that no President after Nixon accepted the War Power Resolution's constitutionality).

200. HENKIN, *supra* note 111, at 105–07.

Powers Resolution,<sup>201</sup> its strictures have largely been ignored or avoided by the executive branch.<sup>202</sup>

Although the War Powers Resolution now appears largely irrelevant,<sup>203</sup> and likely unconstitutional,<sup>204</sup> there is every possibility that it or a similar resolution<sup>205</sup> could be used to challenge executive authority to assert Commander in Chief powers contrary to the express will of Congress. In such a situation, an analysis under the new standard for Jackson's taxonomy would likely "disable" the President from exercising his war powers in a way contrary to the relevant legislation, despite the strong arguments for presidential power in this area.<sup>206</sup>

### B. *The New Standard and Foreign Affairs Powers*

It is in the area of foreign affairs, where the power is most implied and concurrent between the branches, that the new Jackson taxonomy standard could have its greatest effect.<sup>207</sup> Although the President has been described as the "sole organ of the nation in its external relations,"<sup>208</sup> and that "the external powers of the United States are to be exercised without regard to state laws or policies,"<sup>209</sup> it is now unlikely that future presidential actions pursuant to the executive foreign affairs power will have domestic effect, apart from

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201. See Paulsen, *supra* note 3, at 222 (referring to the War Powers Resolution when stating that "Congress has adopted a standing statutory rule [against] any . . . inference" that presidential war powers might exist in the "zone of twilight").

202. See HENKIN, *supra* note 111, at 109–10 (describing various measures that Presidents have taken to either avoid or ignore the War Powers Resolution).

203. See Minda, *supra* note 194, at 984–85 (remarking that "presidents have refused to honor the requirements of the War Powers Resolution, and that neither Congress nor the courts have seemed to care").

204. See, e.g., HENKIN, *supra* note 111, at 107–08, 125–27 (noting that *INS v. Chadha* holds all legislative vetoes presumptively unconstitutional, including the provision in the War Powers Resolution allowing Congress to terminate hostilities through a concurrent resolution).

205. See James A. Baker, III & Warren Christopher, Op-Ed., *Put War Powers Back Where They Belong*, N.Y. TIMES, July 8, 2008, at A21 (attempting to inspire efforts to pass a new and better written war powers resolution that would be more palatable to the executive branch and easier to implement by Congress).

206. See, e.g., John Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 170, 174 (1996) (arguing that Congress could oppose "executive war decisions only by exercising its powers over funding and impeachment"). But see HENKIN, *supra* note 111, at 107 ("I do not perceive any constitutional objections to the Resolution in principle.").

207. Cf. HENKIN, *supra* note 111, at 95 (implying that the "zone of twilight" was especially large in foreign affairs, stating that "surely [in foreign affairs], where the President admittedly has large power, the fact that Congress can act does not, of itself, prove that the President could not").

208. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

209. *United States v. Belmont*, 301 U.S. 324, 331 (1937).



narrowly described claims settlement cases.<sup>210</sup> For good or ill, the requirement that there be a “particularly longstanding practice”<sup>211</sup> of congressional acquiescence to a given presidential action could potentially circumscribe many courses of action that the President might take.<sup>212</sup>

One example of a situation where the new standard might have circumscribed executive action is when President Carter, claiming an inherent foreign affairs power, unilaterally terminated a treaty between the United States and Taiwan.<sup>213</sup> The power to terminate a treaty is not specifically allocated in the Constitution, although the power certainly exists, and both Congress and the President have claimed the power to do so.<sup>214</sup> Despite the Supreme Court’s refusal to rule on the merits in *Goldwater v. Carter*,<sup>215</sup> it is now fairly well accepted that the President does have the power to unilaterally terminate a treaty.<sup>216</sup> However, applying the new standard for Jackson’s taxonomy reaches a different conclusion. Congress has never explicitly given the President the generalized power to unilaterally terminate a treaty, and although there were several instances of a President terminating a treaty without congressional approval before *Goldwater*, there was nothing approaching a “particularly longstanding practice” of congressional acquiescence.<sup>217</sup> This puts President Carter’s action in the third category, which under the new standard would result in a nullification of his action as the Constitution does not specifically allocate the power to terminate a treaty to the President.<sup>218</sup>

210. *Medellin v. Texas*, 128 S. Ct. 1346, 1372 (2008).

211. *Id.* (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003)).

212. *Cf.* HENKIN, *supra* note 111, at 95 (“Presidents, we have seen, have acted unilaterally in foreign affairs matters which Congress might undoubtedly have regulated, where Congress had not in fact done so.”).

213. *See id.* at 213–14 (explaining that when several members of Congress brought suit arguing that President Carter did not have the constitutional power to unilaterally terminate a treaty, the Supreme Court refused to rule on the merits but that the power of the President to unilaterally terminate a treaty is now well established (citing *Goldwater v. Carter*, 444 U.S. 996 (1979))).

214. *See* HENKIN, *supra* note 111, at 211–13 & nn.142–43 (indicating that although the United States rarely terminates treaties, Congress has occasionally asserted its authority to do so); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 249–50 (2001) (pointing out that, like most foreign affairs powers, the Constitution does not specifically assign the power to terminate a treaty).

215. 444 U.S. 996 (1979).

216. *See* HENKIN, *supra* note 111, at 214 (“At the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty . . .”).

217. *See id.* at 213 (“[T]he United States has not often been disposed to terminate treaties.”); *id.* at 212 & n.138 (stating that President Lincoln was the first President to terminate a treaty, although that was later approved by Congress, and explaining that President Roosevelt also denounced several other treaties).

218. *Supra* note 214 and accompanying text.

A more recent controversy involving executive foreign affairs powers concerned not the termination of an international obligation, as in *Goldwater*, but instead the creation of an international obligation, in this case President Bush's attempt to reach a new status of forces agreement ("SOFA") with Iraq through an executive agreement.<sup>219</sup> Although SOFAs have historically been entered into by the President through executive agreements and without the specific authorization of Congress,<sup>220</sup> critics argued that this particular SOFA agreed to much more than previous SOFAs have and could prolong the United States's involvement in Iraq without Congress's approval.<sup>221</sup>

President Bush has admitted that this particular agreement will not likely be made,<sup>222</sup> but the new standard for Jackson's taxonomy would have invalidated it and would not allow for any similar agreement contemplated by future Presidents.<sup>223</sup> Congress has not allocated to the President the power to make such a SOFA agreement<sup>224</sup> nor is there a "particularly longstanding practice" of congressional acquiescence to this type of SOFA agreement.<sup>225</sup> This would leave the SOFA agreement in the third category, and because the President has no textually derived power to make executive agreements, the SOFA

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219. See generally Michael Abramowitz, *Democrats Attack Iraq Security Proposal*, WASH. POST, Jan. 24, 2008, at A9 (reporting that President Bush faced strong opposition from Democrats in Congress who feared that he was trying use an executive agreement to keep the United States in Iraq indefinitely).

220. Bruce Ackerman & Oona Hathaway, *An Agreement Without Agreement*, WASH. POST, Feb. 15, 2008, <http://www.washingtonpost.com/wpdyn/content/article/2008/02/15/AR2008021502539.html>.

221. See *id.* (explaining that this agreement would give civilian contractors working in Iraq immunity for any crime they commit, something that no SOFA had done before, and that through this SOFA, President Bush unilaterally "threatens to deepen the American commitment" in Iraq).

222. See Campbell Robertson & Stephen Farrell, *Pact, Approved in Iraq, Sets Time for U.S. Pullout*, N.Y. TIMES, November 17, 2008, at A1 (describing the new SOFA between the United States and Iraq, an agreement different from the one discussed in this Comment in that it set a timeline for U.S. troop withdrawal and eliminated controversial provisions like prosecutorial immunity for U.S. troops and contractors who commit certain crimes in Iraq).

223. See Steven Lee Myers, *Bush, in a Shift, Accepts Concept of Iraq Timeline*, N.Y. TIMES, July 19, 2008, at A1 (explaining that given Iraqi opposition to the terms of the SOFA agreement the Bush administration decided to forgo the agreement in its initial form).

224. See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2008/03/what-do-authorizations-for-use-of.html> (Mar. 7, 2008, 12:38 EST) (pointing out that President Bush has not shown legislative support for the SOFA but has used the Authorization for Use of Military Force (AUMF) and other statutes as support for continuing combat operations in Iraq).

225. See Ackerman & Hathaway, *supra* note 220 (arguing that the terms of this SOFA are unprecedented and so President Bush cannot rely on previous SOFA agreements for support).

would likely fail.<sup>226</sup> That this new standard is different from the old standard is particularly clear when compared to *Dames & Moore*, where the Supreme Court was willing to extend congressional acquiescence for one type of claims settlement agreement to include another never seen before, that being the “suspension” of claims in court.<sup>227</sup>

Indeed, *Dames & Moore* itself might have turned out much different had this new standard been applied faithfully. Although claims settlement by executive agreement in general had a long history,<sup>228</sup> the Court could show no examples of the specific action taken by President Reagan in the “zone of twilight,” such as suspending claims pending in district court.<sup>229</sup> In addition, strictly speaking the Algiers Accords were not executive agreements but instead “declarations” drafted by the United States, issued by the Algerian Government, and recognized as executive agreements by the Supreme Court.<sup>230</sup> A court applying the new standard would find no legislation granting President Reagan the power to “suspend” claims, and no “particularly longstanding practice” of congressional acquiescence to either “suspension” of claims or the type of executive agreement at issue.

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226. Cf. *id.* (noting that the President’s Commander in Chief powers only cover members of the armed forces, not civilian contractors). That at least some members of Congress were definitely against the SOFA is also demonstrated by a bill introduced by Senator Clinton that, had it been passed, would have sharply restricted the President’s ability to conclude such an agreement. See Congressional Oversight of Iraq Agreements Act of 2007, S. 2426, 110th Cong. § 3 (2007) (mandating that (1) the President report to Congress his reasons for not submitting the SOFA for congressional ratification, and demonstrate through legal analysis how his executive powers derived from the Constitution justify those reasons, and (2) that no funds be authorized to support any agreement with Iraq that is not ratified by two-thirds of the Senate).

227. See *supra* note 97 and accompanying text (finding no previous examples of executive “suspension” of claims pending in court).

228. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 & n.8, 680 (1981) (explaining that Presidents have been agreeing to international executive agreements since at least 1799). But see HENKIN, *supra* note 111, at 226–27 (stating that executive agreements taking the force of law within U.S. territory only came about with *Belmont* and *Pink*). Whether congressional acquiescence of executive agreements taking the force of domestic law was “particularly longstanding” by the time *Dames & Moore* was decided might therefore be up for conjecture.

229. See *supra* note 97 and accompanying text (pointing out that suspension of claims was unique expression of the claims settlement power at the time of *Dames & Moore*).

230. *Dames & Moore*, 453 U.S. at 663–64; see D’Arcy, *supra* note 80, at 292 n.4 (explaining that the government of Iran would not sign any agreement with “the Great Satan”). See generally D’Arcy, *supra* note 80, at 292 & nn.1–2, & 4 (relating that the executive agreement in *Dames & Moore*, known as the Algiers Accords, was agreed to by the United States in order to free American hostages held by the Iranian government following the storming of the U.S. embassy in Iran by a “terrorist student group” in 1979).

This would leave the Algiers Accords in the last category where it would fail despite its great importance and pressing need.<sup>231</sup>

#### CONCLUSION

In the words of Louis Henkin, “Justice Jackson did not tell us, or offer a principle that might help us determine, which powers are concurrent” in the “zone of twilight” with respect to foreign affairs.<sup>232</sup> Forecasting the effects of this new standard on future presidential action in the “zone of twilight” is similarly difficult as the President “exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal.”<sup>233</sup> Perhaps Justice Jackson had this reality in mind he said of the “zone of twilight,” “[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>234</sup> By restricting the “zone of twilight” to a relatively static definition, *Medellin* may invalidate presidential action that, although constitutionally permissible, is mandated by “the imperatives of events”<sup>235</sup> rather than dependent on a “particularly longstanding practice” of congressional acquiescence.<sup>236</sup>

Whether or not this is the case, future Supreme Court opinions dealing with executive power and applying Jackson’s taxonomy as “the accepted framework” should make it clear whether the changes to Jackson’s taxonomy made by *Hamdan* and *Medellin* were intentional. Specifically, the Court should specify whether (1) Congress has a complete disabling power in the third category and (2) valid executive actions in the “zone of twilight” now require a long history of congressional acquiescence. In the meantime, the practical effect of *Medellin* and *Hamdan* is to alter Jackson’s taxonomy from three parts to two, from the functionalism of Justice Jackson to the formalism of Justice Black.

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231. See *id.* at 293 (explaining that the Court in *Dames & Moore* was concerned that a different result would have “done considerable damage to the President’s ability to deal with foreign sovereigns”).

232. HENKIN, *supra* note 111, at 95.

233. *Dames & Moore*, 453 U.S. at 662.

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

235. *Id.*

236. *Medellin v. Texas*, 128 S. Ct. 1346, 1372 (2008) (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003)).