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The Sound of Congressional Silence: Judicial Distortion of the Legislative-Executive Balance of Power

[C]ongress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. . . . Of course, when [C]ongress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that [C]ongress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking.¹

I. INTRODUCTION

In simplistic constitutional terms, Congress makes law that the President enforces. More specifically, Congress makes law by enacting statutes through a series of specific requirements outlined in Article I, Section 7, and, unless acting under his own constitutionally assigned power, the President is bound by that law. To the formalist, who believes in strict adherence to the constitutionally prescribed boundaries between law enactment and law enforcement, that is the end of the story.² The Supreme Court recognized the importance of formal requirements and their impact on the separation of powers when it struck down the legislative veto because it failed to follow

1. Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 522 (1982) (quoting Thomas Reed Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Ass'n of Am. Law Schs. 1938)).

2. See, e.g., John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737, 746 (1984) ("Congress can create law only by enacting a statute, and statutes may be enacted only if the specific constitutional prerequisites contained in article I, section 7 of the U.S. Constitution have been met. . . . [U]nder our constitutional structure of government, Congress 'cannot legislate effectively by not legislating at all.'" (citations omitted) (quoting F. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 181 (1975))); Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375, 376 (1992) ("[F]ailure to follow the [constitutionally prescribed] method results in no law."). As Professor Eskridge explains, formalism prefers "bright-line rules that seek to place determinate, readily enforceable limits on public actors." William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998).

the constitutional rules.³ On the other hand, to the functionalist, who values greater flexibility, there is more to the story.⁴ And, in fact, other Supreme Court decisions indicate that on occasion Congress effectively asserts its own authority, or constrains the authority of the President, not by formal enactment of law, but by doing nothing at all.⁵

As the epigraph above adroitly observes, the judiciary alone decides whether Congress has spoken through silence. Courts wield significant power in determining whether the President has acted appropriately in the face of congressional inaction, and they should tread lightly as their judgments trace the boundaries between legislative and executive power. Where Congress has failed to act or purposely chosen not to act, a gap in authority or power remains, which the President often feels compelled to fill.⁶ Executive action in such situations would appear to fall within the second category described by Justice Jackson in his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁷

Where congressional intention is difficult to discern, as in the case of inaction, this “zone of twilight” provides judges with crucial

3. See *INS v. Chadha*, 462 U.S. 919, 956–59 (1983). The *Chadha* opinion is commonly cited as an example of formalist reasoning. See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1142 (2000).

4. See Eskridge, *supra* note 2, at 21. Eskridge explains that functionalists prefer “standards . . . that seek to provide public actors with greater flexibility.” *Id.* Indeed, according to Professor Eskridge, functionalism “might be understood as emphasizing pragmatic values,” *id.* at 22, and “functionalist reasoning promises adaptability and evolution,” *id.* at 21.

5. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (treating President Taft’s withdrawal of public lands in contravention of congressional legislation as impliedly authorized by a long history of congressional acquiescence to such actions).

6. See *infra* Part IV.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

wiggle room to navigate their way to an outcome that maintains proper balance between the powers of the Executive and Legislative Branches.

However, when judges find implied meaning in congressional inaction this wiggle room disappears, creating an analytical paradox in that an adaptable, functionalistic approach to what constitutes congressional will leads to a clearer, more determinate conclusion on the validity of the executive action.⁸ Depending on the result of such judicial determination, the executive action either falls into Jackson's first category, where executive "authority is at its maximum" because "the President acts pursuant to an express or implied authorization of Congress";⁹ or the third category, where executive authority "is at its lowest ebb" because "the President takes measures incompatible with the expressed or implied will of Congress."¹⁰ The validity of executive actions thus depends to a large degree on whether courts hear the implied will of Congress in silence. Given the tremendous authority of the judiciary to shape the separation of powers in our constitutional system, it is essential that the judicial branch play a measured role as referee and avoid the pitfalls of giving too much voice to congressional silence. This is especially true at the present time, when the apparent expansion of presidential power in the interest of economic stability and national security, as well as through claims of executive privilege, has prompted heated constitutional debate over the proper roles of the Legislative and Executive Branches of government.¹¹

8. This analytical paradox also works in the other direction: judges who choose not to recognize an implied congressional will, without formal action, employ a bright-line approach that leads to the murky "zone of twilight" analysis where flexibility governs. Perhaps the paradox is an inherent aspect of judicial reasoning in this area. As Professor Eskridge observes, this dichotomous interplay between formalism and functionalism "is apparent even in the rhetorical discourse about the relationship of the three, or more, branches of the national government. 'Separation of powers' connotes relatively formalist inquiries of rules, deductions, and sharp lines. 'Checks and balances,' on the other hand, connotes relatively functionalist inquiries of standards, inductions, and flexible interactions." Eskridge, *supra* note 2, at 22.

9. *Youngstown*, 343 U.S. at 635.

10. *Id.* at 637.

11. Most recently, critics of the Bush administration's decision to provide loan funds to the ailing auto industry questioned the constitutional validity of such action in the face of congressional inaction. Former Secretary of Labor Robert Reich opined:

Call me old-fashioned, but I believe in democracy. And under our Constitution, Congress is in charge of appropriating taxpayer money. If Congress explicitly decides not to appropriate it for a certain purpose, where does the White House get the right to do so anyway? By pulling the money out of another bag?

The Supreme Court has demonstrated how this power to interpret congressional inaction works in practice. For example, in cases such as *United States v. Midwest Oil Co.*¹² and *Dames & Moore v. Regan*,¹³ the Supreme Court validated the executive action and relaxed the constraints on executive authority in relation to Congress based on an implied congressional acquiescence to the action at issue. In others, such as *Youngstown*, the Supreme Court rejected executive action in the face of congressional silence to constrain a President seen as trespassing in legislative territory. By giving judicially sanctioned meaning to congressional inaction in these cases, the Supreme Court has both loosened and tightened constraints on presidential power, but not always with proper concern for the overall balance that should be maintained. While *Midwest Oil* represented a sensible and sensitive application of the congressional acquiescence doctrine, *Dames & Moore* improperly extended presidential power by applying the doctrine too loosely, and the *Youngstown* Court disturbed the balance between the branches of government through giving meaning to one form of congressional silence while ignoring others.

In the latter two cases, *Dames & Moore* and *Youngstown*, the Court misinterpreted congressional inaction and thus failed to appreciate the broader “practical consequences of [these] decisions about governmental structure.”¹⁴ These misinterpretations effectively removed the executive actions at issue in these cases from a “zone of twilight” analysis that offers more flexibility and helps limit the impact on the balance of power between branches. Perhaps in cases where congressional inaction renders congressional intent unclear at best, Jackson’s “zone of twilight” would be most appropriate. But those courts discerning an implied will from congressional inaction should look to *Midwest Oil* as an example of a measured, sensitive approach to congressional acquiescence, while avoiding *Dames &*

That other bag, by the way—called the Troubled Asset Relief Program, or TARP for short—was enacted to rescue Wall Street, not the automobile industry. Posting of Robert Reich to Robert Reich’s Blog, <http://robertreich.blogspot.com/2008/12/big-three-and-tarp-what-happened-to.html> (Dec. 17, 2008, 11:51 EST).

12. 236 U.S. 459 (1915).

13. 453 U.S. 654 (1981).

14. E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 507 (1989) (discussing separation of powers jurisprudence within the context of the Court’s failure to provide a cohesive separation of powers doctrine, but not specifically referencing these two cases).

Moore as an overextension of the doctrine and *Youngstown* as an inconsistent interpretation of congressional inaction.

This Comment will analyze past forays into this area by the Supreme Court—represented by *Midwest Oil*, *Dames & Moore*, and *Youngstown*—and their effects on presidential power. Part II clarifies the debate surrounding the meaning of congressional silence and offers a broader framework to reconcile formalistic and functionalistic concerns. Part III then discusses the doctrine of congressional acquiescence, first announced and properly applied in *Midwest Oil*, but later inappropriately expanded in *Dames & Moore*. Part IV briefly examines analytical weaknesses in the Court’s treatment of congressional silence in *Youngstown*, arguing that more specific action by Congress is necessary to maintain the proper balance between the roles of Congress and the President. Generally, the more congressional silence speaks on issues of such importance, the less likely governmental power will be balanced and exercised appropriately.

II. THE FORM AND FUNCTION OF CONGRESSIONAL SILENCE

Not everybody agrees that congressional silence has any meaning, especially in separation of powers cases. To the formalist, the proposition is absurd: “If Congress is the source of authority or the source of the denial of authority of, for example, certain action by the President, then it seems beyond doubt that congressional silence does not suffice to provide or deny authority for action.”¹⁵ Laurence Tribe describes more generally “a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law’s lyrics—altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws.”¹⁶ Moreover, past Supreme Court justices have condemned reliance on congressional silence as, in Justice Harlan’s words, “a poor beacon to follow.”¹⁷ For Justice Rutledge, “[t]here [were] vast differences between legislating by doing nothing and legislating by

15. Rotenberg, *supra* note 2, at 376; *see also* Grabow, *supra* note 2, at 741 (“[D]espite any intuitive appeal reliance on congressional silence may possess, there exists no legal or functional justification for the imputation of any meaning to the necessarily frequent and prolonged silences of Congress.”).

16. Tribe, *supra* note 1, at 516.

17. *Zuber v. Allen*, 396 U.S. 168, 185 (1969).

positive enactment.”¹⁸ Similarly, Justice Frankfurter warned that “we walk on quicksand when we try to find in the absence of . . . legislation a controlling legal principle.”¹⁹

On the other hand, there are obvious practical advantages that encourage judges to employ functionalistic reasoning. The public actors whose behavior the courts must analyze are themselves moving targets, and the constitutional system of government the courts must uphold often lends itself to fluid interactions among those actors. Justice Jackson recognized the value in adaptable, flexible analytical approaches in his second *Youngstown* category; there are, he suggested, moments when a weakness or tendency in one branch of government—such as “congressional inertia”—blurs the line of authority between branches such that judges must rely on less formal considerations, including “the imperatives of events and contemporary imponderables.”²⁰ Functionalists are basically pragmatists, a characterization which allows them to adjust their analysis to the needs of any given set of facts to promote “pragmatic values like adaptability, efficacy, and justice in law.”²¹

But who is right—the formalist or the functionalist? As Donald Elliot argues, the question itself may be wrong.²² Instead of subjecting the issue of congressional silence in separation of powers cases to the formalist-functional dichotomy, courts should look more broadly “to develop a sophisticated theory of the underlying philosophy of our structure of government.”²³ That endeavor requires answering a more appropriate question: “whether a new measure or device is consistent with the Framers’ vision of

18. *Cleveland v. United States*, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring).

19. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

21. Eskridge, *supra* note 2, at 22.

22. Elliot, *supra* note 14, at 508–09.

23. *Id.* at 509. By contrast, Professor Michael Glennon believes that “separation of powers is not a distinct analytical doctrine,” and thus does not require the use of any newly fashioned analytical tools. Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 111–12 (1984). In Professor Glennon’s view, the satisfactory resolution of separation of powers cases requires a “comprehensive analytical framework” whereby the customary analytical tools—e.g., “the constitutional text, the intent of the Framers, or custom and practice”—can be used more effectively to “discover which of these sources will be determinative” in any given case. *Id.* at 111. Courts should look first to the text; but if the issue cannot be resolved textually, Professor Glennon proposes an analytical framework that dictates how custom and practice can be consistently applied to reach a conclusion. *Id.* at 111–12.

government as reflected and made manifest to us by the constitutional structure that they created, and elaborated by our subsequent history and traditions.”²⁴ In other words, courts should decide more generally whether an action fits the contours of our accepted governmental structure and the respective roles of each branch. When viewed through this wider lens, the following seminal separation of powers cases involving the relationship between congressional silence and presidential power come into clearer focus.

III. THE GOOD, BAD, AND UGLY OF CONGRESSIONAL ACQUIESCENCE

Well, it is earth with me; silence resumes her reign:
I will be patient and proud, and soberly acquiesce.²⁵

Broadly speaking, the judicial doctrine of congressional acquiescence states that Congress can impliedly authorize presidential actions or judicial interpretations by failing over time to signal disagreement or opposition.²⁶ In many ways, congressional acquiescence simply reflects a practical and political reality. While not explicitly based in the Constitution, it takes on the weight of a “quasi-constitutional custom.”²⁷ Harold Koh suggests several factors that shape this reality, including “legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional absence of political will.”²⁸

The mere fact that congressional acquiescence occurs in practice, however, does not automatically sanction its application by judges to the resolution of difficult separation of powers cases.²⁹ Many legal scholars argue that reliance on congressional acquiescence as a source

24. Elliot, *supra* note 14, at 513.

25. Robert Browning, *Abt Vogler*, reprinted in THE COMPLETE POETIC AND DRAMATIC WORKS OF ROBERT BROWNING 382, 383 (Cambridge ed., Cambridge Univ. 1895), available at <http://books.google.com/books?id=8KEVAAAAYAAJ&printsec=frontcover&dq=The+complete+dramatic+and+poetic+works+of+robert+browning#PPA383,M1>.

26. See Grabow, *supra* note 2, at 745–47.

27. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1282 (1988) (quoting Harold Hongju Koh, *Introduction: Foreign Affairs Under the United States Constitution*, 13 YALE J. INT’L L. 1, 3 & n.7 (1988)).

28. *Id.* at 1297.

29. Indeed, these are often the cases where, as Justice Jackson observed, “what is at stake is the equilibrium established by our constitutional system.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952).

of law is misguided and misplaced.³⁰ Others contend that, when applied correctly, it “preserves valuable flexibility in the operation of our constitutional scheme.”³¹ While the doctrine of congressional acquiescence has its formal and functional drawbacks, courts should apply it sensitively, as in *Midwest Oil*, to strike the appropriate balance of power between Congress and the President. But courts should refrain from invoking the doctrine in cases such as *Dames & Moore*, where reliance on congressional acquiescence skews, rather than preserves, this balance by validating executive action that encroaches in the legislative domain.

A. Origins: United States v. Midwest Oil Co.

At first glance, *Midwest Oil* represents a revolution in separation of powers disputes. As Henry Monaghan notes, the case “is occasionally cited as a decision—the *only* decision, I should add—in which the Supreme Court upheld presidential law-making contrary to the terms of an Act of Congress.”³² While Professor Monaghan rejects this reading as “untenable,”³³ its appeal is understandable based on the facts of the case. In 1897, Congress passed a statute opening up public lands to be explored and purchased by citizens for discovery and removal of oil deposits.³⁴ But in 1909, the “oil was so rapidly extracted” that President Taft ordered a temporary withdrawal of the ability to explore and purchase lands due to the “immediate necessity for assuring the conservation of a proper supply of petroleum for the Government’s own use.”³⁵ Given the explicit conflict between the congressional enactment and Taft’s executive

30. See, e.g., William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988) (citing as reasons for concern the formal nature of statutory enactments, the “indeterminacy of collective intent” and “systemic problems” in the legislative process).

31. Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1, 35 (1982). Professor Bruff warns that the value in flexibility must be balanced by “the value of identifying relatively clear spheres of responsibility for the branches.” *Id.* He also observes that “the doctrine demands sensitive application, lest it become an excuse for upholding any presidential action not explicitly forbidden by statute.” *Id.*

32. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 44 (1993).

33. *Id.*

34. *United States v. Midwest Oil Co.*, 236 U.S. 459, 466 (1915).

35. *Id.* at 466–67.

order, the Supreme Court faced the challenge of determining what, if any, authority justified the President's action.

1. The Court's enunciation of the congressional acquiescence doctrine

Rather than repudiate the President's action or justify it under Article II, the Court relied on "an implied grant of power"—in other words, congressional acquiescence—to approve the withdrawal.³⁶ Between 1850 and 1910, the Court cited 252 executive orders where, to at least some extent, the President had withdrawn public lands in spite of congressional provisions leaving them open "to acquisition by citizens."³⁷ These "orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved."³⁸ The Court reasoned that:

[G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.³⁹

Forestalling the possibility that the President could "by his course of action[,] create a power," the Court allowed only that he could properly act when a "long-continued practice, known to and *acquiesced* in by Congress . . . raise[s] a presumption that the withdrawals had been made in pursuance of its consent."⁴⁰ The President's response to the situation was "natural" because "[he] was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location."⁴¹

36. *Id.* at 474–75.

37. *Id.* at 469–71.

38. *Id.* at 475.

39. *Id.* at 472–73.

40. *Id.* at 474 (emphasis added).

41. *Id.* at 471.

2. An appropriate application of the doctrine

In formalistic terms, *Midwest Oil* seemed to herald the expansion of presidential power by judicial interpretation of congressional silence. But several factors from the case temper this view, leading instead to the conclusion that the Court properly applied congressional acquiescence as a means to reconcile the respective roles of Congress and the President.

First, *Midwest Oil* involved authority assigned to Congress not under Article I of the Constitution, but under Article IV. As the Court observed,

[T]he land laws are not of a legislative character in the highest sense of the term . . . ‘but savor somewhat of mere rules prescribed by an owner of property for its disposal.’

. . . .

For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein.⁴²

Congress was acting as proprietor and the President as its agent. The Court’s application of congressional acquiescence merely “recognized [the] administrative power of the Executive in the management of the public lands.”⁴³

Second, because *Midwest Oil* focused on the discrete category of land law, some scholars would limit the precedential value of *Midwest Oil* to that context.⁴⁴ Professor Monaghan disagrees by pointing to the Court’s citation of “numerous decisions in a wide variety of contexts in support of its reasoning” as evidence that “the Court’s analysis of presidential power was not confined to the limited issue of presidential withdrawal of public lands.”⁴⁵ Although the citation of those “numerous decisions” may indicate that the Court did not intend to confine its analysis to the narrow issue of land law, the Court’s reference to those cases does not extend as far as

42. *Id.* at 474 (quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905)).

43. *Id.*

44. See Lee R. Marks & John C. Grabow, *The President’s Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 86 (1982) (“The legislative acquiescence in *Midwest Oil* therefore validated an exercise of presidential power unique to land laws . . .”).

45. Monaghan, *supra* note 32, at 45.

Professor Monaghan would suggest. Those decisions, by the Court's own account, dealt almost exclusively with administrative powers: *Stuart v. Laird*⁴⁶ involved "[granting] circuit powers to judges of the Supreme Court";⁴⁷ *McPherson v. Blacker*⁴⁸ discussed "the validity of a state law providing for the appointment of Presidential electors";⁴⁹ and *Grisar v. McDowell*⁵⁰ cited "the practice of the Executive Department . . . as evidence of the validity of these orders making reservations of public land."⁵¹ Professor Monaghan neglects to specify that the "wide variety of contexts" cited by the Court does not include any cases involving presidential powers beyond mere administrative acts, such as the executive land management at issue in the case. Accordingly, application of *Midwest Oil*'s congressional acquiescence principles should be limited in the presidential context to administrative acts. To move beyond that implied boundary, especially to acts that regulate or injure private interests or individual rights, would endanger the balance of power established in the Constitution by removing a critical check on presidential power.

Finally, as suggested above, the *Midwest Oil* Court correctly applied congressional acquiescence because the President's withdrawal violated no inherently private rights. As the Court observed:

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For prior to the initiation of some right given by law the citizen had no enforceable interest in the

46. 5 U.S. (1 Cranch) 299 (1803).

47. *Midwest Oil*, 236 U.S. at 473.

48. 146 U.S. 1 (1892).

49. *Midwest Oil*, 236 U.S. at 473.

50. 73 U.S. (6 Wall.) 363 (1867).

51. *Midwest Oil*, 236 U.S. at 473. The Court also cites *Fairbank v. United States*, 181 U.S. 283 (1901) and *Cooley v. Board of Wardens*, 53 U.S. 299 (1851), which was overruled on other grounds by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Id.* The former involved congressional power to tax inheritances. *See Fairbank*, 181 U.S. at 307. The latter discussed the validity of state-imposed pilotage fees. *See Cooley*, 53 U.S. at 312. Neither examined presidential actions in light of congressional acquiescence. *See Fairbank*, 181 U.S. 283; *Cooley*, 53 U.S. 299. It is not surprising, then, that both were merely cited without treatment in *Midwest Oil*.

public statute and no private right in land which was the property of the people.⁵²

Indeed, President Taft sincerely believed that the public interest demanded such action.⁵³ Far from the invasion of private rights, Taft may have exercised instead what Professor Monaghan calls “the protective power” of the presidency.⁵⁴ Under this conception, “[t]he Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government.”⁵⁵ Professor Monaghan actually borrows this description from the Solicitor General’s brief defending President Taft’s actions in *Midwest Oil*.⁵⁶

The Supreme Court’s application of congressional acquiescence in *Midwest Oil* strikes the proper balance between the powers of Congress and the President by recognizing the proprietor-agent relationship of the two branches in administrative areas. The Article IV power at issue has not traditionally been exercised by Congress through specific legislation authorizing presidential administration, but through a well-established proprietor-agent relationship. In practical terms, it made no sense to alter this situation. The scope of the decision was further limited by the administrative nature of public land withdrawal, as well as the lack of any precedent for congressional acquiescence in the case of injury to private rights. Such limitation prevents “the potential for ‘bootstrapping’ of presidential power, whereby presidents can, over time, accrue power that they should not have simply because they have exercised it enough times.”⁵⁷ It also mitigates Dean Koh’s “one-way ‘ratchet effect,’” whereby a broader doctrine of congressional acquiescence,

52. *Midwest Oil*, 236 U.S. at 471.

53. *See id.* at 466–67 (indicating the governmental reports of public necessity that President Taft relied upon in making his proclamation for the withdrawal).

54. *See* Monaghan, *supra* note 32, at 61–74. Professor Monaghan’s conception of “protective power” fits well within the framework of a broader analysis of the balance of powers between branches and their proper roles: “The protective power is . . . no talisman. Its limits are, in the end, practical ones, limits that, as the Court said in *Lujan v. Defenders of Wildlife*, are grounded in our ‘common understanding’ of what conduct is appropriately ‘executive’ in our scheme of separation of powers.” *Id.* at 73 (citation omitted).

55. *Id.* at 69 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 691 (1952) (Vinson, C.J., dissenting)).

56. *Id.*

57. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 58 (2001).

when taken together with the Court's rejection of the legislative veto, "effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence."⁵⁸ Although President Taft's executive order contravened explicit congressional legislation, no substantive alteration to the balance of power between Congress and the President resulted from congressional acquiescence to his action.

B. Expansion: Dames & Moore v. Regan

In subsequent cases, most notably *Dames & Moore*,⁵⁹ the Supreme Court failed to keep the *Midwest Oil* holding within proper bounds. In that case, the Court relied on the doctrine of congressional acquiescence from *Midwest Oil* to uphold presidential authority to suspend the private claims of Dames & Moore against the Iranian government as part of the resolution to the hostage crisis. Justice Rehnquist's unanimous majority opinion speaks "of the necessity to rest decision on the narrowest possible ground capable of deciding the case."⁶⁰ Although it is admittedly difficult to criticize the outcome given the delicate state of the nation during that time, the Court failed to achieve this stated purpose.⁶¹ The Court's overly functionalistic approach to congressional acquiescence violates the spirit and purpose of *Midwest Oil* by extending the application of the doctrine beyond administrative acts to the realm of private rights in the absence of any clearly implied authorization from Congress.

58. *Id.* (quoting HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 142 (1990)).

59. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

60. *Id.* at 660.

61. Even the staunchest critics of the Court's decision stop short of calling for a different outcome:

To criticize the Court's conclusions is not to suggest that it should have held otherwise. Given the unique context of the case, it is difficult to fault the Court for upholding the President's authority to enter into agreements with Iran. The agreements resolved a prolonged and debilitating foreign affairs trauma. Once the hostages had been released, it was impossible to restore the status quo ante. The international consequences of dishonoring the President's undertaking were unpredictable. Limited to its unique facts, the Court's decision was tolerable as well as predictable. Unfortunately, the Court's analysis cannot be limited to the facts of *Dames & Moore*. Despite its professed caution, to uphold the President's actions the Court was forced to rely on an unprecedented reading of the President's statutory and constitutional power to conduct foreign affairs. The case establishes a precedent that may cause serious mischief in the future and, therefore, cannot easily be dismissed.

Marks & Grabow, *supra* note 44, at 69-70.

What's more, the Court could have avoided this problem by ignoring altogether the question of whether Congress had spoken or been silent, focusing instead on a "zone of twilight" analysis that would, in Justice Jackson's words, "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁶² As such, the case would have been treated as a pragmatic aberration, rather than an extension of a well-established legal doctrine.

1. Procedural history and brief background facts

Dames & Moore involved executive orders and regulations implemented as part of the hostage release agreement with Iran. The petitioner-company, Dames & Moore, had obtained judgment and attachment of assets against Iranian banks in a breach of contract case.⁶³ However, the executive orders signed by the President effectively nullified the attachment and threatened to suspend the company's claims from U.S. courts altogether, setting up an alternative Claims Tribunal to adjudicate.⁶⁴ Dames & Moore challenged the validity of the executive agreements, and the case came before the Supreme Court for "expeditious treatment of the issues involved."⁶⁵

2. The "general tenor" of congressional legislation

After concluding "that the IEEPA [International Emergency Economic Powers Act] constitute[d] specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets," the Court turned to "the question of the President's authority to suspend claims pending in American courts."⁶⁶ Recognizing that no congressional legislation explicitly delegated authority to the President to suspend the private claims of Dames & Moore, the Court ventured into the murky abyss of implied authorization.⁶⁷

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

63. *Dames & Moore*, 453 U.S. at 664.

64. *Id.* at 663-66.

65. *Id.* at 660.

66. *Id.* at 675.

67. *See id.* at 675-88.

To begin, the Court loosened the statutory bearings before engaging in congressional acquiescence analysis. Although the IEEPA and the Hostage Act fell short of authorizing the President's action, the Court found "both statutes highly relevant in the *looser sense* of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."⁶⁸ While "the IEEPA delegates *broad authority* to the President to act in times of national emergency with respect to property of a foreign country," the Hostage Act "similarly indicates congressional willingness that the President have *broad discretion* when responding to the hostile acts of foreign sovereigns."⁶⁹ There is nothing concrete about the Court's statutory analysis here because no language in the IEEPA or the Hostage Act actually sustained the interpretation given by the Court. Nevertheless, the Court apparently "[could not] ignore the general tenor of Congress' legislation in this area,"⁷⁰ which, it claims, was "best demonstrated by . . . the International Claims Settlement Act of 1949."⁷¹ As scholars have pointed out, however, the ICSA "[gave] no such discretion or authority to the President,"⁷² and the Court correctly declined to rest its holding on such tenuous underpinnings. But by seizing on broader, unspoken outlines, the Court prepared the way for its assertion of implied authority through congressional acquiescence.

3. *The shaky past of congressional acquiescence*

Looking to the past, the Court found "a history of congressional acquiescence in conduct of the sort engaged in by the President."⁷³ As the Court recognized, establishing such implicit approval by

68. *Id.* at 677 (emphasis added).

69. *Id.* (emphasis added).

70. *Id.* at 678.

71. *Id.* at 680.

72. Marks & Grabow, *supra* note 44, at 90. Professors Marks and Grabow argue that the scope of ICSA, which "provide[s] for the adjudication of claims arising primarily out of the nationalization of American property," renders it inapplicable to the context of *Dames & Moore*. *Id.* In fact, "Congress created the Foreign Claims Settlement Commission" to handle claims involving "the rights of American claimants," but the Commission does not act in the absence of congressional legislation "specifically authoriz[ing] each new program." *Id.* at 90–91. Finally, "[t]he Court's reliance on the ICSA is also misplaced because the Algerian Declarations contravene one of the primary goals of the ICSA: providing equal treatment to all United States claimants." *Id.* at 91. By contrast, the Algerian Declarations called "for disparate treatment of various categories of claimants." *Id.*

73. *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981).

Congress in the President's actions was "[c]rucial to [its] decision."⁷⁴ By way of proof, however, the Court ignored the "substantial controversy" surrounding "the *general* practice of using executive agreements," and instead relied on "self-selected precedents" focusing on the "[particular] . . . practice [of] executive claims settlement agreements."⁷⁵ Yet even within this narrower field of executive action, the Court overstated its case by failing to recognize critical distinctions between past executive claims settlements and the one at issue in the case.⁷⁶ Professors Marks and Grabow point out that, prior to 1952, "the United States adhered to the doctrine of absolute sovereign immunity, which denied state and federal courts jurisdiction over suits against foreign governments."⁷⁷ Because the issue presented in *Dames & Moore* "was whether the President could force a plaintiff with a cognizable claim pending against a sovereign government to accept an alternative forum," the history of executive claims settlement prior to 1952 "offered no support whatsoever to the exercise of presidential power in *Dames & Moore*."⁷⁸ Moreover, post-1952 claims settlement history similarly failed to provide "a single instance in which the President has, as in *Dames & Moore*, settled the commercial claims of American citizens enforceable in United States courts."⁷⁹

4. *An unwarranted expansion of the Midwest Oil doctrine*

Although pragmatic, the Court's analysis of congressional acquiescence in *Dames & Moore* inappropriately and unnecessarily expanded the proper scope established by *Midwest Oil*. As described above, the latter case involved exercise of the President's administrative powers under Article IV, which rendered analytical flexibility less problematic, while the former dealt with foreign policy powers that affected private rights and thus required express authority from Congress. In *Midwest Oil*, the Court relied on unquestioned custom as suitable justification where the President and Congress had a long-established proprietor-agent relationship in

74. *Id.* at 680.

75. Glennon, *supra* note 23, at 129–30.

76. *See* Marks & Grabow, *supra* note 44, at 87–90.

77. *Id.* at 87–88.

78. *Id.* at 88.

79. *Id.* 89–90.

the administration of land laws. However, in such a critical, dynamic context like foreign policy, as in *Dames & Moore*, the Court should have been more cautious in validating extensions of the President's scope of authority, especially where the historical pedigree was disputed.

In addition, the *Dames & Moore* Court validated an executive action that effectively denied the private right of the company to have its claims settled in U.S. courts. There is particular need for judicial restraint—as well as congressional and presidential restraint, for that matter—in areas that affect the rights of private citizens. The *Midwest Oil* Court recognized this consideration and ascribed appropriate weight to it in its analysis of the case. That no private rights were endangered by President Taft's withdrawal weighed heavily in favor of congressional acquiescence. By contrast, the *Dames & Moore* decision mentioned the effect of the executive orders on the rights of the company only after concluding the bulk of its analysis: "Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief."⁸⁰ While the Court recognized that the Claims Tribunal might treat claimants such as *Dames & Moore* less favorably than a U.S. court,⁸¹ it failed to address the fact that the claimant did not choose the forum change and might face "disparate treatment" under the Algerian Declarations, depending on its category.⁸²

Finally, while the *Midwest Oil* Court described a sustained, visible, and consistent congressional acquiescence in presidential administration and withdrawal of public lands, the *Dames & Moore* Court overreached in finding "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."⁸³ As discussed above, historical analysis of

80. *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981).

81. *See id.* at 687 ("[B]eing overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naiveté which should not be demanded even of judges . . .").

82. *See* Marks & Grabow, *supra* note 44, at 91.

83. *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). As Professors Marks and Grabow assert, "the quoted passage [from Justice Frankfurter's concurrence] is dictum," "no other member of the Court joined his opinion," and Justice Frankfurter reasoned that such long-standing practices "may be treated as a gloss on 'Executive Power' vested in the President

executive claims settlement in *Dames & Moore* was at best inconclusive, and at worst vastly insufficient to establish congressional acquiescence to the President's resolution of private claims—as a means to an end of the hostage crisis—through executive agreement. Although the Court recognized “that executive action in any particular instance falls . . . at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition,” the Court misplaced the actions at issue in the case closer to the former point of explicit congressional authorization than could be reasonably justified.⁸⁴

As a result of its decision, the *Dames & Moore* Court improperly altered the balance of power between the President and Congress in favor of the former and thus judicially engineered an enhanced version of the *Midwest Oil* doctrine. In the name of pragmatic politics, it lowered the threshold required to assert authority under the doctrine and applied the doctrine in a wider range of circumstances than should have been allowed. To one commentator, the decision echoes a paraphrased version of Justice Jackson's ominous warning in *Korematsu v. United States*:

A [political] order, however unconstitutional, is not apt to last longer than the [political] emergency. . . . [Once] a judicial opinion[, however,] rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle The principle then lies about like a loaded weapon [. . .].⁸⁵

Of course, the Court could have followed Justice Jackson's advice and refused to hear the case, rather than “approve [the President's action] under law and thus clothe the decision in constitutionality.”⁸⁶ By not simply “recogniz[ing] that President Carter's decision . . . was a ‘political’ decision based on exigency. . . . [and] was necessary to free the hostages,”⁸⁷ without passing judgment on the matter, the Court took *Midwest Oil* far beyond the

by § 1 of Art. II,” whereas the *Dames & Moore* Court based its decision on implied congressional authority. Marks & Grabow, *supra* note 44, at 85.

84. *Dames & Moore*, 453 U.S. at 669.

85. Rotenberg, *supra* note 2, at 381 (alteration in original) (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

86. *Id.* at 380.

87. *Id.*

boundaries set forth in that case and, thus, corrupted the doctrine of congressional acquiescence.⁸⁸

Alternatively, the Court could have ignored congressional acquiescence entirely and analyzed the case under Justice Jackson's second category of executive action described in *Youngstown*. That way, the Court's analysis would have explicitly announced its pragmatic angle, effectively limiting any precedential impact the case might have had on the doctrine of congressional acquiescence and the balance of power in our constitutional system. Unfortunately, however, in spite of its own disclaimers as to how broadly its decision should be interpreted, the Court's treatment of congressional inaction as implied consent cloaked its analysis of the President's actions in misleading and unwarranted certainty.

IV. PASSING THE BUCK: SILENCE AS A SHIELD IN *YOUNGSTOWN*

It is not only what we do, but also what we do not do, for which we are accountable.⁸⁹

Until now, this Comment has largely focused on congressional silence or, more specifically, acquiescence applied in favor of broader presidential license to act—to the potential or actual detriment of Congress. *Midwest Oil* presented a sensitive and appropriate interpretation of congressional silence, where the Court took a broad, careful view of the balance of power between Congress and the President while, at the same time, being mindful of how its

88. It is not difficult to imagine the possibility that congressional acquiescence might be put to ill-advised use down the road in the global War on Terror or some other sticky domestic or international conflict. In fact, as Dean Koh recognizes, congressional silence and acquiescence over the years has greatly contributed to the shift in foreign affairs power from Congress to the President:

[W]hat very naturally has happened is simply that power textually assigned to and at any time resumable by the body structurally unsuited to its exercise [Congress], has flowed, through the inactions, acqui[e]scences, and delegations of that body, toward an office ideally structured for the exercise of initiative and for vigor in administration [the President]. . . . The result has been a flow of power from Congress to the presidency.

Koh, *supra* note 27, at 1292 (first and third alterations in original) (quoting Charles Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17, 20 (1980)).

89. Jean Baptiste Moliere, in TRYON EDWARDS, A DICTIONARY OF THOUGHTS: BEING A CYCLOPEDIA OF LACONIC QUOTATIONS FROM THE BEST AUTHORS OF THE WORLD, BOTH ANCIENT AND MODERN 528 (F.B. Dickerson Co. 1908), available at <http://books.google.com/books?id=zIMxAAAIAAJ&printsec=titlepage#PPA528,M1>.

decision would affect that relationship. In *Dames & Moore*, however, the Court engaged in a functionalistic, unwarranted expansion of congressional acquiescence as outlined in *Midwest Oil*, which both shifted the balance and failed to recognize, or effectively limit, the effects of that shift.

By contrast, the *Youngstown* Court dealt more generally with congressional inaction in several different forms. Most famous for Justice Jackson's concurring opinion, with its tripartite test described above in Part I, *Youngstown* involved a constitutional challenge to an executive order by President Truman "directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."⁹⁰ The order followed a series of failed administrative attempts to resolve disputes between labor and management in the steel industry.⁹¹ With the country engaged in the Korean War, and given "the indispensability of steel as a component of substantially all weapons and other war materials," President Truman attempted to seize the mills in order to avert a strike and the resulting decline in wartime production.⁹² The morning after issuing his order, President Truman reported his actions to Congress, but received no response.⁹³ Twelve days later, he again alerted Congress to the situation and reiterated his position that Congress could accept or reject his actions.⁹⁴ But again, Congress said and did nothing.⁹⁵

Not long after, the steel companies filed suit in federal court to enjoin the President's actions.⁹⁶ Eventually the case made its way to the Supreme Court, which was "asked to decide whether the President was acting within his constitutional power when he issued [the] order."⁹⁷ The government conceded that the President lacked congressional authorization for the seizure,⁹⁸ arguing instead that "presidential power should be implied from the aggregate of his powers under the Constitution."⁹⁹ In his majority opinion, Justice

90. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

91. *Id.* at 582–83.

92. *Id.* at 583.

93. *Id.*

94. *Id.* at 677 (Vinson, C.J., dissenting).

95. *Id.* at 583 (majority opinion).

96. *Id.*

97. *Id.* at 582.

98. *Id.* at 585–86.

99. *Id.* at 587.

Black invalidated the seizure order as an unconstitutional exercise of presidential power.¹⁰⁰ But the case is most famous for Justice Jackson's concurring opinion, in which he describes the three distinct analytical categories in which to place any questionable executive action.¹⁰¹

Simply put, Justice Black's opinion rested primarily on an elementary conception of the separation of powers: the President cannot exercise lawmaking powers because "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times."¹⁰² But this overly formalistic reasoning fails to take a broader view of the relationships and practical realities involved. For Professor Elliot, this "explanation simply will not do" because throughout the nation's history, "the executive branch has issued over ten thousand executive orders, many of which plainly 'make laws' in every sense at least as much as did the [*Youngstown*] order."¹⁰³

More significantly, Justice Black's opinion presents a problem of greater concern than a simplistic view of government structure. Along with a few of his concurring colleagues, he adopted an interpretation of congressional silence as a limit on the President's authority to act, relying on the fact that "[w]hen the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency."¹⁰⁴ In Professor Tribe's words, "a decisive majority of five Justices treated Congress' silence as speech—its *nonenactment of authorizing legislation* [here, the Labor Management Relations Act of 1947, or Taft-Hartley Act] as a legally binding expression of *intent to forbid* the seizure at issue."¹⁰⁵ Justice Frankfurter agreed with Justice Black's analysis, concluding that "Congress could not more clearly and emphatically have withheld authority than it did [by rejecting the amendment] in 1947."¹⁰⁶ Finally, Justice Burton joined the chorus with his belief that "the

100. *Id.* at 588–89.

101. *Id.* at 635–39 (Jackson, J., concurring).

102. *Id.* at 589 (majority opinion).

103. Elliot, *supra* note 14, at 525.

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

105. Tribe, *supra* note 1, at 520.

106. *Youngstown*, 343 U.S. at 602 (Frankfurter, J., concurring).

most significant feature of that Act [LMRA or Taft-Hartley] is its omission of authority to seize an affected industry.”¹⁰⁷

But the problems go deeper. In fact, the majority and concurring opinions are even more remarkable for the way they give meaning to one form of congressional silence, the “omission of authority”¹⁰⁸ for the seizure in the LMRA, but ignore other forms without comment, including congressional silence in response to repeated efforts by President Truman to involve the Legislative Branch in the process.¹⁰⁹ Only the dissenting Chief Justice Vinson found compelling significance in Truman’s message to Congress the day after the seizure and letter to the President of the Senate twelve days later.¹¹⁰ Both missives described the nature of his actions and gave Congress the opportunity to determine what should be done going forward.¹¹¹ While he believed that the urgency of the moment required seizure of the steel mills, Truman recognized that ultimately the power rested with Congress to ratify or reject his action.¹¹² The failure of a majority of the Court to address this secondary congressional silence results in an inconsistent approach and lack of accountability that does injustice to all three branches of government. In fact, the Court, in one fell swoop—or, more accurately, a plurality and several concurrences—simultaneously shifts responsibility for the result, allows Congress to do the same, and punishes the President, left alone among the parties to shoulder the weight of the outcome.

A. The Supreme Court Passing the Buck to . . .

Professor Tribe suggests that the *Youngstown* majority gives “legal effect to Congress’ silence . . . [in part because] the public

107. *Id.* at 657 (Burton, J., concurring).

108. *Id.*

109. *See id.*

110. *Id.* at 675–77 (Vinson, C.J., dissenting).

111. *Id.*

112. In his first letter to Congress, President Truman provided a list of possible responses and concluded, “I do not believe the Congress will favor any of these courses of action, but that is a matter for the Congress to determine.” *Id.* at 677. In his second letter, Truman openly acknowledged that “[t]he Congress can, if it wishes, reject the course of action I have followed in this matter.” *Id.* But it appears that Truman himself did not think that congressional action was required to sustain his efforts in the short term, as he suggested in the first letter: “On the basis of the facts that are known to me at this time, I do not believe that immediate congressional action is essential; but I would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider.” *Id.*

acceptability of their intended holding is bolstered by the illusion that the power they wield traces to *Congress*' will rather than to *their own*.¹¹³ In other words, given the politically sensitive nature of the case, the Court thought it best to divert attention away from itself by basing its holding on an unspoken but implied congressional intent. In Tribe's view, congressional silence provides a useful judicial tool whereby judges can "disclaim responsibility for altering the legal landscape by passing the buck to Congress"¹¹⁴ and "make it appear that the power exercised by the Supreme Court proceeds from Congress."¹¹⁵ Although this view reflects a deep cynicism about judicial interpretation, reliance by a majority of the *Youngstown* Court on implied congressional will fairly raises the question.

As with *Dames & Moore*, the Court may have been better off not hearing *Youngstown* in the first place. Given the urgency of the situation, the Court thought it best "that the issues raised be promptly decided by this Court" and granted certiorari just days after the Court of Appeals for the District of Columbia stayed an injunction against the government's seizure issued by the District Court.¹¹⁶ But even if we accept the necessity of the Supreme Court's role in resolving this dispute, the Court's analysis did unnecessary damage to the balance of power between the President and Congress and allowed the latter to escape all responsibility for its inaction during this urgent moment. In addition to ignoring the lack of congressional response to Truman's letters, the Court encouraged future congressional inaction in moments of crisis by discerning an implied rejection of Truman's actions by Congress in its earlier rejection of an amendment to the LMRA that would have allowed for seizures like the one at issue, while ignoring the lack of congressional response to Truman's letters. Finally, the Court ironically deferred to "congressional inertia, indifference or quiescence," which, Justice Jackson admitted, "may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."¹¹⁷ By so doing, it lost an opportunity to temper these inherent weaknesses in the Legislative

113. Tribe, *supra* note 1, at 521.

114. *Id.*

115. *Id.* (quoting Clarence Shenton, *Interstate Commerce During the Silence of Congress*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 842 (Ass'n of Am. Law Schs. 1938)).

116. *Youngstown*, 343 U.S. at 584 (majority opinion).

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

Branch, and left the Executive Branch wondering what, if anything, it can do in such moments. Thus, the Court should have instead analyzed Truman's power to order the seizure under Justice Jackson's second category, or "zone of twilight,"¹¹⁸ in which the conclusion would be based "on the imperatives of events and contemporary imponderables,"¹¹⁹ rather than on the supposedly determinate implied meaning of congressional inaction.

B. Congress Passing the Buck to . . .

But, as the above discussion suggests, shifting responsibility and avoiding accountability are not limited to the Court. In fact, Tribe asserts that "Congress itself may well conspire in this buck-passing—for, having said nothing, its members are free in turn to point right back to the courts when called upon to defend what courts claim Congress has, by its silence, brought to pass."¹²⁰ While there is no shame in rejecting the authorization of the seizure power in the LMRA, congressional silence in response to Truman's overtures fails to satisfy the demands of the separation of powers principles on which our government is based. After Truman acted beyond his presidential authority, Congress should have provided what Madison might call the "counteract[ing] ambition."¹²¹ Because "[t]he interest of the man must be connected with the constitutional rights of the place,"¹²² Congress had an affirmative duty to make clear its intent, regardless of political pressure, rather than allow the decision to be made by the unelected Supreme Court. As John Hart Ely has said,

[T]he common case of nonaccountability involves not a situation where the legislature has drawn a distinction whose range of [goals] won't be readily apparent, but rather a situation where the legislature (in large measure precisely in order to escape accountability) has refused to draw the legally operative distinctions, leaving that chore to others who are not politically accountable.¹²³

118. *Id.*

119. *Id.*

120. Tribe, *supra* note 1, at 521.

121. *See* THE FEDERALIST NO. 51 (James Madison).

122. *Id.*

123. JOHN HART ELY, DEMOCRACY AND DISTRUST 130–31 (1980).

Congress, one of the three constituent branches of government, should not use silence as a shield from accountability on matters of such importance to the balance of power.

This does not mean that congressional silence should not exist at all—that is, that Congress must always act with clear intentions so that courts have an easier time determining congressional will. Practical realities inherent in the institution, such as “congressional inertia, indifference or quiescence,”¹²⁴ or even lack of political will in a body filled with actors representing conflicting priorities, necessarily lead to moments of uncertainty as to congressional intent. Courts, in no position to alter this reality, must tolerate it. But courts should never act in a manner that encourages these tendencies, especially on issues that directly affect the balance of power in our constitutional system.

C. President Truman’s Desk: “The Buck Stops Here”

As for Truman, the Court’s treatment of congressional silence clearly weakened him in *Youngstown*. The decision itself was probably correct, but the Court’s interpretation of congressional silence had unintended negative consequences for the Presidency. Some critics, including Professor Monaghan, deny the existence of an “emergency” in *Youngstown*.¹²⁵ But the fact remains that, while “[a]mple time existed for congressional action, both before and after the seizure,”¹²⁶ Congress never did anything to contribute to a solution.¹²⁷ As he wrote in his first letter to Congress, Truman acted as he thought appropriate given his sense of the situation.¹²⁸ In some ways, congressional refusal to act even after Truman’s letters demonstrated not overreaching by the President, but dereliction of duty by Congress. As Professor Monaghan observes, “[i]f we assume that the President can act in an emergency, our constitutional theory would suggest that subsequent congressional approval is necessary, because that requirement . . . would seem to induce caution in the

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

125. See, e.g., Monaghan, *supra* note 32, at 37–38 (“[D]espite the government’s argument and President Truman’s statement, no emergency existed.”).

126. *Id.*

127. *Id.* at 38.

128. *Youngstown*, 343 U.S. at 677 (Vinson, C.J., dissenting) (quoting 98 CONG. REC. 3962–63 (1952)).

executive, while not being so onerous as to deter the President from acting when necessity warrants.”¹²⁹

Of all the actors in this drama, Truman appears to be the only one to understand this principle. He took action, in his words, “with the utmost reluctance” in what he felt to be an emergency.¹³⁰ But immediately thereafter he appealed to Congress, recognizing that “[i]t may be that the Congress will deem some other course to be wiser.”¹³¹ In spite of the government’s claims in the course of litigation that the President had inherent authority for his actions, Truman’s conduct reflected an ideal course for a President who “find[s] himself confronted with a situation of such complexity and ambiguity as to leave him without guidelines for constitutional action.”¹³² He understood that “it would be far better for him to take the action he saw fit without attempting to justify it in advance and leave it to Congress or the courts to evaluate his action in retrospect.”¹³³ Constitutional balance between the branches is best preserved through this kind of purposeful action. President Truman acted with such purpose, but the Congress failed to respond in kind, and the Supreme Court, in its selective interpretation of congressional inaction, failed to recognize that this difference matters.

V. CONCLUSION

Maintaining the proper balance of power between Congress and the President is a delicate and difficult business—made even more so by the reality of congressional silence on matters that could shift the balance. The Supreme Court, charged as expert at interpreting meaning, has met with mixed results. While *Midwest Oil’s* doctrine of congressional acquiescence strikes a sensitive balance, the Court later expanded the doctrine beyond proper boundaries in *Dames & Moore*. In *Youngstown*, the Court gave selective meaning to congressional silence and, by so doing, shifted blame from itself to Congress, which allowed Congress, in turn, to acquiesce in the buck-

129. Monaghan, *supra* note 32, at 38.

130. *Youngstown*, 343 U.S. at 675 (Vinson, C.J., dissenting) (quoting 98 CONG. REC. 3962–63 (1952)).

131. *Id.* at 676.

132. S. REP. NO. 91-129, at 32 (1969). Many would argue that Truman faced no such situation except in his own mind. This paper reserves judgment on this point.

133. *Id.*

passing and shift blame to the President. Only Truman lived up to his constitutional obligation to take purposeful action; yet he alone was held accountable. Constitutional balance requires that Congress accept accountability, and that the Supreme Court listen more closely, and more wisely, when Congress fails to speak.

Due to the delicate nature of judicial responsibility in this area, courts should refrain whenever possible from giving positive meaning to congressional inaction. *Midwest Oil* represents a sensible exception to this rule. But in *Dames & Moore* and *Youngstown*, the Supreme Court did unnecessary harm to the balance of power between branches. Rather than interpret the congressional silence and channel cases into Justice Jackson's more determinate and clear cut first and third categories, which gives these decisions more weight, the Court should take the lighter, more flexible approach offered by his second category and its "zone of twilight" analysis. This would preserve the invitation for the President to act in moments of congressional paralysis, without encouraging continued behavior of this sort in Congress. Best of all, because the "zone of twilight" analysis depends so heavily on case-by-case determinations, the danger of its flexible nature will be mitigated in ways that judicial interpretations of congressional silence, with their cloak of certainty, are not.

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