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Adding Bite to the Zone of Twilight: Applying *Kisor* to Revitalize the *Youngstown* Tripartite

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ADDING BITE TO THE ZONE OF TWILIGHT: APPLYING *KISOR* TO REVITALIZE THE *YOUNGSTOWN* TRIPARTITE

*Zachary W. Singer**

In the half century and more since Justice Jackson's famous concurrence in Youngstown Sheet & Tube Co. v. Sawyer,[1] *the fog surrounding acceptable executive power in national security and foreign affairs has only thickened. Today, whether presidents are responding to the challenges of an amorphous global war on terrorism or a global pandemic, they act against a backdrop of ambiguous constitutional and statutory authorization and shifting precedent. While Justice Jackson outlined zones of presidential power by tying that power to congressional acts, the Court subsequently watered down the test by looking to other factors, like legislative intent. At other times, the Court appeared to jettison the* Youngstown *zones for uncertain statutory analyses. Responding to the changing precedent, some scholars and practitioners called for deference for executive actions in national security and beyond. Others called for using the same statutory tools as in any other case.*

A compromise is available. For courts seeking to remain faithful to Youngstown while recognizing calls for executive deference, I argue that they should look toward recent administrative law precedents. There, courts confront challenges similar to those in the national security and foreign affairs realms—unclear statutes and regulations, an inability to legislate with specificity, and political actors with more subject-matter expertise than the judiciary. The two-part test outlined in Kisor v. Wilkie,[2] *which focuses on whether a regulation is ambiguous and whether the character and context of the agency's actions warrant deference, is the available compromise. The* Kisor *test would not only infuse clarity into Justice Jackson's tripartite system, but would foster improved incentives for the political branches, such as encouraging the executive to utilize internal and external processes deserving of deference, while also serving as a measured restraint on the judiciary.*

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* J.D., Harvard Law School Class of 2020.

1. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

2. 139 S. Ct. 2400 (2019).

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INTRODUCTION

"A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[3] In the decades since Justice Jackson's famous concurrence, the fog surrounding the acceptable use of executive power in national security and foreign affairs has not cleared. If anything, recent administrations in both political parties have been accused of expanding executive power to new bounds unsupported by the Constitution. Yet, at the onset of the current drive toward the expansion of executive power, beginning in 2001 with the War on Terror, some scholars opined that courts were too eager to pare back executive action and that their statutory basis for doing so was weak.[4]

The subsequent two decades of executive power confusion demonstrates that it is high time to reexamine the framework for presidential action in national security and foreign affairs. On one side, *Dames & Moore v. Regan*[5] weakened Justice Jackson's *Youngstown* institutional framework when it shifted the analytic balance toward a deference regime, leaving it as an unsuitable option for those seeking restraints on executive power. On the other, in post-9/11 precedent, embodied in

3. *Youngstown*, 343 U.S. at 634.

4. *See*, *e.g.*, Julian Ku & John Yoo, Hamdan v. Rumsfeld, *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT 179, 180 (2006).

5. 453 U.S. 654 (1981).

cases like *Hamdan v. Rumsfeld*[6] and *Boumediene v. Bush*,[7] the Court used statutory analysis as the primary touchstone for national security cases. Yet, this statutory analysis of the limits of executive power exists in a landscape of vague statutory and constitutional provisions that create uncertainty, allowing courts to be either highly critical or highly deferential depending on the situation.

A compromise is available. This Article argues that courts should look toward recent cases in administrative law, primarily *Kisor v. Wilkie*,[8] for an approach to executive power in national security and foreign affairs. Administrative law provides an apt comparison point for three reasons. First, courts face the same difficulties in interpreting ambiguous statutes and regulations in administrative law as they do in national security cases. Second, agencies and the executive enjoy similar advantages in terms of expertise over the courts in both administrative law and national security-related disputes. Third, in both areas of law, Congress delegates to the executive and federal agencies the power to construe statutory and regulatory ambiguities.

The *Kisor* framework—which advocates for close statutory analysis coupled with institutional process requirements—in conjunction with Justice Jackson's *Youngstown* tripartite scheme—is a compromise between strong executive deference and curbing executive power. Such a framework would also provide clearer and more predictable answers to the fundamental questions of how to approach the analysis and when and how much deference the executive can claim for its actions. In doing so, the *Kisor* framework would foster increased deliberation between and within the political branches, while allowing the executive to leverage its expertise in securing judicial deference.

This Article proceeds by first outlining the descent from Justice Jackson's scheme to the muddled modern precedent. Next, it discusses applying *Kisor* to *Youngstown* and how courts can use the existing precedent within that framework. The Article will examine an example under the proposed *Kisor* scheme, comparing the result to that reached under other regimes. Lastly, the Article concludes by weighing the benefits and drawbacks of such a scheme for today's executive actions in national security and foreign affairs.

I. THE YOUNGSTOWN REGIME RESCINDED

Today, two separate modes of analysis prevail in questions involving executive authority in national security and foreign affairs. Justice Jackson's *Youngstown* concurrence outlines an institutional mode, restraining or releasing the executive's power in line with the degree of congressional approval or acquiescence. The framework initially prescribed a searching analysis in which a court would

6. 548 U.S. 557 (2006).

7. 553 U.S. 723 (2008).

8. 139 S. Ct. 2400 (2019).

evaluate the challenged action within the overall congressional scheme related to it; subsequent cases purportedly applying that framework, however, have loosened the parameters and given a pass to executive action that is not in express contradiction with congressional action. In a second mode, courts have also eschewed the *Youngstown* framework in order to utilize more typical statutory analysis to resolve questions of executive authority. At first blush, the statutory route appeared to constrain executive action during the War on Terror, but the Court has since put it to use buttressing expansive executive power. In sum, two frameworks exist, yet neither offers consistent, predictable constraints on executive authority.

This section traces the Court's change from *Youngstown* to its *Dames & Moore* posture. Next, it describes its embrace of statutory analysis for cases of executive action in the fields of national security and foreign affairs.

A. From Youngstown to Dames & Moore

1. Youngstown: Tethering of the Executive

Youngstown—the opinion that courts[9] and commentators[10] alike have named the pinnacle of executive power analysis—rose amidst the confusion of seven opinions and the emergency of the Korean War. While the system that emerged from Justice Jackson's *Youngstown* opinion is easily summarized, the context in which he wrote it is essential.

During the *Youngstown* case, the Court confronted the "extraordinary times" of the Korean War, which had already resulted in over 108,000 American casualties over its first two years.[11] Facing the grave military threat posed by a nation-wide steel mill strike, President Harry Truman ordered the Secretary of Commerce to take possession of most of the country's mills to ensure their continued operation.[12] The following morning, President Truman reported his action to Congress and sent a second message twelve days later; Congress took no action in response.[13] The steel companies, however, did act, suing Secretary of Commerce Charles Sawyer and arguing that the President's seizure of the mills was neither authorized by an act of Congress nor supported by a constitutional provision.[14] Nine days after President

9. *See*, *e.g.*, Medellin v. Texas, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); Dames & Moore v. Regan, 453 U.S. 654 at 668 ("The parties and the lower courts . . . have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube*.").

10. *See*, *e.g.*, Laurence H. Tribe, *Transcending the* Youngstown *Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J.F. 86 (2016); Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917 (2012).

11. *Youngstown*, 343 U.S. at 668 (Vinson, C.J., dissenting).

12. *Id.* at 582-83.

13. *Id.* at 583.

14. *Id.*

Truman's second message to Congress, the District Court issued a preliminary injunction restraining the Secretary from the mill seizure; the Court of Appeals vacated the stay the same day.[15] The Supreme Court granted certiorari on May third with arguments scheduled in the monumental case on May twelfth.[16]

The Court's opinion, authored by Justice Black, used a statutory approach; it centered on whether the President's action was authorized by the Constitution or an act of Congress.[17] In contrast, Justice Jackson's concurrence offered a dynamic institutional test for determining whether the President's actions were permissible.[18] The test established three zones. Zone One, afforded the most deference, would apply when the President acted pursuant an express or implied congressional authorization.[19] Zone Two, the "Zone of Twilight," results from absence of congressional approval or denial, and would allow the President only their independent powers.[20] Zone Three, the lowest ebb of Presidential power, refers to presidential action incompatible with the expressed or implied will of Congress.[21]

Justice Jackson categorized President Truman's actions as falling into Zone Three.[22] He noted that the seizure of private property was not "an open field" but instead had been covered by three statutory schemes inconsistent with the seizure.[23] Because President Truman neither invoked nor followed any of the three statutes, Justice Jackson found that President Truman could not claim that his action should fall within either Zone One or Zone Two—Congress had neither invited nor explicitly condoned it.[24] Instead, Justice Jackson concluded that President Truman's authority was incompatible with congressional action in the field because these three congressional options existed and President Truman had used none of them. Furthermore, because Congress had legislated in the field, President Truman could not claim that Congress had invited his actions by failing to act itself.[25] President Truman could therefore only rely on his inherent power, which, in this instance, was insufficient.[26]

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15. *Id.* at 584.

16. *Id.*

17. *Id.* at 585.

18. *Id.* at 635-38 (Jackson, J., concurring).

19. *Id.* at 635-37.

20. *Id.* at 637.

21. *Id.* at 637-38.

22. *Id.* at 640.

23. *Id.* at 639. For cases where the government itself was being supplied, Justice Jackson discussed two options. First, under the Selective Service Act of 1948, the government could seize the plant to comply with the orders placed by the government. Second, the government could have condemned the facilities under the power of eminent domain. Lastly, even if the government is not being supplied, it could have cited to the Labor Management Relations Act. *See id.*

24. *Id.*

25. *Id.*

26. *Id.* at 640-41.

Justice Jackson's concurrence stands not only for the three zones that it created, but also for the searching statutory analysis that must precede the test. Jackson did not take the three statutory schemes involving the seizure of private property as a basis for finding a broad congressional approval for permitting the President to seize property in a different manner.[27] He also did not infer congressional approval for President Truman's seizure from the numerous bills that funded the Korean War, inasmuch as much of that funding was for steel purchases to build weapons and vehicles.[28] And he did not rely on the exigencies of the war or the effect a complete steel shortage would have on the country's ability to fight it.[29] Instead, the touchstone of his analysis was his careful discernment of the permissible bounds Congress specifically approved of and his placement of President Truman's actions outside of that permissible area.[30]

2. Dames & Moore: Unleashing the Executive

In *Dames & Moore*, the Court used Justice Jackson's tripartite framework but eschewed his strict statutory analysis. In doing so, the case transformed the meaning of statutory silence from disapproval of an executive action into tacit approval.

Dames & Moore involved, among other questions, whether President Jimmy Carter had the authority to suspend claims in American courts brought by U.S. citizens against Iran.[31] President Carter purported to act under the authority of two pieces of legislation: the Hostage Act and the International Emergency Economic Powers Act (IEEPA).[32] The President argued that the Hostage Act, passed in 1868, gave him the power to suspend the claims because it allowed for presidential action if U.S. citizens abroad were imprisoned in violation of their rights.[33] Additionally, President Carter claimed the IEEPA also provided statutory support for his actions because it empowered the president to nullify or prohibit a transfer of property subject to the jurisdiction of the United States in which a foreign country has an interest.[34] The Court, however, found that neither statute constituted specific authorization for the President's suspension of the claims.[35] The Hostage Act faced "several difficulties" in its application because the 1868 Act was concerned with

27. *See id.* at 639 ("In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.").

28. *Cf. id.* at 671-72 (Vinson, C.J., dissenting).

29. *Cf. id.*

30. *See id.* at 638-40.

31. 453 U.S. at 675.

32. *Id.*

33. *Id.* at 676.

34. *See id.* at 669-71.

35. *Id.* at 677.

"countries refusing to recognize the citizenship of naturalized Americans," whereas in this case, the American hostages "were seized precisely *because of* their American citizenship."[36] Moreover, the Court held that the "terms of the IEEPA [] do not authorize the President to suspend claims in American courts" because the statute only empowers the President to nullify attachments to property and order the transfer of assets.[37] Despite neither statute approving of the President's actions, the Court nonetheless found that both were relevant "in the looser sense of indicating congressional acceptance of a broad scope for executive action."[38] The Court suggested that it could not "ignore the general tenor of Congress' legislation in this area" because the statutes granted the President some discretion.[39] The majority noted that Congress had implicitly approved of such a practice through the enactment of its 1949 Claims Settlement Act and the legislative history of the IEEPA, which stressed that the Act did not interfere with a president's ability to block assets or impede claims settlements between U.S. citizens and foreign countries.[40]

Dames & Moore adopted a more deferential posture toward executive authority than *Youngstown,*[41] the precedent it was purportedly applying.[42] While *Youngstown* had rejected the notion that statutes allowing executive seizures in other contexts implicitly authorized President Truman's seizure of the mills, *Dames & Moore* did the opposite, holding that legislation related to similar presidential powers created a congressional "tenor" which allowed President Carter to do as he willed.[43] The Court in *Dames & Moore* found clear statutory acquiescence for the President's action despite, "at best," an ambiguous statutory basis for it.[44] In doing so, the Court outlined a permissive analysis much more deferential to the executive.

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36. *Id.* at 676-77.

37. *Id.* at 675.

38. *Id.* at 677.

39. *Id.* at 678.

40. *Id.* at 680-82.

41. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1310-11 (1988). Professor Koh discusses that *Dames & Moore* "dramatically alters the application of *Youngstown's* constitutional analysis in foreign affairs cases." *Id.* In sum, under *Dames & Moore*, a court may find congressional inaction or legislation in a related field as implicit approval for executive action. *Id.* at 1311. The dramatic effect of this ruling is realized when put in concert with the Court's later *Chadha* holding which only allows for congressional disapproval of executive action by passing a joint resolution in both houses by a supermajority capable of overcoming a presidential veto. Thus, the two rulings together create a "one-way 'ratchet effect' that effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence." *Id.*

42. *See Dames & Moore*, 453 U.S. at 668.

43. *See* Koh, *supra* note 41, at 1311 (discussing how *Dames & Moore* "radically undercuts *Youngstown*'s vision" because courts may "treat[] all manner of ambiguous congressional action as 'approval' for a challenged presidential act").

44. Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after* Hamdan, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 948 (2007).

B. Post-9/11 Cases: The Rise of Marbury Analysis

Despite the permissive framework put forward by *Dames & Moore*, after 9/11, the Court tacked in a new direction. In 2001, Congress enacted two principal statutes of the War on Terror: the Authorization for Use of Military Force (AUMF)[45] and the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act).[46] These laws were largely silent on subsequent actions from the Bush Administration, like the detention of U.S. citizens as enemy combatants; the detention and trial by military commission of non-citizen enemy combatants at Guantanamo Bay; the use of secret overseas prisons; and the enactment of domestic surveillance measures.[47] The Bush Administration maintained that despite the statutes' silence on the aforementioned actions, their broad grant of powers lent support, or, in the terms of *Dames & Moore*, created a "general tenor," to buttress the aggressive programs.[48] Cases were swiftly brought to challenge President Bush's actions to detain U.S. citizens as enemy combatants and the use of military commissions for non-citizen enemy combatants. However, in the face of ambiguous statutes, the Court did not rely on the *Youngstown* framework, as amended by *Dames & Moore*. Instead, it pursued a statutory analysis. An examination of a handful of cases brings this shift to light.

In *Hamdi v. Rumsfeld*,[49] a plurality opinion written by Justice O'Connor, the Court held that the President maintained the power to indefinitely detain a U.S. citizen seized in Afghanistan because of the AUMF.[50] The Court found that the AUMF gave the President the ability to make battlefield captures because embedded in the ability to use force was the power to detain.[51] The key takeaway of the case was that the Court relied on statutory analysis in a manner inconsistent with *Youngstown* and *Dames & Moore*, analyzing the AUMF as encompassing detention power, rather than analyzing the congressional approval in relation to the three zones.[52] For example, the plurality opinion could have supported its stance by evaluating the statutory field to determine whether Congress had already covered the space, in the analysis of *Youngstown*, or acquiesced to the presidential action, in the analysis of *Dames & Moore*. Justice Thomas's dissent outlined how the Court could have used the permissive analysis of *Dames & Moore* to uphold the President's actions irrespective of close statutory analysis.[53] In his opinion, he cited to that case for the proposition that the President was acting pursuant to broad congressional

45. Pub. L. No. 107-40, 115 Stat. 224 (2001).

46. Pub. L. No. 107-56, 115 Stat. 272 (2001).

47. Vladeck, *supra* note 44, at 950.

48. *Id.* at 950-51; *see also Dames & Moore*, 453 U.S. at 678.

49. 542 U.S. 507 (2004).

50. *Id.* at 518 (plurality opinion).

51. *Id.*

52. Landau, *supra* note 10, at 1952.

53. *Hamdi*, 542 U.S. at 584 (Thomas, J., dissenting).

powers provided to the executive.[54] Additionally, Justice Thomas' analysis suggested that courts should not set aside executive action during the time of war and public danger unless there is clear conviction that the action is in conflict with the Constitution or laws of Congress.[55]

Hamdan v. Rumsfeld addressed the President's authority to create military commissions to try enemy combatants captured during the invasion of Afghanistan. The President defended his use of the commissions as authorized by the AUMF, the Detainee Treatment Act of 2005 (DTA), and the Uniform Code of Military Justice (UCMJ).[56] The government argued that Congress authorized the use of military commissions in the AUMF because it gave the president the authority to deter and prevent acts of international terrorism and gave the president the ability "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks…"[57] Additionally, the government argued that the DTA "expressly recognized" and ratified the practice of military tribunals.[58] Lastly, the government looked to the UCMJ as granting the president the power to use military commissions when he deems necessary.[59] The Court disagreed, holding that absent a clear statutory authorization, the commissions could not continue.[60]

In his concurrence, Justice Kennedy cited to Justice Jackson's tripartite scheme as the "proper framework for assessing whether executive actions are authorized."[61] He noted that the President "acted in a field with a history of congressional participation and regulation."[62] The UCMJ, for example, provides authority for certain forms of military courts, but it "also imposes limitations."[63] Thus, while the laws provided some authority for military courts, they imposed limitations—such as the proscribed structure and composition in the court-martial standards.[64] Because the President did not follow these standards, and, in fact, exceeded their limits, he could not rely on the UCMJ.[65] Justice Thomas's dissent, however, demonstrated how the majority's opinion differed from the *Dames & Moore* approach. Thomas quoted *Dames & Moore* for the proposition that "[t]he enactment

54. *Id.* at 583 (quoting *Dames & Moore*, 453 U.S. at 678 (Jackson, J., concurring)) ("As far as the courts are concerned, 'the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' measures on independent presidential responsibility.' ").

55. *Id.* at 584.

56. Hamdan v. Rumsfeld, 548 U.S. 557, 593-94 (2006).

57. Brief for the Government at 16, *Hamdan*, 548 U.S. 557 (No. 05-184).

58. *Id.* at 15.

59. *Id.* at 17-18.

60. *Hamdan*, 548 U.S. at 594-95.

61. *Id.* at 638 (Kennedy, J., concurring).

62. *Id.* at 639 (citing *Youngstown*, 343 U.S. at 619-20).

63. *Id*.

64. *Id.* at 647.

65. *Id.* at 653.

of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility."[66] Justice Thomas, therefore, noted that under *Dames & Moore*, the President's decision to use military commissions deserved a "heavy measure of deference" given congressional approval by the AUMF.[67]

These two colossal cases[68] demonstrate the Court's departure from the *Dames & Moore* deference regime. In its place, the Court adopted a close statutory analysis as the hallmark for approaching executive authority in national security and foreign affairs. This close statutory analysis, which reserves a judicial role completely independent that of the executive's view—a *Marbury* approach,[69] caused scholars at the time to believe the Court had abandoned the idea of executive deference in these fields.[70]

Yet, with time, it has become clearer that the Court's shift was not per se anti-executive power in these fields. Instead, the statutory analysis may allow for strong deference depending on how it is used. For example, in *Trump v. Hawaii*,[71] a case involving the President's authority to halt entry of immigrants for national security purposes from eight countries (six of which were Muslim-majority), the Court found that the Immigration and Nationality Act (INA) "exudes deference to the President in every clause."[72] It is certainly far from certain that the INA, in fact, exudes deference throughout.[73] Additionally, irrespective of—although likely related

66. *Id.* at 680 (Thomas, J., dissenting) (quoting *Dames & Moore*, 453 U.S. at 678).

67. *Id.*

68. These two cases, however, are not alone in exemplifying the Court's shift toward statutory analysis primacy. For example, in Boumediene v. Bush, 553 U.S. 723 (2008), foreign detainees petitioned for writs of habeas corpus despite the government arguing that the Military Commissions Act denied federal courts jurisdiction to hear their cases. The Court struck down a provision of the Military Commissions Act of 2006 (MCA), which attempted to remove jurisdiction to hear Guantanamo Boy detainees' habeas petitions, as unconstitutional; the Court rejected the executive's arguments that the canon of constitutional avoidance, coupled with deference to the executive's interpretation, could be used to avoid a constitutional holding against the executive. Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 805-06 (2011). To that end, Justice Scalia in his dissent argued that the Court exhibited no deference to the political branches in its analysis. *Id.* at 806 n.118 (citing *Boumediene*, 553 U.S. at 830 n.1 (Scalia, J., dissenting)). In sum, in a series of cases involving executive action in national security and foreign affairs, the Court largely dismissed arguments that the executive should receive deference on its interpretations of these statutes; instead, it used statutory analysis to discern executive power absent claims of deference in the space. *Id.* at 784-86.

69. *See, e.g.*, *id.* at 785 ("In treaty interpretation, the Court has invoked a *Marbury*-based insistence on asserting its own formal interpretative authority.").

70. *See* Ku & Yoo, *supra* note 4, at 180; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204 (2007).

71. 138 S. Ct. 2392 (2018).

72. *Id.* at 2408.

73. *See* Brief of Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law as Amicus Curiae at 12-13, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (discussing that even using *Dames & Moore* as a comparison, the President's action failed because it lacked statutory basis and lacked a "stamp of approval" from Congress). To that end, there was no history of congressional acquiescence because in the 43 instances that a president invoked § 1182(f) to suspend entry of noncitizens, on no

to—this shift in use of statutory analysis, the Court has also found areas of national security and foreign affairs that the executive maintains exclusive control over.[74]

From both a political and jurisprudence perspective, now is the time to address the Court's jurisprudence of executive action in national security and foreign affairs. Politically, both Democrats and Republicans have recently experienced presidents of the opposite political party wielding what they believed to be an overvast executive authority.[75] From a jurisprudential standpoint, on the one hand, the *Youngstown* framework as amended by *Dames & Moore* can be construed as permissive of executive authority in these fields. On the other hand, the immediate post 9/11 cases have demonstrated a type of statutory, *Marbury* approach—an approach that first appeared critical of executive authority outpacing congressional approval, but does not necessitate this outcome. Therefore, a framework that can balance constitutional and functional necessities would help provide greater predictability and incentives for the political branches.

II. *KISOR* FOR THE ZONE OF TWILIGHT

To develop a more robust framework for executive authority, the Court can look toward its recent holdings in administrative law. In administrative law, the Court's opinions have responded to the institutional and constitutional challenges regarding agency actions in the modern administrative state. In *Kisor v. Wilkie*,[76] the Court addressed the deference afforded to agency interpretations of their own regulations (*Auer*[77] deference). The Court outlined a test affording deference only to regulations that are truly ambiguous, where the "character and context of the agency

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occasion had the president used nationality alone to bar entry into the United States. *Id.* at 13. Justice Sotomayor's dissent, among other areas, discussed the majority's departure from even a permissive *Dames & Moore* type of analysis. *See* 138 S. Ct. at 2444 (Sotomayor, J., dissenting) ("Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation.").

74. *See* Zivotofsky v. Kerry, 576 U.S. 1, 12-14 (2015). The Court in *Zivotofsky* used the *Youngstown* framework to analyze whether the President could ignore Congress's attempt to require the State Department to mark in passports that Jerusalem is part of Israel. Despite finding that the President's action in refusing to implement Congress's statute put the action within *Youngstown*'s lowest ebb, the Court nonetheless held that the Constitution's text, structure, and function grants exclusive recognition power to the President. *Id.* at 2084, 2086. Elsewhere, the Executive has expanded upon the use of executive agreements in lieu of treaties, sidestepping the Senate's role in ratifying them. Despite the growth in executive agreements, the Court has never invalidated an executive agreement for undermining the Senate's constitutional role in ratifying treaties. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 388 (5th ed. 2015).

75. *See*, *e.g.*, Charlie Savage, *Presidential Power Must Be Curbed After Trump, Candidates Say*, N.Y. TIMES (Sept. 10, 2019), https://www.nytimes.com/2019/09/10/us/politics/executive-power-survey-2020.html; Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html.

76. 139 S. Ct. 2400, 2415-16 (2019).

77. Auer v. Robbins, 519 U.S. 452 (1997).

interpretation entitles it to controlling weight."[78] These preconditions are similar to the Court's approach to *Chevron* deference for agency interpretations of statutes.[79] A similar test to examine whether executive action exists within Justice Jackson's Zone Two or Zone Three would help bring predictability to cases governing the scope of executive authority. Courts reviewing these types of executive actions are in a similar position to courts interpreting agency action given the expertise of agencies and the executive in their respective fields and the choice Congress often makes to legislate in the general rather than the specific mode, making a similar test a natural option.

This section begins by expanding upon the parallels between administrative law and executive power in these fields. Next, it describes the previous scholarship linking the two areas of law. Lastly, it outlines what applying *Kisor* to executive power in national security and foreign affairs would and the potential benefits and detractions of moving to such a framework.

A. Parallels Between Administrative Law and Executive Power

Courts reviewing agency interpretations of regulations and executive actions in national security and foreign affairs face numerous parallel constraints and incentives. These parallels result from the expertise of agencies and the executive in their respective fields, the reality that Congress and agencies generally do not legislate or regulate with specificity in advance, and the similar incentives facing the political branches that arise in both areas. These conceptual underpinnings are often the basis for the calls for deference to these actors' decisions.

Executive interpretations of national security and foreign affairs laws reflect similar levels of expertise in their field to agencies interpreting relevant statutes and regulations.[80] In administrative law, there is a "well-reasoned view [that] the agencies implementing a statute [have] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[81] Given their experience in

78. *Kisor*, 139 S. Ct. at 2415-16.

79. *See id.* at 2416 (citing United States v. Mead Corp., 533 U.S. 218, 227 (2001), which requires "an analogous though not identical inquiry for Chevron deference").

80. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. at 2421 ("More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.' ") (quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 US. 103, 111 (1948)).

81. United States v. Mead Corp., 533 U.S. 218, 227 (2001) (internal citations omitted); *see also* Ku & Yoo, *supra* note 4, at 202 (discussing agencies with greater expertise over complex and technical statutes); Posner & Sunstein, *supra* note 70, at 1176 (noting that *Chevron* applies in areas of administrative expertise). *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I.*, 65 STAN L. REV. 901, 1004 (2013). Expertise may not equate with Congress delegating authority to resolve important questions of policy. For example, Congress may assume, and delegate, agencies the ability to resolve ambiguity regarding routine matters but believe that major questions were not delegated; although if an agency has technical expertise, Congress may be more inclined to delegate these so called "major questions." *Id.*

their respective subject areas, agencies are presumed to be better positioned to resolve statutory and regulatory ambiguities than are their judicial counterparts.[82] Similarly, the executive is presumed to maintain expertise and experience in the fields of national security and foreign affairs.[83] This relative expertise vis-à-vis Congress and the courts arises from the functional aspects of being able to work in secret, monitor developments in foreign affairs and national security, and act quickly and decisively when needed.[84] Additionally, the executive has the benefit of the experience of their sizeable national security and foreign affairs apparatus, which dwarfs the size and scope of the other branches' capabilities.

Moreover, Congress and agencies face difficulty acting in advance with specificity in both administrative law and areas relating to national security matters and foreign affairs. Legislating in both areas requires building flexibility into governing statutes to ensure they operate amid changing circumstances.[85] Proponents argue that in the face of statutory ambiguity, agencies and the executive are in the best position to make the policy-implementing decisions.[86] Courts are often hesitant

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82. *See* Posner & Sunstein, *supra* note 70, at 1176.

83. *See, e.g.*, *Zivotofsky*, 576 U.S. at 14 (discussing that the President maintains exclusive power of recognizing foreign nations as the country must have a single policy in the area); Posner & Sunstein, supra note 70, at 1176 ("[R]esolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments"); Ku & Yoo, *supra* note 4, at 202 ("In the area of foreign policy, the executive branch is composed of large bureaucracies solely focused on designing and implementing foreign policy."). *But see* Aziz Z. Huq, Structural Constitutionalism as Counterterrorism, 100 Calif. L. Rev. 887, 917-18 (2012). Huq analyzes the internal construction of the branches of government to note that the attributes given to these branches, such as "executive speed" or "congressional deliberation" rest on weak structural assumptions about the branches and are not borne out by empirical research. *Id.* at 904-05.

84. Posner & Sunstein, *supra* note 70, at 1202 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 320 (1936)). Of course, speed may be an irrelevant factor when courts review executive action in the months and years that follow because courts are not under time pressure to respond to an emergency that has likely subsided. *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1252 (2007). However, anticipation of subsequent litigation may incentivize the executive to speedily address an issue, which may or may not be beneficial. *See id.* at 1252 n.82.

85. *See Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (highlighting that *Chevron* allows for statutory "ambiguity (and hence flexibility)" to be resolved by the agencies); *see also* Landau, *supra* note 10, at 1930 (quoting Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 676-78 (2000)) (discussing that a benefit of statutory ambiguity in the foreign affairs context is that it allows for "[c]hanging world conditions and the executive branch's unique access to foreign affairs information").

86. *Hamdi* exemplifies this idea of an executive receiving the leeway to work within a vague statutory basis. The plurality found that the AUMF, which is quite vague on its face, granted the power to detain a US citizen despite the Non-Detention Act's prohibition of detaining a US citizen without congressional approval. Posner & Sunstein, *supra* note 70, at 1220. Thus, despite the dissenters pointing out that the AUMF was "simply too vague to provide the kind of clear authorization required by the Non-Detention Act for detention," the plurality reasoned that the detention power was a necessary implication in the power to use force. *Id.* at 1220-21 (citing *Hamdi*, 542 U.S. at 547-48 (Souter, J., concurring)). The Court allowed the executive to utilize the vague terms of the AUMF to wage the war as it saw fit. Posner and Sunstein noted that even "[i]f the AUMF was ambiguous, the executive should have had the discretion to interpret it in a reasonable fashion." *Id.* at 1221.

to interfere with agency or executive action because doing so could be viewed as interfering with legitimate policy choices.[87]

B. Previous Chevron for National Security and Foreign Affairs Arguments

Reacting to these parallels and the exigencies of the time following 9/11, some scholars began advocating for the application of *Chevron* deference to executive action.[88] Critics pushed back on the idea, noting the risk of executive overreach.[89] From these debates, some advocated for institutional process checks on executive action to help ensure that Congress maintained a role in these fields.[90]

Following the 9/11 and subsequent U.S. military attacks, some scholars advocated for greater deference to executive action in the areas of national security and foreign affairs.[91] With regard to the AUMF, Professor Cass Sunstein noted that the president should enjoy discretion in interpreting the ambiguities within it, subject to a reasonableness constraint.[92] Sunstein cabined his argument by concluding with a "major qualification" that executive interpretations be constrained by the principle that Congress must have explicitly deliberated the question at hand and delegated discretion; still, he hedged, writing that "if national security is genuinely at risk, clear congressional authorization will almost certainly be forthcoming."[93]

The proponents of *Chevron* in these areas argued that its expansion was warranted for several reasons. Some found that it was a helpful "framework for understanding and controlling deference in what is an otherwise very amorphous area."[94] Others argued that a focus on delegation of authority highlights when the executive is acting under such authority or is instead using independent lawmaking power.[95] For some, *Chevron* offered 'deference with constraint,' because to enjoy

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87/ The argument that courts should leave space for agency policy expertise in the face of ambiguous statutes is at the core of *Chevron* deference. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). Similarly, statutory parameters coupled by perceived executive expertise in national security and foreign affairs would similarly lend itself to arguments that courts should not undo the policies and principles chosen by the executive. *See* Bradley, *supra* note 85, at 673.

88. *See*, *e.g.*, Posner & Sunstein, *supra* note 70.

89. *See*, *e.g.*, Jinks & Katyal, *supra* note 84, at 1230.

90. *Id.* at 1279-80.

91. *E.g.*, Posner & Sunstein, *supra* note 70, at 1173 ("Our more ambitious goal is to suggest that courts should generally draw on established principles of administrative law to permit executive interpretations of ambiguous statutory terms to overcome the international relations doctrine.").

92. Cass Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2664 (2005).

93. *Id.* at 2672.

94. Bradley, *supra* note 85, at 674. Notably, scholars in favor of a strong *Chevron* for executive action would replace Justice Jackson's searching statutory analysis with a deference regime that may even exceed the *Dames & Moore* approach to searching for congressional approval through enactment of similar statutes in the area. That said, some scholars have found that the existing *Dames & Moore* gloss on Justice Jackson's Zone Two already represents a deference regime in favor of the President. E. Garrett West, *A* Youngstown *for the Administrative State*, 70 ADMINISTRATIVE L. REV. 629, 646 (2018).

95. Bradley, *supra* note 85, at 674.

deference, the meaning of the law under which the executive acts must be ambiguous, and Congress must have delegated power to the executive.[96] In comparison, others believed *Chevron* should be applied by courts reviewing executive action because *Chevron* would allow the executive greater discretion in its areas of operative expertise.[97] To that end, some *Chevron* proponents argued that courts reviewing the executive's use of military force should use a "super-strong deference" stemming from both *Chevron* and the president's constitutional responsibilities as commander in chief.[98]

Critics pushed back on many of the *Chevron* proponents' assumptions and conclusions. For example, some noted that Professors Sunstein and Eric Posner centered too much of the debate comparing the executive to the judiciary; instead, these critics contended, it was Congress's constitutional and institutional functions that were at issue.[99] Therefore, Professors Derek Jinks and Neal Kumar Katyal advocated against an adoption of a strong *Chevron* deference in foreign affairs matters because current law allows Congress to correct courts when they limit the executive's authority.[100] Other critics found it unusual for scholars to propose the use of *Chevron* at a time when its doctrinal stability was in question.[101]

Similarly, critics noted that *Chevron* was a "blunt tool for ensuring expertise" because under such a regime, the President would enjoy deference from the courts even if those with relevant capabilities were not involved in the decision-making process.[102] Katyal and Jinks proposed that prior to awarding *Chevron* deference to the president, processes should be implemented within the executive branch to ensure that experts were contributing to the decisions being litigated.[103] Thus, for Katyal and Jinks, courts would benefit from implementing *Chevron*

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96. *Id.* at 674-75.

97. Ku & Yoo, *supra* note 4, at 201-02.

98. *Id.* at 196 (quoting Sunstein, *supra* note 92, at 2671).

99. Jinks & Katyal, *supra* note 84, at 1252.

100. *Id.* at 1253.

101. *See* Pearlstein, *supra* note 68, at 787.

102. *Id.* If courts wanted to control against this criticism while still maintaining a *Chevron* deference regime, they could look toward *Mead* and other *Chevron* Step Zero cases. For example, *Mead* tied the agency's formal process and expertise to the determination of whether or not it could receive *Chevron* deference. Jinks & Katyal, *supra* note 84, at 1248. As explained further in Subsection Section C, *infra*, one could import a similar test from *Kisor* to assuage this concern about the executive using its expertise.

103. *See* Jinks & Katyal, *supra* note 84, at 1280 ("To be sure, the President has a State Department, a Defense Department . . . but each of these entities can be cut out under streamlined presidential decision-making. One way of viewing our point is to say that when Congress is 'delegating' interpretive power to the President, it is doing so under the assumption that the President will use existing channels and procedures. If the President truncates them, however, the arguments in favor of *Chevron* deference are weakened significantly."); *see also* Pearlstein, *supra* note 68, at 819 ("If one accepts the view that the executive's key strength is its expertise . . . one would presumably wish to insist that the actual experts inside the executive branch be consulted.").

deference in non-emergencies only when the executive used standard inter-agency processes.[104]

Ultimately, some scholars found that the *Chevron* proponents and detractors were both off-base, as cases in national security and foreign affairs demonstrated that the Court tailored its deference depending on institutional considerations. For example, Professor Joseph Landau described that the national security cases were similar to their *Chevron* administrative law counterparts where the Court would defer to policies resulting from joint political branch decision-making while maintaining skepticism toward policies lacking statutory foundation.[105] Landau argued that the Court must not allow *Chevron* to displace Congress' participation in the lawmaking process.[106] To that end, courts, instead of embracing a fully deferential regime, could, as they have done in the past, calibrate their own role and adjudications to the actions of political branches: where both branches have endorsed an action, courts could and should accept their judgments.[107]

The debate surrounding the post-9/11 executive authority cases pitted those seeking *Chevron* deference for executive authority against those believing that the courts should maintain their fidelity to *Marbury* statutory analysis, with some calling for chartering a middle ground relying on institutional considerations.[108] Over time, scholarly support arguing for *Chevron* deference to presidential actions in national security and foreign affairs dissipated as the exigencies of 9/11 faded and *Chevron* was increasingly questioned within administrative law scholarship.[109]

C. Kisor for Youngstown

Today, administrative law principles address many of the concerns held by the *Chevron* critics while satisfying many of the institutional factors identified by those seeking to apply *Chevron* to presidential action. Resurrecting the principles from Justice Jackson's *Youngstown* concurrence would not only constitute a compromise between deference and *Marbury* analyses but also allow courts to craft

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104. Jinks & Katyal, *supra* note 84, at 1280. The inter-agency processes refer to the systematic process of coordination across the executive department. This process stems from the National Security Act of 1947, which created the National Security Council, a new organization aimed at improving the integration of national security strategy. The National Security Council, amongst other things, collects information, identifies policy options, and, ultimately, ensures that the President has all the necessary information to make decisions. *See* Lieutenant Colonel John E. O'Neil IV, *The Interagency Process — Analysis and Reform Recommendations*, U.S. Army War College Research Project, 4 (2006).

105. Landau, *supra* note 10, at 1971.

106. *Id.* at 1977.

107. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES 1, 44 (2004). Thus, under this account, the courts have "tied their own role to that of the more political branches" trusting that bilateral institutional action checked executive excess sufficiently during times of crisis. *Id.*

108. Landau, *supra* note 10, at 1977.

109. *See, e.g.*, Pearlstein, *supra* note 68, at 787.

institutional, predictable compromises that rely on coordination between the political branches.

This section proceeds by first describing how *Kisor* applies to questions of deference to agency interpretations of their statutes. Next, it advocates for crafting a similar two-part test from Justice Jackson's *Youngstown* tripartite framework. Lastly, it applies this test to an example and compares that analysis and outcome to those of *Youngstown*, *Dames & Moore*, and strict *Marbury* statutory processes.

1. Kisor for Agency Action

Auer deference instructs courts to give an agency's interpretation of its own regulation controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation.[110] Just as with *Chevron*, *Auer* deference is rooted in a presumption about congressional intent.[111] The idea is that Congress would want the agency to "play the primary role" in resolving regulatory ambiguities.[112]

In *Kisor*, the Court clarified when courts should afford *Auer* deference to agency decisions. The Court noted that *Auer* deference "is not the answer to every question of interpreting an agency's rules."[113] Instead, the Court created a two-pronged test. First, the possibility of deference arises only if a regulation "is genuinely ambiguous" after a court "resorted to all the standard tools of interpretation."[114] Next, not all reasonable agency constructions of ambiguous regulations will receive the presumption of deference. The Court noted that "when the reasons for that presumption do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the 'power to persuade.' "[115] A court, therefore, "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[116] Factors for this inquiry include whether it is the agency's authoritative or official position.[117] Additionally, the interpretation must have relied on the agency's substantive expertise and reflect its "fair and considered judgment."[118]

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110. Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 105 (2018) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

111. *Kisor*, 139 S. Ct. at 2412.

112. *Id.* Critics of the doctrine note that lodging law-making and law-executing powers within the same actor violates separation of powers principles. In addition to these separation of powers concerns, critics discuss that *Auer* deference institutes perverse incentives for agencies to promulgate vague regulations to give themselves additional power to interpret them. Walker, *supra* note 110, at 105-06.

113. *Kisor*, 139 S. Ct. at 2414.

114. *Id.*

115. *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012)).

116. *Id.* at 2416 (citing *Christopher*, 567 U.S. at 155).

117. *Id.* (quoting *Mead*, 533 U.S. at 257-59).

118. *Id.* at 2417 (quoting *Christopher*, 567 U.S. at 155). Justice Gorsuch was not convinced that these factors secure *Auer* deference from constitutional infirmities. He notes that the granting of deference to

2. Kisor for Executive Action

Integrating *Kisor* and *Youngstown* could help delineate the boundary between Zones Two and Three and the corresponding deference owed to a particular executive action.[119] Confusion over the zone in which executive action lies typically arises when the statutory basis for the executive's action is unclear, yet Congress could be viewed as acquiescing to the executive's authority in the area.[120] *Kisor* would help to navigate this conundrum.

The first step of *Kisor* fits with Justice Jackson's *Youngstown* concurrence, as both advocate for close statutory analysis. Justice Jackson scrutinized the statutory landscape to determine whether President Truman's mill seizure fell within an express congressional grant of authority.[121] He found that, while Congress had provided various measures through which the executive could seize property, President Truman's takeover had failed to adhere to any of the available Congressionally-approved schemes, knocking the president out of Zones One and Two and into Zone Three.[122] *Kisor*'s first step—applying statutory analysis to agency action—would, in the context of presidential power, constitute an explicit return to Justice Jackson's searching approach.[123] In both *Kisor* and *Youngstown*, a court evaluates the statutory basis for a decision by examining the statute or regulatory basis for the decision, as well as the statutory or regulatory scheme.

Kisor's first step calls for an exhaustion of "all the 'traditional tools' of construction."[124] By searching text, structure, and history, courts can discern whether Congress has explicitly spoken on the issue in question. *Kisor*'s rigorous searching stands in contrast to the approach courts have taken under both *Dames & Moore* and *Marbury* analyses of executive action. On one end, *Kisor* rejects *Dames & Moore*'s permissive statutory analysis. There, the Court not only ignored the legislative history that evinced congressional intent to reign in presidential power, but it also used lack of express congressional disapproval of the President's actions and the

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administrative agencies' interpretations improperly usurps judicial power by "requiring an Article III judge to decide case before him according to principles that he believes do not accurately reflect the law." *Id.* at 2440 (Gorsuch, J., concurring in the judgment). This criticism, that the deference regime violates judicial power as articulated in *Marbury*, is the same criticism lodged against *Chevron* in the executive action.

119. Under Justice Jackson's original formulation this boundary policing was less of an issue; however, as explained in Part I, the *Dames & Moore* gloss on the formation significantly muddied the water by using "the general tenor of Congress' legislation" to indicate that Congress has acquiesced to a presidential power in a certain area. *Dames & Moore*, 453 U.S. at 678.

120. *See supra* Part II.A.

121. *See Youngstown*, 343 U.S. at 639 (Jackson, J., concurring) ("Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure.").

122. *Id.*

123. *Cf. Dames & Moore*, 453 U.S. at 678 (discussing the "general tenor" of Congress' legislation to determine whether the President acted alone or with the acceptance of Congress).

124. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron*, 467 U.S. at 843, n.9).

existence of related legislation as signs of congressional approval.[125] Courts employing traditional statutory construction would be unlikely to find Congressional authorization for agency action solely in a lack of express disapproval of an agency taking such an action. On the other end, traditional tools of construction within this analysis, unlike some of the Court's *Marbury* mode, admit a limit. A *Kisor* approach would caution against finding explicit congressional approval for overweening executive action in statutes which never addressed the actions in question—the methodology of the *Hamdi* plurality.[126] Applied to the president, *Kisor* step one would force courts to examine the actual statutory basis for the executive action. In situations where using tools of statutory interpretation rendered a result, that reading would control and dictate whether the executive's action was permissible. For other cases where a result was ambiguous, the analysis would continue to step two to determine what level of deference, if any, was warranted.

Under *Kisor* step two, courts need to determine whether the character and context of the executive's action warrant defense. To that end, courts investigate whether a) the agency's action was made by the agency, b) whether that action implicates the agency's substantive expertise, and c) whether it reflects a fair and considered judgment.[127] The *Kisor* Court examined these factors to discern whether the presumption that Congress would want courts to defer to agencies is true for the given agency's interpretation.[128] A similar rationale would apply when looking into the character and context of the president's actions to determine whether they deserve some deference—Zone Two's "twilight"—or none—Zone Three's "lowest ebb." A president acting in the face of "congressional inertia, indifference or quiescence" may have been invited by Congress to act, so courts must "depend on the imperatives of events and contemporary imponderables"[129] to understand the nature of the dialogue between the executive and Congress in matters of national security and the essence of the executive's action.

Therefore, to determine whether a presidential action in the face of legislative ambiguity deserves deference, a court should examine how the executive conducted the decision-making process.[130] A court should examine the external

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125. Koh, *supra* note 41, at 1310.

126. *See Hamdi*, 542 U.S. at 518. The Court used the AUMF's language that the President may "use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks." From this text, the opinion makes a few leaps. By finding that the Taliban supported al Qaeda terrorists, the Court concluded that indefinite detention of members of the Taliban at Guantanamo Bay for the duration of conflict was congressionally authorized. *Id.* In dissent, using textual analysis, including the canon of constitutional avoidance, Justice Scalia notes that the AUMF's text cannot be read to suspend the writ of habeas corpus or even detain citizens. *Id.* at 574-75 (Scalia, J., dissenting).

127. *See Kisor*, 139 S. Ct. at 2416-18.

128. *Id.* at 2416.

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

130. *See* Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 442-44 (2009) (discussing that there is a "critical interdependent relationship between internal and external separation of powers" and that, among other things, "external

factors—such as whether the president notified and adequately explained the actions' legal grounding and policy rationales to congressional leaders—to ensure Congress has adequate information to check the executive's action. Given the difficulty Congress may face in responding in these fields,[131] a court should also examine the internal factors—primarily whether the requisite experts within the administration participated in the decision, and whether the process allowed for adequate debate and disagreement amongst those experts.[132] These factors would help to illuminate whether a president had well-enough informed the Congress to call a subsequent silence 'legislative acquiescence,' and whether the executive had relied on the expertise that is the basis for affording their actions deference.

In order to discern the context and character of a presidential action, the first place a court could look would be to the steps the administration took to assure Congress maintained the requisite knowledge and ability to respond to the action.[133] For example, for actions with a questionable statutory basis, the president could

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mechanisms can reinforce internal constraints"). As explained further in this section, an analysis that investigates both internal and external features of the executive's decision seeks to not only facilitate the functional benefits associated with fostering inter- and intra-branch checks and balances, but also ground the analysis in Justice Jackson's original framework. While courts do not explicitly link the external and internal factors as a manner of fostering separation of powers, they are present in recent cases in the field. *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (en banc). There, then-Judge Kavanaugh discusses multi-member independent agencies' benefits of "divid[ing] and dispers[ing] power across multiple commissioners or board members. The multi-member structure thereby reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect liberty." *Id.* at 165 (Kavanaugh, J., dissenting). In examining the internal executive structures, then-Judge Kavanaugh demonstrates the connection between these structures and the larger separation of powers between branches that aim to promote the same aims he cites. Another example of courts looking at the connection of internal and external processes is *Mead*. In *Mead*, the Court looked toward factors such as whether Congress delegated rulemaking or adjudication powers to the agency and whether the agency ultimately used these powers. 533 U.S. at 230-31. Thus, while not explicit, the Court diminished the fear of impermissible delegation and expansive agency power by looking at the actions, and interactions, of the two political branches.

131. *See* Metzger, *supra* note 130, at 437 (highlighting that "[r]eal limitations exist on the ability of traditional external constraints, specifically Congress and the courts, to check the power of the Executive Branch" because Congress faces the "arduous process of bicameralism and presentment and the additional obstacles created by the operation of congressional committees and rules" and "the frequent need to overcome a presidential veto").

132. Related to these internal questions is *to what extent* must the Executive facilitate and encourage debate to reach an outcome compared to just receiving information from the experts. While the line drawing between these two manners is difficult, in order to uphold the idea that the executive is using its expertise in a manner Congress would expect, courts should demand that the executive take steps to foster and incorporate debate. In fact, this demand is in line with the Court's decision in *Hamdan*. The Court was likely concerned there with that the President's actions with regard to the rights of detainees under international law were not in line with the executive's experts in the fields, such as the Judge Advocate General and State Department. Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 695 (2009).

133. A question even preceding this initial one could look at the character of the executive action itself. For example, it could examine how much it falls within the prerogative of one branch or the other. For most of these questions, the actions will likely exist somewhere within Justice Jackson's "Zone of Twilight" where both branches have concurrent authority over some subsection of the area. That said, if this is not the case, and one branch has clearly stepped into the constitutional function of another, a court could certainly make the determination on this factor alone.

request and share with senior congressional leaders an opinion from the Office of Legal Counsel (OLC) outlining the legality of the action.[134] The sharing of these memos would allow Congress, or at least its leaders, to understand the legal and factual basis for an executive's policy choice, and understanding the rationales for the executive's decision could give Congress the ability to intervene with new legislation.[135] Additionally, if Congress failed to act, the failure would help to point up its acquiescence, pushing the presidential action into Zone Two and affording it some deference.[136] Other actions, such as meetings with congressional leaders or frequent detailed updates on the action, would go towards the same end.

A court should also look beyond these limited processes. Focusing solely on external checks ignores that in many instances Congress has delegated some of these decisions to the executive by not intervening in the policy area over time.[137] Incorporating this idea into the analysis fully connects it with administrative law principles.[138] Thus, courts can examine whether the president engaged in adequate internal deliberation to merit deference under Zone Two.[139]

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134. Currently, OLC memos are not shared with members of Congress. Instead, Congress must request and haggle with the Executive to read them. Additionally, the public only gains access to OLC opinions when they are released voluntarily or by a Freedom of Information Act request. Billy Easley & Sean Vitka, *The Attorney General's Secret Law Factory*, MORNING CONSULT (July 3, 2019), https://morningconsult.com/opinions/olc-opinions-attorney-general-secret-law-factory/.

135. The effects of INS v. Chadha, 462 U.S. 919 (1983) loom large over this analysis. First, the precedent limits Congress because Congress may only signal a disapproval of presidential action through the formal mechanism of bicameralism and presentment by passing of legislation and likely overcoming a presidential veto. *Id.* at 944-51; *see also* Koh, *supra* note 41, at 1311. Next, given this is the case, one may question applying *Kisor* to look for *congressional* approval or disapproval outside of the formal mechanism of bicameralism and presentment. However, given that this analysis calls for the examination of the *executive's* actions in relation to Congress, it at least sidesteps some of this criticism. That said, this *Chadha* concern signals that courts may put emphasis on the internal deliberation aspects of the analysis.

136. This analysis is incredibly similar to what Justice Jackson *rejected* in his *Youngstown* concurrence. There, President Truman was quite transparent with Congress as to his plan and rationale for taking possession of the steel mills. In fact, he notified Congress the day following the seizure and sent a second message twelve days later. Both times, Congress took no action. *Youngstown*, 343 U.S. at 583. Yet, Justice Jackson did not take this under consideration, but instead found that Congress had dictated what was permissible when it enacted separate legislation in the area. *See id.* at 639. Applying *Kisor* in this manner would demonstrate a relaxation of Justice Jackson's scheme. That said, it still reflects an additional hurdle compared to the permissiveness outlined in *Dames & Moore* allowing courts to read congressional inaction or related legislation as implicit approval of executive action. 453 U.S. at 681-88.

137. *See* Sunstein, *supra* note 92, at 2666. In one manner, this implicit delegation is in conflict with Justice Jackson's attempt to police the boundaries of executive action by looking for *explicit* congressional approval. Yet, his Zone Two does acknowledge that there are some areas of overlapping constitutional power that the Congress allows the President to exercise, albeit through implicit manners of acquiescence.

138. *Id.* at 2663-64.

139. *See Kisor*, 139 S. Ct. at 2416 (discussing that courts should presume that Congress intended for agency deference to their interpretations but noting that "such a presumption cannot always hold" and that courts must examine the processes taken to arrive at the decision); *Mead* 533 U.S. at 230-31 (examining agency actions, such as notice-and-comment making, that foster fairness and deliberation to determine whether an agency action warrants *Chevron* deference); *see also* Neal K. Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 66, 105 (2006) [hereinafter Katyal, *Legal Academy]* (Katyal notes that "[o]ne way of understanding *Hamdan* is through the lens of administrative law." He finds that the Court "consciously refused to award deference" to the President's actions because

The touchstone of *Kisor* step two, therefore, should be examining executive action to determine whether it was by informed deliberation by experts.[140] Criteria for this investigation would include whether the decision resulted from a debate between all relevant policy and legal actors who were capable of looking beyond the immediate political necessities of a given presidency.[141] A contemporary memorandum by a senior administration official outlining the contours and relevant players of the debate would help demonstrate that a given action was a well-reasoned policy and not simply a litigation position.[142] Other context-specific indications of internal debate could also be considered. For example, the State Department maintains a dissent channel for foreign service officers to express displeasure with a State Department's proposed policy and warn of potential problems for them in the field.[143] Executive evidence of similar channels allowing for debate amongst experts could also be considered. Lastly, a court could look toward whether the executive sought to conform its actions to accepted past practices or whether it significantly departed from precedent. Constraining action to past precedent would demonstrate that the executive was still operating within the area of congressional approval.

3. Kisor in Practice—an Example

An application of *Kisor* to *Youngstown* would clarify many of the hardest cases involving executive power with which the current *Youngstown* and *Marbury* analyses struggle to grapple. In cases where Congress clearly legislated a power to the executive, the analysis would be decided at step one as it would indicate that the action is permissible. However, given that most of these cases do not arise in situations with such clear statutory background, *Kisor* step two would illuminate the proper amount of deference that should be afforded to the executive's action based primarily on the internal decision-making process leading to the decision.

Consideration of a hypothetical example here is helpful. It is early 2022 and the President orders a bombing of military targets within a Middle Eastern country unrelated to the original 2001 AUMF.[144] Congressional leaders are caught off guard.

"they lacked support from the bureaucracy, and in particular the Judge Advocates General and the State Department.").

140. Jinks & Katyal advocate for the use of similar internal executive processes as preconditions for deference. Noting that the executive's claims for deference stems partially from its claimed expertise, it should only be rewarded with deference for processes that ensure expertise. For example, when agencies adopt processes such as the State Department that allow for airing of internal dissent, the claim of expertise is strengthened. In comparison, the growth of political appointees within the bureaucracy challenges the reason for deference stemming from expertise. *See* Jinks & Katyal, *supra* note 84, at 1279-80.

141. Katyal, *Legal Academy*, *supra* note 139, at 112.

142. *Cf.* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-13 (1988) (denying *Chevron* deference because the interpretation seeking deference was taken for the first time during litigation).

143. Jinks & Katyal, *supra* note 84, at 1279.

144. The AUMF provides that the "President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of

While they, like the public, knew of a public feud between the two countries, they did not think it would lead to an attack with casualties. Some in Congress call for the rescission of the AUMF or a change to its contours. Others verbally approve the tough stance taken by the President. No legislation is passed.

A court examining a case challenging the President's action with these facts would face difficulty using any of *Youngstown*, *Dames & Moore*, or *Marbury* analyses. Under *Youngstown* as articulated by Justice Jackson, a court would likely find that such an attack is impermissible. While the President would argue that the 2001 AUMF directly authorized the strike—allowing it to enter Zone One, or at least invited presidential action—placing it in the Zone Two, a court faithfully applying Justice Jackson's analysis would likely reject these arguments. The court would likely not find that the AUMF, authorizing force against those who participated in the September 11 terrorist attacks, could be stretched to constitute textual support for actions against unrelated countries over two decades after its enactment. Additionally, as Justice Jackson articulated, the absence of a broader provision within the AUMF to attack other countries could be viewed as Congress not leaving the president's powers as "an open field."[145] In comparison, a court applying the *Dames & Moore* gloss onto *Youngstown* might reach the opposite result. A court might, for example, look to Congress's failure to respond to similar past presidential military strikes as a premise for their approval.[146] In fact, unlike in *Youngstown*, a court might even look to the AUMF's "general tenor" as support for the President's actions given that both address external threats to the country.[147] A court applying a *Marbury* statutory analysis approach would be left with a dearth of tools to analyze the short AUMF to discern whether it permits a president attacking a country that had nothing to do with the 2001 terrorist attacks but could nonetheless be considered a sponsor of terrorism *today*.

Applying *Kisor* to discern where this action fits within the *Youngstown* tripartite system would provide clarity to a court seeking it.[148] The step one statutory analysis would not yield a definitive result. While the attacked country did not

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international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

145. *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring).

146. *See Dames & Moore*, 453 U.S. at 682, n.10 ("Indeed, Congress has consistently failed to object to this longstanding practice of claim settlement by executive agreement, even when it had an opportunity to do so.").

147. *See id.* at 678-79 (discussing that "enactment of legislation closely related to the question of the President's authority in a particular case. . . may be considered to invite measures on independent presidential responsibility . . . where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President") (internal citations omitted).

148. A court may seek such clarity as it navigates the existing *Youngstown*, *Dames & Moore*, and post-9/11 precedent. A lower court in these situations face the reality of utilizing the *Youngstown* zones and factoring the *Dames & Moore* gloss; at the same time, the court may utilize the statutory analysis evidenced in the post-9/11 cases. Facing such precedent, *Kisor* offers a deference regime without abandoning the tenets of the *Youngstown* zones.

participate in the 2001 attacks, it would be difficult to categorically declare the AUMF denies the President from taking actions to protect from future attacks, especially since Congress has yet to vote to repeal the legislation despite its continued use. Therefore, the level of deference would be decided under *Kisor* step two, principally looking at the executive's internal decision-making process. The executive could point to aspects of that process such as which military and diplomatic experts were involved in the decision or whether there was a robust and informed debate with opportunities for dissent. Outside of looking toward whether the requisite experts and process were used, a court could examine whether this practice falls into a precedent of presidential action that Congress has taken no action in response to. While this should not be the only factor, it could signal whether such actions have been delegated through the political branch practice. Lastly, the President could bring forward other evidence to demonstrate that the decision taken used the appropriate level of expertise that Congress would assume that the executive would take for such an action. Thus, the analysis would put the burden on the executive to demonstrate that procedures were followed, but once done, would provide predictable deference for the decision.

Ultimately, comparing how a court would utilize the different modes of analysis illuminates two key factors. First, applying *Kisor* represents a functional compromise between *Youngstown* and *Dames & Moore*. It grants the executive more leeway than *Youngstown* to work outside of congressional approval to respond to the scenario in front of it. Yet it does not grant the executive the *Dames & Moore* carte blanche power to base their actions on perceived congressional intent. Second, the burden is on the executive to demonstrate that the character and context of the decision warrants deference, but this burden is predictable and would provide a clear backdrop for judicial review. Therefore, this analysis returns some of the burden of the uncertainty to the executive. Under *Youngstown* the burden was very much on the executive to demonstrate that its actions fell within a congressional scheme or at least was not foreclosed by similar legislation. In comparison, *Dames & Moore* turned this analysis on its head, finding that ambiguity can *support* an executive's claim. How a court conducts a *Marbury* statutory approach does not allocate silence in a predictable manner. Applying *Kisor*, the burden of ambiguity—and in this sense, action—falls on the executive to demonstrate that their decision-making is worthy of deference. The executive, however, would know that this is the case and if it desired such deference, it could mold its processes accordingly.

III. THE BENEFITS AND DRAWBACKS OF *KISOR* IN THE *YOUNGSTOWN* REGIME

There are three primary advantages of importing *Kisor* into Justice Jackson's *Youngstown* framework. First, it provides predictable and consistent criteria to judge congressional support for an executive's action, and it would shape superior

incentives for both political branches than currently exist. Second, it advocates for judicial restraint, within reason, to allow the political branches to fulfill their constitutional roles. Lastly, and related to both previous areas, the *Kisor* framework represents a workable compromise between those that advocate for strong deference to the executive in these areas and those that believe the courts must follow the *Marbury* statutory approach. On the other hand, there are potential constitutional and institutional drawbacks of importing *Kisor* into the *Youngstown* framework. Constitutionally, such a regime may impede the executive's inherent national security and foreign affairs powers, while also inhibiting the judiciary's role of stating what the law is. Institutionally, additional process requirements may hinder a president's ability to act quickly in a crisis.

A. Benefits

1. Predictability and Incentives

The current analysis is devoid of predictability for both the political and judicial actors involved. For example, the Bush administration was unlikely to know how the Court would apply the ambiguous post-9/11 statutory provisions when crafting the policies later challenged in a series of Supreme Court cases involving detainee rights.[149] Notably, both the current methods of analyzing executive action—statutory analysis primacy and *Youngstown*—suffer from similar predictability problems. Courts relying on the statutory interpretation of a *Marbury* analysis face a problem that the statutes in these fields are often limited and inherently opaque with multiple potential sources of law and precedent, making their outcomes unpredictable.[150] Similarly, cases adjudicated under the *Youngstown* framework alone lack predictability given courts' difficulty discerning whether Congress has acquiesced to a given action or rejected it. While Justice Jackson's concurrence as originally formulated, focusing on a close distillation of the congressional scheme, would be fairly predictable, this aspect was curtailed by *Dames & Moore*'s emphasis on congressional intent.[151]

Actors' incentives would be better positioned under a predictable regime compared to the current status quo. With *Kisor* in place, the executive would be incentivized to undertake external and internal processes to better position itself for the potential of later litigation. In comparison, under the status quo, or under a

149. It appears that Congress also may not have incorrectly anticipated the Court's actions during this time period. For example, following the string of defeats, Congress amended the MCA habeas corpus statute to eliminate federal jurisdiction over detainees claims; instead, the review procedures in the D.C. Circuit were contemplated to be the sole mechanism. Landau, *supra* note 10, at 1957-58. That said, it is not clear how much Congress actually endorsed the President's procedures, as they were not within a comprehensive framework and the President advocated a reading of the DTA which appeared to contradict the statutes' plain text. *Id.* at 1958.

150. *See supra* Section I.B.

151. *See supra* Section I.A.ii.

deferential *Youngstown* regime, the president is incentivized to articulate bold policies with loose connections to the underlying statutes.[152] *Kisor* would provide better incentives for both political branches—the regime would prod the president to notify Congress of upcoming action, and Congress would be unable to claim ignorance. Under the current statutory analysis, Congress can punt difficult questions to the executive or craft ambiguous legislation that gives the president significant and unintentional leeway.[153] Under a modern *Youngstown* analysis, Congress's incentives may be even more perverse. For example, given that the touchstone of *Dames & Moore* Zone Two is congressional acquiescence and intent,[154] Congress currently benefits from using legislative history to try to bind, or at least influence, the executive outside of bicameralism and presentment.[155] Granting the executive deference only after they followed process requirements would push the two political branches to work together to shape policy and disincentivize Congress from using amorphous and unclear tools like legislative history to influence the executive.

2. Judicial Restraint

The current national security and foreign policy analysis allows for the potential of greater judicial intervention into the political actors' realms even as it has also allowed for broader presidential powers. Judicial interference with President Bush's post-9/11 policies is what spurred the initial call for the *Chevronization* of foreign affairs and national security doctrines.[156] Intervention is not preordained, however. In this field of vague statutory analysis, courts using a *Marbury* analysis maintain a broad latitude to rule in whichever manner they deem proper. While the Court used this discretion to curtail the expansive claim of power articulated by the

152. *See* Jinks & Katyal, *supra* note 84, at 1255 ("The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power.").

153. *See*, *e.g.*, Huq, *supra* note 83, at 924 ("[Congress] is [] likely to respond erratically to exogenous pressures and to punt hard questions; often, it will be simply unwise.").

154. *Dames & Moore*, 453 U.S. at 678-79.

155. *See* Russell Balikian, *Textualism in the "Zone of Twilight" Understanding Textualism's Effects on* Youngstown *Cases*, 4 NAT. SEC. L. BR. 1, 11 (2013) (concluding the congressional debates and reports used in *Youngstown* cases tend to favor Congress).

156. *See* Landau, *supra* note 10, at 1961 ("*Chevron*-backers, as one might expect, lament the past decade's lack of 'super-strong' deference to the Executive. Posner and Sunstein argue that '*Hamdan* [wa]s simply wrong' and that Justice Thomas's dissent, which 'relied on the principle of executive deference, based on the President's institutional advantages, is very much in the spirit of our argument that foreign relations should be *Chevron*ized.' ").

Bush administration,[157] it could also use it to grant deference to the executive.[158] In short, by heavily relying on statutory analysis in this field, courts are left with enormous opportunity to expand their authority beyond stating what the law is because of the dearth of statutory foundation in national security and foreign policy matters. In fact, this paucity of statutory bases is what prompted Justice Jackson's concurrence in the first place.[159] Today, the *Youngstown* framework does not serve to constrain the judiciary appropriately given its ability to consider factors like congressional intent and acquiescence.

In comparison, *Kisor* analysis would limit the ability of courts to be overly deferential or vice-versa by proscribing specific criteria to use as a basis for decision making. This limit of judicial outcomes would allow courts to police the boundaries of executive action vis-à-vis Congress. Using process-based approaches to police deference in this field is also similar to how courts use *Auer* and *Chevron* to regulate agency action without having to fully assess the nuanced technical basis for the decisions. Additionally, it would allow courts to fulfill their constitutional duty of saying what the law is because of Step One, which analyzes the statutory and constitutional basis for an executive's action. While courts may still overstep within the framework and find the executive's basis either clear or ambiguous, the *Kisor* framework would at least make the steps taken by the court clearer and more uniform than they currently are.

3. Compromise

Ultimately, what may be considered the largest benefit of applying *Kisor* to *Youngstown's* tripartite scheme in these areas is that it represents a compromise between competing stances. On one hand, it constrains the growth of executive power compared to those that believe that extensive deference is warranted. On the other hand, it is more permissive than, at least in some situations, courts using the

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157. *See Hamdan,* 548 U.S. at 593-94 ("The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find that either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions."). *But see* Landau, *supra* note 10, at 1948-49 (discussing that the President argued the Supreme Court should defer to its security policies because of its inherent Article II powers or broad authority to read congressional statutes broadly but the Court rejected these arguments without "making itself the center of attention" by deciding the scope of individual rights or executive power). Therefore, Landau argues that the Court did not craft ultimate holdings relying on individual rights or executive power and left it to the political branches to update the underlying statutes to grant executive authority. While this is true, the Court nonetheless curtailed the executive's power barring new, specific legislation.

158. All one needs to do is look toward the other opinions in the post-9/11 cases, which often argued that there was strong statutory basis for the President's action. *See*, *e.g.*, *Hamdan*, 548 U.S. at 678 (Thomas, J., dissenting) ("Our review of petitioner's claims arises in the context of the President's wartime exercise of his Commander in Chief authority *in conjunction with the complete support of Congress*.") (Emphasis added).

159. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) ("A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.").

Marbury approach in the areas of national security and foreign affairs. The *Kisor* approach applies a more predictable framework for the two political branches to work within. By refocusing their analysis on the compromise embodied in *Youngstown* between executive deference and strict construction of the law, courts would maintain their judicial role in declaring what the law is.

B. Drawbacks

The arguments against applying *Kisor* are constitutional and institutional. On the constitutional end, this approach may encroach upon the executive's inherent powers in foreign affairs and national security and the judiciary's power to interpret statutes to say what the law is. Institutionally, focusing on statutory analysis and process could hinder a president's ability to react quickly in a crisis.

1. Constitutional—Executive

Many of the critics of the post-9/11 cases found that the judiciary was depriving the executive of their constitutional role in the country's foreign affairs and national security.[160] Article II makes the President Commander in Chief of the armed forces and vests the office with executive power.[161] In his *Hamdan* dissent, Justice Thomas utilizes these constitutional provisions and purported original understandings to argue for vast executive power.[162] To that end, for the judiciary to curtail the executive's ability to operate within these fields may pose a constitutional issue.[163]

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160. *See, e.g.,* Ku & Yoo, *supra* note 4, at 213 (discussing that even if Congress failed to authorize the military commissions challenged in *Hamdan*, President Bush would maintain the power under Article II to establish them).

161. *See* Landau, *supra* note 10, at 1922.

162. *Hamdan*, 548 U.S. at 679 (Thomas, J., dissenting) ("The structural advantages attendant to the Executive Branch — namely the decisiveness, 'activity, secrecy, and dispatch' that flow from the Executive's 'unity,' led the Founders to conclude that the 'President ha[s] primary responsibility — along with the necessary power — to protect the national security and to conduct the Nation's foreign relations.") (internal citations omitted).

163. In addition to this inherent constitutional question of impinging on the executive's prerogative, it could be argued that these cases raise non-judiciable political questions. For example, given that the subject of disputes between the executive and Congress would involve "the politically sensitive area of foreign affairs" a court may view it as being controlled by political standards. RICHARD FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 260-61 (7th ed. 2015) (quoting Goldwater v. Carter, 444 U.S. 996 (1979)). This argument, however, would not likely preclude a court from resolving a case on the merits. To begin, while the statutory basis for the decisionmaking would be unclear for a court to resort to the *Kisor* framework, it would still be involve interpreting a statute. *See id.* at 261 (citing Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986)) (discussing that a unanimous Court rejected the government's argument that it was precluded from reviewing a decision of the Secretary of Commerce in refusing to certify Japan's whaling practices inhibited an international conservation program despite the significant political overtones bearing on the relationship between the U.S. and Japan). More recently, the Court noted that the political question doctrine was a "narrow exception" and that the invocation of a congressional statute rendered it difficult to establish the *Baker* standards of "textual commitment of the question to a coordinate branch and the

Yet, even proponents of strong deference to the executive in these fields acknowledge that constitutional basis for dominant executive power in these areas is indeterminate at best.[164] As Justice Jackson found, "[a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question" regarding executive authority.[165] For that reason, any imposition on the executive's authority in this area will likely only concern those that favor a very strong executive. Additionally, the imposition would be small. An executive operating with a statutory basis for their action could act with little fear of *Kisor* analysis interference. In situations where statutory permission is less clear, a president being reviewed under the regime could take additional steps, such as ensuring that their relevant department heads were coordinating and opining on the action.

2. Constitutional—Judiciary

Others would critique applying *Kisor* in this context for reasons similar to critiques of *Chevron* and *Auer* in administrative law: it potentially abdicates the core judicial role of declaring what the law is.[166] The Constitution vests the "judicial Power of the United States" in the Supreme Court and lower federal courts, and a core aspect of this judicial power is to interpret the laws and apply them.[167] A precedent directing judges to defer to the executive's interpretations, which are far from impartial, strikes at the core of what Article III judges do under the Constitution.[168]

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absence of judicially manageable standards." *Id.* at 256-57 (citing Zivotofsky v. Clinton, 566 U.S. 189 (2012)); *see also* Mark V. Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1208 (2002) ("We are now in a position to understand why the political question doctrine came under pressure once *Baker v. Carr* gave it the form of law. *Baker v. Carr* made it natural to reject political question arguments by noting that only an ordinary question of constitutional interpretation . . . should be self-monitoring in Henkin's sense, while skepticism about the ability of the political branches to behave in a constitutionally responsible manner undermines the claim that any constitutional provision should be self-monitoring in the sense [he] urged.").

164. *See* Posner & Sunstein, *supra* note 70, at 1202 ("But the explicit grants of foreign relations power to the executive are rather sparse and ambiguous."). *But see Zivotofsky*, 576 U.S. at 14, 61 (finding that the Constitution grants the President the exclusive power to recognize foreign nations and government despite the dissent not supporting such a contention).

165. *Youngstown*, 343 U.S. at 634-35.

166. *Kisor*, 139 S. Ct. at 2440 (Gorsuch, J., concurring in the judgment) ("*Auer* is different. It does not *limit* the scope of the judicial power; instead, it seeks to *co-opt* the judicial power by requiring an Article III judge to decide a case before him according to principles that he believes do not accurately reflect the law. Under *Auer*, a judge is required to lay aside his independent judgment and declare affirmatively that a regulation *means* what the agency *says* it means — and, thus, the law *is* what the agency *says* it is.").

167. *Id.* at 2437 (Gorsuch, J., concurring in the judgment).

168. *See id.* at 2438-39. In addition to the general Article III concerns of applying a deference regime in place of statutory analysis, advocating for the utilization a decision purporting to apply *Auer* deference may be questioned. In his opinion, Justice Gorsuch found that *Kisor* represented "more a stay of execution than a pardon" and that the "Court cannot muster even five votes to say that *Auer* is lawful or wise." *Id.* at 2425 (Gorsuch, J., concurring in the judgment). Similar arguments were made when

While valid, this particular concern lacks bite. In applying the *Kisor* framework, judges would still determine whether the statutory basis for deference is ambiguous using all traditional tools of statutory construction.[169] To that end, a reviewing court would still parse those executive interpretations as courts considering regulations under *Kisor* must "carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[170] Therefore, while modifying the deference regime may implicate some Article III constitutional concerns, it would still preserve the courts' role in properly fulfilling their roles under the Constitution.

A related concern is the ability of the judiciary to proscribe *process* requirements onto the executive.[171] Some would argue that this not only aggrandizes courts' power but impermissibly trammels on the executive's prerogative to operate as they see best. But courts applying *Kisor* would not *force* the executive to respond with process changes; they would only allow for greater deference when these processes are used—courts would be *allowing* the executive to leverage their institutional expertise to grab greater deference for themself.[172] Additionally, courts applying *Kisor* would be doing so for many of the same reasons that are present in administrative law, where it has served to ensure that delegation actually occurred and deliberative processes were followed.[173]

3. Institutional

Outside of the constitutional concerns, applying the *Kisor* framework to national security and foreign affairs would hinder the executive's advantages in flexibility and speed. Given that the executive needs to be able to react quickly and

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scholars advocated for *Chevron* to be applied to these questions. *See*, *e.g.,* Pearlstein, *supra* note 68, at 810 ("It is perhaps more than a little ironic that *Chevron* has gained interest from foreign relations scholars at the same time that scholars of administrative law have been demonstrating with increasing persuasiveness how limited the impact of *Chevron* has been in cases reviewing agency statutory interpretation."). However, unlike with *Chevron* many of the same concerns that apply for administrative law, such as poor incentives for the agency and separation of powers concerns, do not apply for the executive because the executive is not promulgating an underlying regulation to be interpreted.

169. *Kisor*, 139 S. Ct. at 2415.

170. *Id.* (internal quotations omitted).

171. *See* Katyal, *Legal Academy*, *supra* note 139, at 112 ("Brazenly advocating for a different executive branch process could potentially undermine the legitimacy of the Court — particularly if the Court was seen as empowering itself to measure the executive branch support of any future legal interpretation by the President.").

172. *Id.*

173. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2000) ("Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result.") (quoting *Chevron*, 467 U.S. at 845).

efficiently,[174] any requirement of additional steps to assuage fears of judicial disapproval may prove disastrous.

Again, this potential concern does not stand up. It is questionable how much *Kisor* would hinder these types of actions because litigation typically ensues over multiple months and years following a decision.[175] While it is true that a heightened judicial review compared to complete deference may lead to more caution,[176] this would be a feature and not a bug—the executive would be encouraged to take steps to ensure expertise is embedded into the process. In fact, moments when it is unclear whether the executive maintains authority for their actions are likely the times when courts *should* be incentivizing further deliberation, such as engaging Department heads or policy experts in conjunction with congressional committees.

CONCLUSION

Ultimately, Justice Jackson's opinion reflected an institutional process, tying an executive's power directly to its coordination with Congress. Yet this framework is diluted when courts allow for criteria like legislative history and congressional 'tenor' to bless a president's action. Responding to this dilemma by using recent administrative law precedents, which respond to similar dynamics, would help courts ensure that a workable balance is maintained. While any application of judicially created process raises constitutional and institutional concerns, it appears that these are outweighed by the potential benefits of predictability and judicial restraint. Moreover, given that the test utilizes both statutory and institutional process components, it reflects a compromise between various conceptions of executive power vis-à-vis the other branches.

174. *See* Bradley, *supra* note 85, at 664 (discussing foreign affairs deference decisions reliance on the need for the executive to respond to changing and difficult situations).

175. *See* Jinks & Katyal, *supra* note 84, at 1252.

176. *See id.* at 1252 n.82.