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## ARTICLES

### Courts, Congress, and the Conduct of Foreign Relations

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*In the US constitutional system, the president generally conducts foreign relations. But not always. In recent years, the courts and Congress have repeatedly taken steps to interact directly with foreign governments. Nonexecutive conduct of foreign relations occurs when the courts or Congress engage in or take actions that result in the opening of a direct channel of official communications between the US non-executive branch and a foreign executive branch. Nonexecutive conduct of foreign relations raises serious constitutional questions, but to date there is no clear rubric for analyzing the constitutionality of the judiciary's or Congress's actions. Moreover, nonexecutive conduct of foreign relations is likely to become more frequent due to changes in technology, foreign governments' increasing sophistication about the US government, hyperpartisanship in the United States, and what might be called the "Trump effect."*

*Building on Justice Robert Jackson's iconic tripartite framework from *Youngstown Sheet & Tube Co v Sawyer*, this Article proposes a converse Youngstown framework for determining when nonexecutive conduct of foreign relations is constitutional. The converse Youngstown framework judges the constitutionality of the courts' or Congress's actions in light of executive authorization or condonation (Category 1), executive silence (Category 2), or executive opposition*

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(Category 3). The converse Youngstown framework offers significant advantages over the current ad hoc approach to analyzing nonexecutive conduct of foreign relations, and it avoids some of the pitfalls that critics have identified with traditional Youngstown analysis. First, it more accurately reflects the fact that the president isn't the only actor who exercises foreign relations initiative. Second, it avoids much of the indeterminacy that plagues traditional Youngstown analysis. Finally, it simplifies the constitutional analysis of nonexecutive conduct of foreign relations by explaining why easy cases are easy, allowing courts to engage in constitutional avoidance in some cases, and showing how Congress and the courts may sometimes trump the executive, even in Category 3.

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## INTRODUCTION

In the US constitutional system, the executive branch generally conducts foreign relations.<sup>1</sup> But in recent years, the

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<sup>1</sup> See, for example, *American Insurance Association v Garamendi*, 539 US 396, 414 (2003) (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’”), quoting *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 610–11 (1952) (Frankfurter concurring); *First National City Bank v Banco Nacional de Cuba*, 406 US 759, 767–68 (1972) (noting that the Court “has recognized the primacy of the Executive in the conduct of foreign relations” and that the executive branch is “charged . . . with primary responsibility for the conduct of foreign affairs”). See also Curtis A. Bradley and Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 145–46 (Aspen 6th ed 2017) (“Congress has an elaborate institutional machinery devoted to foreign relations[, but] despite its broad powers and institutional expertise, Congress generally does not conduct U.S. foreign relations.”); id at 155 (“[T]he President is often described as having the dominant role in the conduct of U.S. foreign relations.”); Louis Henkin, *Foreign Affairs and the United States Constitution* 42 (Clarendon 2d ed 1996) (“That the

nonexecutive branches—the judiciary and Congress—have challenged the exclusivity of the president’s authority to conduct foreign relations by opening direct channels of communication with foreign governments’ executive branches. For example, in January 2015, Speaker of the House John Boehner invited Israeli Prime Minister Benjamin Netanyahu to address Congress, breaking protocol by failing to coordinate with the White House.<sup>2</sup> Two months later, forty-seven Republican senators, led by Senator Tom Cotton, penned a letter to the leaders of Iran in an attempt to undermine the executive branch’s negotiations to halt Iran’s nuclear program.<sup>3</sup> More recently, Senator John McCain independently reached out to the Australian ambassador to smooth over relations after President Donald Trump “abruptly ended” a call with Australian Prime Minister Malcolm Turnbull.<sup>4</sup>

These contacts challenge conventional understandings about the constitutional separation of powers. Although the judiciary decides cases related to foreign affairs,<sup>5</sup> and Congress exercises fiscal, treaty, and other powers that affect foreign relations,<sup>6</sup> generally the executive branch actually *conducts* foreign relations, interacting directly with representatives of foreign governments’

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President is the sole organ of official communication by and to the United States has not been questioned and has not been a source of significant controversy.”).

<sup>2</sup> See notes 93–111 and accompanying text.

<sup>3</sup> See notes 127–37 and accompanying text.

<sup>4</sup> Greg Miller and Philip Rucker, *This Was the Worst Call by Far: Trump Badgered, Bragged and Abruptly Ended Phone Call with Australian Leader* (Wash Post, Feb 2, 2017), archived at <http://perma.cc/9XTY-F9NP>. See also *Statement by SASC Chairman John McCain on U.S.-Australia Alliance* (John McCain, Feb 2, 2017), archived at <http://perma.cc/M6VF-Z9DJ> (reporting on McCain’s phone call with Ambassador Joe Hockey).

<sup>5</sup> See, for example, *RJR Nabisco, Inc v European Community*, 136 S Ct 2090, 2099–2106 (2016) (addressing the extraterritorial reach of the Racketeer Influenced and Corrupt Organizations Act); *Samantar v Yousef*, 560 US 305, 325 (2010) (holding that the Foreign Sovereign Immunities Act does not govern a defendant’s claim to foreign official immunity); *Medellín v Texas*, 552 US 491, 504–06 (2008) (discussing the doctrine of treaty self-execution).

<sup>6</sup> See US Const Art I, § 8 (giving Congress the powers, inter alia, to “regulate Commerce with foreign Nations” and to “declare War”); US Const Art II, § 2 (qualifying the president’s treaty power by requiring “the Advice and Consent of the Senate” in the process). See also, for example, *American Insurance Association*, 539 US at 414 (recognizing that the president has independent foreign affairs powers, but that “Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers”); Bradley and Goldsmith, *Foreign Relations Law* at 146 (cited in note 1) (noting that “Congress [ ] exercises significant influence on U.S. foreign policy” because of its “power of the purse” and other institutional powers); id at 136 (“Article I of the Constitution confers on Congress numerous powers *relating to* the conduct of foreign relations.”) (emphasis added).

executive branches.<sup>7</sup> The Netanyahu invitation and other examples deviate from this model. Moreover, courts, Congress, executive officials, and commentators lack a framework—much less an agreed-upon framework—for assessing whether the actions nonetheless comply with the Constitution.

Actors within and outside the three branches of government often analyze separation-of-powers disputes using the tripartite framework set out in Justice Robert Jackson’s concurring opinion in *Youngstown Sheet & Tube Co v Sawyer*.<sup>8</sup> Jackson’s *Youngstown* framework assumes, however, that the action in question is an *executive* action that must be judged in light of Congress’s approval, silence, or disapproval. The Netanyahu invitation and other examples disrupt this assumption: their defining feature is the initiative exercised by the nonexecutive branch in engaging in direct contacts with foreign governments.

Building on the Netanyahu invitation, the Cotton letter, and additional historical and recent examples, this Article identifies “nonexecutive conduct of foreign relations” as a discrete category of constitutional questions and then proposes a “converse *Youngstown*” framework for resolving separation-of-powers disputes when the branch whose actions are at issue is Congress or the judiciary.

Nonexecutive conduct of foreign relations occurs when a non-executive branch—the courts or Congress—engages in or takes actions that result in the opening of a direct channel of official communications between the US nonexecutive branch and a foreign executive branch. Although the courts and Congress often take actions that affect foreign policy, the direct conduct of relations with foreign governments has long been understood as the province of the executive.<sup>9</sup> It is precisely the incongruity of conduct that would be considered diplomacy if done by executive

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<sup>7</sup> See note 1 (collecting sources).

<sup>8</sup> 343 US 579, 635–38 (1952) (Jackson concurring).

<sup>9</sup> See Bradley and Goldsmith, *Foreign Relations Law* at 172 (cited in note 1) (“In practice, the Executive Branch exercises a virtual monopoly over formal communications with foreign nations.”); Henkin, *Foreign Affairs* at 88 (cited in note 1) (“Since the early years [ ], Congress has not seriously doubted that the President is the sole organ of communication with foreign governments: Congress does not speak or receive communications on behalf of the United States, or negotiate with foreign governments, or ‘conduct foreign relations.’”); Curtis A. Bradley and Jack L. Goldsmith, *Presidential Control over International Law*, 131 Harv L Rev 1201, 1258 (2018) (noting that the president is “understood to be the official organ of the United States in diplomacy”). See also note 1 (collecting sources).

officials being undertaken by nonexecutive officials that renders the actions constitutionally suspect.<sup>10</sup>

The need to determine the constitutionality or unconstitutionality of nonexecutive conduct of foreign relations (or “non-executive foreign relations,” for short) is rendered more urgent because several factors suggest that the phenomenon is likely to become more frequent going forward. Most basically, technology has made international communications easier, and, as other scholars have noted,<sup>11</sup> technology facilitates the formation of horizontal transnational government networks between US government entities and their foreign counterparts. It does the same for the diagonal transnational networks—that is, Congress to foreign executives and the judiciary to foreign executives—at issue in nonexecutive foreign relations. Foreign governments have also become more sophisticated about disaggregating the US government. Increased familiarity with the US policy process allows foreign governments to forum shop, reaching out to potentially sympathetic audiences in US government entities other than their traditional State Department interlocutors. Perhaps most importantly, the hyperpartisanship that dominates US political discourse, especially when combined with the Trump administration’s perceived incompetence at and inattention to diplomacy, will incentivize US officials outside the executive branch to reach out to foreign governments. It may also incentivize foreign officials to seek interlocutors outside the executive branch in order to hedge their bets by engaging broadly with actors across the US political spectrum.

By definition, all incidents of nonexecutive foreign relations involve the same powers on the part of the executive—namely, the powers to appoint ambassadors with the advice and consent of the Senate and to receive ambassadors. Nonexecutive foreign relations incidents vary, however, in which powers (if any) of the nonexecutive branch they involve. This variance allows for the

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<sup>10</sup> I do not use the term “diplomacy” to describe nonexecutive conduct of foreign relations because to do so carries normative implications. Calling judicial or legislative interactions with foreign executives “diplomacy” may have a legitimating effect that suggests the actions are necessarily constitutional. Or, on the other hand, it could suggest that the judicial and legislative actors are acting unconstitutionally by taking on executive-branch roles as diplomats. To avoid either implication, I have chosen the neutral term “non-executive conduct of foreign relations” (“nonexecutive foreign relations,” for short), saving the constitutional assessment for Part III. But see Ryan M. Scoville, *Legislative Diplomacy*, 112 Mich L Rev 331, 334 (2013) (defining the term “legislative diplomacy” as “diplomacy by Congress or one of its members”).

<sup>11</sup> See note 156 and accompanying text.

creation of a typology of nonexecutive foreign relations incidents based on whether the nonexecutive branch is receiving communications from a foreign government (“inbound nonexecutive foreign relations”) or is purporting to convey information to a foreign government (“outbound nonexecutive foreign relations”). The difference between inbound and outbound nonexecutive foreign relations affects the constitutional analysis.

This Article’s proposed converse *Youngstown* framework provides an analytically rigorous method for executive-branch officials, legislators, judges, and scholars to determine when nonexecutive foreign relations are and are not constitutionally permissible.<sup>12</sup> The converse *Youngstown* framework ensures that the actions of the legislature or the judiciary are judged not only by reference to the textual constitutional allocation of power, but in light of executive authorization or condonation (Category 1), executive silence (Category 2), or executive opposition (Category 3). As in traditional *Youngstown* analysis, the converse *Youngstown* framework reveals how the relationship between branches of the federal government can affect the constitutionality of each branch’s actions.

The converse *Youngstown* framework offers significant benefits over the current ad hoc approach to analyzing nonexecutive conduct of foreign relations, and it also avoids some of the pitfalls that critics have identified with traditional *Youngstown* analysis.

First, while the traditional *Youngstown* framework is designed to evaluate instances when the president exercises initiative, the converse *Youngstown* framework accounts for the fact that sometimes Congress and the judiciary prevail in a race to act. Converse *Youngstown* may actually incentivize greater initiative taking by the nonexecutive branches by mandating careful consideration of their constitutional positions. Such initiative taking may have the salutary effect of defending Congress and the judiciary against executive claims that they have acquiesced to executive assertions of power.

Second, the converse *Youngstown* framework is less susceptible to the indeterminacy that critics argue plagues the traditional *Youngstown* framework. In particular, Professor Laurence Tribe has recently assailed *Youngstown* for being indeterminate with respect to Category 2 cases—when the president acts in the

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<sup>12</sup> This Article focuses on nonexecutive conduct of foreign relations, but the converse *Youngstown* framework can be applied to other constitutional disputes as well. See notes 282–84 and accompanying text (discussing other scenarios).

face of congressional silence. Converse *Youngstown* avoids this concern to a large extent because, due to structural differences between the branches, the president is less likely than Congress to remain silent, suggesting that there will be fewer Category 2 cases in converse *Youngstown*. Moreover, converse *Youngstown* makes clearer the import of Category 2 cases that do occur. The comparative ease with which the president can respond to actions by the nonexecutive branches suggests that silence by the executive is a more meaningful signal of approval or acquiescence than silence by Congress, which faces structural impediments to action.

Finally, the converse *Youngstown* framework simplifies the analysis of the constitutionality of nonexecutive foreign relations. The current ad hoc approach to assessing the constitutionality of particular nonexecutive foreign relations incidents does not account for the importance of the executive's approval, acquiescence, or opposition.

The converse *Youngstown* framework explains why easy cases are easy. In Category 1 cases, the converse *Youngstown* framework changes the question from whether the nonexecutive branch has independent authority for its action to whether the nonexecutive branch's power (if any) *plus the power of the executive* is constitutionally sufficient. Because the executive's power alone is likely to be sufficient in many instances, converse *Youngstown* makes nonexecutive foreign relations incidents, done with the approval of the president, easy questions. It also allows adjudicators to engage in constitutional avoidance, obviating the need to determine the precise scope of the nonexecutive branch's constitutional power in cases in which the executive's power alone is sufficient.

In addition, the converse *Youngstown* framework improves upon ad hoc analysis for hard cases—those in Category 3, when the president disapproves of the actions of the nonexecutive branch. Using the converse *Youngstown* framework to assess Category 3 examples from Part II shows that the president should often prevail when the nonexecutive branch engages in outbound nonexecutive foreign relations, but that the implied powers of both Congress and the judiciary generally put their assertions of *inbound* nonexecutive foreign relations power on better footing. As the Supreme Court's recent opinion in *Zivotofsky v Kerry*<sup>13</sup>

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<sup>13</sup> 135 S Ct 2076 (2015).

(“Zivotofsky II”) demonstrates, the president can sometimes prevail even in *Youngstown* Category 3.<sup>14</sup> Similarly, Congress and the courts can prevail in converse *Youngstown* Category 3.

This Article proceeds in three Parts. Part I reviews traditional *Youngstown* analysis, highlighting how courts and non-judicial actors have deployed Jackson’s tripartite framework. Part II defines a typology of nonexecutive foreign relations incidents based on the constitutionally significant distinction between inbound and outbound foreign relations and proposes several reasons why nonexecutive conduct of foreign relations is likely to accelerate. Part III then develops the converse *Youngstown* framework and identifies the benefits it provides over both ad hoc and classic *Youngstown* analysis.

### I. TRADITIONAL *YOUNGSTOWN* ANALYSIS IN THEORY AND PRACTICE

The facts of *Youngstown* are well known. During the Korean War, a labor dispute arose between steel workers and steel companies, and to avert a nationwide strike that would have jeopardized the war effort, President Harry S. Truman issued Executive Order 10340, which authorized the secretary of commerce to seize and operate certain steel mills.<sup>15</sup> The steel companies sued, arguing that the seizure was unconstitutional.<sup>16</sup> In a short opinion by Justice Hugo Black, the Supreme Court rejected the executive branch’s argument that the president had inherent constitutional power to issue the seizure order and invalidated the order on the ground that it effectively made law—a power entrusted to Congress, not the president.<sup>17</sup>

Justice Jackson’s concurrence has long overshadowed Black’s majority opinion.<sup>18</sup> Jackson, drawing on his own prior experience

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<sup>14</sup> Id at 2084, 2096 (holding that the president prevails in a *Youngstown* Category 3 case in which the president, based on his power to recognize foreign sovereigns, defied a statute that purported to require him to list “Jerusalem, Israel” on passports).

<sup>15</sup> Executive Order 10340 (1953), 3 CFR 65, 66.

<sup>16</sup> *Youngstown*, 343 US at 583.

<sup>17</sup> Id at 588–89.

<sup>18</sup> See Henkin, *Foreign Affairs* at 94 (cited in note 1) (noting that Jackson’s *Youngstown* concurrence “has become a starting point for constitutional discussion of concurrent powers”); Sarah H. Cleveland, Hamdi Meets *Youngstown*: Justice Jackson’s Wartime Security Jurisprudence and the Detention of “Enemy Combatants,” 68 Albany L Rev 1127, 1128 (2005) (“It is impossible to exaggerate the significance of Justice Jackson’s concurrence in *Youngstown* for U.S. foreign relations jurisprudence.”); Edward T. Swaine, *The Political Economy of Youngstown*, 83 S Cal L Rev 263, 266 (2010) (noting that Jackson’s tripartite framework “has become *Youngstown*’s enduring legacy”).



as an executive-branch lawyer,<sup>19</sup> took a functionalist, practice-based approach to resolving separation-of-powers disputes.<sup>20</sup> Jackson recognized that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>21</sup> To channel judicial analysis of this presidential power fluctuation, Jackson proposed a tripartite framework.<sup>22</sup>

Category 1 includes instances “[w]hen the President acts pursuant to an express or implied authorization of Congress.”<sup>23</sup> There the president’s “authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>24</sup> Presidential actions in Category 1 are, according to Jackson, “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>25</sup>

Category 2 involves presidential action and congressional silence, creating a “zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>26</sup> The president “can only rely upon his own independent powers,” but “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”<sup>27</sup> Unlike Categories 1 and 3, which each come with a

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<sup>19</sup> See, for example, Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* 366–67 (Twelve 2010) (discussing the positions that Jackson had taken on executive power when he served as President Franklin D. Roosevelt’s attorney general). Jackson cited his prior executive-branch experience in his opinion. *Youngstown*, 343 US at 634 (Jackson 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.”) (emphasis added); *id.* at 647 (Jackson concurring) (“[A] judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.”).

<sup>20</sup> See *Youngstown*, 343 US at 635 (Jackson concurring) (arguing that “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context,” but rather “the Constitution [ ] contemplates that practice will integrate the dispersed powers into a workable government”).

<sup>21</sup> *Id.* (Jackson concurring).

<sup>22</sup> *Id.* at 635–38 (Jackson concurring).

<sup>23</sup> *Id.* at 635 (Jackson concurring).

<sup>24</sup> *Youngstown*, 343 US at 635 (Jackson concurring).

<sup>25</sup> *Id.* at 637 (Jackson concurring).

<sup>26</sup> *Id.* (Jackson concurring).

<sup>27</sup> *Id.* (Jackson concurring).

substantive presumption or guide as to the ultimate constitutional outcome,<sup>28</sup> Jackson is vague as to how courts should approach Category 2 cases. He notes only that the resolution of Category 2 cases will “likely [ ] depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>29</sup>

Finally, Category 3 involves instances in which “the President takes measures incompatible with the expressed or implied will of Congress.”<sup>30</sup> In Category 3, the president’s “power is at its lowest ebb,” encompassing “his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>31</sup> Jackson instructs that courts, which must “scrutiniz[e] with caution” presidential actions in Category 3, can uphold the president’s actions “only by disabling the Congress from acting upon the subject,”<sup>32</sup> that is, by holding the issue to be within the president’s sole “domain and beyond control by Congress.”<sup>33</sup> Jackson deemed Truman’s steel seizure to be a Category 3 case and accordingly voted to invalidate the executive order.<sup>34</sup>

Until 2015, the president had never prevailed in a Category 3 case in the Supreme Court. That changed in *Zivotofsky II*. The Court held that the president has the exclusive power to recognize foreign sovereigns and therefore that the president could defy a congressional statute that purported to allow a US citizen born in Jerusalem to have his place of birth listed as “Israel” in his passport.<sup>35</sup> Chief Justice John Roberts noted in dissent the unprecedented nature of the president’s Category 3 win, asserting that “[n]ever before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”<sup>36</sup>

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<sup>28</sup> See *Youngstown*, 343 US at 637–38 (Jackson concurring). See also Swaine, 83 S Cal L Rev at 280 (cited in note 18) (“In the judiciary’s hands, at least, Jackson’s categories serve both a sorting function (identifying which category applies to a given case) and a standard-setting function (articulating how each set of circumstances should be scrutinized).”) (emphasis omitted).

<sup>29</sup> *Youngstown*, 343 US at 637 (Jackson concurring). See also *id* at 637 n 3 (Jackson concurring) (discussing President Abraham Lincoln’s suspension of the writ of habeas corpus at the start of the Civil War and Congress’s later ratification of that action).

<sup>30</sup> *Id* at 637 (Jackson concurring).

<sup>31</sup> *Id* (Jackson concurring).

<sup>32</sup> *Id* at 637–38 (Jackson concurring).

<sup>33</sup> *Youngstown*, 343 US at 640 (Jackson concurring).

<sup>34</sup> *Id* (Jackson concurring).

<sup>35</sup> *Zivotofsky II*, 135 S Ct at 2081, 2096.

<sup>36</sup> *Id* at 2113 (Roberts dissenting).

Jackson himself recognized in *Youngstown* that the tripartite framework was “over-simplified”<sup>37</sup>—a characterization scholars and the Court have echoed<sup>38</sup>—and that it only “roughly” distinguishes the “legal consequences” of the different permutations of presidential action and congressional approval, silence, and disapproval.<sup>39</sup>

Nonetheless, Jackson’s framework for analyzing the constitutionality of presidential actions in areas of claimed concurrent congressional power has proven to be an enduring and popular method for evaluating separation-of-powers questions. The Supreme Court has cited Jackson’s concurrence in dozens of cases, including in nineteen majority opinions.<sup>40</sup> The executive branch also often relies on Jackson’s opinion. The Office of Legal

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<sup>37</sup> *Youngstown*, 343 US at 635 (Jackson concurring).

<sup>38</sup> See, for example, *Dames & Moore v Regan*, 453 US 654, 669 (1981) (“[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”); Daniel Bodansky and Peter Spiro, *Executive Agreements+*, 49 Vand J Transnatl L 885, 897 (2016) (endorsing the understanding of the *Youngstown* framework as a spectrum, rather than an oversimplified three-category scheme).

<sup>39</sup> *Youngstown*, 343 US at 635 (Jackson concurring).

<sup>40</sup> The majority opinions that cite Jackson’s concurrence include: *Old Dominion Branch No 496 v Austin*, 418 US 264, 273 n 5 (1974); *United States v Nixon*, 418 US 683, 707 (1974); *Buckley v Valeo*, 424 US 1, 122 (1976) (per curiam); *Nixon v Administrator of General Services*, 433 US 425, 443 (1977); *Chrysler Corp v Brown*, 441 US 281, 306 n 37 (1979); *Dames & Moore*, 453 US at 660–62, 668–69, 674, 678; *Bowsher*, 478 US 714, 721–22 (1986); *Morrison v Olson*, 487 US 654, 694 (1988); *Mistretta v United States*, 488 US 361, 381, 386, 408 (1989); *United States v Munoz-Flores*, 495 US 385, 394 (1990); *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise, Inc.*, 501 US 252, 276 n 22 (1991); *Barclays Bank PLC v Franchise Tax Board of California*, 512 US 298, 329 (1994); *Clinton v Jones*, 520 US 681, 696–98, 701 n 35 (1997); *Loving v United States*, 517 US 748, 756 (1996); *Crosby v National Foreign Trade Council*, 530 US 363, 375 (2000); *American Insurance Association v Garamendi*, 539 US 396, 414–15, 427 (2003); *Boumediene v Bush*, 553 US 723, 742–43 (2008); *Medellín v Texas*, 552 US 491, 524–25, 527–30 (2008); *Zivotofsky II*, 135 S Ct at 2083–84, 2087. For other cases in which Justices cite Jackson’s concurrence in concurrences or dissents, see, for example, *Immigration and Naturalization Service v Chadha*, 462 US 919, 962 (1983) (Powell concurring in the judgment); *id* at 978, 984 (White dissenting); *Clinton v City of New York*, 524 US 417, 472 (1998) (Breyer dissenting); *Hamdi v Rumsfeld*, 542 US 507, 552 (2004) (Souter concurring in part and dissenting in part); *id* at 562–63 (Scalia dissenting); *id* at 583–85 (Thomas dissenting); *Hamdan v Rumsfeld*, 548 US 557, 638 (2006) (Kennedy concurring in part); *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 519 (2010) (Breyer dissenting); *Zivotofsky v Clinton*, 566 US 189, 215 (2012) (“*Zivotofsky I*”) (Breyer dissenting). The circuit courts have also relied heavily on Jackson’s opinion, citing it in well over one hundred cases as of early 2018.

Counsel (OLC) has cited Jackson's concurrence in dozens of opinions,<sup>41</sup> including to analyze issues like the scope of the treaty power<sup>42</sup> and war powers.<sup>43</sup>

Many of the separation-of-powers disputes to which the *Youngstown* framework applies do not end up before courts due to problems of standing or justiciability, among others.<sup>44</sup> The use of *Youngstown* outside the courts—by the executive and Congress—is at least as important as its use within them, and more fraught because of the absence of an authoritative decider to resolve disputes between the branches.<sup>45</sup>

Reliance on Jackson's *Youngstown* concurrence is often coupled with resort to another separate opinion in *Youngstown*, namely the concurring opinion by Justice Felix Frankfurter. Frankfurter's concurrence emphasized the importance of historical practice to understanding the constitutional separation of powers. He explained, "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn

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<sup>41</sup> A search of Westlaw's "U.S. Attorney General Opinions" database for "Youngstown /s Jackson" retrieves thirty OLC opinions, as of February 7, 2018, that cite Jackson's concurring opinion.

<sup>42</sup> See, for example, Office of Legal Counsel, *Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations under an Existing Treaty*, 20 Op Off Legal Counsel 389, 395 (Nov 25, 1996) (applying Jackson's framework in determining that Congress may authorize the president to modify via executive agreement US obligations under a preexisting treaty); Office of Legal Counsel, *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op Off Legal Counsel 232, 244 (Nov 22, 1994) (relying on Jackson's framework to conclude that the joint authority of the president plus Congress means that an international agreement need not be concluded as an Article II treaty).

<sup>43</sup> See, for example, Office of Legal Counsel, *Deployment of United States Armed Forces into Haiti*, 18 Op Off Legal Counsel 173, 173, 175 (Sept 27, 1994) (relying on Jackson's framework to conclude that the president had authority to deploy US military forces into Haiti).

<sup>44</sup> See Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 Harv L Rev 112, 133 (2015) (noting that "[s]eparation-of-powers disputes between the branches in foreign relations—including direct clashes of the sort at issue in *Zivotofsky II*—arise all the time but are rarely adjudicated" due to "the absence of a plaintiff with standing and a cause of action," the political question doctrine, and other justiciability problems).

<sup>45</sup> See, for example, *National Labor Relations Board v Noel Canning*, 134 S Ct 2550, 2617 (2014) (Scalia concurring in the judgment) ("It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches."); Bodansky and Spiro, 49 Vand J Transnatl L at 919–20 (cited in note 38) ("Much of the constitutional law of foreign relations has developed through practice outside the courts [because] of the modern judicial tendency to evade engaging the merits of foreign affairs disputes.").

to uphold the Constitution . . . may be treated as a gloss on ‘executive Power’ vested in the President.”<sup>46</sup> The Supreme Court itself,<sup>47</sup> as well as commentators<sup>48</sup> and executive-branch entities,<sup>49</sup> have recognized the importance of “historical gloss” in resolving separation-of-powers questions. Appeals to historical practice “are particularly common in constitutional controversies implicating foreign relations,”<sup>50</sup> likely due to the implicit nature of many of the constitutional foreign affairs powers. Historical practice is often deployed in particular to argue that one branch has acquiesced in a claim of power by a coordinate branch.<sup>51</sup> Like Jackson’s concurrence, Frankfurter’s opinion is relied on outside the courts.<sup>52</sup>

Evidence from historical practice can complement Jackson’s tripartite framework. As Professors Curtis Bradley and Trevor Morrison have explained, “Historical practice is potentially relevant in each of” the three *Youngstown* categories.<sup>53</sup> Historical practice can shed light on: whether Congress supports or opposes presidential action, placing it in Categories 1 or 3; whether the president’s power in a Category 3 case is exclusive, leading to a presidential victory despite congressional opposition; and how

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<sup>46</sup> *Youngstown*, 343 US at 610–11 (Frankfurter concurring).

<sup>47</sup> See, for example, *Noel Canning*, 134 S Ct at 2560 (“[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”); *id.* at 2594 (Scalia concurring in the judgment) (“[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.”).

<sup>48</sup> See, for example, Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv L Rev 411, 412–13 (2012) (highlighting that “[a]rguments based on historical practice are a mainstay of debates about the constitutional separation of powers” and “are especially common in debates over the distribution of authority between Congress and the executive branch”). See also Curtis A. Bradley and Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum L Rev 1097, 1108–09 & nn 45–47 (2013) (collecting scholarly uses of historical practice).

<sup>49</sup> See, for example, Bradley and Morrison, 113 Colum L Rev at 1105–07 (cited in note 48) (discussing the prominent role that historical practice has played in opinions issued by OLC).

<sup>50</sup> Bradley and Morrison, 126 Harv L Rev at 420 (cited in note 48).

<sup>51</sup> See *id.* at 414 (arguing that acquiescence is “[t]he most common reason” for invocation of historical practice in separation-of-powers cases).

<sup>52</sup> A search of Westlaw’s “U.S. Attorney General Opinions” database for “*Youngstown* /s Frankfurter” retrieves ten OLC opinions, as of February 7, 2018, that cite Frankfurter’s concurrence. See, for example, see Office of Legal Counsel, *Authority to Use Military Force in Libya* \*7 (Apr 1, 2011), archived at <http://perma.cc/B9R5-L5YN> (discussing “historical gloss” in the context of war powers).

<sup>53</sup> Bradley and Morrison, 113 Colum L Rev at 1105 (cited in note 48).

power is allocated in areas of shared authority but congressional silence, that is, in Category 2.<sup>54</sup>

The challenge with both *Youngstown* opinions is that they were written for and have since been applied primarily in instances in which *presidential* actions are at issue. But the president is not the only actor challenging the separation of powers. Increasingly, Congress and even the judiciary are conducting foreign relations, as detailed in the next Part.

## II. NONEXECUTIVE CONDUCT OF FOREIGN RELATIONS

Nonexecutive conduct of foreign relations (or “nonexecutive foreign relations” for short) requires a nonexecutive branch—the courts or Congress—to engage in or take actions that result in the opening of a channel of direct communications with a foreign executive branch. Nonexecutive foreign relations captures communications to and from foreign governments that are undertaken or purport to be undertaken in an official, institutional capacity, not communications undertaken in a personal (that is, unofficial) capacity.

The boundaries of what counts as “conduct” of foreign relations may change depending on the circumstances. One possible definition of actions that should be considered “conduct” of foreign relations would be actions by a constitutionally significant majority of a nonexecutive branch—for example, a majority of a court, a majority of both houses of Congress, or a supermajority of the Senate as required to ratify a treaty.<sup>55</sup> In some circumstances, however, the actions of a constitutionally significant *minority* might be relevant. Consider, for example, communications to a foreign government by a minority of senators, but a minority sufficient to block ratification of a treaty (that is, at least thirty-four). In other circumstances, the actions of even a single congressperson or judge could be sufficient to constitute the conduct of foreign relations. One district judge could accept a filing by a foreign government. One senator’s statements could interfere with treaty negotiations or adversely affect relations with a foreign government. The potential relevance of the actions of a single individual should not be surprising. Much of US foreign relations is conducted by

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<sup>54</sup> See *id.* at 1105; Bradley and Morrison, 126 Harv L Rev at 419–20 (cited in note 48).

<sup>55</sup> US Const Art II, § 2, cl 2 (explaining that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

individual executive-branch officials (albeit with significant support from staff and others in the executive branch). The United States deploys one ambassador to each country, plus a number of subject-matter-specific ambassadors to international gatherings and institutions.

Whether the actions of less than a constitutionally significant majority of a nonexecutive branch constitute the conduct of foreign relations will be a fact-specific inquiry. Relevant factors could include the perception of the foreign government involved: Would that government be likely to believe that the conduct is significant? Another factor could be to consider a substitution effect. If the nonexecutive official's or officials' actions effectively substitute for an action that could be or has previously been done by the executive, then the nonexecutive's action constitutes conduct of foreign relations.

Nonexecutive foreign relations provides examples of diagonal transnational networks—that is, transnational networks between one country's executive branch and another country's legislature or judiciary.<sup>56</sup> The existence of transnational networks among government officials has garnered significant attention in recent years.<sup>57</sup> Scholars like Anne-Marie Slaughter have focused on the disaggregation of modern states into component parts, such as judiciaries, legislatures, and regulatory agencies that engage with their counterparts abroad.<sup>58</sup> But while existing scholarship has focused primarily on “[h]orizontal government networks”

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<sup>56</sup> See Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 Va L Rev 289, 291–92 (2016) (coining the term “diagonal” to describe transnational networks between foreign executive branches and the US judiciary, specifically in the context of foreign sovereign amicus briefs filed with the Supreme Court). See also Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 Ohio St L J 649, 722–23 (2002) (noting, in discussing disaggregation of national governments, that the participation of foreign governments in foreign relations cases is “becoming routine”); Zachary D. Clopton, *Diagonal Public Enforcement*, 70 Stan L Rev \*5 (forthcoming 2018), archived at <http://perma.cc/8W6Q-KQ8H> (adopting the “diagonal” idea to describe “diagonal public enforcement” in which foreign executive branches use US courts to enforce US law).

<sup>57</sup> See, for example, Anne-Marie Slaughter, *A New World Order* 31 (Princeton 2004) (arguing that as the state “disaggregat[es],” “[i]ts component institutions—regulators, judges, and even legislators—are all reaching out beyond national borders” and “creat[ing] horizontal networks” with their foreign counterparts). See also generally, for example, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va J Intl L 1 (2002) (discussing the rise and import of transnational regulatory networks).

<sup>58</sup> See Slaughter, *A New World Order* at 12 (cited in note 57) (discussing the idea of the “disaggregated state” as “the rising need for and capacity of different domestic government institutions to engage in activities beyond their borders, often with their foreign counterparts,” and identifying examples including “regulators pursuing the subjects of

“link[ing] [ ] counterpart national officials across borders”—judge to judge, legislature to legislature, regulator to regulator<sup>59</sup>—non-executive foreign relations involves diagonal networks running from the US judiciary or legislature to foreign governments’ executive branches.<sup>60</sup> These diagonal transgovernmental interactions raise different issues from the horizontal governmental networks and pose serious questions for the US constitutional system and the conduct of US foreign relations.<sup>61</sup>

The next Section uses examples to develop a typology of non-executive foreign relations.

#### A. A Typology of Nonexecutive Conduct of Foreign Relations

Nonexecutive foreign relations can be inbound or outbound. Inbound instances involve Congress or the courts receiving communications *from* foreign executives, whereas outbound instances involve US nonexecutive branches transmitting communications directly *to* foreign governments. Some examples of nonexecutive foreign relations involve aspects of both inbound and outbound. For example, Speaker Boehner’s invitation to Prime Minister Netanyahu was an outbound communication that solicited an inbound communication—Netanyahu’s address to Congress.

Both inbound and outbound nonexecutive foreign relations have constitutional implications. The Constitution affords the president the power to conduct both outbound foreign relations by appointing ambassadors “by and with the Advice and Consent of the Senate”<sup>62</sup> and inbound foreign relations by “receiv[ing] Ambassadors and other public Ministers.”<sup>63</sup> The Supreme Court’s

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their regulations across borders; judges negotiating minitreaties with their foreign brethren to resolve complex transnational cases; and legislators consulting on the best ways to frame and pass legislation affecting human rights or the environment”).

<sup>59</sup> *Id.* at 13. See also *id.* at 19 (“The structural core of a disaggregated world order is a set of horizontal networks among national government officials in their respective issue areas, ranging from central banking through antitrust regulation and environmental protection to law enforcement and human rights protection.”); *id.* at 13–14 (contemplating “vertical government networks, those between national government officials and their supranational counterparts,” such as the relationship between national courts in Europe and the European Court of Justice).

<sup>60</sup> See Eichensehr, 102 Va L Rev at 291–92 (cited in note 56) (originating the idea of diagonal transnational networks).

<sup>61</sup> See Part III.

<sup>62</sup> US Const Art II, § 2, cl 2.

<sup>63</sup> US Const Art II, § 3.



*Zivotofsky II* opinion cites the president’s powers as to both inbound and outbound foreign relations to support its conclusion that “Congress . . . has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”<sup>64</sup> The Court in *United States v Curtiss-Wright Export Corp*<sup>65</sup> put the point even more bluntly, stating that “the President alone has the power to speak or listen as a representative of the nation.”<sup>66</sup>

As the examples in this Section show, however, there are in fact both multiple speakers and multiple listeners when it comes to the US government’s interactions with foreign governments.<sup>67</sup> The converse *Youngstown* framework set out in the next Part will explore which nonexecutive foreign relations scenarios, with their multiplication of speakers and listeners, are constitutionally permissible and which are constitutionally problematic.

### 1. Inbound.

The most basic example of inbound nonexecutive foreign relations occurs with respect to courts. The judiciary routinely receives filings from foreign sovereigns that are plaintiffs or defendants in cases before the courts.<sup>68</sup> The Supreme Court has noted the “long-settled general rule” that “a foreign nation is generally entitled to prosecute any civil claim in the courts of the United

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<sup>64</sup> *Zivotofsky II*, 135 S Ct at 2086.

<sup>65</sup> 299 US 304 (1936).

<sup>66</sup> *Id* at 319. See also Transcript of Oral Argument, *Zivotofsky v Kerry*, Docket No 13-628, \*21 (US Nov 3, 2014) (available on Westlaw at 2014 WL 7661633) (reflecting Justice Elena Kagan’s statement that “what we usually say about diplomatic communication is that whatever Congress’s other foreign affairs powers are, the power of diplomatic communication belongs to the President and the President alone; that in that realm we only speak with one voice”).

<sup>67</sup> See Eichensehr, 102 Va L Rev at 301 (cited in note 56) (“Although the Court has repeatedly stated that the United States must *speak* with ‘one voice’ in foreign relations—the President’s voice—its acceptance of foreign sovereign amicus briefs makes clear that there are multiple *listeners* in the U.S. government.”) (citation omitted).

<sup>68</sup> See Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case against “Judicial Imperialism,”* 73 Wash & Lee L Rev 653, 666–67 (2016) (describing and creating a typology of claims brought by foreign governments as plaintiffs in US courts); Clopton, 70 Stan L Rev at \*5 (cited in note 56) (discussing one species of claims brought by foreign governments as plaintiffs). Foreign governments are also frequently defendants in US courts, and in that posture, their susceptibility to suit is governed by the Foreign Sovereign Immunities Act §§ 2(a), 3, 4(a), 5, Pub L No 94-583, 90 Stat 2891, 2891–98 (1976), codified at 28 USC §§ 1330, 1332(a), 1391(f), 1601–11. Court communications to foreign government parties in such cases could also be considered outbound nonexecutive foreign relations.

States upon the same basis as a domestic corporation or individual might do.”<sup>69</sup> This entitlement is limited to governments that are “at peace with” and “recognized by the United States,”<sup>70</sup> a status that the Court has held to be subject to the executive’s determination.<sup>71</sup> In a recent article, Professor Hannah Buxbaum identified nearly “300 claims lodged by foreign sovereigns in U.S. courts.”<sup>72</sup> All of these filings are examples of nonexecutive foreign relations: communications between a foreign sovereign and a non-executive branch of the US government, namely the judiciary.

In addition to filing with US courts when they are parties to cases, foreign sovereigns also communicate with US courts as *amici curiae*. One important example of the Supreme Court as a nonexecutive foreign relations actor stems from the Court’s instigation of a shift in the filing practices of foreign governments.<sup>73</sup> Prior to 1978, foreign governments that wished to provide their views to the Supreme Court about pending cases in which they were not parties sometimes filed *amicus* briefs directly with the Court but more often transmitted diplomatic notes to the State Department, which passed the notes to the solicitor general who then filed them with the Court.<sup>74</sup> In a 1978 case, however, the diplomatic-note practice caused concern at oral argument. *Zenith Radio Corp v United States*<sup>75</sup> raised issues about international trade, and the United States, which was the respondent, transmitted diplomatic notes from the European Commission and Japan, which supported the petitioner.<sup>76</sup>

The State Department’s *Digest of United States Practice in International Law* chronicles the Supreme Court’s action and the Justice and State Departments’ responses.<sup>77</sup> In a letter to State Department Legal Adviser Herbert Hansell, Solicitor General Wade H. McCree explained that the Clerk of the Supreme Court wrote to McCree “stating that the procedure of transmitting diplomatic notes to the Court is not authorized by the Court’s rules,”

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<sup>69</sup> *Pfizer, Inc v India*, 434 US 308, 318–19 (1978).

<sup>70</sup> *Id* at 319–20.

<sup>71</sup> *Id* at 320 (“[I]t is within the exclusive power of the Executive Branch to determine which nations are entitled to sue.”).

<sup>72</sup> Buxbaum, 73 Wash & Lee L Rev at 656 (cited in note 68).

<sup>73</sup> For a more extensive treatment of foreign sovereign amici, see generally Eichensehr, 102 Va L Rev 289 (cited in note 56).

<sup>74</sup> *Id* at 297–98.

<sup>75</sup> 437 US 443 (1978).

<sup>76</sup> See Marian Lloyd Nash, *Digest of United States Practice in International Law* 1978 561 (US Department of State 1980).

<sup>77</sup> *Id* at 560–63.

and that “foreign governments ordinarily should make their presentations to the Supreme Court in a way authorized by the Court’s rules.”<sup>78</sup> McCree noted that the Japanese diplomatic note “became a subject of concern” during oral argument in *Zenith Radio*, and he concluded:

[T]he fact that the note was provided to the Court by us [the United States] as a litigant in the case tended to confuse the presentation of the issues in a way that did not improve the prospect that the final decision would be favorable to the interests of the Government of Japan.<sup>79</sup>

McCree therefore suggested that the State Department “discourage foreign governments from presenting diplomatic notes to the Department of State with requests that the notes be transmitted to the Supreme Court” and instead “request foreign governments to communicate their views to the judicial branch through the more effective method preferred by that branch—the filing of formal briefs.”<sup>80</sup>

In a circular diplomatic note transmitted to embassies in Washington, the State Department informed foreign governments of the Supreme Court clerk’s letter to the solicitor general and explained that the State Department would “no longer transmit diplomatic notes submitted to it by foreign governments with respect to cases pending in the Supreme Court” or federal courts of appeals.<sup>81</sup> The State Department noted that the Supreme Court rules permit “any person to file a brief as *amicus curiae* with the consent of the parties to the case, or by motion in the absence of such consent” and that the courts of appeals have a similar rule.<sup>82</sup> The United States further precommitted that it would consent to the filing of a foreign sovereign amicus brief in any case in which it is a party, and noted that even if the other party refused consent, the Court would “almost certainly grant the motion of a foreign government for leave to file a brief.”<sup>83</sup>

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<sup>78</sup> Id at 561 (reproducing Letter from Wade H. McCree, Solicitor General of the United States, to Herbert J. Hansell, Legal Adviser of the Department of State, May 2, 1978).

<sup>79</sup> Id.

<sup>80</sup> Nash, *Digest of United States Practice* at 561 (cited in note 76).

<sup>81</sup> Id at 560.

<sup>82</sup> Id.

<sup>83</sup> Id.

The State Department also began declining foreign governments' requests to convey to courts the foreign governments' intent *not* to file in particular cases.<sup>84</sup> The *Digest* notes that the State Department's decision to decline to transmit Canada's decision not to file in a district-court case

reflected a growing consensus within the U.S. Government that from a standpoint of international, *as well as domestic*, law, there was no reason why foreign governments should not in most cases present their views . . . to the courts in the United States directly rather than through the diplomatic channel.<sup>85</sup>

The Supreme Court instigated a change in how foreign governments communicate with the US judicial branch. Before the Supreme Court clerk's letter to the solicitor general, foreign government amicus briefs were not unprecedented, but after the letter and the State Department's diplomatic note, they became the exclusive way in which foreign governments present their views to US courts.<sup>86</sup> The Supreme Court effected this change indirectly. The Court did not itself directly communicate with foreign governments; rather, it simply communicated to the Department of Justice that the department's own filing of the diplomatic notes was not in compliance with the Court's rules.<sup>87</sup> It appears from the solicitor general's portrayal of the events that it was the solicitor general who closed the loop between the Court's letter—stating that the filing of diplomatic notes was not authorized by the Court's rules—and the filing of amicus briefs as a way for foreign governments to comply with the Court's rules.<sup>88</sup> And the executive branch went further than the Court suggested. The State Department declared that the executive branch would no longer transmit foreign governments' views to either the Supreme Court

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<sup>84</sup> Nash, *Digest of United States Practice* at 561–62 (cited in note 76) (explaining that in June 1978—after the solicitor general's letter to the Legal Adviser had been received, but before the State Department communicated its new policy to the embassies—the State Department declined to relay Canada's decision not to file in a particular case to the US District Court for the Southern District of New York).

<sup>85</sup> *Id.* at 562 (emphasis added).

<sup>86</sup> See Eichensehr, 102 Va L Rev at 298–302 (cited in note 56).

<sup>87</sup> See Nash, *Digest of United States Practice* at 561 (cited in note 76). This account corresponds to the way the solicitor general recounts the letter from the Supreme Court clerk in his letter to the State Department Legal Adviser. The *Digest* does not provide the text of the Supreme Court clerk's letter. See *id.*

<sup>88</sup> See *id.*

or the federal courts of appeals,<sup>89</sup> nor would the executive transmit foreign governments' decisions not to file.<sup>90</sup> The State Department later extended the nontransmittal policy to federal district courts and to state courts, though maintaining that it would review such requests "on a case-by-case basis."<sup>91</sup>

In sum, the Supreme Court instigated the shift in practice from diplomatic notes to amicus briefs, thereby broadening a direct, unmediated line of communication between foreign executives and the US judiciary, but the US executive branch consented to and widened the scope of the communications channel by declining to transmit foreign governments' views to any US court. As I explored in detail in a prior article,<sup>92</sup> federal courts today routinely engage in inbound nonexecutive foreign relations by receiving foreign governments' amicus briefs in addition to receiving filings by foreign sovereigns as parties.

## 2. Mixed inbound/outbound.

On January 21, 2015, Boehner invited Netanyahu to address a joint meeting of Congress about ongoing negotiations regarding Iran's nuclear program.<sup>93</sup> Foreign heads of state addressing Congress is not unusual.<sup>94</sup> But the invitation to Netanyahu was unprecedented because it was not coordinated with the executive branch.<sup>95</sup> Boehner admitted that he deliberately failed to notify

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<sup>89</sup> Id at 560.

<sup>90</sup> Id at 561–62.

<sup>91</sup> Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 73 Am J Intl L 669, 678–79 (1979). See also *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522, 554 n 5 (1987) (Blackmun concurring in part and dissenting in part) (noting in 1987 that the State Department "in general does not transmit diplomatic notes from foreign governments to state or federal trial courts").

<sup>92</sup> See generally Eichensehr, 102 Va L Rev 289 (cited in note 56).

<sup>93</sup> Letter from John A. Boehner, Speaker, House of Representatives, to Benjamin Netanyahu, Prime Minister of Israel (Jan 21, 2015), archived at <http://perma.cc/F3J9-UY2Q>. See also *Speaker Boehner Invites Israeli Prime Minister Netanyahu to Address Congress* (Speaker Boehner's Press Office, Jan 21, 2015), archived at <http://perma.cc/ZK4L-SLTL>.

<sup>94</sup> See *Joint Meeting & Joint Session Addresses before Congress by Foreign Leaders & Dignitaries* (US House of Representatives, Sept 26, 2017), archived at <http://perma.cc/FUB6-TD2P> (providing a list of foreign leaders and dignitaries who have addressed Congress).

<sup>95</sup> See Elizabeth A. Cobbs, *Why Boehner's Invite to Netanyahu Is Unconstitutional* (Reuters, Mar 2, 2015), archived at <http://perma.cc/WCE3-M23D> ("Boehner's decision to invite a foreign head of government to address Congress without first consulting the sitting president has no precedent in American history."); David Nakamura, Sean Sullivan, and David A. Fahrenthold, *Republicans Invite Netanyahu to Address Congress as Part of*

the White House of the invitation in order to “‘make sure there was no interference’ from the administration,”<sup>96</sup> and he asserted that “Congress ‘can make this decision on its own.’”<sup>97</sup> For its part, the White House noted that it learned of the invitation only shortly before Boehner publicly announced it, and that the invitation was a “departure” from “typical protocol.”<sup>98</sup> The White House further announced that President Barack Obama would not meet with Netanyahu, who faced an election in mid-March, because of a “long-standing practice and principle” of not meeting with “heads of state or candidates in close proximity to their elections, so as to avoid the appearance of influencing a democratic election in a foreign country.”<sup>99</sup>

Boehner issued the invitation against the backdrop of contentious negotiations over Iran’s nuclear program. In his State of the Union address in January, Obama called on Congress to refrain from imposing additional sanctions on Iran while the United States and other powers negotiated a framework agreement with Iran to halt its nuclear program.<sup>100</sup> Congressional Republicans and Netanyahu opposed the negotiations.<sup>101</sup> The day he issued the invitation, Boehner reportedly told Republican lawmakers, “Obama ‘expects us to stand idly by and do nothing while he cuts

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*Spurning of Obama* (Wash Post, Jan 21, 2015), archived at <http://perma.cc/5XT6-UT3A> (explaining that the Netanyahu invitation “was a departure from normal procedure, in which the executive branch—and not a legislative leader—would coordinate the visit of a head of state”).

<sup>96</sup> Nick Gass, *Boehner Defends Netanyahu Invitation* (Politico, Feb 15, 2015), archived at <http://perma.cc/9U9R-LCHC> (quoting House Speaker John Boehner).

<sup>97</sup> Nakamura, Sullivan, and Fahrenthold, *Republicans Invite Netanyahu* (cited in note 95) (quoting Speaker Boehner). See also *Background on Invitation to Prime Minister Netanyahu* (Speaker John Boehner, Jan 28, 2015), archived at <http://perma.cc/N9MM-C9QB> (“As Speaker Boehner has said, the Congress is a separate and co-equal branch of government. It was the Speaker’s right to invite the Prime Minister of Israel.”).

<sup>98</sup> *Press Gaggle aboard Air Force One En Route Boise, Idaho* (White House Office of the Press Secretary, Jan 21, 2015), archived at <http://perma.cc/42G2-ZK7S> (quoting White House Press Secretary Joshua Earnest).

<sup>99</sup> Krishnadev Calamur, *Citing Proximity of Israeli Election, Obama Won’t Meet with Netanyahu* (NPR, Jan 22, 2015), online at <http://www.npr.org/sections/thetwo-way/2015/01/22/379095373/israels-netanyahu-accepts-invitation-to-address-congress> (visited Feb 7, 2018) (Perma archive unavailable) (quoting White House spokeswoman Bernadette Meehan).

<sup>100</sup> *Remarks by the President in State of the Union Address* (White Office of the Press Secretary, Jan 20, 2015), archived at <http://perma.cc/FU6H-KGQP>.

<sup>101</sup> See Lisa Mascaró and Kathleen Hennessey, *White House Says Boehner Broke Protocol with Netanyahu Invitation* (LA Times, Jan 21, 2015), archived at <http://perma.cc/EWE4-YJNP> (noting that Netanyahu had “repeatedly warned against easing sanctions against Iran and supported adopting a tougher approach”).

a bad deal with Iran . . . . Two words: Hell no!”<sup>102</sup> Netanyahu, having accepted Boehner’s invitation, addressed Congress on March 3 and argued strenuously against the negotiations with Iran.<sup>103</sup>

The invitation and Netanyahu’s subsequent speech appear to have been aimed at influencing US policy and public opinion with respect to negotiating with or sanctioning Iran.<sup>104</sup> Boehner explained in an interview that:

[W]hen it comes to the threat of Iran having a nuclear weapon—these are important messages that the Congress needs to hear and the American people need to hear. And I believe that Prime Minister Netanyahu is the perfect person to deliver the message of how serious this threat is.<sup>105</sup>

He also claimed, however, that he was “trying to . . . strengthen the president’s hand” in the negotiations with Iran, presumably by threatening sanctions.<sup>106</sup> Despite opposition from congressional Republicans and Netanyahu, the United States and Iran, along with China, France, Germany, Russia, the United Kingdom, and the European Union, reached agreement in July 2015 on a Joint Comprehensive Plan of Action to limit Iran’s nuclear capabilities in exchange for the lifting of sanctions.<sup>107</sup>

Boehner’s invitation to Netanyahu sparked debate among legal commentators about whether Boehner’s actions complied with the Constitution. Some argued that the invitation was unconstitutional because Article II, § 3 of the Constitution gives the president the exclusive power to “receive Ambassadors and other

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<sup>102</sup> Nakamura, Sullivan, and Fahrenthold, *Republicans Invite Netanyahu* (cited in note 95) (quotation marks omitted).

<sup>103</sup> See *The Complete Transcript of Netanyahu’s Address to Congress* (Wash Post, Mar 3, 2015), archived at <http://perma.cc/662H-DZFR> (arguing that the deal “doesn’t block Iran’s path to the bomb; it paves Iran’s path to the bomb”).

<sup>104</sup> See note 257 and accompanying text.

<sup>105</sup> *Rep. John Boehner Sounds Off on Fight over Homeland Security Funding; Alabama Chief Justice Roy Moore Explains Stance on Same-Sex Marriage* (Fox News, Feb 15, 2015), online at <http://www.foxnews.com/transcript/2015/02/15/rep-john-boehner-sounds-fight-over-homeland-security-funding-alabama-chief-justice-roy> (visited Feb 7, 2018) (Perma archive unavailable).

<sup>106</sup> *Id.*

<sup>107</sup> *Joint Comprehensive Plan of Action* (US Department of State), archived at <http://perma.cc/FT2Z-P4CG>. See also Michael R. Gordon and David E. Sanger, *World Leaders Strike Agreement with Iran to Curb Nuclear Ability and Lift Sanctions*, NY Times A1 (July 15, 2015) (explaining the elements of the deal).

public Ministers.”<sup>108</sup> Others argued in favor of the invitation’s constitutionality on a variety of grounds. Some pointed to the evolution of less formal communications between congressmen and foreign governments to argue that constitutional practice supports the constitutionality of the invitation.<sup>109</sup> Others argued that the president’s failure to exercise his constitutional power to bar Netanyahu’s entry into the United States constituted implied consent to the address to Congress.<sup>110</sup> Another commentator suggested that the invitation was constitutional because it did not interfere with the president’s power to receive ambassadors and because “[h]earing from foreign leaders . . . can support” congressional powers, such as appropriating funds for foreign policy and ratifying treaties.<sup>111</sup>

As these arguments reveal, commentators not only disagreed as to the ultimate constitutionality of the invitation, but also as to the appropriate framework with which to evaluate it. Part of the divergence stems from the fact that the Netanyahu incident has aspects of both inbound and outbound nonexecutive foreign relations. Boehner’s initial invitation letter to Netanyahu was outbound—a direct communication to a foreign head of state from the legislative branch. Netanyahu’s acceptance and ultimate speech to Congress, on the other hand, were inbound—direct communication from a foreign executive to a nonexecutive branch of the US government (here, Congress). Some of the dispute over the incident’s constitutionality involves dueling claims about authority to conduct foreign relations versus Congress’s authority to receive information pertinent to fulfilling its functions.

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<sup>108</sup> US Const Art II, § 3. See also Michael Ramsey, *Is Netanyahu’s Address to Congress Unconstitutional?* (Originalism Blog, Jan 25, 2015), archived at <http://perma.cc/D6YP-678V>; David Bernstein, *Is Netanyahu’s Address to Congress Unconstitutional?* (Wash Post, Jan 25, 2015), archived at <http://perma.cc/CX96-VWT7>.

<sup>109</sup> See, for example, Peter Spiro, *More on Boehner’s Netanyahu Invite (and What It Says about Constitutional Change)* (Opinio Juris, Jan 27, 2015), archived at <http://perma.cc/4QPF-3PW5>; Ryan Scoville, *Boehner Invites Bibi: A Closer Look at Historical Practice* (Just Security, Jan 27, 2015), archived at <http://perma.cc/U89W-FSVV> (noting a long-standing practice of “legislative diplomacy” without taking a position on whether the differences in the Netanyahu invitation are “material in a constitutional sense”).

<sup>110</sup> See, for example, Seth Barrett Tillman, *A Response on Netanyahu’s Address to Congress* (Originalism Blog, Jan 26, 2015), archived at <http://perma.cc/3M6F-R4VU>; Gerard Magliocca, *Netanyahu’s Address to a Joint Session Is Not Unconstitutional* (Concurring Opinions, Jan 26, 2017), archived at <http://perma.cc/S744-R4PH>.

<sup>111</sup> Adam J. White, *The Constitution Doesn’t Let President Close Congress’s Doors to Israel* (Weekly Standard, Jan 26, 2017), archived at <http://perma.cc/R4RB-K6AA>.



A more routine example of mixed inbound/outbound nonexecutive foreign relations is congressional travel abroad.<sup>112</sup> As Professor Ryan Scoville has documented, congressmen frequently visit foreign countries to inform themselves about issues related to their legislative responsibilities.<sup>113</sup> Such trips are mixed inbound/outbound because in meetings with foreign government representatives, congressmen receive information and gather facts (inbound), but may also communicate messages (outbound). The executive branch often supports congressional travel abroad.<sup>114</sup>

Sometimes, however, congressional travel proves controversial. In 2007, then-Speaker of the House Nancy Pelosi, a Democrat from California, met with Syrian President Bashar al-Assad and discussed a variety of regional security issues.<sup>115</sup> President George W. Bush criticized Pelosi's visit on the ground that it "sen[t] mixed signals"<sup>116</sup> at a time when the Bush administration was trying to isolate Syria diplomatically.<sup>117</sup>

More recently, in January 2017, Representative Tulsi Gabbard, a Democrat from Hawaii, traveled to Syria on a "fact-finding trip" and met with al-Assad.<sup>118</sup> Gabbard had "called for the [Obama] administration to abandon all assistance to armed

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<sup>112</sup> See note 184 and accompanying text.

<sup>113</sup> See Scoville, 112 Mich L Rev at 339–49 (cited in note 10). For examples of foreign travel by congresspersons, see *Foreign Travel Reports* (Office of the Clerk, US House of Representatives), archived at <http://perma.cc/QW72-QDRY> (providing a searchable database of congressional foreign travel expenditures). Foreign travel reports are also published in the Congressional Record. See, for example, *Foreign Travel Financial Reports*, 115th Cong, 1st Sess, in 163 Cong Rec S 752–61 (daily ed Feb 6, 2017).

<sup>114</sup> See note 184 and accompanying text.

<sup>115</sup> See Hassan M. Fattah and Graham Bowley, *Pelosi Meets with Syrian Leader* (NY Times, Apr 4, 2007), online at <http://www.nytimes.com/2007/04/04/world/middleeast/04cnd-pelosi.html> (visited Feb 7, 2018) (Perma archive unavailable) (describing the issues discussed in the meeting).

<sup>116</sup> *President Bush Makes Remarks on the Emergency Supplemental* (White House Office of the Press Secretary, Apr 3, 2007), archived at <http://perma.cc/T86Q-5VMX>.

<sup>117</sup> See David Stout and Hassan M. Fattah, *Bush Assails Pelosi's Trip to Syria* (NY Times, Apr 3, 2007), online at <http://www.nytimes.com/2007/04/03/world/americas/03iht-pelosi.4.5130701.html> (visited Feb 7, 2018) (Perma archive unavailable); Fattah and Bowley, *Pelosi Meets with Syrian Leader* (cited in note 115) (noting that several Republican congressmen had also met with al-Assad, but that Bush did not mention them in criticizing Pelosi's meeting).

<sup>118</sup> *Congresswoman Tulsi Gabbard Returns from Syria with Renewed Calls: End Regime Change War in Syria Now* (Congresswoman Tulsi Gabbard, Jan 25, 2017), archived at <http://perma.cc/SJ4U-UEFW>. See also *Tulsi Gabbard's Syria Meeting with Assad Sparks Outcry* (BBC, Jan 27, 2017), archived at <http://perma.cc/B6F6-ZE4Q>.

groups and stop seeking Assad's overthrow,"<sup>119</sup> and fellow congressmen criticized her meeting with Assad.<sup>120</sup> Although the Defense Department was aware of Gabbard's trip,<sup>121</sup> neither Obama nor Trump administration officials commented on it.<sup>122</sup>

Another possible, although so far hypothetical, example of mixed inbound/outbound nonexecutive foreign relations could come from the Supreme Court. The Court routinely "calls for the views of the solicitor general" (CVSGs), essentially inviting the executive branch to file a brief expressing its views on whether the Court should grant certiorari in a case or on which way the Court should rule on the merits.<sup>123</sup> The Court occasionally calls for the views of parties other than the solicitor general. For example, the Court has called for the views of the houses of Congress and states, among others.<sup>124</sup> As the Court becomes increasingly accustomed to amicus briefs from foreign sovereigns, it might call for the views of a specific foreign government or governments in a future case in which the foreign sovereign's views would be particularly material to the Court's consideration. For example, in a case about extraterritorial application of US law—an issue on which the Court has been especially solicitous of foreign governments' briefs<sup>125</sup>—the Court might request the views of governments whose domestic enforcement efforts would be impacted by application of US law abroad. Such an action by the Court would be analogous in form to the Netanyahu invitation: an invitation from a nonexecutive branch (outbound) for a foreign executive branch to provide its views to the Court (inbound). What the Court scenario would lack, of course, is the literal receiving of a

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<sup>119</sup> Karen DeYoung, *Rep. Tulsi Gabbard Makes Unannounced Trip to Syria* (Wash Post, Jan 18, 2017), archived at <http://perma.cc/76A4-GXF3>.

<sup>120</sup> See Mike Lillis, *Gabbard Meeting with Assad Draws Disgust from Fellow Lawmakers* (The Hill, Jan 26, 2017), archived at <http://perma.cc/EU7B-PK2X> (collecting comments).

<sup>121</sup> See *id.* (quoting a Defense Department spokesman).

<sup>122</sup> See Ryan Scoville, *A Legal Analysis of Rep. Tulsi Gabbard's Trip to Syria* (Lawfare, Feb 14, 2017), archived at <http://perma.cc/2DZ9-C286> (arguing that the executive branch may have "quietly endorsed the trip: The Pentagon knew about it in advance, and yet there's no public evidence of an objection").

<sup>123</sup> See Neal Devins and Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U Chi L Rev 859, 881–83 (2013) (detailing the frequency with which the Court requests the views of the solicitor general and the solicitor general's perceived duty to respond).

<sup>124</sup> *Id.* at 883–84.

<sup>125</sup> See, for example, *Morrison v National Australia Bank Ltd*, 561 US 247, 269–70 (2010) (discussing amicus briefs filed by the United Kingdom, Australia, and France complaining that extraterritorial application of US securities laws interferes with their securities regulations, and explaining that the Court's test will avoid such interference).

foreign ambassador, and the Court's request would also occur in the shadow of the executive branch's own precommitment to consent to the filing of any foreign sovereign amicus brief.<sup>126</sup>

### 3. Outbound.

The Iran nuclear deal negotiations sparked another example of nonexecutive conduct of foreign relations by Congress, specifically an outbound example.<sup>127</sup> On March 9, 2015, forty-seven Republican senators, led by Senator Cotton, released an "Open Letter to the Leaders of the Islamic Republic of Iran."<sup>128</sup> The letter began by noting that the Iranian leaders "may not fully understand our constitutional system."<sup>129</sup> It then warned that the senators would regard an agreement "not approved by the Congress as nothing more than an executive agreement between President

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<sup>126</sup> See note 83 and accompanying text.

<sup>127</sup> Instances of outbound nonexecutive foreign relations frequently raise questions about the Logan Act. See Logan Act, 1 Stat 613, 613 (1799), codified at 18 USC § 953:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.

See also Steve Vladeck, *The Iran Letter and the Logan Act* (Lawfare, Mar 10, 2015), archived at <http://perma.cc/N26B-EY3U> (arguing that there are significant legal and political obstacles to prosecution of the Cotton letter signatories under the Logan Act); Peter Spiro, *GOP Iran Letter Might Be Unconstitutional. Is It Also Criminal?* (Opinio Juris, Mar 9, 2015), archived at <http://perma.cc/JNC6-RQE6> (arguing that the Cotton letter meets the elements of a Logan Act violation). See also Ryan Goodman, *Many Think This Law Is Obsolete. It Could Actually Be a Big Problem for Trump*. (Wash Post, Apr 5, 2017), archived at <http://perma.cc/5CD5-UE7S> (arguing that despite the lack of convictions under the Logan Act, it "has been 'enforced' and relied upon time and again by the executive branch," including to expel "foreign ambassadors . . . for aiding and abetting violations" and to restrict and suspend US passports). The Logan Act, which has not been the basis for a prosecution since 1803, see Vladeck, *The Iran Letter* (cited in note 127), stretches more broadly than outbound nonexecutive conduct of foreign relations because it covers any US citizen, not just legislative or judicial officials. But the Act is also narrower than nonexecutive foreign relations because it is limited to correspondence intended to influence a foreign government "in relation to any disputes or controversies with the United States" or "to defeat the measures of the United States," whereas outbound nonexecutive conduct of foreign relations is not so limited. 18 USC § 953. However, the two could interact if, for example, debates about the constitutionality of instances of nonexecutive foreign relations were taken to shape the interpretation of "without authority of the United States" in the text of the Logan Act. *Id.*

<sup>128</sup> Tom Cotton, et al, Open Letter to the Leaders of the Islamic Republic of Iran (Mar 9, 2015), archived at <http://perma.cc/KZ73-5UX7>.

<sup>129</sup> *Id.*

Obama and Ayatollah Khamenei” that could be revoked by the next president or modified by Congress.<sup>130</sup> After releasing the letter, Cotton took the extraordinary step of tweeting the letter directly to Iranian leaders, including Ayatollah Khamenei, President Hassan Rouhani, and Foreign Minister Javad Zarif.<sup>131</sup> Zarif responded by tweeting back a link to remarks in which he responded to the letter, calling it a “propaganda ploy” and “unprecedented in diplomatic history” and arguing that the senators “do not understand international law.”<sup>132</sup>

The senators intended the letter to undermine then ongoing negotiations over the nuclear deal,<sup>133</sup> and the White House blasted their interference. White House Press Secretary Josh Earnest called the letter “the continuation of a partisan strategy to undermine the President’s ability to conduct foreign policy and advance our national security interests around the globe,”<sup>134</sup> and he noted that interfering in ongoing negotiations “is not [ ] the role that our Founding Fathers envisioned for Congress to play when it comes to foreign policy.”<sup>135</sup> Vice President Joe Biden issued a strongly worded statement declaring that the letter “ignores two centuries of precedent and threatens to undermine the ability of any future American President, whether Democrat or Republican, to negotiate with other nations on behalf of the United States.”<sup>136</sup> Biden further highlighted the long history of US international agreements made without Congress’s approval, and noted that in his thirty-six years in the Senate, he could not “recall another instance in which Senators wrote directly to advise another

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<sup>130</sup> Id.

<sup>131</sup> See Megan Specia, *Republican Senators’ Open Letter to Iran Sparks Fierce Twitter Spat* (Mashable, Mar 10, 2015), archived at <http://perma.cc/BC76-S599> (chronicling tweets).

<sup>132</sup> Id (quoting the text of an article containing Zarif’s response).

<sup>133</sup> Greg Jaffe and Sean Sullivan, *Republican Letter to Iran Intensifies Dispute with White House* (Wash Post, Mar 9, 2015), archived at <http://perma.cc/X2XT-A9E2> (explaining that the letter was “designed to kill any potential deal”); Peter Baker, *G.O.P. Senators’ Letter to Iran about Nuclear Deal Angers White House* (NY Times, Mar 9, 2015), online at <http://www.nytimes.com/2015/03/10/world/asia/white-house-faults-gop-senators-letter-to-irans-leaders.html> (visited Feb 7, 2018) (Perma archive unavailable) (“The letter appeared aimed at unraveling a framework agreement even as negotiators drew close to reaching it.”).

<sup>134</sup> *Press Briefing by Press Secretary Josh Earnest, 3/9/2014* [sic] (White House Office of the Press Secretary, Mar 9, 2015), archived at <http://perma.cc/GF8Y-VN66>.

<sup>135</sup> Id.

<sup>136</sup> *Statement by the Vice President on the March 9 Letter from Republican Senators to the Islamic Republic of Iran* (White House Office of the Vice President, Mar 9, 2015), archived at <http://perma.cc/C7T2-FQBH>.

country—much less a longtime foreign adversary—that the President does not have the constitutional authority to reach a meaningful understanding with them.”<sup>137</sup>

Many commentators and media outlets derided the letter on a variety of grounds.<sup>138</sup> Separation-of-powers concerns even made their way into major newspapers’ editorials. The *Los Angeles Times*, for example, argued, “[N]egotiating with foreign nations is the president’s job. The Republican senators’ meddling in that responsibility is outrageous.”<sup>139</sup> *The Boston Globe* called the letter a “breathtakingly reckless intrusion into international diplomacy” that “undercuts the president’s traditional authority to oversee the shaping of foreign policy.”<sup>140</sup>

Legal commentators debated similar issues.<sup>141</sup> Professor Josh Chafetz has argued that the Cotton letter is constitutionally protected based on a broad understanding of the Speech and Debate Clause.<sup>142</sup> Professor Julian Ku noted that the letter “could be

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<sup>137</sup> *Id.*

<sup>138</sup> For a compilation of negative coverage of the letter, see Josh Earnest, *Round-Up: Editorial Boards from around the Country Respond to the 47 Republican Senators* (White House, Mar 11, 2015), archived at <http://perma.cc/M93F-GMFQ>.

<sup>139</sup> *Republican Senators Go Nuclear with Missive to Iran* (LA Times, Mar 11, 2015), archived at <http://perma.cc/GRA4-ACB2>.

<sup>140</sup> *GOP Letter to Iran Is a Reckless Intrusion into Nuclear Talks* (Boston Globe, Mar 10, 2015), online at <http://www.bostonglobe.com/opinion/editorials/2015/03/10/gop-letter-iran-was-reckless-intrusion-into-nuclear-talks/ztJVtjcXF0ljBUDz8P03kJ/story.html> (visited Feb 7, 2018) (Perma archive unavailable).

<sup>141</sup> Academics also raised additional concerns about the letter. For example, Professor Jack Goldsmith pointed out that the letter erred in stating that the Senate ratifies treaties, when in fact the Senate votes on a resolution of ratification that, if approved, allows the president to ratify. Jack Goldsmith, *The Error in the Senators’ Letter to the Leaders of Iran* (Lawfare, Mar 9, 2015), archived at <http://perma.cc/UCP3-9NXK>. The letter also sparked a separate discussion of whether the signatories violated the Logan Act. See note 127.

<sup>142</sup> Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* 229–31 (Yale 2017). Because of the many constitutional powers of Congress that relate to foreign relations, Chafetz is certainly correct that “we should be deeply skeptical of any attempt to give the president the sole authority to define, construct, and delimit American interests or positions on the world stage.” *Id.* at 230. However, Congress’s powers to help define US interests and shape foreign policy through the confirmation of executive-branch officials, the power of the purse, and voting on treaties, among others, do not necessarily mean that Congress has or should have constitutional sanction to *conduct* foreign relations as I and other foreign relations scholars define that term. See note 1 and accompanying text. In stating that “multiple institutions of government—most definitely including the members and houses of Congress—take part in conducting foreign relations,” Chafetz, *Congress’s Constitution* at 230 (cited in note 142), Chafetz appears to use a broader understanding of “conduct,” though he also endorses congressional conduct of foreign relations, narrowly defined. See *id.* at 231 (endorsing the constitutionality of the Cotton letter and arguing, with approval, that “[b]y purporting to write directly to the

criticized as an unconstitutional interference in the President's inherent power to conduct foreign affairs" and "is very unusual."<sup>143</sup> He nonetheless concluded that the letter "skirts, but manages to avoid, any unconstitutional interference" because it "does not state U.S. policy" and is instead "[p]hrased merely as a letter 'bringing attention' to the U.S. constitutional system."<sup>144</sup>

Professors Robert Howse and Ruti Teitel, on the other hand, argued that the letter was a "flagrant violation of at least the spirit" of the principle that "the President is the sole representative of the United States 'with foreign nations'" and, "in the words of the Supreme Court, 'the President alone has the power to speak' with other states on America's behalf."<sup>145</sup> Professor Marty Lederman similarly noted that the letter "is deeply transgressive of constitutional values and traditions," if not of the Constitution itself.<sup>146</sup>

As the executive-branch, popular-media, and legal-expert reactions to the Cotton letter reveal, the senators' direct communication to a foreign government during delicate negotiations and in an overt attempt to interfere with those negotiations is at least constitutionally troubling, if not strictly violative of the Constitution.

The Cotton letter incident shares some similarities with a historical antecedent. In 1984, ten Democratic congressmen sent a letter to Nicaragua's then—Coordinator of the Junta of National Reconstruction—who later became President—Daniel Ortega urging him to ensure free and open elections.<sup>147</sup> Known as the "Dear Comandante" letter,<sup>148</sup> the missive explained that the congressional signatories opposed the Reagan administration's support of "military action directed against the people or government of Nicaragua," and argued that if Ortega held free and open

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Iranian regime, the signatories to the letter asserted that they were . . . entitled to a seat at the diplomatic table").

<sup>143</sup> Julian Ku, *47 US Senators Send Iran's Leader an Unnecessary(?) Primer on How US Constitution Works* (Opinio Juris, Mar 9, 2017), archived at <http://perma.cc/9ETL-EPQZ>.

<sup>144</sup> *Id.*

<sup>145</sup> Robert Howse and Ruti Teitel, *Legal Flaws in the 47 Senators' Letter to Iran* (Just Security, Mar 10, 2015), archived at <http://perma.cc/2BGA-J92S>, quoting *Curtiss-Wright Export Corp.*, 299 US at 319.

<sup>146</sup> Marty Lederman, *The Cotton Letter . . . and the Vice President's Response* (Just Security, Mar 10, 2015), archived at <http://perma.cc/Q8LE-PE6F>.

<sup>147</sup> See Jim Wright, et al, *Ten Congressmen Send a Message to Managua*, Wall St J 34 (Apr 17, 1984) (reprinting the full text of the letter). See also Steven V. Roberts, *Congress; Letter to Nicaragua: 'Dear Comandante'*, NY Times A14 (Apr 20, 1984).

<sup>148</sup> See, for example, *That 'Dear Comandante' Letter*, Wash Post A20 (May 3, 1984).

elections, “[t]hose responsible for supporting violence against your government . . . would have far greater difficulty winning support for their policies.”<sup>149</sup> Newt Gingrich, then a Republican congressman, condemned the letter, arguing that it “clearly violates the constitutional separation of powers” and “undercut[s] the [Reagan] Administration’s foreign policy.”<sup>150</sup>

More than a year later, the Reagan administration’s Secretary of State George Shultz gave a speech criticizing the letter and trips by congressmen to Nicaragua, arguing that the Reagan administration “‘cannot conduct a successful policy’ toward Nicaragua when legislators” act as “self-appointed emissaries to the communist regime.”<sup>151</sup> Shultz also noted, however, that congressmen have the right to travel to and review the situation in Nicaragua,<sup>152</sup> and after meeting with Democratic congressmen later in the day, he “reversed course,” telling reporters that “any phrase that might be interpreted as criticism” of the congressmen “is not a proper interpretation.”<sup>153</sup>

## B. Drivers of Nonexecutive Foreign Relations

The phenomenon of nonexecutive conduct of foreign relations is not new. For decades, foreign governments have filed amicus briefs, and congressmen have intervened with foreign governments for even longer.<sup>154</sup> But the salience of nonexecutive conduct of foreign relations increased in 2015 with the Netanyahu address to Congress and the Cotton letter. Some of the drivers discussed below suggest that although nonexecutive foreign relations have occurred in the past, they are likely to be more frequent going forward.

*Technology.* Technology facilitates communication, and communications among government actors are no exception.

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<sup>149</sup> *Ten Congressmen Send a Message to Managua*, Wall St J at 34 (cited in note 147).

<sup>150</sup> Roberts, *Congress; Letter to Nicaragua*, NY Times at A14 (cited in note 147).

<sup>151</sup> Don Oberdorfer, *Shultz Backs Off Attack on Meddling by Congress; Lawmakers Confront Him about Nicaragua*, Wash Post A24 (May 24, 1985).

<sup>152</sup> See R. Gregory Nokes, *Reagan, Shultz Criticize Congress on Nicaragua; Lawmakers Don’t Like It* (Associated Press, May 24, 1985).

<sup>153</sup> Oberdorfer, *Shultz Backs Off Attack on Meddling by Congress*, Wash Post at A24 (cited in note 151) (quoting Shultz and noting that Shultz “seem[ed] to exonerate the authors of the letter”).

<sup>154</sup> See Scoville, 112 Mich L Rev at 351–54 (cited in note 10) (discussing the history of congressional contacts with foreign governments).

Advanced communications technology is not necessary for non-executive foreign relations communications,<sup>155</sup> but it does make communications across borders faster, cheaper, and easier. Scholars have argued that the information technology revolution has spurred global networks both among government officials and outside of governments.<sup>156</sup> In a study of transgovernmental networks among regulatory agencies, for example, Professor Kal Raustiala noted that every regulator he interviewed cited “advances in information technologies . . . as a central permissive cause of the contemporary network phenomenon.”<sup>157</sup>

In the same way that they enable horizontal governmental networks, technological advances facilitate diagonal communications between foreign executives and US nonexecutive branches. New technologies may just replace earlier counterparts in the way that email can substitute for a mailed letter or a fax machine. But as Cotton’s tweets to Iranian leaders and the Iranian foreign minister’s tweeted response reveal,<sup>158</sup> new technologies can also create communication channels that are different in kind from prior options.

*Sophistication about disaggregation.* Another driver leading foreign executive branches to engage the US judiciary and Congress may be foreign governments’ increasing sophistication about the relative powers of the branches of the US government. As foreign executive branches interact directly with parts of the US government other than the State Department, they may come to better understand the policy process within the United States and the policy bottlenecks and power centers. This understanding may reveal more diverse avenues of engagement than the traditional State Department–foreign ministry route. For example, Professor Peter Spiro has argued that foreign governments’ “increasing sophistication . . . when it comes to internal U.S. governance structures” has led them to “play the system directly” by “participat[ing] in U.S. judicial proceedings not just as defendants

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<sup>155</sup> See notes 166–69 and accompanying text (discussing the Genet episode).

<sup>156</sup> See, for example, Raustiala, 43 Va J Intl Law at 12 (cited in note 57) (“Technological advances provide the means for networks to develop with greater frequency and at lower cost.”); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Georgetown L J 487, 497 (2005) (“The revolution in information technology [ ] has produced a worldwide communications capacity that empowers and energizes loose networks of nongovernmental organizations and so-called ‘epistemic communities,’ which as a result play an increasingly important role in shaping the global agenda.”) (citation omitted).

<sup>157</sup> Raustiala, 43 Va J Intl Law at 12 (cited in note 57).

<sup>158</sup> See notes 131–32 and accompanying text.



(which more likely involves a lack of sophistication) but increasingly as plaintiffs and amici curiae.”<sup>159</sup> While existing scholarship has explored how disaggregation impacts international law and US compliance with international law,<sup>160</sup> this Article takes a different approach, focusing instead on the constitutional implications of foreign governments’ interactions with the disaggregated pieces of the federal government.

*Fractionalization in the United States.* Advances in communications technology and increased knowledge among foreign governments about the US system help to create the conditions for nonexecutive foreign relations, but they do not explain what causes nonexecutive foreign relations to move from potential to actual. The trigger for many of the instances of nonexecutive foreign relations discussed above, particularly those undertaken by Congress, appears to be serious policy disagreements between government officials of opposing political parties.<sup>161</sup>

Divided government—when one party controls the presidency and the other party controls Congress—may foster non-executive foreign relations. In such a circumstance, the party controlling Congress can use levers of congressional authority, such as issuing invitations and engaging in foreign travel, to engage in nonexecutive foreign relations. The Netanyahu invitation and the Cotton letter are prominent examples: Republican leaders of Congress used the powers of their offices in an attempt to derail the foreign policy of a Democratic president.<sup>162</sup>

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<sup>159</sup> Spiro, 63 Ohio St L J at 683 (cited in note 56) (citations omitted). See also generally Buxbaum, 73 Wash & Lee L Rev 653 (cited in note 68) (assessing the claims that foreign governments bring as plaintiffs in US courts); Eichensehr, 102 Va L Rev 289 (cited in note 56) (analyzing the role of foreign governments as amici curiae).

<sup>160</sup> See, for example, Raustiala, 43 Va J Intl Law at 91–92 (cited in note 57) (discussing the impact of transgovernmental networks on international law); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 L & Contemp Probs 195, 196 (Autumn 2004) (exploring how “disaggregated governmental components beyond the traditional foreign policy apparatus[ ] may be developing an institutional interest in the acceptance of” international law).

<sup>161</sup> Examples include, among others, Democrat Pelosi’s trip to Syria during the Republican Bush administration, see notes 115–17 and accompanying text; Republican Boehner’s invitation to Netanyahu during the Democratic Obama administration, see notes 93–107 and accompanying text; and the Cotton letter by Republican senators during the Obama administration, see notes 127–137 and accompanying text.

<sup>162</sup> See David E. Pozen, *Self-Help and the Separation of Powers*, 124 Yale L J 2, 4–12 (2014) (proposing that unilateral executive actions by the Obama administration should be conceived of as “constitutional self-help”—the use of generally impermissible means that become permissible because done in response to a prior impermissible act by Congress). Some commentators have argued that the Netanyahu invitation was a form of congressional self-help in retaliation for perceived executive unilateralism on other issues

But divided government is not necessary for nonexecutive foreign relations to occur. Examples of nonexecutive foreign relations from the courts do not depend on the same political dynamics as executive-legislative divided government. Moreover, even when a single party controls both the presidency and Congress, minority legislators may attempt to engage in nonexecutive foreign relations using different tactics than a legislative majority has at its disposal. In fact, unified government may increase the odds of nonexecutive conduct of foreign relations by minority legislators: if policy divisions and fractionalization make working with the executive and legislative majority untenable, minority legislators may have a greater incentive to engage in nonexecutive foreign relations through in-person visits abroad or sending of messages precisely because they lack other mechanisms for affecting policy.

Fractionalization in the US political system incentivizes not just US actors but also foreign countries to engage in non-executive foreign relations. The existence of deep disagreements—if not outright animosity—between US government branches or majority and minority parties makes it prudent for foreign governments to attempt to engage multiple actors to understand the full range of views held by those with some potential to influence US policy, either currently or after the next election cycle. Fractionalization also creates the possibility that foreign governments can forum shop. If a foreign government is stymied by the executive branch, it might find a more receptive audience in Congress or the courts.<sup>163</sup> Netanyahu's address to Congress, for

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or executive resistance to cooperation over inviting Netanyahu. See, for example, Bernstein, *Is Netanyahu's Address to Congress Unconstitutional?* (cited in note 108) (suggesting that Boehner viewed the invitation as self-help based on an interview in which, as reported by Bernstein, Boehner "suggested that given that President Obama has been ignoring Congress' constitutional prerogatives, as by unilaterally rewriting immigration law, Congress can retaliate by ignoring the president's constitutional prerogatives"); Josh Blackman, *Gridlock and Congressional Power* (Josh Blackman's Blog, Jan 26, 2015), archived at <http://perma.cc/9M24-CTUR> (citing Boehner's invitation to Netanyahu as a potential example of self-help per Professor David E. Pozen and noting that "[u]nder normal circumstances, the President would likely approve of the Speaker wishing to invite the [Prime Minister] of an ally to address Congress. But we are not living in normal times"). To the extent that a desire to engage in self-help may describe the instances of non-executive foreign relations that I discuss, I consider "self-help" as a descriptive label here, not one with the normative, justificatory import that Pozen separately proposes.

<sup>163</sup> Spiro, 67 *L & Contemp Probs* at 215 (cited in note 160) ("The United States is no longer a monolith for purposes of international law and relations; it is now, rather, an arena in which global forces can play at the game of transnational politics and rational institutional action.").

example, seemed designed precisely to find a friendly audience, avoiding Obama, with whom Netanyahu had had a troubled relationship,<sup>164</sup> and engaging directly with congressional Republicans, who the prime minister (correctly) believed were more receptive to his arguments for a tougher approach to Iran.<sup>165</sup>

Professor Michael Ramsey noted that Netanyahu's engagement with Congress, perceived to be more aligned with Israeli policy than the president, echoes an incident from the Founding era.<sup>166</sup> In 1793, French Ambassador Edmond Genet "sought to enlist U.S. support for France in its conflict with Britain," and when President George Washington "insisted on neutrality, Genet attempted to communicate directly with Congress, which he suspected was more sympathetic to France."<sup>167</sup> The Washington administration, in a series of letters from Secretary of State Thomas Jefferson, instructed Genet to communicate only with the president.<sup>168</sup> Jefferson explained, "[B]y our constitution all foreign agents are to be addressed to the President of the US[,] no other branch of the government being charged with the foreign communications."<sup>169</sup>

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<sup>164</sup> See, for example, Peter Baker and Jodi Rudoren, *Obama and Netanyahu: A Story of Slight and Crossed Signals* (NY Times, Nov 9, 2015), online at <http://www.nytimes.com/2015/11/09/us/politics/obama-and-netanyahu-a-story-of-slight-and-crossed-signals.html> (visited Feb 7, 2018) (Perma archive unavailable) (chronicling tensions between Obama and Netanyahu).

<sup>165</sup> See, for example, David E. Sanger, *In Reprieve to Obama, Senate Democrats Agree to Wait on Iran Sanctions* (NY Times, Jan 28, 2015), online at <http://www.nytimes.com/2015/01/28/world/middleeast/house-hearing-iran-nuclear-talks-sanctions.html> (visited Feb 7, 2018) (Perma archive unavailable) (chronicling congressional support for imposing additional sanctions on Iran).

<sup>166</sup> Ramsey, *Is Netanyahu's Address to Congress Unconstitutional?* (cited in note 108).

<sup>167</sup> *Id.*

<sup>168</sup> See Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L J 231, 321–22 (2001) (recounting the correspondence between Jefferson and Genet). For a detailed chronology of the disputes accompanying Genet's tenure as ambassador, see Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich L Rev 545, 664–76 (2004).

<sup>169</sup> Letter from Thomas Jefferson, US Secretary of State, to Edmond Charles Genet, French Ambassador to the United States (National Archives, Oct 2, 1793), archived at <http://perma.cc/PEM7-F5AP>. See also Letter from Thomas Jefferson, US Secretary of State, to Edmond Charles Genet, French Ambassador to the United States (National Archives, Nov 22, 1793), archived at <http://perma.cc/RWT2-JVPY> (deeming the president to be "the only channel of communication between this country and foreign nations"). Eventually, Genet's hijinks prompted the Washington administration to request that France recall him as ambassador, and some of Jefferson's reprimands to Genet for attempting to contact Congress occurred after recall was requested, but before France's decision to recall Genet reached the United States in January 1794. See Bradley and Flaherty, 102 Mich L Rev at 670–71, 673–74 (cited in note 168).

As the Genet example illustrates, forum shopping isn't new, but the current era of hyperpartisanship and fractionalization may make it more appealing and more common.

*The Trump effect.* The Trump administration's perceived incompetence at and inattention to diplomacy may provide yet another spur for domestic and international actors to seek one another out, circumventing the executive branch.<sup>170</sup> Missteps by Trump, such as failing to affirm the United States' continued commitment to NATO<sup>171</sup> and proposing deep cuts to the State Department's budget,<sup>172</sup> have provoked congressional pushback.<sup>173</sup> And in at least one instance, a legislator has stepped in directly to countermand Trump. In a February phone call, "President Trump blasted Australian Prime Minister Malcolm Turnbull over a refugee agreement and boasted about the magnitude of his electoral college win" before "abruptly end[ing]" the call.<sup>174</sup> In an attempt to smooth things over, Senator McCain called Australia's ambassador to the United States to "express [ ] unwavering support for the U.S.-Australia alliance."<sup>175</sup>

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<sup>170</sup> See, for example, Morgan Chalfant, *Worries Mount about Vacancies in Trump's State Department* (The Hill, May 21, 2017), archived at <http://perma.cc/D7H4-5AQV> (discussing how the lack of political appointees signals that diplomacy and US alliances are not a priority for the Trump administration); Eliana Johnson and Michael Crowley, *The Bottleneck in Rex Tillerson's State Department* (Politico, June 4, 2017), archived at <http://perma.cc/XMK2-XC4Y> (discussing ongoing State Department vacancies at the political-appointee level).

<sup>171</sup> See Michael D. Shear, Mark Landler, and James Kanter, *In NATO Speech, Trump Is Vague about Mutual Defense Pledge* (NY Times, May 25, 2017), online at <http://www.nytimes.com/2017/05/25/world/europe/donald-trump-eu-nato.html> (visited Feb 7, 2018) (Perma archive unavailable) (noting that at his first NATO summit, Trump "declin[ed] to explicitly endorse NATO's mutual defense pledge" and instead "lash[ed] out at fellow members for what he called their 'chronic underpayments' to the alliance").

<sup>172</sup> See Carol Morello and Anne Gearan, *Senators Sharply Question State Department Budget Cuts* (Wash Post, June 13, 2017), archived at <http://perma.cc/8B86-JN9T> (reporting that Trump's budget proposed cutting the State Department's budget by roughly 30 percent).

<sup>173</sup> See, for example, *The Latest: Senate Jabs Trump in Unanimous Vote on NATO* (Boston Herald, June 15, 2017), archived at <http://perma.cc/7S7D-ZUUD> (reporting that the Senate voted unanimously in favor of a resolution reaffirming NATO's mutual defense commitment); Morello and Gearan, *Senators Sharply Question State Department Budget Cuts* (cited in note 172) (reporting on bipartisan criticism of the Trump administration's proposed State Department budget cuts, including Republican Senator Lindsey Graham's statement that the proposed cuts are "radical and reckless when it comes to soft power").

<sup>174</sup> Miller and Rucker, *This Was the Worst Call by Far*' (cited in note 4).

<sup>175</sup> *Statement by SASC Chairman John McCain* (cited in note 4). See also Peter Baker, Emmarie Huetteman, and Glenn Thrush, *McCain Steps In to Ease Tension with Australia over Trump Insult* (NY Times, Feb 2, 2017), online at <http://www.nytimes.com/2017/02/02/us/politics/trump-congress-tax-code.html> (visited Feb 7, 2018).

If the Trump administration continues its combination of diplomatic gaffes and lack of engagement through normal State Department channels, more congressmen may engage in direct communications with foreign governments, and foreign governments may increasingly seek out interlocutors among the legislators.<sup>176</sup>

The likelihood that nonexecutive conduct of foreign relations will become more frequent makes development of a legal framework to assess its constitutionality all the more crucial. The next Part takes up that task.

### III. THE CONVERSE *YOUNGSTOWN* FRAMEWORK

While the traditional *Youngstown* framework provides guidance on how to assess presidential and executive-branch actions, it does not address the increasingly frequent circumstances in which the president is cast in a reactive role.<sup>177</sup> The converse *Youngstown* framework proposed here addresses precisely those situations in which Congress or the courts are the initial actors and the executive branch reacts to their initiative. The two *Youngstown* frameworks are not mutually exclusive. Many separation-of-powers disputes are iterative processes wherein, for example, the president takes an action, Congress reacts, then the president reacts to Congress's reaction, and so on. Which framework applies depends on which branch's action is at issue. Traditional *Youngstown* applies when the action at issue is the executive's; converse *Youngstown* applies when the action at issue is Congress's or the judiciary's.

Many of the situations to which converse *Youngstown* will apply, like many instances in which traditional *Youngstown* applies, will be nonjusticiable and not ultimately resolved or resolvable by courts.<sup>178</sup> The converse *Youngstown* framework can nonetheless

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(Perma archive unavailable) (reporting on McCain's "remarkable statement" recounting his call).

<sup>176</sup> See, for example, Jennifer Steinhauer, *World Leaders Wary of Trump May Have an Unlikely Ally: Congress* (NY Times, June 20, 2017), online at <http://www.nytimes.com/2017/06/19/us/politics/world-leaders-wary-of-trump-may-have-an-ally-congress.html> (visited Feb 7, 2018) (Perma archive unavailable) (detailing numerous actions by Congress to resist the Trump administration's foreign policy positions).

<sup>177</sup> See Henkin, *Foreign Affairs* at 95 (cited in note 1) (noting that "[t]he Jackson formula was written from the President's perspective," and raising the possibility of "a parallel formulation [that] might address the powers of Congress in relation to those of the President, and might be somewhat different").

<sup>178</sup> See notes 44–45 and accompanying text. Some circumstances in which converse *Youngstown* would apply might in fact be justiciable. For example, imagine a scenario in

help to guide analysis of separation-of-powers disputes by government officials, such as OLC<sup>179</sup> and legislators,<sup>180</sup> who are on the front lines of such debates.<sup>181</sup> It will also be useful to scholars focused on the respective powers of the three branches.

The frequent absence of courts as authoritative adjudicators of separation-of-powers disputes does not diminish the constitutional-law nature of such questions. Although “there is a strand of British (and, more generally, Commonwealth) constitutional thinking that would limit the term ‘constitutional law’ to norms that are enforceable by the judiciary,” such a limitation “does not map well onto U.S. constitutional understandings” and constitutional-law scholarship.<sup>182</sup> Rather, in the United States, extrajudicial constitutional decisionmaking by the political branches is accepted and frequent.<sup>183</sup>

Moreover, judicial decisions remain relevant even for non-justiciable constitutional questions. When either *Youngstown* or

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which Congress overrides a presidential veto founded on constitutional objections by enacting a statute that conveys rights for or imposes burdens on private parties, who would then have standing to sue.

<sup>179</sup> See, for example, Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L & Contemp Probs 105, 113–14 (Summer 2004) (arguing that “the political branches do engage in principled constitutional interpretation,” and citing Department of Justice legal opinions as an example). See also notes 41–43 and accompanying text (discussing OLC citations to Jackson’s *Youngstown* framework).

<sup>180</sup> See Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 Stan L Rev 585, 587–88 (1975) (arguing that “legislators are obligated to determine, as best they can, the constitutionality of proposed legislation” and that “[t]he modern legislative committee, staffed by lawyers and others having expertise in particular areas of policy and law, is competent to consider the constitutional implications of pending measures”).

<sup>181</sup> See Johnsen, 67 L & Contemp Probs at 115 (cited in note 179) (arguing that “[t]he absence of judicial review . . . does not signify the absence of constitutional limits,” but rather that “[c]onstitutional fidelity . . . often depends on the branches’ effectiveness in determining their own constitutional obligations and then exercising principled self-restraint, as well as on the branches’ substantial powers to check each other and on the ultimate power of the electorate”).

<sup>182</sup> Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex L Rev 773, 832 (2014). See also Mark Tushnet, *Taking the Constitution Away from the Courts* x–xi (Princeton 1999) (noting that “constitutional interpretation goes on outside the courts” and arguing that such interpretation is in fact “law because it is not in the first instance either the expression of pure preferences by officials and voters or the expression of unfiltered moral judgements”).

<sup>183</sup> See Jack Goldsmith and Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv L Rev 1791, 1813 (2009) (“A far greater number of constitutional issues [than are decided by courts] will never be heard by any court and are decided by nonjudicial political actors in Congress, the executive branch, and state governments.”).

converse *Youngstown* apply in nonjusticiable circumstances, those applying the frameworks can benefit from courts' application of *Youngstown* in prior cases that did raise justiciable questions. *Youngstown* cases can illuminate later converse *Youngstown* situations by, for example, construing the powers of multiple branches in a way that can be used in later outside-the-courts analyses, holding that certain powers are exclusive to one branch and thus perhaps determinative in later assessments, or providing methodological guidance on issues like the relevance of historical gloss. Thus, converse *Youngstown* analysis can benefit from the penumbras of judicial pronouncements in much the same way that nonjusticiable *Youngstown* situations do.

Part III.A develops the converse *Youngstown* framework. Part III.B then argues that the converse *Youngstown* framework provides significant benefits over the current ad hoc approach to analyzing nonexecutive conduct of foreign relations and avoids some of the pitfalls that critics have identified with the traditional *Youngstown* framework.

#### A. Converse *Youngstown* for Nonexecutive Foreign Relations

*Youngstown* and converse *Youngstown* share the same basic goal of guiding determination of the relative constitutional powers of competing branches. Both frameworks are triggered by explicit or implicit claims of power over an issue by more than one branch of the federal government. To put it another way, both *Youngstown* and converse *Youngstown* depend on at least two branches of the federal government claiming constitutional authority over a particular issue. Once this circumstance is identified, the choice of the *Youngstown* framework versus the converse *Youngstown* framework depends on which branch's action is at issue. If the president's action is at issue, *Youngstown* applies; if the actions of Congress or the courts are at issue, then converse *Youngstown* applies.

The converse *Youngstown* framework focuses on the president's position vis-à-vis acts of Congress or the courts. In traditional *Youngstown* analysis, the president is the actor, and Categories 1 to 3 are defined by Congress's position—authorization, silence, and opposition, respectively. Converse *Youngstown* flips the actor and reactor roles.

A situation falls within converse *Youngstown* Category 1 when Congress or the courts take an action that is authorized by,

coordinated with, or mediated through the executive. For non-executive conduct of foreign relations, Category 1 involves instances in which Congress or the courts engage foreign governments in direct communication that the US executive branch explicitly or implicitly approves.

A quintessential example of Category 1 as applied to non-executive conduct of foreign relations is the routine interactions between congressmen and foreign governments when congressmen travel abroad on congressional delegations (or “codels”). Such official trips are coordinated with the State Department, which provides in-country embassy support to visiting lawmakers, and they also often involve the Defense Department, which may provide military transportation for lawmakers.<sup>184</sup> By these actions (and absent any other expressed disapproval of the trip), the executive can be understood either to tacitly consent to the legislators’ activities or to retain some control over their actions.

Another example of converse *Youngstown* Category 1 is typical invitations for foreign leaders to address Congress. Beginning with King Kalākaua of Hawaii in 1874, more than one hundred foreign leaders or dignitaries have addressed Congress.<sup>185</sup> Usually invitations for foreign leaders to address Congress are coordinated with the executive branch,<sup>186</sup> with the executive explicitly or at least tacitly by its coordination actions approving of the invitations. The 2015 invitation to Benjamin Netanyahu was anomalous precisely because it was *not* coordinated with or approved by the White House.

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<sup>184</sup> See, for example, Department of Defense, *Directive No 4515.12: DoD Support for Travel of Members and Employees of Congress* \*1–2 (Jan 15, 2010), archived at <http://perma.cc/KHW4-FCSG> (discussing the Defense Department’s support for congressional travel); *Bureau of Legislative Affairs* (US Department of State), archived at <http://perma.cc/46ZN-SGMY> (noting that the Bureau of Legislative Affairs “facilitates Congressional travel to overseas posts for Members and staff”); Scoville, 112 Mich L Rev at 339–40 (cited in note 10) (discussing State Department and Defense Department roles in supporting congressional travel abroad).

<sup>185</sup> *Joint Meeting & Joint Session Addresses* (cited in note 94).

<sup>186</sup> See, for example, Jacob R. Straus, *CRS Insights: Foreign Heads of State Addressing Congress* \*1 (Federation of American Scientists, Feb 27, 2015), archived at <http://perma.cc/8H93-RJ2P> (“[S]ome form of consultation protocol may exist between the executive and legislative branch when foreign leaders visit the United States on official duties and the leader will be invited to speak to Congress. However, no such procedure is codified in law or in House or Senate Rules.”). See also Nakamura, Sullivan, and Fahrenthold, *Republicans Invite Netanyahu* (cited in note 95) (calling the Netanyahu invitation “a departure from normal procedure” because it was not coordinated with the executive branch); *Visits* (US Department of State), archived at <http://perma.cc/9N9A-PQ76> (explaining that the State Department’s Office of the Chief of Protocol “plans, arranges and executes detailed programs for visiting Chiefs of State and Heads of Government”).



Categories 2 and 3 of converse *Youngstown* similarly parallel their regular *Youngstown* counterparts. In converse *Youngstown* Category 2, Congress or the courts engage in direct communications with a foreign government and the president remains silent, neither approving nor disapproving the action. In converse *Youngstown* Category 3, Congress or the courts engage in direct communications with a foreign government, and the executive branch actively opposes or denounces the nonexecutive branch's action.<sup>187</sup> The next Section explores in detail examples of Category 2 and Category 3 and the constitutional questions they raise.

## B. Benefits of the Converse *Youngstown* Framework

The converse *Youngstown* framework provides several advantages over the current ad hoc methods of analyzing instances of congressional and judicial involvement in foreign relations,<sup>188</sup> and it is less susceptible to some of the criticisms lodged against the traditional *Youngstown* framework.

### 1. Captures and encourages initiative.

The converse *Youngstown* framework captures the reality that the scrappiness often attributed to the executive in areas of shared power is not exclusive to that branch. Professor Louis Henkin explained that “[c]oncurrent power often begets a race for initiative and the President will usually ‘get there first.’”<sup>189</sup> But usually is not always, and as the examples in Part II.A show, sometimes Congress or the judiciary “gets there first.”

In *Youngstown* itself, Justice Jackson worried that Congress's power would be overwhelmed by executive initiative. He explained that he had “no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise

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<sup>187</sup> The utility of the converse *Youngstown* framework is not limited to instances of nonexecutive conduct of foreign relations. For examples of additional situations in which the converse *Youngstown* framework could be deployed, see notes 282–84 and accompanying text.

<sup>188</sup> Consider Adrian Vermeule, *Chevron as a Legal Framework* (JOTWELL, Oct 24, 2017), archived at <http://perma.cc/R56T-Z386> (arguing that Justice Jackson's *Youngstown* concurrence “supplied a capacious-but-coordinating legal framework that allows various judges on various occasions to express the major competing concerns about the relationship between legislative and executive power” and that “it has the great virtue of giving [judges] a conceptual structure within which to speak to one another and disagree with each other”).

<sup>189</sup> Henkin, *Foreign Affairs* at 93 (cited in note 1).

and timely in meeting its problems.”<sup>190</sup> He warned that “there was worldly wisdom in the maxim attributed to Napoleon that ‘[t]he tools belong to the man who can use them,’”<sup>191</sup> suggesting that the executive would usually seize and use shared powers. But Congress and the judiciary have proven capable of seizing and using tools at their disposal to assert power in foreign relations.<sup>192</sup>

The converse *Youngstown* framework mandates the identification of constitutional powers (if any) at issue for each branch and weighs competing powers against one another, rather than simply looking to the executive branch powers in play. The addition of converse *Youngstown* to the *Youngstown* landscape ensures that there is a framework for analyzing assertions of power, regardless of which branch is using the tools at its disposal.

In addition, the converse *Youngstown* framework may actually encourage the nonexecutive branches to take the initiative more often. By mandating consideration of any constitutional powers implicated by the nonexecutive branches’ actions, the framework incentivizes those branches to make constitutional arguments. Of course, the executive may object to congressional or judicial actions, but that’s just the start, not the end, of the constitutional analysis for a converse *Youngstown* Category 3 case. Assertion of constitutional authority can play an offensive role in asserting legislative or judicial prerogatives, but also a defensive role, blocking executive claims that the nonexecutive branches have acquiesced in executive dominance over particular issues.

Moreover, even if one president objects to an instance of non-executive initiative, such an aberrational (in the sense of out of line with past presidents) objection may be insufficient to trigger converse *Youngstown* Category 3. Analyses of both historical gloss and acquiescence make related points. As Justice Frankfurter explained in *Youngstown*, historical gloss on the separation of powers comes from “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never

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<sup>190</sup> *Youngstown*, 343 US at 654 (Jackson concurring).

<sup>191</sup> *Id.* (Jackson concurring).

<sup>192</sup> See Transcript of Oral Argument, *Zivotofsky v Clinton*, Docket No 10-699, \*10 (US Nov 7, 2011) (available on Westlaw at 2011 WL 7005874) (reflecting Justice Antonin Scalia’s description of the “usual inter-branch hand wrestling” in which Congress “has an innumerable number of clubs with which to beat the executive”); Bradley and Morrison, 126 Harv L Rev at 457 (cited in note 48) (discussing Jackson’s quotation of Napoleon and noting that the “observation is generalizable to the preservation of executive as well as legislative power”).

before questioned.”<sup>193</sup> When an executive objection to a congressional or judicial practice is instead unsystematic and illustrative of a break with past practice, perhaps the aberrant objection should be disregarded, keeping the nonexecutive branch in converse *Youngstown* Category 2.

Similarly, in assessing how to evaluate one branch’s nonobjection to another’s actions, scholars have argued that acquiescence cannot be inferred from a single instance of nonobjection because “[o]therwise, the outlier decisions of a single administration could change the constitutional order.”<sup>194</sup> Just so. Therefore, if many presidents have explicitly or impliedly approved of a type of nonexecutive foreign relations, then one president’s opposition may be insufficient to move the conduct into Category 3. Aberrant executive objections—especially ones that do not appear to be based on rigorous analysis—should not be sufficient to disrupt prior executive acquiescence to congressional or judicial practice.

For all of these reasons, the converse *Youngstown* framework both captures the initiative that Congress and the judiciary may exercise and incentivizes them to undertake additional actions.<sup>195</sup>

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<sup>193</sup> *Youngstown*, 343 US at 610 (Frankfurter concurring). See also 18 Op Off Legal Counsel at 178 (cited in note 43) (“[A] pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of a broad constitutional power.’”), quoting Office of Legal Counsel, *Presidential Power to Use the Armed Forces Abroad without Statutory Authorization*, 4A Op Off Legal Counsel 185, 187 (Feb 12, 1980).

<sup>194</sup> Bradley and Morrison, 126 Harv L Rev at 454 (cited in note 48).

<sup>195</sup> A similar argument may apply to state initiatives with respect to foreign relations, which are becoming increasingly frequent in the Trump era. Although the primary legal framework for assessing the permissibility of states’ actions is preemption, the Supreme Court in preemption cases has considered the extent to which the federal government is unified or divided over the potentially preemptive federal policy or action. For example, in *Crosby v National Foreign Trade Council*, 530 US 363 (2000), the Court relied on the fact that the president was acting in *Youngstown* Category 1—with Congress’s approval—in imposing sanctions on Burma as a reason to find that stricter Massachusetts sanctions were obstacle preempted. *Id.* at 375–77. In other words, the fact that Congress and the president agreed caused the Court to increase the scope of federal preemption vis-à-vis the states. Similar reasoning may apply to Category 3 cases in either the classic *Youngstown* or converse *Youngstown* frameworks: if Congress and the president disagree, courts may use the disagreement as a justification for finding a narrower scope for federal preemption, leaving states with more freedom to act. This possibility is a reason for Congress to disagree with President Trump—and to do so vocally—on issues like withdrawal from the Paris Climate Agreement. See, for example, Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement* (NY Times, June 1, 2017), online at <http://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> (visited Feb 7, 2018) (Perma archive unavailable). Even if Congress’s opposition does not stop the presidential action, it might have the more indirect effect of shrinking the preemptive scope of federal power to allow state initiatives to proceed. See, for example, Hiroko Tabuchi and Henry Fountain, *Bucking Trump, These Cities, States, and Companies Commit to Paris*

## 2. Decreases indeterminacy.

The converse *Youngstown* framework avoids some of the pitfalls that critics observe in the traditional *Youngstown* framework. In particular, converse *Youngstown* decreases, though does not eliminate, the indeterminacy that dogs traditional *Youngstown* analysis.

Critics have assailed *Youngstown* for being indeterminate on at least two dimensions.<sup>196</sup> Professor Tribe recently highlighted indeterminacy in *Youngstown* Category 2, calling “the nearly sacrosanct triptych [ ] deeply ambiguous on the key question of what to make of congressional silence.”<sup>197</sup> Tribe argues that *Youngstown* fails to provide a

normative framework for deciding: (1) which kinds of presidential action in the relevant sphere are void unless plainly authorized by Congress *ex ante*; (2) which are valid unless plainly prohibited by Congress *ex ante*; and (3) which are of uncertain validity when Congress has been essentially “silent” on the matter although dropping hints about its supposed “will.”<sup>198</sup>

The converse *Youngstown* framework is less susceptible to indeterminacy in Category 2. The differences between *Youngstown* and converse *Youngstown* on this score stem from the differing institutional features of the counterparty branch in each framework. In traditional *Youngstown*, the executive acts, and then the question is what position, if any, has Congress (the counterparty) taken. Very often Congress is silent, and that silence may be attributable to a variety of factors. Congressional silence may indicate congressional acquiescence in the executive’s claim of

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*Accord* (NY Times, June 1, 2017), online at <http://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html> (visited Feb 7, 2018) (Perma archive unavailable). I plan to explore further the federalism implications of *Youngstown* and converse *Youngstown* in future work.

<sup>196</sup> Henkin adds perhaps a third type of indeterminacy critique in arguing that “Justice Jackson did not tell us, or offer a principle that might help us determine, which powers are concurrent.” Henkin, *Foreign Affairs* at 95 (cited in note 1). This argument may demand unnecessary work from the *Youngstown* framework. The question of which powers are concurrent can be answered by looking to constitutional text, historical practice, or the claims of competing branches. The *Youngstown* framework is needed to help adjudicate competing claims to power, not to identify such competing claims in the first instance.

<sup>197</sup> Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 Yale L J F 86, 91 (2016).

<sup>198</sup> *Id.* at 92.

power.<sup>199</sup> But structural features of the legislative branch, rather than considered congressional agreement with the executive, may often explain congressional silence.<sup>200</sup> “Structural [i]mpediments to [c]ongressional [a]ction,” including voting rules and veto gates, make it difficult for Congress to pass legislation to counter executive initiative.<sup>201</sup> Moreover, collective-action problems limit the incentives for individual congressmen to act to protect the prerogatives of the institution because the benefits of such action inure to Congress as a whole, rather than to the individual legislator.<sup>202</sup> These features do not suggest that Congress is impotent to check claims of executive power,<sup>203</sup> just that Congress often will not formally act to approve or disapprove of executive action. Congressional failure to act—whether out of agreement or inertia—causes cases of contested power to be in the indeterminate Category 2.

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<sup>199</sup> See Henkin, *Foreign Affairs* at 93 (cited in note 1) (“When the President acts and Congress is silent, there is often a justifiable presumption that Congress has acquiesced in, even approved, what the President has done; if so, the action can be seen as supported by the constitutional powers of both branches.”); Bradley and Morrison, 126 *Harv L Rev* at 433–36 (cited in note 48) (distinguishing between acquiescence as implicit agreement by Congress to the executive claim and acquiescence as waiver of Congress’s powers).

<sup>200</sup> See Terry M. Moe and William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J L, Econ & Org* 132, 140 (1999) (“Congress is burdened by collective action problems and heavy transaction costs that make it extremely difficult for that institution to fashion a timely, coherent response to presidential action, or even to respond at all.”).

<sup>201</sup> Bradley and Morrison, 126 *Harv L Rev* at 440 (cited in note 48).

<sup>202</sup> See, for example, *id.* (noting that “[b]ecause Congress is a plural body,” all members of Congress “benefit from the protection and enhancement of legislative authority even if some of them do not contribute to the effort,” and therefore that “each individual member has relatively little incentive to expend resources trying to increase or defend congressional power, since he or she will not be able to capture most of the gains”); Moe and Howell, 15 *J L, Econ & Org* at 144 (cited in note 200) (explaining that congressmen, each motivated to secure their own reelection, “are trapped in a prisoners’ dilemma: all might benefit if they could cooperate in defending or advancing Congress’s power, but each has a strong incentive to free ride in favor of the local constituency”).

<sup>203</sup> For example, Congress has less formal tools, such as “oversight hearings, non-binding resolutions, the threat of contempt proceedings, and public disclosure of information,” which “are not subject to the collective action problems that beset the formal legislative process.” Bradley and Morrison, 126 *Harv L Rev* at 446 (cited in note 48). Professors Bradley and Morrison argue that these less formal options for expressing congressional disapproval of executive action should be taken into account in *Youngstown* analysis and that doing so would reduce the number of cases in which interpreters try to draw meaning from silence. *Id.* at 451 (“[I]nclud[ing] a wider array of congressional responses to executive action will substantially shrink the universe of cases where Congress can truly be said to have remained silent, which will in turn shrink the number of cases drawing inferences from such silence. That is all to the good.”).

The converse *Youngstown* framework is less susceptible to this concern because it posits that the governmental actor is either Congress or the courts, which thereby casts the executive in the role of counterparty. The executive is very differently structured and incentivized than Congress.<sup>204</sup> The executive, by design, is comparatively more nimble than Congress and can act quickly.<sup>205</sup> The unitary nature of the executive ensures that it does not suffer from the same collective-action problems that restrain congressional action and that the executive captures the benefits of expending capital on protecting the branch's institutional prerogatives, making it more likely to do so.<sup>206</sup> These features mean that the executive is much more likely than Congress to (re)act when its powers are challenged.<sup>207</sup> In converse *Youngstown* situations, executive silence will be rare,<sup>208</sup> which means far fewer Category 2 cases than traditional *Youngstown* and thus less indeterminacy.<sup>209</sup>

Converse *Youngstown* not only decreases indeterminacy by limiting the number of Category 2 cases; it also clarifies the import of those Category 2 cases that do occur. As noted above,

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<sup>204</sup> See *id.* at 439–40 (“Congress and the President are not equally situated in their ability to take action.”).

<sup>205</sup> See, for example, Edward S. Corwin, *The President: Office and Powers* 200 (NYU 2d ed 1941) (noting that in the “struggle for the privilege of directing American foreign policy . . . the President has . . . certain great advantages,” including “the *unity* of the office, its capacity for *secrecy* and *despatch*,” and “the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time”).

<sup>206</sup> See Bradley and Morrison, 126 Harv L Rev at 452 (cited in note 48) (“The executive branch faces fewer collective action and veto obstacles than does Congress, and thus it is easier for the President and those serving under him to take legally consequential steps to protect executive prerogatives.”); Moe and Howell, 15 J L, Econ & Org at 144–45 (cited in note 200) (explaining that “Presidents are not hobbled by” the collective-action problems that plague Congress and that “not only is the presidency a unitary institution with the capacity for coherent action, but there is also substantial congruence between the president’s individual interests and the interests of the institution”).

<sup>207</sup> See Moe and Howell, 15 J L, Econ & Org at 145 (cited in note 200) (noting a “fundamental imbalance” in which “Presidents have both the will and the capacity to promote the power of their own institution, but individual legislators have neither and cannot be expected to promote the power of Congress as a whole in any coherent, forceful way”).

<sup>208</sup> Henkin, *Foreign Affairs* at 93 (cited in note 1) (“A President is less likely to remain silent when Congress acts in what he considers his domain.”).

<sup>209</sup> Category 2 cases are, of course, still possible. The “Dear Comandante” letter may be an example. The Reagan administration apparently offered no official statement for more than a year, at which point the secretary of state condemned the letter before repudiating the criticism later the same day. See notes 147–53 and accompanying text. See also notes 68–72 and accompanying text (discussing the routine filings by foreign sovereigns as parties in cases before US courts—filings that do not typically occasion endorsement or objection by the executive).

traditional *Youngstown* Category 2 cases involve congressional silence, and “assigning interpretive consequences to congressional silence or inaction is perilous at best” because congressional silence may indicate agreement or simply reflect inertia.<sup>210</sup> In converse *Youngstown* Category 2, the silence is executive, not congressional, and executive silence is arguably more meaningful. Because the executive does not have the structural impediments to action and collective-action problems that Congress does, inertia is less likely to be the cause of executive silence. In other words, because it is so (comparatively) easy for the executive to speak and to disapprove the actions of the other branches,<sup>211</sup> executive silence is more likely to indicate meaningful agreement with (or at least nonobjection to) the acting branch’s claim of authority.<sup>212</sup> Understanding executive silence in converse *Youngstown* as more communicative than congressional silence in traditional *Youngstown* further limits indeterminacy in Category 2.

Although converse *Youngstown* mitigates the Category 2 indeterminacy critique, that’s not the only indeterminacy problem with *Youngstown*. Commentators have raised a separate critique of indeterminacy in Category 3 cases, when the president acts in opposition to the expressed will of Congress. Henkin noted that in Category 3, “Jackson[’s] ‘arithmetic’” does not “suggest which

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<sup>210</sup> Bradley and Morrison, 126 Harv L Rev at 451 (cited in note 48).

<sup>211</sup> To object to legislation, for example, the president may exercise the veto, express concerns in a signing statement, or “publicly refus[e] to enforce or comply with the statute,” and “[p]residential administrations regularly avail themselves of one or more of these means, on the understanding that failure to do so could be taken as acquiescence.” Id at 452–53 (cited in note 48). The president can also object to nonlegislative congressional or judicial actions in other ways, such as in public statements. See, for example, Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 BU L Rev 109, 140 (1984) (arguing that the president can object to congressional actions through “[p]ress releases, statements made upon signing or vetoing of a bill, [ ] statements made during a press conference,” or statements by other executive officials that are attributable to the president).

<sup>212</sup> See Henkin, *Foreign Affairs* at 93 (cited in note 1) (arguing that while executive silence is less likely than congressional silence, a president’s “failure to veto Congressional legislation or to protest other Congressional initiatives might also imply acquiescence and mute any objection that Congress lacks constitutional authority”); Bradley and Morrison, 126 Harv L Rev at 454 (cited in note 48) (arguing that “[e]xecutive silence . . . should generally carry greater weight than congressional silence” because executive-branch actors can easily object and they “understand that failure to object to legislative limits on executive authority may be treated as accepting their constitutionality”).

branch prevails in case of conflict between them.”<sup>213</sup> A fairer description might be that Jackson does suggest, but does not settle, which branch should prevail in Category 3.

Prior to *Zivotofsky II*, Category 3 was understood to include a strong presumption that the president loses, something akin to the maxim that in other constitutional contexts “strict scrutiny” is “‘strict’ in theory and fatal in fact.”<sup>214</sup> Category 3 might have been glossed as presumption in theory, fatal in fact.<sup>215</sup> But that changed in *Zivotofsky II* when, for the first time, the Supreme Court upheld a presidential action in foreign relations that contravened a statute.<sup>216</sup> Prior to the Court’s decision, Category 3 indeterminacy was more hypothetical than actual. But *Zivotofsky II*’s holding brings to the fore the Category 3 indeterminacy inherent in the original *Youngstown* framework.<sup>217</sup>

Converse *Youngstown* largely mirrors the Category 3 indeterminacy issue from *Youngstown*. In the foreign relations context and in the wake of *Zivotofsky II*, however, Category 3 in converse *Youngstown* may be slightly less indeterminate. Converse *Youngstown* Category 3 does not arithmetically resolve which branch should prevail, but like *Youngstown*, it implies a presumption that the acting branch—Congress or the courts—will lose when faced with opposition from the counterparty (the executive). Category 3 in both frameworks at least starts with a presumption, making it more determinate than Category 2, which in classic *Youngstown* puts no thumb on the scale for either branch.

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<sup>213</sup> Henkin, *Foreign Affairs* at 95 (cited in note 1).

<sup>214</sup> Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972). See also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand L Rev 793, 794–95 (2006) (noting that Professor Gerald Gunther coined the phrase).

<sup>215</sup> See Swaine, 83 S Cal L Rev at 311 (cited in note 18) (calling Category 3 “practically a death knell for executive branch action”).

<sup>216</sup> See *Zivotofsky II*, 135 S Ct at 2113 (Roberts dissenting) (“For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.”); id at 2116 (Roberts dissenting) (arguing that the Court’s ruling for the president “takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs”).

<sup>217</sup> This indeterminacy bespeaks yet another similarity to the strict scrutiny framework: despite the popularity of the “fatal in fact” label, Professor Adam Winkler has shown that in practice “strict scrutiny is survivable in fact,” with “30 percent of all applications of strict scrutiny . . . result[ing] in the challenged law being upheld.” Winkler, 59 Vand L Rev at 796 (cited in note 214). Just so with presidential actions in Category 3, per *Zivotofsky II*.



In some cases, however, the presumption of congressional or judicial loss in converse *Youngstown* Category 3 cases may be somewhat stronger than the presumption of executive loss in classic *Youngstown* Category 3. In converse *Youngstown* Category 3, the presumptive winner is the executive, whose power over recognition decisions the Supreme Court recognized to be exclusive in *Zivotofsky II*.<sup>218</sup> For nonexecutive foreign relations scenarios in which the executive power at issue is recognition, therefore, it will be difficult for Congress or the courts (the presumptive losers) to overcome the presumption that the executive should prevail. In other words, converse *Youngstown* does not solve the Category 3 indeterminacy problem, but for certain foreign relations cases, it does align the presumption about which branch prevails with the executive, who the Supreme Court has held has at least one exclusive power related to foreign relations.

### 3. Simplifies constitutional analysis.

By taking into account the relative position of the executive branch as to the actions by the nonexecutive branch, the converse *Youngstown* framework simplifies the constitutional analysis.

The simplification of the constitutional analysis is particularly apparent with respect to cases in converse *Youngstown* Category 1. Instead of asking whether the nonexecutive branch has the constitutional authority to take the action it has taken, the converse *Youngstown* framework asks whether the nonexecutive branch plus the executive branch (which has approved the nonexecutive branch's action) have the constitutional authority. The nonexecutive branch does not have to prevail based on the strength of its own power alone; rather, it benefits from the boost provided by executive approval.

Different theories could explain the nature of the constitutional boost provided by the executive's approval. Presidential approval could be considered a delegation to the nonexecutive branch,<sup>219</sup> such that congressional or judicial communications to

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<sup>218</sup> See note 35 and accompanying text.

<sup>219</sup> In the traditional *Youngstown* context, Jackson described Category 1 as involving a congressional delegation to the president. See *Youngstown*, 343 US at 635 (Jackson concurring) (arguing that in Category 1, the president's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate").

foreign governments would effectively represent exercises of delegated executive power.<sup>220</sup> Alternatively, executive approval may suggest that preexisting congressional or judicial power should be construed broadly. Presidential endorsement demonstrates that the nonexecutive branch's actions are helpful to or desired by the executive, and thus that any concern about the nonexecutive branches' infringement on executive power would be misplaced, opening the door to reading whatever power the nonexecutive branch possesses to its outer limits.

Regardless of the precise explanation, long-standing practice supports the executive effectively deputizing members of the other branches.<sup>221</sup> "[T]hroughout American history," members of Congress "have served as members of or advisers to the U.S. delegation negotiating a treaty."<sup>222</sup> For example, President William McKinley "appointed three Senators to a commission to negotiate a treaty with Spain" in 1898,<sup>223</sup> and fully half of the members of the US delegation to the San Francisco Conference to negotiate the UN Charter were sitting members of Congress.<sup>224</sup> The executive's occasional decision to include congressmen in treaty negotiations is "now common and no longer challenged."<sup>225</sup> The same logic can justify, for example, senators' and representatives' more ad hoc interactions with foreign officials while traveling abroad.

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<sup>220</sup> See, for example, Scoville, 112 Mich L Rev at 377 (cited in note 10) (arguing that Article II "empowers the president to delegate executive power to members of the House and Senate so that they can act on his behalf").

<sup>221</sup> For examples from the judiciary, see *id.* at 379 (arguing that "official practice strongly suggests that horizontal executive delegation is permissible" and providing examples of presidents tasking Supreme Court justices to foreign relations-related activities, such as Jackson's service as the chief US prosecutor at the Nuremberg trials). For congressional examples, see notes 223–25 and accompanying text.

<sup>222</sup> *Treaties and Other International Agreements: The Role of the United States Senate*, S Prt No 106-71, 106th Cong, 2d Sess 109 (2001).

<sup>223</sup> *Id.*

<sup>224</sup> See *id.* at 109–10 (detailing this and numerous other examples). See also Louis Fisher, "The Law": *Treaty Negotiation; A Presidential Monopoly?*, 38 Pres Stud Q 144, 151–52 (2008) (recounting numerous examples of congressmen serving as members of or advisers to treaty-negotiating delegations).

<sup>225</sup> Henkin, *Foreign Affairs* at 178 (cited in note 1). See also *id.* at 82 & n \* (cited in note 1) (noting that appointing congressmen to delegations to international conferences "no longer raises constitutional questions under Art. 1, sec. 6, cl. 2"). This is so despite earlier questions about the practice's conformity with the Constitution's Incompatibility Clause. See US Const Art I, § 6, cl 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). See also Henkin, *Foreign Affairs* at 178 & n \*\* (cited in note 1) (detailing earlier examples of Incompatibility Clause controversies).

Accounting for the confluence of the executive and nonexecutive branches' authority allows adjudicators of the constitutional question, whether legislators, judges, or executive officials, to engage in constitutional avoidance. As the Supreme Court has explained, "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."<sup>226</sup> Converse *Youngstown* renders some constitutional adjudications avoidable for Category 1 cases. In particular, the converse *Youngstown* framework makes it unnecessary to decide the precise scope of the nonexecutive branch's power so long as the executive's power alone or a broad understanding of the nonexecutive branch's power is sufficient to surpass the constitutional threshold.

Take, for example, routine invitations for foreign leaders to address Congress. These invitations are typically done with the approval of and in coordination with the executive branch. For such coordinated invitations, the constitutional analysis is simple: assuming the president's power to receive ambassadors covers inviting a foreign leader to come to the United States, and Congress agrees to hear the leader's remarks, then there is no need to assess the magnitude of Congress's independent power to invite and hear from a foreign leader or to do so over the objections of the executive branch.

A similar analysis applies for routine congressional travel abroad. The executive branch approves explicitly, or at least implicitly, the legislators' travel by providing transportation, coordinating meetings, and supplying other types of support.<sup>227</sup> So long as the executive branch's power alone provides sufficient constitutional justification for having US citizens meet with foreign government representatives, there is no need to determine what (if any) independent power Congress has to conduct the activities.

Consider also the Supreme Court's instigation of the shift from foreign sovereigns filing diplomatic notes to filing amicus briefs. This is a Category 1 case because the executive agreed to

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<sup>226</sup> *Spector Motor Service, Inc v McLaughlin*, 323 US 101, 105 (1944). See also *Department of Commerce v United States House of Representatives*, 525 US 316, 343–44 (1999) (declining to reach the constitutional question presented due to the doctrine of constitutional avoidance); Richard H. Fallon Jr, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 77–81 (West 7th ed 2015) (discussing constitutional avoidance).

<sup>227</sup> See Scoville, 112 Mich L Rev at 339–40 (cited in note 10) (discussing executive-branch support for congressional travel to foreign countries). See also note 184 and accompanying text.

the Supreme Court's determination that foreign sovereign views should no longer be communicated via diplomatic notes.<sup>228</sup> The executive chose how to respond to the letter from the Supreme Court clerk indicating that the diplomatic-note practice was contrary to the Court's rules, and in acceding to the Court's letter, the executive actually went beyond the letter, declaring that not only would it cease transmitting diplomatic notes to the Supreme Court, but it would also cease transmitting them to courts of appeals and eventually district courts as well.<sup>229</sup> Because the Court and the executive agreed, so long as the executive's power to communicate with foreign governments, considered in isolation, is sufficient to support the shift from diplomatic notes to amicus briefs, there is no need to determine whether the Supreme Court would have had independent constitutional authority to effectuate the shift.

As these examples illustrate, by situating the nonexecutive foreign relations analysis within a framework that explicitly accounts for the combined power of the executive and nonexecutive branches, the converse *Youngstown* analysis allows adjudicators, in the words of Justice Louis Brandeis, to avoid "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it."<sup>230</sup> Nailing down the independent powers of each branch is necessary for Category 2 and 3 cases, but not for Category 1 cases. Converse *Youngstown* thereby helps to explain why easy cases are easy and to make some cases easier by rendering some constitutional holdings avoidable.<sup>231</sup>

Before turning to Category 3 cases, an important caveat is worth highlighting. The discussion of converse Category 1 cases does not imply that if Congress or the courts receive executive

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<sup>228</sup> See notes 77–83 and accompanying text.

<sup>229</sup> See notes 89–91 and accompanying text.

<sup>230</sup> *Ashwander v Tennessee Valley Authority*, 297 US 288, 346–47 (1936) (Brandeis concurring). See also Fallon, et al, *Hart and Wechsler's The Federal Courts* at 77 (cited in note 226) (calling Brandeis's concurrence the "nearly canonical citation for the avoidance doctrine").

<sup>231</sup> It is perhaps useful to note that the converse *Youngstown* framework would not prohibit adjudicators from assessing the power of each branch; it merely means that they do not *have to* for Category 1 cases. Providing adjudicators the discretion to address whichever question is easier—the power of each branch separately or the combined power of the branches—is consistent with, for example, the Supreme Court's shift in qualified immunity jurisprudence to give courts discretion over the ordering of determinations about whether a constitutional violation occurred and whether the right violated was clearly established. See *Pearson v Callahan*, 555 US 223, 242 (2009) ("Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.").

support, they can do anything. As in traditional *Youngstown* Category 1, the branches' actions even—or perhaps especially—when they agree are cabined by constitutional limits, including protections for individual rights. However, in the foreign relations context in which both *Youngstown* and converse *Youngstown* would most often be deployed, the interests at stake are typically the powers of coordinate branches of government, not the rights of individuals.<sup>232</sup>

Although the converse *Youngstown* framework does not eliminate Category 3 indeterminacy, it nonetheless adds value by channeling the analysis of competing powers in circumstances in which the executive objects to congressional or judicial conduct of foreign relations. Like traditional *Youngstown*, converse *Youngstown* does not answer the question of how to determine whether there are competing powers at issue, but once claims of competing power are made, both frameworks provide a presumptive prevailing branch and thereby frame the analysis.

In describing Category 3 in his *Youngstown* concurrence, Jackson appears to suggest two alternative—though related—analyses. The first is an arithmetic weighing up of the competing powers that instructs that the president can prevail when “his own constitutional powers minus any constitutional powers of Congress over the matter” generates a positive result.<sup>233</sup> The second formulation instructs that “[c]ourts can sustain *exclusive* Presidential control in such a case only by disabling the Congress from acting upon the subject.”<sup>234</sup> This second formulation may simply be a special application of the arithmetical formula: a power of the president minus an erroneously claimed power of Congress results in a power of the president and thus a presidential win.

The second formulation—the exclusive formulation—may be the one appropriate for easy Category 3 cases—that is, those in which Congress lacks the power it claims. This would explain the Supreme Court’s formulation of Category 3 in *Zivotofsky II*. There, Justice Anthony Kennedy’s opinion for the Court explained that “[t]o succeed in this third category, the President’s

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<sup>232</sup> See Bradley and Morrison, 126 Harv L Rev at 416–17 (cited in note 48) (arguing in the related context of assessments of historical practice that “[h]istorical practice in the separation of powers context is distinctive [ ] in that it generally involves conduct by one political branch implicating the interests and prerogatives of the other,” rather than individual rights).

<sup>233</sup> *Youngstown*, 343 US at 637 (Jackson concurring).

<sup>234</sup> *Id.* at 637–38 (Jackson concurring) (emphasis added).

asserted power must be both ‘exclusive’ and ‘conclusive’ on the issue.”<sup>235</sup> The Court went on to hold for the president—despite Congress’s opposition—on the ground that “Congress . . . has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”<sup>236</sup> In the Court’s framing, at least, *Zivotofsky II* was an easy Category 3 case: the president’s recognition power was exclusive, so there was no congressional power to subtract. The result would have been the same, regardless of which verbal formulation of Category 3 the Court employed. The two formulations of Category 3 are not, however, interchangeable for “hard” Category 3 cases: those in which competing branches each possess some competing powers and deploy their powers in opposition to one another.

For purposes of converse *Youngstown*, the arithmetic formulation gains increased importance. Because converse *Youngstown* casts the executive in the role of counterparty, there are unlikely to be many easy Category 3 cases. It would be a rare case in which the executive would be entirely “disable[ed] . . . from acting upon the subject” when the subject touches on foreign relations.<sup>237</sup> If the totally disabled formulation were the only understanding of Category 3, then converse *Youngstown* would suggest that Congress or the courts would always lose Category 3 cases because the executive would have *some* power to act upon the subject. The arithmetic formulation, however, includes greater flexibility and better captures the likely scenario in foreign relations cases—that such cases will often be hard cases in which both the executive and the nonexecutive branch have some power.

*Zivotofsky II* did not have to confront the complexities of the arithmetical formulation because it held that Congress had no power over recognition. In making this “easy” Category 3 holding, however, the Court provided some guidance on the antecedent question of the scope of executive and congressional powers in foreign relations. The United States argued that “the President has ‘exclusive authority to conduct diplomatic relations,’ along with ‘the bulk of foreign-affairs powers,’”<sup>238</sup> citing *Curtiss-Wright Export Corp.*<sup>239</sup> The Court pointedly “decline[d] to acknowledge

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<sup>235</sup> *Zivotofsky II*, 135 S Ct at 2084.

<sup>236</sup> *Id* at 2086.

<sup>237</sup> *Youngstown*, 343 US at 637–38 (Jackson concurring).

<sup>238</sup> *Zivotofsky II*, 135 S Ct at 2089, quoting Brief for Respondent, *Zivotofsky v Kerry*, Docket No 13-628, \*16, 18 (US filed Sept 22, 2014) (available on Westlaw at 2014 WL 4726506).

<sup>239</sup> *Curtiss-Wright Export Corp.*, 299 US at 320.

that unbounded power”<sup>240</sup> and instead emphasized that Congress retains important authorities over foreign relations:

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation’s foreign policy.<sup>241</sup>

*Zivotofsky II* is at once a strong executive-power holding because the president prevailed in Category 3, but also an executive-power defeat because of its explicit rejection of the executive’s broader claim of exclusive power over foreign relations.

For purposes of converse *Youngstown* analysis, although *Zivotofsky II* relied on the “totally disabled” formulation of Category 3, the Court also suggested that outside the recognition context, it remains open to claims of foreign relations power by the nonexecutive branches. Nonexecutive foreign relations cases, therefore, are likely to be “hard” Category 3 cases in which branches have competing claims of power, requiring an arithmetic resolution.<sup>242</sup>

Although the converse *Youngstown* framework does not resolve the Category 3 indeterminacy inherent in the *Youngstown* framework, it can at least help to move beyond the mere identification of branches’ competing claims to authority to a regularized analysis. Ultimately, the resolution of Category 3 cases will be fact specific and may often depend on one’s view of the underlying constitutional powers and appropriate methods of constitutional interpretation. On hard Category 3 cases in both *Youngstown* and converse *Youngstown*, reasonable minds may differ on the outcome.

Three examples—two actual and one hypothetical—can help to illustrate the utility and limits of the converse *Youngstown* framework for Category 3 cases. The Cotton letter and the

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<sup>240</sup> *Zivotofsky II*, 135 S Ct at 2089.

<sup>241</sup> *Id* at 2090 (citations omitted).

<sup>242</sup> See Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 67 (Yale 1990) (arguing that with respect to foreign affairs powers, the Constitution “frequently . . . grants clearly related powers to separate institutions, without ever specifying the relationship between those powers. . . . Most often, the text simply says nothing about who controls certain domains”).

Netanyahu invitation are Category 3 cases. In both instances, Congress or a meaningful subset of Congress<sup>243</sup> engaged directly with foreign government officials, and the president expressly disapproved. The hypothetical example is a reimagining of the Supreme Court's instigation of the shift from foreign governments filing diplomatic notes to filing amicus briefs, but one in which instead of going along with and expanding on the Supreme Court's desire not to receive diplomatic notes, the executive branch disagreed and attempted to continue filing diplomatic notes on behalf of foreign governments.

Taking first the Cotton letter, the converse *Youngstown* framework instructs that the first step is identification of competing constitutional powers. On the executive-branch side, two powers may be implicated. The first is the general implied power to conduct foreign relations, stemming from the president's constitutional authority to "receive Ambassadors and other public Ministers."<sup>244</sup> Most legal commentators who have considered the Cotton letter's constitutional implications focus on potential interference with this presidential power.<sup>245</sup> A similar interference argument could be made with respect to the president's power to "make Treaties" with the advice and consent of two-thirds of the Senate.<sup>246</sup> Although the Iran agreement was ultimately concluded as a political commitment,<sup>247</sup> not an Article II treaty, there was

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<sup>243</sup> The inclusion of the Cotton letter as an example of nonexecutive conduct of foreign relations could be challenged on several grounds. First, the letter was signed by forty-seven Republican senators and did not claim to speak for the Senate as a whole. Second, the letter did not purport to speak for the United States—an action that would have been a clear subversion of the president's authority to conduct foreign relations. Rather, the letter purported simply to provide information about the US constitutional system that Iran "should seriously consider as negotiations progress." Cotton, et al, Open Letter (cited in note 128). See also Ku, *47 US Senators Send Iran's Leader an Unnecessary(?) Primer on How US Constitution Works* (cited in note 143). On the other hand, as to the first point, the letter was signed and sent on behalf of a group of senators sufficient to block adoption of an agreement with Iran as either an Article II treaty or a congressional-executive agreement (given the filibuster), making the group a potentially constitutionally significant bloc. See note 55 and accompanying text. And on the second point, the letter was apparently intended to and was understood as an attempt to interfere in ongoing negotiation of an agreement with Iran, which suggests an intent to interfere with the president's authority to negotiate on behalf of the United States. On balance, although some might argue against inclusion of the Cotton letter as an example of nonexecutive conduct of foreign relations, the question is sufficiently close that I have included the example for purposes of discussion.

<sup>244</sup> US Const Art II, § 3.

<sup>245</sup> See notes 141–46 and accompanying text.

<sup>246</sup> US Const Art II, § 2, cl 2.

<sup>247</sup> Letter from Julia Frifield, Assistant Secretary for Legislative Affairs, US Department of State to Representative Mike Pompeo \*1 (Nov 19, 2015), archived at



ambiguity on the agreement's form when the senators sent the Cotton letter.<sup>248</sup> The president's authority to "make Treaties" is understood to include implied authority to negotiate them,<sup>249</sup> and thus the Cotton letter arguably could be understood as an interference with the president's negotiating authority, in addition to interference with the president's authority to communicate with foreign governments more generally.

With the presidential authorities on one side, the congressional side of the equation is more problematic. The Cotton letter itself does not purport to invoke any constitutional authority. The strongest possible argument would stem from the Senate's role in advising and consenting to treaties,<sup>250</sup> but even as to that clear textual power, the justification for transmitting the Cotton letter to a *foreign* government's executive branch is not clear.<sup>251</sup> Traditionally, the Senate's role has not extended to involvement in negotiations,<sup>252</sup> which are left to the president, with the Senate (or

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<http://perma.cc/C32V-LKYK> ("The Joint Comprehensive Plan of Action (JCPOA) is not a treaty or an executive agreement. . . . The JCPOA reflects political commitments between Iran, the P5+1 (the United States, the United Kingdom, France, Germany, Russia, China), and the European Union."). See also Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 *Harv Intl L J* 455, 465–66 (2016) (discussing the status of the Iran deal as a political commitment).

<sup>248</sup> For an overview of contemporaneous debates about the status of the Iran deal, see Stephen Collison, *Iran Deal: A Treaty or Not a Treaty, That Is the Question* (CNN, Mar 12, 2015), archived at <http://perma.cc/49XE-MHQ7>; Carol Morello, *In Iran Nuclear Talks, It's All in a Name* (Wash Post, Mar 12, 2015), archived at <http://perma.cc/VSU9-9E9T> (collecting disparate views).

<sup>249</sup> See, for example, *Treaties and Other International Agreements* at 6 (cited in note 222) ("The first phase of treaty-making, negotiation and conclusion, is widely considered an exclusive prerogative of the President except for making appointments which require the advice and consent of the Senate."); *id.* at 97–98 (locating the president's implied power to negotiate international agreements in the Article II, § 2 power to "make Treaties," as well as the president's powers to appoint and receive ambassadors and the Article II, § 1 vesting clause).

<sup>250</sup> US Const Art II, § 2, cl 2 ("[The president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

<sup>251</sup> See Henkin, *Foreign Affairs* at 81 (cited in note 1) (drawing a constitutional distinction between sense-of-Congress resolutions about international issues and "Congressional resolutions directly addressed to foreign governments," which are "technically objectionable" because of the president's status as the "sole organ of communication with foreign governments").

<sup>252</sup> See *Treaties and Other International Agreements* at 2–3, 27–38 (cited in note 222) (discussing the evolution of the Senate's role with respect to treaty negotiation). One prominent historical episode deviates from the Senate's traditional noninvolvement prior to advising and consenting to a negotiated agreement. In 1789, President Washington personally went to the Senate to consult on "the terms of a treaty to be negotiated with the Southern Indians." *Id.* at 33. The consultations went so badly that they are "famous as the first and last times that a President personally appeared before the Senate to seek its

Congress as a whole in the case of congressional-executive agreements) weighing in on a proposed treaty text after it has been negotiated.<sup>253</sup> Alternatively, the senators might have argued that they were seeking to protect the Senate's interest in ensuring that the Iran agreement was concluded as an Article II treaty so that the Senate would have the opportunity to advise and consent (or not) to the deal. Assuming such a penumbral power exists, there may be permissible and impermissible ways to exercise it. Such an argument, for example, could support sending something like the Cotton letter to the US executive branch as part of the routine sparring among the branches about the scope of executive and congressional power. The Senate's power to advise and consent to treaties, however, does not obviously indicate as a matter of text or history any congressional authority to communicate with foreign powers negotiating with the US executive branch.

Deploying the arithmetic approach, Congress and the subset of senators who sent the Cotton letter appear to have little constitutional power to support their actions and in fact invoked none. Subtracting the president's substantial foreign relations and treaty-negotiating powers from the baseline of minimal congressional authority results in a loss for Congress. This may be a common result for the instances of nonexecutive foreign relations described as "outbound" in Part I. The implied power of the president to engage in direct communications with foreign governments will be present in all such circumstances, and neither Congress nor the courts have a clear constitutional power to transmit messages to foreign governments unless potentially acting at the direction of the executive (which would be Category 1, not Category 3) or, in the case of the courts, engaging in routine communications with foreign sovereigns who are parties in cases before the courts.

Although finding constitutional footing for outbound non-executive foreign relations may often be difficult,<sup>254</sup> instances

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advice and consent." *Id.* See also Chafetz, *Congress's Constitution* at 281 (cited in note 142) (describing the incident with an emphasis on how a senator used procedural mechanisms to frustrate Washington).

<sup>253</sup> See *Treaties and Other International Agreements* at 3 (cited in note 222) ("Although Senators sometimes play a part in the initiation or development of a treaty, the Senate role now is primarily to pass judgment on whether completed treaties should be ratified by the United States.").

<sup>254</sup> To be sure, congresspersons have other avenues that do not involve direct communications to foreign governments to express their views on foreign policy issues. They can, for example, make statements on the House or Senate floor, issue press releases, give

involving inbound nonexecutive foreign relations—*receipt* by Congress or the courts of direct communications from foreign governments—find firmer constitutional footing, as illustrated by the next two examples.

The Netanyahu address to Congress presents a more complex question for the Category 3 analysis. As explained in Part II, the Netanyahu example is mixed inbound/outbound nonexecutive foreign relations: the invitation from Speaker Boehner to Netanyahu was an outbound communication conveying a message—an invitation—to Netanyahu, but Netanyahu’s speech itself was inbound nonexecutive foreign relations, delivery of a message from a foreign government to Congress. The characteristics of inbound nonexecutive foreign relations, however, dominate this case. The outbound communication was incidental to the inbound communication and did not purport to convey substantive policy messages, though of course the sending of the invitation at all did communicate a message of willingness to engage with Netanyahu at a time when the executive branch was not willing to do so.

The same process for analysis applies. First, what power or powers of the executive branch are implicated by the Netanyahu address? Again here, the president’s power to receive ambassadors is at issue and potentially infringed.<sup>255</sup> Congress literally received, over the executive’s objection, an “Ambassador[ ] [or] other public Minister[ ].”<sup>256</sup>

Unlike in the Cotton letter case where Congress sent an outbound message, Congress has an implied constitutional power on

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speeches, and speak to the press. These avenues implicate other constitutional protections, including the Speech or Debate Clause and the First Amendment. US Const Art I, § 6, cl 1 (“[F]or any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place.”); US Const Amend I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”). Given the increasing sophistication of foreign governments about the US government and competing power centers within it, foreign governments are likely to be aware of statements relevant to their interests, even if such statements are not communicated to them directly. See notes 159–60 and accompanying text. See also Spiro, *GOP Iran Letter Might Be Unconstitutional* (cited in note 127) (“[T]he above-the-fold attention given to the Cotton letter shows that there is something out of the ordinary going on here. If he had said the same things on CNN no one would have paid any attention . . . . Not so as addressed to the Iranian leadership.”).

<sup>255</sup> A clearer case of infringement would occur if Congress were to receive as a foreign head of state a representative of an entity, such as Taiwan, that the United States (via the executive branch) has declined to recognize. See Bureau of East Asian and Pacific Affairs, *U.S. Relations with Taiwan* (US Department of State, Sept 13, 2017), archived at <http://perma.cc/4MZV-3JYY> (describing the history and current nature of the US-Taiwan relationship).

<sup>256</sup> US Const Art II, § 3.

its side of the ledger in hearing from Netanyahu. In addressing why he invited Netanyahu, Boehner explained:

[W]hen it comes to the threat of Iran having a nuclear weapon—these are important messages that the Congress needs to hear and the American people need to hear. And I believe that Prime Minister Netanyahu is the perfect person to deliver the message of how serious this threat is.<sup>257</sup>

Boehner's view of congressional power finds support in Supreme Court cases that have recognized an implied power of Congress to obtain information in support of its legislative function.<sup>258</sup> As the Court noted in a 1927 case, "the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function."<sup>259</sup> The Court explained:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite

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<sup>257</sup> *Rep. John Boehner Sounds Off on Fight over Homeland Security Funding* (cited in note 105).

<sup>258</sup> For academic agreement on this issue, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 *Admin L Rev* 109, 111 (1996) (citation omitted):

Congress has broad investigatory powers to fulfill its responsibilities under the Constitution. . . . A key element of Congress' ability to carry out this mandate depends on how much information is made available to it as it deliberates and then legislates. Absent access to accurate, relevant information, it would probably be impossible to legislate either effectively or wisely.

See also J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 *U Chi L Rev* 440, 441 (1951) (explaining the view of a sitting senator that "[t]he power to investigate is . . . the most necessary of all the powers underlying the legislative function" because it "provides the legislature with eyes and ears and a thinking mechanism," as well as "an orderly means of being in touch with and absorbing the knowledge, experience and statistical data necessary for legislation in a complex democratic society"); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 *Geo Wash L Rev* 627, 675 (1989) (noting that "no express provision of the Constitution . . . specifically authorizes the Congress to conduct investigations and take testimony for the purpose of performing its legitimate functions," but "numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress"); Scoville, 112 *Mich L Rev* at 382–83 (cited in note 10) (discussing "Congress's implied power of investigation").

<sup>259</sup> *McGrain v Daugherty*, 273 US 135, 174 (1927). See also *Eastland v United States Servicemen's Fund*, 421 US 491, 504 (1975) ("This Court has often noted that the power to investigate is inherent in the power to make laws.").

information—which not infrequently is true—recourse must be had to others who do possess it.<sup>260</sup>

The Court has described Congress’s power of investigation or inquiry as “broad”<sup>261</sup> and explained that “[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>262</sup> But the Court has explained that “the power is not [ ] without limitations” and must be linked to some legitimate action of Congress, such as legislation or appropriations.<sup>263</sup> The Court has also declined to recognize a congressional power to inform the public, as opposed to informing itself.<sup>264</sup> Thus, Boehner’s claim of constitutional authority for the Netanyahu invitation must rest on the first part of his explanation—the need for Congress to hear from Netanyahu—rather than the second part, highlighting the need for the US public to hear from him.

The implied legislative power of inquiry or investigation provides a counterweight to the executive’s constitutional power to

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<sup>260</sup> *McGrain*, 273 US at 175.

<sup>261</sup> *Watkins v United States*, 354 US 178, 187 (1957). See also *id.* (noting that “[t]he power of the Congress to conduct investigations is inherent in the legislative process. . . . It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes,” “surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them,” and “probes into departments of the Federal Government to expose corruption, inefficiency or waste”).

<sup>262</sup> *Barenblatt v United States*, 360 US 109, 111 (1959).

<sup>263</sup> *Id.* at 111. See also *id.* at 111–12 (“Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.”); *Watkins*, 354 US at 187:

[B]road as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.

<sup>264</sup> See *Hutchinson v Proxmire*, 443 US 111, 132–33 (1979) (explaining that although prior cases “hold[ ] that congressional efforts to inform itself through committee hearings are part of the legislative function,” Congress’s perceived “duty of Members to tell the public about their activities . . . is not a part of the legislative function or the deliberations that make up the legislative process”); Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 Iowa L Rev 1, 33 (2004) (arguing that although “Congress frequently asserts that it possesses general authority to investigate for the purpose of informing the American public,” the Supreme Court has not “endorsed” such claims and instead “has suggested that the purpose of informing the American public is not within the core legislative mandate of Congress”).

receive ambassadors in circumstances of *inbound* nonexecutive foreign relations. When Congress requests or receives a communication from a foreign government official that appropriately falls within the ambit of its power of inquiry—that is, the communication relates to actual or potential legislation or is ancillary to another congressional power—Congress begins the arithmetic analysis with a positive score.

Congress could arguably invoke the power of inquiry as to the Netanyahu speech.<sup>265</sup> In recent years, Congress has considered and adopted legislation sanctioning Iran for its nuclear program.<sup>266</sup> Moreover, at the time of Netanyahu’s address, the form of the Iran deal was unclear. Congress might have therefore argued that hearing from Netanyahu was incident to its power to approve international agreements. This argument, however, is hampered by the fact that the invitation came from the speaker of the House, not from the Senate, which has primary responsibility for approving treaties. Nonetheless, it might be incidental to the legislative power to approve congressional-executive agreements. In other words, the legitimacy of Congress’s claim to engage in inbound nonexecutive foreign relations depends on whether the foreign government’s communications can reasonably be argued to relate to a legitimate function of Congress, such as legislation, appropriations, or advising and consenting to treaties.<sup>267</sup>

Both *Youngstown* and converse *Youngstown* provide guidance on what to consider in resolving interbranch power disputes, but neither determines which branch prevails once competing powers are identified. A constitutional adjudicator’s determination about which branch prevails in Category 3 will be fact specific, depending on the circumstances of a particular case, which

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<sup>265</sup> The congressional power of inquiry or investigation may also be sufficient to justify congressional travel abroad and meetings with foreign government officials as part of fact-finding missions over the executive’s objection. See, for example, text accompanying notes 115–17 (discussing then-Speaker Pelosi’s travel to Syria and criticism from President Bush). The determination of the constitutionality of such an action will depend on the factors discussed below. See notes 268–70 and accompanying text.

<sup>266</sup> See *Iran Sanctions* (US Department of the Treasury, Sept 25, 2017), archived at <http://perma.cc/PU38-CEN3> (collecting statutes regarding Iran sanctions).

<sup>267</sup> See Magliocca, *Netanyahu’s Address to a Joint Session Is Not Unconstitutional* (cited in note 110) (proposing that the standard for evaluating the constitutionality of the Netanyahu address “would be whether Congress is considering legislation related to the speech,” and that because it was considering a new Iran sanctions bill, “if Congress wants to hear from Netanyahu or anybody else with something useful to say about that, I think that they can”).

powers are invoked, and the strength of each branch's arguments for the existence and scope of its claimed powers. A determination about which branch prevails in Category 3 will also likely vary depending on an interpreter's views of the relative salience of different kinds of arguments the branches might make. For example, an interpreter may rely on the extent of interference one branch poses to the other branch's power,<sup>268</sup> the historical practice to support each branch's claims,<sup>269</sup> or the intent of the branches, especially whether they intended to interfere with the other branch's exercise of its competing power.<sup>270</sup> Reasonable minds may disagree about the relative importance of these factors or may add others, and reasonable minds will certainly disagree about the application of these factors to specific facts.<sup>271</sup>

The Netanyahu address to Congress over the president's objection is a close question. Some factors cast serious doubt on Congress's position. In particular, the reception of a foreign governmental leader over the executive's objection was unprecedented. Congress therefore has no support in historical practice, and the long-standing practice of foreign leaders addressing Congress only in coordination with the executive branch instead supports the president's position. Moreover, the Netanyahu invitation was widely understood as an attempt to interfere with the Iranian nuclear deal negotiations, suggesting that Congress did intend to interfere with the president's power to communicate with foreign governments and to negotiate agreements. On the other hand, the degree of interference with the president's communication and negotiation powers appears, at least in retrospect, to have been minimal. The Iran deal was concluded, and it was done in a form that did not require Senate or congressional approval. As the debates among legal commentators about the constitutionality of the invitation reveal,<sup>272</sup> reasonable minds can reach different results on this case, but deploying the converse *Youngstown* framework would clarify the terms of

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<sup>268</sup> See *Morrison v Olson*, 487 US 654, 691 (1988) (assessing the constitutionality of a congressionally imposed "good cause" restriction on removal of an executive officer based on whether the restriction "unduly trammels on executive authority").

<sup>269</sup> See notes 46–54 and accompanying text.

<sup>270</sup> See *Zivotofsky II*, 135 S Ct at 2095 (citing as one reason that a statute infringed the president's exclusive recognition power "the undoubted fact that the purpose of the statute was to infringe on the recognition power").

<sup>271</sup> See Vermeule, *Chevron as a Legal Framework* (cited in note 188) (arguing that a "legal framework" has "staying power" when it is sufficiently "flexible to appeal to judges with competing views, who can all articulate their positions within the framework").

<sup>272</sup> See notes 108–11 and accompanying text.

debate by directing consideration of the powers of both branches and providing a mechanism for weighing their interaction.

A final example of Category 3 analysis rests on a hypothetical. Suppose that upon receiving the Supreme Court clerk's letter stating that filing of diplomatic notes did not comply with the Court's rules, the Department of Justice had attempted to continue filing them instead of taking its actual approach of declining to file diplomatic notes with the Supreme Court or the lower federal courts. The branches would have clearly been in opposition, with the Supreme Court asserting its right to control who can file and how they can file with the Court, and the executive asserting that regardless of the Court's stated rules, the executive had the right to present foreign governments' views to the Court.

In this hypothetical Category 3 case, the executive's asserted power would again have been the implied power to conduct foreign relations and to handle communications to and from foreign governments. But the Court would have had a strong claim to power on its side as well—namely, the implied or inherent power of courts to control their own processes. The Supreme Court has recognized the “inherent power of every court of justice to control its own process.”<sup>273</sup> In particular, the Court has explained that “[g]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.”<sup>274</sup> The courts' inherent authority includes the power to appoint persons, such as amici and special masters, to assist the court in carrying out its functions, as well as to allow participation by those who can assist the court.<sup>275</sup> Rules governing how interested parties may (and may not) communicate their views to

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<sup>273</sup> *Krippendorf v Hyde*, 110 US 276, 282 (1884).

<sup>274</sup> *United States v Hasting*, 461 US 499, 505 (1983) (citation omitted). See also *Carlisle v United States*, 517 US 416, 425–26 (1996) (affirming the authority of federal courts to formulate procedural rules).

<sup>275</sup> See *In re Peterson*, 253 US 300, 312–13 (1920) (explaining that “[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties,” including the “authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause”) (citation omitted); John F. Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 Wash U J L & Pol 109, 142 (2000) (noting that the “judicial power to seek expert assistance” includes both inviting amicus briefs and “appoint[ing] nonwitness experts in appropriate cases”); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L J 694, 699 (1963) (discussing evolution of amicus curiae participation as part of courts' inherent powers).



the court fall within the category of procedural rules that are part of the courts' inherent constitutional power.

Having identified competing constitutional powers, which branch would or should prevail in this hypothetical scenario? Considering again factors such as the degree of interference into each branch's powers, intent to interfere with the other branch's powers, and historical practice, there is a strong case that the Court should prevail. The shift from the executive branch filing diplomatic notes to foreign governments filing their own amicus briefs directly poses a minimal interference with the executive's power to communicate with foreign governments. Prior to the shift, the executive was essentially fulfilling a ministerial, pass-through role, simply transmitting the views of foreign governments to the Court. Sometimes those views were even contrary to the executive's own position, as in *Zenith Radio* itself, the case that prompted the Court to protest the filing of diplomatic notes.<sup>276</sup> If the executive wishes to contradict or simply opine on the views of a foreign government filed before the Court, it can file an amicus brief, and per the Court's rules, the executive has an automatic right to file (provided it complies with the filing deadlines) and need not seek leave of the Court.<sup>277</sup>

By the time of the shift from diplomatic notes in 1978, longstanding historical practice also supported the filing of amicus briefs by foreign governments.<sup>278</sup> Foreign governments' embassies filed briefs as early as 1919,<sup>279</sup> and foreign governments began filing briefs in the name of their governments, rather than their embassies, in 1952<sup>280</sup>—all without apparent objection by the executive branch.

Moreover, there is no evidence that by highlighting the non-compliance of the diplomatic-note practice with its rules the Court intended to interfere with the executive's power to communicate with foreign governments. To the contrary, the Court

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<sup>276</sup> See notes 75–80 and accompanying text.

<sup>277</sup> See US S Ct Rule 37.4.

<sup>278</sup> For additional details on the history of foreign sovereign amicus briefs, see Eichensehr, 102 Va L Rev at 297–302 (cited in note 56).

<sup>279</sup> See generally Brief of Counsel for British Embassy as Amici Curiae, *Strathearn Steamship Co v Dillon*, Docket No 373 (US filed June 2, 1919).

<sup>280</sup> See, for example, *Lauritzen v Larsen*, 345 US 571, 572 (1953) (noting an amicus brief filed by Denmark). See also generally Brief of the Royal Danish Government, as Amicus Curiae, *Lauritzen v Larsen*, Docket No 226 (US filed Nov 26, 1952) (available on Westlaw at 1952 WL 82186).

would have been well aware that foreign governments had communicated their views to the Court directly through amicus briefs for nearly six decades without objection by the executive. Even if the executive could have made a claim of interference with executive authority, it had, in essence, already acquiesced to a direct channel of communication between foreign governments and the Supreme Court in the decades preceding the Court's letter.<sup>281</sup>

Additionally, the Court's move to have foreign governments' views communicated solely by amicus briefs worked a regularization of its processes, ensuring that both the United States and foreign governments were treated like all other parties wishing to communicate with the Court. The fact of regularization, rather than exceptionalism, supports the argument that the Court did not intend to interfere with the executive; it was simply policing compliance with its normal processes—processes derived from its inherent authority.

For all of these reasons, had the executive continued to attempt to file diplomatic notes after receiving the Court's letter, that hypothetical may have been a converse *Youngstown* equivalent of *Zivotofsky*—a Category 3 case in which the presumed losing branch nonetheless prevails.

#### CONCLUSION

Nonexecutive conduct of foreign relations has already sparked several recent incidents of interbranch friction. And technology, foreign governments' increasing sophistication about the US government, hyperfractionalization in US politics, and the "Trump effect" may make nonexecutive foreign relations more frequent and more contentious going forward.

Moreover, the converse *Youngstown* framework need not be limited in application to the conduct of foreign relations questions that this Article addresses. Converse *Youngstown* can be applied to other interbranch separation-of-powers disputes. For example, the converse *Youngstown* framework could be used to analyze a court's attempt to solicit the views of particular executive branch departments about a pending case. The Seventh Circuit made

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<sup>281</sup> See Bradley and Morrison, 126 Harv L Rev at 435 (cited in note 48) (discussing acquiescence as waiver as "akin to the adverse possession doctrine in property law: if one branch of government has been engaging in a practice for a long time without any resistance, it (and potentially also third parties) may have formed reasonable expectation interests surrounding the practice"). See also *id.* at 453–54 (arguing that executive silence or acquiescence is more meaningful than congressional silence).

such a request in 2014 in an antitrust case, when, in response to the filing of an amicus brief for the United States signed by the Justice Department and the Federal Trade Commission, the court issued an order “invit[ing]” the Departments of Commerce and State to file amicus briefs on the foreign relations impacts of the case.<sup>282</sup> The executive branch declined the court’s “invitation.”<sup>283</sup> The converse *Youngstown* framework could also be used to assess the constitutionality of congressional actions, such as resolutions that purport to place limits on the president’s war powers.<sup>284</sup>

The converse *Youngstown* framework avoids some of the weaknesses of the traditional *Youngstown* analysis, but more importantly, it fills out the picture for separation-of-powers disputes. The *Youngstown* and converse *Youngstown* frameworks together ensure that constitutional interpreters in any branch of government and scholars outside the government can systematically evaluate competing constitutional claims to power.

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<sup>282</sup> Order of May 1, 2014, *Motorola Mobility LLC v AU Optronics Corp*, Civil Action No 14-8003 (7th Cir filed May 1, 2014). See also generally Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc*, *Motorola Mobility LLC v AU Optronics Corp*, Civil Action No 14-8003 (7th Cir filed Apr 24, 2014) (available on Westlaw at 2014 WL 1878995).

<sup>283</sup> Letter from Solicitor General Donald B. Verrilli Jr to Gino J. Agnello, Clerk of Court, *Motorola Mobility LLC v AU Optronics Corp*, Civil Action No 14-8003 (7th Cir filed May 19, 2014).

<sup>284</sup> See, for example, War Powers Resolution, Pub L No 93-148, 87 Stat 555 (1973), codified at 50 USC §§ 1541–48.