

The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation

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ABSTRACT

In a number of significant separation of powers decisions, Supreme Court Justices have relied on Congressional silence to support their conclusion that the President had or did not have the power being challenged. Using language such as “implied” grants or denials of authority and “congressional acquiescence” in Presidential actions, the Court has utilized congressional inaction to tilt the outcome for or against Presidential power in cases such as Youngstown Sheet & Tube Co. v. Sawyer, Dames & Moore v. Regan, and Clinton v. City of New York. This Essay argues that reliance on congressional silence in separation of powers litigation is improper for two reasons. First, INS v. Chadha held that positive action by one House of Congress was invalid as an attempt to affect the rights of third parties because it did not comply with the bicameralism and presentment requirements of Article I, Section 7 of the Constitution. Because action by one House alone has no legal effect, inaction cannot have more legal significance. Second, as a normative matter, legislative silence does not logically support the inference that Congress supports the exercise of presidential power. Because no Justice has argued that a single instance of congressional silence would suffice, the courts must struggle with how many instances and how comparable to the present case they must be to support the desired inference. Similarly, there are multiple reasons why Congress did not seek to overrule the President by legislation,

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or take other action to accomplish that end, that are as consistent with disagreement as with acquiescence in the prior instances on which the Court has relied. Taking silence off the table does not ease the difficulty in deciding separation of powers; rather it forces the Court to return to first principles instead of attempting to divine the meaning of congressional inaction.

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INTRODUCTION

In two legally and politically significant cases, *Youngstown Sheet & Tube Co. v. Sawyer*¹ and *Dames & Moore v. Regan*,² the Supreme Court had to decide whether the President had the authority to take certain actions. In *Youngstown*, by a vote of 6–3, the Court held against the President³, while in *Dames & Moore*, the Court was unanimous in sustaining his action, although there were additional opinions on another issue.⁴ In both cases, the Court relied on not only what Congress had actually authorized in laws that it had enacted, but also found support in what Congress had *not* done.⁵ My focus in this Essay is not on whether the Court reached the right result in those cases, although I do offer my views. Rather, the focus is on whether the Court was justified—in both normative and constitutional terms—in inferring or, as the Court put it, implying, the grant or denial of authority to the President from congressional silence. Whether labeled inaction or silence, there are a number of reasons why Congress may not have acted and that courts should therefore draw no inference from what Congress has not done when they are deciding issues of executive power. Moreover, and more fundamentally, the Court's de-

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

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

3 *Youngstown*, 343 U.S. at 580, 589.

4 *Dames & Moore*, 453 U.S. at 689–90; *id.* at 690 (Stevens, J., concurring); *id.* at 690–91 (Powell, J., concurring).

5 *Id.* at 686–88; *Youngstown*, 343 U.S. at 583, 585–86.

cision in *INS v. Chadha*,⁶ decided after both *Youngstown* and *Dames & Moore*, forecloses as a constitutional matter the relevance of congressional inaction. As explained more fully below, the Court in *Chadha* ruled that *action* by one House of Congress had no legal impact on the rights of others outside of Congress.⁷ Because inaction is always less definitive and less certain in its meaning than action, congressional silence surely cannot have greater or, for that matter, any legal significance.

I. *YOUNGSTOWN AND DAMES & MOORE*

At issue in *Youngstown* was the validity of an Executive Order issued by President Harry S. Truman directing his Secretary of Commerce, Charles Sawyer, to take possession of the nation's steel mills and prevent the workers from striking.⁸ No one disputed that steel was vitally needed to build planes, tanks, and other military equipment to fight the Korean War, or that all other efforts to stop the strike had failed.⁹ Congress had not passed a law purporting to end the strike, but it had also not passed any law forbidding the President from ordering the plants and the workers to continue making steel (or any other product).¹⁰ That is hardly surprising because Congress almost never affirmatively forbids Presidential action, whether in a stand-alone law, or as part of a law granting an executive branch official some new authority. As Justice Frankfurter observed in *Youngstown*, “[i]t would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President’s power in terms into a statute rather than to have it authoritatively expounded, as it was, by *controlling legislative history*.”¹¹ Congress may say that the Executive must do something or may do it, or may do it if certain conditions are met, but it almost never includes prohibitory language in a statute.¹²

⁶ *INS v. Chadha*, 462 U.S. 919, 952–58 (1983). The author was counsel for Mr. Chadha in that case.

⁷ *Id.*

⁸ Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952).

⁹ See *Youngstown*, 343 U.S. at 670–72 (Vinson, C.J., dissenting).

¹⁰ See *id.* at 583, 585–86 (majority opinion).

¹¹ *Id.* at 603 (Frankfurter, J., concurring) (emphasis added).

¹² Following a prolonged series of disputes with President Richard Nixon over his authority to refuse to spend appropriated funds, Congress passed the Impoundment Control Act of 1974, which severely limited the power of the President to refuse to spend (“rescind”) appropriated funds. For these purposes, the operative provision is 2 U.S.C. § 683(b) (2006), which makes it clear that the President may carry out a rescission only if Congress affirmatively approves:

Any amount of budget authority proposed to be rescinded . . . shall be made availa-

Previously, Congress had enacted a number of laws in the labor field that gave the President certain powers different from the one that he exercised in the Executive Order in *Youngstown*.¹³ Some were available only after periods of delay that the President apparently concluded were unacceptable, and others could not provide the relief that the President concluded was needed under the circumstances.¹⁴ No one suggested these laws authorized the Executive Order.¹⁵ Finally, Congress had debated several bills and proposed amendments that would have given the President the power that he invoked, but none had passed.¹⁶

The *Youngstown* Court concluded that the President lacked the authority to issue the order, a conclusion with which I agree, although for different reasons that are explained below. Although Justice Robert Jackson's opinion was a concurrence, it has been viewed as the most significant one in terms of setting the parameters for debates on separation of powers. In the key portion, Jackson set up a tri-partite method of analysis in which he asserted that the powers of the President are at their apex when they are expressly or impliedly granted in the Constitution or in legislation, and at their nadir when they are expressly granted to another branch in the Constitution or expressly or impliedly limited by legislation.¹⁷ He then created a third or middle category in which there is no authoritative law, and in which the President's authority is uncertain.¹⁸

Jackson resolved the question in *Youngstown* by concluding that Congress had impliedly denied the President the power he sought to exercise.¹⁹ That view was also expressed by Justice Burton in his concurring opinion in which he claimed that Congress had "reserved to

ble for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.

Id.

¹³ See *Youngstown*, 343 U.S. at 585–86 (discussing the Defense Production Act of 1950 and the Taft Hartley Act).

¹⁴ See *id.*

¹⁵ *Id.* at 586.

¹⁶ For example, Congress considered but did not adopt an amendment to the Taft Hartley Act, which would have given the President the power the power to seize industrial facilities in times like these. See *id.*

¹⁷ *Id.* at 635–38 (Jackson, J., concurring).

¹⁸ *Id.* at 637.

¹⁹ *Id.* at 653–55. He also included within the first category "implied" as well as express grants. *Id.* at 635. Because there is no difference in analysis based on the category in which the case falls, this Essay will focus on the denial category only.

itself” the power to end strikes.²⁰ Justice Black found that Congress “had refused to adopt” the President’s chosen method for resolving this dispute because Congress (actually only one House) rejected an amendment to that effect.²¹ The dissent also agreed that congressional inaction was relevant, but drew different conclusions from what it considered to be the relevant legislative history.²² Jackson’s opinion neither explains the method by which the implied denial or reservation took place, nor does it point to specific laws that Congress enacted to achieve those ends—because there were none. If Jackson’s approach is correct, there must be something other than actual legislation to sustain his position.

Part of Jackson’s rationale was based on what Congress authorized in laws that spelled out what the executive branch could do to prevent strikes from harming the defense effort and the negative implications from what was not authorized by those laws.²³ Some of the laws spelled out the means by which the President could act, and some included time frames for cooling off.²⁴ Others had specific conditions that had to be met, including in some cases expiration dates for the use of the law in question.²⁵ As Justice Tom Clark, President Truman’s former Attorney General, noted in his concurrence, these other statutes dealt with the very same subject, and provided alternative means to achieve their ends, which undermined the claim that the President had these powers without congressional authorization.²⁶ From those statutes, the Court seemed to draw the inference that Congress intended to allow the President to go so far, and no further. If that broad reading were correct, it would mean that the President could act only when authorized by Congress or expressly by the Constitution. But that interpretation would eviscerate any inherent powers that the President has. A better understanding would be that, if Congress’s authorization had been necessary, the President lacked it because it was not expressly provided by statute. The problem is that Jackson did not rest solely on what Congress had done.²⁷ Similarly, Justice Black pointed to several bills Congress had considered which would have given the President something very close to the power

²⁰ *See id.* at 657 (Burton, J., concurring).

²¹ *Id.* at 586 (majority opinion).

²² *See id.* at 702–03 (Vinson, C.J., dissenting).

²³ *See id.* at 638–39 (Jackson, J., concurring).

²⁴ *See id.* at 639; *see also id.* at 657 (Burton, J., concurring).

²⁵ *See id.* at 639 (Jackson, J., concurring), *id.* at 657 (Burton, J., concurring).

²⁶ *Id.* at 662–66 (Clark, J., concurring).

²⁷ *Id.* at 635–38, 644, 648 (Jackson, J., concurring).

that he used, none of which became law.²⁸ What is significant is that Justice Jackson and others in the majority seemed to treat the failure to grant the President those powers as the functional equivalent of denying them to him. In other words, inaction equaled action, and congressional silence was the same as congressional legislation.

In *Dames & Moore v. Regan*, as part of a settlement with the Government of Iran under which American hostages were released, President Jimmy Carter entered into an agreement that, among other features, suspended all litigation against the Government of Iran and channeled that litigation into an arbitration claims tribunal.²⁹ Justice Rehnquist expressly relied on Justice Jackson's concurring opinion in *Youngstown*, in which he analyzed whether the President acted "in contravention of the will of Congress," and not merely in violation of a duly enacted law.³⁰ The Court held that the two statutes on which the President had relied for the litigation channeling provisions were not "specific authorization" for them, but it found them "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."³¹ The Court then went on to note that one statute "delegates broad authority to the President" and the other "similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns."³² The Court observed that, although neither act "directly authorizes the President's suspension of claims . . . we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress."³³

The Court also cited other statutes involving the settlement of similar foreign claims, involving other countries, by which "Congress has implicitly approved the practice of claim settlement by executive agreement."³⁴ In 1949, Congress had passed the International Claims Settlement Act,³⁵ which included provisions that would "provide a

²⁸ *Id.* at 586 (majority opinion).

²⁹ *Dames & Moore v. Regan*, 453 U.S. 654, 664–66 (1981).

³⁰ *Id.* at 668–69.

³¹ *Id.* at 676–77. The plaintiff also objected to the President's freeze of all Iranian assets in the U.S., but the Court found that Congress had expressly authorized him to do that. *Id.* at 671–74.

³² *Id.* at 677.

³³ *Id.* at 678.

³⁴ *Id.* at 680.

³⁵ International Claims Settlement Act of 1949, ch.54, 64 Stat. 12 (1949) (codified as amended at 22 U.S.C. §§ 1621–1645 (2006)).

procedure whereby funds resulting from future settlements could be distributed.”³⁶ This included the creation of what was subsequently renamed the Foreign Claims Settlement Commission (the entity that was chosen for the claims involving Iran), which was originally used for claims involving Yugoslavia and other countries.³⁷ The Court cited ten other settlements with foreign nations since 1952 to which Congress did not object³⁸ as support for its “conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.”³⁹ Justice Rehnquist then observed that, although Congress had frequently amended the International Claims Settlement Act, not only did it not question the President’s use of Settlement Commission for countries for which there was no specific legislation or treaty, but the legislative history of related laws showed positive support for the practice.⁴⁰ This amounted, in Justice Rehnquist’s view, to “congressional acquiescence,”⁴¹ which supported the conclusion that Congress had authorized the President to settle these claims and to require that all of them be decided through this special tribunal instead of the court system.⁴²

In addition to its general acquiescence argument, Justice Rehnquist’s opinion also invoked what might be called “specific acquiescence” because “Congress has consistently failed to object to this longstanding practice of claim settlement by executive agreement, even when it has had an opportunity to do so.”⁴³ As seen by the Court, Congress had considered related legislation and failed to include anything that would limit the power to use the Settlement Com-

³⁶ *Dames & Moore*, 453 U.S. at 680.

³⁷ *Id.* at 680–81.

³⁸ *Id.* at 680 n.9.

³⁹ *Id.* at 680.

⁴⁰ *See id.* at 681–82.

⁴¹ *Id.* at 682, 683 (“Congress has acquiesced.”).

⁴² *Id.* at 686 (relying on Justice Frankfurter’s approach in *Youngstown*). On the other hand, Congress had enacted specific legislation to cover specific settlements with certain countries, which might suggest that existing law was not adequate to cover future agreements. *See id.* at 685–86.

⁴³ *Id.* at 682 n.10. The opinion pointed out that Congress did object to one executive agreement, and passed legislation requiring that the agreement be renegotiated, not because of the means chosen to assess the claims under it, but apparently because the amount of the settlement fund was too small. *Id.* at 688 n.13 (citing R.B. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT’L L. 837, 839–40 (1975)). Although not necessary to the approach adopted by the Court in *Dames & Moore*, the example could be seen as a silent legislative approval of the method for claims resolution, which it did not change, while finding only the total settlement fund inadequate.

mission. In further support of the notion that Congress had not “in some way resisted the exercise of Presidential authority” and that the use of the Settlement Commission was therefore proper, the Court cited the holding of hearings on the Iranian agreement, and the failure of Congress to pass even “a resolution, indicating its displeasure with the Agreement.”⁴⁴

Although *Youngstown* used congressional silence or inaction to defeat the President’s claim that he was authorized to end the steel strike,⁴⁵ and *Dames & Moore* used congressional silence, or what the Court called “congressional acquiescence,”⁴⁶ to sustain the President’s imposition of mandatory arbitration of claims against Iran, it is their reliance on something other than laws that were enacted that unites them. Despite the differences in outcomes, there is another similarity between the two cases: the prevailing branch (Congress in *Youngstown* and the President in *Dames & Moore*) took the first step—debating other labor bills or extending claims settlements to new countries—and when the other branch did not, for whatever reason, direct a different outcome, those first steps became law. What the other branch might have done and whether it would have been effective are discussed below in determining the possible relevance of silence, but for the moment it suffices to note that the sounds of silence begin to be heard when one branch takes certain actions that trigger what the Court sees as an obligation to respond by the other, lest silence be construed as acquiescence.⁴⁷

II. CONSTITUTIONAL OBJECTIONS TO RELYING ON CONGRESSIONAL INACTION

Before turning to the constitutional rationale for why it is improper to take silence into account in determining the extent of Presidential power, there is one other constitutional point that should be kept in mind. Although separation of powers questions are sometimes seen as a kind of competition between the branches, Congress and the President cannot surrender powers to one another if the Con-

⁴⁴ *Id.* at 687–88.

⁴⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–55 (1952) (Jackson, J., concurring).

⁴⁶ See *Dames & Moore*, 453 U.S. at 678.

⁴⁷ Reading *Dames & Moore* as well as *Youngstown*, one is struck by their very heavy reliance on legislative history, including not only amendments that were rejected, but floor statements and committee reports. Even if congressional silence might be relevant, some of those examples would seem to have little to commend them because they are the views of no more than one or two members.

stitution forbids it. The clearest case for this proposition is the line item veto case, *Clinton v. City of New York*,⁴⁸ in which the statute at issue was enacted as a free-standing law.⁴⁹ When its constitutionality was directly presented, both Houses and the President supported the law.⁵⁰ The Court nonetheless held that the law was unconstitutional because it purported to give the President the power to amend future spending laws without going through the legislative process.⁵¹ Even though both Houses actually voted to acquiesce in the President's desire to have line item veto authority, the Court said, "No."⁵²

It is against this background, under which even interbranch agreement has constitutional limits, that this Essay assesses the constitutional relevance of silence or acquiescence of the kind relied on in *Youngstown* and *Dames & Moore*. The constitutional barrier to relying on silence or inaction arose two years after *Dames & Moore* was decided, in *INS v. Chadha*,⁵³ when the Court struck down the legislative vetoes that were then found in more than 200 federal statutes.⁵⁴ The legislative veto was a statutorily authorized procedure by which one or both Houses, or in some cases a single committee of one House, could vote to overturn a decision by an administrative agency, or in some statutes, by the President. The Court found the procedure to be unconstitutional because the Presentment Clause permits Congress to achieve that result only if both Houses and the President concur, or if Congress overrides a presidential veto by a two-thirds vote of both Houses.⁵⁵ As Chief Justice Burger stated, when Congress acts in its legislative capacity, "the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure," which it did not fol-

⁴⁸ *Clinton v. City of New York*, 524 U.S. 417 (1998). The author filed an amicus brief in that case and was lead counsel in the prior line item veto case, *Raines v. Byrd*, 521 U.S. 811 (1997), in which the Court held that a statute granting Members of Congress standing to challenge the constitutionality of the line item veto violated Article III of the Constitution by purporting to grant authority that did not meet the case or controversy requirement.

⁴⁹ Line Item Veto Act of 1996, Pub L. No. 104-130, 110 Stat. 1200.

⁵⁰ See generally, *Clinton*, 524 U.S. at 417-48.

⁵¹ See *id.* at 436, 448.

⁵² The 6-3 lineup in *Clinton* defies ideological stereotyping. In the majority were liberal Justices Stevens, Ginsburg and Souter, the conservatives Chief Justice Rehnquist and Justice Thomas, and the centrist Justice Kennedy. See *id.* at 420. Similarly, the liberal Justice Breyer and the centrist Justice O'Connor joined the conservative Justice Scalia in dissent. See *id.*

⁵³ *INS v. Chadha*, 462 U.S. 919 (1983).

⁵⁴ *Id.* at 959 (Powell, J., concurring); *id.* at 968 (White, J., dissenting).

⁵⁵ *Id.* at 946, 951 (majority opinion).

low there.⁵⁶ Justice Powell concurred on the ground that the one House veto exercised in *Chadha* was in effect a judicial override, a function that the doctrine of separation of powers precludes Congress from exercising.⁵⁷ In the context of *Youngstown* and *Dames & Moore*, there is no question that the activity of Congress that the Justices examined is legislative, and hence the majority's analysis in *Chadha* is the proper framework for assessing the constitutional relevance of congressional silence.

The argument that *Chadha* precludes reliance on congressional inaction is based on *Chadha's* holding that the concurrence of the two Houses plus the President is the exclusive means by which laws are enacted.⁵⁸ Because the Court in *Youngstown* did not identify any laws that Congress enacted other than those that the Court found were inapplicable or insufficient,⁵⁹ it is difficult to understand what it is that the silence of Congress did under the Constitution that denied the President the right to order the steel industry back to work. Adding the word "impliedly" does not help. Indeed, because Jackson treated implied grants or denials by Congress in exactly the same manner as he did express grants or denials,⁶⁰ that underscores that Congress's action was legislative in character. This would be true even though it was inaction, not action, that altered the outcome of a dispute between private parties and the Government. Or, using Justice Burton's terminology, by what law or other legally binding means had Congress "reserved for itself" the power to decide when federal law could be used in these circumstances to achieve the goals that the President sought?⁶¹ Because there is no statute on point, it must be the sounds of silence that created these legal limitations. But that would be at least odd, if not worse, because it would suggest that Congress has *more* power when it does nothing than when one House acts as it did in *Chadha*. Moreover, under the theory of action by silence, Members of Congress who want to be on the record for refusing to grant the President some specific authority could find someone to introduce a bill or offer an amendment *granting* that authority, and then make sure it is defeated.

⁵⁶ *Id.* at 951.

⁵⁷ *Id.* at 960 (Powell, J., concurring).

⁵⁸ *See id.* at 951.

⁵⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952).

⁶⁰ *See id.* at 635–37 (Jackson, J., concurring).

⁶¹ *Id.* at 657 (Burton, J., concurring).

Similarly in *Dames & Moore*, the Court concluded that the text of statutes that Congress enacted did not cover claims involving Iran.⁶² It nonetheless held that Congress had “acquiesced” when the President utilized the procedures for resolving claims for countries not among those specifically included in those statutes, and that Congress thereby effectively amended them to allow the President to rely on those statutes when new claims problems with different countries arose.⁶³ Under *Chadha*, however, “[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I.”⁶⁴ That requires the full process of bicameralism and presentment, which leaves no place for a theory of accretion of presidential power by congressional inaction.⁶⁵ It may be that the Court could properly read the existing laws, combined with the inherent powers of the President in the area of foreign affairs, to permit him to remove the claims against Iran from the court system and direct them to binding arbitration. But the Constitution precludes the Court from drawing any inference from what Congress did not do in response to the President’s expansive reading of the statute, any more than it could infer congressional disapproval if one House had passed a resolution condemning the President for misconstruing the law. Indeed, as I now argue, the case for imputing any significance to silence or inaction is far weaker as a matter of logic, than when at least one House takes concrete action.

III. THE LOGICAL FALLACIES OF IMPLYING ANYTHING FROM CONGRESSIONAL SILENCE

In *Youngstown*, it was not only Justices Jackson and Burton who discussed the meaning of silence. Justice Frankfurter agreed that consistent executive action, to which Congress did not object, could put a “gloss” on the statute that permitted the executive to act as it had done before.⁶⁶ In that particular case, however, the Justice found that there were an insufficient number of comparable actions to warrant inferring the gloss.⁶⁷ By contrast, the dissenters in *Youngstown* also heard music from the sounds of silence, but in another key. To them, past Presidents had taken a significant number of similar actions to what President Truman had done in ordering the steel mills to remain open, and because Congress had never objected, that silence sup-

⁶² *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981).

⁶³ *See id.* at 685, 688.

⁶⁴ *INS v. Chadha*, 462 U.S. 919, 954 (1983).

⁶⁵ *See id.* at 957–58.

⁶⁶ *See Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

⁶⁷ *Id.* at 612–13.

ported the use of presidential power here.⁶⁸ Justice Black, however, rejected the notion that Congress had “lost its exclusive constitutional authority to make laws” even if prior Presidents had done exactly what President Truman did here.⁶⁹ Even though the Court pointed to no text that became law, it nonetheless found that “congressional will could be expressed nonstatutorily.”⁷⁰

Leaving aside the constitutional objection to implying anything from congressional inaction, there are other reasons why courts should reject efforts to draw such inferences. In *Youngstown*, the differences between Justice Frankfurter and the dissenters on the uses of history demonstrate some of the non-constitutional problems in inferring congressional acquiescence from past silence: which actions are “similar” and how many instances are required to support an inference?⁷¹ At some level of generality, similarity is easy to satisfy: the President does something that is not clearly authorized by statute and Congress does not object. But would a five-day back-to-work order by the President be similar to what happened in *Youngstown*? Suppose it was not during a war—would that help or hurt? Suppose the order applied to a single company that made a part that was critical for a missile defense system designed to counter the Soviet threat? How many such silences are needed to constitute a pattern and over what time frame, and with what degree of similarity? Are there any judicially manageable standards by which a court can answer these questions? By contrast, at least there was certainty with a legislative veto as to what was done, and under what law, and no such comparisons were needed.

This kind of debate actually occurred in *Youngstown*. Justice Jackson found only one example with even “superficial similarities with the present case,” but “upon analysis,” this example yielded “distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure.”⁷² In his concurring opinion, Justice Frankfurter looked at the same examples and found that until World War II, “the record is barren of instances comparable

⁶⁸ See *id.* at 683–701 (Vinson, C.J., dissenting).

⁶⁹ *Id.* at 588 (majority opinion).

⁷⁰ See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 287 (2010).

⁷¹ For an excellent discussion of the problems of assessing this historical evidence in the context of these disputes, see Julian Davis Mortenson, Review, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 397–430 (2011), in particular pages 410–16 regarding when a claim of acquiescence is raised.

⁷² *Youngstown*, 343 U.S. at 648–49 (Jackson, J., concurring).

to the one before us.”⁷³ He seemed to concede that three examples from 1941 were closer, declining to “split hairs in comparing those actions to the one before us,” but found them unpersuasive on other grounds.⁷⁴ By contrast, the dissent relied on *United States v. Midwest Oil Co.*,⁷⁵ in which the Court upheld a presidential order temporarily withdrawing oil property from the market based on a long history of congressional silence in the face of similar reservations.⁷⁶ Justice Frankfurter disagreed that this situation was analogous, asserting that the dissenters had shown “[n]o remotely comparable practice” to the 252 instances over an eighty-year period⁷⁷ that were used to justify the temporary withdrawal of oil property to give Congress time to act to make them permanent in *Midwest*. In the end, the question of comparability is rather like most questions of analogies: the answer often depends on the level of generality at which the question is posed.

Another basic problem regarding silence is how courts can attribute inaction to two separate bodies of 435 and 100 members each. There is no problem identifying an accused who remains silent in a criminal case, nor is there a question of who is being silent when a President does not sign a bill presented to him within the ten days (Sundays excepted) provided for in the Presentment Clause.⁷⁸ If a majority of both Houses “objected” by a resolution of disapproval, or if all of one House, but no one in the other objected, would that still be silence in light of *Chadha*’s observation that “[t]he bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent?”⁷⁹

Moreover, silence is never legally relevant unless the would-be responder has heard the statement calling for a response. In the case of *Youngstown*, every Member of Congress was aware of the Executive Order, in part because President Truman sent a message to Congress the day after he issued the seizure order, as well as another letter twelve days later, in which he agreed to abide by whatever laws Con-

⁷³ *Id.* at 612 (Frankfurter, J., concurring).

⁷⁴ *Id.* at 613.

⁷⁵ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Whether *Midwest Oil* was correctly decided under the theory used or on some other basis is of no significance to the overall thesis of this Essay, and so the case will not be discussed further.

⁷⁶ *Id.* at 479–80.

⁷⁷ *Youngstown*, 343 U.S. at 611 (Frankfurter, J., concurring).

⁷⁸ U.S. CONST. art. I, § 7, cl. 2.

⁷⁹ *INS v. Chadha*, 462 U.S. 919, 948 (1983).

gress passed.⁸⁰ The relevant question is not whether Congress received the message to which it did not formally respond (in *Youngstown* presumably because the steel companies had already sued), but whether a sufficient number of Members of a prior Congress actually received word of a similar action some years in the past. Furthermore, there would have to be some objective standard courts could use to determine what kind of notice and how many Members had to receive it to suffice. And even if such standards existed, it would be difficult to make determinations of this kind years and perhaps decades later, yet they seem essential to support an inference of acquiescence by silence.

In addition, silence can only be relevant if there is something that Congress could have said or done that would have been an effective answer to the charge of acquiescence. What might that be? One House could vote to disapprove the action of the President, or defund it, but, after *Chadha*, that would have no legal or practical effect, other than as a protest. Even if both Houses joined, it would be ineffective under the Presentment Clause, unless the President went along, or there was a veto override. Even a vote agreeing that the President had the power he asserted would have no effect because only courts, not Congress, can issue binding interpretations of law. A committee might hold hearings at which members expressed their “non-acquiescence,” but that too would have no effect except as a response to future claims of acceptance by silence. Finally, as to the possibility of litigation, there was a time in the late twentieth century when Members of Congress were found to have standing, at least in some circumstances, to challenge presidential actions; however, in light of *Raines v. Byrd*,⁸¹ it would be futile for Members of Congress to respond to an alleged presidential encroachment by filing suit challenging it.

It is also important to keep in mind the specifics that are being attributed to Congress’s alleged acquiescence by silence. It is not whether Congress agrees with the substance of the President’s decision—surely no Member would publicly disagree that getting the hostages back from Iran was not worth the possible losses to the private companies that had claims against Iran. Rather, congressional silence is relevant only if it leads to the inference that Congress agrees that the President had the legal authority to do what he did. But if Congress as a whole agrees with the substance of the President’s decision,

⁸⁰ *Youngstown*, 343 U.S. at 673–77 (Vinson, C.J., dissenting).

⁸¹ *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997).

it would be a rare Member indeed who would protest solely over the means to achieve a desired end.

There are other similar reasons why congressional silence is not a proper basis for any inference about the President's methods.⁸² Except for a small minority of lawyers, most people focus on ends, not means. Therefore, even if Members are aware of a presidential action, they may not be aware of the means by which it was carried out, let alone have considered the relevant statutes and the doctrines involving inherent presidential power and determined whether they applied or not.⁸³ Moreover, even when Members disagree about either means or ends, the issue may be of minor significance, the Member may have other more pressing matters, and Members cannot effectively act alone. Thus, unless there is a critical mass of motivated opposition, the default position is inaction. Even when a sufficient number of Members (in both Houses) agree that there is a problem, they may not be of one mind as to the proper solution. Finally, Members must always consider whether the subject matter and the statutory issue are of sufficient importance to publicly take on the President, as well as possible negative consequences from opening up the issue to further debate.⁸⁴ And if they are truly taking on the President via the legislative route, they have to weigh the likelihood of a veto and their ability to gain the votes to override it.

The award for the most creative attempted use of congressional silence in *Youngstown* (and perhaps anywhere) must go to President Truman. When he issued his Executive Order, he sent Congress a copy with a message saying in effect: "Here's what I have done. Tell me if you don't like it or think I don't have the authority to do it. And if you pass a law, I will obey it."⁸⁵ He was fortunate that no Member took up his offer, perhaps because the matter was quickly in court. But suppose Congress had replied, passing a resolution saying that the President had no authority to issue the order. Is there any chance that he would have withdrawn it, even if a majority of both Houses (but less than enough to override a veto) joined the opposition? Had such an opposition from legislators been before the Court, it should have found it to be of no significance, just as the majority properly found President Truman's gambit and the ensuing silence to be of no effect.

⁸² See Swaine, *supra* note 70, at 326–27.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 675–77 (1952) (Vinson, C.J., dissenting).

An example of how the executive branch has misused congressional silence is found in the Bush Administration's post-9/11 disregard of the restrictions of the Foreign Intelligence Surveillance Act of 1978 ("FISA").⁸⁶ FISA was preceded by a spirited debate about the authority of the executive branch to engage in wiretapping and other similar activities for the purpose of gathering intelligence about foreign agents.⁸⁷ The Act spelled out in considerable detail the surveillance methods that were acceptable and the processes by which court approvals were to be obtained for their use.⁸⁸ After 9/11, the Bush Administration sought to obtain intelligence through means covered by FISA without complying with the conditions that it imposes.⁸⁹ There was nothing in FISA that said that it was the "exclusive" authority for gathering electronic intelligence, or that the President could go just this far and no further, but that was the most natural reading of the law.

The law also provided that Congress was to be briefed about activities involving foreign surveillance, and the Bush Administration defended its actions based in part on congressional silence in the wake of those briefings.⁹⁰ But only a limited number of Members of Congress had been told of the existence of these secret wiretaps that were done without court approval,⁹¹ and it is highly doubtful that they were given a full briefing. We do know that Members were not allowed to bring staff, to take any notes, to copy documents, or to discuss these matters with each other.⁹² To be sure, this is an extreme example of the misuse of congressional silence, but if the teachings of *Chadha* were properly applied, lines would no longer have to be drawn between proper and improper uses of congressional inaction.

⁸⁶ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1871 (2006). See also *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 987 (N.D. Cal. 2006) and sources cited therein.

⁸⁷ See generally Richard Henry Seamon & William Dylan Gardner, *The PATRIOT Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319 (2005).

⁸⁸ 50 U.S.C. §§ 1802–1805.

⁸⁹ See, e.g., *Hepting*, 439 F. Supp. 2d at 987.

⁹⁰ Douglas Jehl, *Spy Briefings Failed to Meet Legal Test, Lawmakers Say*, N.Y. TIMES, Dec. 21, 2005, at A5.

⁹¹ Jeff Bliss, *Senators Say They Weren't Briefed on Wiretapping*, BLOOMBERG (Dec. 20, 2005, 6:08 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aLyPjz5Nm_UE&refer=top_world_news.

⁹² See *id.* ("The limited members [of Congress] who were told of the program were prohibited by the administration from sharing any information about it with our colleagues, including other members of the intelligence committees."); see also Jehl, *supra* note 90 ("Mr. Rockefeller has said that the rules of secrecy imposed on the briefing process left him unable to voice his concerns in public.").

The most recent instance in which the executive branch sought to rely on the sounds of silence shows the pitfalls of attempting to read too much into congressional inaction. The case involved efforts by the House Judiciary Committee to enforce investigatory subpoenas served on two senior White House assistants to President George W. Bush.⁹³ The Committee was investigating the role of the White House in the firing of nine United States Attorneys, allegedly for their refusal to use their criminal law enforcement powers to assist Republicans running for political office.⁹⁴ The Committee served subpoenas on former White House Counsel Harriet Miers, seeking her testimony, and on Chief of Staff Joshua Bolten, seeking production of various White House records.⁹⁵ Both witnesses were directed by the President not to appear, based on a blanket claim of executive privilege.⁹⁶ Extensive negotiations took place, but unlike most prior situations of this kind, no agreement was reached.⁹⁷ The Committee then obtained the authorization of the full House to enforce the subpoenas, and suit was filed by lawyers in the Office of General Counsel of the House.⁹⁸

The main battle was not on the merits, both because the Committee sought only to require the witnesses to attend the hearing and to claim the privilege on a question-by-question, or document-by-document basis, and because the district court had no trouble concluding that there is no legal basis for an across-the-board claim of executive privilege as was asserted there.⁹⁹ As a threshold matter, the Department of Justice urged that the House had no right to sue, arguing that it had no standing, that there was no cause of action available to it, and that the political question doctrine prevented the House from invoking the power of the court to assist it.¹⁰⁰

⁹³ See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 57–64 (D.D.C. 2008) (discussing factual background). The author informally advised counsel for the Committee but was not listed on the papers.

⁹⁴ *Id.* at 57–58.

⁹⁵ *Id.* at 61.

⁹⁶ *Id.* at 62.

⁹⁷ *Id.* at 59–63.

⁹⁸ *Id.* at 63–64.

⁹⁹ *Id.* at 100–07. Because the Supreme Court had held in *United States v. Nixon*, 418 U.S. 683 (1974), that the federal courts had the power to decide claims of executive privilege made by the President in response to a grand jury subpoena, the executive privilege claim in *Miers* was limited to civil and perhaps only congressional subpoena cases. See *Miers*, 558 F. Supp. 2d at 72–74.

¹⁰⁰ *Miers*, 558 F. Supp. 2d at 66. In order not to appear to be arguing that Congress was wholly defenseless, Defendants suggested that the House could use its own powers to obtain compliance. For example, they suggested that the House refuse to pass legislation important to the President (perhaps even stopping all appropriations) or to confirm the President's nominees

For support, Defendants noted that the two branches had always resolved such disputes without judicial intervention in the past, and hence Congress should not be allowed to sue here.¹⁰¹ Although Defendants had not expressly argued that the prior failures to sue amounted to a concession that, absent agreement, the President alone could decide whether executive privilege was applicable, that would have been the practical effect if the court had accepted their argument, which it did not.¹⁰² There are sound practical reasons why failure to sue the President, even if the nominal defendants are two of his close advisers, should not be held against Congress. Such litigation is a high-risk and potentially inflammatory step that was not and should not be taken lightly. Each House must continue to deal with the President, even one who is of the opposing political party, on a whole range of matters of varying degrees of significance to various Members of the body contemplating bringing a subpoena enforcement action. Accordingly, before filing a lawsuit challenging the President, the information sought by Congress must be of great importance, and the principal underlying the dispute must be of overriding significance to the ability of that House to carry out its business. It is not as if the courts had routinely entertained suits by Congress against the President over its other disagreements with him, but Members of Congress had declined to sue over subpoena enforcement matters. Congress had almost never sued the President or those acting under his direction at all, a circumstance that should make litigation silence (or inaction) of no significance even without *Chadha*.¹⁰³

Similar rationales should also inform the courts when confronted with the claim that *presidential* silence should result in a diminution of

to both executive and judicial positions (although that option is available only if the Senate is the party seeking enforcement because it alone has the power of Advice and Consent under the Constitution). *Id.* at 93 n.29.

¹⁰¹ *Id.* at 67.

¹⁰² *Id.* at 103–04 (“Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one, yet that is what the Executive seeks through its assertion of Ms. Miers’s absolute immunity from compulsory process. That proposition is untenable and cannot be justified by appeals to Presidential autonomy.”).

¹⁰³ The White House defendants appealed and obtained a stay until after the presidential election. After the election, the parties, including the new Administration, reached an accommodation on the issue of privilege and the case was dismissed by consent. *Comm. on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008), *dismissed*, No. 08-5357, 2009 WL 3568649, at *1 (D.C. Cir. Oct. 14, 2009). The threshold legal issues are currently being reprised in *Comm. on Oversight & Gov’t Reform v. Holder*, No. 1:12-cv-1332 (D.D.C. filed Aug. 13, 2012), with the principal difference being that it is a Republican House Committee that is suing a Democratic Administration, rather than the other way around.

his powers. That argument was inferentially raised in *Chadha* because Presidents had regularly accepted the inclusion of legislative vetoes in laws that they signed since such provisions were first added in the 1930s.¹⁰⁴ The dissent in *Youngstown* had argued that the consistent exercise by the President of powers similar to those exercised in the Order he issued in that case amounted to an agreement by Congress that he had those powers.¹⁰⁵ Had that argument been accepted in *Youngstown*, the fact of presidential silence, or actual agreement in signing into law a bill that provided for a one-House veto, would have been a concession that the veto at issue in *Chadha* was lawful or perhaps that the President had forfeited any separation of powers claim he might have that the veto violated the Presentment Clause. The principal response must be that Presidents cannot, by their action or inaction, alter the structural protections of the Constitution, which are not there to protect the three branches, but to preserve liberty and guard against precipitous action, as *Clinton v. City of New York* establishes.¹⁰⁶ Moreover, because the President's only choices are to sign or reject the entire law, his "silence" as to one objectionable feature can have no constitutional significance. Even an objection made through a signing statement would have no legal significance beyond making clear that the President might challenge the provision in court at some appropriate time.¹⁰⁷

What is most interesting about presidential silence is that no one has seriously argued that it has any impact on the balance of power between his office and Congress. Like Congress, the President may remain silent for many reasons, often having nothing to do with his agreement that Congress is correct in attempting to limit his powers or extend its own. Unlike Congress with its 535 Members, there is no difficulty identifying who speaks for the President, and because he must sign or veto every law that comes to him, there is no doubt that his attention will focus directly on each possible congressional intrusion on his powers. Indeed, Presidents sat silently by for decades in the face of legislative vetoes that they contended were unconstitutional until a case was brought by an outsider (Mr. Chadha).¹⁰⁸ The

¹⁰⁴ *INS v. Chadha*, 462 U.S. 919, 968–69 (1983) (White, J., dissenting).

¹⁰⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 689–93 (1952) (Vinson, C.J., dissenting).

¹⁰⁶ See *supra* notes 48–50 and accompanying text.

¹⁰⁷ See *DaCosta v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972) (executive statement "denying efficacy" to legislation can have no legal effect).

¹⁰⁸ See *Chadha*, 462 U.S. at 942 n.13 (reviewing history of presidential objections to constitutionality of congressional veto).

same is true for the long-standing presidential objection to the statutes allowing the Comptroller General, who was viewed as an agent of Congress, to perform executive functions, until it was challenged successfully by other outsiders in *Bowsher v. Synar*.¹⁰⁹ Yet no one contends that presidential silence or inaction, or even agreement by signing a bill into law, alters the President's powers, or that Congress could augment its own by this form of adverse possession. The constitutional irrelevance of presidential silence further confirms that congressional silence should receive the same treatment.¹¹⁰

IV. WHAT'S LEFT AFTER SILENCE IS REMOVED?

Taking silence out of the analysis does not eliminate the need to decide whether the President had the powers he asserted in *Youngstown* and *Dames & Moore*. Although this is not an Essay about presidential powers, it does seem appropriate and perhaps necessary to explain how those cases should be decided without considering the sounds of silence. That analysis begins with Article II, governing the Executive, which provides in Section 3 that the President shall "take Care that the Laws be faithfully executed" and sets forth a number of other specific powers and duties that he possesses.¹¹¹ Nothing in Article II contains a word about the power of the President to halt a steel strike when the country is engaged in a war for which steel is essential, nor is there anything in Article I that assigns exclusive power over that subject to Congress. At least today, there is little doubt that Congress has the power to pass a law on that subject, but that does not answer the question of whether that possibility prevents the President from acting in the absence of such a law. To be sure, as Justice Black

¹⁰⁹ See *Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986) (noting the President's signing statement expressing the view that Act was unconstitutional).

¹¹⁰ This Essay does not deal with a related topic: what inferences, if any, may a court draw from congressional silence or failure to adopt a proposal in a law that Congress has actually enacted? The question arises in a variety of contexts, ranging from a provision that was deleted from a bill that was enacted, to a proposal that was debated and defeated, to a proposal that was made in one bill, but not in the law that was enacted. A similar set of questions relates to amendments to an existing law that were proposed but not adopted, both when other amendments were approved, and when there were no changes made in the relevant portion of the existing law, in some cases where other provisions were amended. In each of those situations, unlike the silences or inactions discussed in this Essay, Congress did enact a law that contained various provisions that must be construed, and so there is at least some text that meets the *Chadha* standard, which distinguishes those cases from the ones discussed in this Essay. Many of the normative reasons to disregard silence noted in this Essay have salience regarding issues of statutory interpretation, at least in some contexts, but that discussion will have to wait for another day.

¹¹¹ U.S. CONST. art. II, § 3.

observed in *Youngstown*,¹¹² the power to execute the law refutes the notion that the President has the power to make the law, but that largely begs the question of whether what the President did was make a law, which he cannot do, or something else, which he has the authority to do.

One might start by examining the Executive Order issued by President Truman that precipitated the lawsuit in *Youngstown*.¹¹³ Judging it by its format, the Order resembles legislation. It is forward-looking; it directs various people to do various things; it does not cite any existing laws as its basis; and it does not purport to be carrying out any statutory directions.¹¹⁴ To the extent that appearances matter, the Order looks very much like a law.

Second, in a representative government such as ours, it is the function of the elected representatives—the legislature—to make basic policy choices, with the executive branch assigned the duty to carry them out. The Supreme Court has recognized this distinction in its decisions on the extent to which Congress may delegate its powers to administrative agencies and the requirement that the law at least contain an “intelligible principle” to guide the agency.¹¹⁵ The understanding is that it is the role of Congress to make policy choices as to the desired ends, and, in most cases, to provide the means to achieve them. Focusing on the field of labor relations as of 1952, it was Congress that decided the basic rules by which labor and management would engage each other and the circumstances in which the national interest required or permitted the President to step in when those parties could not agree. Moreover, Congress had provided the conditions under which government intervention could take place and the tools that government had available to it.¹¹⁶ The President signed the bills that became those laws, and he may have influenced their contents, but it was only Congress that had the power to enact those ideas into law.

The legislative nature of the Executive Order is also supported by putting it alongside the laws on the subject that Congress had enacted. As the Court observed in *Chadha*: “The legislative character of the one-House veto in these cases is confirmed by the character of the

¹¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952).

¹¹³ Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952) (reprinted in *Youngstown*, 343 U.S. at 589–92 (Appendix to Opinions)).

¹¹⁴ See generally *id.*

¹¹⁵ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

¹¹⁶ See *Youngstown*, 343 U.S. at 585–86.

congressional action it supplants.”¹¹⁷ Both the laws and the Order in *Youngstown* were directed to the issue of when and under what circumstances the government should intervene, and they both provided certain means by which such intervention would take place. The policy choices, however, as to both means and ends, were quite different in the Executive Order from those in the existing laws.¹¹⁸ That suggests that what President Truman did was much more like “supplanting” or making the law, rather than carrying out any of his inherent powers. In addition, as Justice Douglas observed, the seizure of the steel mills gave rise to a takings claim, which would require an appropriation that only Congress could authorize.¹¹⁹ Again, it is possible that the President has powers that look like the lawmaking power, but that would be at odds with the overall notion of separation of powers.

No one suggests that the President can do no more than follow the directives of Congress or carry out the specific additional powers enumerated in the Constitution, such as the duties of Commander-in-Chief, his powers of appointing judges and other officers of the United States, or the power to make treaties. Nonetheless, it would be surprising if he had significant unspecified powers beyond those that the Constitution enumerates for Congress, especially because of the limitation in the Necessary & Proper Clause. Under that provision Congress (not the President) is authorized to “make all Laws necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States”¹²⁰ Although the President surely has some inherent powers closely related to his express powers, they are not likely to be extensive, given the overall structure of the allocation of authority in the Constitution. Seen in that light, and considering the other factors bearing on this question, the majority in *Youngstown* was correct in concluding that President Truman lacked the power to order the end of the steel strike, but congressional silence should have played no role in reaching that conclusion.

Dames & Moore, even without congressional silence, is a stronger case for presidential power. The form of the action—an agreement with a foreign country—more closely resembles an executive decision than a law written by Congress, although there were executive orders

¹¹⁷ *INS v. Chadha*, 462 U.S. 919, 952 (1983).

¹¹⁸ See *Youngstown*, 343 U.S. at 602–03 (Frankfurter, J., concurring).

¹¹⁹ *Id.* at 631 (Douglas, J., concurring).

¹²⁰ U.S. CONST. art. I, § 8, cl. 18.

that implemented the agreement.¹²¹ The agreement was made pursuant to the President's undoubted authority over foreign affairs, although its domestic impacts were what was being challenged. The decision to require all the claims against Iran to be arbitrated, not litigated, was not contrary to policy choices Congress had made in this area, although it was extended to a country that Congress had not previously covered. The failure to include Iran in prior legislation could be argued to be a decision to exclude it, but there is no factual basis for such an assertion: Congress had never been asked to make those procedures applicable to disputes with Iran. Moreover, except for those claimants who thought they would do less well in arbitration than in court, no one, including Members of Congress, had expressed disapproval of the deal, which was supported by the outgoing and incoming Presidents, who were of different political parties. Indeed, because the deal also included a guaranteed means of collecting any judgment that was obtained, it was far from certain that the claimants actually would be worse off than if they had been permitted to continue in court. And the Court left open the possibility that if a claimant were not made whole, there might be a takings case against the United States in the Court of Claims.¹²²

In the end, none of those factors provide the necessary authority for the President to enter an agreement where the Court found that neither existing laws nor the powers expressly granted to him in the Constitution supplied it. If the President had the power to substitute arbitration, plus other benefits to the claimants, for litigation, plus the return of the hostages, it must be because the President had some inherent power that enabled him to do this. And if so, the question becomes, what limits might there be to an argument based on inherent power?

In trying to think about what those limits might be, an incident from my first summer Navy ROTC cruise came to mind. The weather was very hot, and I decided to take my ice cream on deck where there was a breeze. Almost immediately, an upper-class midshipman confronted me, asking what I was doing: "Eating my ice cream," I replied. He responded, "Who told you you could eat it up here?" to which I answered, "No one, but no one told me I couldn't." And then came the final words in our conversation, "But no one told you that you could." It was at that moment that I knew the difference between being a civilian and being in the military: in the former, you can do

¹²¹ *Dames & Moore v. Regan*, 453 U.S. 654, 665 (1981).

¹²² *Id.* at 688–90.

anything unless someone tells you that you can't, and in the latter, you can't do anything unless someone tells you that you can.

Translated into a separation of powers question, and in particular into a presidential powers question, the issue is whether the President can exercise any power that is granted to the federal government, unless he is told that he cannot, or whether he is limited in what he can do, which means he has mainly the powers granted him by Congress or expressly by the Constitution itself, with a penumbra extending only slightly beyond the powers specified. That is the ultimate presidential powers question, as to which the words of the Constitution provide no answer. If we were candid about it, we would admit that the answer turns on what we think the Founders would have wanted regarding an expansive or a limited role for the President, or perhaps what role we think is appropriate in the twenty-first century, but that is not generally the way the question is phrased. Although I generally do not favor an expansive view of presidential power, I think that *Dames & Moore* came to the right conclusion, but not because congressional silence there provided a basis for accretion of presidential power, as the Court concluded.

More fundamentally the question is, does the President have authority under the Constitution to do everything he needs or wants to do, unless Congress tells him that he may not? Or, is it more the other way around—like my experience in the Navy—that he generally can do nothing unless Congress authorizes him to do so? To be sure, there are express powers in the Constitution and some implied powers based on them, many of them in the field of foreign affairs. However, none of the Justices suggested in *Youngstown* that the President had inherent authority to take control over private property (the steel mills) and order individuals (the striking employees) to continue working. Indeed, it is almost unthinkable that the men who wrote the Constitution in 1787 would have conceived that any governmental official, let alone the head of the executive branch of the federal government, which was created as a government of limited powers, would be able to exercise such authority on his own. On the other hand, it is at least in the realm of possibility that the Framers would have envisioned the President making the kind of agreement at issue in *Dames & Moore*, although probably not including the arbitration feature. Although this answer is not entirely satisfactory, it is surely a sounder constitutional footing than was the resort to the sounds of silence relied on in that case.

CONCLUSION

The flaw in Justice Jackson's vaunted three-prong test for determining the existence of Presidential power is that it misleads lawyers and judges into focusing on what Congress did *not* do rather than on what it and the President actually did do. It also treats the separation of powers question as if the only considerations were balancing the interests of the two branches, when in fact, as *Chadha* once again shows, ordinary people (including those who are not citizens) are affected by actions by one or the other, or sometimes both, of the two political branches, and they are entitled to rely on separation of powers doctrines to protect their interests. Not only do those outside the political branches not have a chance to break the silence by expressing their views, but the meaning of silence by Congress or the President is vastly overstated and runs directly contrary to the Presentment Clause requirements as articulated in *Chadha*. As the psychoanalyst Sigmund Freud said, sometimes a cigar is just a cigar, to which I would add, and sometimes the sounds of silence in determining the allocation of power between Congress and the President are just silence.