Foreign Affairs Exceptionalism in Statutory Interpretation: A Reverse Major Questions Doctrine

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It is getting harder for executive branch agencies to win in court. One prominent reason for the harsh climate that agencies face is the Major Questions Doctrine, which has grown more important in statutory interpretation since the Supreme Court decided West Virginia v. EPA. *If the Supreme Court applies it to an assertion of power by the executive branch, the odds are that the executive action will be enjoined. Some scholars thus fear that the Major Questions Doctrine will dangerously constrain the president's conduct of foreign affairs. This Note argues that those predictions are misguided. It identifies a body of law in which the Supreme Court applies a "Reverse Major Questions Doctrine" to give presidents broad discretion when they interpret statutes touching on foreign affairs or national security.*

Typically, the Major Questions Doctrine leads the Court to interpret a statute in a way that confers narrower authority to the agency at issue. When the president exercises some statutory delegation of power that implicates foreign affairs or national security, however, the Supreme Court selects the broader of two possible interpretations. One reading of the Major Questions Doctrine is that it operates—intentionally or not—to avoid a constitutional nondelegation problem. But the Reverse Major Questions Doctrine does the opposite. By broadening the scope of delegated authority, the Reverse Major Questions Doctrine forces the Court to confront whether the statute violated the nondelegation doctrine, often alongside other constitutional issues like due process or the First Amendment. The Reverse Major Questions doctrine allows the Court to avoid a different constitutional problem: defining whether the President has independent power under Article II of the U.S. Constitution over the asserted action.

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Part I of this Note describes the Major Questions Doctrine in more detail and explains why some commentators believe it may or may not apply to foreign affairs delegations. Part II describes the Reverse Major Questions Doctrine by focusing on the constitutional pressures that created it and, through a series of case studies, argues that it may already be implicit in landmark Supreme Court decisions. Part III explores the normative implications for the Reverse Major Questions Doctrine and argues ultimately that its explicit recognition would be helpful for both lawyers and courts.

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INTRODUCTION

The sweep of Article II of the U.S. Constitution and the constitutional powers it conceivably confers onto the president is growing. Indeed, the Supreme Court's decision in *Trump v. United States*[1] contains some of the most expansive statements about the scope of executive power yet.[2] Although the Supreme Court was primarily concerned with President Trump's immunity from criminal prosecution, the Court wrote that Article II gives the president the power to, amongst other things, "oversee[ ] international diplomacy and intelligence gathering, and manag[e] matters related to terrorism, trade, and immigration."[3]

Professor Jack Goldsmith has argued that the most significant part of *Trump v. United States* is "the Court's unusually expansive discussion—much of it dicta—of the president's exclusive presidential powers."[4] True, exercises of executive power rarely end up being challenged in court, where formal determinations of what is dicta or not matter. The expansive dicta may still affect executive branch policy, however, because presidents rely on the advice of executive branch lawyers who "tend to see executive power in broader terms than do courts" by "rely[ing] on general principles embodied in Supreme Court dicta, especially ones that favor presidential power."[5]

Trump v. United States joined a long line of cases recognizing the challenges of identifying the scope of the Constitution's executive power. The Supreme Court acknowledged that there is "little pertinent precedent" guiding "questions about the powers of the [p]resident and the limits of his authority under the Constitution."[6] There is, however, another branch of government that plays a significant role in determining whether a president is allowed to do what they want: Congress. As Justice Robert

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1. 603 U.S. 593 (2024).

2. *See* Jack Goldsmith, *The Relative Insignificance of the Immunity Holding in* Trump v. United States *(and What Is Really Important in the Decision)*, LAWFARE (Sept. 23, 2024), https://www.lawfaremedia.org/article/the-relative-insignificance-of-the-immunity-holding-in-trump-v.-united-states-(and-what-is-really-important-in-the-decision) [https://perma.cc/UE88-VZCV].

3. *Trump*, 603 U.S. at 607.

4. Goldsmith, *supra* note 2. Because President Trump's criminal prosecution did not directly implicate his powers over diplomacy, immigration, or trade, the Court's discussion of those topics is dicta.

5. *Id.*

6. *Trump*, 603 U.S. at 616.

Jackson recognized in his famous *Youngstown* concurrence, the president often acts either with the explicit approval of Congress or in a "zone of twilight" where neither Congress nor the Constitution speaks clearly.[7]

The interplay, and sometimes clash, between Article II of the Constitution and statutory authority occurs particularly frequently in executive action involving national security and foreign affairs.[8] This is because Congress and the president have overlapping powers on the subject—Congress often legislates on issues touching the country's security using its power to regulate commerce, trade, and immigration, while the president "manages" the same issues.[9]

During the summer of 2019, for example, President Donald Trump proposed using a long extant statute, the International Emergency Economic Powers Act of 1977 (IEEPA),[10] to impose tariffs on Mexican goods.[11] The president can only invoke the IEEPA in a national emergency.[12] Thus, in order to induce the Mexican government to take steps to curb migration over its border, President Trump declared that illegal immigration over the southern border was a national emergency and threatened to impose tariffs on Mexican imports.[13]

The tariffs had the potential to be hugely impactful: they would start at five percent, and increase by an additional five percent

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7. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952). That case assessed whether President Truman had the power to seize steel mills critical to U.S. military efforts in Korea. *See id*. at 583.

8. *See* Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS. (Mar. 2, 2017), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/TU9P-2AVV] ("The periodic tug-of-war between the president and Congress over foreign policy is not a by-product of the Constitution, but rather, one of its core aims.").

9. *See Trump*, 603 U.S. at 607; *see also* Amy L. Stein, *Statutory National Security President*, 70 FLA. L. REV. 1183, 1197 (2018) (finding that about half of executive orders aiming to advance national security objectives are "issued by a president acting under statutory authority" rather than solely relying on the constitutional executive power); *What Roles Do Congress and the President Play in U.S. Foreign Policy?*, COUNCIL ON FOREIGN RELS. EDUC., https://education.cfr.org/learn/reading/what-roles-do-congress-and-president-play-us-foreign-policy [https://perma.cc/NN6H-FCRC] ("Although the Constitution assigns certain enumerated powers to the president and Congress, many of those powers overlap and conflict. As a result, a tug-of-war periodically ensues over the country's foreign policy agenda.").

10. 50 U.S.C. §§ 1701–1709.

11. *See* M. ANGELES VILLARREAL, CONG. RSCH. SERV., IN11130, PRESIDENT TRUMP'S POSSIBLE TARIFFS ON MEXICAN GOODS: POTENTIAL ECONOMIC EFFECTS (2019).

12. *See* 50 U.S.C. § 1701(a).

13. *See* VILLARREAL, *supra* note 11.

every month up to 25% on all Mexican imports until Mexico took steps to reduce migration into the United States.[14] As a result of the potential impact on the U.S. economy, commentators—including members of the Republican Party—quickly denounced President Trump's plan as an unprecedented and dangerous use of the IEEPA.[15] Likewise, the U.S. Chamber of Commerce threatened legal action.[16]

President Trump ultimately withdrew the tariff proposal, but he got what he wanted regardless: the Mexican government agreed to take certain steps to curb illegal immigration into the United States.[17] Mexico may have feared that U.S. courts would authorize President Trump's tariffs, which could have substantially harmed its economy.[18] Whether threatening tariffs is a strong negotiation tactic depends at least in part on the negotiators' perceptions of the tariffs' legal bases. If the IEEPA clearly did not authorize the president to impose tariffs, there would have been less reason for Mexico to cut a deal.

A lawsuit never played out, but analyzing some of the questions that would have arisen is a useful illustration of the pattern that this Note identifies. No previous president had ever used the IEEPA to impose tariffs on imports, and as a statutory matter, the IEEPA does not clearly authorize such action.[19] But the language of the statute permits some ambiguity about whether President Trump's proposal was legally acceptable. The IEEPA gives the president a suite of authorities invocable during "any unusual or

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14. *See id.*

15. *See* Catie Edmondson & Maggie Haberman, *Senate Republicans Warn White House Against Mexico Tariffs*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/us/politics/republicans-mexico-tariffs.html [https://perma.cc/6SXM-R56H].

16. *See* Nathan Bomey, *US Chamber Weighing Lawsuit Against White House Over Trump Tariff*, USA TODAY (May 31, 2019), https://www.usatoday.com/story/money/2019/05/31/donald-trump-mexico-tariffs-u-s-chamber-of-commerce/1301491001/ [https://perma.cc/GUF8-Q5QU].

17. *See* Michael D. Shear et al., *Trump Calls Off Plan to Impose Tariffs on Mexico*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/2019/06/07/us/politics/trump-tariffs-mexico.html [https://perma.cc/7SVF-SKNM].

18. *See* Douglas A. Rediker, *The Consequences of Trump's Tariff Threats*, BROOKINGS INST. (Dec. 11, 2024), https://www.brookings.edu/articles/the-consequences-of-trumps-tariff-threats/ [https://perma.cc/2STZ-MB69] (noting that Trump threatens tariffs on Mexico primarily as a "negotiating ploy"); Geoffrey Gertz, *6 Things to Know About Trump's Mexico Tariffs*, BROOKINGS INST. (May 31, 2019), https://www.brookings.edu/articles/6-things-to-know-about-trumps-mexico-tariffs/ [https://perma.cc/5MQV-6PH3] (reporting the value of the Mexican peso dropped three percent after Trump's 2019 tariff threat).

19. *See* Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019), https://www.lawfaremedia.org/article/legal-authority-behind-trumps-new-tariffs-mexico [https://perma.cc/3LYZ-QLU7].

extraordinary threat, which has its source in whole or substantial part outside the United States," including "investigat[ing], block[ing] during the pendency of an investigation, [and] regulat[ing] . . . importation."[20] Does that authority include the ability to impose tariffs in the hopes that the declared emergency will indirectly be abated as a result? Or is the IEEPA more limited to interstitial action directly related to national security such as, for example, increasing the rate of import inspections for shipments from countries that the president finds pose a heightened threat?

Some tools of statutory interpretation might help find an answer. In detailing its Major Questions Doctrine (MQD), the Supreme Court has cited factors such as whether the executive branch action uses statutory authority in a new way or is economically and politically significant as reasons to be suspicious of whether Congress authorized it.[21] In some ways then, Trump's tariff proposal ran afoul of modern doctrines of statutory interpretation: it would have been highly significant economically and would have wielded IEEPA authority in a way that no president had done before.

In addition to the statutory arguments, there may have been an independent constitutional basis for Trump's proposal. As Professors Kathleen Claussen and Timothy Meyer detail, despite Congress' constitutional authority to "regulate commerce with foreign nations,"[22] the "boundary between Congress's authority over foreign commerce and the President's authority over foreign affairs and national security has become blurry."[23] The authors highlight a string of international trade cases in which the executive branch has asserted "maximalist" positions regarding the president's constitutional authority to, for example, impose tariffs.[24] Further, they find that "circuit courts have largely acquiesced in the executive branch's efforts to securitize, and thus constitutionalize, foreign commerce."[25] What accounts for the

20. 50 U.S.C. §§ 1701–02; *see* Anderson & Claussen, *supra* note 19.

21. *See* Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, HOOVER INST. 1 (Nov. 13, 2023).

22. U.S. CONST. art. I, § 8, cl. 3.

23. Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PENN. L. REV. 1955, 1969 (2024).

24. *Id.* at 1969–74.

25. *Id.* at 1974.

shift, and the judicial acquiescence, in the characterization of international trade as implicating inherently executive powers?

This Note argues that the "Reverse Major Questions Doctrine" (Reverse MQD) is responsible. It analyzes the contrast between the Supreme Court's method of statutory interpretation when the executive asserts that foreign affairs or national security are at issue versus when more purely domestic dynamics are at play. In doing so, the Note uncovers an incentive structure that quietly pushes courts to generously evaluate the executive branch's proffered interpretation of statutes directly related to foreign affairs or national security.

The Note focuses on the scenario exemplified above by Trump's invocation of the IEEPA: Congress delegates authority to the president, typically in a broadly worded statute, to take certain measures to safeguard U.S. national security or improve U.S. standing in foreign affairs. Later, the president invokes this statutory authority to take a highly controversial action. Usually, the president grounds the order in *both* statutory and constitutional authority.[26] If litigation ensues, the Reverse MQD counsels that courts are likely to read the statute as broadly as possible. Even if litigation is not initiated, whether the president's legal authority credibly supports the order or not may influence the way affected parties respond.[27]

The MQD is useful as a counterpoint. It demonstrates how, when evaluating executive action more focused on domestic issues, federal courts have become less forgiving of executive assertion of authority. Especially after the landmark case *West Virginia v. EPA*,[28] in which the Supreme Court struck down an Environmental Protection Agency regulation aimed at reducing greenhouse gas emissions, it is likely that the executive branch will have to consider the MQD whenever it tries to exercise authority delegated by Congress.[29] Statistically, if the MQD applies, the

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26. For example, President Trump issued the "Muslim Ban," discussed *infra* at Part II.A.iii, "[b]y the authority vested in [him] as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States." Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

27. *See, e.g.*, *supra* note 18 and accompanying text.

28. 597 U.S. 697 (2022).

29. *See* Patrick Jacobi & Jonas Monast, *Major Floodgates: The Indeterminate Major Questions Doctrine Inundates Lower Courts*, 62 HARV. J. ON LEG. 1, 2 (2024) (noting that "courts are applying the MQD far beyond high-profile regulations such as the

executive branch action is likely to be enjoined; the executive branch has lost every case in which the Supreme Court has expressly applied the MQD after *West Virginia v. EPA* except one.[30] One analysis of circuit court cases found that the MQD enjoined executive action more than half the time.[31] In short, the MQD has significant implications for how the executive branch exercises statutorily delegated authority. The Reverse MQD, however, spares the president from the MQD when delegations of national security or foreign affairs authorities are at issue.[32]

This Note will describe the MQD in more detail in Part I, which highlights recent scholarship prognosticating about whether the MQD may or may not disrupt presidents' authority in national security and foreign affairs. Part II describes the "Reverse MQD" for foreign affairs and national security cases.[33] Instead of adopting a reading of the statute that would narrow the scope of executive authority, the Reverse MQD does the opposite and adopts the broader of two possible readings. Unlike the MQD,

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Environmental Protection Agency's Clean Power Plan (*West Virginia*) or the Biden administration's student loan debt relief efforts (*Biden v. Nebraska*). Litigants have raised the doctrine in nearly every conceivable setting, even including a challenge to the criminal prosecution of an alleged participant in the riot at the Capitol on January 6, 2021. In its current form, there is little to lose when litigants raise the MQD and much to gain.").

30. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023–1031 (walking through new Major Questions Doctrine cases after *West Virginia v. EPA*). *But see* Biden v. Missouri, 595 U.S. 87 (2022) (upholding agency rule requiring that staff at healthcare facilities participating in Medicare and Medicaid to receive the COVID-19 vaccine). In *Biden v. Missouri*, the dissent cited the MQD's clear-statement requirement supporting their position that the agency regulation was not authorized by statute. *See id.* at 104 (Thomas, J. dissenting). The majority, however, emphasized the "longstanding" history of vaccine requirements in healthcare facilities. *See id.* at 94–95.

31. *See* Erin Webb, *Analysis: More Major Questions Doctrine Decisions Are Coming*, BLOOMBERG L. (Nov. 5, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-more-major-questions-doctrine-decisions-are-coming (on file with the *Columbia Journal of Law & Social Problems*).

32. It is difficult to precisely define the point at which an issue switches from being domestic to foreign. *See* Zachary R. Lemonides, Note, *Continued Exceptionalism and the Need for a Foreign Affairs 'Step Zero'*, 62 COLUM. J. TRANSNAT'L L. 813, 846–47 ("Even issues which at first might seem disconnected from foreign affairs may have serious foreign affairs implications."). This Note does not attempt to define what is a "foreign affairs" case or not—others have already done so. *See id.* at 851–52. Nevertheless, the cases that this Note highlights as comprising the Reverse MQD canon center foreign affairs or national security explicitly.

33. Zachary Lemonides used the term "reverse major questions doctrine" in a footnote describing the Supreme Court's decision in *Biden v. Texas*, discussed *infra* at Part II.A.iii. *See* Lemonides, *supra* note 32, at 843 n.184 (2024). This Note, however, fully expands on the term and the conditions that create it, identifies a body of case law dating back to the mid-20th century incorporating it, and discusses its significance moving forward.

which eliminates any nondelegation issues, the Reverse MQD sometimes *creates* a nondelegation issue because the limits of the authority the statute delegates are no longer identifiable. Embedded in the Reverse MQD is thus a hierarchy of constitutional avoidance, in which the Supreme Court prefers answering some constitutional questions over others. The Reverse MQD allows courts to avoid the question of whether a challenged executive action can stand solely on the president's Article II authority, even though that means courts must tackle other constitutional issues such as nondelegation and due process. Part III argues that explicitly recognizing the Reverse MQD would help both litigants and courts. Especially for executive branch lawyers, the Reverse MQD provides a blueprint to successfully litigate when a president's authority over foreign affairs and national security are at issue. For courts, recognizing the Reverse MQD would help interpret statutes given the way canons of interpretation interact with congressional drafting of statutes.

I. IMPLICATIONS OF STATUTORY INTERPRETATION TRENDS FOR NATIONAL SECURITY AND FOREIGN AFFAIRS

Federal courts currently give executive branch agencies less leeway in their interpretations of authorizing statutes than they used to.[34] This happens regardless of the party in power; during Democratic presidencies, litigants rush to the Fifth Circuit to

34. *See* Charlie Savage, *Weakening Regulatory Agencies Will Be a Key Legacy of the Roberts Court*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/supreme-court-regulatory-agencies.html [https://perma.cc/5GBZ-SYDV] (arguing that the Supreme Court "has also made it easier to sue agencies and get their rules overturned, including by advancing the so-called major questions doctrine"). Of course, the Supreme Court's decision to overrule *Chevron*, which gave executive agencies deference in their interpretations of ambiguous statutory language, will also make it more difficult for administrative agencies to win statutory interpretation cases. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); Max E. Schulman & Nicholas B. Venable, *Supreme Court Overrules Chevron, Sharply Limiting Judicial Deference to Agencies' Statutory Interpretation*, GIBSON DUNN (June 28, 2024), https://www.gibsondunn.com/supreme-court-overrules-chevron-sharply-limiting-judicial-deference-to-agencies-statutory-interpretation/ [https://perma.cc/THC9-W8KP]. *Loper Bright* itself is unlikely to influence the MQD. *See* David Lehn, Loper Bright *Replaces* Chevron*, But the Changes May Not Be as Significant as Some Think*, BOIES SCHILLER FLEXNER LLP (July 2, 2024), https://www.bsfllp.com/news-events/loper-bright-replaces-chevron-but-the-changes-may-not-be-as-significant-as-some-think.html [https://perma.cc/GH3E-SH5R] ("[T]he [MQD] is not about how to review agency interpretations but about the existence of agency authority: agencies lack the power to make 'major policy decisions' absent 'clear congressional authorization.' Therefore, the major[ ] questions doctrine should continue to have force with respect to *Loper Bright*'s threshold question of whether the statute delegates the decision to the agency.").

enjoin agency action, and during Republican ones, they head to the Ninth.[35] One of the primary tools federal courts use to strike down agency action is the MQD. No description of the MQD will satisfy everyone. There is still substantial uncertainty over exactly how it operates, and new scholarship on the topic is abundant.[36] This Part nevertheless provides a rough sketch to illustrate how it functions in comparison to the Reverse MQD. Next, this Part highlights an academic split in opinion regarding whether the MQD will disrupt the United States' national security strategy.[37] Some envision disaster for the executive branch, while others express less concern about whether the MQD will constrain the president in national security and foreign affairs.

The scope of executive authority moving forward will be impacted by whether courts apply the trend to strictly construe the executive's statutory authority to the president's interpretation of statutes touching on foreign affairs or national security. When presidents assert authority over foreign affairs and national security matters, they usually attempt to ground their executive order or proclamation in statutes rather than relying solely on their authority under Article II of the U.S. Constitution.[38] Presidents are incentivized to do so because the Supreme Court evaluates "claims of Presidential power" under Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co.*

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35. *See* Pamela King et al., *Red States Bet on 5th Circuit to Take Down Biden Agenda*, E&E NEWS BY POLITICO (Feb. 15, 2023), https://www.eenews.net/articles/red-states-bet-on-5th-circuit-to-take-down-biden-agenda/ [https://perma.cc/E4S8-65HC] (explaining that litigants challenging Democratic policies prefer the Fifth Circuit because it is perceived as skewing conservative and that litigants challenging Republican policies prefer the Ninth and D.C. Circuits because they skew more liberal); *see also* Susannah Luthi, *How Trump is Filling the Liberal 9th Circuit with Conservatives*, POLITICO (Dec. 22, 2019), https://www.politico.com/news/2019/12/22/trump-judges-9th-circuit-appeals-court-088833 [https://perma.cc/3GKK-XN69] (noting that the Ninth Circuit "has been the go-to venue for activist state attorneys eager to freeze Trump policies on health care, immigration and other social issues").

36. *See* Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REG. NOTICE & COMMENT (Mar. 18, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/ [https://perma.cc/GH3E-SH5R] (highlighting the plethora of scholarship available on different topics of contention surrounding the Major Questions Doctrine).

37. *See infra* Part I.B.

38. *See* Stein, *supra* note 9 (finding that about half of executive orders aiming to advance national security objectives are "issued by a president acting under statutory authority").

v. Sawyer,[39] which gives presidents the most latitude when they act consistently with Congress' will.[40] But determining whether the action is consistent with congressional will depends on the role of the MQD; if courts use the MQD to narrow the scope of delegated authority, as they have in the domestic context, then presidents have less statutory authority to do what they see fit to protect the United States' national security interests.

A. WHAT IS THE MAJOR QUESTIONS DOCTRINE?

The Supreme Court formally minted the MQD in *West Virginia v. EPA*.[41] The Court did not describe it, however, as a new judicial invention; rather, it was an "identifiable body of law" that the Court then characterized as a "doctrine."[42] Broadly, the MQD is a rule of statutory interpretation requiring that whenever an executive agency uses its regulatory authority to decide a question of major "economic and political significance," the agency must point to a clear statement from Congress granting such authority.[43] Professor Thomas Merrill characterizes the MQD as triggered by some combination of three features, though it is not clear which, if any, are necessary or sufficient.[44] First, the agency invokes its statutory authority in a new way.[45] Second, its decision transforms the scope of its statutory authority or its jurisdiction.[46] Third, the decision implicates a question of major political or

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39. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)); *see Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

40. The president's power is at its maximum when acting pursuant to an "express or implied authorization of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). In the middle is a "zone of twilight" when Congress is silent and the constitution does not provide a clear answer. *Id.* at 637. There, "congressional inertia, indifference or quiescence" allows for unilateral presidential action. *Id.* Finally, in the third category, "the president takes measures incompatible with the express or implied will of Congress." *Id.* Here, presidents can rely only on their *exclusive* constitutional powers. *See id.* at 637–38. As a result of the tripartite framework, executive branch lawyers are always incentivized to locate their authority within *both* a statutory grant from Congress and the president's independent constitutional authority.

41. 597 U.S. 697 (2022).

42. *Id.* at 724.

43. *Id.* at 721–24; *see also* Merrill, *supra* note 21 at 1.

44. Merrill, *supra* note 21, at 3.

45. *See id.*; *see also West Virginia*, 597 U.S. at 724 (". . . EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority" (internal quotations omitted)).

46. *See* Merrill, *supra* note 21, at 3; *see also West Virginia*, 597 U.S. at 724.

economic significance.[47] Many points of confusion shroud the MQD, such as how clear the statute must be in its authorization and the threshold for defining "major" questions.[48] This Note leaves resolving many of those issues for another day but highlights some features and ambiguities that are relevant to understanding the Reverse MQD.

A primary point of contention between the sitting Justices is whether the MQD is a substantive canon of statutory interpretation[49] or simply a helpful descriptor for why the text of a statute itself does not support the executive agency's interpretation.[50] One possibility is that the MQD derives legitimacy from the constitutional nondelegation doctrine. The Court has repeatedly said that it is unconstitutional for Congress to delegate legislative power to the executive branch because Article I vests "all legislative Powers" in Congress.[51] Congress must provide an "intelligible principle" to guide executive discretion in implementation.[52] If, instead, it delegates unfettered

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47. *See* Merrill, *supra* note 21, at 3; *see also* NFIB v. OSHA, 595 U.S. 109, 117 (2022) (finding OSHA's mandate that workers at companies with over 100 employees must either get the COVID-19 vaccine or test and wear a mask to be a question of "vast economic and political significance" (quoting Ala. Assn. of Realtors v. Dep't of Health and Hum. Servs., 594 U.S. 758, 764 (2021))).

48. *See, e.g.*, *Questions Remain on Major Questions Doctrine*, U. PENN. L. (June 30, 2023), https://www.law.upenn.edu/live/news/15982-questions-remain-on-major-questions-doctrine [https://perma.cc/T7ZP-Y827] (recapping a statement made by Professor Cary Coglianese after the Supreme Court decided Biden v. Nebraska, 143 S. Ct. 2355 (2023)).

49. According to then-Professor Amy Coney Barrett, substantive canons are tools of statutory interpretation that "promote policies external to a statute." Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010). Some substantive canons put a light thumb on the scale between two equally plausible readings of a statute, while stronger "clear statement rules" instruct "a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it." *Id.* at 118.

50. *See* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024) (describing one justification for the MQD as "to preserve legislative primacy and reduce the policymaking authority of the executive branch[,]" while the other sees the MQD "as an effort to capture Congress's likely instructions").

51. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 135 (2019) ("Article I of the Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' [Section] 1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'"); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (noting that the text of the Constitution vests legislative power in Congress and "permits no delegation of those powers").

52. *See Gundy*, 588 U.S. at 135 ("So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" (internal citations omitted)).

discretion, the statute is unconstitutional.[53] The MQD thus allows the Court to avoid deciding whether a statute is an unconstitutional delegation of legislative power to an executive agency. It instead adopts a reading of the statute that cabins the scope of discretion conferred to the agency and holds that the agency action transgressed statutory limits in a particular case. By adopting an interpretation of a statute that does not permit the executive agency to decide a particularly important question, the MQD functions to avoid a lurking nondelegation problem.[54]

Justice Gorsuch's writings center the nondelegation doctrine as the MQD's constitutional underpinning.[55] His concurrence in *West Virginia v. EPA* argued that "[t]he major questions doctrine works . . . to protect the Constitution's separation of powers."[56] Justice Gorsuch framed the MQD as a clear statement rule that grows out of the text of Article I, which vests "all legislative powers . . . in a Congress of the United States."[57] In his dissent in *Gundy v. United States*, he explained that the MQD was one way in which the Court continued to protect the constitutional value that the nondelegation doctrine was designed for—having Congress decide important issues.[58] This version of the MQD "narrow[s] the field in which the nondelegation doctrine remains underenforced"[59] and allows the Court to avoid a construction of the statute that would leave the executive agency with unfettered policy discretion.

Chief Justice Roberts, who penned the majority opinion in *West Virginia v. EPA*, has been less willing to justify the MQD as a tool

53. *See id.*

54. *See* Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 483 (2021) (characterizing one version of the MQD as a "nondelegation canon, forbidding the agency from seizing on ambiguous language to aggrandize its own power (in some sufficiently major and transformative way)"); *see also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 265–66 (2022) (whether the MQD is intentionally used to avoid nondelegation issues or not, "a sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine").

55. *See* Cass Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 253 (2024) (explaining Justice Gorsuch's view that "the major questions doctrine is best understood as a nondelegation canon").

56. 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring).

57. U.S. CONST. art. I, § 1; *see id.* at 736.

58. *See* Gundy v. United States, 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting).

59. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. 693, 703 (2022), https://www.yalelawjournal.org/forum/deference-delegation-and-divination [https://perma.cc/R5YZ-VPRR].

to specifically avoid nondelegation issues.[60] Instead, he emphasizes precedent and attempts to situate the agency's action within the context of its previous actions, asking whether the proposed action is "extraordinary" or "unheralded."[61] Nevertheless, according to Roberts, the MQD is still grounded in separation of powers principles more broadly.[62] Unlike Justice Gorsuch, however, the Chief Justice has yet to specify which, if any, constitutional text the MQD serves to enforce. Additionally, the Chief Justice has referred to the MQD as a "clear authorization" requirement rather than a "clear statement rule," which may leave room for finding that the statute implied that Congress delegated an authority to the agency even if it did not explicitly say so.[63]

A contrary explanation of the MQD is that it is not rooted in any substantive policies but is a corollary of textualist interpretation. For Justice Barrett, the doctrine is quasi-linguistic; it derives from common-sense ideas about what principals intend when they delegate authority to agents.[64] Interpreting that delegation must account for the context in which it took place.[65] Justice Barrett gives the example of a parent who tells the babysitter to "make sure the kids have fun."[66] Although the babysitter's subsequent decision to spend thousands of dollars and take the kids to Disneyland would be authorized by the literal meaning of the instruction, common sense indicates that the parent would not have contemplated or intended such an action.[67] The babysitter might be authorized to take the kids to Disneyland, though, if the babysitter were told to "take any and all means to ensure the kids have fun" and had also taken the kids to Disneyland before based on this instruction. For Justice Barrett, the MQD is not a substantive canon that derives its legitimacy from the nondelegation doctrine or more general separation of

60. *See* James C. Phillips, *The Major Questions Doctrine Is Not About Delegation, but Usurpation—and That Matters*, YALE J. ON REG. NOTICE & COMMENT (Sept. 11, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-is-not-about-delegation-but-usurpation-and-that-matters-by-james-c-phillips [https://perma.cc/W6A9-ZACQ].

61. *West Virginia*, 597 U.S. at 721–22; *see* Merrill, *supra* note 21, at 4 (describing differences between Chief Justice Roberts' and Justice Gorsuch's articulations of the MQD).

62. *See* Merrill, *supra* note 21, at 4.

63. *See id.* at 4–5.

64. *See generally* Biden v. Nebraska, 143 S. Ct. 2355, 2377–85 (Barrett, J., concurring).

65. *See id.* at 2379.

66. *Id.*

67. *See id.*

powers principles. Instead, it is just another name for ordinary statutory interpretation and the Court's efforts to derive the best reading of the delegation.[68] It is worth noting, though, that Justice Barrett has thus far been unable to get others on the Court to join in her theory.[69]

Although there is still some in-fighting over the theoretical groundings of the MQD, one thing is clear: federal courts are not supposed to allow executive agencies to resolve the most important questions the United States faces without strong evidence that Congress intended for them to do so. If the MQD is applied to statutes delegating the president or an executive agency authority over issues involving national security and foreign affairs, it could drastically pare down the president's ability to manage those issues.

B. ANXIETY OVER THE MQD'S IMPACT ON NATIONAL SECURITY

Although presidents have some inherent constitutional powers over foreign affairs and national security, they also frequently act pursuant to broad delegations from Congress.[70] Consequently, the MQD may disrupt the way presidents are able to apply those statutes.[71] Presidents may find themselves constrained if courts force them to point to clear congressional statements whenever they invoke a statute designed to give them certain powers to safeguard national security interests in some new, but highly significant manner.[72] This outcome may be desirable under the view that Congress has ceded too much power to presidents.[73] On

68. *See generally* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (June 10, 2024) (describing and justifying the MQD in a similar manner as Justice Barrett in *Biden v. Nebraska*).

69. *See Nebraska*, 143 S. Ct. 2355, 2376–85 (2023) (Barrett, J., concurring). Justice Barrett was the sole concurring Justice setting forth her vision of the MQD.

70. *See* Stein, *supra* note 9, at 1193 (finding that around "400 statutes discuss national security authority provided to the President, as opposed to other agents of the government, and over [60] provide the President with explicit power to act in the name of national security").

71. *See generally* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55 (2023).

72. *See supra* note 19 and accompanying text (discussing President Trump's proposal to use the IEEPA in order to impose tariffs despite the lack of a clear statement in the statute about tariffs).

73. *See, e.g.*, Russ Feingold, *It's Time to Tear Up the Executive Branch's Blank Check*, BRENNAN CTR. FOR JUST. (July 22, 2021), https://www.brennancenter.org/our-work/analysis-opinion/its-time-tear-executive-branchs-blank-check [https://perma.cc/Z4SJ-5YQK] (arguing that "[s]ince 9/11, Congress has repeatedly expanded the executive's

the other hand, broad and flexible delegations might be especially helpful in national security and foreign affairs matters, where presidents have institutional advantages like unity of office and ready access to confidential information that allow them to respond to crises more deftly than Congress.[74]

Professors Timothy Meyer and Ganesh Sitaraman have argued that the MQD will present significant difficulties in the realm of economic warfare, implicating the ability to sanction foreign governments.[75] They provide examples of presidents using national security statutes in novel ways that have large impacts on the U.S. economy.[76] They argue that the MQD presents considerable difficulties for presidents acting pursuant to the IEEPA, for example, if they decide to levy large sanctions against Russia that carry global economic impacts.[77] Applying the MQD to these economic warfare statutes might risk incentivizing presidents to resort to more traditional uses of force grounded more solidly in Article II of the Constitution.[78] Professors Meyer and Sitaraman worry about a more dangerous world in which presidents have to use bombs rather than sanctions to achieve their goals.[79]

Likewise, professors Kristen Eichensehr and Oona Hathaway have explored the consequences of the MQD for the United States' ability to reach diplomatic solutions to international problems.[80] They point out that most binding international legal instruments are finalized via "ex ante congressional executive agreements" rather than formal treaties ratified by the Senate.[81] Congressional executive agreements are when Congress grants the president

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authorities by delegating its own powers through legislation and then acquiesced to the executive stretching the limits of those authorities beyond recognition").

74. *See* Masters, *supra* note 8 ("[P]residents have many natural advantages over lawmakers with regard to leading on foreign policy. These include the unity of office, capacity for secrecy and speed, and superior information."); Meyer & Sitaraman, *supra* note 71, at 78–81 (arguing that applying the MQD to national delegations would hamstring the president's ability to effectively safeguard national security).

75. *See generally* Meyer & Sitaraman, *supra* note 71.

76. *See id.* at 72 ("A wide range of economic tools used to respond to interstate conflict—or, critically, reduce global dependence on supply chains located in countries with whom we might come into conflict—would likely become unavailable or would be substantially curtailed in terms of their usefulness should the MQD be applied to them.").

77. *See id.* at 72–73.

78. *See id.* at 78.

79. *See id.*

80. *See generally* Kristen E. Eichensehr & Oona A. Hathaway, *Major Questions About International Agreements*, 172 PENN. L. REV. 1845 (2024).

81. *Id.* at 14.

statutory authority to conclude an international agreement, usually before the terms of the deal are settled.[82] Often, these statutes give presidents broad discretion and do not contain clear statements defining the limits on what the president can agree to.[83] The professors then advance various functionalist arguments as to why the MQD should not apply to treaty negotiations: for example, Congress might authorize a congressional executive agreement because the president has an informational advantage about sensitive diplomatic negotiations.[84]

Others have tried to dispel some of the concern expressed above by arguing that the MQD as properly understood will not limit the president when acting pursuant to national security and foreign affairs statutes.[85] Professors Jack Goldsmith and Curtis Bradley posit that national security statutes tend to implicate independent constitutional powers in Article II, where there are diminished nondelegation concerns; if the MQD is simply a contextual tool, as Justice Barrett has described, then national security and foreign affairs delegations are instances where Congress especially "expected to authorize major presidential actions with broad authorizations."[86]

This Note generally concurs with Professors Goldsmith and Bradley's prediction that the MQD is unlikely to disturb the manner in which presidents exercise their delegated authority over national security and foreign affairs. The Reverse MQD, however, may provide a more theoretically grounded reason as to why and thus be more helpful both in anticipating how the harder cases may come out and in developing a litigation strategy.[87]

II. REVERSE MAJOR QUESTIONS DOCTRINE IN NATIONAL SECURITY AND FOREIGN AFFAIRS

This Part identifies and describes the Reverse Major Questions Doctrine (Reverse MQD). The scholarship described in Part I

82. *See id.*
83. *See id.*
84. *See id.* at 28.
85. *See* Curtis Bradley & Jack L. Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PENN. L. REV. 1743, 1790–91 (2024); *see also* Lemonides, *supra* note 32, at 843–44 (making similar predictions for similar reasons).
86. Bradley & Goldsmith, *supra* note 85, at 1796.
87. *See infra* Part II.A (explaining why Bradley and Goldsmith's approach may be useful in easy cases, but exploring its limitations and arguing that the reverse MQD provides a more helpful approach).

analyzed the potential consequences of applying the MQD to foreign affairs or national security delegations, but it has thus far not adequately analyzed Supreme Court decisions where the Court could have used the MQD to enjoin the executive branch but did not. This analysis reveals a structural pressure that counsels against being too parsimonious with the president—and thus against the more restrictive trend in statutory interpretation. Each case discussed below involved the following scenario: Congress delegated a foreign affairs or national security authority to the president, who then used that authority to decide a question that might be one of major economic or political significance. In each case, rather than employing the MQD or its underlying structure to constrain the president, the Court reversed much of the MQD's logic to uphold the executive action. The pattern that emerges is the Reverse MQD—a doctrine that permits and encourages foreign affairs exceptionalism to thrive in statutory interpretation cases.[88]

A. THE REVERSE MQD'S INCENTIVE STRUCTURE

In cases implicating the Reverse MQD, the Court selects the interpretation that delegates broader, rather than narrower, discretion to the executive. Often, it does so in the absence of a clear statement in the statute. The Reverse MQD reveals that constitutional avoidance is not always one dimensional—some cases involve more than one possible constitutional issue, and in those the Court prefers to answer some constitutional questions and avoid others. In Reverse MQD cases, by selecting the broader of two interpretations, the Court in turn is forced to address one or more constitutional questions. The MQD, whether theoretically intended to or not, avoids nondelegation issues; the Reverse MQD, however, often does the opposite by increasing the breadth of the delegation, raising questions about whether the statute leaves the executive with any limits on its discretion. After interpreting the statute broadly, the Court then attempts to supply the statute with an intelligible principle using history or context. Moreover, choosing the broader of two interpretations often forces the Court

88. *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1900 (2015) (describing foreign affairs exceptionalism as "the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy").

to address whether the president's action violates individuals' constitutional rights. It goes through this trouble in service of avoiding a different constitutional problem: defining the distribution of powers between the legislative and executive branches. Courts acting pursuant to the Reverse MQD prefer to avoid defining Article II, even if it means they must answer questions such as whether the president violated rights such as due process or free speech. Why?

In the foreign affairs context, nondelegation challenges are historically quite easy for the executive branch to defeat. Many argue that the Supreme Court has long analyzed constitutional issues involving foreign affairs and national security through a lens distinct from, and more permissive than, domestic questions.[89] One of the most prominent demonstrations of foreign affairs exceptionalism is *Curtiss-Wright*.[90] There, Congress authorized the president to prohibit the sale of arms to countries engaged in the Chaco War if doing so "may contribute to the reestablishment of peace."[91] Plaintiffs challenged the statute as an unconstitutional delegation of the legislative power over foreign commerce to the executive.[92] In upholding the statute, Justice Sutherland reasoned that there are "fundamental" differences between the powers of the federal government in foreign versus domestic affairs.[93] The delegation was thus justified largely on functionalist grounds: in negotiations with foreign nations, the president has better intelligence than Congress and needs to keep discussions secret.[94] Some members of the Court today continue to agree with the rationale of *Curtiss-Wright*, and thus view the scope of permissible delegations to the executive as broader in the

89. *See* Sitaraman & Wuerth, *supra* note 88 (describing "foreign affairs exceptionalism" as characterized in part by "expansive" executive authority coupled with "considerable deference"). Recently, though, there has been some debate over whether the Roberts Court has scaled back the scope of foreign affairs exceptionalism. *See id.* (arguing that since *Curtiss-Wright*, the Supreme Court has shifted towards evaluating foreign affairs questions with principles indistinct from domestic issues). *But see generally* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From 'Exceptionalism'*, 128 HARV. L. REV. 294 (2015) (responding to Sitaraman). This Note demonstrates that foreign affairs exceptionalism is alive and well, at least as it pertains to statutory interpretation.

90. United States v. Curtiss-Wright, 299 U.S. 304 (1936).

91. *Id.* at 312. The Chaco War was a conflict between Bolivia and Paraguay that took place from 1932–1935. *See Chaco War*, BRITANNICA, https://www.britannica.com/event/Chaco-War [https://perma.cc/NCR9-LA8E].

92. *Curtiss-Wright*, 299 U.S. at 314.

93. *Id.* at 315.

94. *See id.* at 319.

foreign affairs context.[95] As Justice Department lawyers commonly refrain, "*Curtiss-Wright* so I'm right."[96]

That permissiveness also extends to the strength of plaintiffs' individual rights claims. Constitutionally protected rights such as due process or those protected by the First Amendment are highly susceptible to erosion in national security crises.[97] This is because constitutional rights are often governed by various balancing tests, and in times of crisis, the government's interest will more easily outweigh the individual's.[98] Further, because the relative weight of individual and government interests is highly case-dependent, judicial holdings that constrain some constitutional right as a result of their being outweighed by a government interest can more readily be cabined to their facts.[99]

By contrast, the task of defining what the "executive power" in Article II means is much harder for courts to address, and the impact of constitutional decisions are arguably more consequential in the long term.[100] This fact does much to explain the lasting impact that Jackson's tripartite framework has in separation of powers cases "where the Constitution says little . . . judicial

95. *See* Gundy v. United States, 588 U.S. 128, 159 (2019) (Gorsuch, J., dissenting) (arguing that Congress can vest greater discretion in the executive over matters that "overlap[ ] with authority the Constitution separately vests" in the president (citing *Curtiss-Wright*, 299 U.S. at 320, 57)). Justice Gorsuch was joined by Chief Justice Roberts and Justice Thomas. *See id.* at 149.

96. Harold H. Koh, *America's Overlooked National Security Threat*, JUST SEC. (Sept. 11, 2024), https://www.justsecurity.org/99994/americas-national-security-threat/ [https://perma.cc/LL2X-SDNS].

97. *See* Philip A. Hamburger, *The Inversion of Rights and Power*, 63 BUFF. L. REV. 731, 790 (2015) ("The inversion of rights and powers is most clearly dangerous in emergencies. A sharp emergency can make a government interest seem especially pressing. In such circumstances, therefore, the compelling-government-interest test opens up a path for harsh infringements on rights.").

98. *See id.*

99. *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 595, 635 (1988) ("The peculiar ease with which judges can distinguish away past balancing test cases, along with their ability to add new categories of interests when the need arises, makes it especially easy for balancing judges to handle the unusual case.").

100. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2051 (2005) ("While the President's constitutional authority as Commander-in-Chief is enormously important, determining the scope of that authority beyond what Congress has authorized implicates some of the most difficult, unresolved, and contested issues in constitutional law. Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous."); *see also* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 4 (1982) ("Article II of the Constitution is notoriously ambiguous.").

resolutions are few, and the stakes are high."[101] Jackson's concurrence recognized the "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves" and thus attempted to set out a flexible framework that preserves a role for Congress.[102] Only when a court finds that the executive acts against the will of Congress must a court expressly decide whether the president has independent Article II power to take the proposed measure.[103] When the executive acts consistent with Congressional intent, however, flexibility is preserved in "the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge . . . and the Constitution . . . ."[104] The difficulty in drawing a line between executive and legislative power may explain why "judges . . . will do everything in their power to avoid considering an unusual action in terms of the President's power alone, and will seize with manifest relief on any evidence of congressional approval."[105] It is in this context that the Reverse MQD emerges.

Ironically, the incentive structure that produces the Reverse MQD was repudiated in one of the decisions most responsible for its development: *Youngstown*. While Justice Jackson's concurrence is more frequently used by courts today, Justice Black's majority opinion explicitly rejected President Truman's claim of statutory and constitutional right to seize steel mills embroiled in a labor dispute that was undermining the Korean War effort.[106] As exemplified by the following case studies—all after *Youngstown*—the limits established by Black's opinion have

101. Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT 87, 90 (2002).

102. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring); *see also* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (noting that Jackson's concurrence is the framework that the Supreme Court uses when it evaluates claims of presidential power).

103. *See Youngstown*, 343 U.S. at 637–38.

104. Dames & Moore v. Regan, 453 U.S. 654, 662 (1981).

105. CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 6 (expanded ed. 1976).

106. *See Youngstown*, 343 U.S. at 587–88 (majority opinion). Justice Black rejected the executive's claim of statutory authority despite the views of three dissenting Justices who thought that President Truman's decision was authorized by various statutory provisions. *See id.* at 670–72 (Vinson, C.J., dissenting).

been "hollow[ed] out" in subsequent decades.[107] The Reverse MQD has supplanted them.

1. *Canceling Claims via Sole Executive Agreement:* Dames & Moore v. Regan

The Iranian Revolution in 1979 produced a deeply anti-American Iranian government.[108] When Iran's exiled leader, Mohammad Reza Pahlavi, sought cancer treatment in the United States, the new Iranian government led by Ayatollah Khomeini incited militant followers to attack the U.S. embassy in Tehran.[109] On November 4, 1979, over 50 Americans were taken hostage at the embassy.[110] The hostages were held for 444 days, and President Carter's failure to quickly secure their release contributed to his failure to win a second term in office.[111]

The Hostage Crisis prompted an extremely complex negotiation process to try to free the American hostages.[112] One of Khomeini's conditions for freeing the hostages was that the United States cancel any legal claims that Americans had against Iranian assets, then frozen in U.S. banks.[113] On January 20, 1981, on the first day of the Reagan administration, the hostages returned to the United

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107. Chris Edelson, *The Hollowing of* Youngstown: *How Congress and the Courts Can Restore Limits on Presidential Power*, 47 PRESIDENTIAL STUDS. Q. 816, 818 (2017). Professor Chris Edelson has argued that Jackson's framework—the part of *Youngstown* with the most lasting precedential effect—has become "an increasingly hollow shell used mainly to provide cover for presidential action that in fact broke free of constitutional and statutory limits." *Id.* Part of the problem that Professor Edelson identified was that if "a claim that presidential action has statutory support is demonstrably false or incorrect, it must be rejected. Otherwise, Jackson's framework becomes a malleable or hollow device used to stamp legitimacy on actions that lack solid legal support." *Id.*

108. *See* Michael J. Hancock, *The Iran Hostage Crisis*, NAT'L ARCHIVE: PIECES OF HIST. (Nov. 29, 2021), https://prologue.blogs.archives.gov/2021/11/29/the-iran-hostage-crisis/ [https://perma.cc/2QAC-PUAG].

109. *See id.*

110. *See The Iranian Hostage Crisis*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, https://history.state.gov/departmenthistory/short-history/iraniancrises [https://perma.cc/UZM4-VA2A] (last visited Dec. 30, 2024).

111. *See* Lee Sigelman & Pamela J. Conover, *The Dynamics of Presidential Support During International Conflict Situations: The Iranian Hostage Crisis*, 3 POL. BEHAV. 303, 304 (1981) (explaining that, although the public initially approved of Carter's handling of the Iranian Hostage Crisis, his approval ratings had dropped to 36% by the end of October 1980).

112. *See generally* Joseph J. Norton & Michael H. Collins, *Reflections on the Iranian Hostage Settlement*, 67 AM. BAR ASS'N J. 428 (1981).

113. *See id.* at 428–30.

States in accordance with the Algiers Accord signed with Iran.[114] In exchange for the hostages' release, the United States transferred billions of dollars to Iran and provided that U.S. courts could not hear any of the legal claims that Americans had against the Iranian assets at issue.[115] The Carter administration, which negotiated the Algiers Accords, cited IEEPA as their source of authority for canceling litigation in U.S. courts.[116]

Lower courts that analyzed whether Carter could effectively cancel litigation in Article III courts without Senate ratification of a treaty or other legislation besides IEEPA took an approach more characteristic of the MQD. The First Circuit, for example, thought it was "not impossible" to read the IEEPA as supporting President Carter's decision to cancel legal claims against Iranian assets.[117] However, it refused to hold that the IEEPA authorized Carter's executive order because "the statutory meaning in this regard is scarcely clear, and there is no precedent for such a reading."[118] In the face of ambiguity and one of the more pressing crises facing the country, the First Circuit declined to read IEEPA in a novel, unheralded way.[119] Although the lower court did not analyze the economic or political significance of Carter's decision as part of a deal to free the American hostages, it would be surprising if the decision did not qualify as "major."[120] The First Circuit did not find the executive agreement authorized by statute, but ultimately concluded that the president had the power to unilaterally cancel claims by virtue of Article II of the Constitution.[121]

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114. *See* Kate Hewitt & Richard Nephew, *How the Iran Hostage Crisis Shaped the US Approach to Sanctions*, BROOKINGS INST. (Mar. 12, 2019), https://www.brookings.edu/articles/how-the-iran-hostage-crisis-shaped-the-us-approach-to-sanctions/ [https://perma.cc/NMG3-U8JW].

115. *See* Warren Christopher & Richard M. Mosk, *The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy*, 7 PEPP. DISP. RESOL. L.J. 165, 168 (2007).

116. *See* Dames & Moore v. Regan, 453 U.S. 654, 655 (1981). Recall that IEEPA is the International Emergency Economic Powers Act. *See supra* note 19.

117. Charles T. Main Int'l v. Khuzestan Water & Power Auth., 651 F.2d 800, 809 (1st Cir. 1981).

118. *Id.* at 809–10.

119. *Id.* at 809.

120. The Supreme Court recognized the importance of the moment. "[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, . . . we are not prepared to say that the President lacks the power to settle such claims." *Dames & Moore*, 453 U.S. at 678.

121. *See Charles T. Main International*, 651 F.2d at 814 ("Whatever may be the reach of the executive power under circumstances that implicate less squarely the conduct of foreign affairs, the executive power extends so far as to permit the accord reached here."). Notably,

It was this move that the Supreme Court was unwilling to make in *Dames & Moore*, which also reviewed the constitutionality of the Algiers Accord. In an opinion by Justice Rehnquist, the Court found that the IEEPA did not expressly authorize President Carter to cancel legal claims that U.S. citizens had against Iranian assets.[122] Nevertheless, it upheld the executive order. The language used is remarkable as compared to the modern MQD: "[W]e cannot ignore the *general tenor* of Congress's legislation in this area . . . Such failure of Congress *specifically* to delegate authority does not, especially in the areas of foreign policy and national security, imply congressional disapproval of the action taken by the Executive."[123] The MQD requires clear authorization from Congress before the executive can assert some delegated authority over a major economic or political question.[124] In *Dames & Moore*, however, the Court required a clear statement that Congress did *not* authorize the cancellation of claims.[125] Even though the Court found that the IEEPA did not clearly or expressly authorize the president to unilaterally cancel claims, the "general tenor" of legislation on the subject reflected "that Congress has implicitly approved" the president's ability to settle the claims against Iranian assets without the Senate's separate ratification.[126]

As will become a feature in the following case studies, the Court construed the legislative atmosphere as permitting this particular claim of executive power in the name of constitutional avoidance.[127] The Court noted at the top of the opinion that its decision "will not dramatically alter" the immense difficulty of defining executive power discussed by Justice Jackson in *Youngstown*.[128] It stressed its desire "to lay down no general 'guidelines' covering other situations" and to "rest [its] decision on

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then-judge Breyer concurred on the grounds that the Article II question was unnecessary to reach because IEEPA provided sufficient statutory authority. *See id.* at 815–16 (Breyer, J., concurring).

122. *See* Dames & Moore v. Regan, 453 U.S. 654, 675 (1981) ("We . . . refuse to read out of [IEEPA] all meaning to the words 'transfer,' 'compel,' or 'nullify.'").

123. *Id.* at 678 (emphases added).

124. *See supra* notes 44–48 and accompanying text (discussing features of the MQD).

125. *See* 453 U.S. at 678.

126. *Id.* at 680.

127. *See id.* at 678.

128. Dames & Moore v. Regan, 453 U.S. 654, 660 (1981).

the narrowest possible ground."[129] Even though it approved of the executive agreement suspending claims against Iran in that particular instance, it noted at the end of its decision that it "[did] not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities."[130] In other words, it took care to make no constitutional ruling about the scope of Article II, instead painting a hazy image of legislative acceptance in one particular case.

Dames & Moore is thus an early example of the post-*Youngstown* role of the Reverse MQD. The Court construed the legislation broadly without articulating any clear limits on the president's authority instead of deciding whether Carter transgressed structural constitutional limits.[131] Dames & Moore allegedly lost out on $3.7 billion for work it performed for the Atomic Energy Organization of Iran.[132] When the hostages touched down on U.S. soil on January 20, 1981, and reunited with their families, they knew nothing of the complex legal structure that secured their release and created controversial precedent.[133]

2. *Passport Cases—An MQD Moment, Followed by the Reverse:* Kent v. Dulles *and* Zemel v. Rusk

Kent v. Dulles[134] involved the State Department's denial of a passport to Mr. Rockwell Kent, a U.S. citizen desiring to travel to England, on the grounds that he was a communist. The case

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129. *Id.* at 661 (citing Ashwander v. TVA, 297 U.S. 288 (1936)). *Ashwander* represents the fountainhead of modern constitutional avoidance. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 73 (1995) ("Although the strategy of construing a statute so as to avoid having to make a constitutional decision did not originate with Brandeis's *Ashwander* opinion, it was *Ashwander* that gave the principle so much of its enduring importance.").

130. *Dames & Moore*, 453 U.S. at 688.

131. *See* Rebecca A. D'Arcy, *The Legacy of* Dames & *(and)* Moore v. Regan*: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for A Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 294 (2003) (arguing that, as a result of *Dames & Moore*, "there is functionally no limiting principle applicable to executive orders where any congressional act at all—offered by the government or discovered by the courts—might be interpreted to authorize implicitly or explicitly the [p]resident's prerogative to do as he sees fit once he has declared a state of national emergency").

132. *See* Sharon D. Liko, *The Settlement Claims Case:* Dames & *(and)* Moore v. Regan, 10 DENV. J. INT'L L. & POL'Y 577, 578 (1981).

133. *See* Paul Hond, *Held Hostage for 444 Days: A Story of Survival*, COLUM. MAG. (Winter 2020–2021), https://magazine.columbia.edu/article/held-hostage-444-days-story-survival [https://perma.cc/QCT5-5K6G].

134. 357 U.S. 116 (1958).

represents a brief moment in which the Court, by a 5-4 decision, could be read as using a version of the MQD in a national security case. Just a few years later, however, in *Zemel v. Rusk*,[135] the Court's use of the Reverse MQD relegated *Kent* to relative obscurity.

The underlying statute at issue in *Kent* is representative of the broad delegations discussed in this Note: it directed the Secretary of State to issue passports "under such rules as the President shall designate and prescribe."[136] The case thus implicated two constitutional issues. First, the nondelegation doctrine: did Congress' broad authorization provide any intelligible principle for the president's rules and regulations?[137] Second, the Fifth Amendment "right of exit": how is the government allowed to regulate and restrict exit from the country?[138]

Against these lurking constitutional issues, Justice Douglass construed the statute narrowly and found that Mr. Kent was entitled to a passport notwithstanding the government's accusation that he was a communist.[139] In many ways, the decision exemplified an early version of the MQD and employs its fundamental logic. The Court emphasized the significance of the question: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."[140] The Court also found that the authority had been exercised "quite narrowly" in the past—the executive had only inquired into whether the passport applicant was indeed a

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135. 381 U.S. 1 (1965).

136. Kent v. Dulles, 357 U.S. 116, 123 (1958); *see also* Zemel v. Rusk, 381 U.S. 1, 8 n.5 (1965) (noting that although the statute delegated authority to make rules about issuing passports to the president, the president subdelegated that authority to the Secretary of State).

137. *See Kent*, 357 U.S. at 129 ("[I]f that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), one of two cases ever to hold a statute unconstitutional for failure to abide by the nondelegation doctrine)). The Court's decision to cite *Panama Refining Co.* makes clear that it was interpreting the statute at issue with the nondelegation issue in mind.

138. *See id.* at 125–26.

139. *See id.* at 129 ("[T]he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.").

140. *Id.* at 129.

citizen, and whether they wanted a passport to conduct illegal conduct such as fleeing from justice or committing passport fraud.[141] Ultimately, the Court narrowed the statute because of constitutional avoidance: "We would be faced with important constitutional questions" if passports could be withheld because of a citizen's "beliefs or associations."[142] Since "Congress has made no such provision in explicit terms . . . the [executive branch] may not employ that standard to restrict the citizens' right of free movement."[143] Implicit in the Court's decision was that the president had no inherent executive authority to issue passports. The Court candidly acknowledged that the case might turn out differently if the president had constitutional, rather than merely statutory, authority over passport issuance.[144]

The government took the cue a few years later in *Zemel v. Rusk*.[145] In *Zemel*, pursuant to the same statute at issue in *Kent*, the government refused a passport to a citizen hoping to go to Cuba to "satisfy [his] curiosity about the state of affairs in Cuba" and thus "become a better informed citizen."[146] The passport was not denied because of Mr. Zemel's political beliefs, but because the government issued a general restriction on travelling to Cuba.[147] In addition to arguing that the president had statutory authority, the government seems to have more aggressively asserted that "the President has 'inherent' power to make laws governing the issuance . . . of passports."[148] Instead of endorsing the government's constitutional argument, the *Zemel* majority held simply that the restriction was authorized by statute.[149] This created tension with the holding in *Kent*, which the Court distinguished by holding that area-wide passport restrictions have long been used and approved by Congress, whereas Mr. Kent was

141. *Id.* at 127.
142. Kent v. Dulles, 357 U.S. 116, 130 (1958).
143. *Id.*
144. *See id.* at 129.
145. 381 U.S. 1 (1965).
146. *Id.* at 4–5.
147. *See id.* at 14–15 (describing how the U.S. government determined that travel to and from Cuba risked the spread of "subversion" and was also concerned that U.S. citizens could be arrested and imprisoned in Cuba).
148. *Id.* at 20 (Black, J., dissenting).
149. *See id.* at 8 (majority opinion) ("[I]ts language is surely broad enough to authorize area restrictions, and there is no legislative history indicating an intend to exclude such restrictions from the grant of authority; these factors take on added significance when viewed in light of the fact that during the decade preceding the passage of the Act, the Executive had imposed both peacetime and wartime area restrictions.").

denied a passport because of his political beliefs and associations.[150] As one of the dissents noted, however, that distinction was strained because *Kent* found that previously the government only declined to issue a passport if the applicant was not a citizen or was otherwise attempting to use the passport to commit some crime.[151]

Like other Reverse MQD cases, the majority's holding required it to address other constitutional issues. In this case, it had to decide whether Mr. Zemel's Fifth Amendment right to travel was deprived without due process.[152] On this issue, the majority engaged in a balancing test to find that the government's interest in safeguarding national security outweighed Mr. Zemel's desire to tour Cuba.[153] After holding that the area-wide restrictions were authorized, the Court also had to address whether the statute violated the nondelegation doctrine.[154] Citing *Curtiss-Wright* for the proposition that nondelegation functions loosely in "subjects affecting foreign relations,"[155] the Court cryptically concluded that the statute took an intelligible principle from past practice without specifying where exactly the statute's broad authority ran out.[156]

While the majority did not explicitly say that its holding was driven by a desire to avoid addressing the government's argument that Article II authorized the area-wide travel restriction to Cuba, Justice Goldberg's and Justice Black's dissents bring the Reverse MQD's role into focus. Both rejected the government's theory that the president has "inherent power" to impose an area-wide travel restriction, especially during peacetime.[157] They reasoned that only Congress can do so.[158] Justice Goldberg would have employed constitutional avoidance more traditionally, and because there was no clear statement by Congress and no inherent executive

150. *See id.* at 12–13.
151. *See* Zemel v. Rusk, 381 U.S. 1, 35–38 (1965).
152. *See id.* at 13–16.
153. *See id.* at 14 ("The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction.").
154. *See id.* at 17–18.
155. *Id.* at 17 (quoting U.S. v. Curtiss-Wright Export Co., 299 U.S. 304, 324 (1936)).
156. *See id.* at 17–18 ("[T]he 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice. So limited, the Act does not constitute an invalid delegation.").
157. Zemel v. Rusk, 381 U.S. 1, 20–21 (1965) (Black, J., dissenting); *see id.* at 28–30 (Goldberg, J., dissenting).
158. *See id.* at 30 (Goldberg, J., dissenting); *id.* at 21 (Black, J., dissenting).

authority, he would have read the statute narrowly to avoid the Fifth Amendment issue.[159] Justice Black, meanwhile, would have held the statute an unconstitutional delegation.[160]

3. *Post 9/11 Detention Issues:* Hamdi v. Rumsfeld *and* Hamdan v. Rumsfeld

Since September 11, executive power has expanded because Congress passed statutes with broad delegations of power, the president interpreted those statutes aggressively, and Congress has been largely acquiescent to those interpretations.[161] There are many reasons for Congress' post-9/11 acquiescence to the expansion of executive power over national security, including its fear of being blamed for disasters and the relative ease of foisting primary responsibility for any failures onto the president.[162] But the Reverse MQD may have also silently played a role: early litigation produced permissive interpretations of Congress' delegations and suggested that attempting to reign in the president through clearer and more specific legislation would be futile.[163] This section focuses primarily on *Hamdi v. Rumsfeld*[164] to demonstrate the role of the Reverse MQD after 9/11.

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159. *See id.* at 27–40 (Goldberg, J., dissenting).

160. *See id.* at 20–23 (Black, J., dissenting).

161. *See* Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), https://hls.harvard.edu/today/presidential-power-surges [https://perma.cc/34HQ-Q243] ("More recent presidents have also used cataclysmic events—most notably, the attacks of Sept. 11—to leverage significant power. Professor Jack Goldsmith, who served as an assistant attorney general in the Office of Legal Counsel in the George W. Bush administration and is co-founder of the Lawfare blog, says that expansions of presidential powers linked to 9/11 have generally come with congressional support and have spanned the presidencies of George W. Bush, Barack Obama . . ., and Donald Trump. '[Presidents have] been detaining enemy combatants at the Guantánamo Bay detention center without trial for more than 18 years,' Goldsmith says."); *see also* Sarah A. Binder & Molly E. Reynolds, *20 Years Later: The Lasting Impact of 9/11 on Congress*, BROOKINGS INST. (Aug. 27, 2021), https://www.brookings.edu/articles/20-years-later-the-lasting-impact-of-9-11-on-congress [https://perma.cc/465D-UL35] ("Over the past two decades, Congress has generally been comfortable letting the president use [delegated] power expansively with limited oversight: Legislators neither want to be seen as undermining national security nor blamed for potentially unpopular military operations.").

162. *See* Binder & Reynolds, *supra* note 161.

163. *See* Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1115 (2009) ("[N]o one should think that simply codifying more narrow or explicit clear-statement requirements will stop presidents from continuing to infer congressional authorization from vague or ambiguous statutory language.").

164. 542 U.S. 507 (2004).

In 2001, Yaser Hamdi, a U.S. citizen, was captured by U.S.-allied forces in Afghanistan.[165] According to a declaration from a Department of Defense official, Mr. Hamdi was affiliated with the Taliban and was thus an "enemy combatant."[166] Based on that evidence alone, Hamdi was held by the U.S. military at the naval brig in Charleston, South Carolina, for about two years without charges, a trial, or access to counsel—he had no way to challenge the Department of Defense's conclusion that he was an enemy combatant.[167]

Hamdi sued on the ground that he had been denied his Fifth Amendment right to challenge the government's finding.[168] The government claimed to have the power to detain Hamdi without the procedures typical of trials against a U.S. citizen because of the Authorization for the Use of Military Force (AUMF), which Congress passed after September 11.[169] The AUMF, which is still in effect today, authorizes the president "to use all necessary and appropriate force against those nationals, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[170]

The Court ultimately agreed with Hamdi that he had been denied due process.[171] Some have cited the Court's due process holding as support for the proposition that "foreign affairs exceptionalism" is on the decline because the Court was willing to impose procedural checks on the executive during wartime.[172]

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165. *See* James B. Anderson, Hamdi v. Rumsfeld*: Judicious Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process*, 95 J. CRIM. L. & CRIMINOLOGY 689, 694 (2005).

166. *Hamdi*, 542 U.S. 507, 512–13 (2004).

167. *See* Hamdi v. Rumsfeld, ACLU (June 29, 2004), https://www.aclu.org/cases/hamdi-v-rumsfeld [https://perma.cc/F739-5K9E].

168. *See Hamdi*, 542 U.S. at 509.

169. *See* Authorization for the Use of Military Force § 2(a), 115 STAT. 224, 224 (codified at 50 U.S.C. § 1541) (2001).

170. *Id.* The constitutionality of the AUMF's delegation is debatable. *See generally* Michael D. Ramsey & Matthew C. Waxman, *Delegating War Powers*, 96 S. CAL. L. REV. 741 (2023) (arguing that "the history of war power delegation does not provide strong support for either of two common but opposite positions: that war power, as a branch of foreign affairs powers, is special in ways that make it exceptionally delegable; or that it is special in ways that make it uniquely nondelegable"). As a result, it may not be so easy for originalists to decide that certain actions taken pursuant to the AUMF are located squarely in Article II, rather than statutory authorization.

171. *See* 542 U.S. at 509. The case is thus commonly known for holding that due process requires an opportunity for a detainee to challenge their designation as an "enemy combatant." *See, e.g.*, Dannel Duddy, Case Note: *Supreme Court of the United States,* Hamdi v. Rumsfeld, 11 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 219, 221 (2005).

172. *See* Sitaraman & Wuerth, *supra* note 88, at 1922.

While that argument may be plausible, it misses how *Hamdi*'s statutory interpretation-based holding entrenched foreign affairs exceptionalism by using more permissive rules of interpretation than in domestic contexts.

Although the government had to provide Hamdi "a meaningful opportunity to contest the factual basis for [his] detention before a neutral decisionmaker," the Court held that the AUMF gave the Government power to detain Hamdi without an indictment and trial.[173] The government justified Hamdi's detention in relevant part by arguing that it had inherent Article II power to do so and, in the alternative, that Congress granted the president the power to do so through the AUMF.[174] Justice O'Connor held that the Court did not have to reach the constitutional question because Hamdi's detention was "clearly and unmistakably" authorized by the AUMF.[175] To Justice O'Connor, it was "of no moment that the AUMF does not use specific language of detention"—recall that it refers only to "force"—because detention is "so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized."[176] Notably, Justice Thomas provided the fifth vote in holding that the AUMF authorized Hamdi's detention; he also joined the majority decision formally introducing the MQD, *West Virginia v. EPA*.[177]

Although Justice O'Connor characterized that conclusion as "clear" and "unmistakable," other Justices pointed out that the plurality's statutory interpretation turned a blind eye to several traditional conventions. For example, Justice Scalia argued in dissent that the AUMF did not authorize detention "with the clarity necessary to satisfy" the canon of constitutional avoidance.[178] Justice Souter, in a concurrence joined by Justice Ginsburg, highlighted the rule that "enactments limiting liberty in wartime [required] a clear statement."[179] In other words, the plurality selected the broader of two interpretations of the AUMF even when doing so created tension with other clear-statement

173. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).
174. *See id.* at 516–17.
175. *Id.* at 519.
176. *Id.*
177. *Id.* at 587 (Thomas, J., dissenting); *see also* West Virginia v. EPA, 597 U.S. 697 (2022).
178. *Hamdi*, 542 U.S. at 574 (Scalia, J., dissenting).
179. Hamdi v. Rumsfeld, 542 U.S. 507, 544 (2004) (Souter, J., concurring).

canons of statutory interpretation. This is likely why Justice O'Connor felt the need to characterize her interpretation as "clear."

Hamdi v. Rumsfeld thus follows the pattern of the Reverse MQD. First, it selects the broader of two plausible interpretations of the statute. At the very least, Justice O'Connor's plurality implicitly did not require a clear statement, as the MQD might.[180] Second, the express effect of the Court's statutory interpretation was to avoid defining the scope of Article II.[181] In deciding that the executive had the authority to detain citizens without following normal procedure, it ran into another constitutional problem: the Fifth Amendment's due process guarantee.[182] Here, under the familiar *Mathews v. Eldridge*[183] test, the Court ultimately held that Hamdi "must receive notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[184] While the executive may have not given Hamdi due process in this particular case, the process owed to detainees in similar situations was quite minimal given the government's pressing national security interests. This drew Justice Scalia's ire in dissent, where he criticized the plurality for applying the more permissive *Mathews v. Eldridge* balancing test to a situation where "the Constitution and the common law already supply" a hard line.[185] Justice Scalia thus implicitly recognized the incentive structure that encourages the Reverse MQD—balancing tests are doctrinally more flexible, and allow the Court to avoid setting down a fixed rule good for all time when it perceives that doing so could hamper future efforts to safeguard national security.

Even where the Court has adopted a less deferential view towards the president in the post-9/11 context, the Court's proponents of the MQD in domestic affairs have adopted the rationales underlying the Reverse MQD when it comes to national

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180. Although Justice O'Connor characterized the statutory language as "clear," that position was heavily contested. *See Hamdi*, 542 U.S. at 573–74 (Scalia, J., dissenting); *see also id.* at 544 (Souter, J., concurring); Sarah Erickson-Muschko, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO L.J. 1399, 1403 (2013).

181. *See Hamdi*, 542 U.S. at 517.

182. *See id.* at 524.

183. 424 U.S. 319 (1976). The *Mathews* test instructs courts to balance the private interests at stake against the government's burden in adding procedural safeguards to determine whether additional process is required by the Fifth Amendment. *See id.* at 335.

184. *Hamdi*, 542 U.S. at 533.

185. *Id.* at 576 (Scalia, J., dissenting).

security. In *Hamdan v. Rumsfeld*, decided two years after *Hamdi*, the Court held that the AUMF did not authorize the president to establish of military commissions that would try suspected terrorists.[186] Justice Alito and Justice Thomas dissented, arguing that it did.[187] As they noted, they did not have to decide whether Article II authorized the President to establish military commissions, because the AUMF authorized it.[188] Although their opinion was a dissent, they have applied the MQD in more stringent ways than Chief Justice Roberts' coalition has been willing to do.[189] Their unwillingness to use some version of the MQD in foreign affairs or national security cases, both in *Hamdi* and in *Hamdan*, endorses Reverse MQD reasoning and provides further evidence that the MQD is unlikely to disrupt the president's conduct of foreign affairs today.

4. *Exclusion of Foreign Nationals:* Trump v. Hawaii *and* Biden v. Texas

The Supreme Court has never been entirely clear about whether Article II includes the power to exclude foreign nationals.[190] Nevertheless, because immigration touches on sensitive issues like diplomacy and national security, the Reverse MQD is particularly evident in cases challenging the president's management of immigration. *Trump v. Hawaii* and *Biden v. Texas*, two cases in which the president took highly controversial action pursuant to the Immigration and Nationality Act (INA), demonstrate the Reverse MQD's power in immigration cases.

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186. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

187. *See id.* at 681 (Thomas, J., dissenting).

188. *See id.* at 682 n.2 (Thomas, J., dissenting) ("Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so.").

189. In *Biden v. Missouri*, 595 U.S. 87 (2022), Justices Thomas and Alito each wrote separate dissents explaining why, based on the MQD, they did not think that Congress authorized the Department of Health and Human Services to require that healthcare providers obtain the COVID-19 vaccine.

190. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 461 (2009) (noting that the Supreme Court's cases addressing the distribution of power over immigration between Congress and the President "has been too thin and confused to provide definitive answers"). The Supreme Court's dicta in *Trump v. United States* that Article II may include the power to manage immigration is emblematic of the proposition that the Reverse MQD will be especially implicated in cases dealing with the exclusion of foreign nationals. *See Trump*, 603 U.S. 593, 607 (2024).

President Trump's January 2017 executive order, suspending entry for anyone traveling to the United States from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen (the "Muslim Ban"), immediately caused global disruption.[191] Thousands traveling outside the United States with lawful visas or green cards were unable to return.[192] Some individuals were even detained on arrival at John F. Kennedy Airport in New York City because the executive order took effect while they were en route to the United States, visas in hand.[193]

President Trump ordered the Muslim Ban pursuant to the Immigration and Nationality Act, which states in relevant part that:

> Whenever the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of any aliens restrictions he may deem to be appropriate.[194]

According to the government, restricting entry from the eight countries was necessary in order to incentivize cooperation from those countries in sharing more complete information about people seeking to travel to the United States.[195]

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191. *See* Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 214, 226 (2017); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Because of protracted litigation, President Trump's policy went through several iterations. *See Timeline of the Muslim Ban*, ACLU WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban [https://perma.cc/7HFL-PYTU]. By the time the Supreme Court decided *Trump v. Hawaii*, entry restrictions were in place for some non-Muslim majority countries like North Korea and Venezuela. *See id.*; *see also Trump v. Hawaii*, 585 U.S. 667, 667 (2018) ("After a 50-day period during which the State Department made diplomatic efforts to encourage foreign governments to improve their practices, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient.").

192. *See* Ayoub & Beydoun, *supra* note 191.

193. *See* Robert Hall & Susan Carey, *Travelers Stopped in Transit to U.S. After Trump Order*, WALL ST. J., (Jan. 28, 2017), https://www.wsj.com/articles/migrants-prevented-from-boarding-flights-to-the-u-s-in-wake-of-trump-order-1485611598 (on file with the *Columbia Journal of Law & Social Problems*).

194. 8 U.S.C. § 1182(f).

195. *See* Trump v. Hawaii, 585 U.S. 667, 679 (2018).

The Supreme Court ultimately upheld President Trump's Muslim ban in *Trump v. Hawaii*.[196] As Chief Justice Roberts put it, the relevant portion of the INA "exudes deference to the President."[197] The majority's interpretation of the statute forced the Court to confront a First Amendment issue, as the plaintiffs argued that "the Proclamation violate[d] [the First Amendment] by singling out Muslims for disfavored treatment."[198] Given that the executive order implicated national security concerns, however, the Court applied a more deferential standard of review and found that the government interest outweighed the plaintiffs' First Amendment concerns.[199]

While the majority may have been right to note the broad and deferential character of the INA, Hawaii argued that the MQD sometimes curtails exercises of executive authority in spite of similarly worded statutes.[200] It further argued that the Trump administration's interpretation of the INA would "render Section 1182(f) a delegation of unprecedented political and economic significance, unconstrained by any intelligible principle."[201] In short, Hawaii asked the Supreme Court to apply the MQD to avoid a nondelegation issue by reading limits into the statute.

Indeed, several lower court judges agreed with the respondents and thought that the MQD should guide the interpretation of the INA. In the Ninth Circuit, the court enjoined Trump's proclamation in part by relying on *FDA v. Brown & Williamson Tobacco Corp.*,[202] a case that now comprises part of the MQD canon,[203] for the proposition that economically or politically important decisions pursuant to statutory delegations might be limited without especially clear indications from Congress.[204] In another case challenging the same proclamation, the Fourth Circuit produced dueling concurrences.[205] One judge would have

196. *Id.* at 667.
197. *Id.* at 684.
198. Trump v. Hawaii, 585 U.S. at 699.
199. *See id.* at 704.
200. *See* Brief in Opposition at 14–16, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965) (discussing Kent v. Dulles, 357 U.S. 116 (1958) and Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014)).
201. *Id.* at 16.
202. Hawaii v. Trump, 878 F.3d 662, 683 (9th Cir., 2017) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).
203. *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022) (citing *Brown & Williamson*, 529 U.S. at 160).
204. *See Hawaii*, 878 F.3d at 683–84.
205. *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018).

enjoined the Muslim Ban because "[c]ourts require a clear statement of congressional intent before finding that Congress has ceded decisions of great economic and political significance."[206] That concurrence continued, saying that the "major questions canon"[207] is *especially* useful in curtailing the "conferral of unrestrained discretion"[208] to the president because the president is not subject to the same constraints that agencies are (i.e., the Administrative Procedure Act).[209] Another judge's concurrence noted that the MQD had not yet been applied in the immigration context and preferred to decide the case using the standard constitutional avoidance canon that would have narrowed the reach of the INA so as to avoid First Amendment concerns.[210] Yet the Supreme Court never even mentioned the MQD argument urged by the respondents nor the MQD's role in the Ninth Circuit decision and the Fourth Circuit concurrence.[211]

The structure of the Reverse MQD may have pushed the Supreme Court in *Trump v. Hawaii* to avoid defining the scope of the President's Article II authority to exclude non-citizens. In its brief, the government relied on *United States ex rel. Knauff v. Shaughnessy*,[212] which held that the power to exclude foreign nationals "is inherent in the executive power to control the foreign affairs of the nation."[213] Although many contest this conclusion,[214] Justice Thomas endorsed it in his concurrence.[215] Justice Thomas even acknowledged that the Court's interpretation of the INA left it with no intelligible principle to guide the president's discretion.[216] The lack of an intelligible principle, however, was not a constitutional problem for Justice Thomas because, in his

206. *Id.* at 291.
207. *Id.*
208. *Id.* at 292.
209. *See id.*
210. *See id.* at 328 n.3.
211. *See generally* Trump v. Hawaii, 585 U.S. 667 (2018).
212. 338 U.S. 537 (1950).
213. *Id.* at 542.
214. *See, e.g.*, Josh Blackman, *The Power to Exclude* (Oct. 13, 2018), https://ssrn.com/abstract=3265780 (concluding that the power to exclude foreign nationals belongs to Congress, not the president); Josh Blackman, *Five Unanswered Questions from* Trump v. Hawaii, 51 CASE W. RSRV. J. INT'L L. 139, 148 (2015) (arguing that *Trump v. Hawaii* leaves unanswered questions about the scope of the president's Article II power over immigration); *see also* Biden v. Texas, 597 U.S. 785, 830 (2022) (Alito, J., dissenting) ("[W]e have said that policies pertaining to the entry of aliens are entrusted *exclusively* to Congress." (internal quotations and citations omitted)).
215. *See Trump v. Hawaii*, 585 U.S. at 712 (Thomas, J., concurring).
216. *See id.*

view, the president has inherent constitutional power to exclude foreign nationals.[217]

Unlike in *Dames & Moore* and *Hamdi*, the Roberts majority in *Trump v. Hawaii* did not expressly discuss its ability or desire to avoid defining the scope of Article II. But its silence on the matter is conspicuous, considering it was a component of the government's brief, appeared in lower court opinions, and made its way into one Justice's concurring opinion.[218] The outcome, nevertheless, is now familiar. Instead of determining the scope of Article II, the Court simply found that Congress authorized the proclamation, effectively leaving the analyzed provision of the INA without readily discernible limitations. While there are challenges in over-analyzing the Court's silence about whether the MQD was implicated in the case, the underlying incentive structure of *Trump v. Hawaii* meant that the Court effectively—even if not intentionally—implicated the Reverse MQD. It adopted a broad, if not limitless, interpretation of the INA, balanced a First Amendment claim against the government's national security interest, and avoided opining on whether Article II bore on the subject.

Biden v. Texas[219] similarly implicates the Reverse MQD. There, the Court upheld President Biden's decision to halt the "Migrant Protection Protocols" (MPP)—a Trump-era policy authorizing the Department of Homeland Security (DHS) to return non-Mexicans crossing illegally into the United States to Mexico—against a challenge that Biden's rescission violated the Immigration and Nationality Act (INA).[220] President Biden explained that the MPP interfered with the administration's diplomatic efforts with Mexico.[221] The Court used Reverse MQD logic to hold that the president's Article II power to "engage in direct diplomacy with foreign heads of state and their ministers" confirmed its broad reading of the INA.[222] Justice Alito's dissent, however, protested that "enforcement of immigration laws often has foreign relations

217. *See id.*

218. *See* Brief in Opposition at 11, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965); *see also, e.g.*, *Hawaii v. Trump*, 878 F.3d at 683; *Trump v. Hawaii*, 585 U.S. at 712 (Thomas, J., concurring).

219. Biden v. Texas, 597 U.S. 785 (2022).

220. *See id.* at 807.

221. *See id.* at 796.

222. *Id.* at 805–06; *see also* Lemonides, *supra* note 32 at n.184 (noting that *Biden v. Texas* "applied a reverse MQD" because it "applied a presumption that the Executive had discretion unless Congress clearly expressed the 'affirmative intention' to limit it").

implications, and the Constitution gives Congress broad authority to set immigration policy."[223] Nevertheless, the majority's holding that the statute permitted President Biden to terminate the MPP allowed it to avoid "second-guess[ing] the President's Article II judgment."[224] *Biden v. Texas* thus illustrates how broad notions and articulations of the specter of Article II affect statutory interpretation.

High profile immigration cases are likely to continue to arise given the current political climate.[225] Unlike some of the cases analyzed thus far, *Trump v. Hawaii* and *Biden v. Texas* were decided by Justices who have played a role in cementing the MQD.[226] As a result, these cases show that the Reverse MQD has staying power: it is not just a relic left from an old Court.

B. IS THE REVERSE MQD CONSISTENT WITH ESTABLISHED TOOLS OF STATUTORY INTERPRETATION?

So far, this Note has argued that the Reverse MQD is its own canon of statutory interpretation with an incentive structure distinct from the rules of interpretation that apply to purely domestic issues, especially the MQD. It could equally be argued, however, that all the cases discussed above are consistent with the various versions of the MQD. If the MQD is a manifestation of normal textualism considering context, for example, foreign affairs and national security delegations might be those in which the reasonable reader would understand that Congress intended to

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223. *Biden*, 597 U.S. 785, 829–30 (Alito, J., dissenting).

224. *Id.* at 816 (Kavanaugh, J., concurring).

225. *See* Hannah Tyler & Marisol Hernandez, *How the Supreme Court Is Shaping Immigration Policy*, BIPARTISAN POL'Y CTR., (Sept. 26, 2022), https://bipartisanpolicy.org/blog/supreme-court-shaping-immigration-policy/ [https://perma.cc/5NH7-EQCU] ("As Congress continues to avoid legislating on major immigration policy, presidents and their administrations have increasingly taken bold steps, leading to increasing litigation. This means that the federal courts have taken on a larger role in the sphere of immigration policy and beyond, including the Supreme Court."); *see also* Ted Hesson & Kristina Cooke, *Inside Trump's Plan for Mass Deportations—and Who Wants to Stop Him*, REUTERS (Nov. 10, 2024), https://www.reuters.com/world/us/inside-trumps-plan-mass-deportations-who-wants-stop-him-2024-11-06/ [https://perma.cc/RY6Y-MT6A] ("Trump plans to use a 1798 wartime statute known as the Alien Enemies Act to rapidly deport alleged gang members, an action that would almost certainly be challenged in court.").

226. At that time, the Court consisted of Chief Justice Roberts, and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, and Gorsuch. Many of these Justices have played critical roles in developing the MQD. *See supra* Part I.A.

confer uniquely broader and more flexible authority.[227] On the other hand, the MQD might not figure as strongly in areas where the president has independent Article II authority because the nondelegation concern is lessened in that context.[228]

For example, the Reverse MQD critic could understand *Trump v. Hawaii* in one of two ways. First, they might argue that the Court was not concerned about narrowing the scope of discretion conferred by the INA because the president has some inherent constitutional authority to exclude non-citizens.[229] This was Justice Thomas' position.[230] Second, they might argue that even if there is no Article II power to exclude non-citizens, the context of immigration and management of the border is one in which it is reasonable to expect Congress to paint with a broader brush than in a purely domestic area such as workplace safety rules.[231] These arguments may be true in particular cases, but they do not mitigate the explanatory power of the Reverse MQD.

First, the argument that the separation of powers or nondelegation concern is less prevalent in foreign affairs cases begs the question by obscuring the crux of the Reverse MQD—there is scarce precedent defining the scope of Article II. In *Trump v. Hawaii*, if it was so obvious that the president had some measure of independent constitutional authority over the matter at issue, it is curious that that theory appeared only in Justice Thomas' sole concurrence.[232] Granted, some Justices may be more likely than others to decide on the limits of Article II, and in some cases the president's Article II authority may be clearer than in others. But in cases where there is no firm guidance, such as the scope of executive power over immigration or tariffs in furtherance of legitimate national security objectives, the Reverse MQD means

227. Under Justice Barrett's version of the MQD, for example, it might be reasonable to read statutes dealing with immigration and emergency economic powers broadly because Congress likely intended the president to exercise broad authority in these areas. *See, e.g.*, *supra* notes 64–69 and accompanying text (explaining Justice Barrett's views on the MQD).

228. Justice Gorsuch, for example, has already noted that nondelegation is less of an issue where the statute confers concurrent authority. *See* Gundy v. United States, 588 U.S. 128, 159 (2019) (Gorsuch, J., dissenting).

229. *See, e.g.*, Goldsmith & Bradley, *supra* note 85, at 1799.

230. *See* Trump v. Hawaii, 585 U.S. 667, 679 (2018) (Thomas, J., concurring).

231. *See* Goldsmith & Bradley, *supra* note 85, at 1799–80.

232. There is academic debate over the scope of executive power over immigration. *See* Blackman, *supra* note 214; Cox & Rodriguez, *supra* note 190; *see also* Anne Y. Lee, Note, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 226 (2005–2006) (arguing that the power to exclude non-citizens derives from congressional delegations).

the Court is likely to interpret the statute broadly to avoid the question. Further, some scholarship suggests that the empirical foundations of the foreign affairs exception to nondelegation established by *Curtiss-Wright* are more complex than the case supposed.[233] If the nondelegation doctrine applies equally to a given statute touching on foreign affairs or national security, the applicability of the MQD to cases implicating that statute is even stronger. However, the Reverse MQD provides an independent reason that the Court is likely to continue interpreting those statutes broadly: it is motivated by trepidation about defining Article II.

The second critique of the Reverse MQD, that these cases just represent textualist statutory interpretation in a context that uniquely requires broader congressional delegations, is more challenging to overcome. It may be that, in each case study discussed above, the majority reached the "right" conclusion as a matter of statutory interpretation—i.e., the reasonable reader at the time of enactment would understand that Congress authorized the president's executive action. This Note does not take a position on whether, in each individual case study above, the Court reached the correct interpretation of the text of a given statute.

Professors Goldsmith and Bradley argue, in accordance with Justice Barrett's more contextual version of the MQD, that one reason the MQD is unlikely to apply to foreign affairs and national security cases is because Congress simply intends to delegate broader authority than in domestic cases.[234] The Reverse MQD, however, reveals that the incentive structure behind such cases provides a more predictively valuable explanation for which cases are likely to resolve favorably for the executive branch. The argument that broad delegations are more likely in a national security context than elsewhere rests on shaky empirical grounds—Congress often intends to delegate vast authority to regulate important aspects of American life and readers of those

233. *See* Ramsey & Waxman, *supra* note 170; *see also generally* Nicholas R. Parillo, *Foreign Affairs, Nondelegation, and Original Meaning: Congress's Delegation to Lay Embargoes in 1794*, 172 U. PA. L. REV. 1803 (2024) (summarizing the scholarly debate about the supposed foreign affairs exception to the prohibition on delegating legislative power to the president and arguing against said exception using evidence from the Embargo Authorization Act of 1794).

234. *See* Goldsmith & Bradley, *supra* note 85, at 1790. For Justice Barrett, the national security context of the delegation might mean that the reasonable reader would expect a broader delegation to the president than in areas like student loans or climate change. *See supra* note 227 and accompanying text.

statutes may well interpret those delegations as broad.[235] In other words, it is not necessarily empirically true that Congress intends delegations touching on national security and foreign affairs to be broader than those dealing with pressing domestic issues. The Reverse MQD thus explains, in a more theoretically consistent manner, why statutes like those at issue in *Trump v. Hawaii* are likely to be interpreted in ways that deviate from traditional methods of statutory interpretation.

Further, Professors Goldsmith and Bradley likely exaggerate how clearly discernible the results of these cases were ahead of time. What happens, for example, when executive practice under a particular statutory delegation and context is equivocal? In *Zemel v. Rusk*, for example, there was considerable debate between the majority and dissenting opinions as to whether the weight of historical practice indicated that the type of area-wide travel restriction at issue was new in kind or degree.[236] It is also not always clear which interpretation of a statute the Supreme Court will adopt ahead of time—if it was, the case probably would not reach the Court in the first instance. Some still believe that the Supreme Court reached the wrong conclusion in cases like *Trump v. Hawaii* and *Hamdi v. Rumsfeld*.[237] For those cases in which it might be challenging to predict ex ante a close question pertaining

235. *See, e.g.*, Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 743–45 (2023) (arguing that the Congressional Review Act, an overarching statute that instructs agencies to submit "major" rules to Congress, "indicates that, not only are major rules to be *expected*, those major rules are to be given legal effect as a default basis"); Kevin Tobia et al., *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1158–9 (2024) (empirically demonstrating that "ordinary people do not adjust their judgments of clarity according to the stakes of interpretation, and they interpret broad language broadly, even in situations where Justice Barrett claims that 'common sense' would dictate narrower interpretations").

236. *Compare* Zemel v. Rusk, 381 U.S. 1, 33 (1965) (Goldberg, J., dissenting) ("The administrative practice of the State Department prior to 1926 does not support the Court's view that when Congress re-enacted the 1856 provision in 1926 it intended to grant the Executive authority to impose area restrictions."), *with id.* at 12 (majority opinion) ("This case is therefore unlike *Kent v. Dulles* . . . where we were unable to find . . . an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it.").

237. *See* Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159 (2019) (arguing that the *Trump v. Hawaii* majority ignored normal methods of statutory interpretation like constitutional avoidance and reading a statute in context to reach its conclusion); *see also* Edelson, *supra* note 107 (arguing with respect to *Hamdi* that "the members of Congress who voted for the 2001 AUMF did not include any language in the statute indicating they intended to give the president to authority to detain U.S. citizens as enemy combatants. It is eminently reasonable to conclude, as Justice Souter did, that the 1971 Non-Detention Act requires a clear expression of such intent").

to a statute, the Reverse MQD and the incentive structure that underlies it is particularly powerful.

III. RECOGNIZING THE REVERSE MQD

The Reverse MQD is a distinct mode of statutory interpretation when foreign affairs or national security are directly at issue. First, the executive must make a credible argument that the action it wishes to take is both statutorily and constitutionally authorized. Second, the statute must be vague, broad, or ambiguous and, therefore, capable of more than one interpretation or construction. Under these conditions, the Court is most likely to select a reading of the statute that broadens the scope of power delegated by Congress to the executive. Sometimes it does so expressly to avoid deciding the constitutional separation of powers issue.[238] Other times, it does so implicitly.[239] Either way, the implications are consequential.

Foremost, the Reverse MQD may force a reappraisal of Justice Jackson's traditional framework for evaluating presidential power.[240] The Reverse MQD creates a systematic bias in favor of finding that Congress authorized an executive action. As discussed earlier, where statutes authorize executive action, a reviewing court does not have to define the president's constitutional powers.[241] The Reverse MQD shows that federal courts prefer not to delineate Article II, even if it forces consideration of other constitutional issues. The Reverse MQD thus calls into question the utility of Justice Jackson's framework, which depends on reviewing courts first discerning whether presidents are acting in accordance with the statutorily expressed will of Congress.

The Reverse MQD also has broader implications for the president's function vis-à-vis other branches of government. Whether foreign affairs exceptionalism in statutory interpretation is normatively good depends on debates outside the scope of this Note, such as how one thinks about constitutional avoidance, the significance of the president's institutional advantages in foreign

238. *See, e.g.*, *supra* Part II.B (discussing *Dames & Moore*).
239. *See, e.g.*, *supra* Part II.E (discussing *Trump v. Hawaii*).
240. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).
241. *See supra* Part II.A (discussing the structure of the Reverse MQD).

affairs, and whether Congress has ceded too much of its power to the president.[242] On the one hand, the Reverse MQD's refusal to address the limits of Article II might be beneficial because it preserves Congress' power and flexibility over foreign affairs and national security questions that it might otherwise lose if all the president's powers were constitutionalized instead.[243] Those who believe in the imperative of a strong presidency in foreign affairs and national security might also argue that setting inflexible constitutional rules that limit the president may be especially dangerous when it comes to dynamic foreign affairs and national security contexts.[244] On the other hand, those concerned about the expansion of executive power may argue that the Reverse MQD is dangerous. As discussed in this Note, presidents are almost always bound by statutory delegations of authority.[245] If those delegations cease to contain meaningful limits whenever a colorable Article II power lurks in the background, then so does the president's power.

Finally, explicitly recognizing the Reverse MQD might be beneficial regardless of the impacts of the Reverse MQD itself. If Congress indeed legislates against the backdrop of statutory canons of interpretation,[246] it is helpful to make explicit what

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242. *See, e.g.*, Aneil Kovvali, *Constitutional Avoidance and Presidential Power*, 35 YALE J. ON REG. BULL. 10 (2017) (arguing against the use of constitutional avoidance when presidential assertions of authority are at stake); *see* Goldsmith & Bradley, *supra* note 100, at 2051 ("While the President's Constitutional authority as Commander-in-Chief is enormously important, determining the scope of that authority beyond what Congress has authorized implicates some of the most difficult, unresolved, and contested issues in constitutional law. Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous."); *see also* Julian G. Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180 (2006) (arguing that "[t]he executive has strong institutional advantages over courts in the interpretation of laws relating to the conduct of war").

243. This is indeed the impetus of Justice Jackson's tripartite framework. *See Youngstown*, 343 U.S. at 635 ("The 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.").

244. *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004) ("Constitutional arguments for executive power . . . escalate with increased perceptions of foreign threat. It is therefore hardly surprising that broad assertions of presidential power have become commonplace after the events of September 11, 2001, and the ensuing war on international terrorism.").

245. *See* Stein, *supra* note 9.

246. *See generally* Abbe R. Gluck & Lisa S. Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (surveying congressional staffers and finding that drafters of legislation oftentimes write statutes with judicial canons of interpretation in mind).

would otherwise require legislators to independently weave together different strands of case law. If Congress understood that its delegations touching on sensitive national security or foreign affairs matters were especially likely to be given a broad construction, it may take special care to either provide especially clear limiting language or insert sunset provisions.[247] On the other hand, it may continue to delegate broad authorities to the president. But if it did so against the backdrop of a judicially recognized Reverse MQD, there would be especially strong evidence for reviewing courts that Congress intended for its statute to be given a broad construction.[248]

This Note also provides a roadmap and framework for executive branch lawyers who litigate questions of executive authority in foreign affairs and national security. In particular, understanding the Reverse MQD's incentive structure may help litigants strategically decide which arguments to prioritize. Lower courts may be especially reluctant to pronounce new rules of constitutional law limiting the president's Article II powers where there is a colorable foreign affairs or national security argument without guidance from the Supreme Court. Thus, if executive branch lawyers can in good faith argue that the president has independent constitutional authority over the matter at hand, but simultaneously present a reasonable—but broad—interpretation of a statutory authority, they have a good chance of winning. Returning to President Trump's invocation of the IEEPA discussed in the Introduction, for example, executive branch lawyers would have been wise to argue—if the subject ever reached litigation—that giving the IEEPA a narrow construction would risk judicial imposition on the president's Article II power over diplomacy. Further, understanding that a court would have been more likely than not to uphold Trump's invocation of the IEEPA also changes the baseline against which negotiations take place.

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247. *But see* Mitchell, *supra* note 163, at 1064 (arguing that Congress has sometimes tried to curb the executive branch with clear statement rules, but has failed to do so because executive branch lawyers are "able to concoct congressional 'authorization' from vague statutory language").

248. *See* Finley v. United States, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

CONCLUSION

The primary goal of this Note is to uncover an incentive structure, present particularly in cases that involve the president's prerogatives in foreign affairs, on which litigants can rely in predicting the outcome of that class of cases. The Reverse MQD is in many ways the mirror image of the MQD, a more recent restrictive trend in statutory interpretation when administrative agency action is at issue. Between two possible interpretations or constructions of a statute, the Reverse MQD opts for the interpretation that confers more power on the executive when national security or foreign affairs issues lurk in the background, while the MQD restricts the purported delegation when the Court considers the issue to be purely domestic. Often, such an interpretation invites certain constitutional problems rather than avoids them. The constitutional problems that the Court must decide, typically rights-based claims or nondelegation challenges, are relatively easy for it to dispense with in the foreign affairs or national security contexts. In those contexts, the Court has developed tests and standards that are more deferential to the executive. The Court's selection of the broader of two interpretations, however, has the advantage of avoiding the need to define what "the Executive Power" means in various circumstances.

Whether one thinks this "canon" of interpretation is normatively good or bad depends on many prior assumptions. Some critique substantive canons of interpretation in general and might argue that there should not be a different principle in foreign affairs. Others may think it valid to apply more deferential interpretive methods in foreign affairs, where the president is uniquely possessed of institutional advantages. Either way, recognizing the Reverse MQD could stabilize what was previously a moving target for litigants, courts, and Congress.