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The Reviewability of the President's Statutory Powers

Kevin M. Stack

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This Article argues that longstanding doctrines that exclude judicial review of the determinations or findings the President makes as conditions for invoking statutory powers should be replaced. These doctrines are inconsistent with the fundamental constitutional commitment to reviewing whether federal officials act with legal authorization. Where a statute grants power conditioned upon an official making a determination that certain conditions obtain—as statutes that grant power to the President often do—review of whether that power is validly exercised requires review of the determinations the official makes to invoke the power. Review of those determinations is commonplace with regard to government actors subject to the Administrative Procedure Act. But because the Administrative Procedure Act does not apply to the President, courts have resorted to old common law doctrines barring review of the determinations the President makes to invoke statutory authority. While these doctrines had a justification when judicial review of the President's actions occurred in individual damages actions against officials who implemented the President's orders, they no longer do and should be abandoned. Instead, judicial review of the President's claims of statutory power should extend, as it does for other officials, to all the determinations necessary to evaluate whether the President acts within the limits Congress has prescribed. To better describe and defend such review, this Article argues that we should conceive of it as a branch of ultra vires review, including review of the legal, factual, and law-as-applied-to-fact conclusions necessary to determine whether the President acts within the boundaries of statutory authority.

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*Kevin M. Stack**

INTRODUCTION	1172
I. THE REVIEWABILITY BARRIER: FROM FEDERALIST ORIGINS TO CONTEMPORARY APPLICATION	1178
A. <i>Origins in the Federalist Military</i>	1178
B. <i>Growth and Transplanting</i>	1183
C. <i>The Shifting Background Legal Landscape</i>	1187
1. The APA	1188
2. Federal Employee and Military Immunity	1190
II. REVIEW OF THE STATUTORY PRESIDENT TODAY	1192
A. <i>Statutory Review and the APA</i>	1192
B. <i>The Reviewability Barrier Today</i>	1194
III. <i>ULTRA VIRES</i> REVIEW OF THE STATUTORY PRESIDENT	1199
A. <i>Legal Authorization and Judicial Review</i>	1199
B. <i>Ultra Vires Review, Its Traditional Form</i>	1201
C. <i>Jurisdictional Fact Doctrine and the President</i>	1202
D. <i>Deference and Reviewability</i>	1206
E. <i>Ultra Vires Review, Article II, and Separation of Powers</i>	1208
CONCLUSION	1212

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INTRODUCTION

From the Supreme Court's earliest days, it has reviewed some, but not all, challenges to the President's claims that a statute authorized his action. Not surprisingly, the Court's decisions granting review of the President's assertions of statutory powers have garnered more attention than its denials of review. Beginning with *Marbury v. Madison*¹ and *Little v. Barreme*,² gaining momentum in the twentieth century with the extensive discussion of statutory authority in *Youngstown Sheet & Tube Co. v. Sawyer*³ and *Dames & Moore v. Regan*,⁴ and accelerating in recent years with *Hamdi v. Rumsfeld*,⁵ *Hamdan v. Rumsfeld*,⁶ and *Medellín v. Texas*,⁷ the Court has examined the validity of the President's claims of statutory authorization. These decisions help to solidify a common and comfortable assumption that judicial review extends to whether a President's actions have statutory authority.

That assumption is only half right. In a long line of decisions, the Supreme Court has declined to review whether the President has properly invoked his statutory powers—and declined not because of

1. 5 U.S. (1 Cranch) 137, 155–68 (1803) (examining whether Secretary of State's action, at President's apparent behest, not to deliver commission to Marbury violated act of Congress); Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 486–501 (2004) (examining *Marbury's* review of executive compliance with statute).

2. 6 U.S. (2 Cranch) 170, 179 (1804) (holding official liable for acting under a President's order that lacked statutory authority).

3. 343 U.S. 579, 582 (1952). Although in *Youngstown*, the government did not rely on statutory authorization, see *id.* at 585 (“[W]e do not understand the Government to rely on statutory authorization for this seizure.”); see also *Dalton v. Specter*, 511 U.S. 462, 473 (1992) (confirming this reading of *Youngstown*), the three-part framework for judicial review of the President's actions set forth in Justice Jackson's concurring opinion clearly contemplates review of whether the President acts “pursuant” to statute. 343 U.S. at 634–35. The Supreme Court has embraced Justice Jackson's framework as the grounding structure for review of the President's actions. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (“[W]e have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful . . .”).

4. 453 U.S. at 668–86 (concluding that President's orders of attachment and suspension of claims had legislative authorization, while not determining which statute authorized the suspension).

5. 542 U.S. 507, 516–24 (2004) (plurality opinion) (concluding that Authorization for Use of Military Force (“AUMF”) authorized President to order detention of enemy combatants).

6. 548 U.S. 557, 592–623 (2006) (concluding that President lacked authority under statute to try combatant for conspiracy before military commission as currently structured).

7. 128 S. Ct. 1346, 1369–71 (2008) (concluding that President's order to comply with non-self-executing treaty lacked necessary legislative authorization). But see Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 6 (2009) (arguing that the *Medellín* Court's reliance on *Youngstown* was misplaced in the context of treaty interpretation).

jurisdictional or standing problems, but instead on the basis of its own freestanding reviewability doctrine. Specifically, this doctrine operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power.

The Court's decision in *Dakota Central Telephone v. South Dakota*⁸ provides an example. In *Dakota Central*, the Court declined to review a claim that the President had improperly invoked authority under a joint resolution of Congress. The joint resolution authorized the President to assume control of telephone and telegraph systems "during the continuance of the present war."⁹ Invoking the joint resolution, the President authorized a set of rates for telephone lines over which the government had assumed control.¹⁰ The State of South Dakota sued on behalf of its residents, challenging the rates. It argued that the President lacked authority because the recent war (World War I) was over, and so "nothing in conditions at the time the power was exercised justified calling into play the authority."¹¹ The Court denied review, treating this argument not as a claim that the President lacked authority under the joint resolution, but rather as asserting a "mere excess or abuse of discretion of a power given."¹²

The reviewability doctrine represented in *Dakota Central* grew into a general barrier to review of the determinations that public officials, not only the President, made to satisfy the conditions for exercising statutory powers.¹³ The enactment of the Administrative Procedure Act ("APA")¹⁴ eliminated that exclusion from review for most executive officials. The Supreme Court has held, however, that the APA does not apply to the President.¹⁵ In the absence of review under the APA, courts have continued to apply this reviewability doctrine in suits challenging the President's claims of statutory power.¹⁶

The persistence of this old doctrine would be of little moment if Congress only rarely granted authority to the President in statutes

8. 250 U.S. 163, 183–84 (1919).

9. J. Res., 65th Cong., 40 Stat. 904 (1918).

10. *Dakota Cent.*, 250 U.S. at 182.

11. *Id.* at 184.

12. *Id.*

13. See, e.g., *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 131–32 (1849) (invoking doctrine to bar review of actions of commanding officer of a squadron); see *infra* Parts I.B, II.B.

14. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); see also *infra* text accompanying notes 80–93.

15. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

16. See *infra* Parts II.B–C.

that required the President to make some sort of "determination," "conclusion," or "finding" as a condition to exercising the authority granted. Congress, however, has an established and ongoing practice of granting authority to the President in what are called contingency or conditional form delegations.¹⁷ These statutes, stemming from the early days of the Republic,¹⁸ grant the President power conditioned upon his determination that certain events have transpired. For instance, the President's power to open ports to vessels from a particular country has been conditioned upon his receiving information that the country's ports are open to vessels from the United States.¹⁹ The President's power to waive agreements with India from provisions of the Atomic Energy Act is conditioned, among other things, upon the President's determination that "India has provided the United States and the [International Atomic Energy Agency] with a credible plan to separate civil and military nuclear facilities, materials, and programs, and has filed a declaration regarding its civil facilities and materials with the [Agency]."²⁰ While these contingency format delegations are no longer the standard form of delegations to agencies, Congress still regularly employs them when it delegates power directly to the President.²¹

To determine whether the President's exercise of power under such a contingency delegation is valid requires review of the satisfaction of the condition or contingency. Simply, if the stated

17. See JOHN PRESTON COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* 64-77 (1927) (describing early contingent legislation).

18. See *id.* (describing such legislation's history); see, e.g., Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 ("[W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of militia of the state . . . as he shall think proper.").

19. Act of May 6, 1822, ch. 56, § 1, 3 Stat. 681, 681:

[O]n satisfactory evidence being given to the President of the United States that the ports in the islands or colonies in the West Indies, under the dominion of Great Britain, have been opened to the vessels of the United States, the President shall be, and hereby is, authorized to issue his proclamation, declaring that the ports of the United States shall thereafter be open to the vessels of Great Britain . . .

20. Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, § 104, 120 Stat. 2726, 2729.

21. See, e.g., 40 U.S.C. § 574(d) (2006) (allowing an executive agency to receive property instead of cash under a real property contract if the President determines the property to be a strategic or critical material); *id.* § 11331 (2006) (granting the President power to approve or disapprove federal information system guidelines if he determines such action to be in the public interest); 46 U.S.C. § 60304 (2006) (granting the President the authority to suspend special tonnage taxes if the President is satisfied that foreign country does not impose discriminating or countervailing duties); *id.* § 60505(a) (2006) (granting the President the power to suspend commercial privileges to foreign vessels where the foreign country does not grant vessels from the United States the same privileges).

condition or contingency is not satisfied, there is no justification for the exercise of the statutory power. As a result, a doctrine that bars review of determinations the President makes to invoke statutory power ends up barring review of whether the President's action has or lacks authority under the statute.²² Despite the attention that courts and legal scholars have devoted in recent years to the standard of review applicable to the President's claims of statutory powers,²³ the threshold question of the availability of judicial review of the President's invocation of statutory powers has received little focused attention.²⁴

This Article argues that the long-held barrier to judicial review of these determinations the President makes to invoke statutory authority should be abandoned, and that judicial review, at a minimum, should extend to all determinations necessary to assess whether the President has acted within the scope of authority granted by statute—that is, within his statutory jurisdiction.²⁵ The core steps

22. Indeed, as originally understood, it was the statute's specification of the contingency that validated the delegation in response to the argument that it amounted to an unconstitutional grant of legislative authority to the President. See *Field v. Clark*, 143 U.S. 649, 693 (1892) ("Legislative power was exercised when Congress declared that the suspension [of tariffs] should take effect upon a named contingency."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363–67 (2002) (explaining how the specification of the contingency upon which effectiveness of the law would depend validated these early delegations from nondelegation challenge).

23. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2083–2106 (2005) (defending a framework to review the President's powers under the AUMF); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1085–1179 (2008) (providing a comprehensive treatment of deference to executive actors, including the President); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2301 (2006) (arguing Article II justifies reviewing courts upholding the President's power to complete statutory schemes, subject to congressional override); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 304–10 (2006) [hereinafter Stack, *Statutory Powers*] (arguing that under *Mead*, *Chevron* deference should apply to the President's statutory interpretation, when the statute delegates authority to the President in name); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 590–99 (2005) [hereinafter Stack, *Statutory President*] (arguing that under *Chevron*, deference should apply to the President's statutory interpretation when the statute delegates authority to the President in name); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2603–04 (2006) (arguing for reading *Mead* to allow the President to qualify for *Chevron* deference).

24. A notable exception is Larry Alexander & Evan Tsen Lee, *Is There Such a Thing as Extraconstitutional?: The Puzzling Case of Dalton v. Specter*, 27 ARIZ. ST. L.J. 845, 848–59 (1995).

25. It is critical to distinguish the reviewability of the President's assertions of statutory authority from the prospect of a judicial injunction directly against the President's action. As the Supreme Court made clear in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), in general, the federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Id.* at 501. Neither the legislative department, nor the President, the Court

in this argument are relatively straightforward. First, it is a widely shared premise that, absent a congressional ouster of judicial review, judicial review is available to assess whether federal officials acted within the scope of their statutory powers. Second, where a statute grants authority conditioned upon the President making a determination or finding, to assess whether the President acts within the scope of his statutory powers, judicial review must extend to the determinations the President makes that are conditions for invoking the statutory powers.

The Article begins by examining the origins of the doctrinal barrier to review; it argues the grounds which originally justified the doctrine no longer prevail today. The doctrine emerged in the Federalist period. In that context, it functioned as a means of protecting federal officials and members of the military from common law damages suits against them in their individual capacities. By refusing to review the basis of the President's invocation of statutory authority, and treating the President's determinations as conclusive, the doctrine granted a defense to officers acting in the line of duty. But today, federal officials and members of the military are protected by a statute granting them official immunity,²⁶ and judicial review of executive action has been authorized by statute.²⁷ The conditions that justified the exclusion from review no longer apply.

The Article then explains how this doctrine has persisted in the context of the President's claims of statutory power, despite the shift in the law governing review of other government officials. In short, the courts responded to the Supreme Court's holding that the APA does not apply to the President by continuing to rely upon doctrines developed prior to the APA, including the longstanding bar to review of challenges to the President's invocation of statutory powers. At a practical level, that choice is understandable. The APA did not override these preexisting doctrines of review.²⁸ Following the

explained, may be "restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Id.* at 500. Review of the President's assertions of statutory authority can typically be obtained outside of a suit that requires granting injunctive relief against the President.

26. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified as amended in scattered sections of 28 U.S.C.). To the extent an independent remedy is available for constitutional violations under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), qualified immunity shields officers from liability for all but clear constitutional violations. See *infra* text accompanying notes 101-105.

27. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

28. 5 U.S.C. § 703 (2006) ("The form of proceeding of judicial review is . . . in the absence or inadequacy . . . of a [special statutory review proceeding], any applicable form of legal action,

enactment of the APA, there had been little doctrinal pressure for evolution of those preexisting doctrines, and so they persisted, apparently awaiting renewed application. But by resorting to these prior doctrines, courts fail to acknowledge the legal developments that undermine their continued application.

The final Part of the Article argues that judicial review should extend to all issues necessary to determine whether the President has acted within the scope of his statutory powers, regardless of whether those issues are classified as issues of law, fact, or law-to-fact application. A fundamental commitment of public law in the United States is that judicial review is available for claims challenging whether officials have statutory authorization. Prior to the enactment of the APA, courts implemented this core commitment to review of a federal official's statutory authority by asking whether the official acted *ultra vires*—literally, without legal authority. In its traditional form, *ultra vires* review included review of the determinations—whether factual, legal, or law-to-fact application—necessary to assess whether the official acted with statutory authority.

To the extent that the President's assertions of statutory powers put him on the same legal footing as other officials who act under statute, it makes sense for review of the President's actions under statute to be available on the same grounds, and to conceive of review of his claims of statutory powers as a branch of *ultra vires* review.²⁹ So understood, judicial review should extend to evaluation of

including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.”); see PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1111 (10th ed. 2003) (noting that § 703 acknowledge “tradition of non-statutory review”).

29. The *ultra vires* vocabulary is awkward in one way with regard to the President. *Ultra vires* implies the absence of all legal authority, not just statutory authority. With regard to administrative officials, their only source of authority is granted by Congress, see *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress.”), and as a result there is no difference between their actions being without statutory authority and *ultra vires*. The President's actions might be justified by Article II of the Constitution, even if not by statute. By advocating that judicial review of the President's claims of statutory authority be conceived of as a branch of *ultra vires* review, I of course do not mean to deny that the President could still be authorized independently by the Constitution; I mean only to capture the traditional scope of *ultra vires* review. This awkwardness has not prevented some judges from suggesting *ultra vires* is available to review the President's authority under statute, though they generally have done so without much discussion. See, e.g., *Dalton v. Specter*, 511 U.S. 462, 478 (1994) (Blackmun, J., concurring in part and concurring in the judgment) (“With the understanding that neither a challenge to *ultra vires* exercise of the President's statutory authority nor a timely procedural challenge is precluded, I join . . .”); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (suggesting *ultra vires* review of President's authority under statute is available, but declining to engage in such review based on absence of allegations of sufficient facts to support *ultra vires* claim).

the factual and other determinations the President must make to invoke statutory power.

Before defending these claims in more detail, two clarifications are in order. First, the argument here is that *ultra vires* review provides a default framework defining what aspects of a President's actions under statute should, at a minimum, be subject to review. That argument does not call into question Congress's established constitutional authority to preclude judicial review of specific aspects of the President's (or other officials') assertions of statutory powers. Indeed, my hope is that if we move beyond this across-the-board barrier to review, Congress and the courts will have reason to direct more attention to tailoring exclusions of review to specific circumstances that may warrant them. Second, I do not mean to imply that *ultra vires* review completes the analysis of the availability of review of the President's actions. Other justiciability requirements, such as standing, need to be satisfied as well. The point is rather that the *ultra vires* review framework helps to define a baseline for what aspects of the President's actions under statute should be subject to judicial review.

I. THE REVIEWABILITY BARRIER: FROM FEDERALIST ORIGINS TO CONTEMPORARY APPLICATION

A reviewability doctrine grew from judicial decisions involving the liability of individual military officers in the Federalist period into a general barrier to review of the determinations the President makes to invoke statutory powers. As the doctrine developed, courts used it to treat challenges to those determinations as challenges to the President's *exercise* of his statutory powers, as opposed to whether his actions had or lacked authority under the statute.

A. *Origins in the Federalist Military*

As Professor Jerry Mashaw's recent work highlights, judicial review of government action in the Federalist period proceeded in ways foreign to our understandings.³⁰ Whereas today review is generally impersonal (against the office or commission) and typically involves injunctive or declaratory relief, these defining characteristics of our legal regime did not obtain in the Federalist period.

30. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1334 (2006).

Without a general statutory authorization for claims against federal officials, judicial review of federal officials' actions was determined by common law forms of action.³¹ Frequently, and especially in customs, revenue, and prize disputes, the party alleging a wrong at the hands of a government official would file a tort suit against that official in his personal capacity.³² The normal remedy in these suits was damages,³³ and there was no official immunity for officeholders.³⁴ These conditions placed considerable pressure on whether or not the official acted under valid statutory authority. "Officers could plead their statutory authority as a defense, but if the court—or the jury—thought them wrong on the law or the facts, liability followed."³⁵

In this regime, the intrusiveness of court or jury review of the legality of the officer's conduct depended in part on the particular form of action under which the suit was brought.³⁶ In civil tort suits, the officers did not benefit from deference or a presumption of statutory authorization for their actions. Rather, whether they acted within the scope of their statutory authority was a determination made de novo, with damages awarded when the official did not comply with "the applicable legal standards as determined by the court."³⁷ Even in forms of action in which the court gave greater deference to the official's conduct, such as review under a prerogative writ, the focus of

31. *Id.*; Thomas W. Merrill, *The Origins of the Appellate Review Model of Administrative Law* 10 (Apr. 20, 2009) (unpublished manuscript, on file with the Vanderbilt Law Review) ("The appropriate form of action was dictated in part by inherited English conventions as modified by American statutes and precedents, and in part by circumstances, e.g., whether the government agent was withholding or taking away property or some other vested right.")

32. Mashaw, *supra* note 30, at 1334; Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 204 (1991); Merrill, *supra* note 31, at 11.

33. Mashaw, *supra* note 30, at 1334; Woolhandler, *supra* note 32, at 204; Merrill, *supra* note 31, at 11.

34. Mashaw, *supra* note 30, at 1334.

35. *Id.* As Bruce Wyman put the point with nineteenth-century confidence in his early treatise on administrative law, "action in accordance with legal authorization is legal and the official so acting will always be justified; and that action without warrant in the law is illegal, and the official so acting will always be considered a private wrong-doer." BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 9–10 (1903); *see also* Woolhandler, *supra* note 32, at 204 ("If his invasion of the citizen's interest were not justified by statutory authority, the official was treated as a private person who had committed a tort or other legal wrong."); *id.* at 208 (noting that no good faith immunity could be obtained).

36. Merrill, *supra* note 31, at 11.

37. Woolhandler, *supra* note 32, at 204; Merrill, *supra* note 31, at 12.

review was still upon whether the official acted within his statutory "jurisdiction,"³⁸ or whether he acted *ultra vires*.

This legal regime—common law damages actions against officials with a primary defense of statutory authorization—posed a clear threat to military functions. In the military setting, there was an evident need for lower-ranking officers or soldiers to comply with the orders of higher-ranking officers. But without a form of official or good faith immunity for following orders, lower-ranking officers and soldiers were subject to tort and conversion claims in their individual capacities.³⁹

Consider, for example, *Little v. Barreme*,⁴⁰ which squarely presented the question of whether an officer would be liable for following the President's orders when those orders were based on the President's misconstruction of a statute. Congress had authorized seizure on the high seas of "vessels bound or sailing to a French port."⁴¹ The President, through the Secretary of the Navy, directed the captains of armed vessels to seize ships "bound to or from French ports."⁴² Following those orders, Captain Little, commander of a U.S. war ship, captured a vessel named *The Flying Fish* sailing from a French port. The Court construed the statute as limiting the President's authority to order seizure of ships to a French port.⁴³ Under that construction, Captain Little lacked authority under the statute. The difficult question then was whether "the officer who obeys [orders is] liable for damages sustained by this misconstruction of the act, or will his orders excuse him?"⁴⁴

Chief Justice Marshall, writing for the Court, first "confess[ed]" that he was initially strongly of the opinion that in view of the "implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system," the claim of liability would be against the government "from which the orders proceeded."⁴⁵ That confession foreshadowed our current liability regime. But ultimately Chief

38. See Woolhandler, *supra* note 32, at 210–11 (describing the court's review).

39. Mashaw, *supra* note 30, at 1334.

40. 6 U.S. (2 Cranch) 170, 178–79 (1804).

41. *Id.* at 177–78 (emphasis added) (referring to Act of Feb. 9, 1799).

42. *Id.* at 178.

43. *Id.* at 177–78; see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 969–70 (2008) [hereinafter Barron & Lederman, *Constitutional History*] (commenting that "a statute authorizing seizure of ships heading in one direction implicitly restricted what might otherwise have been the Commander in Chief's constitutional authority to seize ships going in the opposite direction").

44. *Little*, 6 U.S. at 178.

45. *Id.* at 179.

Justice Marshall was “convinced” and “acquiesce[d] in [the view] of my brethren” that the orders provided the Captain no protection from personal liability: “[T]he instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”⁴⁶ As a result, Captain Little was “answerable in damages” for the incorrect statutory construction of the Commander in Chief.

This regime created the unraveling prospect for the military gestured at in Marshall’s reluctant opinion in *Little v. Barreme*. It gave every member of the military incentive to evaluate the legality of the orders they were issued for fear of individual liability. Indeed, if the President’s invocation of statutory authority to engage the military was subject to judicial review in individual damages claims, it could create a cascade of noncompliance with subordinate officers individually assessing the liability risk of compliance with orders. As Justice Story put the point: “While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.”⁴⁷

Without a formal defense of official or good faith immunity, one way to protect officers from liability claims was to hold that particular challenges were not subject to judicial review at all. In particular, for issues seen as definitively determined by the President or other executive officers, courts could create a de facto zone of immunity in which officials, including military officers and soldiers, acting under the President’s powers could follow orders without a corresponding fear of civil liability.

Justice Story’s opinion for the Court in *Martin v. Mott*⁴⁸ displays this solution. In 1814, Jacob E. Mott refused to join the New York militia after the President invoked his statutory authority to call forth a state’s militia.⁴⁹ A court martial convicted Mott of failing to rendezvous and imposed a fine on Mott of ninety-six dollars. When Mott failed to pay, the court martial sentenced Mott to twelve months imprisonment, and the Federal Marshall executed the fine by taking possession of some of Mott’s goods. Undaunted by the authority weighed against him, Mott brought a common law action of replevin in

46. *Id.* Chief Justice Marshall confessed that his first view was that the “instructions of the executive . . . might yet excuse from damages,” but he became convinced “I was mistaken, and have receded from this first opinion.” *Id.*

47. *Martin v. Mott*, 25 U.S. (12 Wheat) 19, 30 (1827).

48. *Id.*

49. *Id.* at 20–21.

New York state court for repossession of the goods. Mott's replevin action eventually made its way to the Supreme Court.

A critical question in Mott's litigation was whether the President had validly exercised statutory powers in calling forth the New York militia. The President had purported to invoke authority under a 1795 statute granting the President broad powers to call forth a state's militia, subject to several specified conditions.⁵⁰ The first statutory condition, and the one relevant to Mott's litigation, was that "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," it shall be lawful for the President to "call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion."⁵¹

The thrust of Mott's challenge was not the President's assessment of the number of the militia to call forth, a question on which the statute granted the President broad discretion. Rather, Mott contended that the President failed to invoke the New York militia validly under this legislation because he did not "aver the facts which bring the exercise within the purview of the statute," and in particular, he failed to set forth an "actual invasion, or . . . imminent danger of invasion."⁵² Mott's litigation thus squarely presented the question of whether the Court would review Mott's challenge to the President's invocation of statutory powers.

The Court sternly rejected the prospect of a court or jury second-guessing the President's determination in the litigation of Mott's common law claims:

If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.⁵³

The Court crafted a ruling that allowed it to uphold the President's exercise of statutory powers without subjecting to jury-revision the President's determinations that justified his invocation of those powers. It did so by treating Mott's challenge as falling within the following broad principle: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts," the Court opined, "it is a sound rule of construction,

50. Act of Feb. 28, 1795, 1 Stat. 424.

51. *Id.* § 1.

52. *Mott*, 25 U.S. at 29, 32. Mott also challenged the President's action on constitutional and other grounds.

53. *Id.* at 33.

that the statute constitutes him the sole and exclusive judge of the existence of those facts.”⁵⁴ As to the prospect that the power could be invoked in a circumstance that did not justify its use, the Court said, “It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse.”⁵⁵

The *Martin* Court thus created a barrier to civil claims against military officers for obeying the President’s orders on the ground that the President lacked statutory authority; it did so by comprehending Mott’s challenge to the existence of the President’s authority to call the militia—whether the exigencies that were conditions of the President’s exercise of his authority under the statute pertained—into a challenge to the President’s exercise of discretion under the statute. Put another way, the existence of the facts (or their averment) necessary to trigger the President’s power under the statute was not seen as bearing on the President’s authority. In the absence of immunity protections, the doctrine provided a pragmatic way to protect military officials from individual liability where they were following orders stemming from the President’s invocation of statutory powers.⁵⁶ In effect, it operated as a doctrine of jury-avoidance with regard to challenges to the grounds upon which the President invoked statutory powers.⁵⁷

B. Growth and Transplanting

From this distinctive common law damages context in *Martin v. Mott*, the exclusion grew. The growth is attributable to a combination of Justice Story’s casting the exclusion in very general terms and Congress’s prevailing practice of delegating conditional authority to the President and others.

At the time *Martin v. Mott* was decided and for close to a century thereafter, Congress routinely granted authority to the President in a contingency format, like the contingency format of the

54. *Id.* at 31–32.

55. *Id.* at 32.

56. As the court in *Vanderheyden v. Young*, 11 Johns. 150, 158 (N.Y. Sup. Ct. 1814), upon which *Martin v. Mott* relies, states:

In a military point of view, the contrary doctrine would be subversive of all discipline; and as it regards the safety and security of the *United States* and its citizens, the consequences would be deplorable and fatal. It is not necessary, therefore, to set forth the occurrences of these events in the pleas, as a justification of the defendant’s conduct, because they were not, and could not be matter of trial.

57. See Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 36–38 (2008) (describing how culture of jury avoidance shapes antitrust law, for the worse).

statute at issue in *Martin v. Mott* itself.⁵⁸ These contingency delegations reflected the period's dominant theory of the constitutional limit on Congress's authority to delegate legislative power. Under the contingency theory of delegation, so long as the grant of authority was conditioned upon the official making a finding or declaration of the specified circumstances, it was not a delegation of "legislative power."⁵⁹ As the Court described in a subsequent explication of the contingency theory: "Legislative power was exercised when Congress declared that the suspension [of tariffs] should take effect upon a named contingency."⁶⁰ Under this logic, when the official acted under the delegation, the official was merely executing the law by determining "the event upon which [Congress's] expressed will was to take effect."⁶¹

Martin v. Mott's general propositions provided an appealing account of the limits of judicial review under federal contingency delegations. *Martin v. Mott* declared that when a statute conditions powers upon an official's "opinion of certain facts," the best course is to construe the statute as making the official "the sole and exclusive judge of the existence of those facts."⁶² With regard to statutes that conditioned an official's invocation of authority upon his view or assessment of facts or conditions, that general proposition proved hard to resist. Indeed, in the first half of the twentieth century, these principles formed a general bar to review of the conditions precedent to the President's invocation of authority under a contingency delegation. Two cornerstones of this expanded doctrine are the Supreme Court's decisions in *Dakota Central Telephone Co. v. South Dakota*⁶³ and *United States v. George S. Bush & Co.*⁶⁴

Dakota Central concerned a challenge to the President's authority under a World War I joint resolution. In 1918, Congress adopted a joint resolution that authorized the President "during the continuance of the present war . . . whenever he shall deem it necessary and for the national security or defense, to supervise or take

58. See COMER, *supra* note 17, at 64–80 (describing early contingent form delegations); Lawson, *supra* note 22, at 363–72 (providing account of early contingent delegations).

59. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 132–33 (1999) (discussing contingency theory); Lawson, *supra* note 22, at 363–72 (same); Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 983–86 (2007) [hereinafter Stack, *Cheney*] (same).

60. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892).

61. *Id.*

62. 25 U.S. (12 Wheat) 19, 32 (1827).

63. 250 U.S. 163 (1919).

64. 310 U.S. 371 (1940).

possession and assume control of any telegraph [or] telephone . . . cable" provided just compensation is given.⁶⁵ Under this grant of authority, in July of 1918, the President took possession of all telephone and telegraph systems and subdelegated the supervision of the systems to the Postmaster General.⁶⁶ Pursuant to this subdelegation, the Postmaster General issued an order on December 18 increasing the rates for intrastate calls in South Dakota.

The State of South Dakota sued, arguing that because the war was over, there was no conceivable connection between the intrastate phone rates and national security, and thus the federal government lacked authority under the statute to set those rates.⁶⁷ South Dakota framed the issue before the Supreme Court as follows:

As a matter of fact it cannot, by any stretch of the imagination, be said that the proposed rates had any relation whatever to the war program of the Federal Government. The order in which these rates were promulgated was made on the 13th of December, 1918, 31 days after the hostilities in Europe had ceased by the signing of the Armistice of November 11, 1918. . . . On the day that the Armistice was signed, the President appeared officially before Congress to advise it as to the state of the Union, and then there said:

"The war thus comes to an end; and having accepted these terms of Armistice it will be impossible for the German command to renew it."⁶⁸

South Dakota argued that because the statute authorized imposing rates only "during the continuance of the present war," the President's action lacked authority under the statute. South Dakota put the matter clearly: Even if the Postmaster or the President had specified that raising intrastate rates was necessary as a war measure, "it would be the duty of the court in a proper proceeding to go behind such recitals, for otherwise it would be impossible to check the exercise of arbitrary power."⁶⁹ If the officer acted in good faith claiming "*authority which he did not possess*, it would lie within the jurisdiction of the courts to enjoin him, if in fact he did not possess the authority claimed."⁷⁰

The Court declined to examine this challenge to the President's action on the ground that "the contention at best concerns not a want

65. 250 U.S. at 181 (quoting Joint Resolution of July 16, 1918, 40 Stat. 904).

66. See *id.* at 182–83 (quoting President Wilson's Proclamation of July 22, 1918).

67. Brief of Defendant in Error, *Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163 (1919) (No. 967).

68. *Id.* at 33.

69. *Id.* at 31.

70. *Id.* at 31–32 (emphasis added). Further, South Dakota argued that even if the President or Postmaster General had declared the rate increases necessary as a war measure, "it would be the duty and within the jurisdiction of the court to review such a determination and determine whether as a matter of fact it was true." *Id.* at 32.

of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power."⁷¹ The Court continued, "[T]he judicial [power] may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."⁷² The Court thus transformed South Dakota's claim that the President "did not possess the authority claimed"⁷³ under the statute into something else pertaining to a "mere excess or abuse of discretion." On this logic, it is difficult to imagine a circumstance in which a court would review whether the President's assertion of authority exceeded the power given.

The Court's decision in *George S. Bush* carried this barrier to review beyond the military context and reiterated the classification of challenges to the grounds for invoking statutory power as challenges to the exercise of power, not its existence. That decision involved a tariff dispute in which the Court held that the President's approval of the Tariff Commission's recommendations was not subject to judicial review.⁷⁴ The statute subjected the Commission's recommended tariff to presidential approval based upon a broad conditional determination: the President "shall by proclamation approve the rates of duty . . . in any report of the commission, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in cost of production."⁷⁵ The President approved the rate change based on the Commission's report.⁷⁶

The Court roundly rejected the suggestion that it could review the President's determination of this condition. For the *Bush* Court, review was foreclosed by the principle of *Martin v. Martin*: "Whenever

71. *Dakota Cent.*, 250 U.S. at 184 (emphasis added).

72. *Id.* While the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), later noted that the duration of hostilities may be finally committed to the political departments' determination under the political question doctrine, the Court in *Baker* remained dismissive of *Dakota Central*. *Id.* at 214 n.40 (relegating *Dakota Central* to an unexplained "but cf." citation). Despite the political question doctrine's general applicability to the cessation of hostilities, the Court in *Baker* remarked, "[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended." *Id.* at 214 (quoting *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924)).

73. Brief of Defendant in Error, *supra* note 67, at 32.

74. *United States v. George S. Bush & Co.*, 310 U.S. 371, 379 (1940). The Tariff Commission had set tariffs on Japanese canned goods by calculating their cost of production for a two year period by converting those costs to dollars based on the average conversion rate of the second year of the period. *Id.* at 377.

75. *Id.* at 376-77 (quoting Tariff Act of 1930 § 366(c), 46 Stat. 590).

76. *Id.* at 377.

a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”⁷⁷ The Court in addition cast this reviewability barrier in explicit separation-of-powers terms: “For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.”⁷⁸

In *George S. Bush*, the statute at issue clearly granted broad discretion to the President. But the Court did not rely on this breadth alone to dispose of the case. Rather, the Court framed the barrier to review as stemming from the requirement of executive determination of the facts. Justice Story’s decision to bar review of such conditional determinations, the officer’s “opinion of certain facts,” operated in a new legal context. Lost was the military command setting and the prospect of individual liability for an officer following orders. The doctrine now applied to a tariff dispute, where the relief sought was injunctive relief against the government, and the case was to be tried before a judge, not a jury. Moreover, the exclusion had acquired a more explicit separation-of-powers association. The Court presumed that if Congress itself had set the tariff rates at issue in *George S. Bush*, the rates would have been immune from review, and accordingly, it would invade both the legislative and executive spheres to review them.⁷⁹

C. The Shifting Background Legal Landscape

Significant developments in the legal landscape following 1940 undermined the already weakened rationale for the general barrier to review reflected in *Dakota Central* and *George S. Bush*. First, the Administrative Procedure Act, enacted in 1946, reshaped the law of review of public officials. It authorized review of questions of law, fact, and discretion as to all officials within the Act’s coverage. Second, the Federal Tort Claims Act, enacted in 1946 and amended in 1988, undermined the doctrine even as to its paradigm application—liability for members of the military.

77. *Id.* at 380 (quoting *Martin v. Mott*, 25 U.S. (12 Wheat) 19, 31–32 (1827)); see also *id.* at 379–80 (“[T]he judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment.”).

78. *Id.* at 380.

79. *Id.* The Court also noted that under the Constitution it is “exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed.” *Id.*

1. The APA

The APA reformulated judicial review of executive action. It created a cause of action for review of government action and waived sovereign immunity for injunctive relief, making the suit an impersonal one against the government. The Act also specified the availability and limits of judicial review.⁸⁰ As a result, the APA funneled litigation in which a public official could have been named as a defendant into an impersonal proceeding against the government for injunctive relief, tried by a judge.

The parameters of judicial review in the APA nowhere embrace the distinction between questions of authority and exercise of authority as a dividing line for the standard of review, or its availability. Nor does the APA exclude review of the determinations—factual or otherwise—that are the basis for an agency’s invocation of statutory powers. As is familiar to students of administrative law, the APA provides that the reviewing court shall “decide all relevant questions of law, [and] interpret constitutional and statutory provisions.”⁸¹ In addition, the APA requires the reviewing court to hold unlawful any agency action that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law,”⁸² as well as agency action “in excess of statutory jurisdiction, authority, or limitations.”⁸³ The Act also specifically prohibits an agency from issuing rules “except within the jurisdiction delegated to the agency or as authorized by law.”⁸⁴ The APA thus reflects the core principle that it is the courts’ role to determine whether an agency has acted within the limits of authority delegated by Congress⁸⁵ as well as to determine whether the agency’s action was arbitrary.

The APA’s standard of review provisions also clearly contemplate review of agencies’ *exercise* of their powers and the determinations agencies make to invoke statutory powers. Put simply, to determine whether an agency has acted arbitrarily, abused its discretion, or acted in excess of its jurisdiction, a court must review the agency’s exercise of power, not just its existence. A fundamental

80. 5 U.S.C. § 702 (2006) (creating right of review); *id.* § 701 (defining scope of judicial review provision’s application); *id.* § 704 (defining actions reviewable); *id.* § 706 (defining scope of review).

81. *Id.* § 706.

82. *Id.* § 706(2)(A).

83. *Id.* § 706(2)(C).

84. *Id.* § 558(b).

85. Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 25 (1985) (“Where the agency’s understanding of its congressional mandate is in question, the court must resolve that controversy through independent judgment.”).

premise of the APA's framework of judicial review is that courts have a role to play in the examination of the vast realm of law application by agencies—the task of relating “the legal standard of conduct to the facts established by the evidence.”⁸⁶ Where judicial review proceeds impersonally against the government, the APA takes the position that there is no across-the-board bar to reviewing challenges to officials' exercise of their powers, much less a bar to reviewing the basis for invoking statutory powers.

Likewise, as to what actions are reviewable, the APA does not distinguish between questions of authority and of exercise. Rather, the APA broadly authorizes persons “adversely affected or aggrieved”⁸⁷ by administrative action to seek review, and it creates a presumption of reviewability of final agency action.⁸⁸ The APA does create two familiar exceptions to review: when the statute itself excludes review⁸⁹ or when the “agency action is committed to agency discretion by law.”⁹⁰

Neither of these exceptions captures the broad exclusion of *Martin v. Mott* and its progeny. The first clearly does not. It applies whenever a statute explicitly excludes review or when congressional intent to preclude judicial review is “‘fairly discernible’ in the detail of the legislative scheme.”⁹¹ The barrier to review that extends from *Martin v. Mott* has applied independently of an express legislative ouster of judicial review or a fairly discernable one.

The second APA exception applies “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply,’”⁹² or in which there is “no meaningful standard against which to judge the agency's exercise of discretion.”⁹³ No doubt, this exception would encompass some instances in which review is precluded under *Martin v. Mott* and its progeny. But the focus of the APA exception is on the breadth of discretion accorded to the official. The barrier to review stemming from *Martin v. Mott* implicates a different class of issues: it excludes review of challenges that the President has exceeded a statutory delegation of power by treating the determination the President makes to invoke statutory

86. Henry Paul Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 236 (1985).

87. 5 U.S.C. § 702.

88. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (stating that APA § 702 creates a presumption of reviewability).

89. 5 U.S.C. § 701(a)(1).

90. *Id.* § 701(a)(2).

91. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

92. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

93. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

powers as barred from review without detailed attention to the breadth or specificity of the underlying statutory delegation or contingency.

In sum, the APA creates a new baseline review of government action for all those entities within its scope. That baseline eclipses the grounds for distinguishing challenges to the *exercise* of power from challenges to the *lack* of power at least as to what actions are reviewable. Once review of government action is impersonal, injunctive, and before a judge, as it is under the APA, the jury-avoidance rationale for denying review of officials' conditional determinations no longer applies.

2. Federal Employee and Military Immunity

Statutory developments granting immunities to federal employees and military officers have undermined even the core case for the barrier to review—members of the military's individual liability. Recall the regime reflected in *Little v. Barreme*: Captain Little was held individually liable for following the President's orders because those orders relied upon a misconstruction of the statute.

In the late nineteenth century and early twentieth century, federal employee and military immunity expanded.⁹⁴ The enactment of the Federal Tort Claims Act ("FTCA") in 1946 permitted suits directly against the United States for money damages arising out of allegations of wrongful or negligent conduct by federal employees, including members of the military,⁹⁵ within the scope of their employment.⁹⁶ The FTCA specifically provides that the actions of members of the military within the line of duty are within the scope of employment under the Act.⁹⁷ Under the FTCA, the United States is liable to the same extent as a private party.⁹⁸ The FTCA had not expressly provided that claims against the United States are the exclusive means for seeking money damages based on a federal

94. See Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1720–26 (2008) (giving the history of pre-Westfall Act immunity).

95. 28 U.S.C. § 2671.

96. Federal Tort Claims Act, Pub. L. No. 79-601, § 410, 60 Stat. 812, 842–44 (1946) (codified, as amended, at 28 U.S.C. §§ 1346(b), 2671–2680).

97. See *id.* § 410(b) (establishing judgment as a bar to legal action against a government employee); *id.* § 402(c) (as amended and codified at 28 U.S.C. § 2671) (" 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.")

98. *Id.* § 410(b).

employee's conduct. In 1988, Congress enacted further legislation making the FTCA's remedies exclusive where violations of the Constitution are not at issue, and precluding any proceedings directly against the employee or the employee's estate.⁹⁹

Moreover, to the extent that an individual officer following a President's direction under statute otherwise may be subject to suit under *Bivens v. Six Unknown Federal Narcotics Agents* for damages for violating the Constitution,¹⁰⁰ the officer is protected by qualified immunity.¹⁰¹ Qualified immunity limits the social costs of damages suits against government officials, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in discharge of their duties,"¹⁰² in situations where officials reasonably thought their actions were lawful.¹⁰³

These broad doctrines of official immunity help to alleviate the prospect of a cascade of noncompliance that had so troubled Justice Story in *Martin v. Mott*. Military officials' defense to individual damages claims no longer hinges on whether the President's actions were lawful, but merely on acting in the line of duty¹⁰⁴ and not violating clearly established constitutional protections.¹⁰⁵ With such immunity, the immunity-creation rationale for the reviewability

99. Federal Employees Liability Reform and Tort Compensation Act of 1988 § 5, 28 U.S.C. § 2679(b)(1) (2006).

100. 403 U.S. 388 (1971); see *Wilkie v. Robbins*, 127 S. Ct. 2588, 2600 (2007) (noting that *Carlson* held that availability of FTCA did not bar *Bivens* remedy); *Carlson v. Green*, 446 U.S. 14, 19–23 (1980) (holding that availability of FTCA action does not preclude *Bivens* action against individual officers).

101. See *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (noting that qualified immunity applies regardless of whether official's action is alleged to be a mistake of law, mistake of fact, or mistake based on mixed question of law and fact); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that qualified immunity shields government officers, including senior presidential aides, from civil damages for performing discretionary functions to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); see also Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003) (arguing that immunity of federal officers under Supremacy Clause from state criminal prosecution has same scope as qualified immunity in *Bivens* actions).

102. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlow*, 457 U.S. at 814).

103. See *id.* at 638–39 (collecting authorities).

104. Immunity from suits against government employees where constitutional violations are not at issue was made even stronger with the enactment, in 1988, of the Federal Employees Liability Reform and Tort Compensation Act, currently codified at 28 U.S.C. § 2679(b)(1), providing that the FTCA is "exclusive of any other civil damages or proceedings for money damages." See also *United States v. Smith*, 499 U.S. 160, 163 (1991) (holding that immunity from claims against employees in their individual capacities applies even when FTCA does not provide a remedy).

105. See *Anderson*, 483 U.S. at 638.

barrier of *Martin v. Mott* has fallen away, even as applied to its originating military context.

II. REVIEW OF THE STATUTORY PRESIDENT TODAY

Despite these legal developments, this reviewability barrier persists with regard to review of the President's claims of statutory powers. It persists in part because of the unusual and misunderstood posture in which review of the President's statutory powers often occurs.

A. Statutory Review and the APA

Outside of the context of habeas corpus, judicial review of the President's claims of statutory power typically occurs in a lawsuit that is neither a garden-variety APA suit, nor an instance of so-called nonstatutory review. Nonstatutory review is the catch-all term for forms of review of officials that existed prior to the APA, in which plaintiffs would sue a government officer, not the government, for the officer's actions in the scope of his employment.¹⁰⁶

There are straightforward reasons why review of the President's claims of statutory powers does not arise in the context of a garden-variety APA suit. As noted above, in *Franklin v. Massachusetts*, the Supreme Court held that the President is not an "agency" under the APA, and therefore the President's actions are not subject to review under it.¹⁰⁷ The APA's text provides that the statute applies to each "authority" of the government, with specific exceptions for Congress, the courts, courts martial and military commissions, and military authority exercised in the field of battle, among others.¹⁰⁸ The President is certainly an "authority" of government and is not specifically excluded, so based on the APA's text alone, the President would appear to be subject to its provisions. The *Franklin* Court, however, read the statute's text as silent as to the President. In view of separation of powers and the constitutional position of the President, the Court decided that without an express statement as to

106. See Clark Byse, *Proposed Reforms in "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1480 (1962) (identifying as a classic statement of operation of nonstatutory review that plaintiff sues government officer for redress); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1623 (1997) (identifying suits against officers as a fundamental mechanism of nonstatutory review). Because the APA specifically recognizes these forms of review in § 703, "nonstatutory" is a misnomer, but one that has persisted.

107. 505 U.S. 788, 801 (1992).

108. 5 U.S.C. § 551(1) (2006).

the APA's application, "we must presume that his actions are not subject to its requirements,"¹⁰⁹ resolving a debate on the question.¹¹⁰ The Court went on to remark that "[a]lthough the President's actions may still be reviewed for constitutionality . . . we hold that they are not reviewable for abuse of discretion under the APA"¹¹¹

Some incorrectly read this final remark as foreclosing judicial review of the President's claims of statutory authority.¹¹² Read out of context, and isolated from past practice, this statement holds the potential to be interpreted as suggesting that judicial review of whether the President's actions have statutory authority was not available outside of the APA, as if APA review and constitutional review were the two exclusive possibilities for review. The reason that the *Franklin* Court framed its decision this way is that Massachusetts only brought claims under the APA and the Constitution.¹¹³

Furthermore, to read *Franklin* as foreclosing statutory review would be inconsistent with the longstanding acknowledgement that the APA did not eliminate the forms of review of officials' conduct that existed prior to its enactment. Section 703 of the APA provides that in the absence of a special statutory authorization for review, "the form of proceeding for judicial review" is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibition or mandatory injunction or habeas corpus, in a court of competent jurisdiction."¹¹⁴ Section 703 is widely understood to recognize the continued vitality of forms of review that are not based on statute—namely, common law, or nonstatutory, forms of review.¹¹⁵

109. *Franklin*, 505 U.S. at 801.

110. Compare Harold H. Bruff, *Judicial Review of the President's Statutory Powers*, 68 VA. L. REV. 1, 23 (1982) (arguing that application of the APA to the President is inappropriate), with Kenneth Culp Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823, 832 (1966) (suggesting that the President is an agency under the APA).

111. *Franklin*, 505 U.S. at 801.

112. *Dalton v. Specter*, 511 U.S. 462, 471:

Seizing upon our statement in *Franklin* that Presidential decisions are reviewable for constitutionality, the Court of Appeals asserted that "there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in separation of powers doctrine." It reasoned . . . that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine.

113. See Brief for Appellants, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502) (raising only constitutional and APA arguments).

114. Administrative Procedure Act, 5 U.S.C. § 703 (2006) ("The form of proceeding of judicial review is . . . in the absence or inadequacy [of a special statutory review proceeding], any applicable form of legal action, including actions for declaratory judgments or writs of prohibition or mandatory injunction or habeas corpus, in a court of competent jurisdiction.").

115. See STRAUSS ET AL., *supra* note 28, at 1111 (showing that § 703 authorizes nonstatutory review); Siegel, *supra* note 106 (same).

Franklin did not eliminate review of the President's compliance with statute outside the APA.¹¹⁶

While judicial review of the President's actions under statute is not specifically authorized by the APA, it does not follow that review of the President's assertions of statutory authority may arise only in the context of a nonstatutory review suit against the President. As Justice Scalia has noted, in almost all cases, a suit challenging the validity of the President's exercise of statutory authority may name the subordinate federal official who acts upon the President's directive.¹¹⁷ This lawsuit composition has a familiar history; it was the basis for review of executive action in *Marbury v. Madison*, with Madison as Secretary of State; *Youngstown Sheet & Tube Co. v. Sawyer*, with Sawyer as Secretary of Commerce; *Dames & Moore v. Regan*, with Regan as Secretary of Treasury; and *Hamdi v. Rumsfeld*, with Rumsfeld as Secretary of Defense. If the President generally is not, and need not be, a named defendant in the suit challenging the validity of his claim of statutory authority, the judgment would not be against him, and the suit therefore would not be an instance of nonstatutory review of the President.¹¹⁸ Instead, a suit in which the subordinate official is the defendant, but which tests validity of the President's claims of statutory powers, may be an APA hybrid. The APA may furnish the cause of action and the waiver of sovereign immunity;¹¹⁹ under *Franklin*, the APA just does not establish the standard or availability of judicial review for the President's claim of statutory power.

B. The Reviewability Barrier Today

In that legal space left open by *Franklin*, courts have invoked the reviewability doctrine stemming from *Martin v. Mott*. The Supreme Court's leading decision on the availability of review of the

116. See, e.g., *Chamber of Commerce v. Reich*, 83 F.3d 442, 444 (D.C. Cir. 1996).

117. See *Franklin*, 505 U.S. at 828–29 (Scalia, J., concurring in part and concurring in the judgment) (“Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive . . .”).

118. See *supra* note 106 and accompanying text (defining nonstatutory review as actions against the official individually).

119. See *Reich*, 83 F.3d at 444 (concluding that a cause of action would lie and sovereign immunity would be waived by APA in suit against Secretary of Labor implementing the President's Executive Order). The same would not be the case if the President were named as a defendant. See *Bismullah v. Gates*, 514 F.3d 1291, 1305 (D.C. Cir. 2008) (Randolph, J., concurring) (concluding that because the President is not an “agency” under the APA, the APA's waiver of immunity does not apply when the President is named defendant).

President's assertions of statutory authority outside of the APA, *Dalton v. Specter*,¹²⁰ sustained this doctrine. In *Dalton*, the Court held that judicial review was not available as to the President's decision to accept the recommendation of the Defense Base Closure and Realignment Commission to close the Philadelphia Naval Shipyard.¹²¹

The reviewability question in *Dalton* was a straightforward one, and certainly one that could have been resolved without distinguishing between review of the existence of the President's authority on the one hand, and review of whether the President exceeded the scope of his authority on the other. The *Dalton* Court, however, invoked that distinction and its articulation in *Dakota Central* and *George S. Bush*. As a result, *Dalton* is now the primary source of reliance for the doctrine's continuing validity.

The statute at issue in *Dalton* granted the President authority to approve or disapprove the recommendation of the Commission, in whole or in part, requiring only that his decision be transmitted to Congress and others.¹²² The Supreme Court concluded that the grant of decision power to the President did not "at all limit the President's discretion in approving or disapproving the Commission's recommendations."¹²³ Because the President could approve or disapprove the Commission's action "for whatever reason he sees fit,"¹²⁴ the Court concluded that how the President chose to exercise that unconstrained discretion was not subject to review.

It would be difficult to quarrel with this conclusion, and I do not aim to do so. In the base closure statute, Congress made a choice to vest final decisionmaking power in the President and chose not to constrain the President's authority with any statutory criteria. The statute is thus a paradigm of one that provides no standard with respect to which the President must conform his action, and thus no standard with which a court could evaluate his compliance with the statute.¹²⁵

120. 511 U.S. 463, 464 (1994).

121. *Id.*

122. See National Defense Authorization Act, Pub. L. No. 101-510, § 2903(e), 104 Stat. 1808, 1812 (1990) ("If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress.").

123. *Dalton*, 511 U.S. at 476.

124. *Id.*

125. In this respect, the Court's decision stood firmly on its prior decision in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). In *Waterman*, the Court held that the President's order to grant an international air route to one carrier, and not to another, was not subject to judicial review. *Id.* at 112. Like the statute at issue in *Dalton*, the statute in *Waterman* granted the President authority to approve the recommendations of an administrative agency; in particular, the statute made changes in overseas air transportation

Where *Dalton* has been the source of mischief is its invocation of a far broader proposition that excludes review of the exercise of authority from the domain of review. To justify its conclusion, the Court in *Dalton* defaulted to the very reviewability barrier that we traced from *Martin v. Mott* to *Dakota Central* and *George S. Bush*. In particular, the *Dalton* Court embraced the position that where the claim “concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power,” quoting *Dakota Central*. The Court also invoked *George S. Bush* for the position that “[n]o question of law is raised when the exercise of [the President’s] discretion is challenged.”¹²⁶

Read in the context of the statutory question at issue in *Dalton*, these statements have no stray consequences. They simply imply that no question of law subject to judicial review is presented when the President’s exercise of discretion is challenged under a statute that does not itself limit how he exercises the discretion it grants.¹²⁷ The problem is that the sources from which the *Dalton* Court drew these propositions—*Dakota Central* and *George S. Bush*—did not involve statutes that conferred that same unconstrained discretion; both involved broad grants of authority, but grants that nevertheless included standards under which their exercise could be judged.¹²⁸ As a result, the *Dalton* Court’s embrace of *Dakota Central* and *George S. Bush* did nothing to quell, and in fact ended up providing support for,

“subject to the approval of the President,” but did not otherwise constrain how the President was to exercise his approval. *Id.* at 106 (quoting Civil Aeronautics Act of 1938 § 801, 52 Stat. 973, 1014). “Presidential control,” the Court noted, clearly impressed with its scope, “is not limited to a negative but is a positive and detailed control over the Board’s decision, unparalleled in the history of American administrative bodies.” *Id.* at 109.

126. 511 U.S. at 476 (quoting 310 U.S. 371, 380 (1940)).

127. See, e.g., *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2003) (“[T]he court is necessarily sensitive to pleading requirements where, as here, it is asked to review the President’s actions under a statute that confers very broad discretion on the President.”); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331–32 (D.C. Cir. 1996) (“*Dalton*’s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President’s exercise of that authority, judicial review of an abuse of discretion claim is not available.”).

128. Indeed, as the Supreme Court’s recent decision in *Massachusetts v. EPA*, 549 U.S. 497, 532–33 (2007), illustrates, the mere fact that a statute frames a delegation in terms of the official’s “judgment” does not exclude review. In *Massachusetts v. EPA*, the statute at issue granted authority to the EPA Administrator to prescribe regulations applicable to the emissions of any air pollutants from new motor vehicles which, “in his judgment, cause, or contribute to air pollution which may reasonably be anticipated to endanger the public health or welfare.” *Id.* at 506 (quoting 42 U.S.C. § 7521(a)(1)). The Court held that “the use of the word ‘judgment’ is not a roving license to ignore statutory text.” *Id.* at 533. Rather, “[i]t is but a direction to exercise discretion within defined statutory limits.” *Id.*

the much broader proposition that judicial review is not available as to whether the President's exercise of authority exceeded the bounds granted.

This broader reading of *Dalton*, suggested by its embrace of *Dakota Central* and *George S. Bush*, has gained a following. Consider, for instance, *Motions Systems Corp. v. George W. Bush*.¹²⁹ There, the Federal Circuit relied upon *Dalton*, and its own reliance on *Dakota Central* and *George S. Bush*, to preclude judicial inquiry into the President's action. In *Motion Systems*, the President had declined to adopt the recommendation of the U.S. International Trade Commission to restrict the quantities of Chinese imports of electrical devices used in motorized wheelchairs.¹³⁰ The statute at issue, a contingency format delegation, provided that if a product imported from China is "being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product," the President "shall" proclaim increased duties for the product for the period of time as "the President considers necessary to prevent or remedy the market disruption."¹³¹

Domestic manufacturers of the devices sued to contest the President's assessment. The court read the challenges in *Dakota Central* and *George S. Bush* as involving claims about the abuse of discretion, not challenges to the President's authority: "[B]oth *Dakota* and *Bush* involved situations where the Court insulated Presidential action from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President's discretion."¹³² Moreover, what the court took from *Dalton* was the idea that judicial review is precluded where the President's determination involves "broad discretion," not *Dalton*'s limitation to statutes that vest unconstrained decisionmaking power in the President. The court ultimately concluded that there was "no colorable claim that the President exceeded his statutory authority," and instead it found the challenge "accuse[d] the President of acting beyond the scope of authority delegated to him under the statute."¹³³ The exclusion from review based on *Dakota Central* and *George S. Bush*, its curious authority versus excess-in-exercise distinction, is alive and well.¹³⁴

129. 437 F.3d 1356, 1359 (Fed. Cir. 2006).

130. *Id.* at 1357.

131. 19 U.S.C. § 2451(a) (2006).

132. *Motion Systems*, 437 F.3d at 1361.

133. *Id.* at 1360.

134. See also, e.g., *Utah Assoc. of Counties v. Bush*, 316 F. Supp. 2d 1172, 1183–86 (D. Utah 2004) (relying on "established Supreme Court precedent" as clearly foreclosing review of the

In sum, this reviewability bar now operates miles from the Federalist world of *Martin v. Mott*, adrift from the considerations that justified it. It bars review of the President's claims of statutory power even though the officials who act under the President's orders are protected by statutory immunities; it bars review where the relief sought is injunctive relief against the government, not damages against an individual; it bars review where a judge, not a jury, is the decisionmaker; and it bars review even though similar review would not be barred as to other executive officials exercising statutory powers. Neither the jury avoidance nor immunity-creation rationales of *Martin v. Mott* justify its application today. Indeed, the misconception that any review of the President's claims of statutory powers is an instance of nonstatutory review may have furnished implicit support for the resort to doctrines formulated in nonstatutory review cases long before the APA.

grounds upon which the President invokes statutory power, on the ground that such a claim " 'concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given' " (quoting *Dalton v. Specter*, 511 U.S. 462, 474 (1994))); Executive Order No. 12954, Entitled "Ensuring the Economic and Efficient Administration and Completion of Federal Government Contracts," 19 Op. Off. Legal Counsel 90 n.8 (Mar. 9, 1995) (invoking authority/exercise doctrine).

While the habeas corpus review involves considerations distinct from those in other forms of review, it is worth noting that the reviewability doctrine stemming from *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827), has been invoked recently in the habeas corpus context. Habeas corpus review includes not only review of whether a petitioner's constitutional rights have been violated, but also of claims that the detention lacks statutory authorization. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 593–94 (2006) (concluding the President lacked statutory authority in habeas corpus review); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2065–66 (2007) (indicating that habeas corpus review includes review of constitutional rights violations as well as claims that detention lacks statutory authority). Accordingly, it makes sense that this reviewability barrier would also surface in habeas corpus review. In his dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for instance, Justice Thomas invoked the reviewability barrier to argue that the President's determination of whether the petitioner "is actually an enemy combatant" ought not be reviewable. *Id.* at 584–86 (Thomas, J., dissenting) (citing *Mott*, 25 U.S. 19, and *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)). While the national security context in *Hamdi* may alone explain Justice Thomas's position, his invocation of the general barrier to review of the determinations the President makes to invoke statutory powers reveals that this doctrine has a presence in the context of habeas corpus. Its straightforward application in the habeas corpus context today would raise many of the same problems as its application in other proceedings. For examination of the availability and scope of review of the executive's determinations in the context of habeas corpus review, see, e.g., Fallon & Meltzer, *supra*, at 2095–2108 (discussing the scope of habeas corpus review of executive determinations); David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1017–24 (2008) (same).

III. *ULTRA VIRES* REVIEW OF THE STATUTORY PRESIDENT

If, as the previous Parts have argued, the doctrine excluding judicial review of the determinations the President makes to invoke statutory powers is no longer justified, then the question is what principle should guide the availability of review of the President's claims of statutory powers. This Part argues that review of the President's claims of statutory powers should be understood as a branch of *ultra vires* review, and as a result review should extend to all determinations—whether they would be classified as questions of law, fact, or law-to-fact application—necessary to assess whether the President acted within the scope of his delegated statutory powers. This approach thus would retire the distinction between challenges to the excess-in-exercise versus existence of authority as a way to distinguish between reviewable and unreviewable claims.

A. *Legal Authorization and Judicial Review*

The argument for this conception begins with three fundamental commitments, which I take as starting points. First, a basic premise of constitutional law in the United States is that every public actor must have legal authorization for his or her actions; without authority from either a constitutional or statutory source, the official has no authority to act. Second, in a federal government of limited powers, the Constitution and statutes grant officials only limited powers. I take the first two points as uncontroversial, and do not defend them further here.

The third starting point is that the federal judiciary is available to enforce the limits of legal authorization.¹³⁵ This third point—the commitment to the availability of judicial review to determine whether any public actor has legal authorization—also garners widespread acceptance, though it has been traced to many different sources. One of the most basic sources of the commitment is the limited government principle, which provides that the federal government is one of limited and enumerated powers. Since *Marbury*

135. See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (stating that courts will “ordinarily presume that Congress intends the executive to obey its statutory commands and accordingly that it expects the courts to grant relief when an executive agency violates such a command”); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (“The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 144 (1998) (describing review for legal authorization, whether constitutional or statutory, as a cornerstone of judicial review).

v. Madison, when individual rights are at stake, the judiciary has been committed not only to the consistency of government action with the Constitution, but also to the limitations "imposed on executive officials by law."¹³⁶ For the *Marbury* Court, as for us, statutes constitute limitations "imposed on executive officials by law."

The availability of a federal judicial forum for review of the limits of legal authorization might also be tied to Article III. For those who take the view that the Constitution requires the availability of some federal judicial forum as to issues of federal law,¹³⁷ it follows that review of the scope of authorization granted by statute falls within that constitutional minimum. Others have argued in addition that judicial review is a necessary accommodation for broad delegation of authority.¹³⁸ Judge Leventhal's celebrated opinion in *Ethyl Corp. v. EPA* provides a classic expression of this view: "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegations—because there is court review to assure that the agency exercises the delegated power within statutory limits."¹³⁹

This is not to say that this principle acknowledges no exceptions. The political question doctrine, for instance, excludes judicial review of a class of decisions deemed committed by the Constitution to the political branches.¹⁴⁰ Likewise, Congress has acknowledged authority to preclude judicial review of particular

136. Siegel, *supra* note 106, at 1628.

137. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209, 239–48 (1985) (arguing that "arising under" jurisdiction must be vested in some federal court).

138. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) ("A crucial aspect of the capacity for external control upon which the permissibility of delegating regulatory power hinged was judicial policing of the terms of the statute.").

139. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring); see also *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("Judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) ("The availability of judicial review is a necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 755 (1992) (arguing the availability of judicial review is a constitutional quid pro quo for courts declining to strike down statutes on nondelegation grounds).

140. See *Nixon v. United States*, 506 U.S. 224, 228 (1993) ("A controversy is nonjusticiable—i.e., involves a political question—where there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ' " (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))); see also *Clinton v. Jones*, 520 U.S. 681, 700 n.34 (1997) (noting the same).

statutory issues.¹⁴¹ But the default presumption of the availability of review for challenges to whether a government official has legal authorization remains a core element of our commitment to a federal government of limited powers.

It is also clear that this commitment extends to the President. As the Court observed in *Youngstown*, the President's power, "if any . . . must stem either from an act of Congress or from the Constitution itself."¹⁴² Indeed, the accumulated canon of decisions in which the Supreme Court has evaluated whether the President's actions were authorized by statute, from *Marbury* through *Medellin*, illustrates that this commitment to legal authorization review includes the President. The difficult questions, to which we now turn, concern how that commitment is implemented.

B. *Ultra Vires Review, Its Traditional Form*

Ultra vires review, I believe, offers an appealing framework for understanding the scope of review of the President's actions under statute. *Ultra vires* literally means an act performed without legal authority. The *ultra vires* vocabulary derives from a period in corporate law in which incorporation required special legislation chartering the entity with specific purposes and limited powers.¹⁴³ With its special legislative charter, the corporation was considered a public entity,¹⁴⁴ and actions of its agents beyond the scope of the corporation's authorized powers were *ultra vires*. The grant of authority to public officials by statute provided a natural case for the application of the *ultra vires* doctrine. For public entities, as with corporations, the *ultra vires* doctrine policed whether the agent acted within the scope of his delegated powers. In Britain, to this day *ultra vires* review is "the central principle of administrative law."¹⁴⁵

141. See, e.g., Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (2006) (noting that statutes may expressly preclude judicial review).

142. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); see also *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) (quoting *Youngstown*).

143. HARRY G. HENN, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTITIES 353 (2d ed. 1970); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1303 (2001); see also Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 503, 526 (2006) (examining the corporate origins of judicial review of legislation for constitutionality).

144. Greenfield, *supra* note 143, at 1303–04.

145. Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 CAMBRIDGE L.J. 122, 122 (1996) (quoting Sir William Wade).

Under the traditional theory of *ultra vires*, “every public officer has marked out for him by law a certain area of ‘jurisdiction’ ”,¹⁴⁶ acting outside of that “jurisdiction” or area of authorized discretion rendered the action *ultra vires*. At this level of abstraction, for administrative officers, *ultra vires* review cannot be distinguished from judicial review for statutory authorization. The fundamental defense for federal officials from individual damages claims was that their actions were authorized by statute and thus not *ultra vires*.

The *ultra vires* inquiry also includes an account of the scope of review necessary to ensure that the officer acts with legislative authority. Review of whether an agent acts *ultra vires* or *intra vires* requires review of the agent’s “jurisdictional” determinations, whether factual, legal, or discretionary, that “could be regarded as conditioning the power.”¹⁴⁷ In other words, how an issue might be classified on the law/fact continuum does not determine the scope of review; it is determined by whether the issue is one that bears on the validity of the agent’s claim of authority. *Ultra vires* review also does not recognize a distinction between authority, on the one hand, and whether it has been exceeded in its exercise, on the other. Both questions concern whether the agency has authority and acts within its jurisdiction. Thus, under the traditional formulation of the *ultra vires* doctrine, a reviewing court would have power to exercise “whatever scope of review was necessary to ensure that agency action was not *ultra vires*,”¹⁴⁸ including review of the conditions necessary to invoke the statutory powers.

The argument from principle seems relatively straightforward: if we are committed to review of officials’—including the President’s—compliance with the limits of authority granted, then review should extend to all the determinations necessary to make that assessment.

C. Jurisdictional Fact Doctrine and the President

Students of administrative law will recognize this suggestion as very close to the argument that so-called jurisdictional fact review should apply to the President’s claims of statutory authority. The mere mention of jurisdictional facts is likely to send shivers down the spines of some; the jurisdictional fact doctrine had a relatively brief and unhappy existence in American administrative law.¹⁴⁹ We need to

146. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 41 (1927).

147. P.P. CRAIG, ADMINISTRATIVE LAW 478 (5th ed. 2003).

148. Monaghan, *supra* note 86, at 249 n.110.

149. Franklin, *supra* note 134, at 1017–24; Monaghan, *supra* note 86, at 260.

see why the demise of the jurisdictional fact doctrine does not undermine *ultra vires* review of the President's statutory actions.

The high point of the jurisdictional fact doctrine was the Supreme Court's decision in *Crowell v. Benson*.¹⁵⁰ In *Crowell*, the Court rejected a constitutional challenge to the Longshoremen's and Harbor Workers' Compensation Act. The Act provided a workers' compensation scheme, with awards made by the U.S. Employees' Compensation Commission, for individuals who were injured performing a service upon navigable waters of the United States. An employer sought to enjoin enforcement of an award by the Commission on the grounds that the individual claimant was not an employee and his injury had occurred outside the navigable waters of the United States, and therefore his alleged injury was outside the jurisdiction of the Commission. Before the Supreme Court, the employer argued that the Act was unconstitutional because it vested a non-Article III body with the power to determine conclusively matters of private right.

The Court upheld the Act, but did so by distinguishing two different kinds of facts: those relevant to the claims of employees already within the "purview" of the Act and those necessary to assess whether the Commission had authority to decide in the first place, that is, jurisdictional facts. While determinations in the former category could be finally made by the Commission, "[a] different question is presented where the determinations of fact are fundamental or 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme."¹⁵¹ The Court treated both the employment relation and the locus of injury as conditions precedent to the Commission's power. In this respect, as John Dickinson, a leading administrative law scholar of the period wrote, *Crowell* affirmed that where "statutory authority to decide depends upon the existence of a fact, then the existence or non-existence of that fact must be independently decided in court in order to enable the court to determine whether or not as a matter of law the administrative decision is *ultra vires* and void."¹⁵² In short, the jurisdictional fact doctrine required court review of the very contingency conditions that the bar in the presidential context operates to exclude.

150. 285 U.S. 22, 36–65 (1932).

151. *Id.* at 54.

152. John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact,'* 80 U. PA. L. REV. 1055, 1059 (1932).

But there is more to *Crowell*. The Court concluded that those same jurisdictional facts—the employment relation and locus of injury—were also constitutional facts, because “the power of the Congress to enact the legislation turns upon the existence of these conditions.”¹⁵³ Thus, in *Crowell*, the “jurisdictional facts”—those conditions precedent to invocation of the statutory authority—were at the same time “constitutional facts,” that is, conditions of the constitutionality of the legislation.¹⁵⁴

To uphold the constitutionality of the Act, the Court held that it must be construed to require de novo review by an Article III court of those jurisdictional and constitutional fact determinations, upon the court’s “own record and the facts elicited before it.”¹⁵⁵ For the Court in *Crowell*, this requirement of de novo review stemmed from Article III itself. Independent review and courts’ development of their own records, the Court reasoned, were necessary to preserve “independence of the exercise of the judicial power of the United States”¹⁵⁶ and necessary to the “maintenance of the Federal judicial power in requiring the observance of constitutional restrictions.”¹⁵⁷

This doctrine immediately generated several important critiques. To advance the case for application of the *ultra vires* review to the President, it will be helpful to gauge the extent to which those critiques apply to a jurisdictional fact inquiry as part of *ultra vires* review of the President.

Crowell’s requirement of *ultra vires* review on an independent record confronted important pragmatic objections. First, as Professor Dickinson pointed out, the prospect of de novo review on a separately developed record in the reviewing court does “not merely . . . deprive the administrative procedure of its supposed advantage of speed, but . . . bring[s] the administrative body into disrepute as ineffectual.”¹⁵⁸ Second and related, Dickinson worried this burden of retrying constitutional and jurisdictional facts based on new evidence could clog the dockets of the federal courts, especially given the volume of administrative adjudications.¹⁵⁹

153. *Crowell*, 285 U.S. at 55.

154. “The doctrine of constitutional fact as developed in *Crowell v. Benson* applies to constitutional limitations on administrative jurisdiction the same reasoning which the doctrine of jurisdictional fact applies to statutory limitations.” Dickinson, *supra* note 152, at 1067.

155. *Crowell*, 285 U.S. at 62–64.

156. *Id.* at 64.

157. *Id.* at 56.

158. Dickinson, *supra* note 152, at 1062.

159. *Id.*

These two grounds for challenge to the doctrine of *Crowell v. Benson* simply do not apply with the same force to the application of jurisdictional fact review to the President. With regard to the President, my suggestion is that as part of *ultra vires* review, jurisdictional facts would be subject to review. But reviewability requires neither de novo consideration, nor consideration on a separate record developed by the reviewing court.

The rationale for de novo review and independent record development in *Crowell* was to protect Article III judicial power from congressional incursion through granting adjudicative powers to agencies.¹⁶⁰ In the context of delegations of power to the President, these Article III concerns simply do not apply. The President does not engage in formal adjudication of the type at issue in *Crowell*, and so Article III cannot require a heightened standard of review as to the President. More generally, as I argue below, in the context of review of the President's action, the availability of review does not imply any particular standard of review.

The concern about duplication of the administrative process created by *Crowell*'s de novo review requirement also does not apply to review of the President's assertions of statutory authority. The President, unlike administrative agencies, is subject to very limited procedural constraints.¹⁶¹ With little process required of the President, there is little process for judicial review to disrupt.

The third prominent criticism of the doctrine of *Crowell v. Benson*, voiced by Dickinson and others,¹⁶² is that any issue can be characterized as implicating constitutional rights, therefore entitling the losing party before the administrative tribunal to de novo consideration in court.¹⁶³ The crux of this concern for Dickinson was the sheer breadth of issues that implicate constitutional rights: "[U]nder the broad interpretation now placed on the Fifth and Fourteenth Amendments there is practically no issue going to the substantial merits of the controversy which if 'unreasonably' decided by an administrative tribunal cannot be made the basis of a claim of constitutional right."¹⁶⁴ This criticism has also been put in more general terms of jurisdictional facts: "Virtually any fact determined and acted upon by an executive tribunal could be said to be essential

160. *Id.* at 1077.

161. Stack, *Statutory President*, *supra* note 23, at 552–53 (noting that few statutes impose procedural constraints on President other than consultation requirements).

162. Dickinson, *supra* note 152, at 1063; Franklin, *supra* note 134, at 1021.

163. Dickinson, *supra* note 152, at 1077–78.

164. *Id.* at 1077.

to the tribunal's exercise of jurisdiction."¹⁶⁵ As a result, identifying facts as "jurisdictional" does little work to distinguish them from ordinary facts.

This last criticism has more purchase with regard to review of the President's assertions of statutory powers, but still it is not devastating. First, *ultra vires* review of the President would include "jurisdictional fact" review, but not review of all "constitutional facts." In other words, it would require review as to the existence of facts necessary to determine whether the President's action was within the scope of statutory authorization (jurisdictional facts), but not review of every fact bearing on the existence of a constitutional right (constitutional facts). In view of the breadth of constitutional rights doctrines, that limitation makes a difference. In particular, it renders more predictable the types of facts to which *ultra vires* review should extend—those pertaining to the boundaries of the statute, not all facts pertaining to matters of constitutional right.

This is not to deny that it will sometimes be difficult to distinguish jurisdictional determinations from nonjurisdictional ones. To be sure, sometimes it will be. But in view of our commitment to judicial review to determine whether officials have acted within the scope of statutory authority, as Professor David Franklin has recently argued, that difficulty at the margins does not undermine the basis for review extending to all those determinations necessary to ascertain the scope of statutory authority granted.¹⁶⁶

In sum, treating review of the President as a branch of *ultra vires* review would involve review of "jurisdiction" determinations. Indeed, that is its focus. But because of the difference between the President's statutory powers and those of agencies, such review will not suffer from the same difficulties that beset jurisdictional (and constitutional) fact review in the agency context.

D. Deference and Reviewability

The preceding section distinguished *Crowell v. Benson* in part on the ground that while *ultra vires* review may specify what issues are subject to review, it may do so without at the same time requiring a particular *standard* of review for those issues (such as *de novo*).¹⁶⁷ To further articulate the parameters of this model of *ultra vires*

165. Franklin, *supra* note 134, at 1021.

166. *Id.* at 1023.

167. Monaghan, *supra* note 86, at 249 n.110 (noting that "neither Jaffe nor Dickinson believe that competence of courts to engage in jurisdictional fact review imposed an obligation "to exercise a given level of review in any particular case"). I agree.

review, it is worth considering the connection between the scope of available review and the standard of review.

Recall that *Crowell*'s requirement of de novo review stems from preserving the role of Article III courts in adjudication of matters of private right. In contrast, *ultra vires* review is grounded in the commitment of the courts to enforce the idea that the federal government is a government of limited powers in which executive officials may act only with legal authorization. Implementing constraints on the limits of government authority does not require de novo review (or imply any particular standard of review).

Consider agencies. In the agency context, there is no necessary conflict between judicial review being broadly available but deferential. Indeed, as noted above, the APA establishes a very broad presumption of reviewability of agency action, yet review of agency action also may be highly deferential under the *Chevron* doctrine.¹⁶⁸ Where *Chevron* applies, it requires a reviewing court to accept an agency's construction of a statute that the agency administers so long as that construction is a permissible one.¹⁶⁹ Thus in any context in which *Chevron* applies, review is available but not de novo. For agencies, the commitment to the availability of review to police limits of agencies' authority may be satisfied even if the review is deferential.

So too with regard to the President: the argument for *ultra vires* review does not require that the court engage in de novo consideration of claims that are reviewable. If we can review an agency's actions deferentially, even when that review goes to the limits of the agency's authority, we can do the same with regard to the President's statutory claims. Indeed, the President's claims of statutory authority may be entitled to a level of deference similar to that which applies to other executive officers' statutory constructions, at least with regard to the statutes the President himself administers.¹⁷⁰

If a deferential standard of review were to apply, it might be objected that deferential review would undermine the argument that judicial review should include whether the President acts within the scope of statutory authorization. In short, if review is deferential, what is the point? This objection assumes that review is justified only when the court actually concludes that the President has acted beyond

168. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

169. *Id.*

170. See Stack, *Statutory Powers*, *supra* note 23, at 306–310 (arguing that “only actions by express recipients of statutory authority are eligible for *Chevron* deference”).

the scope of his powers. But availability of review has effects other than in that moment. Judicial review provides occasion for aggrieved parties to monitor the President's action and as a result forces disclosure of the basis for the President's actions to Congress and other political constituencies.¹⁷¹ Further, the prospect of review, even if deferential, provides incentives for the President (and his lawyers) to provide a reasoned explanation for the conclusions he reaches.¹⁷² The need to produce some explanation to which the courts may defer has a transparency-enforcing effect. It also avoids the signal that the President is beyond the reach of the courts. And because this would merely be a default presumption of reviewability, it could be ousted by Congress under particular statutes.

It is worth highlighting that *ultra vires* review may impose one requirement that could be viewed as an aspect of the standard of review. Justice Jackson's three-part categorization of power in his concurring opinion in *Youngstown* requires a reviewing court to determine whether the President acts "pursuant to" statute. *Ultra vires* review asks that same question. As a result, *ultra vires* review requires the reviewing court to be able to discern what specific statute is doing the authorizing. The principle that statutory authority should not be aggregated from a variety of sources without the court being able to identify the statute that authorizes the action has not always been honored.¹⁷³ But if *ultra vires* review defines the framework for review of the President's claims of statutory powers, it makes sense that a President's action could not be upheld unless a court can identify, as it would for any agency, the statute that authorizes the action.

E. Ultra Vires Review, Article II, and Separation of Powers

One important objection is that applying *ultra vires* review to the President's assertions of statutory power is inconsistent with the President's powers under Article II and the separation of powers. For instance, it might be argued that the President's constitutional status requires a different scope of review, such as that reflected in the

171. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1769–70 (2007) (arguing judicial review enables legislative and public oversight of agency action).

172. Stack, *Chenery*, *supra* note 59, at 1013–20 (2007) (arguing that reasoned elaboration as a condition for judicial deference applies to President's exercise of statutory powers).

173. Stack, *Statutory President*, *supra* note 23, at 575–82 (arguing against affirmation of President's power under statute when court cannot identify which statute authorizes action).

doctrine excluding review of the determinations the President makes to invoke statutory powers.

It is first helpful to clarify the focus of this objection. My core argument has been that *ultra vires* review should provide the presumptive default for the availability of judicial review of the President's assertion of statutory powers. As noted at the outset, I do not mean to contest Congress's authority to except from review particular actions under statute; indeed, if the across-the-board barrier to review is abandoned, Congress (and the courts) would have more reason to attend to those specific instances in which the express ouster of review is warranted.¹⁷⁴ This core argument also does not implicate the availability or scope of review of the President's assertion of constitutional power. Indeed, it does not purport to say anything about when, and under what standards, a court should review a President's claims of Article II power.

The more difficult question is whether Article II or separation-of-powers principles either prohibit or limit the application of *ultra vires* review. This objection might be formulated by recalling the way in which the Supreme Court's decisions bolstered the authority/exercise distinction with separation-of-powers ideas. As noted above, in *George S. Bush*¹⁷⁵ and other decisions,¹⁷⁶ the Court suggested that review of the President's invocation of his *statutory powers* "would amount to a clear invasion of the legislative and executive domains."¹⁷⁷ The Court appeared to presume that (1) if Congress itself had taken the action at issue, Congress's action would not be subject to review, and (2) as a result, the actions of its chosen delegate should also be protected from review.

Neither step is valid. First, it is no longer the case that simply because Congress has made a legislative choice, Congress's choice is generally exempt from judicial review. On the contrary, under a variety of constitutional provisions, including the Due Process and Equal Protection Clauses, the Court engages, at a minimum, in rationality review of legislation, inquiring whether the means

174. See, e.g., Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943–1009 (2004) (providing an excellent treatment and defense of exclusion of review on political question grounds of the President's foreign affairs actions).

175. *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940).

176. *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 181 (1910).

177. *George S. Bush & Co.*, 310 U.S. at 380; see also *Monongahela Bridge*, 216 U.S. at 181 (finding Congress intended for Secretary's action to have same force and effect as Congress's own).

Congress employed have a rational connection to a legitimate legislative end.¹⁷⁸

Perhaps more important, the further implication that Congress's immunity would carry over to its delegate is also questionable. It simply does not follow that if Congress itself would have been immune from judicial scrutiny, the President's decision to invoke a power delegated by Congress to take the same action should also fall outside the boundaries of review. Under well-established constitutional law, Congress may exclude review of an official's compliance with statute.¹⁷⁹ But that power does not support the inference that merely because the courts would not review the action if taken by Congress, courts cannot review the action if taken by Congress's delegate. If anything, the background presumption in public law is just the opposite—namely, that more intense review accompanies the actions of Congress's delegates than Congress's own action, as the delegates are isolated from the first-order political checks of members of Congress. For instance, judicial review of legislation does not require Congress to have expressly articulated the rationality of the legislation; the Court just has to be able to conceive of a rational basis for the legislation. In contrast, a reviewing court will uphold administrative action only upon grounds stated by the agency at the time it acted.¹⁸⁰

But even if this inference does not follow as a general matter, perhaps there are special reasons it should apply to the President in view of the President's greater political accountability and constitutional status. This objection can, I believe, be met at a more general level. The objection suggests that the President's power under Article II should influence the range of his actions *under statute* that are subject to judicial review. In other writing, I have argue that the President's constitutional status does not exempt him from the fundamental frameworks of review that apply to administrative agencies, such as *Chevron* deference for actions he takes pursuant to statutes he administers and for which he offers a *Chevron*-qualifying

178. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); see also *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (quoting *Cleburne*).

179. See, e.g., Administrative Procedure Act, 5 U.S.C. § 701(a)(1)–(2) (2006) (providing for statutory preclusion of judicial review); *Webster v. Doe*, 486 U.S. 592, 601–04 (1988) (precluding review under § 701(a)(2) of agency's compliance with statute, but allowing review of plaintiff's constitutional claims against the agency).

180. See Stack, *Chenery*, *supra* note 59, at 955 (contrasting rules of review of legislation and administrative law).

explanation.¹⁸¹ The core idea is that when the President asserts statutory authority, his actions must fall within the authority granted by statute, just like an agency.¹⁸² Along these lines, one response to this objection is to assert that while the President may have exceptional powers in his constitutional capacity, when he asserts statutory powers he is subject to the commitment to legal authorization review on the same basic terms as agencies.

Institutional considerations support this argument for parity between the President's claims of statutory powers and those of an agency. As I have argued in greater detail elsewhere,¹⁸³ when the Court sustains a sitting President's claim of statutory powers, even if the President's action involves a very adventurous interpretation of the statute, it effectively requires a congressional supermajority to overturn. In contrast, when the Court invalidates the President's assertion of statutory powers, Congress does not face a supermajoritarian obstacle to overriding the Court's determination. On the contrary, if Congress acts to affirm that the President has statutory authority, Congress's and the President's interests are aligned; a simple majority vote is sufficient to reauthorize the President. In this light, denying review of a claim that the President has exceeded his statutory powers provides no check on the validity of the President's claims of statutory authority, and does so at the very juncture where it would be most difficult for Congress to respond to the Court's decision and the President's action.

Perhaps the strongest ground for a constitutional objection is with regard to statutes that authorize the President to take actions that he would arguably have authority to take regardless of legislative authorization. In that context, it might be argued that the statutory authorization merely sanctions a course of action that the President could pursue on his own, and as a result, the President's constitutional powers augment his claim of statutory authority. At first blush, one might respond to this objection that even where the President might have authority to act in the absence of congressional authorization, once Congress delineates the President's authority, the President must abide by those limits.¹⁸⁴ That response, however, takes a side on

181. Stack, *Statutory President*, *supra* note 23, at 579.

182. *See id.* (arguing that "the president's statutory authority derive[s] from identifiable statutes").

183. *See id.* at 579–82.

184. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."); *see also Barron & Lederman, Constitutional History, supra*

the larger constitutional question of the allocation of power between the President and Congress. The shape and boundaries of Congress's powers to direct the President's action, and the President's own autonomous powers to resist such direction, while topics of perennial and current interest,¹⁸⁵ are beyond the scope of my consideration here.

There is, however, a more modest line of response: The objection takes a position that is not consistent with the operation of Justice Jackson's well-established three-part framework for review of the President's action. The President's action fits within Justice Jackson's category one, and thus benefits from the "widest latitude of judicial interpretation"¹⁸⁶ only if the President acts "pursuant to" statute.¹⁸⁷ By using the President's constitutional powers to facilitate the conclusion that the President acted "pursuant to statute," the Court would effectively move an action from *Youngstown* category two—where the President acts in the absence of congressional authorization—to category one.¹⁸⁸ So long as we are committed to the *Youngstown* framework, it does not make sense to use the existence of the President's independent constitutional powers as a basis to infer statutory authorization. Denying review of the determinations the President makes to invoke statutory authority based on the President's constitutional status or powers would undermine *Youngstown's* application as well as our core commitment to judicial review of whether federal officials have authorization for their actions.

CONCLUSION

The U.S. Constitution grants the President exceptional powers, powers not shared by any other officer of government. Not only is the

note 43, at 945 (arguing that "[w]ar powers disputes now increasingly turn on the constitutional issues raised when Congress imposes limitations"); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 703–04 (2008) (exposing the extent to which Congress has power to structure means by which President acts in his capacity as Commander in Chief); Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1383–86 (2006) (arguing that congressional regulation of executive power should be examined through the lens of checks and balances); Saikrishna Prakash, *Regulating Presidential Power*, 91 CORNELL L. REV. 215, 215–17 (2005) (arguing that Congress lacks a general power to regulate presidential powers).

185. See *supra* note 184.

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

187. *Id.*

188. See Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons from the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988) (describing how rulings like *Chadha* "create a one-way 'ratchet effect' that effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence").

“executive Power” vested in the President, but the Constitution makes the President Commander in Chief of the Army and Navy, grants him a veto over legislation, and so on. The question is how far the President’s exceptionalism extends.

The answer in current law is that it extends beyond the President’s exercise of his constitutional powers and permeates judicial review of the President’s assertions of powers granted by Congress. The President’s constitutional status frames both *how* courts evaluate a President’s assertion of statutory powers and *when* the President’s statutory actions are subject to judicial review at all.

As to when the President’s claims are subject to review, longstanding Supreme Court doctrine bars review of the determinations—whether findings or conclusions—the President makes as a condition of invoking statutory powers.

That reviewability barrier should be abandoned. That restriction on review is an artifact of a prior legal regime in which members of the military could be held individually liable for acting under the President’s orders if the President lacked statutory authority. It now applies outside the circumstances of its origins, sustained in part by the misapprehension that merely because the APA does not authorize review of the President’s actions, review proceeds only through pre-APA common law forms of nonstatutory review. Review of the President’s claims of statutory authority, however, is typically obtained by suing a lower-level official implementing the President’s orders. In that suit, the APA still provides the claim for relief as well as the waiver of sovereign immunity; it just does not answer the question of the standard or scope of available review of the President’s assertions.

The scope of available judicial review of the President’s claims of statutory powers should be governed by our fundamental commitments. Conceiving of review of the President’s actions under statute as a branch of *ultra vires* review implements the core commitment that judicial review is available to evaluate whether an official acts with legal authorization as to the President’s claims of statutory power. Under this conception, review of the President’s claims of statutory power extends, as it does for other officials, to all those determinations—whether factual, legal, or law-as-applied-to-fact—necessary to determine if the President’s action falls within the scope of his (or her) statutory authority.
