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ABSTRACT

This Article presents a theory of authorizations for the use of military force (AUMFs) that reconciles separation of power failures in the current interpretive model. Existing doctrine applies the same text-driven models of statutory interpretation to AUMFs that are utilized with all other legal instruments. However, the conditions at birth, objectives, and expected impacts underlying military force authorizations differ dramatically from typical legislation. AUMFs are focused but temporary corrective interventions intended to change the underlying facts that prompted their passage. This Article examines historical practice and utilizes institutionalist principles to develop a theory of AUMF decay that eschews text in favor of time. Consistent with armed conflict, functional needs, and constitutional norms, AUMF decay offers a model that harnesses the institutional advantages and interplay embedded in separation of powers regime. Properly, AUMF interpretation recognizes their peculiar role and lifespan as one that explodes into the legal landscape with supernova intensity and potency that, regardless of text, is just as surely followed by an accelerating decay that ultimately diminishes to complete inoperability.

I. INTRODUCTION

The most visible and publicly accessible national security act undertaken by Congress, "declaring war" is a vestige of the past, unlikely

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to be revived in the foreseeable future. Post-World War II, declarations of war have been overtaken by statutory authorizations for the use of military force ("AUMFs").

Like declarations, which presume a yet-to-be-determined end date, Congress's authorizations of force are accompanied by implicit expirations. While they lack the gravitas of declarations of war in public consciousness, AUMFs behave relatively similarly to their predecessors. They explode into the legal landscape with supernova intensity, briefly outshine the broader legal constellation and, at their birth, are bound only by the functional concerns surrounding armed conflict. As time passes, AUMFs rapidly mature, the potency and breadth of their authority increasingly constricted until they are rendered fully inoperable. In short, they decay. The interpretive tools that once stood as initial limitations are insufficient to empower an AUMF's plainly visible grants of power, and the AUMF lies dormant in the annals of federal code—forgotten, or worse, actively ignored.

Dominant models of statutory interpretation preclude the decay that afflicts force authorizations. These models understand the scope of authority of federal legislation to lie at an unchanging, fixed point.[1] As such, the contours of statutory authority flow only from textually embedded internal limitations and the external boundaries set by hierarchically superior law.[2]

The static, text-driven approach in current doctrine fails to reflect historical practice or comport with the particular context, broad effects, and structural challenges that force authorizations pose to the liberal democratic society. In responding to national security cases invoking force authorizations, the judiciary has feigned doctrinal obedience while effectuating doctrinal usurpation. While the resulting opinions are inconsistent, they present a broad pattern of recognition that the institutional principles embedded in constitutional separation of powers not only counsel AUMF decay, they demand it.

This Article argues that the most important aspect in interpreting the scope of congressional force authorizations is not text, but time. The insufficiency of current doctrine to account for temporal conditions is manifest. As Congress debated heightened tensions in the

1. There are exceptions to this general rule of statutory immutability, most notably the rule of desuetude in which a statute is considered inoperable based on a long period of non-enforcement. The extreme conditions necessary to give rise to desuetude reflect the strength of the rule. *See generally* Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006) (outlining various arguments leading to rare use of desuetude doctrine). Likewise, the stakes of desuetude are absolute. The statute is either completely inoperative or completely authoritative.

2. In this context, such "internal limitations" include not only the parameters of authority set out by the text of individual statutes, but also the limitations existing within statutory law as a whole, which often carry provisions applicable to the understanding of other statutes.

Middle East, one member expressed "shock" that the President already possessed congressional authorization for force in the region per a 1957 statute.[3] As the congressman points out, the "all but forgotten" resolution "places in the hands of the President the exclusive authority to make the determination that military action is required and to order into action military forces without limit [and] . . . relieves the President even of the necessity of consulting with the Congress . . . ."[4] These comments, made in 1969, express unequivocal fears of the operability of a "forgotten" resolution passed only a decade prior.[5] Forty-five years later, that same 1957 resolution remains in full force on the statute books.[6]

Defining the contours of an alternative, or at least augmenting, framework for interpreting force authorizations grows more urgent as contemporary conflicts grow more amorphous. We face parallel questions to those brought up in 1969, the resolution of which are murky and complex (e.g., how does the scope of the 2001 AUMF implemented after 9/11 apply to newly developing terrorist threats?).[7] Understanding force authorizations to decay would affect the applicability of existing AUMFs, the necessity of future AUMFs, and the drafting of any new AUMFs.

In Part I of this Article, I set out the role and import of AUMFs over history by outlaying their constitutional, statutory, and declarative significance. In Part II, I analyze authorizations for force implemented over the past sixty years and the corresponding executive actions taken under their power. This analysis reveals and circumscribes an invisible doctrine that has intuitively been applied by the Executive relative to AUMFs and which greatly differs from other statutory interpretation regimes. Executive AUMF interpretation, as practiced, flows from acknowledgements of the institutional deficiencies structurally accounted for in constitutional design of the U.S.

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3. 115 CONG. REC. 40,228 (1969) (statement of Rep. Findley) (explaining that the existence of the authorization would be "a shock—to most Americans, including, I daresay, most of the Members of Congress").

4. *Id.*

5. 22 U.S.C. § 1962 (2012) (originally enacted as Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957)).

6. *Id.*

7. While governmental and public attention has been trained on the group known as the Islamic State of Iraq and the Levant (ISIL), there is increasing reason to believe that other groups pose even more substantial and imminent threats to United States national security. *See* Mark Mazzetti, Michael S. Schmidt, & Ben Hubbard, *U.S. Suspects More Direct Threats Beyond ISIS*, N.Y. TIMES (Sept. 20, 2014), http://www.nytimes.com/2014/09/21/world/middleeast/us-sees-other-more-direct-threats-beyond-isis-.html?_r=1 (citing governmental officials as saying that the "intense focus on [ISIS] had distorted the picture of the terrorism . . . and that the more immediate threats still come from traditional terror groups like Khorasan and the Nusra Front").

government as well as the process of force authorizations, which Congress deliberates with time and informational constricts uncharacteristic of status quo statutory deliberations.

Part III demonstrates that the statutory decay observable in congressional and executive behavior, while never explicitly articulated as such, reflects planned obsolescence with behavioral patterns that follow four phases of decay from ultimate authority to none at all. As I outline and define, these phases progress through periods of textless conflict functionalism, text-based executive constraint, textless democratic functionalism, and total inoperability. As I argue, making visible the "invisible" decay of AUMFs, formulating AUMF decay theory, and solidifying interpretive doctrine distinct from other statutes offers critical institutional advantages. In concluding Part III, I articulate the underpinnings of a new theoretical model for AUMF decay based upon the foregoing analysis.

Adopting interpretive doctrine for AUMFs is overdue and of utmost utility. As I write this Article, the American public and international community watch with trepidation and concern as President Obama, his national security team, and Congress contemplate their roles on behalf of the United States in using force against the Islamic State of Iraq and the Levant (ISIL). With upcoming congressional elections in the back of everyone's minds, the Executive and legislature must determine what authorizations exist upon which they can rely, whether new AUMFs should be made and of what nature, and the practical and political implications of any action they take or decline. Quite simply, AUMFs matter. A model for their interpretation must be implemented that accounts for statutory decay in order to maintain separation of powers generally (and respect the *Youngstown* assessment specifically), enhance operational clarity, and improve democratic legitimacy in the most sensitive and costly of all national security decisions—military force.

II. THE ROLE AND SIGNIFICANCE OF AUTHORIZING FORCE

U.S. Presidents since Lincoln have always had an expansive view of their own authority. As the decades have passed, the historical basis for an expansive view of presidential authority in the discretionary use of the armed forces has only grown, especially within the province of initiating hostilities. So why would a President seek Congress's authorization for the use of military force?

The post-9/11 era of national security scholarship has focused on executive power. This emphasis is understandable. Throughout the twentieth century, the executive branch steadily gathered power as

Congress steadily ceded it.[8] Transfer of authority to the President reflected changes in both the governmental and factual landscape.[9] Executive consolidation of power was especially potent in foreign relations, the scope of which grew as U.S. and foreign interests became increasingly interconnected and which caused the migration of policy questions once considered squarely within the purview of domestic politics to enter the realm of "foreign policy."[10]

Simultaneously, the formal role of Congress in initiating hostilities was waning. By the mid-twentieth century, the highly visible national security act undertaken by Congress, "declaring war" was a vestige of the past, unlikely to be revived any time in the near future.[11] Setting aside disagreements as to the Framers' intent and the legal significance of such declarations once served, there can be little disagreement that the Congress's abandonment of the declaration is interpreted by the public as equivalent to the abandoning of its responsibility in regulating the initiation (or continuation) of armed hostilities.[12]

Following the terrorist attacks of September 11, 2001, the most pressing questions of national security policy constitutionality have focused on challenges to executive power.[13] Detention, interrogation,

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8. As a legal matter, nothing exemplifies this process more than the consolidation and validation of the administrative state—a regime in which Congress opted for the safety of broad stroke policy direction exercised by agencies guided by executive branch prerogatives.

9. Governmentally, the rise of the administrative state and an enhanced appreciation of the institutional advantages of the executive branch in seeking swift and cohesive action, were both drivers of the consolidation of executive power.

10. *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 301 (2005) (comparing the post-9/11 period and the Great Depression and concluding that "[g]lobalization has launched a similar transformation [of presidential power], with the same chance of constitutional confrontation and breakdown, as the one that occurred almost a century ago").

11. *See* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 320 (2002).

12. As to the question of the lawful initiation of force, there can be little doubt as to the sufficiency of congressional authorizations (in lieu of formal declarations). *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2059 (2005) ("[A]lmost no one argues today that Congress's authorization must take the form of a declaration of war."). But this does not mean that congressional authorizations satisfy all the same purposes as declarations. Declarations are not characterized by the same particularities of force authorizing statutes. Moreover, the perception surrounding the consummation of a declaration is one that includes an understanding of substantially greater longevity than accompanies typical authorizations throughout historical practice.

13. Professor Jack Goldsmith provides a compelling account of this period and the normative desirability of inter-branch communication and cooperation regardless of legal mandates:

> The administration also eschewed genuine consultation with Congress, both formal and informal, with members of the President's own party as well as members of the opposition. . . . The Bush administration's failure to engage

military commissions, surveillance, and unmanned aerial vehicle (UAV) strikes all represent issues in which detailed congressional involvement lagged initial policy action by the executive branch. As such, much of the framing (and democratic vetting) of post-September 11 law relative to U.S. foreign policy was undertaken, Congressional action or input largely absent.[14]

Perhaps due to these dynamics, it has become fashionable to view Congress as a toothless, ceremonial stage prop whose role in U.S. foreign relations has been subjugated by an "Imperial Presidency" with ultimate authority reigning supreme within the realm of national security.[15]

The reality is much more complex. While congressional approval is rarely (if ever) a prerequisite for executive action in national security matters, it is always a booster for presidential authority. As a doctrinal matter, while the scope of independent presidential power in initiating hostilities is undefined, there is no doubt that presidential power can reach no higher than when exercised in accordance with the clearly articulated will of the legislature.[16] As articulated by Justice Jackson in *Youngstown*, the President's authority "is at its maximum" when he "acts pursuant to an express or implied authorization of Congress."[17] In contrast, when the President engages in "measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[18] Within the political arena, the harmonization of congressional and executive action grants a President far

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> Congress eliminated the short-term discomforts of public debate, but at the expense of many medium-term mistakes. It also deprived the country of . . . national debates about the nature of the threat and the proper response that would have served an educative and legitimating function regardless of what emerged from the process. And it hurt the executive branch in dealing with the third branch of government as well. Courts have been much more skeptical of the President's counterterrorism policies than they would have been had the President secured Congress's and the country's express support.

JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 206-07 (2007).

14. *See id.*

15. *See, e.g.*, Glenn Sulmasy, *Executive Power: The Last Thirty Years*, 30 U. PA. J. INT'L L. 1355, 1355 (2009) ("The last thirty years have witnessed a continued growth in executive power—with virtually no check by the legislative branch. . . . [T]he bureaucratic inefficiencies of the Congress have crippled its ability to actually 'check' the executive, for fear of being perceived as 'soft on terror' or 'weak on defense.' ").

16. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). While the *Youngstown* paradigm unmistakably makes room for valid presidential action with congressional silence and even opposition, express approval vastly improves the likelihood that executive acts will be found constitutional.

17. *Id.* at 635.

18. *Id.* at 637.

greater flexibility in implementing policy than exists with a backdrop of legislative inaction, or worse, legislative contradiction.[19]

A. Constitutional Significance of AUMFs

The Constitution affords Congress and the President various powers at play in U.S. foreign relations. The extent to which these executive and congressional powers are exclusively vested in either branch, and the extent to which one branch can limit the other's independently held power, is constantly in debate.[20] What cannot be debated is that when the branches act in concert, the federal government's power is at its most potent and the validity of its actions are least questioned. As a constitutional matter, AUMFs operate squarely at this intersection of power, transforming executive acts from those that must be explained to ones for which no explanation is necessary.

Justice Jackson's famous concurrence in *Youngstown* makes the determination of constitutional authority dependent upon determining the scope of authority granted to the President through congressional authorization. Thus the legality of presidential action becomes a question of statutory interpretation: first of whether authorization exists and then of the scope of the authority granted.

Justice Jackson's vision of executive power is fundamentally grounded in an institutionalist vision of the Constitution.[21] His framework for assessing the constitutionality of executive acts reflects the belief that the Constitution's separation of powers regime distributes institutional competencies and advantages among the branches for which the act of governing would require the navigation and exposure to the institutionalist competencies present in each branch.[22] In this view, both the executive and legislative branches possess institutional strengths that are complementary and function together interdependently. While the Executive is nimble and uni-

19. *Id.* at 635-38.

20. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (outlining controversy over the validity of congressional limitation of the commander-in-chief power throughout American history). The debate regarding the scope of the President's independent ability to initiate hostilities is particularly heated and longstanding. However, the resolution to that question is not relevant here as, regardless of how one might plausibly answer that question, there is no doubt that presidential powers are expanded when coupled with an authorization for the use of force by Congress.

21. *See* Laura A. Cisneros, Youngstown Sheet *to* Boumediene*: A Story of Judicial Ethos and the (Un)fastidious Use of Law*, 115 W. VA. L. REV. 577, 586-92 (2012) (describing *Youngstown* and Jackson's assessment of institutional competencies).

22. *See* Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 272-73 (2010) (discussing *Youngstown* and the institutional incentives created by the Jackson framework).

fied, the legislature is multitudinous and deliberative.[23] When those institutional strengths align in determining a course of action, it is eminently sensible for the judiciary to offer a wide berth in gauging the legal appropriateness of governmental power.

The boundaries of statutory authority flow only from internal limitations and the external boundaries set by hierarchically superior law.[24] Under the models of statutory interpretation embraced by the judiciary, the meaning of any statute is fixed and unalterable from the time of its passage into law.[25] The cornerstone of ascertaining this embedded meaning begins with the statute's text. Only where the text is lacking is the jurist expected to move to secondary interpretive devices such as legislative history.[26]

As a practical matter, the doctrinal inflexibility of statutory immutability is offset by the inherent pliability of judicial interpretation. While the text of law may be fixed,[27] the meaning of that text often changes over time resulting in its expansion, contraction, or alterations to its character. As such, the judicial approach to statutory interpretation generally renders the immutable somewhat malleable.

AUMFs unwittingly usurp the institutional framework embedded in separation of powers and, as such, throw into doubt the accomplishment of the objectives the Jackson framework represents. Judicial trepidation involving national security and the judicial doctrines erected from those fears compromise the flexibility statutory interpretation typically adds. In fact, nothing within the current doctrine effectively explains the exceptionally rapid decay of authority that befalls congressional authorizations of the modern era.

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23. *See id.* at 310, 313.

24. In this context, such "internal limitations" include not only the parameters of authority set out by the text of an individual statute, but also the limitations existing within statutory law as a whole, which often carry provisions applicable to the understanding of other statutes.

25. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-80 (1987) (exploring frailties within the current paradigm of statutory interpretation in which "approaches to statutory interpretation treat statutes as static texts").

26. Even when those secondary mechanisms are invoked, it is in service to the proposition of seeking the statute's fixed meaning, or at least in service of the statute's original purpose.

27. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 618 (1996) (noting that both textualists and intentionalists view statutory authority as "fixed at the time of enactment"); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 230 (1999) ("The decided trend has been toward the formalities of textualism and toward an understanding of statutes as static. On this view, judges are to say what statutes meant when enacted, and have always meant ever since.").

B. Statutory Significance of AUMFs

AUMFs automatically trigger the application of a variety of statutory provisions with both domestic and international effect.[28] When declarations and force authorizations were considered as fulfilling separate purposes the differentiation in part reflected different statutory results and differences in language. That is no longer the case. Contemporary AUMFs possess equivalent breadth of declarations, leading to the inevitable conclusion of interchangeability not just in international law but for domestic law as well.

Several statutes explicitly tie specific legal effects to the presence of a declaration of war or congressional authorization of force. For example, declarations enable the President to unilaterally implement trade restrictions,[29] order the production of weaponry,[30] seize temporary control of transportation instrumentalities,[31] extend military enlistment terms absent individual consent,[32] and expand intelligence gathering absent specific court orders.[33]

AUMFs have also triggered the application of a variety of legal effects even in the absence of a formal instrument of law such as a declaration of war or a congressional force authorization.[34] These statutes impose new limitations or empowerments in administrative

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28. *See* JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS (2014); *cf.* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) ("[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.").

29. *See, e.g.*, 50 U.S.C. § 1702 (2012).

30. *See* 50 U.S.C.A. §§ 4517, 4531-4534 (Westlaw through Pub. L. No. 114-115 (excluding 114-95)).

31. *See* 10 U.S.C. § 2644 (2012) (authorizing assumption of control of transportation systems to transport troops, weapons, and other emergency materials).

32. *See* 10 U.S.C. § 519 (2012) (providing that "in time of war or of emergency declared by Congress" enlistments in armed forces are to be for duration of conflict plus six months); 10 U.S.C. § 1161(a) (2012) (providing that commissioned officers may not be dismissed from service "in time of war, [except] by order of the President").

33. The Bush Administration asserted that the 9/11 AUMF authorized wiretaps without judicial order without time limits. FISA was subsequently amended to authorize such investigative tools without a court order for foreign intelligence purposes in "emergency" circumstances as determined by the Attorney General. *See, e.g.*, 50 U.S.C. § 1802 (2012) (noting that the President may authorize electronic surveillance of certain non-U.S. persons without a court order for periods up to one year in specific circumstances).

34. *See, e.g.*, 10 U.S.C. § 906 (2012) (providing that "[a]ny person who in time of war is found lurking as a spy or acting as a spy" and compromising defense is to be tried by court-martial and executed if convicted); 10 U.S.C. § 2663(a) (2012) (allowing seizure of land, either permanently or for temporary use, for military purposes including the production of munitions or to provide power necessary for the war effort "[i]n time of war or when war is imminent"); 10 U.S.C. § 3014(f) (2012) (lifting troop caps).

law,[35] federal employment law,[36] immigration,[37] international trade,[38] energy regulation,[39] criminal procedure,[40] and even student financial assistance.[41]While these provisions don't require an AUMF to be considered activated, operability is typically assumed when an AUMF is in force.

C. Declarative Significance of AUMFs

AUMFs are the tangible, legal, and sociological heirs to declarations of war. A declaration of war is a paradigmatic example of temporary legislating. Declarations represented notification of a shift in applicable law both internationally and domestically.[42] The notification was required because the laws to be applied were temporary rather than perpetual deviations from the governing rules that acted as the default. [43]

At the time of the Founding, declarations of war served as a notification to other states (neutral and belligerent alike) as to a change in the governing international legal paradigm from "peace" to "war," and thus, the legal rules under which you intended to operate.[44]

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35. *See, e.g.*, 5 U.S.C. § 551(1) (2012) (excluding armed forces activity "exercised in the field in time of war" from administrative procedure requirements).

36. *See, e.g.*, 5 U.S.C. § 5335(b) (2012) (pay increases); 5 U.S.C. § 8332(g) (2012) (retirement benefits).

37. *See, e.g.*, 8 U.S.C. § 1231(b)(2) (2012) (authorizing deportation to states other than the home country of the immigrant in question when the "United States is at war").

38. *See, e.g.*, 12 U.S.C. § 95a (2012) (empowering President to regulate or prohibit any transactions involving foreign nations and foreign nationals "[d]uring the time of war").

39. *See, e.g.*, 16 U.S.C. § 824a(c) (2012) (allowing regulators to order energy facilities as to energy production and transmission "[d]uring the continuance of any war in which the United States is engaged").

40. *See, e.g.*, 18 U.S.C. § 3287 (2012) (suspending statute of limitations for prosecuting fraud perpetrated against U.S. government as well as other crimes against U.S. interests while the U.S. is "at war").

41. *See, e.g.*, 20 U.S.C. § 1098bb (2012) (providing for waiver or modification of student aid programs "in connection with a war or other military operation or national emergency").

42. *See* BRIEN HALLETT, THE LOST ART OF DECLARING WAR 84 (1998) (describing historical development and significance).

43. *See* David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 46-47 (2002); Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 34 (1938) (advocating the use of war declarations in modern times); Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 114-15 (2008).

44. Bradley & Goldsmith, *supra* note 12, at 2059. As historians have thoroughly documented, the phenomenon of "undeclared wars" has persisted throughout American history. *See, e.g.*, J.F. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR: AN HISTORICAL ABSTRACT OF THE CASES IN WHICH HOSTILITIES HAVE OCCURRED BETWEEN CIVILIZED POWERS PRIOR TO DECLARATION OR WARNING: FROM 1700 TO 1870 (1883); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 54-55 (1981); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 170-75 (1996).

The global demise of war declarations primarily impacts their disintegrated efficacy within the international legal system.[45] With the introduction of the United Nations and the Geneva Conventions, the international legal purpose of declarations has been displaced.[46] In the post-World War II international legal system, the triggering effects once marked by formal recognition of conflict was displaced by the actual existence of an armed attack or use of force thus rendering a party's refusal to recognize the conflict as immaterial to the legal questions at hand.[47]

However, domestic legal effects persist. Several statutory regimes are now directly linked to the existence of armed conflict or congressional authorization.[48] During the course of various "undeclared" armed conflicts, the federal government has routinely invoked authority and power, which, formally speaking, could only be activated following a formal war declaration.[49]

Further, declarations of war have always served functions and created effects far beyond their limited international legal purpose.[50] The demise of the legal instrument of declarations of war has only meant that these functions are fulfilled in the context of force authorizations.[51] While declaring war has withered as a legal concept, it has thrived as a sociological one.[52] Ironically, the death of formal declara-

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45. *See* Bradley & Goldsmith, *supra* note 12, at 2061 (noting that "the international law role for declarations of war has largely disappeared"); Prakash, *supra* note 43, at 128-30.

46. The UN Charter and Geneva Conventions represent the definitive death of the international legal purpose, one that had been suffering a slow decline over the course of centuries. *See* HALLETT, *supra* note 42, at 105-10.

47. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19-20 (Jean S. Pictet ed., 1960) (showing international law of war rules are not limited to "cases of declared war" but also apply to "any other armed conflict," regardless of any states formally recognizing the existence of a "state of war").

48. *See, e.g.*, Paul D. Swanson, *Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations*, 97 CORNELL L. REV. 1557, 1564-65 (2012).

49. *See generally* Matthew C. Kirkham, Hamdan v. Rumsfeld: *A Check on Executive Authority in the War on Terror*, 15 TUL. J. INT'L & COMP. L. 707 (2007).

50. While declarations have faded as legal instruments, their expressive aims have not.

51. Throughout American history, declarations of war were never found alone, but rather always in the company of an authorization of force. Bradley & Goldsmith, *supra* note 12, at 2062. In tandem, declarations of war served an internal and external expressive function that has always been temporally limited. *See id.*

52. The rise described here is limited to informal declarations offered within the national security context, although the corresponding rise of "war" declarations on other social issues reflects policy makers understanding as to the sociological and rhetorical power of war declarations. While the wars on poverty and drugs are widely known, other "policy" wars legislators have invoked include a "war against rising health care costs," 160 CONG. REC. E818 (daily ed. May 22, 2014) (statement of Rep. Fincher), a "war against the wage gap," 160 CONG. REC. S2299 (daily ed. Apr. 9, 2014) (statement of Sen. Mikulski), a "war

tions of war has coincided with the dramatic increase of informal declarations within the national security realm.[53] In recent years, government officials have stated that the United States is at war against terrorism,[54] "Islamic fascists,"[55] Al Qaida, Al Qaida in the Arabian Peninsula, ISIL, terrorism, and Muammar Qadhafi, [56] among others. Internally, declarations are decisional vehicles in which the justification and aims of armed conflict are articulated and specified. As a matter of domestic legal process, that means that declarations provide the framework for public understanding as to the limits of the conflict in which the United States is entering.

The academic consensus that formal declarations of war are immaterial to contemporary conflict and that statutory authorizations have taken their place is unmistakably correct.[57] But from that conclusion, the notion that the underlying purposes of declarations are extinguished does not follow. Contemporary AUMFs have carried forward much of the domestic legal implications that once flowed from declarations of war. While formal declarations were always accompanied by authorizations of force, the instruments have merged to form the instrument of contemporary AUMFs.

III. THE FOUNDATIONS OF FORCE AUTHORIZATION DECAY

Given the temporally limited nature of declarations throughout U.S. history, contemporary AUMFs should be read similarly. They serve as the formal congressional means sufficient (in some circum-

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against cancer," 160 CONG. REC. H4014 (daily ed. May 8, 2014) (statement of Rep. Lance), a "war against sex trafficking," 160 CONG. REC. H4510 (daily ed. May 20, 2014) (statement of Rep. Scott).

53. In the first half of the twentieth century, there exist few, if any, Western leaders referring to "war" as anything other than the existence of actual legally declared conflict or internal civil wars (for which a declaration would be irrelevant).

54. Also called the Global War on Terror (GWOT), "war on terror," "war against global terrorism," etc.

55. 152 CONG. REC. S9073 (daily ed. Sept. 7, 2006) (statement of Sen. Bunning). Under this umbrella also falls invoked wars against "Islamic fundamentalism," "violent radical Islamists," and "radical Islam." 160 CONG. REC. H3358 (daily ed. Apr. 30, 2014) (statement of Rep. Gohmert) ("radical Islam"); 160 CONG. REC. S128 (daily ed. Jan. 8, 2014) (statement of Sen. Toomey) ("violent radical Islamists").

56. 160 CONG. REC. E850 (daily ed. May 28, 2014) (statement of Rep. Foxx) (against al Qaeda); 160 CONG. REC. H1237 (daily ed. Jan. 16, 2014) (statement of Rep. Gohmert) (Qadhafi); 148 CONG. REC. S4287 (daily ed. May 13, 2002) (statement of Sen. Hutchinson); Barry Wigmore, *This War with the 'Fascists of Islam', by Bush,* DAILY MAIL (last updated Aug. 11, 2006), http://www.dailymail.co.uk/news/article-400009/This-war-fascists-Islam-Bush.html (showing President Bush stating that a foiled hijacking plot was "a stark reminder that the U.S. is 'at war with Islamic fascists' ").

57. *See* Bradley & Goldsmith, *supra* note 12, at 2057 ("[A] declaration of war is not required in order for Congress to provide its full authorization for the President to prosecute a war. An authorization of military force can be sufficient and, in fact, may even be necessary.").

stances required) for authorizing the use of force. They bring into force emergency provisions designed for applicability during wartime.

The novel characteristics of post-9/11 armed conflict have spurred tremendous consternation regarding the dynamics of war generally and the scope of authority under the 9/11 AUMF. At the highest level of generality, the question pitched is when will the 9/11 AUMF cease to be operative due to the conclusion of the conflict? Does the withdrawal of U.S. troops from Afghanistan impose repatriation obligations of current detainees only alleged to have allied themselves with the Taliban rather than al Qaeda?

Relatedly, commentators are inquiring as to whether the 9/11 AUMF includes an authorization by the President to use military force for the purposes of combating terrorism more generally.[58] Most urgently, this question has arisen relative to an unfolding bombing campaign targeting the Islamic State of Iraq and the Levant (ISIL).[59] Regardless of outcome, this analysis is always anchored to traditional models of statutory interpretation, assessing the text, the intentions of the legislature, and ultimately the policy implications of varying conclusions.[60]

A. Authorization Decay in Practice

The theoretical underpinnings of AUMF decay are matched by the reality of such decay. Under traditional models of statutory interpretation, these authorizations remain valid until repeal. In fact, some are repealed. But while repeal is unusual, ultimate inoperability is the norm.

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58. *See, e.g.*, Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J. 115, 119 (2014) (arguing that "calls for a new framework statute to replace the AUMF are unnecessary, provocative, and counterproductive; they perpetuate war at a time when we should be seeking to end it").

59. *See, e.g.*, William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J.L. & PUB. POL'Y 509, 510-31 (2015). Alternatively, ISIL is self-described as "The Islamic State" and typically described by media outlets as the "Islamic State of Iraq and Syria" (ISIS). *See, e.g.*, *What Is 'Islamic State'?*, BBC (Dec. 2, 2015), http://www.bbc.com/news/world-middle-east-29052144. ISIL appears to be the preferred terminology of U.S. government officials—the relevant actors for this Article.

60. *See, e.g.*, Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES (Sept. 10, 2014), http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html?_r=0 (discussing 9/11 coverage and noting a Middle East specialist from the Brookings Institution saying, "The Islamic State was an Al Qaeda affiliate, and it is not anymore. So technically, the A.U.M.F., as I understand it, would not cover the Islamic State."); Paul Waldman, *Will Lawmakers Really Leave Town Without Voting on War?*, WASH. POST (Sept. 17, 2014), https://www.washingtonpost.com/blogs/plum-line/wp/2014/09/17/will-lawmakers-really-leave-town-without-voting-on-war/ (examining possible coverage of 9/11 AUMF and 2002 Iraq AUMF for the purpose of authorizing force against ISIL).

1. Executive Recognition of Decay

As the Soviet Union was mired in conflict in Afghanistan during the 1980s, the American people would likely have been tremendously surprised to learn that Congress had fully authorized President Reagan to intervene with military force "in the general area of the Middle East" to combat "international communism."[61] After the deployment of ground troops to Afghanistan, the public would likely have also been puzzled by President Reagan's subsequent speech announcing his expansion of the conflict into Cuba and how these actions had also been fully authorized by Congress in a wholly separate authorization which embraced the use of force against Cuba's communist regime.[62]

Less whimsically, in 2002, one would have forgiven the Bush Administration if it had vigorously asserted that it already possessed any requisite congressional authorization for an invasion of Iraq. In 1991, Congress authorized President George H.W. Bush "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678."[63] After all, the United States' use of force in 1991 ended with a cease-fire agreement, the terms of which Iraq had repeatedly violated over the decade that followed, much to the chagrin of U.S. officials.[64] But neither the White House nor Congress made this argument as a matter of domestic law.[65] Forgoing this argument was especially odd given that the White House aggressively pursued a nearly identical argument[66]—specifically, that the AUMF issued

61. Joint Resolution of Mar. 9, 1957, Pub. L. No. 85-7, § 2, 71 Stat. 5, 5 (codified at 22 U.S.C. § 1962 (2012)) ("[I]f the President determines the necessity thereof, the United States is prepared to use armed forces . . . .").

62. Joint Resolution of Oct. 3, 1962, Pub. L. No. 87-733, 76 Stat. 697, 697 (committing to ensure the preventing expansion of communist influence by "whatever means may be necessary, including the use of arms").

63. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3, 3 (1991) (codified at 50 U.S.C. § 1541 note (2012)). The UN Security Council Resolution referenced had been approved toward the conclusion of the year prior. S.C. Res. 678 (Nov. 29, 1990).

64. *See* Colin Warbrick & Dominic McGoldrick, *The Use of Force Against Iraq*, 52 INT'L & COMP. L. Q. 811, 811-12 (2003).

65. That is not to say that scholars and commentators never mentioned this position as a possibility, only that it was never actively embraced as a strategy to justify force.

66. Permanent Rep. of the United States of America, Letter dated Mar. 20, 2003 from the Permanent Rep. of the United States of America to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003) ("The actions being taken are authorized under existing Council resolutions . . ."); *see also* Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 338, 338-41 (Mar. 17, 2003) ("Under Resolutions 678 and 687, both still in effect, the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority. It is a question of will."); U.N. SCOR, 58th Sess., 4726th mtg. at 25, U.N. Doc. S/PV.4726 (Resumption 1) (Mar. 27, 2003) (showing statement of U.S. Permanent Rep. to the U.N. Security Council).

prior to the 1991 Gulf War provided the President with authorization for invading Iraq—before the U.N. Security Council.[67]

Why do Presidents so often decline to rely upon applicable existing force authorizations?[68] The arguments in favor of such reliance as a legal matter are straightforward. First, the textual foundation for the above presidential claims is strong, if not dispositive. That textual foundation coupled with judicial canons of deference to the Executive in matters of foreign affairs presents a formidable claim.[69] Despite this, it is unquestionable that President Reagan's reliance on the 1957 Middle East Resolution and the 1962 Cuba Resolution would be rejected out of hand. While more compelling, President Bush's decision to eschew reliance on the 1991 Gulf War Authorization would roundly be questioned, just as his Administration's identical argument to the United Nations was poorly received.[70]

Part of the answer likely involves political calculations, although not in the democratic accountability sense.[71] But the "political restraint" answer is, at best, incomplete. Democratic accountability is typically referred to as a political constraint on executive action in the electoral sense.[72] In most circumstances, however, armed conflict, especially at the beginning stages, only makes a President more politically powerful, not less. Whatever constraint electoral accountability exerts on a President disintegrates fully in a second term when the President is no longer eligible for re-election. Presidents are likely circumspect regarding force authorizations, insofar as such authorizations present meaningful political risk in accomplishing other objectives should they fail to pass Congress. Having said that, there is good reason to believe that the communicative power of the presidency provides a sufficient platform by which, in most cir-

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67. Professor Sean Murphy provides a highly illuminating and detailed assessment of this argument as a matter of international law. *See* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004).

68. Professor Stephen Griffin has recently provided an excellent examination of the existing conflict against non-state actors through the perspective of the indefinite nature of the Cold War. *See generally* STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION (2013).

69. *See* Daniel J. Freeman, Note, *The Canons of War*, 117 YALE L.J. 280 (2007) (describing applicable canons of interpretation relevant to armed conflict); *see also* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 324-32 (2005) (discussing the text and legislative history of the AUMF at issue in *Hamdi v. Rumsfeld*).

70. *See* Murphy, *supra* note 67, at 175-76; A. Mark Weisburd, *The War in Iraq and the Dilemma of Controlling the International Use of Force*, 39 TEX. INT'L L.J. 521, 529-30 (2004) (examining the Bush Administration's argument put before the United Nations).

71. *See* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 52-55 (2013) (describing the host of difficulties in attaching democratic accountability to executive branch actions).

72. *Id.* at 55.

cumstances, the President would be able to secure a congressional authorization without expending a prohibitive amount of political capital.

It also appears likely that presidential hesitancy in relying on aging authorizations reflects the reasonable belief that to do so would, at best, be viewed as legally questionable by the courts.[73]

2. The Invisible Doctrine of Decay

Formally, the judiciary's approach to force authorizations reflects the standard text-based model.[74] In practice, however, the limited body of cases addressing issues as to national security generally and force authorization in particular appear hopelessly inconsistent. Despite its incoherency, the judiciary has definitively embraced the self-expiring nature of force authorizations and, more haphazardly, reflected an increasing skepticism as to the potency of force authorizations with age—in short, an implicit acknowledgement of AUMF decay.

a. The Failure of Classic Text-Driven Interpretation

Questions of statutory interpretation are generally limited to a single layer—the meaning and scope of the statute being interpreted. In contrast, force authorizations serve as the hub of an enormous constellation of regulations laws.[75] As such, decisions as to the validity and scope of AUMFs ripple widely through the governing law of the United States.[76]

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73. *See* United States v. Pfluger, 685 F.3d 481, 485 (5th Cir. 2012) (noting that while the 1991 Gulf War has not concluded according to the government, that "[w]e admit that it would seem suspect if the Government had tried to indict Pfluger solely based on the suspension of limitations triggered by that conflict").

74. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 559 (2006) ("[T]here is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the . . . UCMJ."); Basardh v. Obama, 612 F. Supp. 2d 30, 34 (D.C. Cir. 2009) (relying on "plain and unambiguous terms" of the AUMF); Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644, 715 (6th Cir. 2007) (interpreting the AUMF language relative to FISA requirements).

75. Several of these laws are set out above. *See supra* notes 29-32, 34-41. The Congressional Research Service has produced a comprehensive list of laws activated by AUMFs, declarations of war, and declarations of emergency. ELSEA & WEED, *supra* note 28, at 1-17.

76. At its extreme, the executive branch has not rejected the notion that force authorizations (in particular the 9/11 AUMF) represent sufficient authority for the use of force against U.S. citizens within the territorial boundaries of the United States. *See* U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (last visited Feb. 27, 2016).

The 9/11 AUMF has likewise been asserted as a triggering justification for domestic electronic surveillance set out under other statutes. *See* 18 U.S.C. § 2511 (2012).

Even more atypically, AUMFs play a central role in contemplating governmental power as a constitutional matter. Jackson's vision of executive power as articulated in *Youngstown* makes assessing constitutionality of executive action dependent upon determining the scope of authority granted to the President through congressional authorization—a question of statutory interpretation.[77]

Statutory interpretation is driven by text.[78] Only where the text is lacking is the jurist expected to move to secondary interpretive devices such as legislative history.[79] The judiciary's articulation of the governing standard in interpreting force authorizations has been no different.[80]

A commitment to text-driven interpretation by the judiciary means, at least theoretically, the meaning of any statute is fixed from the time of its passage into law.[81] If the text dictates the scope of authority of the statute, then that authority cannot change absent a change to the statute's text.[82] Instead, the contours of statutory authority flow only from internal limitations and the external boundaries set by hierarchically superior law.[83]

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77. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

78. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1556-57 (1998) (showing "[a]ll major theories of statutory interpretation consider the statutory text primary," and under all such theories "there must be a compelling reason to derogate" from such text); Gary Lawson, *Optimal Specificity in the Law of Separation of Powers: The Numerous Clauses Principle*, 124 HARV. L. REV. F. 42, 42-43 (2011) ("[M]odern methods of statutory interpretation center primarily on textual analysis.").

79. Even when those secondary mechanisms are invoked, it is in service to the proposition of seeking the statute's fixed meaning, or at least in service of the statute's original purpose. *See* Eskridge, *supra* note 78, at 1520-21.

80. *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 216-22 (2011) (discussing text-based interpretations of the AUMF used by courts examining legality of detention practices).

81. *See* Eskridge, *supra* note 25, at 1479-80 (1987) (exploring frailties within current paradigm of statutory interpretation in which "approaches to statutory interpretation treat statutes as static texts").

82. To be clear, a statute can contain text that is self-limiting through the expression of an implicit conditional termination or an explicit specific temporal limitation (such as a sunset provision). Such limitations are largely inapplicable in the AUMF context. The 1983 Lebanon AUMF contains both explicit-specific and conditional-temporal limitations. In that AUMF, Congress's authorization expired at "the end of the eighteen-month period" from enactment. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 6, 97 Stat. 805, 807 (1983) (codified at 50 U.S.C. § 1541 note (2012)). However, the authorization would expire prior to the passage of eighteen months if (1) other allied foreign forces withdrew; or (2) the United Nations or Government of Lebanon assumed responsibilities of the Multinational Force; or (3) other "effective security arrangements" were implemented; or (4) all other countries withdrew from participation in the Multinational Force. *Id.*

83. In this context, such "internal limitations" include not only the parameters of authority set out by the text of an individual statute, but also the limitations existing within statutory law as a whole which often carry provisions applicable to the understanding of other statutes.

Generally, the doctrinal inflexibility of statutes as immutable instruments of authority is offset by the inherent pliability of judicial interpretation.[84] While the text of law may be fixed, the meaning of that text often changes over time, resulting in the expansion, contraction, or alteration of the nature or scope of authority of the statute in question.[85]

Under normal circumstances, a text-driven view of statutory immutability incentivizes several positive legislative behaviors. Understanding statutory authority as timeless rewards careful draftsmanship and avoids the difficulties (both political and resource-related) that accrue from being forced to revisit past legislation due to unforeseen or unintended consequences.[86]

Requiring active legislative action to change the scope or authority of past law might also combat responsibility shifting. In theory, where statutory authority is immutable, legislators cannot effectively blame other institutions for the breadth and scope of the statute in question.[87] After all, the legislature is both where the statute was born, and the only entity empowered to oversee its death absent Constitution-based infirmities.

Unfortunately, this delicate dance performs poorly when applied to AUMFs. Existing doctrine leads courts to avoid cases in which they might have to engage in limited interpretation or, worse, invoke deference doctrines that would fundamentally compromise the court's statutory interpretation rules generally.[88]

When it comes to questions of foreign affairs generally and national security in particular, the judiciary is very hesitant to interpret law in a manner contrary to that advocated by the executive branch.[89] As an initial barrier, justiciability doctrines, such as invoca-

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84. *See* Peter L. Strauss, *The Supreme Court, Textualism, and Administered Law*, 20 ADMIN. & REG. L. NEWS 1, 14 (1994) ("Treating statutes as static events, forever fixed in meaning at the time of their enactment, can be disruptive even in the context of the common law, where the courts are directly responsible for change.").

85. The limited bandwidth of such change is inherent to text-based interpretation as well as its primary competitor, "intentionalism." *See* Madeline June Kass, *A Least Bad Approach for Interpreting ESA Stealth Provisions*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 427, 433 (2008) (noting that by "focusing on the particular intent of the enacting legislature, the interpreter fixes statutory interpretation to a single moment in history").

86. The inverse is also true. Statutory immutability punishes poor draftsmanship, perhaps excessively.

87. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 343 (2005) (stating that when the judiciary interprets the meaning of the statute, " 'congressional incentive theory' assumes that Congress will act because Congress knows that change can only come from it").

88. *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

89. *Id.*

tion of the political question doctrine, successfully keep many cases posing national security questions from ever reaching a decision on the merits.[90]

When cases make it beyond the justiciability stage, the court has the option of applying a variety of deference doctrines. These doctrines counsel for deference both as to the executive branch's favored interpretations of law, but also as to the facts it proffers supporting its position.[91]

Whenever a court utilizes a deference doctrine, it activates two layers of judicial withdrawal. When the deference is absolute, the judiciary simply does not review the underlying question.[92] In relative deference, where the deference is to take the shape of a non-definitive "weight," deference possesses the power to transform a losing legal argument into a winning one.[93] Under either approach, deferring to the interpretations of law offered by the executive branch necessarily requires the adoption of interpretations of law that, but for the desire to defer to the Executive, would be rejected.[94] Deference to the Executive is even stronger within the factual context, an area where courts feel especially ill-suited to compete against the executive branch's capacities, especially as to issues of armed conflict.[95]

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90. The political question doctrine, essentially a dead-letter doctrine as to domestic issues, is the center of nonjusticiability in foreign relations cases. *See, e.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 273-317 (2002) (detailing the fall of the political question doctrine in domestic-oriented cases); *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2308 (2002) (observing that "[t]he decline of the political question doctrine . . . has been pervasive in all kinds of cases").

91. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1363 (2009) (concluding that "many arguments in favor of deference are unpersuasive, but that deference nonetheless may be justified in limited circumstances").

92. *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 444 (4th ed. 1998) ("Though successful resort to the political question doctrine in purely domestic disputes is unusual, the doctrine appears to have greater vitality in foreign affairs.").

93. For example, it is longstanding doctrine that the judiciary affords the executive branch "great weight" in interpreting treaties. *See* Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 790 n.70 (2008). The degree to which such deference is actually accomplished is debatable, but the judicial norm as to the applicability of weighted deference doctrines is clear. *See* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 103 (2009) (noting that "whether 'great weight' deference is meaningful or just a cover, it does reveal that courts view treaties as requiring at least the appearance of exceptional deference").

94. *See* Knowles, *supra* note 93, at 99 ("When courts defer to the executive branch's interpretation of the law, they cede some or all of [their power to define the meaning of law].").

95. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (stating that the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war").

Collectively, these specialty doctrines reflect a view both of judicial insecurity and political branch superiority.[96] Such doctrines of purported judicial humility purport to reflect deference to the "political branches" thus implying an equal deferential purpose in favor of both Congress and the Executive when finding nonjusticiability.[97] This is not at all the case. With the withdrawal of judicial interaction, the only interpretation that matters is that of the executive branch, the only branch of government empowered to execute the law that the judiciary has declined to interpret. In contrast, Congress, whose very structure is designed for the slow machinations of deliberation, is left only with the implausible, theoretical possibility of an untimely repeal.[98]

Even if, against the weight of institutional design, Congress acted quickly to repeal an active force authorization, the legal effects would be highly circumscribed.[99] The Gulf of Tonkin Resolution is the only force authorization to be repealed while armed conflict continued.[100] Despite its repeal, there was little, if any, legal effect on the President's ability to continue the conflict.[101] Likewise, judicial decisions

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96. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994); Jason Marisam, *Constitutional Self-Interpretation*, 75 OHIO ST. L.J. 293, 315 (2014) ("Presidents are most likely to receive absolute or strong judicial deference in foreign affairs and national security cases . . . .").

97. *See, e.g.*, Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967) ("The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.").

98. While the possibility of repeal of any legislation is not "theoretical," the history of such efforts strongly reinforces the notion that such repeal is unlikely. There were, for example, a number of attempts to pass legislation explicitly limiting or repealing the 2002 Iraq authorization; none of which were successful. From the 110th Congress alone, there were eight pieces of legislation with such aims. *See* H.R. 1460, 110th Cong. (2007) (for repeal of 2002 Iraq AUMF); S. 679, 110th Cong. (2007) (declaring that the objectives of 2002 Iraq AUMF had been achieved and establishing new authorization before redeploying troops); S.J. Res. 3, 110th Cong. (2007) (establishing expiration); S. 670, 110th Cong. (2007) (requiring new military authorization unless conditions met); H.R. 930, 110th Cong. (2007) (repeal 2002 Iraq AUMF); H.R. 508, 110th Cong. (2007) (same); H.R. 413, 110th Cong. (2007) (same).

99. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1291-92 (2006) ("[J]udgments of nonjusticiability . . . tend to conjoin reasoning that emphasizes judicial incompetence with suggestions that the disputed questions are assigned to other branches.").

100. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971). In 1974, Congress also repealed the 1955 authorization for the President to use force to protect Taiwan, but this repeal did not occur in the midst of armed conflict. State Department/USIA Authorization Act, Fiscal Year 1975, Pub. L. No. 93-475, § 3, 88 Stat. 1439 (1974) (codified at 50 U.S.C. app. at 624).

101. *See* Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 905-08 (1990) (discussing the repeal and noting that the "movement for repeal was born of a desire to end the war"

found that the domestic laws triggered initially by the Gulf of Tonkin Resolution remained in force despite its appeal, in large part based on their deference to the President's assertion that the U.S. remained "at war" for purposes of the statutory regimes in question.[102]

The judiciary's commitment to text-based interpretation, combined with its deference to executive legal interpretations and fact proffers, means that existing doctrine currently reflects a design that concretizes poorly justified executive branch legal interpretations into operative precedent.[103] A text-reliant approach to interpreting AUMFs cements the flawed processes that characterize the birth of force authorizations into a state of permanency and severely compromises the ability of the judicial and legislative branches to counter executive branch overreach.[104]

b. Provisionality and Shifting Functionalism

Given the advantages held by the Executive, any attempts to limit the scope and authority of force authorizations, either substantively or temporally, following their passage seem destined to fail. But the reality is that the courts somewhat regularly deviate from the established script, circumscribing presidential power in declared or authorized war as the underlying campaign continues.

The Court's jurisprudence reflects the understanding that the justification and authorization of armed conflict must be understood as temporary, and likewise, lays a foundation for a functionalist shift that coincides as armed conflict authorization wanes.

These two norms can be identified as reflecting a view of AUMF decay. The first resolves a necessary precursor to AUMF decay—that force authorizations expire without any internally embedded restriction requiring such expiration. The second indicates a functionalist interpretation model in which the focus of the "function" driving interpretation shifts from conflict functionalism to democratic functionalism.

Recognizing the decay of force authorizations begins with embracing a notion upon which decay is premised—that neither war, nor the

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but that by the time of repeal, Congress had "pointedly reiterated its authorization of the war" in appropriations legislation).

102. *See* Ely, *supra* note 101, at 905-06.

103. *Cf.* Sullivan, *supra* note 93, at 780 ("[D]eference is the ceding of one power in favor of another.").

104. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999) (documenting the "triumph of 'executive discretion' in the constitutional regime of foreign relations").

enlarged emergency power that accompanies it, can be perpetual in nature.[105] The embedded temporariness of AUMFs has been recognized repeatedly.

The provisional nature of expanded presidential authority was a theme of the Supreme Court's decision rejecting the application of military commissions to a suspected Confederate sympathizer in *Ex parte Milligan*.[106] In *Milligan*, the Court held that expanded wartime powers were not perpetual and that their life is dependent upon the circumstances that gave them birth.[107] In its opinion, the Court repeatedly refers to the fact that the Civil War had recently concluded.[108] While it's true that the Civil War had concluded at the time of the Court's opinion, strictly speaking, that would have been irrelevant for assessing Milligan's case. The Court did not assert that Milligan's circumstances had changed with the conclusion of the conflict, but rather that the commission he was subjected to was unlawful at the time it occurred, several months prior to the conclusion of the conflict.[109]

Instead, it seems that the significance of the conclusion of the war is a functional one. Whereas, "at the beginning" when the Confederates had "seized almost half the territory, and more than half the resources of the government," functionalism demands "that martial law may prevail, so that the civil law may again live."[110] During this time, "the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely

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105. Professor Stephen Vladeck articulates the quandary as such:

> [I]f the fight against terrorists truly is a 'war' for constitutional purposes, as the Supreme Court has now effectively held it to be, then what is the impact on the President's war powers—those extreme prerogatives that the Constitution (or Congress) only authorizes the Executive to exercise during times of war?

Stephen I. Vladeck, Ludecke's *Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 54 (2006) (footnote omitted); *see also id.* at 56-59 (proposing sunset provisions as part of AUMF enactment).

106. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) ("As necessity creates the rule, so it limits its duration.").

107. *Id.*

108. *Id. passim*. The Court's most frequent reference is to the "late Rebellion," but in the alternative, it frames the question relative to the "late war" and "late troubles" as well.

109. *Id.* at 6 (Milligan "was arrested on the 5th day of October, 1864" and put on trial before a military commission on "the 21st day of the same month"). The conclusion of the Civil War is generally considered to have happened with the surrender of the Confederate General Robert E. Lee on April 9, 1865, though fighting did not cease for several months. The Confederate President Jefferson Davis declared the rebellion over on May 9, 1865, and the last of the Civil War hostilities occurred during June or July of 1865 as word filtered to the various Confederate units. *See* BUD HANNINGS, EVERY DAY OF THE CIVIL WAR: A CHRONOLOGICAL ENCYCLOPEDIA 525, 534-35 (2010).

110. *Ex parte Milligan*, 71 U.S. at 106.

judicial question."[111] The gradual conclusion of the conflict gives rise to an opportunity for the Court to formally invalidate law that, in prior years, it would have been unable to invalidate due to the functional demands of conflict. In so doing, the Court expresses a view of itself as reinvigorating the democratic and liberty-respecting values for which the Civil War was fought.[112] In short, when the Court opines that the American people "insist only that the Constitution be interpreted so as to save the nation, and not to let it perish," it refers to security in the sense of both physical safety and safeguarding democratic values.[113]

This shift from "conflict functionalism" to "democratic functionalism" is replicated in other conflicts. Many of the cases decided during the World War II era are understood as exhibiting the height of deference to the executive branch and being exceptionally restrictive of civil liberties.[114] However, even within this universe of cases, a shift from conflict to democratic functionalism is evident: a shift that matches a more optimistic prognosis for the Allies' fulfillment of objectives for the war than existed at the time *Hirabayashi* was decided eighteen months prior.[115]

The shift is most clear, although permeated with ambivalence, among the Supreme Court's considerations of the imposition of special rules, including internment, on Japanese-Americans during the war.[116] The Court's first opinion on the subject, issued on June 21, 1943, rejected a challenge by a Japanese-American university student convicted of violating curfew and relocation orders in California in *Hirabayashi v. United States*.[117] Justice Stone, writing for the majority, made clear that conflict functionalism would be the deciding

111. *Id.* at 109.

112. Margaret A. Garvin, *Civil Liberties During War: History's Institutional Lessons*, 16 CONST. COMMENT. 691, 706 (1999) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) which cites *Milligan* as reflecting the Court's pattern of seizing opportunity for "reinvigoration of civil liberties").

113. *Ex parte Milligan*, 71 U.S. at 104.

114. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); *Ex parte* Quirin v. Cox, 317 U.S. 1 (1942).

115. By the time of the Court's decisions in *Endo* and *Korematsu*, the Allies had entered Rome, Paris had been liberated from the Nazis, and large numbers of Axis power troops were surrendering as the Allies entered Germany. *See* William J. Meade, Book Review, 84 MASS. L. REV. 47, 52 (1999) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME (1998)) (noting that between the major Japanese internment cases, "[w]hat became evident was that as the United States' prosecution of the war grew increasingly successful between the time of the *Hirabayashi* and *Endo* decisions, so did the laws become less silent").

116. *See generally* Patrick O. Gudridge, *Remember* Endo*?*, 116 HARV. L. REV. 1933 (2003) (offering a detailed examination of Supreme Court decisions regarding Japanese internment during the Second World War).

117. 320 U.S. 81 (1943).

factor in the case. The opinion unapologetically embraces an interpretive framework of the war power with its functional ends, stating that "[t]he war power of the national government is 'the power to wage war successfully.' "[118] As such, once in motion, that power "extends to every matter and activity so related to war as substantially to affect its conduct and progress."[119] Notably, there is no allegation or evidence of disloyalty on behalf of Hirabayashi individually. While the majority finds the question of individualized disloyalty of no moment, Justice Douglas's concurrence suggests that the racial distinction is valid because the costs associated with individualized process were, presumably, prohibitively high.[120]

On December 18, 1944, the Court issues two more Japanese internment cases, *Ex parte Endo*[121] and *Korematsu v. United States*.[122] While the cases are fundamentally in tension, both illustrate that the emphasis has shifted toward democratic functionalism.[123] While acknowledging the broad powers of the government in war present in *Hirabayashi*, the opinion in *Endo* contextualizes the legality of this power relative to other guarantees as "the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government."[124] The Court goes on to order Endo's release because, absent individualized evidence of disloyalty, her detention was not necessary in protecting the nation and promoting the war effort.[125]

Even *Korematsu*, which upholds internment in circumstances highly similar to that of *Endo*, frames its decision within rights-protective terms. Contrary to the language of *Hirabayashi*, the *Korematsu* opinion acknowledges that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny," thus first articulating the components of strict scrutiny judicial review.[126]

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118. *Id.* at 93.

119. *Id.*

120. *Id.* at 107 (Douglas, J., concurring) ("But where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. . . . To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it.").

121. 323 U.S. 283 (1944).

122. 323 U.S. 214 (1944).

123. *See id.* at 223-24; *Endo*, 323 U.S. at 294-307.

124. *Endo*, 323 U.S. at 299.

125. *Id.* at 294-307.

126. *Korematsu*, 323 U.S. at 216.

During the Vietnam era, a number of lawsuits were filed by members of the military challenging the legality of the use of force in Vietnam.[127] In the years immediately following the 1964 authorization of the conflict, the courts repeatedly refused to address the merits of these cases in unequivocal terms. In February of 1967, the D.C. Circuit dismissed one such case stating that the grounds for dismissal "are so clear that no discussion or citation of authority is needed."[128] The opinion made clear that the courts had no role in these cases because "the use and disposition of military power . . . are plainly the exclusive province of Congress and the Executive."[129]

By June of 1970, the Second Circuit Court of Appeals initially held that these same challenges were justiciable but then remanded the case, notifying both parties that the challengers would need to show that "congressional debates and actions, from the Gulf of Tonkin Resolution through the events of the subsequent six years," were insufficient in authorizing the President's acts in Vietnam.[130] A year later, the case returned to the Second Circuit as *Orlando v. Laird*.[131] The conventional legacy of *Orlando* is that the case stands for the proposition that Congress's approval of force need not be limited to AUMFs, but can also be inferred from congressional appropriations funding the war effort.[132]

Taken at a slightly higher level of abstraction, however, the *Orlando* court is engaged in a tentative form of democratic functionality. The court doesn't find the authorization of the continuing conflict in Vietnam within a single piece of legislation, but in multiple significant statutes that the court reasonably finds as representing the

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127. These challenges tended to focus on the absence of a formal declaration of war, but in other circumstances, specific regulatory challenges were made as well.

128. Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967) (per curium). Similar cases had nearly identical holdings. *See, e.g.*, Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967) (per curiam).

129. *Luftig*, 373 F.2d at 666.

130. Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970).

131. 443 F.2d 1039 (2d Cir. 1971).

132. *See* David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 685, 739-47 (2014) (discussing authorization of conflict via appropriations power). The War Powers Resolution, passed in 1973, explicitly demands that the judiciary not interpret appropriations legislation as sufficient authorization. It is unclear whether or not this provision would be respected or is consistent with constitutional demands. *See* Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1399 (1994) (arguing that this provision is unconstitutional and should be disregarded); Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1078-88 (2009) (countering constitutionality arguments levied on War Powers Resolution in this respect).

political branches' "mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations."[133]

3. Decay in Contemporary Conflict

One could argue that material differences exist in contemporary conflict, such as that enshrined in the 9/11 AUMF, that renders these historical practices inapplicable. After all, past conflicts were undertaken against state powers with which a definitive conclusion to the conflict could be consummated. In fact, nowhere is an unarticulated understanding of AUMF decay more prominent than within the "War on Terror" context.

Within days of the September 11 attacks, Congress authorized the President to:

> [U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[134]

The 9/11 AUMF is broadly articulated. It places no limitation on the means and methods of force to be used by the President, instead enabling the President to determine himself what force is "necessary and appropriate."[135] It imposes no reporting requirement for the executive branch to fulfill or outline any geographic limitation as to the President's use of force in pursuit of those specified.[136]

Finally, the 9/11 AUMF contains no temporal limitation, automatic sunset provision, or timetable for revisitation. As such, as a statutory matter, the degree of authority granted to the President through the 9/11 AUMF should be fixed throughout time; thus any act within the authorization provided by Congress in 2002 would still be authorized in 2012 or 2052.[137]

The reality has been quite different. In the decade that followed, the Supreme Court has slowly tightened authorities flowing from the

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133. *Orlando*, 443 F.2d at 1042.

134. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

135. *Id.*

136. *Id.*

137. At least absent another act of Congress that undermines the original authority as to the 9/11 AUMF. The most straightforward manner of alteration would be through a subsequent act of Congress that directly amends or repeals the original statute. A change in the authorization's authority could also come through a separate statutory regime. There are a multitude of canons of construction applicable in such circumstances (which often suggest opposing conclusions).

9/11 AUMF, repeatedly emphasizing democratic functions and the relevance of changing circumstances.

In June of 2004, the Court issued an opinion in *Hamdi v. Rumsfeld*, a case challenging the President's detention powers.[138] Hamdi, a United States citizen, was detained as an "enemy combatant" after having been captured in Afghanistan and entering the custody of U.S. forces.[139] As a threshold question, Hamdi challenged the President's authority to detain those it designated as "enemy combatants" under the 9/11 AUMF.[140] Not only was the text of the 9/11 AUMF silent as to the existence of any detention authority, but there also existed other statutory law that precludes the detention of any U.S. citizen absent a specific statutory authorization issued by Congress.[141] Next, if the President does possess the relevant detention authority, what process was Hamdi owed (and thus that the Executive was required to satisfy) for his continued detention to be legally valid?[142]

The resolution of these questions squarely challenged the Court to assess whether Congress had authorized the President's acts. Hamdi's argument as to the threshold detention question was simple: the President did not possess the authority to detain him because Congress had already spoken as to the detention of U.S. citizens during war-time and affirmatively prohibited the practice, absent specific congressional legislation, through the "Non-Detention Act."[143] Further, the passage of the Non-Detention Act was designed precisely for the purpose of avoiding the replication of the unsubstantiated "emergency" detention of citizens that occurred during World War II.[144] Put within the familiar framework of Justice Jackson's *Youngstown* opinion, this was a Category 3 case, as the President was engaged in "measures incompatible with the expressed or implied will of Congress . . . ."[145]

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138. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (plurality opinion).

139. *Id.* at 510 (according to the Court, Hamdi was "seized by members of the Northern Alliance . . . and eventually was turned over to the United States military").

140. *Id.* at 510-11.

141. *Id.* at 510-11, 540-41.

142. Obviously, the 9/11 AUMF does not speak to this issue either.

143. Under the Non-Detention Act, Congress mandated that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2012).

144. Specifically, the internment of Japanese-Americans whom the government deemed a threat due to a presumption of continued loyalty to Japan, an American enemy. *See Hamdi*, 542 U.S. at 517 ("The concentration camp implications of the legislation render it abhorrent.") (citations omitted).

145. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

In response, the Government asserted that the 9/11 AUMF, despite being silent with respect to any detention power of citizens or non-citizens, represented Congress's authorization of the President's acts.[146] Using the parlance of *Youngstown*, the existence of the AUMF meant that this was a Category 1 case, in which the President's acts were "pursuant to" the authorization of Congress, not in contravention of it.

On the threshold question, a plurality of the Court concluded that, despite the silence of the 9/11 AUMF, "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, . . . Congress has clearly and unmistakably authorized detention . . . ."[147] As for the process to which Hamdi was due for his detention to be justified under the AUMF, the Court struck a cautious but deferential tone. The plurality held that Hamdi is due notice and an "opportunity to rebut," which he can exercise in a "meaningful time and in a meaningful manner."[148] The Court continued to suggest that a "knowledgeable affiant" could provide a summary of "documentation regarding battlefield detainees . . . kept in the ordinary course of military affairs" and that such information would be sufficient evidence for detention so long as the individual was provided the opportunity to respond.[149]

The marginal process and broad authorization articulated in *Hamdi* shifted four years later in the Court's decision in *Boumediene v. Bush*.[150] After *Hamdi*, the government erected substantial structures to comport with the procedural requirements the Court had dictated.[151] In many ways, the procedural guarantees offered through these new processes extended meaningfully beyond the bare bones process that the plurality suggested was sufficient. Despite this, the

146. *See Hamdi*, 542 U.S. at 518.

147. *Id.* at 519-21 (referencing "individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States' ").

148. *Id.* at 533, 538 (citation omitted).

149. *Id.* at 534; *see also* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (discussing criminal and military detention models).

150. 553 U.S. 723 (2008).

151. *See* Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 40-47 (2008) (examining the Supreme Court's analogy to Article 5 tribunals in *Hamdi* and the process established by the government thereafter). The establishment of the Combatant Status Review Tribunals, Annual Review Boards, and other procedural rules were issued approximately two weeks after the *Hamdi* decision. *Id.* at 6.

Court struck down this system in 2008. In so doing, the Court was silent as to its typical deference doctrines and unmistakable in its concern regarding executive abuse of power.[152]

B. Institutional Deficiencies in Authorizing Force

The *Youngstown* framework, in which constitutional questions hinge upon congressional authorization, reflects a belief that such a framework maximizes the value of the differing institutional advantages of the political branches.[153] Specifically, it recognizes that both the executive and legislative branch possess institutional strengths and interdependency. While the Executive is nimble and unified, the legislature is multitudinous and deliberative.[154] When those institutional strengths align, it is eminently sensible for the judiciary to offer a wide berth in gauging the legal appropriateness of governmental power. AUMFs upset these presumptions and, as such, throw into doubt the basic wisdom of the approach the Jackson framework represents.

The traits of force authorizations deviate tremendously from those of typical federal legislation. Time and information afforded to Congress for deliberative process, in particular, is greatly reduced when force authorizations are considered.

Most statutes only pass through Congress following an almost painfully slow process of marinating, deliberating, and extensive lobbying of relevant interests. Force authorizations are passed in the relative blink of an eye.

Most legislation is passed seeking to negate the harms produced through underlying realities. Force authorizations are intended to change the underlying observable realities that give birth to them.

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152. *Cf.* Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1955-61 (2012) (describing *Boumediene* as expressing a lack of deference to the Executive as to constitutional questions, and *Hamdan* as a lack of deference in treaty interpretation matters); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 806 n.118 (2011) ("One most easily reads Justice Kennedy [in *Boumediene*] as understanding the deference obligation to go to Congress and the President—not to the executive alone.").

153. This institutionalist view is foundational to separation of powers doctrine. *See* Randy J. Kozel, *Institutional Autonomy and Constitutional Structure*, 112 MICH. L. REV. 957, 964 (2014) (describing the separation of powers and federalism envisioned by the founders as one of "[s]tructural institutionalism").

154. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 269 (2006) ("Structural advantages of the President over Congress—such as the capacity to act unilaterally and poor congressional incentives to monitor expansions of presidential power—provide grounds to embrace such constraints on executive power."); *cf.* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 835 (2013).

Most statutes are designed as part of an interdependent and interrelated regime of legal treatment as to their legal targets or the subject matter being regulated. In contrast, force authorizations largely stand as an island—independent, or at least non-reliant on related legislation.

Of all seven authorizations passed by Congress, only the 1983 authorization in Lebanon and the 1991 Gulf War authorization generated any significant opposition.[155] However, even including the much slimmer than usual margin of these two AUMFs, the average vote margin remains breathtaking, with an average 82-13 vote count in the Senate and 343-77 vote count in the House of Representatives.[156]

The speed and margin of these post-World War II authorizations strongly suggests that Congress's institutional role as the slow, deliberative actor among the political branches has been compromised. Further reinforcing the perception of non-deliberation is the relative lack of amendments and the brevity characteristic of these AUMFs.

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155. *See Actions Overview: S.J. Res. 159—98th Congress (1983-1984)*, CONGRESS.GOV, https://www.congress.gov/bill/98th-congress/senate-joint-resolution/159/actions (last visited Feb. 27, 2016); *Actions Overview: H.J. Res. 77—102nd Congress (1991-1992)*, CONGRESS.GOV, https://www.congress.gov/bill/102nd-congress/house-joint-resolution/77/actions (last visited Feb. 27, 2016); *see also* Charles M. Madigan, *To Americans, Trumpet's Call Uncertain*, CHI. TRIBUNE (Jan. 13, 1991) (discussing ambivalence of public and "significant opposition" to U.S. force against Iraq). Both the 1983 (Lebanon) and 1991 (Iraq) circumstances were unusual in the sense that most of the troop deployments in theater occurred far before congressional authorization was contemplated or requested. *See* Associated Press, *U.S. Troops Not Ready, General Says*, NEW ORLEANS TIMES-PICAYUNE, Dec. 20, 1990, at A1, 1990 WLNR 624838 (noting that in the first Gulf War more than 400,000 troops had been deployed as part of Desert Shield before congressional authorization in January 1991). The Lebanon authorization is particularly anomalous. There, the congressional authorization not only substantially lagged the deployment of significant numbers of troops, but only came about following a separate congressional resolution explicitly requiring statutory authorization for any act that resulted in the material enlargement of the number of troops deployed in the operation. *See* Lebanon Emergency Assistance Act of 1983, Pub. L. No. 98-43, § 4(a), 97 Stat. 214, 215 (1983).

156. *See Actions Overview: S.J.Res.23—107th Congress (2001-2002)*, CONGRESS.GOV, https://www.congress.gov/bill/107th-congress/senate-joint-resolution/23/actions (last visited Feb. 27, 2016); *Actions Overview: H.J.Res.114—107th Congress (2001-2002)*, CONGRESS.GOV, https://www.congress.gov/bill/107th-congress/house-joint-resolution/114/actions (last visited Feb. 27, 2016); *Actions Overview: H.J. Res. 77—102nd Congress (1991-1992)*, CONGRESS.GOV, https://www.congress.gov/bill/102nd-congress/house-joint-resolution/77/actions (last visited Feb. 27, 2016); *Actions Overview: S.J.Res.159—98th Congress (1983-1984)*, CONGRESS.GOV, https://www.congress.gov/bill/98th-congress/senate-joint-resolution/159/actions (last visited Feb. 27, 2016) (a Senate vote count of 100-0 was used to calculate the average because the website indicated the Senate vote was "unanimous"); *H.J.Res. 1145 (88th): Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia*, GOVTRACK.US, https://www.govtrack.us/congress/bills/88/hjres1145 (last visited Feb. 27, 2016); *H.J.Res. 117 (85th): Joint Resolution to Promote Peace and Stability in the Middle East*, GOVTRACK.US, https://www.govtrack.us/congress/bills/85/hjres117 (last visited Feb. 27, 2016); *H.J.Res. 159 (84th): Joint Resolution Authorizing the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores and Related Positions and Territories of That Area*, GOVTRACK.US, https://www.govtrack.us/congress/bills/84/hjres159 (last visited Feb. 27, 2016).

These differences matter. The peculiarities of force authorizations forces Congress to operate in a manner in which many of its institutional strengths are compromised and its weaknesses pronounced. Treating AUMFs identically to routine appropriations legislation ignores the variation of importance and democratic functionalism underlying force authorizations and foregoes an opportunity for more nuanced understanding for judicial action.

1. Time

Typical federal law enacted in typical circumstances is the product of a multi-year dialogue between the executive and legislative branches.[157] This process, in which the deliberative and divided battleship of Congress dances with the unified machinery of the executive branch, has been described as a "signature feature of the constitutional separation of powers [due to] its tendency to foster special qualities associated with good governance, such as deliberation, energy, steady administration, and judgment."[158]

There can be little doubt that the normal framework of interbranch dialogue and deliberation is fundamentally upended when Congress is asked to authorize a President's use of force. While the Executive acts with "unity, force, and dispatch," Congress emphasizes "debate and consensus among large numbers."[159]

American presidents have sought congressional authorization for the use of force six times since the conclusion of World War II.[160] In the 1950s, President Eisenhower twice sought congressional authorization for the use of force, once as to Taiwan and once as to the Middle East. Both were justified as necessary as part of the larger Cold War effort against communism.[161] President Johnson sought and re-

157. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 180-81 (1994) (describing the deliberative process over any non-routine legislative matter as creating interbranch dialogue extending over "several, even many, Congresses").

158. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 23 (2003).

159. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 27 (2010).

160. Congress has actually authorized force seven times during this era, excluded within this discussion is a congressional authorization of force as to Lebanon during the Reagan Administration. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 note (2012)). This is excluded because, unlike the other force authorizations, President Reagan never formally or informally sought an authorization for the use of force.

161. Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 869-70 (1996) (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)) ("When the Chinese Communists threatened Formosa in 1955, Eisenhower sought authorization from Congress for possible U.S. military action. He likewise sought a resolution in 1957 in response to communist threats in the Middle East."). The

ceived authorization for conducting hostilities in the Vietnam War through the Gulf of Tonkin Resolution.[162] In recent decades, in addition to the 9/11 Authorization, Congress passed two other authorizations for the use of force in Iraq in 1991 and 2002.[163] Congress responded to all six requests by passing legislation authorizing force. In four of the six instances, Congress introduced and passed an AUMF through both houses in less than a week.[164]

Such speed is anathema to the deliberative process, but it also is considered a requirement for legislators contemplating AUMF passage.[165] During debate over the 9/11 AUMF, Congressman Ron Paul stated, "The complexity of the issue, the vagueness of the enemy, and the political pressure to respond immediately limits our choices. The proposed resolution is the only option we are offered, and doing nothing is unthinkable."[166]

Even without additional complications, the quality of decisions is compromised when acting under time-sensitive conditions.[167] This phenomenon is easily identified individually, but recent evidence strongly suggests that the cognitive impairments faced by individuals attach equally to institutions.[168]

Formosa Resolution authorized the President "to employ the Armed Forces of the United States as he deems necessary" in defense of Formosa (Taiwan). Joint Resolution of Jan. 29, 1955, ch. 4, 69 Stat. 7, 7. The 1957 Middle East resolution stated that "if the President determines the necessity thereof, the United States is prepared to use armed forces" to assist Middle Eastern nations "against armed aggression from any country controlled by international communism." 22 U.S.C. § 1962 (2012) (originally enacted as Joint Resolution of Mar. 9, 1957, Pub. L. No. 85-7, § 2, 71 Stat. 5).

162. Bobbitt, *supra* note 132, at 1392 (stating that Johnson had sought an AUMF from Congress so there "could be no doubt" as to the legality of his Vietnam policy).

163. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 note (2012)); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a), 105 Stat. 3 (1991) (codified at 50 U.S.C. § 1541 note (2012)).

164. *See* 116 Stat. 1498; Joint Resolution of Mar. 9, 1957, Pub. L. No. 85-7, 71 Stat. 5 (codified at 22 U.S.C. § 1962 (2012)).

165. Carla Crandall, Comment, *Comparative Institutional Analysis and Detainee Legal Policies: Democracy as a Friction, Not a Fiction*, 2010 BYU L. REV. 1339, 1355 (2010) (noting speed of AUMF passage).

166. 147 CONG. REC. 17,112 (2001) (statement of Rep. Paul).

167. *See* Cleotilde Gonzalez, *Learning to Make Decisions in Dynamic Environments: Effects of Time Constraints and Cognitive Abilities*, 46 HUM. FACTORS 449, 450 (2004) (finding that "time constraints have a negative effect on the ability of individuals to make decisions effectively").

168. *See* ERIC K. STERN, CRISIS DECISIONMAKING: A COGNITIVE INSTITUTIONAL APPROACH (2003); Paula Posas & Thomas Fischer, *Organisational Behaviour and Public Decision Making in the EA Context*, *in* ENVIRONMENTAL ASSESSMENT LECTURERS' HANDBOOK 96, 104-11 (Thomas Fischer et al. eds., 2008), http://www.twoeam-eu.net/handbook/03.pdf.

2. Information

The problems inherent as to short timelines are exacerbated by informational deficiencies particular to Congress's consideration of force authorizations. This need to act quickly is combined with multifold informational deficiencies. First, the presence of a short decisional timeline dramatically limits the amount of time Congress possesses to gather information that could be useful in its consideration of authorizing force.[169] The institutional architecture of Congress is built for long-range information gathering in which congressional members and their staff acquire information from various sources (including NGOs, constituents, competing political lobbying groups, etc.) as to the underlying facts relevant to potential legal rules. The circumstances in which force authorizations arise, however, leave Congress reliant upon information from the Executive.[170]

The executive branch, understandably self-interested in the outcome of any congressional authorization, uses its informational advantages by controlling what information is provided, shaping how that information is provided, and deciding when that information is provided relative to a force authorization measure's introduction.

The facts surrounding the Gulf of Tonkin Resolution ably demonstrate all three of these concerns.[171] As hostilities escalated in Vietnam over 1963, President Johnson had determined he would seek an AUMF but did not want the issue to further complicate his domestic legislative agenda including the Civil Rights Bill.[172] While confident that an authorization would be forthcoming, seeking the authorization absent an identifiable act of provocation would require a sub-

169. During the debate of the 9/11 AUMF, Representative Jackson shared the thoughts of a fellow Member who had expressed that "she had been in Congress for 19 years, but never had been asked to make a decision and cast a vote with so little information." 147 CONG. REC. 17,148 (2001) (statement of Rep. Jackson).

170. *See* Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 942 (1994) (characterizing the "the flow of national security information" to Congress as "constricted by the need for secrecy and so dependent on the self-interested discretion of executive officials"); Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 386 (2013) (discussing legislative fact-finding and that congressional reliance on information from the Executive can "interfere with the allocation of legislative power to Congress").

171. *See* Michael Mandel, Note, *A License to Kill: America's Balance of War Powers and the Flaws of the War Powers Resolution*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 785, 787-88 (2009) ("The short period of time between the attack and the passage of the Gulf of Tonkin Resolution allowed little time for debate or independent investigation by Congress, and as such, Congress relied upon the information provided by the executive branch . . . .").

172. *See* Gary R. Hess, *Authorizing War: Congressional Resolutions and Presidential Leadership*, *1955-2002, in* DIVIDED POWER: THE PRESIDENCY, CONGRESS, AND THE FORMATION OF AMERICAN FOREIGN POLICY 39, 52 (Donald R. Kelley ed., 2005).

stantial amount of political capital.[173] When reports came in of a North Vietnam attack of U.S. military vessels the amount of political capital required to secure Congress's authorization to respond was dramatically reduced.[174]

On August 4, 1964, President Johnson reported that the North Vietnamese had launched two attacks on U.S. ships "on the high seas in the Gulf of Tonkin."[175] According to the Johnson Administration, on August 2, 1964, North Vietnamese patrol boats had fired on the U.S.S. Maddox, which sparked an exchange of fire and the sinking of a handful of North Korean vessels. Two days later, the Maddox reported another attack to which several aircraft were launched in response. Armed with a compelling narrative, President Johnson seized the opportunity to justify seeking a congressional force authorization that, in turn, offered him a much freer hand in prosecuting the escalating conflict.[176]

The facts surrounding the incidents in the Gulf of Tonkin remain in dispute.[177] Ultimately, the truth of the facts as to what occurred in the Gulf of Tonkin is not relevant for this Article; however, the presence of the debate as to the accuracy of those facts exemplifies the problem of Congress's informational reliance on the executive branch. When the Executive is the primary (or sole) source of information, Congress is reliant on the information the President provides.[178] This reliance both renders the Executive vulnerable to arguments that

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173. *Id.* (stating that Johnson believed "[c]onvincing congressional leaders of the need for the resolution would take much time unless, as Secretary of Defense Robert McNamara remarked on June 10, 'the enemy acts suddenly in the area' ").

174. *See id*. at 52-54.

175. President Lyndon B. Johnson, Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin (Aug. 4, 1964), *in* 2 PUB. PAPERS 927 (1965).

176. *See generally* Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 22-23 (2005) (explaining the crisis theory and the suggestion "that the Constitution demands judicial deference to the Executive and the legislature during times of international crisis").

177. Many investigative reports and scholars put forth evidence that the attack described by the Johnson Administration never occurred or, at the least, was dramatically exaggerated for political purposes, while others plainly assert that the Johnson Administration's account was if not entirely accurate, entirely truthful. *Compare*, *e.g.*, Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 12 (2012) ("The Vietnam War launched after an alleged attack in the Gulf of Tonkin that never occurred. The Johnson Administration conveyed false information to Congress and the American public."), *with* Bobbitt, *supra* note 132, at 1394 (stating that deception by the Johnson Administration "is frequently, and falsely, alleged about the Gulf of Tonkin incidents").

178. *See* J. William Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 79 (1971) ("As the lawyers say, 'Partial truth is an evasion of truth.' There is no better example of the Congress acting with haste and with insufficient or inaccurate information than the Gulf of Tonkin Resolution of 1964.").

they intentionally misled Congress as to the facts and calls into question the legality of the actions promulgated pursuant to the authorization in question.[179]

3. Deference

The error costs associated with these information deficiencies persist beyond the passage of any particular AUMF. These informational deficiencies are most acute at the time AUMFs are first considered, but the information asymmetry between the branches impedes Congress's ability to monitor their authorization of force after passage as well. As a general matter, once an AUMF is passed Congress is able to diversify its information sources and begin to digest contradictions. The fact remains, however, that the executive branch will remain the primary source of information both to the public and to legislators, ill-equipped to effectively monitor the effects and effectiveness of the force they have authorized.

A hallmark of deliberative lawmaking is its collective draftsmanship. Federal legislation is rarely sponsored by a single member.[180] Final statutory language always reflects the input of tens to hundreds of individuals. Again, the history of force authorizations reflects a much different reality.

The prevalence of amendments is a strong signaling device of properly functioning legislative deliberation. None of the seven post-World War II authorizations passed by Congress were amended as part of Congress's deliberation.

If the absence of successful amendments is unsurprising, the near total absence of proposed amendments is troubling.[181] Most legisla-

179. As articulated by one scholar, "It is an open constitutional question whether even a specific statutory authorization would be valid if it were based on deception." *See* Bobbit, *supra* note 132, at 1394 ("Thus, constitutional argument from an ethical perspective requires that the public be fully and truthfully informed of the war aims of the President. If the People were deceived in the process, no customary method of taking the United States to war would be legitimate.").

180. A study of all legislation introduced between 1973 and 2004 found that the average number of sponsors for federal legislation was over 8.5. *See* James H. Fowler, *Connecting the Congress: A Study of Cosponsorship Networks*, 14 POL. ANALYSIS 456, 459 (2006) (showing that the Library of Congress's "Thomas" legislative database "includes more than 280,000 pieces of legislation proposed . . . with over 2.1 million co-sponsorship signatures").

181. The 2002 Iraq AUMF, in which Congress had the most time, saw two substantive amendments proposed. Both of the failed amendments invoked United Nations Security Council Action, either generally resolving that the President should seek U.N. Security Council authorization or making Congress's authorization contingent upon a like-minded Security Council authorization. *Compare* H. Amendment 609, 107th Cong. (2002) (noting that this amendment would have made the U.N. Security Council Authorization a prerequisite for U.S, action, but it failed 155-270), *with* H. Amendment 608, 107th Cong. (2002) (attempting to resolve that the U.S. should seek resolution by the U.N. Security Council, but the amendment failed 72-335).

tive amendments do not represent an attempt to alter the underlying legislation, but instead serve as a mechanism of expression. Expressively, proposing amendments are frequently used to highlight a line of division between the political parties or serve as backdrop for future legislation to which the amendment relates.[182]

Perhaps the absence of amendments flows naturally from a lack of text to amend—another area in which force authorizations diverge from typical legislation. Political science research demonstrates that "the number of words in the legislation is a good measure of the amount of policy discretion" that will be seized by the Executive.[183] This research suggests that a proliferation of words corresponds with the amount of deliberation by Congress and the level of precision drawn by the statute as to the authority set out in the relevant legislation.[184] In other words, much like the Constitution, when fewer words are present, there is an expectation that substantial ambiguity will remain. The understanding of the presence of ambiguity is coupled with an understanding that such ambiguities will be resolved.[185]

Recent analysis of federal statutes suggests that the "average" statute possesses more than 90,000 words.[186] In contrast, the average contemporary AUMF consists of 427 words.[187] This relative dearth of guidance inverts the historical norm in which declarations were "lengthier and more complex than many eighteenth-century statutes."[188] There are many possible explanations as to the brevity of force authorizations.[189] But those explanations do not change the fact

182. *See* ROGER H. DAVIDSON ET AL., CONGRESS AND ITS MEMBERS 251 (14th ed. 2014).

183. John D. Huber et al., *Legislatures and Statutory Control of Bureaucracy*, 45 AM. J. POL. SCI. 330, 337 (2001). If nature abhors a vacuum in space, government abhors a vacuum of power. *See id.*

184. *Id.*

185. Resolved by someone or some entity (as opposed to lying fallow and inoperative).

186. Kirk A. Randazzo et al., *Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior*, 68 J. POL. 1006, 1011 n.16 (2006) ("[T]he mean number of words per statute equals 94,122 with a standard deviation of 107,238.").

187. This constitutes less than one-half of one percent of the average statute (.49%). Of these seven AUMFs, five have less than 270 words. The 2002 Iraq AUMF and the 1983 Lebanon AUMF are the two longest authorizations at 591 and 1373 words respectively.

188. Prakash, *supra* note 43, at 119 ("Declarations reached this length precisely because they served so many different purposes. As we have seen, declarations were used not only to start a war, but also to provide notice of a forthcoming or ongoing war, to lay down conditions for peace, to propagandize, and to create wartime legal rules for citizens, enemy nationals, and neutrals.").

189. It is likely that even with full congressional deliberation, the text of force authorizations would never approach the statutory average. The level of precision necessary to engage in effective regulation in most areas undoubtedly drives much of the text in domestic legislation. This is not to say that the use of force should be viewed as a simple binary calculation, but more that the degree of precision typically appropriate (or demanded) in other legislation is not present in the force authorization context. In this vein, members of Congress might, quite appropriately, understand that changing circumstances justify a substantial degree of baked-in discretion to the President. Whatever these explanations

that such brevity lends itself to a broad transference of authority away from Congress and that this transference is accompanied by the careful deliberation that the legislative process is designed to effectuate. In this case, the outlier effectively proves the rule. Congress's 1983 Lebanon AUMF is, by far the longest AUMF of the post-war era at 1,373 words. The facts surrounding the Lebanon AUMF are unique. Congress faced no time pressure in considering an AUMF for Lebanon because substantial numbers of U.S. troops had already been deployed and were already filling combat roles.[190] Absent time pressure, Congress was able to more effectively gather information and contemplate its desired course of action. Finally, unlike the other post-World War II era AUMFs, President Reagan did not dictate when Congress would consider the authorization. Its consideration was a product of congressional prerogative rather than presidential fiat.

4. Specified Objectives

Congress's consideration of legislation typically focuses on the future, rather than the past. Federal statutes typically seek to ameliorate the effects of generalized, intractable problems.[191] By contrast, force authorizations are sparked by specific, identifiable facts, and changing those identifiable facts is the entire purpose of Congress in authorizing force.

By definition, intractable problems possess a persistency and systemic embeddedness that make them highly resistant to resolution.[192] The quality and depth of such resistance is highly variable and tends to reflect the peculiarities of the regulated subject matter. For instance, the persistence of problems the government seeks to address

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are, they cannot be boiled down to the substantive demands (or lack thereof) of military force.

190. Deployment of troops as part of the Multinational Force in Lebanon began in 1982. John H. Kelly, *Chapter 6: Lebanon 1982-1984*, RAND CORP., http://www.rand.org/pubs/conf_proceedings/CF129/CF-129-chapter6.html (last visited Feb. 27, 2016). Congressional authorization in October of 1983 was for the "continued" U.S. participation in the operation. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 note (2012)); *see* Curtis Wilkie, *Reagan: Marines to Stay Until Israel, Syria Leave*, BOSTON GLOBE (Sept. 29, 1982) (discussing the deployment of U.S. troops to the area).

191. Immutability is certainly not the only factor at play here. The influential strength of statutory immutability directly correlates with the transaction and opportunity costs associated with passing legislation in the first instance. In a world in which such costs are very low, the immutable authority and scope of a statute is inconsequential because the alteration or repeal of that statute is equally costless. Of course, where transaction and opportunity costs are high, immutability becomes an almost insurmountable burden.

192. *See* Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439, 1447-48 (1992) (defining indeterminacy); William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 177-83 (2000).

in drafting rules for financial markets fundamentally reflects the disagreement among experts in identifying the core factors causing the ills legislators are seeking to avoid.[193]

In other circumstances, many of the acts that give rise to societal problems may not, in and of themselves, be independently recognized as problematic. This quandary underlies much of the debate within health care reform. Specifically, while there is consensus that the rising costs of the health care system are unsustainable, there is also consensus that doctors should not be impeded in exhausting all avenues in treating patients, the cost of which is a direct contributor to the collective expense problem.

Regardless of the cause of a problem's persistence, most legislative efforts are intended to provide immediately applicable solutions, for which the indefinite continuation is understood. Not only is the steady continuation of a statute envisioned at its inception, the error costs associated with failure are likely to be insignificant. While it is true that few statutes reach the lofty goals envisioned at the time of their passage, a statutory regime cannot fairly be considered a true failure unless it is responsible for the harms meaningfully beyond those it intended to alleviate.[194]

The specificity of the facts giving rise to force authorizations, and thus responsible for the existence of AUMFs, fundamentally undercuts an understanding of AUMFs as possessing static, perpetual power through the passage of time.[195] Force authorizations are the product of identifiable facts, and the changing of those facts is their entire reason for being.[196] As such, regardless of text, their scope can only be understood relative to the alteration of the facts that gave them birth.

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193. *See* Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281, 1294-98 (1994) (discussing the framing of problems for legislative attention and legislative responses).

194. The harms created must be "meaningfully" above those at the time of origin due to the value of experimentation implicitly embedded in the attempt at resolving the harm in the first instance.

195. *See* Craig W. Dallon, *Interpreting Statutes Faithfully—Not Dynamically*, 1991 BYU L. REV. 1353 (1991) (arguing against deviations from textualist interpretive models); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1463-65 (2000) (discussing force of context in interpreting congressional action); Steven D. Smith, Correspondence, *Law Without Mind*, 88 MICH. L. REV. 104, 105 (1989).

196. Congress has never authorized the use of force (or declared war) without knowledge of (a) the identity of the enemy, (b) the facts sparking the AUMF, and (c) an answer as to what the immediate aims of the use of force are. *See* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 437-38 (2010) (suggesting that the primary debate does not concern the readily identifiable answers to these questions, but what conditions are sufficient to give rise to use of force authorities).

Specificity in declarations of war and AUMFs may not only be a matter of historical practice, but also constitutionally required. Congress passed the War Powers Resolution in 1973 seeking to avoid the creeping conflict escalation that characterized Vietnam.[197] The Resolution, among other things, authorized the President to deploy U.S. troops for sixty days before requiring specific congressional approval.[198] One of the primary constitutional attacks levied against the Resolution was that it pre-authorized (and pre-limited) the use of force without specifying as to the circumstances giving rise to the authorization, the parties to which the force was targeted, and the aims for which the force was to be applied.[199]

This specificity and purpose is uniformly manifest in contemporary AUMFs. The specific facts underlying the use of force differ, but they are always identifiable and Congress's authorization of force is based on the alteration of those facts. For example, Congress's 1955 AUMF, with respect to Formosa, found that "certain territories in the West Pacific under the jurisdiction of the Republic of China are now under armed attack, and . . . the Chinese Communists [have declared] that such armed attack is in aid of and in preparation for armed attack on Formosa."[200] In response, the President is authorized to use force for "the specific purpose of securing and protecting Formosa, and the Pescadores against armed attack."[201]

The planned obsolescence of Congress's authorization of force is an AUMF prerequisite. While it is fundamentally normal for most

197. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1260 (1988) (detailing a variety of military actions usurping the War Powers Resolution, including "the creeping escalation it was expressly designed to control").

198. 50 U.S.C. § 1544(b) (2012) (enabling the President to unilaterally extend a deadline an additional thirty days upon a determination and certification to Congress "that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces"); § 1547(a)(1) (prohibiting implicit authorization and requiring a force authorization statute that "specifically authorizes . . . hostilities . . . and states that it is intended to constitute specific statutory authorization within the meaning of this chapter").

199. *See* Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 671 n.365 (1993) (noting constitutional problems with "an arrangement under which Congress pre-authorizes the use of force without specifying the particular conflict or the specific party against whom the troops would be used"). *See generally* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991) (discussing the constitutional and definitional difficulties associated with the "ex ante" determination of "war" required by the War Powers Resolution).

200. Joint Resolution of Jan. 29, 1955, Pub. L. No. 84-4, 69 Stat. 7, 7 (reprinted in 50 U.S.C. app. at 12,269 (1970)) (repealed 1974).

201. *Id.*

legislation to alleviate harm, an authorization of force with the belief that changing the facts giving rise to that authorization is impossible would be the height of foolishness.

If Congress understands the force authorizations it provides as temporally finite, why do these authorizations so infrequently make the demise of authorizations explicit? Because understanding something will occur is not the same as understanding when that thing will occur.

C. Recognizing Four Phases of AUMF Decay

Instead of interpreting AUMFs as an emergency frozen in time, a proper interpretation of force authorizations can only occur with the understanding that as time passes, facts inevitably change, institutionally compromising urgency subsides, and democratic values counsel renewed attention. What is required is an approach to AUMF interpretation that emphasizes the distinct phases of force authorization, beginning with a potent functionalist approach and concluding with total inoperability.

1. Textless Conflict Functionalism

This functionalist perspective on the scope of authorization is not limited to the judiciary; it is also typically shared by those in Congress.[202] During the discussion of the Gulf of Tonkin Resolution, one Senator commented that under the Resolution the President is not "limited in regard to the sending of ground forces."[203] Likewise, Senator John S. Cooper commented that the Resolution gives "the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense."[204]

This basic functionalist interpretation does not limit the Executive in action so long as the acts possess a colorable tie to advancing U.S. interests in the armed conflict in question.[205] While acts during this phase are almost never considered invalid, they do impose

202. As well as, unsurprisingly, officials within the executive branch.

203. 110 CONG. REC. 18,427 (1964) (statement of Sen. Morse).

204. 110 CONG. REC. 18,409 (1964) (statement of Sen. Cooper).

205. This is not to suggest the impossibility of any finding of invalid executive action during the first phase of authorization, only that such a finding would necessarily involve (1) a very substantial violation of other existing statutory law; (2) in which the acts in question the judicial actor finds insubstantial (or at least largely irrelevant) to the U.S. war effort. Neither element would independently suffice and the presence of the latter component is exceptionally unlikely during this phase, a period of time in which the judiciary would find itself particularly insecure as to its grasp of the various factual dimensions at play relative to the armed conflict. *See, e.g.*, United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968) (stating that "in the Vietnam situation a declaration of war would produce consequences which no court can fully anticipate").

marginal executive-constraining effects. Perhaps the most significant of these effects is the creation of a basic burden of production and explanation.[206]

2. Text-Based Executive Constraint

As an AUMF ages, it transitions into a second phase of interpretation in which the text and legislative history of an AUMF are increasingly utilized for assessing the lawfulness of executive action.[207] As the emphasis increases as to these traditional tools for interpreting statutes, the persuasiveness of the functionalist justifications decreases correspondingly.[208]

While not as executive-friendly as a purely functionalist approach, the shift towards text and legislative history remains one in which executive action is highly likely to be considered lawful for multiple reasons. First, the circumstances in which AUMFs are drafted is one in which the Executive possesses an unusually high degree of influence.[209] For the same reason, the legislative history is likely to be light, and that which exists is likely to weigh substantially toward a construction of broad statutory authorization.[210]

More subtly, judicial determinations established during the first interpretive phase are likely to significantly affect the outcome and framing of interpretive issues that arise subsequently.[211] At its most basic level, this influence is one of application of precedent. As with precedent generally, the effect could possess the strength of binding law of a superior court decision on a lower court. More generally, even when decisions are not binding, the resolution of specific issues by earlier courts strongly influences the acceptable contours of the argument between the parties.[212]

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206. *See id.* at 514-15.

207. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

208. One refrain frequently used by Presidents relates to the broad margins by which AUMFs tend to pass. For example, in a response to fifteen senators criticizing President Johnson's escalation of armed conflict in Vietnam, he simply stated, "I continue to be guided in these matters by the resolution of the Congress approved on Aug. 10, 1964 – Public Law 88-408 – by a vote of 504 to 2." *Reply to a Letter from a Group of Senators Relating to the Situation in Vietnam*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=27748 (last visited Feb. 27, 2016).

209. In the case of the 2001 AUMF, the executive branch was not simply influential, it drafted the AUMF itself. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (2007).

210. *See* United States v. Minoru Yasui, 48 F. Supp. 40 (D. Or. 1942).

211. Garvin, *supra* note 112, at 706 (citing *Milligan*, 71 U.S. (4 Wall.) 2 (1866), as reflecting a pattern of the Court to seize the opportunity for "reinvigoration of civil liberties").

212. *See* Kozel, *supra* note 153, at 964 (describing the separation of powers and federalism envisioned by the founders as one of "structural institutionalism").

3. Textless Democratic Functionalism

In classic statutory interpretation, emphasizing text serves to anchor the judiciary to legislative intent and, relatedly, as a legitimizer of the judicial function. However, as time progresses, circumstances inevitably change and democratic society grows increasingly divorced from the original, specific circumstances that drove the language embedded in AUMF text.

As a result, continued adherence to the text-driven interpretive model perpetuates a legal paradigm powered more by inertial forces than democratic will.[213] As set out above, the judiciary has frequently responded to this problem by adhering to its classic interpretive canons in form, but deviating from them in practice. Of course, this produces precisely the questions of legitimacy and predictability that serve to undermine trust in the judicial branch. More damaging, this pattern fails to address the root causes of the divergent nature between judicial precedent and the inherent pressure that builds with the suppression of civil liberties and democratic values during armed conflict (represented or triggered by force authorization), which at best, produces piecemeal democratic response.

The move from a text-driven approach to a functionalist approach focusing on democratic norms reflects the reality of the unique circumstances of AUMF passage that strongly counsel against unchecked continued authority. As the courts have recognized, even prior to the conclusion of armed conflict, the intensity of exigency subsides.[214] As exigency subsides, embedded democratic values and separation of powers norms demand that should the nation continue to operate in what represents an emergency status, that decision is of the variety that should be presented and accepted after full consideration, a prospect never present at the time original authorizations are enacted.

4. Total Inoperability

Just over a decade following its enactment, Congressman Paul Findley sounded the alarm as to the "forgotten" 1957 Middle East AUMF and the potential for its broad delegations to the Executive to lead to war:

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213. *See id.*

214. While *Youngstown* post-dates the Second World War, the basic moving operations of Justice Jackson's three category test seemed relevant to jurists of the immediately preceding era. *Compare Ex parte* Endo, 323 U.S. 283, 298 (1944) (granting habeas corpus relief to detained Japanese-American), *with Minoru Yasui*, 48 F. Supp. at 44 (assessing that Japanese internment during World War II necessarily requires "a premise, then, the existence of a war in which victory is a vital necessity to assure survival of the freedom of the individual guaranteed by the Federal Constitution, must be predicated").

> This act has never been repealed. It has no specified date of expiration. It is permanent law.
>
> Let there be no mistake. This resolution, passed under circumstances in the Middle East which have radically changed in the intervening thirteen years, requires neither consultation with Congress nor congressional approval before the President can send American men to fight in a war.[215]

Mr. Findley's attempt to repeal the authorization of force failed, and the 1957 Middle East Resolution remains valid, "permanent law" under existing doctrine. However, the notion that the 1957 Middle East Resolution is now fully inoperable rests on solid ground. The 1957 Middle East Resolution was "all but forgotten" by 1969, and that year it seems the general consensus was "that the resolution is dormant and would never be cited."[216]

The final phase of decay, total inoperability, simultaneously directly contradicts existing doctrine, reflects the consensus of normative view on the subject, and is the natural conclusion of the disintegrating authority of AUMFs explored thus far. Just as the shift from conflict functionalism to democratic functionalism reflects the recession of exigency, the progression to inoperability reflects the dissipation of conflict instrumentalities. Inoperability occurs when the circumstances giving rise to the force authorization in question are distant and the opportunity for deliberation present, such that the defining traits of the original conflict simply cannot be said to solidly attach to new deployments.

D. Revived Institutionalism and Force Authorization Decay

Recognizing the phases of decay that attach to a congressional authorization of force reinforces a variety of the institutionalist flaws present within the current system that are degrading separation of powers norms.

It is accepted wisdom that the executive branch possesses far greater competency in all aspects of foreign relations and national security compared to the other branches of government. The Executive is structured to be fast, unified, secret, and better resourced for fact gathering and consumption as well as for weighing various options and likely consequences. While merits to this wisdom accrue, complications and complexities abound, and it cannot be considered a static rule of thumb. First, disparity in competency among the branches on national security matters shrink over time as executive qualitative and quantitative advantages also lessen over time. The

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215. 115 CONG. REC. 40,229 (1969) (statement of Rep. Findley).

216. *Id.* at 40,228.

most pressing issue of AUMF interpretation concerns resetting force authorization processes in order to capture the institutional competencies and advantages that reside in each of the political branches.

Understanding and applying the phases of force authorization decay offers broad functional executive authority during the period in which such authority is most warranted—the period immediately following the passage of the AUMF. Devoid of an artificial mandate to hew to the hastily drafted text characteristic of force authorizations, both the judiciary and executive branch are free to read the mandate provided by Congress as one in pursuit of freshly identified objective. This focus on the functional necessities of conflict means that the "apex" of presidential power attained through Congress's authorization as articulated in *Youngstown* captures the Court's statement that war powers are fundamentally about the successful prosecution of armed conflict.[217]

As an institutional matter of balance between the political branches, decay offers broad functional executive authority even beyond the strictures of the text during the period in which such authority is most warranted—immediately following passage—and precludes any reliance on authorizations that might formally empower presidential action but are outdated. As exigencies wane, recognizing that the AUMF is in a state of declining power encourages long-term, repeat engagement by the legislature rather than treating the passage of AUMFs as the conclusion of the legislature's role in conducting hostilities.

At the core, AUMF statutory decay theory harnesses the institutional advantages embedded in our separation of powers regime. It promotes long-term engagement, periodic reconsideration, and relegitimation of an AUMF's threshold question of whether force should be used. It supports deliberative, democratic input and refinement regarding the limitations of how that force should be used. This process, if not democracy-forcing, is at least democracy-enhancing. It enables public debate over a host of questions of utmost concern to the electorate that were unknown or inadequately explained at the initial time of authorization, such as economic and human cost, strategic error, etc. Periodic review and refinement likewise encourages a focused deliberation that might otherwise become enmeshed in other issues, most notably the perpetual appropriations discussions, and short-circuits negative predispositions toward inertia and responsibility shirking that naturally adhere to large institutions like Congress.

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217. Similarly, recognizing such broad powers at the outset of AUMF passage should incentivize Congress to carefully consider AUMF passage and comports with Congress's most recent practice of drafting broad authorization language.

AUMF decay theory also offers a smooth transition away from the highly government-centric authority recognized in wartime toward the full application of the default peacetime domestic regime. Current regime is always binary—based on an assessment of whether the U.S. is in conflict or not. However, in actuality, armed conflict does not follow an on/off pattern, nor should its imposition upon domestic life be binary. AUMF decay is consistent with increasing recognition of the spectrum of intensity that characterizes armed conflict as well as the spectrum of functional impact that various conflicts impose within the domestic sphere. As such, decay is the more realistic and functionally attractive alternative to the congressional acts currently recognized in the current conflict-terminating regime of repeal, defunding, or proposed mandatory AUMF sunset, all of which portend substantial uncertain costs, political red tape, and potentially dramatic legal shocks. As to the judiciary, decay theory offers an opportunity to formalize, elucidate, and legitimate existing doctrine in a more coherent manner. Perhaps even more importantly, it offers an off-ramp from both assessments as to "some metaphysical test for war" and determinations regarding how to determine the "end" of conflicts.

As I have discussed, Congress's comparative advantages, both deliberative and democratic, grow as an armed conflict grinds on. The same is true with the judiciary. Previously classified information is made available, independent fact-finders contribute to knowledge, and specific cases with distinct sets of facts that actually occurred, purportedly per the plan set into action by a force authorization, come forward for legal review. Like the legislature, Courts practice their own means of shirking responsibility or subsuming to inertia. They can decide a case on the merits or refuse to hear it as a political question. When accepting a case, they can defer to executive interpretations or ignore deference all together.

Absent a workable model for AUMF interpretation that recognizes their unusual character and origins, the institutional competencies upon which separation of powers doctrine relies are too easily overwhelmed. Overly diminished roles of Congress and the courts lose sight of their functionally valuable and constitutionally supported contributions to assessing and legitimizing the use of military force over time.

IV. CONCLUSION

Institutional principles and historical practice demand that temporal conditions and implicit force authorization obsolescence inform a model for interpreting congressional authorizations for the use of military force. Evidence of force authorization decay manifests in the

decisions and actions of all three branches of government, yet is unarticulated in doctrine. Acknowledging decay theory as to AUMF interpretation rebuilds governmental checks, which have been compromised over the past half a century. Timeless grants of armed conflict power don't simply enhance the authority of the executive branch, they constrict the functional authority of Congress and the judiciary. A phased constriction in AUMF statutory authority over time enables unhindered executive action at times most appropriate and a built-in—but not cliff-like—falloff in unchecked authority as exigency moves toward normalcy.