

**THE ILLUSORY UNITARY EXECUTIVE:
A PRESIDENTIAL PENCHANT FOR JACKSON’S
YOUNGSTOWN CONCURRENCE**

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INTRODUCTION

The presidency of “George W. Bush . . . sparked a resurgence in popular interest in presidential power”¹ and brought scholarly debate and research regarding the reach of that power to the leading edge of academic discourse. Among the most contentious of these theories is the Unitary Executive Theory. The Unitary Executive Theory postulates that *all* executive power rests exclusively in the hands of the President. Traditionally, the Unitary Executive Theory advanced the idea that the President was empowered to remove and direct all subordinates in his

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1. JOHN YOO, CRISIS AND COMMAND 410 (2009) [hereinafter YOO, CRISIS AND COMMAND].

exercise of executive power. Recently, legal scholars working in the Bush Administration expanded the scope of the Unitary Executive Theory to include emergency powers that stem from the President's inherent and implied Article II powers in foreign affairs and national security. Throughout the Bush presidency, traditional unitary executive theorists derided this claim to emergency powers as separate from and inconsistent with traditional Unitary Executive Theory. Despite the unfeigned contention between these competing views, the debate has been largely misplaced as neither President Bush nor his successor has acted on this expanded view of the unitary executive. Instead, they have relied on the robust authority granted to them by the United States Congress under Senate Joint Resolution 23, the Authorization for the Use of Military Force in Response to the 9/11 Attacks (AUMF).

The scholarly disagreement during and following the Bush era over the Unitary Executive Theory and the reach of the President's inherent and implied constitutional Article II powers has transcended customary bifurcation along ideological lines. This transcendence has manifested itself in an intra-ideological divide among conservative legal scholars, best evidenced by the approaches to the Unitary Executive Theory advanced by Steven Calabresi and Christopher Yoo on the one hand,² and John Yoo on the other.³ The reach of the powers granted to the Executive, beyond those enumerated in Article II of the U.S. Constitution, is far from settled. However, in the context of Presidents acting pursuant to the AUMF, the academic debate surrounding the Unitary Executive Theory remains just that—academic. The AUMF granted the President the power to take all

2. See generally Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) (asserting a Unitary Executive Theory that supports a broad presidential power of removal and control over law execution); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003) (discussing shifts between presidential and congressional authority between 1837 and 1889); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1 (2004); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (1997); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) [hereinafter CALABRESI & YOO, *UNITARY EXECUTIVE* (2008)].

3. See generally John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009) [hereinafter Yoo, *Unitary, Executive, or Both?*] (stating that Calabresi and Yoo's separation of the procedural executive powers from the substantive powers may be inadequate); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter YOO, *POWERS OF WAR AND PEACE*] (arguing that the Constitution does not require one specific procedure for conducting foreign affairs, but instead allows branches to cooperate or compete by relying on their unique constitutional powers); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 11–12 (2006); YOO, *CRISIS AND COMMAND*, *supra* note 1.

“necessary and appropriate force against [any entity that] . . . planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁴ While Presidents acting under the AUMF may have invoked inherent and implied powers on occasion, they have never acted on this claim in defiance of another branch of government—there has been no need. The AUMF provided unprecedented authority for the President to pursue those entities that he determined participated in the attacks on September 11 with force that he alone deemed necessary.

Since AUMF’s passage, Presidents have almost categorically nested executive action taken in response to the September 11 attacks in the AUMF. These Presidents have preferred to nest their actions in Justice Robert H. Jackson’s “widely accepted categorization of presidential power”⁵ in *Youngstown, Sheet & Tube Co. v. Sawyer*, which denied President Harry Truman’s attempt to seize steel mills during the Korean War to avoid a labor strike.⁶ In his *Youngstown* concurrence, Justice Jackson noted that “[w]hen the President acts pursuant to an . . . authorization of Congress, his authority is at its maximum”⁷ Despite the opinion’s concurring status, “a majority of the [Supreme] Court since has made it part of the Court’s separation of powers jurisprudence.”⁸ Thus, Presidents have preferred the certainty of Justice Jackson’s “categorization of presidential power”⁹ to the less conventional, less tested claim of inherent and implied Article II powers in “foreign affairs and national security.”¹⁰

Over the eleven years following the enactment of the AUMF, this executive penchant for Justice Jackson’s “categorization of presidential power” has persisted.¹¹ Neither President Bush nor President Obama has taken action consistent with a Unitary Executive Theory asserting “inherent [and implied] powers in foreign affairs and national security.”¹²

Even putting aside the strong preference among Presidents to nest their authority in Justice Jackson’s *Youngstown* concurrence, the language of the AUMF is so expansive that it effectively rendered the need to invoke “the

4. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

5. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005).

6. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 589 (1952).

7. *Id.* at 635 (Jackson, J., concurring).

8. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 193 (1996) [hereinafter Yoo, *Continuation of Politics*].

9. Bradley & Goldsmith, *supra* note 5.

10. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

11. Bradley & Goldsmith, *supra* note 5.

12. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

president's inherent powers in foreign affairs and national security" superfluous.¹³ Content to remain at the apex of presidential authority, no President acting under AUMF authority has pursued the claim of "inherent [and implied] powers in foreign affairs and national security"¹⁴ pursuant to Article II with any real vigor. The AUMF's broad grant of authority ensured that the question of whether the President harbors inherent and implied powers in foreign affairs and national security would remain unanswered. The AUMF imposed "no geographic limitation on the use of force."¹⁵ It imposed no limit upon "the time period in which the President can act."¹⁶ It granted the President the novel authority to take "action against unnamed nations . . . or against named individual nations" but never against "organizations or persons."¹⁷ Congress granted the Executive most, if not all, of the authority he might otherwise invoke as inherent or implied in Article II of the Constitution.

It is true that Presidents Bush and Obama, the two Presidents charged with ensuring that the AUMF "be faithfully executed,"¹⁸ have occasionally sought¹⁹ to insulate their actions from legislative or judicial intrusion by asserting "plenary authority . . . pursuant to Article II."²⁰ The constitutionality of this assertion, insofar as it conceives of implied and inherent executive power in the realm of foreign affairs and national security, remains unsettled as the Supreme Court has never reached this claim on the merits.²¹ Furthermore, neither President has acted on such a claim in defiance of any Court rulings limiting executive authority. In practice, these two Presidents have deferred to the coordinate branches of

13. *Id.*

14. *Id.*

15. Bradley & Goldsmith, *supra* note 5, at 2117.

16. *Id.* at 2123.

17. 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 4 (2007) [hereinafter GRIMMETT, AUMF].

18. U.S. CONST. art. II, § 3.

19. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004) ("The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution."); *Rumsfeld v. Padilla*, 542 U.S. 426, 432 (2004) ("On the merits, the Government contended that the President has authority to detain Padilla militarily pursuant to the Commander in Chief Clause of the Constitution, Art. II, § 2, cl. 1 . . ."); see also 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*, NBC NEWS, 10, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper] ("[M]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981))).

20. *Hamdi*, 542 U.S. at 516–17; *Padilla*, 542 U.S. at 432.

21. *Hamdi*, 542 U.S. at 517; *Padilla*, 542 U.S. at 434.

government on the rare occasion that either the Court or the Legislature has acted to rein in executive action taken pursuant to the AUMF.²² They have neither seized the opportunity to invoke their inherent and implied Article II powers²³ nor proceeded unilaterally in defiance of restrictions placed upon their powers by the coordinate branches. It is difficult, given the preferences and practices of these two Executives, to see what lessons or insight executive action taken pursuant to the AUMF can offer the debate surrounding the scope of the Unitary Executive Theory.

Undoubtedly, the President has the authority to exercise “interpretive discretion” under the Take Care Clause in seeing that the laws “be faithfully executed.”²⁴ Thus, the more pertinent question, in the context of a President acting “pursuant to an express or implied authorization of Congress,”²⁵ is whether the President’s “interpretive discretion”²⁶ has exceeded the authority granted by Congress. It is difficult to see how either of these Presidents has exceeded the authority granted by the enactment of the AUMF.

This Article underscores the immense weight afforded to Justice Jackson’s “widely accepted categorization of presidential power”²⁷ in *Youngstown*. The presidential proclivity toward summing the apex of executive power, as described by Justice Jackson, is a primary reason that the deriding of the Bush Administration for bastardizing Unitary Executive Theory is misplaced.

This Article argues that neither the Bush nor the Obama Administrations have invoked the kind of inherent and implied Article II powers in “foreign affairs and national security”²⁸ espoused by expansive unitary executive theorists. To the contrary, where Congress has deferred to the Executive’s interpretation of the AUMF by quiescence, and the Supreme Court has found occasion to exercise its “[p]ower . . . to render dispositive judgments”²⁹ voiding executive determinations, both

22. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2006); David M. Herszenhorn, *Funds to Close Guantánamo Denied*, N.Y. TIMES, May 21, 2009, http://www.nytimes.com/2009/05/21/us/politics/21detain.html?pagewanted=all&_r=0.

23. YOO, CRISIS AND COMMAND, *supra* note 1, at 414.

24. U.S. CONST. art. II, § 3. See Sai Prakash, *Take Care Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 222, 223 (Edwin Messe III, Matthew Spalding & David Forte eds., 2005) (“[T]he President possesses wide discretion in deciding how and even when to enforce laws. He also has a range of interpretive discretion in deciding the meaning of laws he must execute.”).

25. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

26. Prakash, *supra* note 24.

27. Bradley & Goldsmith, *supra* note 5.

28. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

29. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995)

Administrations have accommodated the Court's rulings. When repudiated by the Court, these Administrations have sought congressional legislation to overcome the Court's rulings. Despite the strong impetus to not execute the Court's judgments, given the exigency and the enactment of the AUMF, these Administrations have not taken the kind of unilateral action supported by expansive unitary executive theorists.³⁰

Furthermore, this Article argues that the executive penchant for Justice Jackson's categorization of presidential power ensured the preservation of the traditional understanding of the constitutional principle of separation of powers after September 11. Continuing the traditional understanding of separation of powers is significant because it runs directly contrary to the curtailed notion of checks on the Executive's powers in the realm of foreign affairs and national security, as espoused by expansive unitary executive theorists.

The AUMF's enactment forestalled any need for the Executive to invoke his inherent and implied powers in "foreign affairs and national security,"³¹ which, under an expansive Unitary Executive Theory, would vest *all* decisions relating to these matters exclusively in the Chief Executive. Undoubtedly, such a bold assertion of authority would have opened the door to litigation over "some of the most difficult, unresolved, and contested issues in constitutional law."³² Moreover, where "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,"³³ the AUMF afforded the Court occasion to apply the "basic principles of constitutional avoidance [which] counsel[s] in favor of focusing on congressional authorization when considering war powers issues."³⁴ The upshot of affording the Court this opportunity is a fully functioning system of checks and balances, free

The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a judicial Power is one to render dispositive judgments."

Id. (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

30. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 276 (1994) [hereinafter Paulsen, *Most Dangerous Branch*].

31. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

32. Bradley & Goldsmith, *supra* note 5, at 2051.

33. *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988).

34. Bradley & Goldsmith, *supra* note 5, at 2051.

of encumbrances that would otherwise tip the scales in favor of unilateral executive decision-making.

That the legislative and judicial branches rarely, if ever, exercised their numerous constitutional and procedural checks³⁵ upon Executive action pursuant to the AUMF is immaterial to the separation of powers issue.³⁶ The simple fact is that our tripartite system of checks and balances remained at its zenith because the Executive was acting pursuant to a congressional authorization and not an invocation of “plenary authority . . . pursuant to Article II.”³⁷

This Article concludes that, first, Presidents Bush and Obama preferred the surety of Justice Jackson’s “widely accepted categorization of presidential power”³⁸ in *Youngstown*, to the less conventional, less tested, claim of inherent and implied powers in “foreign affairs and national security”³⁹ pursuant to Article II. Second, neither of these Presidents acted in a manner consistent with a Unitary Executive Theory that advances the notion of inherent and implied Article II powers in the realm of “foreign affairs and national security.”⁴⁰ Third, “[t]he process of exercising . . . executive power . . . requires interpretation” of congressional enactments when the legislature fails to or chooses not to “provide sufficient specificity to render such interpretation unnecessary.”⁴¹ Thus, any presidential action flowing from the exercise of his “interpretive discretion”⁴² in fulfillment of his duties under the Take Care Clause and pursuant to the language of the AUMF, “an express . . . authorization of Congress,”⁴³ is lawful. This presumption of constitutionality stands until either Congress acts to narrow the authorization through a procedural maneuver⁴⁴ or constitutional check,⁴⁵ or until the Supreme Court exercises

35. See Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-first Century*, 1 HARV. L. & POL’Y REV. 3, 9 (2007) (“Over the years, however, Congress has developed various forms of leverage to force compliance, including the power of the purse, the power to impeach, the use of congressional subpoenas, the holding of executive officials in contempt, GAO investigations, and the blockage of nominations.”).

36. See *id.* (“Congress has demonstrated little interest in using any of [its checks upon the executive] during the Bush era”).

37. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 433–34 (2004).

38. Bradley & Goldsmith, *supra* note 5.

39. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

40. *Id.*

41. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1286 (1996).

42. Prakash, *supra* note 24.

43. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

44. Schumer, *supra* note 35, at 4.

its power “to render dispositive judgment”⁴⁶ voiding the Executive’s determination.

Finally, this Article finds that the question of whether the Unitary Executive Theory extends to the “president’s inherent powers in foreign affairs and national security,”⁴⁷ or whether it is so narrow as to apply only to the removal power, remains unanswered. The question cannot be answered by examining two presidential administrations that preferred the surety of Justice Jackson’s “categorization of presidential power”⁴⁸ to the less assured claim of inherent and implied powers in “foreign affairs and national security.”⁴⁹ The actions of these Presidents simply did not reach the question at the crux of the debate over these competing unitary executive theories.

The balance of this Article proceeds in three parts. Part I describes the competing unitary executive theories and the nugatory effort to validate or invalidate them through the actions of the Bush Administration pursuant to the AUMF. Part II explains how, contrary to expansive Unitary Executive Theory’s notion of curtailed checks and balances, the enactment of the AUMF left the coordinate branches with the full array of checks necessary to rein in an overzealous Executive acting pursuant to an authorization of Congress.

Moreover, Part II explains that, contrary to the assertions of classic unitary executive theorists, the Bush and Obama Administrations never truly gave effect to the assertions of “inherent [and implied] powers in foreign affairs and national security”⁵⁰ in the manner contemplated by expansive unitary executive theorists. These Presidents merely exercised their “interpretive discretion”⁵¹ in seeing that the laws be “faithfully executed,” as is their charge under the Take Care Clause.⁵² When challenged by coordinate branches, these Presidents accommodated judicial rulings and sought legislative enactments to support executive action taken pursuant to the AUMF.

45. See U.S. CONST. art. I, § 2, cl. 5 (providing Congress with the authority to initiate impeachment proceedings); U.S. CONST. art. I, § 9, cl. 7 (providing Congress with appropriation powers).

46. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

47. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

48. Bradley & Goldsmith, *supra* note 5.

49. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

50. *Id.*

51. Prakash, *supra* note 24.

52. U.S. CONST. art. II, § 3.

Part III explains how President Obama continues to exercise his “interpretive discretion”⁵³ with regard to the AUMF. This Part also explains how President Obama’s “interpretive discretion”⁵⁴ under the Take Care Clause, as applied to the AUMF, justifies the recent use of the Predator/Reaper Drone Program to kill U.S. citizens abroad.⁵⁵ This Program’s continuation under the AUMF umbrella is evidenced by the leaked Department of Justice white paper, *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*.⁵⁶

I. COMPETING THEORIES OF THE UNITARY EXECUTIVE

A. Unitary Executive Theory at the Macro Level

It is useful to think of the divide over Unitary Executive Theory at a macro and micro level. At the macro level, constitutional scholars debate whether the Constitution contemplated a unitary executive at all. This debate turns largely on a dispute over the meaning of the Executive Vesting Clause, which states in pertinent part: “The executive power shall be vested in a President of the United States of America.”⁵⁷

Proponents of classic Unitary Executive Theory assert that “the Constitution created a ‘unitary executive’ in which all executive authority is centralized in the president[; a government] . . . in which all administrative authority [is] concentrated in a single person.”⁵⁸ Three presidential powers lie at the heart of classic Unitary Executive Theory.⁵⁹ These three powers are the “president’s power to remove subordinate policy-making officials at will, . . . to direct the manner in which subordinate officials exercise discretionary executive power, and the power to veto or nullify such officials’ exercises of discretionary executive power.”⁶⁰ These core executive powers “flow from the general grant of . . . power”⁶¹ found in the Executive Vesting Clause of Article II.⁶² In other words, Article II confers a

53. Prakash, *supra* note 24.

54. *Id.*

55. Lisa Daniel, *Panetta: Awlaki Airstrike Shows U.S.-Yemeni Cooperation*, U.S. DEPT. OF DEF., Sept. 30, 2011, <http://www.defense.gov/News/NewsArticle.aspx?ID=65512>.

56. *See generally*, DOJ White Paper, *supra* note 19.

57. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

58. Yoo, Calabresi & Colangelo, *supra* note 2, at 604.

59. *Id.* at 607.

60. *Id.*

61. PACIFICUS NO. 1 (Alexander Hamilton), *available at* http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html.

62. U.S. CONST. art. II, § 1, cl. 1.

broad “presidential control over the execution of the law.”⁶³ Or, as explained by one unitary executive detractor, this “executive view of government organization under the Constitution . . . posits constitutional mandates for . . . agencies organized in a unitary body under the President’s control either directly or through a chain of command.”⁶⁴

In contrast to this “executive view of government,”⁶⁵ critics of the Unitary Executive Theory at the macro level posit a narrower reading of the Executive Vesting Clause.⁶⁶ They conceive of a “legislative view of government organization.”⁶⁷ Under this reading of the Executive Vesting Clause,⁶⁸ there is “scholarly debate over whether the Article II Vesting Clause grants the president a residual foreign affairs power or war power.”⁶⁹ Some suggest, “the ‘executive power’ merely refers to those specific powers enumerated elsewhere in Article II.”⁷⁰ Still, “[o]thers have argued that the Executive Vesting Clause does no more than designate the title and number of the apex of the executive branch [and that t]o claim more for the Executive Vesting Clause . . . would make the rest of Article II redundant.”⁷¹

Yet another group of critics of the Unitary Executive Theory recognize only limited power under the Executive Vesting Clause. These critics note:

[A] unitary body accountable to the President is the . . . means to accomplish national missions . . . such as military and diplomatic activity. However, when a function not among [those] . . . under the exclusive [control] . . . of the President . . . would be . . . compromised by a lack of independence, presidential control is not mandated⁷²

63. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 17; *See also* Myers v. United States, 272 U.S. 52, 161 (1926), *overruling recognized by* Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 U.S. 3138 (2010) (holding that the President has exclusive authority to remove executive branch officials).

64. Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 60–61 (1983) (internal quotation marks omitted).

65. *Id.*

66. U.S. CONST. art. II, § 1, cl. 1.

67. Tiefer, *supra* note 64, at 62.

68. U.S. CONST. art. II, § 1, cl. 1.

69. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 20.

70. Prakash, *supra* note 24, at 180.

71. *Id.* at 180–81.

72. Tiefer, *supra* note 64, at 62.

These critics put forward “classes of . . . executive functions that need not be under the President’s exclusive control,”⁷³ envisioning a “more flexible government structure.”⁷⁴ They argue that on occasion, “independence from presidential control [is] the only remedy that [can] effectively accomplish Congress’s goals.”⁷⁵

B. Unitary Executive Theory at the Micro Level

At the micro level, conservative advocates of the Unitary Executive Theory agree that the Executive Vesting Clause “is a grant to the president of *all* of the executive power.”⁷⁶ Rather than debate whether the Unitary Executive Theory is supported by the text of the Constitution, these advocates of Unitary Executive Theory disagree on the powers contemplated by the Executive Vesting Clause’s use of the word “*all*.”⁷⁷

Traditional unitary executive theorists propose that “[s]o long as the president possesses the power to remove and the power to direct all subordinates in his exercise of executive power, the classic theory of the unitary executive is quite agnostic on the question of whether the president possesses implied, inherent powers in foreign or domestic policy.”⁷⁸ Proponents of a more expansive view of the Unitary Executive postulate that the president has “inherent [and implied] powers in foreign affairs and national security,”⁷⁹ and contend that the “arguments made for the [classic] unitary executive . . . depend on the same theory of constitutional construction”⁸⁰

The foundation of this maverick approach to the Unitary Executive Theory, like its classic counterpart, is the Executive Vesting Clause. Advocates of the expansive theory note that “the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action.”⁸¹ In particular, they note that “centralization of authority

73. *Id.* at 103.

74. *Id.* at 82.

75. *Id.* at 103.

76. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 3 (emphasis added); *see also* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (emphasis added) (“[The Executive Vesting Clause] does not mean *some* of the executive power, but *all* of the executive power.”).

77. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

78. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 20.

79. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

80. *Id.*

81. Robert J. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 487, 493 (2002).

in the President *alone* is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize military and diplomatic resources with a speed and energy . . . far superior to any other branch.”⁸² The Bush Administration’s response to the attacks perpetrated against the United States on September 11 brought these competing theories to an unsatisfying crescendo. Despite numerous legal and historical justifications⁸³ and occasional admonishments,⁸⁴ the ultimate flashpoint remains unresolved.⁸⁵

C. Inapplicability After September 11

In the wake of the September 11 attacks, expansive unitary executive theorists working in the Bush Administration “argue[d] that] the President ha[d] broad constitutional power, even . . . [in the absence of] legislation, to deploy military force to retaliate against those implicated in the September 11 attacks.”⁸⁶ Furthermore, they argued that “the President had the innate power . . . to retaliate against any person, organization, or state suspected of involvement in terrorist attacks on the United States, . . . [and] foreign states suspected of harboring or supporting such organizations.”⁸⁷ These inherent powers, in their estimation, “include[d] both the power to respond to past attacks and the power to act preemptively against future ones.”⁸⁸ Action undertaken by the Bush Administration in the years following the September 11 attacks included:

[D]etain[ing] prisoners . . . at the U.S. naval base at Guantanamo Bay, . . . coercive interrogation measures[,] . . . the establishment of military commissions[, and] . . . the National Security

82. *Id.* (emphasis added).

83. See generally YOO, CRISIS AND COMMAND, *supra* note 1; CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 408.

84. See generally Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 594–95 (2010) (praising Calabresi and Yoo for filling a void in Unitary Executive Theory by chronicling the historical struggle between the President and Congress in executing federal laws).

85. Yoo, Calabresi & Colangelo, *supra* note 2, at 729; see also Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) (“We do not reach the question whether Article II provides such authority”); Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004) (“The question whether the Southern District has jurisdiction over Padilla’s habeas petition breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the Southern District have jurisdiction over him or her? We address these questions in turn.”).

86. Delahunty & Yoo, *supra* note 81, at 487.

87. *Id.*

88. *Id.*

Agency's surveillance of the communications of suspected terrorists without a warrant, inside the United States⁸⁹

These actions were justified in part by expansive unitary executive theorists as exercises of the President's inherent and implied Article II powers. These same policies were vilified by classic unitary executive theorists as "an overly vigorous [exercise] of presidential power that expanded far beyond the logical boundaries of the unitary executive."⁹⁰

Classic unitary executive theorists derided the Bush Administration for "discredit[ing] the theory of the unitary executive by associating it . . . with implied, inherent foreign policy powers, some of which, at least, the president simply does not possess."⁹¹ These critics noted that the "administration would have been better served if it had sought congressional backing for the steps it took in the aftermath of 9/11."⁹²

This highlights a defect in the classic theorists' critique of executive overreach within the Bush Administration. On Tuesday, September 18, 2001,⁹³ when the President signed Senate Joint Resolution 23 into law,⁹⁴ the point of contention between these rival unitary executive theories became moot.

The AUMF, which satisfied the requirements of bicameralism and presentment, has the force of law and its language "does not lend itself to a narrow reading."⁹⁵ Its broad language authorized the President to

*use all necessary and appropriate force against those nations, organizations, or persons he determine[d] 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 [attacks] . . . against the United States by such nations, organizations or persons.*⁹⁶

89. YOO, *CRISIS AND COMMAND*, *supra* note 1, at 413.

90. Yoo, Calabresi & Colangelo, *supra* note 2, at 730; *see also* Pierce Jr., *supra* note 96, at 597 (noting that the President's removal powers do not include the power to veto the decisions of executive branch officers).

91. CALABRESI & YOO, *UNITARY EXECUTIVE* (2008), *supra* note 2, at 429.

92. *Id.* at 412.

93. GRIMMETT, *AUMF*, *supra* note 17.

94. Authorization for Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

95. H.R. REP. NO. 109-384, pt. II(A), at 18 (2006).

96. Authorization for Military Force, Pub. L. No. 107-40, §2, 115 Stat. 224, 224 (2001) (emphasis added).

The AUMF's enactment, under Justice Jackson's "three now-canonical categories, that guide modern analysis of separation of powers"⁹⁷ placed the President's "authority . . . at its maximum, for it include[d] all that he possesse[d] in his own right plus all that Congress . . . delegate[d]."⁹⁸ In Justice Jackson's concurring opinion striking down President Harry Truman's Executive Order authorizing the government's seizure of steel mills in response to a "national steel strike that threatened the war effort in Korea,"⁹⁹ he identified three degrees of executive authority. First, Jackson noted that when acting directly contrary to an act of Congress, the President's authority "is at its lowest ebb."¹⁰⁰ Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers," subject to judicial review of "the imperatives of events and contemporary imponderables rather than on abstract theories of law."¹⁰¹ Third, he noted that, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹⁰² In such circumstances, the President may be said "to personify the federal sovereignty."¹⁰³ "While Justice Jackson's thoughts on executive power took the form of a concurrence, a majority of the [Supreme] Court since has made it part of the Court's separation of powers jurisprudence."¹⁰⁴

According to Justice Jackson's concurrence in *Youngstown*, any action taken by President Bush pursuant to the AUMF is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might"¹⁰⁵ challenge him. Moreover, Congress's broad grant of power explicitly gave the President both the authority to "determine" who was responsible for the September 11 attacks and "interpretive discretion"¹⁰⁶ as to what "force" was

97. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002).

98. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

99. Yoo, *Continuation of Politics*, *supra* note 8, at 192.

100. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).

101. *Id.*

102. *Id.* at 635.

103. *Id.* at 636.

104. Yoo, *Continuation of Politics*, *supra* note 8, at 193; *see also* Transcript: Day Two of the Roberts Confirmation Hearings, WASH. POST, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html> (discussing executive power and its limits during times of war).

105. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).

106. Prakash, *supra* note 24.

“necessary and appropriate”¹⁰⁷ to fulfill the congressional goal of “prevent[ing] . . . future attacks.”¹⁰⁸ In short, the language of the AUMF was so broad that there was effectively no action that the President could take that would require an assertion of inherent and implied powers. The actions taken by the President needed only to be guided by two important principles. First, the President’s action must be taken in pursuit of those “nations, organizations, or persons . . . [the President] determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ”¹⁰⁹ Second, they must be taken in an effort to “prevent any future acts of international terrorism against the United States.”¹¹⁰ The AUMF imbued the President with powers strikingly similar to those imagined by expansive unitary executive theorists. Its enactment equipped the Executive with the very powers imagined by John Yoo,¹¹¹ Robert Delahunty,¹¹² and Jay S. Bybee¹¹³ to be inherent and implied in Article II—the emergency powers.

Cautious skeptics of a congressional investiture of a unitary executive attempt to cabin the President’s “interpretive discretion”¹¹⁴ by noting that “[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”¹¹⁵ But, given the AUMF’s broad language, and the President’s “interpretive discretion”¹¹⁶ under the Take Care Clause,¹¹⁷ such cabining is problematic. The scope of the President’s authority resembles the power bestowed on the President as a result of the Militia Act of 1795.

107. Authorization for Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001).

108. *Id.*

109. *Id.* (emphasis added).

110. *Id.*

111. See generally Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1965.

112. See generally Delahunty & Yoo, *supra* note 81, at 487 (arguing that the President has broad powers to deploy military force to retaliate for attacks that are implied in Article II of the Constitution).

113. See generally Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf> (arguing that interrogation methods that violate the Convention Against Torture may be justified under necessity or self-defense because of the Executive Branch’s constitutional authority to protect the nation from attack after September 11).

114. Prakash, *supra* note 24.

115. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, F., concurring) (citing *Myers v. United States*, 272 U.S. 52, 177 (1926), *overruling recognized* by *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 U.S. 3138 (2010)).

116. Prakash, *supra* note 24.

117. U.S. CONST. art. II, § 3.

In 1795, the Third Congress delegated its constitutional authority under the First Militia Clause¹¹⁸ to the President. The Militia Act of 1795 authorized the President to determine when circumstances required the militia to be called into service.

President James Madison exercised this power in response to the threat of British invasion. President Madison's exercise of power was challenged in *Martin v. Mott*.¹¹⁹ Justice Story, writing for a unanimous Court, sided with the President, stating:

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, . . . it shall be lawful for the President, . . . to call forth such number of the militia, . . . *as he may judge necessary to repel such invasion.*"¹²⁰

Similarly, the AUMF authorizes the President "to use *all necessary and appropriate force* against those . . . *he determines . . .* committed, or aided the terrorist attacks . . . on September 11, 2001 . . . in order to prevent *any* future acts of international terrorism against the United States."¹²¹ Justice Story's decision in *Mott* went on to note that

the power itself is confided to the Executive of the Union, to him who is, by the constitution, 'the commander in chief . . .,' whose duty it is to 'take care that the laws be faithfully executed,' and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to *his* belief of the facts.¹²²

In this context, Justice Story notes that when "a statute gives discretionary power to any person, to be exercised *by him* upon *his* own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."¹²³ In such a case, "the President should be taken to have authority to interpret

118. U.S. CONST. art. I, § 8, cl. 15.

119. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28 (1827).

120. *Id.* at 31 (emphasis added).

121. Authorization for Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001) (emphasis added).

122. *Martin*, 25 U.S. (12 Wheat.) at 31 (emphasis added).

123. *Id.* at 31-32 (emphasis added).

ambiguities as he chooses.”¹²⁴ So long as Congress lies dormant and no occasion arises for the Supreme Court to review the actions of the Executive, the President is “bound to act according to *his* belief of the facts,” and his actions are necessarily constitutional.¹²⁵

The White House drafted the AUMF on September 12, 2001,¹²⁶ and the Senate and House of Representatives amended and passed it on September 14, 2001, by votes of 98-0 and 420-1 respectively.¹²⁷ The President signed the Resolution into law on September 18, 2001.¹²⁸ The resulting language of the AUMF, a product of swift cooperation between the legislative and executive branches of government, eliminated the need for the Bush Administration to rely on the untested notion of the “president’s inherent powers in foreign affairs and national security.”¹²⁹ The AUMF’s enactment, the Court’s proclivity toward constitutional avoidance, and the Executive’s preference for the surety of Justice Jackson’s *Youngstown* concurrence ensured that the question of implied and inherent powers would not be reached. When coupled with the fact that “Presidents no longer claim an independent right to interpret the Constitution differently from the judiciary,”¹³⁰ the question whether the Unitary Executive Theory included inherent and implied powers beyond “removal,” such as in the areas of “foreign affairs and national security,” was rendered moot.¹³¹

The Bush Administration has been derided for its claims of implied and inherent “authority to use force to defend the national security.”¹³² However, the Bush Administration had no need to invoke the Executive’s “plenary authority . . . pursuant to Article II.”¹³³ “In the wake of the September 11, 2001, terrorist attacks, the Administration sought and received from Congress an Authorization to Use Military Force”¹³⁴ leaving the question of whether the President has “inherent powers in foreign affairs and national security,”¹³⁵ at least for the time being, exclusively in the realm of academic debate. The immediate request for congressional authorization

124. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170, 1220 (2007) (“[T]he President should be taken to have the authority to interpret [the AUMF’s] ambiguities as he chooses.”).

125. *Martin*, 25 U.S. (12 Wheat.) at 31 (emphasis added).

126. GRIMMETT, AUMF, *supra* note 17, at 2.

127. *Id.* at 3.

128. *Id.*

129. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

130. YOO, CRISIS AND COMMAND, *supra* note 1, at 426.

131. *Id.*

132. *Id.* at 411.

133. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

134. YOO, CRISIS AND COMMAND, *supra* note 1, at 411.

135. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

was a far cry from the “tradition established by Jefferson, Lincoln, the two Roosevelts, and Nixon,” who “asserted that the president was the ‘steward’ of the people who possessed not only the ‘right but [also the] duty to do anything that the needs of the Nation demanded,’ except when the Constitution *expressly* forbids.”¹³⁶

II. SEPARATION OF POWERS AND THE UNITARY EXECUTIVE

The inapplicability of the intra-ideological debate over unitary executive Theory and the exact powers granted by the Executive Vesting Clause¹³⁷ in the context of the Bush Administration is further underscored by the continuing traditional notion of separation of powers throughout the Bush presidency. The Bush Administration’s acceptance of traditional notions of separation of powers runs directly contrary to the expansive Unitary Executive Theory’s notion of curtailed checks and balances on the President’s emergency powers. The Bush Administration’s commitment to traditional notions of checks and balances erodes the assertion by classic unitary executive theorists that President Bush “discredited the theory of the unitary executive by associating it . . . with implied [and] inherent foreign policy powers”¹³⁸ A closer look at the underpinnings of expansive Unitary Executive Theory highlights the importance of this distinction.

Expansive Unitary Executive Theory flows from three basic understandings of the Constitution. First, the theory gives effect to every word of the Constitution. Whereas the Legislative Vesting Clause¹³⁹ *constrains* the legislative powers to those granted in Article I (“all legislative powers *herein* granted”)¹⁴⁰ and diffuses them over an entire branch of government (“shall be vested in *a Congress* of the United States”),¹⁴¹ the Executive Vesting Clause¹⁴² grants a general power (“*the executive Power*”)¹⁴³ to a single person (“shall be vested in *a President* of the United States”).¹⁴⁴ The Legislative Vesting Clause¹⁴⁵ and the Executive Vesting Clause,¹⁴⁶ thus, present an incontrovertible difference.

136. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 428–29 (alteration in original) (emphasis added).

137. U.S. CONST. art. II, § 1.

138. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 429.

139. U.S. CONST. art. I, § 1.

140. *Id.* (emphasis added).

141. *Id.* (emphasis added).

142. U.S. CONST. art. II, § 1, cl. 1.

143. *Id.* (emphasis added).

144. *Id.* (emphasis added).

145. U.S. CONST. art. I, § 1.

146. U.S. CONST. art. II, § 1, cl. 1.

Second, and in light of this understanding of the Executive Vesting Clause,¹⁴⁷ “the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations The Executive . . . is entrusted with the whole foreign intercourse of the nation”¹⁴⁸ In short, “the foreign affairs power is an executive one;”¹⁴⁹ thus:

Article II effectively grants to the president any unenumerated foreign affairs power not elsewhere given to other branches. This . . . is . . . reinforced by . . . Article II, . . . Section 2 [which] grants the president the power of commander in chief¹⁵⁰

Third, expansive unitary executive theorists assert that, given this constitutional construction, “the president . . . has the . . . authority to initiate military hostilities without any authorizing legislation,”¹⁵¹ subject *only* to the legislative branch’s “power over funding and . . . impeachment.”¹⁵² Moreover, under this construction, the judicial branch is completely stripped of its traditional check upon the political branches when it comes to war powers.¹⁵³

In short, expansive unitary executive theorists posit that

the Constitution did not inadvertently allocate all war powers to the two political branches; rather, the nature of the mutable process it created made judicial supervision unworkable and undesirable. The Framers established a system . . . designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions. Congress could express its opposition to executive war decisions *only* by exercising its powers over funding and impeachment.¹⁵⁴

Contrary to the expansive Unitary Executive Theory’s constitutional construction of curtailed checks and balances in the realm of “foreign

147. *Id.*

148. 6 ANNALS OF CONG. 613–14 (1800).

149. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 18.

150. *Id.*; see U.S. CONST. art. II, § 2, cl. 1 (The Constitution has specifically divided a foreign affairs power between the executive and legislative branches: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

151. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 165.

152. Yoo, *Continuation of Politics*, *supra* note 8, at 286.

153. *Id.* at 288.

154. *Id.* at 174 (emphasis added).

affairs and national security,”¹⁵⁵ the Bush Administration signed the AUMF into law¹⁵⁶ and gave effect to dispositive judicial judgments reining in Executive action later taken pursuant to the AUMF.¹⁵⁷ When the Court rejected the AUMF, the Bush Administration turned to Congress for supplemental legislation to overcome the Court’s rulings¹⁵⁸ and accepted congressional limitations placed on the scope of Executive authority.¹⁵⁹ Simply put, the Bush Administration preferred the surety of Justice Jackson’s “three now-canonical categories that guide modern analysis of separation of powers”¹⁶⁰ to the unfettered, but unproven power associated with expansive Unitary Executive Theory.

A. *The Import of Traditional Checks and Balances*

The primary distinction between a President responding to an attack on the nation pursuant to his emergency powers, which provide for “complete independent initiative in national security matters[,]”¹⁶¹ and a President taking action pursuant to an express authorization of Congress is remarkable in its simplicity, but indispensable in its effect. Under the former, because the Executive is acting pursuant to inherent and implied powers flowing from Article II, and all Article II powers are “vested in a President of the United States,”¹⁶² the initiation of hostilities, the boundaries of the subsequent action, and the actions themselves are creations of the executive branch. This leaves only three potential checks to “guard against [executive] usurpation or wanton tyranny.”¹⁶³ The first two checks upon the Executive lie with Congress.

The first meaningful check on the President rests with Congress’s plenary control over appropriations. “Simply by refusing to do anything, by

155. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

156. GRIMMETT, AUMF, *supra* note 17.

157. Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html>.

158. Kate Zernike, *White House Prods Congress to Curb Detainee Rights*, N.Y. TIMES, July 13, 2006, http://www.nytimes.com/2006/07/13/washington/13gitmo.html?pagewanted=all&_r=0.

159. See Scott Shane, *Lawmakers Back Limits on Interrogation Tactics*, N.Y. TIMES, Dec. 7, 2007, <http://www.nytimes.com/2007/12/07/washington/07interrogate.html> (noting that since Congress passed the Detainee Treatment Act in 2005, the military has been restricted from using harsh interrogation techniques).

160. Katyal & Tribe, *supra* note 97, at 1274.

161. Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1453 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)).

162. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

163. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32 (1827).

not affirmatively acting to vote funds or to enact legislation, Congress may block presidential initiatives”¹⁶⁴ Alternatively, Congress can allocate funds, but “plac[e] conditions on their use.”¹⁶⁵

The second check upon the Executive rests in the congressional power of impeachment.¹⁶⁶ “Members of the House [of Representatives], bound by the oaths they take to uphold the Constitution, are under a[n] . . . obligation to” discipline a President who abuses his constitutional responsibilities.¹⁶⁷ The Constitution directs the House to exercise this “indictment-like power . . . irrespective of whether their bill of impeachment may or may not lead to a conviction in the Senate.”¹⁶⁸ The Constitution then delegates the conduct of the impeachment trial to the Senate.¹⁶⁹ As one scholar noted, “impeachment . . . properly belong[s] in the legislative arsenal as a weapon of last resort against a president who has seriously subverted the constitutional system so that Congress cannot otherwise exercise its prerogatives of shared participation in important national foreign policy judgments.”¹⁷⁰

The third check rests in the “judicial Power . . . to render dispositive judgments”¹⁷¹ voiding executive actions as unconstitutional. Of course, under expansive Unitary Executive Theory this check could prove of little consequence. As previously explained, expansive unitary theorists posit that when the Executive is exercising such emergency powers, the judicial branch is completely stripped of its check upon the executive branch.¹⁷² History provides no shortage of Presidents, including “Jefferson, Jackson, Lincoln, and Roosevelt,”¹⁷³ who have asserted that the text of the Constitution reserves for the executive branch “an independent right to interpret the Constitution differently from the judiciary.”¹⁷⁴ President Lincoln explained as much in his First Inaugural Address, noting:

164. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 22.

165. *Id.* at 160.

166. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6.

167. Stephen B. Presser, *Impeachment*, in THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 24, at 60, 62.

168. *Id.* at 61–62.

169. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6.

170. Lori Fisler Damrosch, *Impeachment as a Technique of Parliamentary Control Over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525, 1527 (1999).

171. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

172. *Id.*

173. YOO, CRISIS AND COMMAND, *supra* note 1, at 426.

174. *Id.*

[I]f the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.¹⁷⁵

Expansive unitary executive theorists have made clear their view that the Framers “did not inadvertently allocate all war powers to the two political branches; rather, the nature of the . . . process . . . [they] created made judicial supervision unworkable and undesirable.”¹⁷⁶ Finally, even assuming that the Court has a workable role,

the judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society It [has] . . . neither Force nor Will, but merely judgment; and . . . ultimately depend[s] upon the aid of the executive . . . even for the efficacy of its judgments.¹⁷⁷

History is not without an example of a President having had the benefit of these curtailed checks and balances. President Lincoln’s actions after the bombardment of Fort Sumter on April 12, 1861, offer a concrete example of a President acting under an assumption of “complete independent initiative in national security matters.”¹⁷⁸ Lincoln personified an executive “donn[ed in] his military garb . . . do[ing] in this country what he could never do in merely executive dress.”¹⁷⁹ He is the expansive unitary executive theorist’s Executive exemplar.

In the wake of Fort Sumter,¹⁸⁰ and without consulting Congress, Lincoln summoned 75,000 state troops under the Militia Act.¹⁸¹ He unilaterally expanded the regular Army, purchased new warships,¹⁸² and “removed millions from the Treasury for military recruitment and pay.”¹⁸³ On April 27, 1861, Lincoln suspended the writ of habeas corpus, allowing

175. Abraham Lincoln, First Inaugural Address, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865 at 215, 221 (Don E. Fehrenbacher ed., 1989).

176. Yoo, *Continuation of Politics*, *supra* note 8, at 174.

177. Lawson & Moore, *supra* note 41, at 1285–86 (quoting THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

178. Ramsey, *supra* note 161, at 1453.

179. Katyal & Tribe, *supra* note 97, at 1275.

180. YOO, CRISIS AND COMMAND, *supra* note 1, at 208.

181. *Id.*

182. *Id.*

183. *Id.*

the military to detain “rebel spies and operatives”¹⁸⁴ without trial. While all of these acts are unquestionably constitutional, they are reserved to the legislative branch under Article I of the U.S. Constitution.¹⁸⁵

Moreover, when a petition arising out of the suspension of the writ of habeas corpus reached Chief Justice Roger Taney, Taney issued a writ of habeas corpus ordering the detainee, John Merryman, to appear in court.¹⁸⁶ Justice Taney wrote in his accompanying opinion, “the people of the United States are no longer living under a government of laws”¹⁸⁷ Lincoln simply ignored Justice Taney’s writ.¹⁸⁸ In a letter to Albert Hodges, editor-in-chief of a Kentucky newspaper, the *Frankfurt Commonwealth*,¹⁸⁹ Lincoln defended his actions writing, “my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by *every indispensable means*, that government—that nation—of which that constitution was the organic law.”¹⁹⁰

By contrast, when a President derives authority from the AUMF, Congress retains the two aforementioned checks on executive power, but has the added checks of Presentment and of being able to modify the scope of the powers granted to the Executive in its own authorizing legislation. By placing “geographical limitation[s] on the use of force,”¹⁹¹ “the time period in which the President can act,”¹⁹² or restricting those entities that the President can take action against, Congress’s latitude for controlling the hostilities is expanded. In this manner, Congress is able to “place a statutory straightjacket on war powers undermin[ing] the very flexibility” that led to the passing of the War Powers Resolution in 1973.¹⁹³ Notably, the legislative branch has routinely challenged the War Powers Resolution as an unconstitutional infringement upon the Executive’s war-making powers.¹⁹⁴ This is of little consequence to the matter at hand. Executives,

184. *Id.* at 209.

185. *Id.*

186. *Id.* at 210; Paulsen, *Most Dangerous Branch*, *supra* note 30, at 278.

187. *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861).

188. Paulsen, *Most Dangerous Branch*, *supra* note 30, at 278.

189. *Letter from Lincoln to Albert G. Hodges, April 4, 1864, Explaining Lincoln’s Position on Slavery*, KY. HISTORICAL SOC’Y, http://www.lrc.ky.gov/record/Moments08RS/49_web_leg_moments.htm (last visited Sept. 12, 2013).

190. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 585 (Don E. Fehrenbacher ed., 1989) (emphasis added).

191. Bradley & Goldsmith, *supra* note 5, at 2117.

192. *Id.* at 2123.

193. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 160.

194. Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683, 683–84 (1984) [hereinafter Turner, *Unhelpful*]; Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*, 45 CASE W. RES. J. INT’L L. 109, 109 (2012).

whose preference is to “personify the federal sovereignty”¹⁹⁵ in accordance with Justice Jackson’s *Youngstown* concurrence, accept Congress’s authority to “place a statutory straightjacket on [the Executive’s] war powers.”¹⁹⁶

Congress’s position is further fortified by the AUMF’s enactment because the AUMF affords the courts a workable role.¹⁹⁷ The AUMF lets the Court apply the “basic principles of constitutional avoidance [which] counsel[s] in favor of focusing on congressional authorization when considering war powers issues.”¹⁹⁸ In fact:

Courts have been . . . reluctant to address the scope of [the President’s] constitutional authority [as Commander-in-Chief], especially during wartime, when the consequences of a constitutional error are potentially enormous. Instead, courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized.¹⁹⁹

Of course, the added check of amending the authorizing legislation is subject to the Presentment Clause’s presidential veto; but under the same clause, the presidential veto can be nullified by a two-thirds vote in both houses of Congress.²⁰⁰ Failure to override the President’s veto “show[s] only that Congress has refused to exercise the ample powers at its disposal, not that there has been [a] . . . breakdown in the constitutional structure.”²⁰¹ Under expansive Unitary Executive Theory, the same is true regarding the Appropriations Clause.²⁰²

This says nothing of the fact that Congress held “floor debates in the Senate and the House on S.J.Res. 23” between September 12, 2001, when Congress received the first draft of the AUMF from the White House, and the evening of September 14, when the House finally passed the authorization.²⁰³ In fact, the floor debates resulted in a congressional

195. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

196. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 160.

197. Yoo, *Continuation of Politics*, *supra* note 8, at 174.

198. Bradley & Goldsmith, *supra* note 5, at 2051.

199. *Id.* at 2051–52; *Compare* *Korematsu v. United States*, 323 U.S. 214, 223 (1945) *with Steel Seizure*, 343 U.S. at 582 (holding that several factors, including Congressional approval, led to *Korematsu* being lawfully detained during World War II).

200. U.S. CONST. art. I, § 7, cl. 2.

201. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 159.

202. U.S. CONST. art. I, § 9, cl. 7.

203. GRIMMETT, AUMF, *supra* note 17, at 3.

determination to limit the scope of the President's authorization as compared to the original draft received from the White House.²⁰⁴ Despite the congressional limitations, the Bush Administration signed the AUMF into law impliedly conceding his emergency powers. Congress's decision to alter the AUMF's original language was in itself a powerful check on the Executive, and further proof of President Bush's preference for the certainty of Justice Jackson's concurrence in *Youngstown* over the uncertainty of expansive Unitary Executive Theory's inherent and implied Article II powers in the areas of "foreign affairs and national security."²⁰⁵

After the September 11 attacks, President Bush was a Chief Executive acting "pursuant to an express . . . authorization of Congress, [with] his authority . . . at its maximum,"²⁰⁶ not a Lincolnesque President acting under the presumption of "complete independent initiative in national security matters."²⁰⁷ The AUMF's enactment essentially ensured that all constitutional checks remained in their traditional recognizable mode—right down to fulfillment of bicameralism and Presentment.²⁰⁸ There never was an expansive unitary executive acting pursuant to inherent and implied powers in "foreign affairs and national security" in the Bush White House.²⁰⁹ The resulting years of the Bush Administration, following the enactment of the AUMF, offered an example of a President acting "pursuant to an . . . authorization of Congress, . . . [where the President's] authority . . . [was] at its maximum,"²¹⁰ but congressional specificity and follow-on supervision was at its absolute minimum.

The "process of exercising . . . executive power . . . requires interpretation [when the legislature fails to] . . . provide sufficient specificity to render such interpretation unnecessary."²¹¹ As the *Rasul*,²¹² *Hamdi*,²¹³ and *Hamdan*²¹⁴ line of Supreme Court cases aptly demonstrate, this was not a President acting first and seeking permission later in the style of Lincoln. To the contrary, upon President Bush's request, Congress amended the Foreign Intelligence Surveillance Act (FISA) to support the

204. 107 CONG. REC. S9,949 (daily ed. Oct. 1, 2001) (statement of Sen. Robert Byrd).

205. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

206. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

207. Ramsey, *supra* note 161, at 1453.

208. U.S. CONST. art. I, § 7, cl. 2.

209. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

210. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring).

211. Lawson & Moore, *supra* note 41.

212. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

213. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

214. *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006).

Bush Administration's terrorist surveillance program,²¹⁵ and enacted the Detainee Treatment Act²¹⁶ and the Military Commissions Act.²¹⁷ To be sure, this was a President exercising his "interpretive discretion"²¹⁸ in seeing that the AUMF, an "express . . . authorization of Congress,"²¹⁹ "be faithfully executed."²²⁰ When the Supreme Court rebuked a particular Executive determination, the Bush Administration either self-corrected or went to Congress for supplemental legislation. Even assuming that Harold Koh was right when he wrote that "the Constitution provides no single source for the President's various abilities to promulgate agency regulations, to exercise prosecutorial discretion, and to conduct foreign relations,"²²¹ the Constitution certainly provides a bipartite source for the President to acquire those various abilities, as was recognized in Justice Jackson's "widely accepted categorization of presidential power."²²² Congress bestowed these powers on the President.

The notion that President Bush "[a]dvanc[ed] an argument reminiscent of the vision of presidential authority asserted by Abraham Lincoln in 1861"²²³ is simply not historically accurate. To the contrary, President Bush had "congressional backing for [all of] the steps . . . [he] took in the aftermath of 9/11."²²⁴ This "backing" was demonstrated largely through congressional quiescence, routinely through appropriations void of conditions, and occasionally by enacting legislation.

B. The Executive's Proclivity Toward Cooperation

In 2007, Senator Charles Schumer (Democrat from New York) published an article in the *Harvard Law & Policy Review* titled, *Under Attack: Congressional Power in the Twenty-first Century*.²²⁵ In the article, Senator Schumer opines that, "President Bush has turned to Congress on matters of national security only as a last resort and often only after judicial

215. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 1801, 92 Stat. 1786 (codified as amended at 50 U.S.C. §§ 1812, 1881, 1881g, 1885, 1885c (2008)).

216. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2006).

217. Military Commissions Act of 2006, 10 U.S.C. §§ 948a-950w (2006).

218. Prakash, *supra* note 24.

219. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

220. U.S. CONST. art. II, § 3.

221. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2373 (2006).

222. Bradley & Goldsmith, *supra* note 5.

223. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 410.

224. *Id.* at 412.

225. Schumer, *supra* note 35, at 3.

rebuke.”²²⁶ This is a strange critique to say the least, given that Senator Schumer was one of the ninety-eight senators who unanimously passed “the broadest congressional delegation of war power [the AUMF] in our nation’s history,”²²⁷ and then effectuated a procedural move to ensure that the House of Representatives would be unable to modify the language.²²⁸

President Bush’s perceived independence is not a case of unitary action. When Congress enacts legislation “and delegat[es] to the President [the] authority to implement it, . . . the President must interpret the [legislation] . . . in deciding how best to carry the law into effect.”²²⁹ “No one would take seriously an assertion that the President may not interpret federal law. After all, the President must carry out the law, and faithful execution is the application of law to facts. Before he can implement he must interpret.”²³⁰ Moreover,

the prima facie case for independence in presidential interpretation[] . . . is [that] . . . the executive department is coordinate with the other departments, presidential review is part of a system of checks and balances, [and] the other departments should not be judges in their own causes²³¹

Receiving no meaningful disapproval from Congress during the years immediately following the September 11 attacks, the President was free “to act according to *his* belief of the facts.”²³² So long as Congress lay dormant in the face of executive action and forthcoming with unconditioned appropriations, the Executive was within his authority to continue to pursue the AUMF’s objectives in accordance with his interpretation of the authorization. None of the President’s actions demonstrated an “arrogation of power, at the expense of Congress.”²³³ If anything, they were an abdication of power by the Congress.²³⁴ Given this permissive landscape, it hardly seems a surprise that the first challenge to the President’s authority would eventually come from the courts.

226. *Id.* at 14.

227. Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 252 (2002).

228. GRIMMETT, AUMF, *supra* note 17, at 5.

229. Lawson & Moore, *supra* note 41, at 1286.

230. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905 (1990).

231. Lawson & Moore, *supra* note 41, at 1287.

232. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (emphasis added).

233. Schumer, *supra* note 35, at 10.

234. *Id.*

In *Hamdi v. Rumsfeld*, Yaser Esam Hamdi, “a United States citizen captured in Afghanistan”²³⁵ challenged “whether the Executive ha[d] the authority to detain [U.S.] citizens who qualify as ‘enemy combatants.’”²³⁶ A plurality of the Court approved of the Bush Administration’s determination that the AUMF authorized the Executive to “detain an American citizen captured in Afghanistan just after 9/11.”²³⁷ The Court noted:

In light of these principles, it is of no moment that the AUMF does not use *specific language* of detention. Because detention to prevent a combatant’s return to the battlefield is a *fundamental incident of waging war*, in permitting the use of “necessary and appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstance considered here.²³⁸

Despite the Court’s recognition of statutory ambiguities and the plurality’s deference to the Executive’s interpretation of “necessary and appropriate force,” Justice O’Connor, writing for the plurality, also noted that “constitutional due process required stronger evidence and better procedures than the government had used in detaining Hamdi.”²³⁹ In response to the Court’s concern, the Bush Administration “established Combat Status Review Tribunals (CSRTs)” in order “to comply with the due process requirements identified by the plurality in *Hamdi*.”²⁴⁰ Though the “judiciary . . . has no influence over either the sword or the purse,” the Bush Administration accommodated the Court’s ruling in *Hamdi* and gave “efficacy [to] . . . its judgment[.]”²⁴¹ In fact, the Bush Administration’s subsequent adoption of CSRTs closely resembled the model of due process suggested by Justice O’Connor in her plurality opinion—“the military could detain United States citizens based on hearsay evidence, evaluated by a panel of military officials employing a presumption in favor of the government.”²⁴²

235. Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 1018 (2011).

236. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

237. Afshen John Radsan, *Bush and Obama Fight Terrorists Outside Justice Jackson’s Twilight Zone*, 26 CONST. COMMENT. 551, 553 (2010).

238. *Hamdi*, 542 U.S. at 519 (emphasis added).

239. Green, *supra* note 235.

240. *Boumediene v. Bush*, 553 U.S. 723, 733–34 (2008).

241. Lawson & Moore, *supra* note 41, at 1285–86 (quoting THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

242. Green, *supra* note 235.

Later, in *Rasul v. Bush*, two detainees held abroad in the U.S. Naval Base, Guantanamo Bay, filed “a petition for writ of habeas corpus.”²⁴³ The question before the Court in *Rasul* was “whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”²⁴⁴ The Court ruled against the Administration’s interpretation of the AUMF and extended statutory habeas corpus to detainees being held at Guantanamo Bay.²⁴⁵ Rather than ignore the Court’s judgment, as President Lincoln did in *Merryman*, the Executive implored Congress to enact supplemental legislation. Congress abided and enacted the Detainee Treatment Act (DTA).²⁴⁶ The DTA stated that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”²⁴⁷

In *Hamdan v. Rumsfeld*, petitioner Salim Ahmed Hamdan “filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch’s intended means of prosecuting [him].”²⁴⁸ “[H]amdan was charged with one count of conspiracy ‘to commit . . . offenses triable by military commission.’”²⁴⁹ The Government filed a motion to dismiss invoking the Detainee Treatment Act’s divestiture of the Court’s jurisdiction in such matters.²⁵⁰ Again, the Court thwarted the Executive’s design under the AUMF, holding that the DTA’s rescission of the Court’s jurisdiction over “application[s] for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . did not apply to cases . . . pending when the DTA was enacted.”²⁵¹ Assured by the Court that “[n]othing prevent[ed] the President from returning to Congress to seek the authority he believe[d] necessary,”²⁵² the Executive returned “to Congress with hat in hand”²⁵³ asking that the words “or is awaiting such determination” be added to the Military

243. *Rasul v. Bush*, 542 U.S. 466, 472 (2004).

244. *Id.* at 470.

245. *Id.* at 484.

246. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2005).

247. *Boumediene v. Bush*, 553 U.S. 723, 735 (2008) (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2742 (2005)).

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

249. *Id.* at 566.

250. *Id.* at 572.

251. *Boumediene*, 553 U.S. at 735.

252. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

253. *Radsan*, *supra* note 237, at 556.

Commission Act (MCA).²⁵⁴ Again, Congress granted the Executive's request and amended the Act.

Furthermore, when "the Bush Administration [asserted that] the AUMF justified [a] terrorist surveillance program, . . . without seeking warrants through [FISA],"²⁵⁵ and it was summarily challenged, the Executive again sought an amendment to an act of Congress,²⁵⁶ and again Congress granted the amendment.²⁵⁷

At every turn, the President was exercising his "interpretive discretion"²⁵⁸ in seeing that the AUMF "be faithfully executed."²⁵⁹ That the Court repudiated the President is not *per se* indicative of unconstitutionality. The repudiation demonstrates only that a single branch of government—in this case the Supreme Court—disagreed with the executive branch's interpretation. "[I]nterpretative independence is an integral part of the separation of powers."²⁶⁰ "Only when the Congress, the President, and the courts all agree on an interpretation can the national government lawfully act on the basis of that interpretation—unless, of course, the Constitution specifically commits the decision in question to fewer than all of the departments."²⁶¹ Thus, Senator Schumer's chiding of the Administration because the Court did not accept the Executive's interpretation of the AUMF is of little consequence. The principal of coordinancy demands that "[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."²⁶² The fact that the executive branch found itself at odds with the judiciary is precisely what our system of checks and balances envisions.

It is true that, on occasion, the Bush Administration attempted to justify its policies in the Supreme Court by arguing that "the Executive possess[e] plenary authority . . . pursuant to Article II of the Constitution."²⁶³ Nevertheless, the Administration always argued that its actions were

254. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636 (codified as amended at 28 U.S.C. § 2241(e)(1)).

255. Radsan, *supra* note 237, at 554.

256. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 102(a), 122 Stat. 2436, 2459 (codified as amended at 50 U.S.C. §§ 1812, 1881, 1881g, 1885, 1885c (2008)).

257. *Id.*

258. Prakash, *supra* note 24.

259. U.S. CONST. art. II, § 3.

260. Lawson & Moore, *supra* note 41, at 1276.

261. *Id.*

262. Paulsen, *Most Dangerous Branch*, *supra* note 30, at 259 (citing Andrew Jackson, Veto Message (July 10, 1832), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson, III ed., 2d ed. 1911)).

263. Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004).

authorized under the AUMF. To the chagrin of many scholars, the Bush Administration's alternative argument ensured that "the Court was able to resolve [the issue] . . . without having to address whether the Constitution gave the executive the authority to pursue [its goal] . . . in the absence of statutory authorization."²⁶⁴ The Court's avoidance of the question of inherent and implied powers is consistent with the notion that the courts prefer the "basic principles of constitutional avoidance [which] counsel[s] in favor of focusing on congressional authorization when considering war powers issues."²⁶⁵ Moreover, it is reasonable to imagine that when the Bush Administration sought the AUMF from Congress,²⁶⁶ effectively opting to rely on the apex of Executive authority, the Administration was aware of the Court's proclivity toward constitutional avoidance.

Classic unitary executive theorists ridiculed the Bush Administration's policies as "an overly vigorous [exercise] . . . of presidential power that expanded far beyond the logical boundaries of the unitary executive."²⁶⁷ Yet, President Bush rarely invoked his so-called "inherent powers in foreign affairs and national security"²⁶⁸ pursuant to Article II and never pursued such a claim in a manner consistent with expansive Unitary Executive Theory. In fact, the Bush Administration defended the Executive's "removal power" with far more energy.²⁶⁹ President Bush's actions were never indicative of a President wielding broad emergency powers under a theory of implied and inherent powers pursuant to Article II. President Bush was an Executive fulfilling his obligation to see that the AUMF "be faithfully executed" under circumstances virtually uncharted by his predecessors.²⁷⁰ When President Bush ran afoul of one of the coordinate branches' interpretations of the Constitution, *not once* did President Bush act in unilateral defiance of their judgment or exercise a power not granted to him by the Constitution.

264. Yoo, Calabresi & Colangelo, *supra* note 2, at 729. *See also Hamdi*, 542 U.S. at 517 ("We do not reach the question whether Article II provides such authority . . ."); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The question whether the Southern District has jurisdiction over Padilla's habeas petition breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the Southern District have jurisdiction over him or her? We address these questions in turn.").

265. Bradley & Goldsmith, *supra* note 5, at 2051.

266. GRIMMETT, AUMF, *supra* note 17, at 2.

267. Yoo, Calabresi & Colangelo, *supra* note 2, at 730; *see also Pierce Jr.*, *supra* note 84, at 597 (noting that the President's removal powers do not include the power to veto the decisions of executive branch officers).

268. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

269. CALABRESI & YOO, UNITARY EXECUTIVE (2008), *supra* note 2, at 408–09 (noting that in 2002, President George W. Bush insisted on broad removal powers over the newly created Department of Homeland Security; and his assertions were ultimately sustained).

270. U.S. CONST. art. II, § 3.

C. Congress's Investiture of a Unitary Executive

In *Hamdi v. Rumsfeld*, Justice O'Connor wrote that "war is not a blank check for the President Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."²⁷¹

In *Boumediene v. Bush*, Justice Kennedy pointedly took up Justice O'Connor's torch and expanded the Court's role. Rather than support an action "executed by the President pursuant to an Act of Congress . . . [with] the strongest of presumptions and the widest latitude of judicial interpretation,"²⁷² Justice Kennedy noted that the Supreme Court would not be silenced by the decisions of the coordinate branches of government. Writing for the majority, he noted, "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."²⁷³ Moreover, Justice Kennedy noted that "[t]o hold that the political branches may switch the Constitution on or off at will would lead to a regime in which *they*, not [the] Court, say '*what the law is*.'"²⁷⁴ Justice Kennedy's opinion in *Boumediene* marks a regression in the Court's deference to the political branches in "area[s] of foreign and military affairs,"²⁷⁵ as well as an erosion of Justice Jackson's notion of deference to the coordinate branches in his *Youngstown* concurrence.²⁷⁶

The Court in *Boumediene* directly addressed the pattern of cooperation between Congress and the Executive in enacting the AUMF, DTA, and the MCA, forcefully pushing back against attempts to limit the Court's power. Yet, there remained in the chambers of Congress a historical revisionism, whereby the Executive was painted, at least by some, as "act[ing] upon the theory of a unitary executive."²⁷⁷

Senator Charles Schumer, the vice-chair of the Democratic Conference and chairman of the Subcommittee on Administrative Oversight and the Courts, asserted that "[t]he Executive [had] . . . undermined the legislative prerogative in a more than fundamental way by repeatedly insisting on

271. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (internal citations omitted).

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

273. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

274. *Id.* (emphasis added) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

275. *Id.* at 832 (Scalia, J., dissenting).

276. *See Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring) (explaining that presidential powers fluctuate depending on powers shared with Congress).

277. Schumer, *supra* note 35, at 11.

unilateral action with respect to the war on terror rather than cooperating with Congress to modify laws that might be in need of changes or updates.”²⁷⁸ During a speech on the House floor, Congressman Barney Frank concurred with Senator Schumer’s assessment, asserting that the Bush Administration “consider[ed] checks and balances to be a hindrance to effective governance.”²⁷⁹ He went on to say that the Bush Administration “believe[d] that democracy consist[ed] essentially of electing a President every 4 years and subsequently entrusting to that President almost all of the important decisions.”²⁸⁰ Mysteriously, many in Congress and in academia adopted the notion that the Bush Administration was “embrac[ing] and act[ing] upon the theory of a Unitary Executive.”²⁸¹

Despite the Court’s recognition in *Boumediene* that the President was not acting unilaterally, some in Congress appeared to remain willfully blind of Congress’s role in the enactment of the AUMF. As previously noted, the AUMF authorize[d] the President “to use *all necessary and appropriate force* against those nations, organizations, or persons *he determine[d]* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”²⁸² Congress, in forging the AUMF, gave the Executive “discretionary power . . . to be exercised *by him* upon *his* own opinion of certain facts[.]”²⁸³ The AUMF’s power was “confided to the Executive of the Union, to him who is, by the Constitution, ‘the commander in chief . . .,’ whose duty it is to ‘take care that the laws be faithfully executed’”²⁸⁴

The only powers Congress expressly reserved were the powers retained through the War Powers Resolution,²⁸⁵ which the AUMF explicitly stated was not superseded by the September 2001 authorization.²⁸⁶ Though the constitutionality of the War Powers Resolution remains dubious at best,²⁸⁷ and in spite of the routine disregard for the War Powers Resolution of his predecessors, President Bush filed a number of reports with Congress—described as “consistent with” the War Powers Resolution—that related to the war on terrorism.²⁸⁸

278. *Id.* at 8.

279. 152 CONG. REC. H5,212 (daily ed. July 13, 2006) (statement of Rep. Barney Frank).

280. *Id.*

281. Schumer, *supra* note 35, at 11.

282. Authorization for Military Force, Pub. L. No. 107-40, 115 Stat. 224 (emphasis added).

283. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (emphasis added).

284. *Id.*

285. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)); §2, 115 Stat. at 224.

286. Authorization for Military Force, Pub. L. No. 107-40, 115 Stat. 224, 225.

287. Turner, *Unhelpful*, *supra* note 194, at 685.

288. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS

Congress explicitly authorized the President's actions in response to the September 11 attacks by enacting the AUMF, the DTA, the MCA, the PATRIOT Act, and authorizing billions of dollars in unconditional appropriations.²⁸⁹ Moreover, Congress tacitly authorized the President's actions through quiescence and the continuance of the AUMF for the entirety of the Bush presidency and beyond. Under the Appropriations Clause,²⁹⁰ Congress released a \$20 billion emergency appropriations bill in October 2001 and another on July 23, 2002, for \$4 billion.²⁹¹ Under the Army Clause, Congress increased the size, force, structure, and weapons systems of the U.S. military in the fall of 2001.²⁹² In October 2002, Congress authorized a second AUMF for operations in Iraq.²⁹³ Congress never "lack[ed] the authority to intervene;"²⁹⁴ rather it refused to use the "ample powers at its disposal" under the Constitution of the United States to thwart the President's course of action.²⁹⁵

In short, Congress clothed the President in immense power. The AUMF left all determinations to the President's judgment as Commander-in-Chief, granting him the tools to combat the enemy through subsequent legislation aimed at frustrating rulings by the Supreme Court. Thus, it should come as no surprise when Justice Kennedy, in his majority opinion in *Boumediene*, pointedly addresses not the powerful unitary executive clothed in his inherent and implied Article II powers, but the empowering Congress and the empowered President.²⁹⁶

III. THE OBAMA ADMINISTRATION AND THE AUMF

The difficulty of wielding the AUMF's broad language, while avoiding the unitary executive brand, is not unique to the Bush era. In a bit of situational irony, Harold Koh's writings regarding the Bush Administration are worth keeping in mind as one reviews the many ways that the Obama Administration has elicited the unitary executive brand. In his 2006 article, Harold Koh criticized the Bush Administration's response to the September 11 attacks.²⁹⁷ Koh wrote, "the Constitution provides no single source for the

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289. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 156.

290. U.S. CONST. art. I, § 9, cl. 7.

291. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 156.

292. *Id.*

293. *Id.*

294. Schumer, *supra* note 35, at 11.

295. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 159.

296. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

297. Koh, *supra* note 221.

President's various abilities to promulgate agency regulations, to exercise prosecutorial discretion, and to conduct foreign relations."²⁹⁸ Yet, in his own way, President Obama has done more to engender the perception of a unitary executive than his predecessor. This is best illustrated in the Department of Justice's recently leaked white paper.²⁹⁹ Section II (C) reads: "[it] is well-established that '[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.'"³⁰⁰ As one scholar noted, "[a]cross the executive branch, Obama's smile has replaced Cheney's scowl."³⁰¹

A. *The O'Connor Question*

In her plurality opinion in *Hamdi*, Justice O'Connor stated that the AUMF authorized the Executive to "detain an American citizen captured in Afghanistan . . . after 9/11."³⁰² Focusing on the text of the AUMF and the context in which it was enacted, she noted that the action was legal not only because detainment is *fundamental* and *incident to waging war*, but also because it is permitted as *necessary and appropriate* force.³⁰³ Justice O'Connor also noted the fragility of her framework "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."³⁰⁴

The Obama Administration seems to share Justice O'Connor's concern, and has preferred to conduct many of its policy shifts away from Bush era tactics through Executive Orders and policy letters.³⁰⁵ The President's preference for Executive Orders and policy letters demonstrates this concern. Certainly, President Obama's policy decisions demonstrate the continuing need for the President to exercise "interpretive discretion"³⁰⁶ in an effort to ensure that the AUMF be "faithfully executed." Moreover, Executive Orders and policy letters are tools to aid the President in the process of exercising executive power. These tools allow the Executive the ability to "direct the manner in which subordinate officials exercise

298. *Id.*

299. *See generally*, DOJ White Paper, *supra* note 19, at 16 (concluding the United States may lawfully carry out lethal operations against U.S. citizens outside the United States without violating the Constitution).

300. *Id.* at 10 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

301. Radsan, *supra* note 237, at 581.

302. *Id.* at 553.

303. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (emphasis added).

304. *Id.* at 521.

305. *See generally* Radsan, *supra* note 237 (comparing the Bush and Obama Administrations and their use of presidential power).

306. Prakash, *supra* note 24.

discretionary executive power,³⁰⁷ and to quickly disseminate his interpretation of ambiguities in the law. However, if President Obama determines that “the practical circumstances of [the war on terror] . . . are entirely unlike those of the conflicts that informed the development of the law of war,”³⁰⁸ Executive Orders and policy letters allow the President the flexibility of shifting policy without congressional input.³⁰⁹

For instance, after signing the Military Commission Act of 2009,³¹⁰ President Obama issued Executive Order No. 13,491.³¹¹ The Order accomplished three objectives: it closed covert CIA prisons, rescinded “the CIA exception for interrogations, [which had been approved by Congress,] and imposed a uniform interrogation standard” for all government entities.³¹² Rather than work with Congress to enact legislation to resolve these issues, President Obama relied completely on his Article II powers.

President Obama also maintained the rendition program, which “involves the transfer of suspected terrorists between jurisdictions without complying with the elaborate procedures of extradition.”³¹³ Like the MCA, the internal “checks and controls” of the rendition program are handled by Executive Order.³¹⁴ Once again, there is no need for the President to consult with Congress.

Finally, in an effort to increase government transparency after the Bush era, the Obama Administration issued a Justice Department policy letter outlining the limited circumstances in which his Administration would invoke the State-Secrets privilege.³¹⁵ Once again, the President chose an executive instrument to “direct the manner in which subordinate officials exercise[d] discretionary executive power.”³¹⁶ Rather than seek long-term legislation subject to the rigors of bicameralism and presentment, President Obama relied exclusively on his Article II powers.

While the true reasons for the President’s decisions to use presidential devices rather than the legislative process are not obvious, these actions inherently insulate the Executive from the Legislature and allow the

307. Yoo, Calabresi & Colangelo, *supra* note 2, at 607.

308. *Hamdi*, 542 U.S. at 521.

309. Radsan, *supra* note 237, at 557.

310. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-1807, 123 Stat. 2574 (2009).

311. Exec. Order No. 13,491, 3 C.F.R. 199 (2009).

312. Radsan, *supra* note 237, at 557.

313. *Id.* at 573.

314. *Id.*

315. Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009) available at <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>; Radsan, *supra* note 237, at 577.

316. Yoo, Calabresi & Colangelo, *supra* note 2, at 607.

President “to direct the manner in which subordinate officials exercise discretionary executive power.”³¹⁷ As one scholar noted:

[T]he unitary executive is here to stay. Precisely because the American constitutional executive is a unitary power, President Obama can close Guantanamo unilaterally, without Congress’s leave . . . revoke Bush’s executive orders regarding secrecy . . . , renounce Bush Administration memoranda attempting to justify torture, and . . . prohibit further acts of torture during his tenure in office.³¹⁸

While few of these policy shifts invoke the AUMF outright, they demonstrate areas of disagreement between the Bush and Obama Administrations regarding the matter of “interpretive discretion.”³¹⁹ While many of these policy shifts represent walk-backs of the Bush presidency’s most aggressive interpretations under the AUMF, there remains at least one area under the AUMF that the Obama Administration has expanded with vigor.

B. The Predator/Reaper Drone Program and the AUMF

Since President Obama’s historic election in 2008,³²⁰ few issues have captured the attention of the American people like the White House’s secret Predator/Reaper Drone Program. Though concerns surrounding the Program’s legality had long been percolating through the legal academy, the groundswell of questions surrounding the Program culminated when NBC News obtained a 16-page memo providing “details about the legal reasoning behind one of the Obama Administration’s most secretive and controversial polices: its dramatically increased use of drone strikes.”³²¹ Concerns surrounding the Predator/Reaper Drone Program were at the forefront of American thought during Senator Rand Paul’s (Republican

317. *Id.*

318. Sotirios A. Barber & James E. Fleming, *Constitutional Theory and the Future of the Unitary Executive*, 59 EMORY L.J. 459, 459 (2009). However, this proved to be an overestimation of the unitary executive’s authority as it failed to account for the Legislature’s power over appropriations. See *Obama’s Promise to Close Guantanamo Prison Falls Short*, NAT’L PUB. RADIO (Jan. 23, 2013, 3:35 AM), <http://www.npr.org/2013/01/23/169922171/obamas-promise-to-close-guantanamo-prison-falls-short> (stating that Congress passed legislation to stop Obama from closing Guantanamo unilaterally).

319. Prakash, *supra* note 24.

320. Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 4, 2008, http://www.nytimes.com/2008/11/05/us/politics/05elect.html?pagewanted=all&_r=0.

321. Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS, Feb. 4, 2013, http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite.

from Kentucky) thirteen-hour talking-filibuster of the nomination of John Brennan, President Obama's nominee for Director of the CIA.³²² Senator Paul's stated purpose for the filibuster was to seek clarification from the Administration as to the Drone Program's geographic limitations and targeting criteria.³²³ Few could argue that the Administration had been forthcoming with answers regarding the Predator/Reaper Drone Program. What appeared remarkably clear was that the Administration believed that the Drone Program allowed the President to "exercise prosecutorial discretion, and to conduct foreign relations" unilaterally.³²⁴ Few policies in the Obama White House engendered the unitary executive brand as squarely as the Predator/Reaper Drone Program.

As previously discussed, the expansive theory of the unitary executive flows from three basic understandings: the Executive Vesting Clause³²⁵ grants "[t]he executive Power . . . in a President of the United States of America,"³²⁶ "the foreign affairs power is an executive one,"³²⁷ and "the president . . . has the . . . constitutional authority to initiate military hostilities without any authorizing legislation."³²⁸ A brief review of the language of the Department of Justice's (DOJ) leaked white paper regarding the Predator/Reaper Drone Program reveals a President who neither embraces nor rejects these three basic understandings of expansive Unitary Executive Theory.³²⁹ Instead, like his immediate predecessor, he is content to nest his authority in the apex of executive power announced by Justice Jackson in his "now-canonical"³³⁰ concurring opinion in *Youngstown*.³³¹ Once again, the AUMF rendered the need for an Executive to invoke inherent and implied Article II powers superfluous. Every aspect of President Obama's Drone Program is "drawn from the nature of the power"³³² granted to the Executive by the AUMF. The President is squarely within the first category of Justice Jackson's concurrence, acting "at the

322. Jim Michaels, *Rand Paul Ends Epic Filibuster Over Brennan*, USA TODAY, Mar. 7, 2013, <http://www.usatoday.com/story/news/politics/2013/03/07/rand-paul-brennan-filibuster/1969869/>.

323. *Id.*

324. Koh, *supra* note 221.

325. U.S. CONST. art. II, § 1, cl. 1.

326. *Id.* (emphasis added).

327. YOO, POWERS OF WAR AND PEACE, *supra* note 3, at 18.

328. *Id.* at 165.

329. DOJ White Paper, *supra* note 19.

330. Katyal & Tribe, *supra* note 97.

331. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

332. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (arguing for a broad interpretation of executive powers when the United States is in imminent danger); *see also* Militia Act of Feb. 28, 1795, ch. 36, 1 Stat. 424, *repealed by* Militia Act of 1903, ch. 196, 32 Stat. 775 (authorizing the Executive to call forth the militia when the United States is in imminent danger).

height of his powers because he [is] act[ing] with the consent of Congress under full statutory authority.”³³³

To begin, on two occasions the DOJ’s white paper invokes the President’s “constitutional responsibility to protect the country.”³³⁴ Though the white paper is laden with legal citations, it does not, on either occasion, specify the particular provision of the Constitution it relies on for this responsibility. This ambiguity leaves open the question of whether the Obama Administration is asserting a notion of “a presidential emergency power” or a “general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm” which is, “strictly speaking, *not* a doctrine of emergency power.”³³⁵ The white paper goes on to note that, “[i]t is well-established that ‘[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention’ . . . because such matters ‘frequently . . . involve the exercise of a discretion demonstrably committed to the executive *or* legislature.’”³³⁶ The white paper also insulated the Executive from the legislative branch noting that

the legislature may enact a criminal prohibition in order to limit the scope of the conduct that the legislature has otherwise authorized the Executive to undertake pursuant to another statute *But* . . . it would not make sense to attribute to Congress the intent to criminalize . . . activities undertaken . . . in the legitimate exercise of their otherwise lawful authorities³³⁷

The white paper does not expand on the authorities contemplated by other “lawful authorities.” Finally, the white paper notes, “under the Constitution [as opposed to the AUMF] . . . the President may authorize the use of force against a U.S. citizen who is a member of al-Qa’ida or its associated forces and who poses an *imminent* threat of violent attack against the United States.”³³⁸ The white paper notes that “*imminent* . . . does not

333. Julian G. Ku, *Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. PA. J. CONST. L. 615, 616 (2009).

334. DOJ White Paper, *supra* note 19, at 1.

335. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (emphasis in original).

336. DOJ White Paper, *supra* note 19 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981); *Baker v. Carr*, 369 U.S. 186, 211 (1963)) (emphasis added).

337. *Id.* at 12 (emphasis added).

338. *Id.* at 15 (emphasis added).

require . . . clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”³³⁹

Despite the expansive unitary executive overtones discussed above, the white paper invokes the AUMF, stating that the President has the “authority to respond to the imminent threat posed by al-Qa’ida and its associated forces”³⁴⁰ no less than seven times—once again demonstrating a presidential penchant to remain at the height of presidential power described in Justice Jackson’s *Youngstown* concurrence. While the white paper implies that the President has independent constitutional authority to take military action to protect the nation, it does not rest its authority on any amorphous invocation of inherent and implied Article II powers, nor does it outright reject such a notion. That aside, the white paper does offer some insight into the Obama Administration’s interpretation of the AUMF.

First, DOJ’s white paper clarifies the Administration’s understanding that the AUMF authorized the President “to use *all* necessary and appropriate force against those nations, organizations, or persons *he determine[d]* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”³⁴¹ The white paper also establishes that the President’s determination as to whether a person “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”³⁴² is unaffected by the potential target’s citizenship.³⁴³ In other words, U.S. citizens are as likely as not to be targets under the AUMF. This interpretation of the AUMF is bolstered by the Court’s opinion in *Hamdi*, which announced that a U.S. citizen who has joined enemy forces in the armed conflict against the United States and who is “an imminent threat” is not entitled to the protections of the Due Process Clause.³⁴⁴ What remains unclear is whether the Administration’s definition of “imminent”³⁴⁵ is congruent with the Court’s. The white paper also makes abundantly clear the Administration’s belief that “the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes.”³⁴⁶

Beyond the white paper, additional public remarks by high-level officials in the Obama Administration provide more information regarding the Predator/Reaper Drone Program. For instance, the Administration has

339. *Id.* at 7 (emphasis added).

340. *Id.* at 1.

341. Authorization for Military Force, Pub. L. No. 107-40, 115 Stat. 224 (emphasis added).

342. *Id.*

343. DOJ White Paper, *supra* note 19, at 3; *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

344. *Hamdi*, 542 U.S. at 519, 552.

345. DOJ White Paper, *supra* note 19, at 3.

346. *Id.* at 3.

been clear that the AUMF is not an open-ended authority to target any person deemed to be a terrorist, but is limited to al-Qa'ida and associated forces.³⁴⁷ The question remains whether some inherent, protective, or emergency power would allow the President to utilize the Predator/Reaper Drone Program to target existential threats beyond the reach of the AUMF. Furthermore, Administration officials have noted that the purpose of the Program is not to seek vengeance for past crimes, but “to mitigate an actual ongoing threat”³⁴⁸ Finally, Administration officials have repeatedly asserted their belief that targeted killings “are [a] core function[] of the Executive Branch” and not subject to judicial review³⁴⁹—an assertion which Judge Rosemary M. Collyer of the United States District Court for the District of Columbia found troubling during the government’s motion to dismiss a *Bivens* action brought by relatives of Anwar al-Awlaki, Abdulrahman, and Samir Khan in a 2011 drone strike in Yemen.³⁵⁰

Nevertheless, the Predator/Reaper Drone Program, as described by the Obama Administration, fits squarely within the parameters of the AUMF. The resulting executive review of targets is not the product of a unitary executive, but of a statutory grant of authority from the Legislature to the Executive. As has been stated by the Administration and is supported in the language of the AUMF, as well as the Supreme Court’s decision in *Hamdi*, U.S. citizenship is not a constitutional force field against executive targeting.³⁵¹ Though no court has reached the merits of a claim arising from the Predator/Reaper Drone Program, and it is doubtful that one will find the jurisdiction to do so,³⁵² it is equally unlikely that a judiciable claim challenging the Executive’s Drone Program would be successful.

There are several reasons such a claim would likely fail before the courts. First, President Obama’s authority, according to Justice Jackson’s *Youngstown* concurrence, is at its zenith because the President is “act[ing]

347. Jeh Charles Johnson, Gen. Counsel, Dep’t of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Dean’s Lecture at Yale Law School (Feb. 22, 2012), available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>.

348. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Efficacy and Ethics of U.S. Counterterrorism Strategy, Remarks at Woodrow Wilson International Center for Scholars (April 30, 2012), available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

349. Johnson, *supra* note 347.

350. Scott Shane, *Judge Challenges White House Claims on Authority in Drone Killings*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/20/us/politics/judge-challenges-white-house-claims-on-authority-in-drone-killings.html>.

351. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

352. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46 (D.D.C. 2010) (“Viewed through these prism, it becomes clear that plaintiff’s claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-judiciable under the political question doctrine.”).

with the consent of Congress under full statutory authority.”³⁵³ Any action President Obama takes under the Program would be “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might” challenge him.³⁵⁴ Second, as has been demonstrated, the Program is designed with the AUMF in mind. The Program’s selection and review processes are consistent with the statutory language, and the President’s targeting criteria are sufficiently narrow so as to fall within the proscribed language of the AUMF. Indeed, given that the AUMF has no geographical limitation, the Program could likely target a U.S. citizen on U.S. soil and still sustain legal scrutiny so long as the President *determined* the target was a member of the exclusive target cohort enumerated in the AUMF.

In sum, the use of Executive Orders and policy letters may demonstrate President Obama’s bend toward *classic* Unitary Executive Theory, but in matters of “foreign affairs and national security,”³⁵⁵ like his predecessor, President Obama is content to ground his actions in the AUMF—once again ensuring that the President’s actions remain nested in Justice Jackson’s “widely accepted categorization of presidential power.”³⁵⁶ Nevertheless, it can be reasonably argued, given the DOJ white paper, comments made by senior White House officials, and arguments made by White House counsel before the U.S. District Court, that the Administration conceives of some executive authority beyond the AUMF that sanctions the Predator/Reaper Drone Program. That power conceivably flows from the Constitution: be it inherent and implied powers, protective powers, or emergency powers.

CONCLUSION

Legal scholars continue to provide ample scholarship in favor of and in opposition to expansive Unitary Executive Theory. The question whether the President harbors emergency powers as an outgrowth of inherent and implied powers pursuant to Article II has been argued before the Supreme Court; yet, the scope of the Executive’s inherent and implied powers in the areas of foreign affairs and national security under Article II of the Constitution remains amorphous. The scholarly debate, sparked by the Bush Administration’s response to the attacks on September 11, 2001, overstated the Administration’s proclivity for invoking the Unitary Executive Theory.

353. Ku, *supra* note 333.

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

355. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

356. Bradley & Goldsmith, *supra* note 5.

Moreover, classic unitary executive theorists never addressed the possibility that, in practice, President Bush preferred the more restrictive, but “widely accepted,”³⁵⁷ power of Justice Jackson’s concurring opinion in *Youngstown*, to the unfettered, but constitutionally uncertain, inherent and implied Article II powers. Congress did not thrust authorization upon President Bush after September 11, 2001—the Bush White House sought the AUMF from Congress. The Bush White House sent a draft of the AUMF to Congress on September 12, 2001.³⁵⁸ This is hardly the kind of action that resembles a White House enamored with expansive Unitary Executive Theory. The scholarly uproar over the reach of Article II’s inherent and implied powers was more an academic debate than one borne out in presidential practice. Post-September 11 Presidents have preferred the surety and common acceptance of Justice Jackson’s “widely accepted categorization of presidential power”³⁵⁹ in *Youngstown* to the less conventional, less tested, claim of inherent and implied powers in “foreign affairs and national security”³⁶⁰ pursuant to Article II.

Finally, beyond Justice Jackson’s concurrence, expansive Unitary Executive Theory is unlikely to be realized so long as Congress remains at the outer edges of wartime decision-making. Presumably, Congress is content to broadly authorize the executive branch to pursue military objectives and to rely on the Executive’s exercise of his “interpretive discretion”³⁶¹ in prosecuting hostilities, leaving the supervision of the Executive to the judicial branch. Moreover, given Congress’s sweeping authorization under the AUMF, there is simply no reason for a President to step outside of the surety of Justice Jackson’s “widely accepted”³⁶² concurrence in *Youngstown*. It is as likely as it is not, given the correct set of circumstances, that Justice Jackson’s approach to executive power will yield an Executive as powerful as expansive Unitary Executive Theory. As evidenced in this Article’s brief overview of the Obama Administration’s use of the AUMF, it is easier to operate within a broad grant of congressional authority, unassumingly alluding to a reserved inherent power, than to brazenly assert an implied power that has rarely, if ever, been vindicated. The exoneration of expansive Unitary Executive Theory will have to wait for another exigency.

357. *Id.*

358. GRIMMETT, AUMF, *supra* note 17, at 2.

359. Bradley & Goldsmith, *supra* note 5.

360. Yoo, *Unitary, Executive, or Both?*, *supra* note 3, at 1939.

361. Prakash, *supra* note 24.

362. Bradley & Goldsmith, *supra* note 5.

