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INTERPRETING FORCE AUTHORIZATION

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ABSTRACT

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

I. INTRODUCTION

The most visible and publicly accessible national security act undertaken by Congress, “declaring war” is a vestige of the past, unlikely to be revived in the foreseeable future. Post World War II, declarations of war have been overtaken by statutory authorizations for the use of military force (“AUMFs”).

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

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grants of power and the AUMF lies dormant in the annals of federal code–forgotten, or worse, actively ignored.

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

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

This Article argues that the most important aspect in interpreting the scope of congressional force authorizations is not text, but time. The insufficiency of current doctrine to account for temporal conditions is manifest. As Congress debated heightened tensions in the Middle East, one member expressed “shock” that the President already possessed congressional authorization for force in the region per a 1957 statute. As the congressman points out, the “all but forgotten” resolution “places in the hands of the President the exclusive authority to make the determination that military action is required and to order into action military forces without limit [and] relieves the President of the necessity of consulting with the Congress.” These comments, made in 1969, express unequivocal fears of the operability of a “forgotten” resolution

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1 There are exceptions to this general rule, most notably the rule of desuetude in which a statute is considered inoperable based on a long period of non-enforcement. The extreme conditions necessary to give rise to desuetude reflect the strength of the general rule of statutory immutability. Only when __ is a statute considered to have fallen into disrepair. Likewise, the stakes of desuetude are absolute. The statute is either completely inoperative or completely authoritative.

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

3 115 Cong. Record at 40228 (Dec. 16, 1969) (Findley, P.) (saying that the existence of the authorization would be “a shock-to most Americans, including, I daresay, most of the Members of Congress.”)

4 Id.
passed only a decade prior.\textsuperscript{5} Forty-five years later, that same 1957 resolution remains “in full force on the statute books”.\textsuperscript{6}

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

In Part I of this paper, I set out the role and import of AUMFs over history by outlaying their constitutional, statutory and declarative significance.

In Part II, I analyze authorizations for force implemented over the past sixty years and the corresponding executive actions taken under their power. This analysis reveals and circumscribes an invisible doctrine that has intuitively been applied by the executive relative to AUMFs, and which greatly differs from other statutory interpretation regimes. Executive AUMF interpretation, as practiced, flows from acknowledgements of the institutional deficiencies structurally accounted for in constitutional design of the U.S. government, as well as the process of force authorizations, which Congress deliberates with time and informational constricts uncharacteristic of status quo statutory deliberations.

Part III demonstrates that the statutory decay observable in congressional and executive behavior, while never explicitly articulated as such, reflects planned obsolescence with behavioral patterns that follow four phases of decay from ultimate authority to none at all. As I outline and define, these phases progress through periods of textless conflict functionalism, text-based executive constraint, textless democratic functionalism, and total inoperability. As I argue, making visible the “invisible” decay of AUMFs, formulating AUMF decay theory, and solidifying interpretive doctrine distinct from other statutes


\textsuperscript{6} Id.

\textsuperscript{7} While governmental and public attention has been trained on the group the Islamic State of Iraq and the Levant (ISIL), there is increasingly reason to believe that other groups pose even more substantial and imminent threats to United States national security. See Mark Mazzetti, Michael S. Schmidt, and Ben Hubbard, “U.S. Suspects More Direct Threats Beyond ISIS”, N.Y. TIMES, Sept. 20, 2014 (citing governmental officials as saying that the “intense focus on [ISIS] had distorted the picture of the terrorism…and that the more immediate threats still come from traditional terror groups like Khorasan and the Nusra Front.”)
offers critical institutional advantages. In concluding Part III, I articulate the underpinnings of new theoretical model for AUMF decay based upon the foregoing analysis.

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

II. THE ROLE AND SIGNIFICANCE OF AUTHORIZING FORCE

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

The post-9/11 era of national security scholarship has focused on executive power. This emphasis is understandable. Throughout the 20th century, the Executive branch steadily gathered power as Congress steadily ceded it. Transfer of authority to the President reflected changes in both the governmental and factual landscape. Executive consolidation of power was especially potent in foreign relations, the scope of which grew as U.S. and foreign interests became increasingly interconnected and which caused the migration of policy questions once

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

9 Governmentally, the rise of the administrative state, and an enhanced appreciation of the institutional advantages of the Executive branch in seeking swift and cohesive action were both drivers of he consolidation of Executive power.
considered squarely within the purview of domestic politics to enter the realm of “foreign policy”.

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

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

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10 See John Yoo, The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11, at 301 (2005) (comparing post-9/11 period and Great Depression and concluding “Globalization has launched a similar transformation [of presidential power], with the same change of constitutional confrontation and breakdown, as the one that occurred almost a century ago.”).


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

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

The administration also eschewed genuine consultation with Congress, both formal and informal, with members of the President’s own party as well as members of the opposition. [...] The Bush administration’s failure to engage Congress eliminated the short-term discomforts of public debate, but at the expense of many medium-term mistakes. It also deprived the country of ... about the nature of the threat and the proper response that would have served an educative and legitimating function regardless of what emerged from the process. And it hurt the executive branch in dealing with the third branch of government as well. Courts have been much more skeptical of the President’s counterterrorism policies than they would have been had the President secured Congress’s and the country’s express support.
military commissions, surveillance, and UAV strikes all represent issues in which detailed congressional involvement lagged initial policy action by the executive branch. As such, much of the framing (and democratic vetting) of post-September 11 law relative to U.S. foreign policy was undertaken Congressional action or input largely absent.\footnote{Id.}

Perhaps due to these dynamics, it has become fashionable to view Congress as a toothless, ceremonial stage prop whose role in U.S. foreign relations has been subjugated by an “Imperial Presidency” with ultimate authority reigning supreme within the realm of national security.\footnote{See e.g., Glenn Sulmasy, Executive Power: The Last Thirty Years, 30 U. Pa. J. INT’L L. 1355, 1356 (2009) (“The last thirty years have witnessed a continued growth in executive power— with virtually no check by the legislative branch. […] the bureaucratic inefficiencies of the Congress have crippled its ability to actually ‘check’ the executive, for fear of being perceived as ‘soft on terror’ or ‘weak on defense.’”)}

The reality is much more complex. While congressional approval is rarely (if ever) a prerequisite for Executive action in national security matters, it is always a booster for presidential authority. As a doctrinal matter, while the scope of independent presidential power in initiating hostilities is undefined, there is no doubt that presidential power can reach no higher than when exercised in accordance with the clearly articulated will of the legislature.\footnote{Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635 (Jackson, J., concurring). While the Youngstown paradigm unmistakably makes room for} As articulated by Justice Jackson in Youngstown, the President’s authority “is at its maximum” when he “acts pursuant to an express or implied authorization of Congress.”\footnote{Id. at 636.} In contrast, when the President engages in “measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”\footnote{Id. at 635.}

Within the political arena, the harmonization of Congressional and Executive action grants a president far greater flexibility in implementing policy than exists with a backdrop of legislative inaction, or worse, legislative contradiction.\footnote{Id. at 635-38.}

A. Constitutional Significance of AUMFs

The Constitution affords Congress and the President various constitutional powers at play in U.S. foreign relations. The extent to which these executive and congressional powers are exclusively vested

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\footnote{Jack L. Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 206-07 (2007).}
in either branch, and the extent to which one branch can limit the other’s independently held power is constantly in debate.\textsuperscript{20} What cannot be debated is that when the branches act in concert, the federal government’s power is at its most potent and the validity of its actions are least questioned. As a constitutional matter, AUMFs operate squarely at this intersection of power, transforming executive acts from those that must be explained to ones for which no explanation is necessary.

Justice Jackson’s famous concurrence in \textit{Youngstown} makes the determination of constitutional authority dependent upon determining the scope of authority granted to the president through congressional authorization. Thus the legality of presidential action becomes a question of statutory interpretation, first of whether authorization exists and then of the scope of the authority granted.

Justice Jackson’s vision of executive power is fundamentally grounded in an institutionalist vision of the constitution.\textsuperscript{21} His framework for assessing the constitutionality of executive acts reflects the belief that the Constitution’s separation of powers regime distributes institutional competencies and advantages among the branches for which the act of governing would require the navigation and exposure to the institutionalist competencies present in each branch.\textsuperscript{22} In this view, both the executive and legislative branch possess institutional strengths that are complementary and function together interdependently. While the executive is nimble and unified, the legislature is multitudinous and deliberative.\textsuperscript{23} When those institutional strengths align in determining a course of action, it is eminently sensible for the judiciary to offer a wide berth in gauging the legal appropriateness of governmental power.

The boundaries of statutory authority flow only from internal limitations and the external boundaries set by hierarchically superior law.\textsuperscript{24} Under the models of statutory interpretation embraced by the

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\item \textsuperscript{20} The debate regarding the scope of the President’s independent ability to initiate hostilities is particularly heated and longstanding. However, the resolution to that question is not relevant here as, regardless of how one might plausibly answer that question, there is no doubt that presidential powers are expanded when coupled with an authorization for the use of force by Congress.
\item \textsuperscript{22} See Edward Swaine, \textit{The Political Economy of Youngstown}, 83 S. CAL. L. REV. 263, __ (2010) (discussing Youngstown and institutional incentives created by the Jackson framework).
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} In this context, such “internal limitations” include not only the parameters of authority set out by the text of individual statute, but also the limitations
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judiciary, the meaning of any statute is fixed and unalterable from the
time of its passage into law. The cornerstone of ascertaining this
embedded meaning begins with the statute’s text. Only where the text is
lacking is the jurist expected to move to secondary interpretive devices
such as legislative history.

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

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

**B. Statutory Significance of AUMFs**

AUMFs automatically trigger the application of a variety of
statutory provisions with both domestic and international effect. When
declarations and force authorizations were considered as fulfilling
separate purposes, the differentiation in part reflected different statutory
results and differences in language. That is no longer the case.

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25 See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1480 (1987) (exploring frailties within current paradigm of statutory interpretation in which “approaches to statutory interpretation treat statutes as static texts.”)

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

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

28 Id.; cf. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (“[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.”).
Contemporary AUMFs possess equivalent breadth of declarations, leading to the inevitable conclusion of interchangeability not just in international law but for domestic law as well.

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

AUMFs have also triggered the application of a variety of legal effects not to an instrument of law such as a declaration of war or a congressional force authorization, but when the United States is “at war” or during a declared emergency. These statutes impose new limitations or empowerments in administrative law, federal employment law, immigration, international trade, energy regulation, criminal procedure, and even student financial assistance.

31 See 10 U.S.C. § 2644 (authorizing assumption of control of transportation systems to transport troops, weapons, and other emergency materials)
32 See 10 U.S.C.A. § 519 (provides that “in time of war or of national emergency declared by Congress” enlistments in armed forces shall are to be for duration of conflict plus six months); 10 U.S.C.A. § 1161(a) (providing that commissioned officers may not be dismissed from service “in time of war, [except] by order of the President.”).
33 The Bush Administration asserted that the 9/11 AUMF authorized wiretaps without judicial order without time limits. FISA was subsequently amended to authorize such investigative tools without a court order for foreign intelligence purposes in “emergency” circumstances as determined by the Attorney General. See, e.g., 50 U.S.C. § 1802 (electronic surveillance of certain non-U.S. persons without a court order for periods up to one year in specific circumstances).
34 See e.g., 10 U.S.C. § 2663(b) (allowing seizure of land, either permanently or for temporary use, for military purposes including the production of munitions or the to provide power necessary for the war effort “in time of war or when war is imminent”); 10 U.S.C. § 3014(f) (lifting troop caps); 10 U.S.C.A. § 906 (provides that “any person who in time of war is found lurking as a spy or acting as a spy” and compromising defense, is to be tried by court-martial and executed if convicted).
35 See e.g., 5 U.S.C. § 551(1) (excluding armed forces activity “exercised in the field in time of war” from administrative procedure requirements).
36 See e.g., 5 U.S.C. § 5335(b) (pay increases); 4 U.S.C. § 8332(g) (retirement benefits).
37 See e.g., 8 U.S.C. § 1231(b)(2) (authorizing deportation to states other than the home country of the immigrant in question when the “United States is at war”)
While these provisions don’t require an AUMF to be considered activated, their operability is typically assumed when an AUMF is in force.

C. Declarative Significance of AUMFs

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

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

38 See e.g., 12 U.S.C. § 96a (empowers President to regulate or prohibit any transactions involving foreign nations and foreign nationals “during the time of war”).

39 See e.g., 16 U.S.C. § 824a(c) (allows regulators to order energy facilities as to energy production and transmission “during the continuance of any war in which the United States is engaged”).

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

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

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


44 Bradley and Goldsmith, supra note __ at 2059. As historians have thoroughly documented, the phenomenon of “undeclared wars” has persisted throughout American history. See e.g., J.F. Maurice, HOSTILITIES WITHOUT DECLARATION OF WAR: AN HISTORICAL ABSTRACT OF THE CASES IN WHICH HOSTILITIES HAVE OCCURRED BETWEEN CIVILIZED POWERS PRIOR TO DECLARATION OR WARNING: FROM 1700 TO 1870 (1883); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVÉ BRANCH? 54–55 (1981); John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167, 170–75 (1996).
The global demise of war declarations primarily impacts their disintegrated efficacy within the international legal system.\textsuperscript{45} With the introduction the United Nations and the Geneva Conventions, the international legal purpose of declarations has been displaced.\textsuperscript{46} In the post-World War II international legal system the triggering effects once marked by formal recognition of conflict was displaced by the actual existence of an armed attack or use of force thus rendering a party’s refusal to recognize the conflict as immaterial to the legal questions at hand.\textsuperscript{47}

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

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

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\item \textsuperscript{45} See Prakash, \textit{supra} note \_ at 28-30; Bradley and Goldsmith, \textit{supra} note \_ at 2061 (noting that “the international law role for declarations of war has largely disappeared.”)
\item \textsuperscript{46} The UN Charter and Geneva Conventions represent the definitive death of the international legal purpose, one that had been suffering a slow decline over the course of centuries. See Hallett, \textit{supra} note \_ at 105-10.
\item \textsuperscript{47} See \textit{International Committee of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 19-20} (Jean S. Pictet ed., 1960) (international law of war rules not limited to “cases of declared war” but also apply to “any other armed conflict”, regardless of any states formally recognizing the existence of a “state of war”).
\item \textsuperscript{48} See e.g., Paul D. Swanson, \textit{Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations}, 97 CORNELL L. REV. 1557 (2012).
\item \textsuperscript{49} See Matthew C. Kirkham, Hamdan v. Rumsfeld: A Check on Executive Authority in the War on Terror, 15 TUL. J. INT’L & COMP. L. 707 (2007).
\item \textsuperscript{50} While declarations have faded as legal instruments, their expressive aims have not.
\item \textsuperscript{51} Throughout American history, declarations of war were never found alone, but rather always in the company of an authorization of force. In tandem, declarations of war served an internal and external expressive function that has always been temporally limited.
\item \textsuperscript{52} The rise described here is limited to informal declarations offered within the national security context, although the corresponding rise of “war” declarations on other social issues reflects policy makers understanding as to the sociological and rhetorical power of war declarations. While the wars on poverty
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coincided with the dramatic increase of informal declarations within the national security realm. In recent years, government officials have stated that the United States is at war against terrorism, “Islamic fascists,” Al Qaida, Al Qaida in the Arabian Peninsula, ISIL, terrorism, Moamar Qadhafi, among others. Internally, declarations are decisional vehicles in which the justification and aims of armed conflict are articulated and specified. As a matter of domestic legal process, that means that declarations provide the framework for public understanding as to the limits of the conflict in which the United States is entering.

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

III. THE FOUNDATIONS OF FORCE AUTHORIZATION DECAY

Given the temporally limited nature of declarations throughout U.S. history contemporary AUMFs should be read similarly. They serve as the formal relevant congressional means sufficient (in some...
circumstances required) for authorizing the use of force. They bring into force emergency provisions designed for applicability during wartime.

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

Relatively, commentators are inquiring as whether the 9/11 AUMF includes an authorization by the President to use military force for the purposes of combating terrorism more generally. Most urgently, this question has arisen relative to an unfolding bombing campaign targeting the Islamic State of Iraq and the Levant (ISIL).

Regardless of outcome, this analysis is always anchored traditional models of statutory interpretation, assessing the text, the intentions of the legislature, and ultimately the policy implications of varying conclusions.

A. Authorization Decay in Practice

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

1. Executive recognition of decay.

As the Soviet Union was mired in conflict in Afghanistan during the 1980s, the American people would likely have been tremendously surprised to learn that Congress had fully authorized President Reagan

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

59 Alternatively, this groups is self-described as “The Islamic State” and typically described by media outlets as the Islamic State of Iraq and Syria” (ISIS). ISIL appears to be the preferred terminology of U.S. government officials, the relevant actors for this Article.

60 See e.g., Charlie Savage, “White House Invites Congress to Approve ISIS Strikes, but Says it Isn’t Necessary”, NY TIMES, Sep. 11, 2014 (discussing 9/11 coverage, “The Islamic State was an Al Qaeda affiliate, and it is not anymore. So technically, the A.U.M.F., as I understand it, would not cover the Islamic State.”); Paul Waldman, “Will lawmakers really leave town without voting on war?” WASHINGTON POST, September 11, 2014 (examining possible coverage of 9/11 AUMF and 2002 Iraq AUMF for purpose of authorizing force against ISIL).
to intervene with military force “in the general area of the Middle East” to combat “international communism.” After the deployment of ground troops to Afghanistan, the public would likely have also been puzzled by President Reagan’s subsequent speech announcing his expansion of the conflict into Cuba and how these actions had also been fully authorized by Congress in a wholly separate authorization which embraced the use of force against Cuba’s communist regime.

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

61 Middle East Resolution, Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957) (“if the President determines the necessity thereof, the United States is prepared to use armed forces”).


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


67 Professor Sean Murphy provides a highly illuminating and detailed assessment of this argument as a matter of international law. See Sean D. Murphy, Assessing the Legality of Invading Iraq, 92 GEO. L.J. 173 (2004).
prior to the 1991 Gulf War provided the President with authorization for invading Iraq. This fact is even more tremendous given that the White House aggressively pursued a nearly identical line of reasoning as to U.N. Security Council authorization of the conflict.

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

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

68 Professor Stephen Griffin has recently provided an excellent examination of the existing conflict against non-state actors through the perspective of the indefinite nature of the Cold War. See Stephen M. Griffin, Long Wars and the Constitution (2013).


congressional authorization without expending a prohibitive amount of political capital.

It also appears likely that presidential hesitancy in relying on aging authorizations reflects the reasonable belief that to do so would, at best, be viewed as legally questionable by the courts.\(^{72}\)

2. **The Invisible Doctrine of Decay**

Formally, the judiciary’s approach to force authorizations reflects the standard text-based model.\(^{73}\) In practice, however, the limited body of cases addressing issues as to national security generally and force authorization in particular appear hopelessly inconsistent. Despite its incoherency, the judiciary has definitively embraced the self-expiring nature of force authorizations and, more haphazardly, reflected an increasing skepticism as to the potency of force authorizations with age. In short, an implicit acknowledgement of AUMF decay.

a. **The failure of classic text-driven interpretation.**

Questions of statutory interpretation are generally limited to a single layer - the meaning and scope of the statute being interpreted. In contrast, force authorizations serve as the hub of an enormous constellation of regulations laws.\(^{74}\) As such, decisions as to the validity and scope of AUMFs ripples widely through the governing law of the United States.\(^{75}\)

\(^{72}\) See *United States v. Pfluger*, 685 F.3d 481, 486 (5th Cir. 2012) (noting that while the 1991 Gulf War has not concluded according to the government, that “[w]e admit that it would seem suspect if the Government had tried to indict Pfluger solely based on the suspension of limitations triggered by that conflict.”)


\(^{74}\) Several of these laws are set out above. See infra at __. The Governmental Accountability Office has produced a comprehensive list of laws activated by AUMFs, declarations of war, and declarations of emergency. Jennifer K. Elsea & Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force*, Congressional Research Service, April 18, 2014.

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

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

A commitment to text-driven interpretation by the judiciary means, at least theoretically, the meaning of any statute is fixed from the time of its passage into law. If the text dictates the scope of authority of the statute, then that authority cannot change absent a change to the statute’s text. Instead, the contours of statutory authority flow only


77 Even when those secondary mechanisms are invoked it is in service to the proposition of seeking the statute’s fixed meaning, or at least in service of the statute’s original purpose. See Eskridge, supra note __, at 1544.


80 To be clear, a statute can contain text that is self-limiting through the expression of an implicit conditional termination or an explicit specific temporal limitation (such as a sunset provision). Such limitations are largely inapplicable in the AUMF context. The 1983 Lebanon AUMF contains both an explicit specific and conditional temporal limitations. In that AUMF Congress’s authorization expired at “the end of the eighteen-month period” from enactment. However, it the authorization would expire prior to the passage of eighteen months if (1) other allied foreign forces withdrew; or (2) the United Nations or Government of Lebanon assumed responsibilities of the Multinational Force; or (3) other “effective security arrangements” were implemented; or (4) all other countries withdrew from participation in the Multinational Force. See Multinational Force in Lebanon Resolution, P.L. 98-119, 97 Stat. 805, October 12, 1983 [S.J.Res. 159].
from internal limitations and the external boundaries set by hierarchically superior law.81

Generally, the doctrinal inflexibility of statutes as immutable instruments of authority is offset by the inherent pliability of judicial interpretation.82 While the text of law may be fixed, the meaning of that text often changes over time, resulting in the expansion, contraction or alteration of the nature or scope of authority of the statute in question.83

Under normal circumstances, a text-driven view of statutory immutability incentivizes several positive legislative behaviors. Understanding statutory authority as timeless rewards careful draftsmanship to avoid the difficulties (both political and resource related) that accrue to being forced to revisit past legislation due to unforeseen or unintended consequences.84

Requiring active legislative action to change the scope or authority of past law might also combat responsibility shifting. In theory, where statutory authority is immutable, legislators cannot effectively blame other institutions for the breadth and scope of the statute in question.85 After all, the legislature is where both the statute was born, and the only entity empowered to oversee its death absent Constitution based infirmities.

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

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

82 See Peter L. Strauss, The Supreme Court, Textualism, and Administered Law, 20-FALL ADMIN. & REG. L. NEWS 1, 4 (“Treating statutes as static events, forever fixed in meaning at the time of their enactment, can be disruptive even in the context of the common law, where the courts are directly responsible for change.”).

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

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

85 See Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 GEO. WASH. L. REV. 317, 343 (2005) (when the judiciary interprets the meaning of the statute, “‘congressional incentive theory’ assumes that Congress will act because Congress knows that change can only come from it.’”).
When it comes to questions of foreign affairs generally and national security in particular, the judiciary is very hesitant to interpret law in a manner contrary to that advocated by the executive branch. As an initial barrier, justiciability doctrines, such as invocation of the political question doctrine, successfully keep many cases posing national security questions from ever reaching a decision on the merits.\textsuperscript{86}

When cases make it beyond the justiciability stage, the court has the option of applying a variety of deference doctrines. These doctrines counsel for deference both as to the executive branch’s favored interpretations of law, but also as to the facts it proffers supporting its position.\textsuperscript{87}

Whenever a court utilizes a deference doctrine it activates two layers of judicial withdrawal. When the deference is absolute, the judiciary simply does not review the underlying question.\textsuperscript{88} In relative deference, where the deference is to take the shape of a non-definitive “weight”, deference possesses the power to transform a losing legal argument into a winning one.\textsuperscript{89} Under either approach, deferring to the interpretations of law offered by the executive branch necessarily requires the adoption of interpretations of law that, but for the desire to defer to the executive, would be rejected.\textsuperscript{90} Deference to the executive is

\textsuperscript{86} The political question doctrine, essentially a dead-letter doctrine as to domestic issues carries does is the center of nonjusticiability in foreign relations cases. See e.g., Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 273-317 (2002) (detailing fall of the political question doctrine in domestic-oriented cases); see also William N. Eskridge, Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 MICH. L. REV. 2062, 2308 (2002) (observing that “the decline of the political question doctrine... has been pervasive in all kinds of cases”).

\textsuperscript{87} See Robert M. Chesney, National Security Fact Deference, 95 VA. L. REV. 1361 (2009) (concluding that “many arguments in favor of deference are unpersuasive, but that deference nonetheless may be justified in limited circumstances.”)

\textsuperscript{88} See Peter W. Low & John C. Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 516 (2008) (“Though successful resort to the political question doctrine in purely domestic disputes is unusual, the doctrine appears to have greater vitality in foreign affairs.”)

\textsuperscript{89} For example, it is longstanding doctrine that the judiciary affords the executive branch “great weight” in interpreting treaties. See Sullivan, Rethinking Treaty Interpretation, supra note __ at __. The degree to which such deference is actually accomplished is debatable, but the judicial norm as to the applicability of weighted deference doctrines is clear. See Robert Knowles, American Hegemony and the Foreign Affairs Constitution, 41 ARIZ. ST. L.J. 87, 103 (2009) (noting that “whether ‘great weight’ deference is meaningful or just a cover, it does reveal that courts view treaties as requiring at least the appearance of exceptional deference.”).

\textsuperscript{90} See Knowles, supra note __ at 99 (When courts defer to the executive branch's interpretation of the law, they cede some or all of [their power to define the meaning of law].)

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even stronger within the factual context, an area where courts feel especially ill-suited to compete against the executive branches capacities, especially as to issues of armed conflict.\textsuperscript{91}

Collectively, these specialty doctrines reflect a view both of judicial insecurity and political branch superiority.\textsuperscript{92} Such doctrines of purported judicial humility purport to reflect deference to the “political branches” thus implying an equal deferential purpose in favor of both Congress and the Executive when finding nonjusticiability.\textsuperscript{93} This is not at all the case. With the withdrawal of judicial interaction, the only interpretation that matters is that of the executive branch, the only branch of government empowered to execute the law that the judiciary has declined to interpret. In contrast, Congress, whose very structure is designed for the slow machinations of deliberation, is left only with the implausible, theoretical possibility of an untimely repeal.\textsuperscript{94}

Even if, against the weight of institutional design, Congress acted quickly to repeal an active force authorization, the legal effects would be highly circumscribed.\textsuperscript{95} The Gulf of Tonkin Resolution is only force authorization to be repealed while armed conflict continued.\textsuperscript{96} Despite

\begin{footnotes}
\textsuperscript{91} See e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (the President “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war”).

\textsuperscript{92} See Jason Marisam, Constitutional Self-Interpretation, 75 Ohio St. L.J. 293, 315 (2014) (“Presidents are most likely to receive absolute or strong judicial deference in foreign affairs and national security cases.”); David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L. Rev. 953, 1015 (1994).

\textsuperscript{93} See e.g., Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967) (The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.”).

\textsuperscript{94} While the possibility of repeal of any legislation is not “theoretical,” the history of such efforts strongly reinforces the notion that such repeal is unlikely. There were, for example a number of attempts to pass legislation explicitly limiting or repealing the 2002 Iraq authorization, none of which were successful. From the 110th Congress alone, there were eight pieces of legislation with such aims. See H.R. 1460 (for repeal of 2002 Iraq AUMF); H.R. 1262 (same); S. 679 (declaring objectives of 2002 Iraq AUMF met and new authorization before troops redeployed); S.J.Res. 3 (establishing expiration); S. 670 (requiring new military authorization unless conditions met); H.R. 930 (repeal 2002 Iraq AUMF); H.R. 508 (same); H.R. 413 (same).

\textsuperscript{95} Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1275, 1291-92 (2006) (“judgments of nonjusticiability ... tend to conjoin reasoning that emphasizes judicial incompetence with suggestions that the disputed questions are assigned to other branches”).

\textsuperscript{96} Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971). In 1974, Congress also repealed the 1955 authorization for the President to
its repeal, there was little, if any, legal effect on the President ability to continue the conflict. Likewise, judicial decisions found that the domestic laws triggered initially by the Gulf of Tonkin Resolution remained in force despite its appeal, in large part based on their deference to the President’s assertion that the U.S. remained “at war” for purposes of the statutory regimes in question.

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

b. Provisionality and shifting functionalism.

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

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

These two norms can be identified reflecting a view of AUMF decay. The first resolves a necessary precursor to AUMF decay – that force authorizations expire without any internally embedded restriction requiring such expiration. The second indicates a functionalist

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use of force to protect Taiwan, but this repeal did not occur in the midst of armed conflict. P.L. 93-475, § 3, 88 Stat. 1439, October 26, 1974.

97 See John Hart Ely, The American War in Indochina: The (Troubled) Constitutionality of the War They Told Us About, 42 STAN. L. REV. 877, 905-908 (1990) (discussing the repeal and noting that the “movement for repeal was born of a desire to end the war” but that by the time of repeal Congress had “pointedly reiterated its authorization of the war” in appropriations legislation); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

98 Id.


interpretation model in which the focus of the “function” driving interpretation shifts from conflict functionalism to democratic functionalism.

Recognizing the decay of force authorizations begins with embracing a notion upon which decay is premised – that neither war, nor the enlarged emergency power that accompanies it, can be perpetual in nature. The embedded temporariness of AUMFs has been recognized repeatedly.

The provisional nature of expanded presidential authority was a theme of the Supreme Court’s decision rejecting the application of military commissions to a suspected Confederate sympathizer in Ex Parte Milligan. In Milligan, the Court held that expanded wartime powers were not perpetual and that their life is dependent upon the circumstances that gave them birth. In its opinion, the Court repeatedly refers to the fact that the Civil War had recently concluded.104 While it’s true that the Civil War had concluded at the time of the Court’s opinion, strictly speaking, that would have been irrelevant for assessing Milligan’s case. The Court did not assert that Milligan’s circumstances had changed with the conclusion of the conflict, but rather that the commission he was subjected to was unlawful at the time it occurred, several months prior to the conclusion of the conflict.105

101 Professor Stephen Vladeck articulates the quandary as such: “[I]f the fight against terrorists truly is a ‘war’ for constitutional purposes, as the Supreme Court has now effectively held it to be, then what is the impact on the President’s war powers - those extreme prerogatives that the Constitution (or Congress) only authorizes the Executive to exercise during times of war?” See Stephen I. Vladeck, Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End, 2 J. NAT’L SECURITY L. & POL’Y 53, 56-57 (2006) (proposing sunset provisions as part of AUMF enactment).

102 See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) (“[a]s necessity creates the rule, so it limits its duration.”)

103 Id.

104 Id. The Court’s most frequent reference is to the “late Rebellion”, but in the alternative it frames the question relative to the “late war” and “late troubles” as well.

105 Id. at 6 (Milligan “was arrested on the 5th day of October, 1864” and put on trial before a military commission on “the 21st day of the same month.”). The Civil War conclusion of the Civil War is generally considered to occur with the surrender of the Confederate General Robert E. Lee on April 9, 1865, but fighting did not cease for several months. The Confederate President Jefferson Davis declared the rebellion over on May 9, 1865 and the last of the Civil War hostilities occurred during June or July of 1865 as word filtered to the various Confederate units. See BUD HANNINGS, EVERY DAY OF THE CIVIL WAR: A CHRONOLOGICAL ENCYCLOPEDIA (2011).
Instead, it seems the significance of the conclusion of the war is a functional one. Whereas, “at the beginning” when the Confederates had “seized almost half the territory, and more than half the resources of the government” functionalism demands “that martial law may prevail, so that the civil law may again live.”\textsuperscript{106} During this time, “the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question.”\textsuperscript{107} The gradual conclusion of the conflict gives rise to an opportunity for the Court to formally invalidate law that, in prior years, it would have been unable to invalidate due to the functional demands of conflict. In so doing, the Court expresses a view of itself as reinvigorating the democratic and liberty values for which the Civil War was fought.\textsuperscript{108} In short, when the Court opines that the American people “insist only that the Constitution be interpreted so as to save the nation, and not to let it perish,” it refers to security in the sense of both physical safety and safeguarding democratic values.\textsuperscript{109}

This shift from “conflict functionalism” to “democratic functionalism” is replicated in other conflicts.

Many of the cases decided during the World War II era are understood as exhibiting the height of deference to the executive branch and exceptionally restrictive of civil liberties.\textsuperscript{110} However, even within this universe of cases, a shift from conflict to democratic functionalism is evident. A shift that matches a more optimistic prognosis for the Allies’ fulfillment of objectives for the war than existed at the time Hirabayashi was decided eighteen months prior.\textsuperscript{111}

The shift is most clear, although permeated with ambivalence, among the Supreme Court’s consideration of the imposition of special

\textsuperscript{106} Ex Parte Milligan, 71 U.S. at 106.
\textsuperscript{107} Id. at 109.
\textsuperscript{108} Margaret A. Garvin, Civil Liberties During War: History’s Institutional Lessons, 16 CONST. COMMENT. 691, 701 (1999) (citing Milligan as reflecting pattern as Court seizing opportunity for “reinvigoration of civil liberties”).
\textsuperscript{109} Ex Parte Milligan, 71 U.S. at 104.
\textsuperscript{110} See e.g., Ex parte Quirin, 317 U.S. 1 (1942); Johnson v. Eisentrager, 339 U.S. 763 (1950).
\textsuperscript{111} By the time of the Court’s decision in Endo and Korematsu, the Allies had entered Rome, Paris had been liberated from the Nazis and large numbers of Axis power troops were surrendering as the Allies enter Germany. See also, William J. Meade, All the Laws But One, Civil Liberties in Wartime, by William H. Rehnquist, 84 MASS. L. REV. 47, 52 (1999) (noting that between the major Japanese internment cases, it “became evident was that as the United States’ prosecution of the war grew increasingly successful between the time of the Hirabayashi and Endo decisions, so did the laws become less silent.”)
rules, including internment, on Japanese-Americans during the war.\textsuperscript{112} The Court’s first opinion on the subject, issued on June 21, 1943, rejected a challenge by a Japanese-American university student convicted of violating curfew and relocation orders in California in \textit{Hirabayashi v. United States}.\textsuperscript{113} Justice Stone, writing for the majority, made clear that conflict functionalism would be the deciding factor in the case. The opinion unapologetically embraces an interpretive framework of the war power with its functional ends, stating that, “[t]he war power of the national government is ‘the power to wage war successfully’.”\textsuperscript{114} As such, once in motion, that power, “extends to every matter and activity so related to war as substantially to affect its conduct and progress.”\textsuperscript{115} Notably, there is no allegation or evidence of disloyalty on behalf of Hirabayashi individually. While the majority finds the question of individualized disloyalty of no moment, Justice Douglas’ concurrence suggests that the racial distinction is valid because the costs associated with individualized process were presumably prohibitively high.\textsuperscript{116}

On December 18, 1944, the Court issues two more Japanese internment cases, \textit{Ex parte Endo}\textsuperscript{117} and \textit{Korematsu v. United States}.\textsuperscript{118} While the cases are fundamentally in tension, the emphasis has shifted toward democratic functionalism.\textsuperscript{119} While acknowledging the broad powers of the government in war present in \textit{Hirabayashi}, the opinion in Endo contextualizes the legality of this power relative other guarantees as “the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government.”\textsuperscript{120} The Court goes on to order Endo’s release because, absent individualized evidence of disloyalty, her detention was not necessary in protecting the nation and promoting the war effort.\textsuperscript{121}


\textsuperscript{113} \textit{Hirabayashi v. United States}, 320 U.S. 81 (1943).

\textsuperscript{114} Id. at 92.

\textsuperscript{115} Id.

\textsuperscript{116} Id. at 107 (Douglas, J., concurring) (“But where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. [...] To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it.”)

\textsuperscript{117} 323 U.S. 283 (1944).

\textsuperscript{118} Id. at 290

\textsuperscript{119} Id.

\textsuperscript{120} \textit{Ex parte Endo}, 323 U.S. at 299.

\textsuperscript{121} Id. at 294-307.
Even *Korematsu*, which upholds internment in circumstances highly similar to that of *Endo*, frames its decision within rights-protective terms. Contrary to the language of *Hirabayashi*, the *Korematsu* opinion acknowledges while “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and that “courts must subject them to the most rigid scrutiny” thus first articulating the components of strict scrutiny judicial review.\(^{122}\)

During the Vietnam era, a number of lawsuits were filed by members of the military challenging the legality of the use of force in Vietnam.\(^{123}\) In the years immediately following the 1964 authorization of the conflict, the courts repeatedly refused to address the merits of these cases in unequivocal terms. In February of 1967, the D.C. Circuit dismissed one such case stating that the grounds for dismissal “are so clear that no discussion or citation of authority is needed.”\(^{124}\) The opinion made clear that the courts had no role in these cases because “the use and disposition of military power...are plainly the exclusive province of Congress and the Executive.”\(^{125}\)

By June of 1970, the Second Circuit Court of Appeals first held that these same challenges were justiciable, but remanded notifying both parties that the challengers would need to show that “congressional debates and actions, from the Gulf of Tonkin Resolution through the events of the subsequent six years” were insufficient in authorizing the President’s acts in Vietnam.\(^{126}\) A year later, the case returned to the Second Circuit as *Orlando v. Laird*.\(^{127}\) The conventional legacy of *Orlando* is that the case stands for the proposition that Congress’ approval of force need not be limited to AUMFs, but can also be inferred from congressional appropriations funding the war effort.\(^{128}\)

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\(^{122}\) *Korematsu*, 323 U.S. at 216.

\(^{123}\) These challenges tended to focus on the absence of a formal declaration of war, but in other circumstances specific, regulatory challenges were made as well.

\(^{124}\) *Luftig v. McNamara*, 373 F.2d 664, 665 (D.C. Cir. 1967). Similar cases found nearly identical holdings. See e.g., *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967).

\(^{125}\) *Id.*

\(^{126}\) *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970).

\(^{127}\) *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971).

Taken at a slightly higher level of abstraction, however, the Orlando court is engaged in a tentative form of democratic functionality. The court doesn’t find the authorization of the continuing conflict in Vietnam within a single piece of legislation, but in multiple significant statutes that the court reasonably finds as representing the political branches’ “mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations.”

3. Decay in Contemporary Conflict

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

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

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

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

Finally, the 9/11 AUMF contains no temporal limitation, automatic sunset provision, or timetable for revisititation. As such, as a statutory matter, the degree of authority granted to the President through the 9/11 AUMF should be fixed through time, thus any act

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129 Orlando, 443 F. 2d at 1042.


131 Id.

132 Id.
within the authorization provided by Congress in 2002 would be authorized in 2012 or 2052.133

The reality has been quite different. In the decade that followed, the Supreme Court has slowly tightened authorities flowing from the 9/11 AUMF, repeatedly emphasizing democratic functions and the relevance of changing circumstances.

In June of 2004, the Court issued an opinion in *Hamdi v. Rumsfeld*, a case challenging the President’s detention powers.134 Hamdi, a United States citizen, was detained as an “enemy combatant” after having been captured in Afghanistan and entering the custody of U.S. forces.135

As a threshold question, Hamdi challenged the President’s authority to detain those it designated “enemy combatants” under the 9/11 AUMF.136 Not only was the text of the 9/11 AUMF silent as to the existence of any detention authority, there existed other statutory law that precludes the detention of any U.S. citizen absent a specific statutory authorization issued by Congress.137 Next, if the President does possess the relevant detention authority, what process was Hamdi owed (and thus that the Executive was required to satisfy) for his continued detention to be legally valid?138

The resolution of these questions squarely challenged the Court to assess whether Congress had authorized the President’s acts. Hamdi’s argument as to the threshold detention question was simple: the President did not possess the authority to detain him because Congress had already spoken as to the detention of U.S. citizens during war-time and affirmatively prohibited the practice absent specific congressional legislation through the “Non-Detention Act”.139 Further, the passage of the Non-Detention Act was designed precisely for the purpose of avoiding the replication of the unsubstantiated “emergency” detention of

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


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

136 *Id.* at 510-11.

137 *Id.*

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

139 Under the “Non-Detention Act”, a Congress mandated that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001(a).
citizens that occurred during World War II. Put within the familiar framework of Justice Jackson’s *Youngstown* opinion, this was a Category 3 case, as the President is engaged in “measures incompatible with the expressed or implied will of Congress.”

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

On the threshold question, a plurality of the Court concluded that, despite the silence of the 9/11 AUMF, “[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war...Congress has clearly and unmistakably authorized detention.”

As for the process to which Hamdi was due for his detention to be justified under the AUMF, the Court struck a cautious but deferential tone. The plurality holds that Hamdi is due notice and an “opportunity to rebut” he can exercise in a “meaningful time and manner.” The Court continues to suggest circumstances in which a “knowledgeable affiant” provided a summary of “documentation regarding battlefield detainees...kept in the ordinary course of military affairs,” would be sufficient evidence for detention so long as the individual was provided the opportunity to respond.

The marginal process and broad authorization articulated in *Hamdi* shifted four years later in the Court’s decision in *Boumediene v. Bush*. After *Hamdi*, the government erected substantial structures to comport with the procedural requirements the Court had dictated. In

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141 *Youngstown*, 343 U.S. at 602.

142 *Hamdi*, 542 U.S. at 519 (plurality opinion) (referencing “individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States’”)

143 Id. at 533–38; see also, Robert M. Chesney and Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

144 553 U.S. 723 (2008).

many ways, the procedural guarantees offered through these new processes extended meaningfully beyond the bare bones process that the plurality suggested was sufficient. Despite this, the Court struck down this system in 2008. In so doing, the Court was silent as to its typical deference doctrines and unmistakable in its concern regarding executive abuse of power.146

B. Institutional Deficiencies in Authorizing Force

The Youngstown framework, in which constitutional questions hinge upon congressional authorization reflects a belief that such a framework maximizes the value of the differing institutional advantages of the political branches.147 Specifically, it recognizes that both the executive and legislative branch possess institutional strengths and interdependency. While the executive is nimble and unified, the legislature is multitudinous and deliberative.148 When those institutional strengths align, it is eminently sensible for the judiciary to offer a wide berth in gauging the legal appropriateness of governmental power. AUMFs upset these presumptions and, as such, throw into doubt the basic wisdom of the approach the Jackson framework represents.

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

Most statutes only pass through Congress following an almost painfully slow process of marination, deliberation, and extensive Review Boards and other procedural rules were issued approximately two weeks after the Hamdi decision.


147 This institutionalist view is foundational to separation of powers doctrine. See Randy J. Kozel, Institutional Autonomy and Constitutional Structure, 112 MICH. L. REV. 957, 964 (2014) (describing the separation of powers and federalism envisioned by the founders as one of “structural institutionalism”).

148 See Ashley S. Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 FORDHAM L. REV. 827, 835 (2013); Kevin M. Stack, The President’s Statutory Powers to Administer the Law, 106 COLUM. L. REV. 263, 269 (2006) (“Structural advantages of the President over Congress--such as the capacity to act unilaterally and poor congressional incentives to monitor expansions of presidential power--provide grounds to embrace such constraints on executive power.”)
lobbying of relevant interests. Force authorizations are passed in the relative blink of an eye.

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

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

Of all seven authorizations passed by Congress, only the 1983 authorization in Lebanon and the 1991 Gulf War authorization generated any significant opposition.\(^{149}\) However, even including the much slimmer than usual margin of these two AUMFs, the average vote margin remains breathtaking, with an average 75 – 20 vote count in the Senate and 344 - 77 vote count in the House of Representatives.\(^{150}\)

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

These differences matter. The peculiarities of force authorizations forces Congress to operate in a manner in which many of its institutional strengths are compromised and its weaknesses pronounced. Treating AUMFs identically to routine appropriations legislation ignores the significance of these differences in a manner that undermines historical realities of AUMF decay and foregoes an opportunity for more nuanced understanding for judicial action.

1. **Time**

Typical federal law enacted in typical circumstances is the product of a multi-year dialogue between the executive and legislative

\(^{149}\) Both the 1983 (Lebanon) and 1991 (Iraq) circumstances were unusual in the sense that most of the troop deployments in theater occurred far before congressional authorization was contemplated or requested. See __. The Lebanon authorization is particularly anomalous. There, the congressional authorization not only substantially lagged the deployment of significant numbers of troops but only came about following a separate congressional resolution explicitly requiring statutory authorization for any act that resulted in the material enlargement of the number of troops deployed in the operation. See P.L. 98-43, 97 Stat. 214, June 27, 1983 [S. 639].

\(^{150}\) Id.
branches. This process in which the deliberative and divided battleship of Congress dances with the unified machinery of the executive branch has been described as a “signature feature of the constitutional separation of powers is its tendency to foster special qualities associated with good governance, such as deliberation, energy, steady administration, and judgment.”

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

American presidents have sought congressional authorization for the use of force six times since the conclusion of World War II. In the 1950s President Eisenhower twice sought congressional authorization for the use of force, once as to Taiwan and once as to the Middle East. Both were justified as necessary as part of the larger Cold War effort against communism. President Johnson sought and received authorization for conducting hostilities in the Vietnam War through the Gulf of Tonkin

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


154 Congress has actually authorized force seven times during this era, excluded within this discussion is a congressional authorization of force as to Lebanon during the Reagan administration. P.L. 98-119, 97 Stat. 805, October 12, 1983 [S.J.Res. 159]. This is excluded because, unlike the other force authorizations, President Reagan never formally nor informally sought an authorization for the use of force.

In recent decades, besides the 9/11 Authorization, other authorizations for the use of force in Iraq were passed by Congress in 1991 and 2002. Congress responded to all six requests by passing legislation authorizing force. In four of the six instances, Congress introduced and passed an AUMF through both houses in less than a week.

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

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

2. Information

The problems inherent as to short timelines are exacerbated by informational deficiencies particular to Congress’s consideration of force

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156 Bobbitt, supra note __ at 1355 (stating that Johnson had sought an AUMF from Congress so there “could be no doubt” as to the legality of his Vietnam policy.)


161 See Cleotilde Gonzalez, Learning to Make Decisions in Dynamic Environments: Effects of Time Constraints and Cognitive Abilities, 46 HUMAN FACTORS 449, 450 (Fall 2004) (finding that “time constraints have a negative effect on the ability of individuals to make decisions effectively.”). Studies indicate that this effect is true whether the time sensitivity is real or imagined. Id.

authorizations. This need to act quickly is combined with multi-fold informational deficiencies. First, the presence of a short decisional timeline dramatically limits the amount of time Congress possesses to gather information that could be useful in its consideration of authorizing force. The institutional architecture of Congress is built for long-range information gathering in which congressional members and their staff acquires information from various sources (including NGOs, constituents, competing political lobbying groups, etc.) as to the underlying facts relevant to potential legal rules. The circumstances in which force authorizations arise however, leaves Congress reliant upon information from the executive.

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

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

163 During the debate of the 9/11 AUMF, one congresswoman remarked a conversation with other members and how “she had been in Congress for 19 years, but never had been asked to make a decision and cast a vote with so little information.” Remarks of Jesse L. Jackson, Jr., Congressional Record, Authorizing Use of United States Armed Forces Against Those Responsible for Recent Attacks Against the United States, 147 Cong. Rec. H5638-04, 2001 WL 1076208, Sept. 14, 2001.

164 See Peter Raven-Hansen and William C. Banks, Pulling the Purse Strings of the Commander in Chief, 80 VA. L. REV. 833, 942 (1994) (characterizing the “flow of national security information” to Congress as “constricted by the need for secrecy and dependent on the self-interested discretion of executive officials.”); Ryan M. Scoville, Legislative Diplomacy, 112 MICH. L. REV. 331, 385 (2013) (discussing legislative fact-finding and that congressional reliance on information from the executive can “interfere with the allocation of legislative power to Congress.”).

165 See Michael Mandel, A License to Kill: America’s Balance of War Powers and the Flaws of the war Powers Resolution, 7 CARDozo PUB. L. POL’Y & ETHICS J. 785, 788 (2009) (The short period of time between the attack and the passage of the Gulf of Tonkin Resolution allowed little time for debate or independent investigation by Congress, and as such, Congress relied upon the information provided by the executive branch”).

an identifiable act of provocation would use a substantial amount of political capital.\textsuperscript{167} When reports came in of a North Vietnam attack of U.S. military vessels, the amount of political capital required to secure Congress’ authorization to respond was dramatically reduced.\textsuperscript{168}

On August 4, 1964, President Johnson reported that the North Vietnamese had launched two attacks on U.S. ships “on the high seas in the Gulf of Tonkin.”\textsuperscript{169} According to the Johnson administration, on August 2, 1964, North Vietnamese patrol boats had fired on the U.S.S. Maddox, which sparked an exchange of fire and the sinking of a handful of North Korean vessels. Two days later, the Maddox reported another attack to which several aircraft were launched in response. Armed with a compelling narrative, President Johnson seized the opportunity to justify seeking a congressional force authorization that, in turn, offered him a much freer hand in prosecuting the escalating conflict.\textsuperscript{170}

The facts surrounding the incidents in the Gulf of Tonkin remain in dispute.\textsuperscript{171} Ultimately, the truth of the facts as to what occurred in the Gulf of Tonkin is not relevant for this Article, however, the presence of the debate as to the accuracy of those facts exemplifies the problem of Congress’ informational reliance on the executive branch. When the executive is the primary (or sole) source of information, Congress is reliant on the information the President provides.\textsuperscript{172} This reliance both

\begin{itemize}
\item \textsuperscript{167} Id. at 52 (stating that Johnson believed “convincing congressional leaders of the need for the resolution would take much time unless, as Secretary of Defense Robert McNamara remarked on June 10, ‘the enemy acts suddenly in the area.’
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Text of Speech by President Lyndon Johnson as to Gulf of Tonkin Incident, August 4, 1964.
\item \textsuperscript{170} See generally, Lee Epstein, Daniel E. Ho, Gary King and Jeffrey A. Segal, The Supreme Court During Crisis: How War Affects Non-War Cases, 80 N.Y.U. L. REV. 1, 44 (2005).
\item \textsuperscript{171} Many investigative reports and scholars put forth evidence that the attack described by the Johnson administration never occurred, or, at the least were dramatically exaggerated for political purposes, while others plainly assert that Johnson administration’s account was if not entirely accurate, entirely truthful. Compare e.g., Robert Bejesky, Precedent Supporting the Constitutionality of Section 5(B) of the War Powers Resolution, 49 WILLAMETTE L. REV. 1, 17 (2012) (“The Vietnam War launched after an alleged attack in the Gulf of Tonkin that never occurred. The Johnson Administration conveyed false information to Congress and the American public”) and Philip Bobbitt, War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath, 92 Mich. L. Rev. 1364, 1394 (1994) (stating that deception by the Johnson administration “is frequently, and falsely, alleged about the Gulf of Tonkin incidents.”)
\item \textsuperscript{172} See J. William Fulbright, Congress the President and the War Power, 25 Ark. L. Rev. 71, 72 (1971) (“As the lawyers say, ‘Partial truth is an evasion of truth.’ There is no better example of the Congress acting with haste and with insufficient or inaccurate information than the Gulf of Tonkin Resolution of 1964.”)
\end{itemize}
renders the executive vulnerable to arguments that they intentionally misled Congress as to the facts and calls into question the legality of the actions promulgated pursuant to the authorization in question.

3. Deference

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

A hallmark of deliberative lawmaking is its collective draftsmanship. Federal legislation is rarely sponsored by a single member. Final statutory language always reflects the input and actual textual input of dozens or hundreds of individuals. Again, the history of force authorizations reflects a much different reality.

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

If the absence of successful amendments is unsurprising, the near total absence of proposed amendments is troubling. Most legislative

173 As articulated by one scholar, “it is an open constitutional question whether even a specific statutory authorization would be valid if it were based on deception.” See Bobbitt, Constitutional Lessons of Vietnam and its Aftermath, 92 Mich. L. Rev. at 1394 (“Thus, constitutional argument from an ethical perspective requires that the public be fully and truthfully informed of the war aims of the President. If the People were deceived in the process, no customary method of taking the United States to war would be legitimate.”).

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

175 The 2002 Iraq AUMF, in which Congress had the most time, saw two substantive amendments proposed. Both of the failed amendments invoked United Nations Security Council Action, either generally resolving that the President should seek U.N. Security Council authorization or making Congress’s authorization contingent upon a like-minded Security Council authorization. Compare H. AMDT. 609 (10/10/2002) (Spratt, J.) (this amendment makes UN
amendments do not represent an attempt to alter the underlying legislation but as a mechanism of expression. Expressively, proposing amendments are frequently used to highlight a line of division between the political parties or as backdrop for future legislation to which the amendment relates.176

Perhaps the absence of amendments flows naturally from a lack of text to amend – another area in which force authorizations diverge from typical legislation. Political science research demonstrates that “the number of words in the legislation is a good measure of the amount of policy discretion” that will be seized by the executive.177 This research suggests that a proliferation of words corresponds with the amount of deliberation by Congress and the level of precision drawn by the statute as to the authority set out in the relevant legislation.178 In other words, much like the Constitution, when fewer words are present, there is an expectation that substantial ambiguity will remain. The understanding of the presence of ambiguity is coupled with an understanding that such ambiguities will be resolved.179

Recent analysis of federal statutes suggests that the “average” statute possesses more than 90,000 words.180 In contrast, the average contemporary AUMF consists of 427 words.181 This relative dearth of guidance inverts the historical norm in which declarations were lengthier and more complex than many eighteenth-century statutes.”182 There are

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177 If nature abhors a vacuum in space, government abhors a vacuum of power.


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


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

182 Saikrishna Bangalore Prakash, Exhuming the Seemingly Moribund Declaration of War, 77 GEO. WASH. L. REV. 89, 119 (2008) (“Declarations reached this length precisely because they served so many different purposes. As we have seen, declarations were used not only to start a war, but also to provide notice of a
many possible explanations as to the brevity of force authorizations. But those explanations do not change the fact that such brevity lends itself to a broad transference of authority away from Congress and that this transference is accompanied by the careful deliberation that the legislative process is designed to effectuate. In this case, the outlier effectively proves the rule. Congress’s 1983 Lebanon AUMF is, by far the longest AUMF of the post-war era at 1,373 words. The facts surrounding the Lebanon AUMF are unique. Congress faced no time-pressure in considering an AUMF for Lebanon as substantial numbers of U.S. troops had already been deployed and were already filling combat roles. Absent time pressure, Congress was able to more effectively gather information and contemplate its desired course of action. Finally, unlike the other post-World War II era AUMFs, President Reagan did not dictate when Congress would consider the authorization. Its consideration was a product of congressional prerogative rather than Presidential fiat.

4. Specified Objectives

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

By definition, intractable problems possess a persistency and systemic embeddedness that make them highly resistant to resolution.

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

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

185 See Mark R. Brown and Andrew C. Greenberg, On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics, 43
The quality and depth of such resistance is highly variable and tends to reflect the peculiarities of the regulated subject matter. For instance, the persistence of problems the government seeks to address in drafting rules for financial markets fundamentally reflects the disagreement among experts in identifying the core factors causing the ill legislators are seek to avoid.  

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

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

The specificity of the facts giving rise to force authorizations, and thus responsible for the existence of AUMFs, fundamentally undercuts an understanding of AUMFs as possessing static, perpetual power through the passage of time. Force authorizations are the product of identifiable facts and the changing of those facts is their entire reason for

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187 Even where the solutions proffered fail to meet their original standard of success, the statutory regime cannot fairly be considered a true failure unless the cost

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

being. As such, regardless of text, their scope can only be understood relative to the alteration of the facts that gave them birth.

Specificity in declarations of war and AUMFs may not only be a matter of historical practice, but also constitutionally required. Congress passed the War Powers Resolution in 1973 seeking to avoid the creeping conflict escalation that characterized Vietnam. The Resolution, among other things, authorized the President to deploy U.S. troops for 60-days before requiring specific congressional approval. One of the primary constitutional attacks levied against the Resolution was that it pre-authorized (and pre-limited) the use of force without specifying as to the circumstances giving rise to the authorization, the parties to which the force was targeted, and the aims for which the force was to be applied.

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

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

191 See Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255, 1258 (1988) (detailing a variety of military actions usurping War Powers Resolution, including “the creeping escalation it was expressly designed to control.”).

192 50 U.S.C. § 1544(b) (2000) (enables the president to unilaterally extend deadline additional 30 days upon a determination and certification to Congress “that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”) Id. § 1547(a)(1) (prohibits implicit authorization, requiring force authorization statute that “specifically authorizes” hostilities and “states that it is intended to constitute specific statutory authorization within the meaning of this chapter.”)

193 See Jane E. Stromseth, Rethinking War Powers: Congress, The President, and the United Nations, 81 GEO. L.J. 597, fn365 (1993) (noting constitutional problems with “an arrangement under which Congress pre-authorizes the use of force without specifying the particular conflict or the specific party against whom the troops would be used.”); J. Gregory Sidak, To Declare War, 41 DUKE L.J. 27 (1991) (discussing the constitutional and definitional difficulties associated with the “ex ante” determination of “war” required by the War Powers Resolution).
specific purpose of securing and protecting Formosa, and the Pescadores against armed attack."\textsuperscript{194}

The planned obsolescence of Congress’s authorization of force is an AUMF prerequisite. While it is fundamentally normal for most legislation to alleviate harm, an authorization of force with the belief that changing the facts giving rise to that authorization is impossible would be the height of foolishness.

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

C. Recognizing Four Phases of AUMF Decay

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

1. Textless Conflict Functionalism

This functionalist perspective on the scope of authorization is not limited to the judiciary, it is also typically shared by those in Congress.\textsuperscript{195} During the discussion of the Gulf of Tonkin Resolution, one Senator commented that under the Resolution the President is not “limited in regard to the sending of ground forces”\textsuperscript{196}. Likewise, Senator J. William Fulbright, the Chair of the Foreign Relations Subcommittee commented that the Resolution gives “the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense.”\textsuperscript{197}

This basic functionalist interpretation does not limit the Executive in action so long as the acts possess a colorable tie to advancing U.S. interests in the armed conflict in question.\textsuperscript{198} While acts during this

\textsuperscript{195} As well as, unsurprisingly, officials within the Executive branch.
\textsuperscript{196} 110 Cong. Rec. 18426-27 (Aug. 6, 1964) (Morse).
\textsuperscript{197} 110 Cong. Rec. 18409 (Aug. 6, 1964) (Fulbright)
\textsuperscript{198} This is not to suggest the impossibility of any finding of invalid Executive action during the first phase of authorization, only that such a finding would necessarily involve (1) a very substantial violation of other existing statutory law; (2) in which the acts in question the judicial actor finds insubstantial (or at least largely irrelevant) to the U.S. war effort. Neither element would independently
phase are almost never considered invalid, they do impose marginal Executive constraining effects. Perhaps the most significant of these effects is the creation of a basic burden of production and explanation.\textsuperscript{199}

2. Text-based Executive Constraint

As an AUMF ages, it transitions into a second phase of interpretation in which the text and legislative history of an AUMF are increasingly utilized for assessing the lawfulness of Executive action.\textsuperscript{200} As the emphasis increases as to these traditional tools for interpreting statutes, the persuasiveness of the functionalist justifications decreases correspondingly.\textsuperscript{201}

While not as Executive friendly as a purely functionalist approach, the shift towards text and legislative history remains one in which Executive action is highly likely to be considered lawful for multiple reasons. First, the circumstances in which AUMFs are drafted is one in which the Executive possesses an unusually high degree of influence.\textsuperscript{202} For the same reason, the legislative history is likely to be light and that which exists is likely to weigh substantially toward a construction of broad statutory authorization.\textsuperscript{203}

More subtly, judicial determinations established during the first interpretive phase are likely to significantly affect the outcome and framing of interpretive issues that arise subsequently.\textsuperscript{204} At its most basic level, this influence is one of application of precedent. As with precedent generally, the effect could possess the strength of binding law of a superior court as to the decisions of an inferior one. More generally, even when decisions are not binding, the resolution of specific issues by

\textsuperscript{199} Id.

\textsuperscript{200} See e.g., Hamdan, 548 U.S. at 557

\textsuperscript{201} One refrain frequently used by Presidents relates to the broad margins by which AUMFs tend to pass. For example, in a response to 15 senators criticizing President Johnson’s escalation of armed conflict in Vietnam, he simply stated, “I continue to be guided in these matters by the resolution of the Congress approved on August 10, 1964 – Public Law 88-408 – by a vote of 504 to 2.” Public Papers of the Presidents of the United States – 1966, Reply to a Letter from a Group of Senators Relating to the Situation in Vietnam – January 28, 1966.

\textsuperscript{202} Id.

\textsuperscript{203} U.S. v. Minoru Yasui, 48 F.Supp. 40 (1942)

\textsuperscript{204} Margaret A. Garvin, Civil Liberties During War: History’s Institutional Lessons, 16 Const. Comment. 691, 701 (1999) (citing Milligan as reflecting pattern as Court seizing opportunity for “reinvigoration of civil liberties”).
earlier courts strongly influences the acceptable contours of the argument between the parties.205

3. Textless Democratic Functionalism

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

As a result, continued adherence to the text-driven interpretive model perpetuates a legal paradigm powered more by inertial forces than democratic will.206 As set out above, the judiciary has frequently responded to this problem by adhering to its classic interpretive canons in form, but deviating from them in practice. Of course, this produces precisely the questions of legitimacy and predictability that serve to undermine trust in the judicial branch. More damaging, this pattern fails to address the root causes of the divergent nature between judicial precedent and the inherent pressure that builds with the suppression of civil liberties and democratic values during armed conflict (represented or triggered by force authorization), which at best, produces piece-meal democratic response.207

The move from a text-driven approach to a functionalist approach focusing on democratic norms reflects the reality of the unique circumstances of AUMF passage that strongly counsel against unchecked continued authority. As the courts have recognized, even prior to the conclusion of armed conflict, the intensity of exigency subsides.208 As exigency subsides, embedded democratic values and separation of powers norms demand that should the nation continue to operate in what represents an emergency status, that decisions is of the variety that

206 Id.
207 Such as the results flowing from the classic “democracy forcing” move undertaken by the Court in Hamdan, to which congressional
208 While Youngstown post-dates the Second World War, the basic moving operations of Justice Jackson’s three category test seemed relevant to jurists of the immediately preceding era. Compare U.S. v. Minoru Yasui, 48 F.Supp. 40 (1942) (assessing Japanese internment during World War II necessarily requires “a premise, then, the existence of a war in which victory is a vital necessity to assure survival of the freedom of the individual guaranteed by the Federal Constitution, must be predicated.”) and Ex Parte Endo, 323 U.S. 283 (1944) (granting habeas corpus relief to detained Japanese-American).
should be presented and accepted after full consideration, a prospect never present at the time original authorizations are enacted.

4. Total Inoperability

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

This act has never been repealed. It has no specified date of expiration. It is permanent law.

Let there be no mistake. This resolution, passed under circumstances in the Middle East which have radically changed in the intervening 13 years, requires neither consultation with Congress nor congressional approval before the President can send American men to fight in a war.209

Mr. Findley’s attempt to repeal the authorization of force failed and the 1957 Middle East Resolution remains valid, “permanent law” under existing doctrine. However, the notion that the 1957 Middle East Resolution is now fully inoperable rests on solid ground. The 1957 Middle East Resolution was “all but forgotten” by 1969 and that year it seems the general consensus was “that the resolution is dormant and would never be cited.”210

The final phase of decay, total inoperability, simultaneously directly contradicts existing doctrine, reflects the consensus of normative view on the subject, and is the natural conclusion of the disintegrating authority of AUMFs explored thus far.

Just as the shift from conflict functionalism to democratic functionalism reflects the recession of exigency, the progression to inoperability reflects the dissipation of conflict instrumentalities. Inoperability occurs when the circumstances giving rise to the force authorization in question are distant and the opportunity for deliberation present, such that the defining traits of the original conflict simply cannot be said to solidly attach to new deployments.

D. Revived Institutionalism and Force Authorization Decay

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

It is accepted wisdom that the Executive branch possesses far greater competency in all aspects of foreign relations and national

210 Id.
security compared to the other branches of government. The executive is structured to be fast, unified, secret, and better resourced for fact gathering and consumption for weighing various options and likely consequences. While merits to this wisdom accrue, complications and complexities abound and it cannot be considered a static rule of thumb. First, disparity in competency among the branches on national security matters shrink over time as executive qualitative and quantitative advantages also lessen over time. The most pressing issue of AUMF interpretation concerns resetting force authorization processes in order to capture the institutional competencies and advantages that reside in each of the political branches.

Understanding and applying the phases of force authorization decay offers broad functional executive authority during the period in which such authority is most warranted — the period immediately following the passage of the AUMF. Devoid of an artificial mandate to hew to the hastily drafted text characteristic of force authorizations, both the judiciary and executive branch are free to read the mandate provided by Congress as one in pursuit of freshly identified objective. This focus on the functional necessities of conflict means that the “apex” of presidential power attained through Congress’ authorization as articulated in Youngstown captures the Court’s statement that war powers are fundamentally about the successful prosecution of armed conflict.211

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

At the core, AUMF statutory decay theory harnesses the institutional advantages embedded in our separation of powers regime. It promotes long-term engagement, periodic reconsideration and re-legitimation of an AUMF’s threshold question of whether force should be used or continue to be used. It supports deliberative, democratic input and refinement regarding the limitations of how that force should be used. This process, if not democracy forcing, is at least democracy enhancing. It enables public debate over a host of questions of utmost concern to the electorate that were unknown or inadequately explained.

211 Similarly, recognizing such broad powers at the outset of AUMF passage should incentivize Congress to carefully consider AUMF passage and comports with the most of Congress’ recent practice of drafting broad authorization language.
at the initial time of authorization, such as economic and human cost, strategic error, etc. Periodic review and refinement likewise encourages a focused deliberation that might otherwise become enmeshed in other issues, most notably the perpetual appropriations discussions, and short-circuits negative predispositions toward inertia and responsibility shirking that naturally adhere to large institutions like Congress.

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

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

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

Institutional principles and historical practice demand that temporal conditions and implicit force authorization obsolescence inform a model for interpreting congressional authorizations for the use of military force. Evidence of force authorization decay manifests in the decisions and actions of all three branches of government, yet is unarticulated in doctrine. Acknowledging decay theory as to AUMF interpretation rebuilds governmental checks, which have been compromised over the past half a century. Timeless grants of armed conflict power don’t simply enhance the authority of the Executive branch, they constrict the functional authority of Congress and the judiciary. A phased constriction in AUMF statutory authority over time enables unhindered executive action at times most appropriate and a built-in – but not cliff-like fall off – in unchecked authority as exigency moves toward normalcy.