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Understanding Self-Imposed Limitations on the Executive as Meaningful Restrictions on Authorizations for the Use of Military Force (AUMFs)

Fallon A. Voltolina

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* J.D./D.C.L. candidate 2023, Paul M. Hebert Law Center, Louisiana State University. Sincere thanks to Professor Scott M. Sullivan for his guidance and willingness to act as a sound board for ideas, to Christopher Vidrine for all of the careful edits, and finally, to Dr. Jason S. Maloy for spurring my interest in international ethics and the use of force. This comment is dedicated to the late Lydia G. Creel—a teacher in the truest form—for her lifelong commitment to her pupils and for her contagious belief in the power of written work.

INTRODUCTION

On January 4, 2020, the streets of Tehran spilled over with individuals donned in black.[1] A three-day national period of mourning commenced in Iran—the sea of drawn faces only broken up by raised pictures of General Qassem Soleimani.[2] On the previous night in a highly classified mission, a United States MQ-9 Reaper Drone fired into a convoy leaving Baghdad International Airport.[3] Several individuals were killed, and among them was Iran's top security and intelligence commander General Qassem Soleimani, who the United States government suspected of engaging in past and future terrorist attacks on the United States.[4]

Prior to the strike, President Donald J. Trump was on vacation at his resort in Palm Beach, Florida.[5] There, he insisted that he did not want war with Iran.[6] He told reporters, "I don't think that would be a good idea for

1. *Iran in mourning, vows revenge for Qassem Soleimani's killing*, AL JAZEERA (Jan. 3, 2020), https://www.aljazeera.com/news/2020/1/3/iran-in-mourning-vows-revenge-for-qassem-soleimanis-killing [https://perma.cc/X6R2-URYV].

2. *Id.*

3. Michael Crowley et al., *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html [https://perma.cc/34J6-YEUR].

4. *Id.*

5. *Id.*

6. *Id.*

Iran. It wouldn't last very long, . . . I want to have peace. I like peace."[7] Three days later, President Trump authorized the targeted strike on Soleimani without consulting Congress—a strike that has since been considered a "reckless unilateral escalation."[8]

While few details were given regarding the imminent threat posed by Soleimani that triggered the airstrike, the U.S. Department of Justice Office of Legal Counsel wrote a memorandum to the Legal Advisor of the National Security Council explaining the incident.[9] While most of the memorandum was redacted, Assistant Attorney General Stephen Engel admitted the airstrike was a targeted operation to kill Soleimani.[10] The Office of Legal counsel justified the strike using the Authorization for the Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF), which authorizes the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq . . . ."[11] Killing Soleimani was legally justifiable because of the historically broad interpretation of the 2002 AUMF.[12] While controversy regarding the legality of this incident remains unsolved, the killing of Soleimani has drawn the attention of scholars, causing them to question just how far the President's power and discretion extends under an authorization of force.[13]

History continues to remind us that few meaningful limitations on a President's use of armed force exist.[14] The few restraints in place are all

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7. *Id.*

8. *Id.*

9. *See* Memorandum from Steven A. Engel, Assistant Attorney General, to John A. Eisenberg, Legal Advisor to the National Security Council (Mar. 10, 2020) (on file with The United States Department of Justice), https://www.justice.gov/olc/opinions-main [https://perma.cc/D2WA-HA2N].

10. *Id.*

11. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

12. Memorandum from Steven A. Engel, Assistant Attorney General, to John A. Eisenberg, Legal Advisor to the National Security Council, *supra* note 9.

13. Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?*, LAWFARE (Jan. 3, 2020, 4:49 PM), https://www.lawfareblog.com/did-president-have-domestic-legal-authority-kill-qassem-soleimani [https://perma.cc/C9WS-DFR9].

14. Despite the power to "declare war" being an independent power of Congress, the executive proves to have other various powers, such as the commander-in-chief power, allowing the executive to use force subject to Article II. *See* U.S. CONST. art. II. Further, some powers rooted within commander-in-chief power may be considered exclusive to the president. This is particularly

but washed away in circumstances where Congress has affirmatively authorized the President to use force.[15] Though Congress has the sole authority under Article I, section 8 of the U.S. Constitution to declare war, the issuance of an AUMF allows the President to use whatever military force he[16] considers to be consistent with the congressional authorization.[17] Given the urgency of the circumstances surrounding authorizations, Congress generally drafts AUMFs broadly. Broad drafting of an AUMF, like that of the 2002 AUMF, leaves the scope of its reach unclear.[18] This may result in the President interpreting an authorization in a manner justifying a variety of seemingly unrelated subsequent acts. The search for meaningful restraints on AUMFs has proven difficult because judges and scholars have been met with judicial and legislative impediments.[19]

Sometimes, however, Presidents limit the executive branch through the issuance of an executive order.[20] Presidents most often use executive orders to regulate the internal affairs of the executive branch.[21] While

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within the "theater of war." *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

15. AUMFs grant sweeping power to the executive, which would normally be vested with the Congress. Generally, the broad language results in discretion within one person as opposed to a body which proves difficult to limit. *See generally* Waseem Ahmad Qureshi, *The Efficacy, Limitations, and Continued Need for Authorizations for Use of Military Force*, 21 SAN DIEGO INT'L L.J. 1, 6 (2019).

16. The pronoun "he" is used here and throughout this Comment when referring to the President. After careful consideration, I have made the stylistic decision to use "he" for ease of reference. While it is true that the role of President of the United States has historically been filled by men, I am hopeful to see a day when my Comment's use of "he" will prove to be outdated.

17. U.S. CONST. art. I, § 8. Note that congressional authorizations empower the President but also require him to follow limitations in the authorization at least insofar as the congressional authorization justifies presidential use of force. *See* U.S. CONST. art. II, § 3.

18. RICHARD F. GRIMMETT ET AL., CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 14 (2014), https://crsreports.congress.gov/product/pdf/RL/RL31133/17 [https://perma.cc/MR6M-9AQC].

19. *See* discussion *infra* Part II.

20. *See generally* Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026 (2015).

21. *What Is an Executive Order?*, ABA (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/ [https://perma.cc/93VS-2FE6].

executive orders differ from the statutory laws Congress passes, executive orders still purport to govern the executive branch and are afforded the "force and effect given to a statute enacted by Congress."[22] If executive orders are afforded the *force and effect* of law, AUMFs should be interpreted in a manner consistent with executive orders.[23] In rare instances in which the President issues an executive order that limits executive power, congressional delegations of power to the President that are broadly drafted should be interpreted with respect to the internal limitations placed upon the executive branch. In these cases, the text of the executive order and the AUMF should be harmonized, meaning that the Office of Legal Counsel, when assisting the President in his determination of what force can be used under the authorization, should ensure that AUMFs and executive orders are interpreted in a way that renders them compatible and not contradictory prior to using military force. Reading broadly drafted grants of power to the President in light of internal limits of the executive branch will protect AUMFs from being appropriated to uses for which they were never intended. Though this has not been recognized as a meaningful limitation on AUMFs, the legal system would be better served if executive orders were integrated into the current understanding of restraints on the power the President may exercise under AUMFs.

Part I of this Comment introduces the basics of AUMFs and the difficulty that they pose with regards to the expansion of presidential power. Part II of this Comment describes the difficulty that courts and scholars have experienced in restraining presidential power under AUMFs. This Part articulates the barriers to finding meaningful restraints both from a judicial and legislative standpoint. Part III of this Comment expounds upon executive orders and considers presidential powers as a potential area where restraints can be drawn. Part IV proposes that courts consider self-imposed limitations on the Executive as an avenue for placing meaningful restraints on the President's ability to use force under a force authorization. Part V considers the potential issues that may arise when viewing executive orders as limitations. Finally, Part VI illustrates the solution of harmonization by applying the principle using Executive Order 12,333 and Executive Order 13,732 to limit the scope of the broadly drafted 2001 AUMF.

22. *See* Farkas v. Tex. Instrument, Inc. 375 F.2d 629, 632 (5th Cir. 1967).
23. *See id.*

I. THE POWER DYNAMIC: EXECUTIVE POWER, LEGISLATIVE POWER, & THE RESULTS OF THEIR INTERACTION

Although the U.S. Constitution does not explicitly reference a *separation of powers*, it allocates exclusive powers to each of the three branches of government.[24] Article I enumerates the powers given to the legislative branch.[25] Article II vests certain powers with the executive branch.[26] Finally, Article III lists the powers granted to the judicial branch.[27] The Framers, in incorporating this Montesquieuian[28] theory of separation of powers, intended to vest different powers within the three branches to "safeguard against tyranny by combating excessive concentration of power."[29]

A. Executive Power

Article II of the U.S. Constitution vests in the President the executive power.[30] Under the Constitution, the President has the duty to faithfully execute the laws.[31] While it may be difficult to draw a line between the powers afforded to Congress and the President regarding foreign policy issues, the President, as Head of State, has the sole authority to recognize foreign governments, receive foreign ambassadors, and negotiate treaties.[32] Additionally, he has powers as Commander in Chief, which grant him authority over military operations.[33] Courts and scholars alike

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24. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 297 (20th ed. Foundation Press 2019); *see* U.S. CONST arts. I–III.

25. *See* U.S. CONST. art. I.

26. *See id.* art. II.

27. *See id.* art. III.

28. Montesquieu, an 18th century French philosopher, coined the term "Separation of Powers." Montesquieu's model divides government into separate branches, giving each branch separate and independent powers. This ensures that one branch of government is not more powerful than the others. *See Separation of Powers*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/separation_of_powers_0#:~:text=The%20term%20%E2%80%9CSeparation%20of%20Powers,has%20separate%20and%20independent%20powers [https://perma.cc/JRH4-RXUP] (last visited July 25, 2022).

29. *See* FELDMAN & SULLIVAN, *supra* note 24, at 297.

30. U.S. CONST. art. II, § 1.

31. *Id.* art. II, § 3.

32. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 277 (2001) (citing U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

33. Newland, *supra* note 20, at 2031.

have interpreted these enumerated powers to afford the President a great deal of authority over such issues.[34] Specifically, the President has been deemed to be the *sole organ* of foreign affairs.[35] The Sole Organ Theory of foreign affairs originated during the Neutrality Controversy of 1793, where Alexander Hamilton, writing under the name Pacificus, introduced the idea that the United States Constitution implicitly makes the Executive the *sole organ* of communication with foreign nations.[36] This idea was based on the enumerated powers affording the President the authority to negotiate treaties and appoint and receive ambassadors.[37] The judiciary recognizes the idea that the President acts as the *sole organ* of foreign affairs, as it has been referenced explicitly[38] and implicitly[39] in cases pertaining to foreign affairs.[40] For this reason, the execution of foreign policy and diplomatic relations is generally left to the President.[41]

Although the President is not tasked with making laws, he is not completely excluded from acting in a capacity that, on its face, appears legislative in nature, as he is able to issue executive orders.[42] The President issues executive orders to ensure that the laws are faithfully executed.[43] An executive order is a rule or order serving as a directive from the President of the United States.[44] The orders are used to manage the affairs and operations of the executive branch and its agencies.[45] Executive orders are generally limited to the governing of executive agencies, and while they may cover a wide variety of different topics, they do not require congressional approval.[46] Because executive orders are not considered legislation, they are not subject to the traditional, law-making process; therefore, they are exempt from congressional approval.[47]

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34. Gaziano, *supra* note 32, at 277.

35. *See generally* ALEXANDER HAMILTON, "PACIFICUS" NO. 1 (1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33 (Harold C. Syrett & Jacob E. Cooke eds., 1969); *see also Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

36. HAMILTON, *supra* note 35, at 33.

37. *Id.*

38. *See generally Curtiss-Wright Exp. Corp.*, 299 U.S. 304.

39. *See generally* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

40. *See generally Curtiss-Wright Exp. Corp.*, 299 U.S. 304; *Crosby*, 530 U.S. 363.

41. Gaziano, *supra* note 32, at 277.

42. *What Is an Executive Order?*, *supra* note 21.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Newland, *supra* note 20, at 2031. *See* discussion *infra* Part I.B.

While the sitting United States President has the sole authority to issue and overturn executive orders, the U.S. Constitution does not expressly vest in the President the authority to issue such orders.[48] Despite the lack of an explicit grant of authority within the Constitution, the power to issue executive orders can be implied or inherent to the substantive powers that the Constitution or a federal statute has afforded to the President.[49] The powers most frequently used to justify presidential authority to issue executive orders are the President's powers as Commander in Chief, Head of State, Chief Law Enforcement Officer, and Head of the Executive Branch.[50] Although there is no express power given to the President to issue executive orders, so long as the president is acting within one of the powers previously mentioned, he is afforded broad discretion in the directives he issues.[51]

Presidents are often inclined to use executive orders because they are not directly subject to the hurdles of the legislative process and, therefore, not burdened by the procedural restraints associated with the legislative branch.[52] As the Supreme Court recognized in *Immigration & Naturalization Service v. Chadha*, the lack of legislative constraints on executive orders makes them an effective tool for a sitting President because executive orders are able to bypass congressional scrutiny.[53] Although capable of circumventing the constraints of the legislative process, these presidential directives still affect the lives of millions of Americans because they impact the structure of the federal government.[54] This has elicited controversy, as executive orders are capable of implicating individual rights and governmental structure while bypassing the procedural restraints imposed on other forms of lawmaking.[55] Ultimately, the question becomes: "Who will watch the warders?"[56]

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48. *See* U.S. CONST. art. II.
49. Gaziano, *supra* note 32, at 276.
50. *Id.*
51. Newland, *supra* note 20, at 2031.
52. INS v. Chadha, 462 U.S. 919, 951 (1983); *see* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 n.10 (1981) ("Executive orders are effective Presidential tools because they do not need the approval of Congress, therefore largely bypassing congressional and public scrutiny . . . .").
53. *Chadha*, 462 U.S. at 951.
54. Newland, *supra* note 20, at 2032–33.
55. *See id.*
56. JUVENAL, SATIRE VI, at lines 347–48 (trans. G. G. Ramsay, 2008) (1918).

Despite the controversy surrounding executive orders, courts have deemed these instruments to have the "force and effect of law."[57] While the ability to create executive orders pertaining to foreign relations is not expressly granted, and executive orders are not subject to congressional approval, the powers the President possesses concerning foreign affairs offer some substantive authority that the Constitution vests in the President the power to issue executive orders.[58] The issuance of foreign affairs-related executive orders would then have the effect of being a tool utilized by the President for the faithful execution of the laws.[59]

B. Congressional Power

In contrast to the powers granted to the executive branch, Article I delegates "[a]ll legislative Powers" to Congress.[60] Article I sets forth the legislative process by which Congress makes law.[61] Specifically, Article I, section 1 vests all legislative powers in Congress and creates two houses within Congress—the Senate and the House of Representatives.[62] The presence of two houses within a legislative body is known as bicameralism.[63] The power to make laws is shared between the two houses, and one cannot make law without the other.[64] This is because the branches are co-dependent upon one another in that the House of Representatives and the Senate must each pass a bill for that bill to become law.[65] While the bills originate in either the House of Representatives or the Senate, the non-originating house may propose amendments or concur with amendments.[66] Once both houses pass the bill, Congress must present the bill to the President of the United States pursuant to the Presentment Clause located in Article I, section 7.[67] The President may then either sign the bill into law or return the bill to the originating house for

57. Farkas v. Tex. Instrument, Inc. 375 F.2d 629, 632 n.1 (5th Cir. 1967).
58. Gaziano, *supra* note 32, at 276.
59. *See* U.S. CONST. art. II, § 1.
60. *Id.* art. I, § 1.
61. *Id.* art. I, § 7.
62. *Id.* art. 1, §1.
63. *Definition of bicameral*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bicameralism [https://perma.cc/922H-EHPZ] (last visited July 26, 2022).
64. *How a Bill Becomes a Law*, AM. GOV'T, www.ushistory.org/gov/6e.asp [https://perma.cc/HNB9-74AK] (last visited July 2, 2022).
65. *See id.*
66. U.S. CONST. art. I, § 7.
67. *Id.*

reconsideration.[68] In the event the President returns an unsigned bill to the originating house, Congress must reconsider and pass the bill again by a two-thirds majority of each house for the bill to become a law.[69] This process is known as *bicameralism and presentment*.[70] Since the Founders considered efficiency to be one of the hallmarks of oppressive government, they crafted the tedious process of *bicameralism and presentment*.[71] The hurdles ensured that the laws passed were the product of careful consideration and that no laws were created on a mere whim.[72] While the *bicameralism and presentment* process ensures that all laws passed are carefully considered and deliberate, the process takes time. The untimeliness of the *bicameralism and presentment* process often renders the legislative process ill-suited for matters requiring swift and efficient decision-making.[73]

In addition to Congress's general task of law-making, Article 1, section 8 of the U.S. Constitution vests in Congress the sole authority to declare war.[74] Despite the ability to declare war being widely associated with the authority to use military force, Congress has been increasingly reluctant to use its power to declare war.[75] Though the formal *declaration of war* seems to be a relic of Congress's past, it would be incorrect to assume that this is due to a decrease in U.S. engagement in foreign hostilities.[76] In fact, the U.S.'s armed hostilities have continued through the legislature's gradual secession of power to the executive branch.[77]

While the structure of the Constitution reflects the notion of a *separation of powers*, this separation was never intended to be airtight.[78] Often the powers afforded to the branches are intermixed, raising questions as to which branch has the authority to assert particular powers.[79] Ultimately, the intermixing of executive and legislative powers

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68. *Id.*

69. *Id.*

70. Boris Bershteyn, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 361 (2004).

71. *How a Bill Becomes a Law*, *supra* note 64.

72. *Id.*

73. This is consistent with the Founders' belief that efficiency was a hallmark of oppressive government. *See id.*

74. U.S. CONST. art. 1, § 8.

75. Scott M. Sullivan, *Interpreting Force Authorization*, 43 FLA. ST. U. L. REV. 241, 245 (2015) (citing Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 320 (2002)).

76. *Id.*

77. *Id.*

78. *See* FELDMAN & SULLIVAN, *supra* note 24, at 297.

79. *See id.*

has led to the strengthening of the President's discretionary authority with respect to foreign affairs and the use of force.[80] In particular, this intermixing of powers occurs when Congress, acting in its legislative capacity, cedes a portion of its legislative power to the President through the passage of a statute.[81] When this occurs, the President and Congress are able to act with one accord, as the President is presumptively afforded congressional approval for future acts.[82]

Throughout the twentieth century, the United States saw an appreciation for the centralization of powers including centralization through legislative grants of power to the President.[83] This is a result of the advantage of having an Executive who is able to act swiftly, providing the United States with a unified voice in times of national emergency.[84]

C. Authorizations for the Use of Military Force (AUMFs)

Congressional statutes that authorize the President to use military force are one of the clearest examples of the secession of military power from the legislative branch to the executive branch.[85] These statutes, often referred to as authorizations for the use of military force (AUMFs), date back to President John Adams's administration.[86] At Adams's request, Congress authorized the Adams administration to use force to protect U.S. commercial vessels against France in 1798 and further authorized the Jefferson administration to do the same against Tripoli in 1802.[87] Many past presidential administrations used these authorizations.[88] This includes, but is not limited to, the James Madison, Dwight Eisenhower, Lyndon Johnson, Ronald Reagan, and George W. Bush administrations.[89]

While AUMFs allow the President to use military force, they differ from and are not considered equivalent to formal declarations of war because they do not trigger common wartime statutes and procedures that

80. Sullivan, *supra* note 75, at 244–45.
81. Dakota Cent. Tel. Co. v. S.D. ex rel. Payne, 250 U.S. 163, 184 (1919).
82. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
83. Sullivan, *supra* note 75, at 245 n.9.
84. *Id.*
85. *Id.* at 244.
86. GRIMMETT ET AL., *supra* note 18, at 5.
87. *Id.* at 5–6.
88. *Id.* at 6–18.
89. *Id.*

allow the President additional discretion in various domestic areas.[90] Despite this, AUMFs have often "delegated sweeping powers to the president through" their broad drafting.[91] AUMFs function by granting the President authority to conduct uses of force typically reserved for times of war without a congressional *declaration of war*.[92] Broad drafting is a characteristic of AUMFs that makes them effective during times of national emergency. This is due to Congress's ability to draft and implement them quickly.[93]

Notable examples of this are the 2001 and 2002 Authorizations for the Use of Military Force.[94] On September 18, 2001, one week after the fall of the World Trade Center, Congress passed Joint Resolution 107-40, authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ."[95] The goal of this joint resolution, now commonly referred to as the 2001 AUMF, was to "prevent any future acts of international terrorism against the United States . . . ."[96] The instrument authorized the use of force not only on foreign states but also on organizations or any individuals that could be linked to the September 11, 2001 attacks.[97] Overall, the 2001 AUMF grants vast discretion to the President when authorizing force.[98] Namely, it allows the President to interpret Congressional intent regarding the method of force that is "necessary and appropriate" to deter terrorism against the United States.[99] For this reason, the 2001 AUMF is famously referenced as a "blank

90. A declaration of war invokes the statutes that give the President discretion in areas pertaining to the following: nationals of enemy states within U.S. territory, trade with opposing forces, surveillance for gathering foreign intelligence information, appointment of commanders, and use of natural resources on public lands and the continental shelf. *See id.*

91. Qureshi, *supra* note 15, at 6.

92. GRIMMETT ET AL., *supra* note 18, at 6–18.

93. *Id.*

94. *See* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2, 115 Stat. 225 (2001) (enacted); Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong., 116 Stat. 1498 (2002).

95. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2, 115 Stat. 225 (2001) (enacted).

96. *Id.*

97. GRIMMETT ET AL., *supra* note 18, at 17.

98. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2, 115 Stat. 225 (2001) (enacted).

99. *Id.*

check"[100] to the President for the use of force.[101] The broad drafting of the 2001 AUMF has even resulted in it being viewed as "'full congressional authorization for the President to prosecute a war'" despite congressional power to declare war under the U.S. Constitution.[102] Like the 2001 AUMF, the 2002 AUMF shares similar broadly drafted language.[103]

D. AUMFs: The Consequences of Broad Drafting

Such broad construction of AUMFs gives the President the sole authority to interpret and execute AUMFs in any way that he deems fit, as the language often permits discretion with respect to the circumstances where force can be used and the scope of that force.[104] It is true that there is an element of functionality that is desirable where the President is given the authority to make decisions regarding the use of force.[105] While there is value in the functionality of giving the President authority to use force

100. Congressional member Rep. Barbara Lee (D-Cal.) first used the term "blank check" in defending her vote against the passage of the 2001 AUMF. Specifically, Lee referred to the 2001 AUMF as "a blank check to the president to attack anyone involved in Sept. 11 events -- anywhere, in any country . . . without time limit." Since Lee termed the 2001 AUMF a "blank check," scholars have widely referred to it as such. *See* Barbara Lee, *Why I opposed the resolution to authorize force*, SFGATE (Sept. 23, 2001), https://www.sfgate.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php [https://perma.cc/J9XQ-VFW3]; *see also* Heather Brandon-Smith, *The 2001 AUMF and Afghanistan, 18 Years Later*, FRIENDS COMM. ON NAT'L LEGIS. (Sept. 18, 2019), https://www.fcnl.org/updates/2019-09/2001-aumf-and-afghanistan-18-years-later [https://perma.cc/ASR5-7KTK].

101. Lee, *supra* note 100; Brandon-Smith, *supra* note 100.

102. Qureshi, *supra* note 15, at 16 (quoting Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2083 (2005)).

103. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

104. For example, language in the 2002 AUMF gives the President the power to authorize force whenever he deems it "necessary and appropriate." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

105. The President is often considered better suited for making decisions regarding foreign affairs. Namely, the President has confidential sources of information and "agents in the form of diplomatic, consular[,] and other officials." U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936). Further, secrecy of this information and avoidance of premature disclosure is often of utmost importance. Overall, the President, not Congress, has better opportunities of knowing conditions that prevail in foreign countries. *See id.*

in times of necessity, affording too much discretion can cause an AUMF to begin to look like a "blank check"[106] to declare war—a power that is vested with the legislative branch.[107] In vesting the power to declare war with Congress and not the President, the Framers addressed a common critique of the British Monarchy: they wanted to ensure that common folk would not have to go to war and die at the hand of one leader engrossed in the heat of private passion.[108] AUMFs, while not formal declarations of war, often involve common folk risking their lives at the hand of one man.[109] Scholars and judges ought to be wary of the implications of straying from the Framer's intent of vesting power to declare war with the branch of government subject to the democratic process. This is particularly true when it stifles the people's voice in decisions affecting the United States as a whole.

In addition to the dangers of affording the President too much discretion in authorizing force, there is further concern with the continued broadening of AUMFs through presidential interpretation. If presidents continue to interpret AUMFs broadly, precedent may be set for later administrations to do the same, further blurring the line between uses of force reserved for Congress and those afforded to the President. The Trump administration's justification for the killing of Soleimani illustrates one way a president may broadly interpret AUMFs.[110]

Following the use of force, the U.S. Department of Justice Office of Legal Counsel released a memorandum justifying the Trump administration's acts.[111] The Office of Legal Counsel used the 2002 AUMF to justify the strike against Soleimani.[112] Following Assistant

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106. *See* Lee, *supra* note 100.

107. *See* U.S. CONST. art. 1, § 8.

108. In The Federalist No. 6, Hamilton stated that some wars:

> [T]ake their origin intirely in private passions; in the attachments, enmities, interests, hopes and fears of leading individuals in the communities of which they are members. Men of this class, whether the favourites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage, or personal gratification.

THE FEDERALIST NO. 6, at 29 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

109. Since AUMFs grant the President discretion to use force, this lends itself to the President unilaterally exposing citizens to foreign hostilities.

110. Memorandum from Steven A. Engel, Assistant Attorney General, to John A. Eisenberg, Legal Advisor to the National Security Council, *supra* note 9.

111. *See id.*

112. *See id.*

Attorney General Steven Engels's recognition of the historically broad interpretation of the 2002 AUMF, he explained:

> Although the primary focus of the 2002 AUMF was the threat posed by Saddam Hussein's regime, the statute has long been read, in accordance with its express goals, to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. . . . Such use of force need not address threats emanating from only the Iraqi government, but may address threats also posed by militias . . . .[113]

Here, the Office of Legal Counsel for the Trump Administration interpreted the 2002 AUMF in a way that underscored its primary purpose—addressing the threat posed by or emanating from Iraq.[114] The presidential discretion that the 2002 AUMF's broad drafting created resulted in the appropriation of the statute for a use that is, at best, attenuated from the original purpose of the 2002 AUMF.[115] Due to judicial impediments and congressional restraints on power, there are few ways in which this sort of interpretation can be reviewed or limited in future instances. As AUMFs divert from the context of their original drafting, the need for limitations on their grant of power increases. Given the fact that presidential administrations continue to enact foreign policy, questions concerning the limitations of executive discretion under AUMFs will likely continue to arise.[116] Further, it forces one to ask whether there are any meaningful restraints on the Executive's power following the passage of these AUMFs.

II. BARRIERS TO FINDING MEANINGFUL RESTRAINTS ON BROADLY DRAFTED AUMFS

In the search for meaningful restraints on the power of the President under AUMFs, courts may only address the restraints if an injured party challenges the exercise of power.[117] If the President's exercise of power is challenged, courts face the task of seeking meaningful restraints to restore

113. *Id.* at 20.

114. *Id.* at 2.

115. The original purpose of the 2002 AUMF was to address the threat emanating from Iraq. *See id.*

116. *See generally* GRIMMETT ET AL., *supra* note 18.

117. For the judiciary to limit the power of the President, there must first be a case or controversy for which the Court has jurisdiction. *See* Baker v. Carr, 369 U.S. 186, 198–99 (1962); *see also* U.S. CONST. art. III, § 2.

the balance of power without further complicating it through judicial overstep.[118] The answer to the question of meaningful restraints on power has proven difficult to answer due to the various judicial and legislative impediments, which are discussed below, that tend to favor executive discretion. Favoring executive discretion makes it difficult to find any meaningful limitations on the power of the President, resulting in a strengthening of the Executive over time. These legislative and judicial impediments include non-justiciability doctrines, deference doctrines, and restraints on the power of Congress.[119]

A. Judicial Impediments

For a court to hear a case on the merits, the case must be justiciable.[120] A court may find a challenge nonjusticiable when a party lacks standing or when an issue presents a political question.[121] Additionally, even if a court determines a case may be heard on the merits, courts have a customary policy of deferring to the executive.[122]

1. Standing

Parties before a court must have standing to sue.[123] There are three elements of standing: (1) the plaintiff must have suffered or be likely to suffer a concrete injury in fact; (2) the injury must be fairly traceable to the defendant's conduct; and (3) the injury must be likely to be remedied by a favorable judgement.[124] Since most foreign affairs activities do not have a direct effect on private citizens, foreign affairs issues often can only be heard on the merits where there is legislative standing.[125]

The legislative standing doctrine is "a special body of case law . . . that addresses the question of standing when the party is a legislator or legislative body seeking relief based on an injury in an official

118. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (attempting to define limitations on the power of President).

119. *See* discussion *infra* Parts II.A & B.

120. *See Justiciability* LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/justiciability [https://perma.cc/WW3K-Z78W] (last visited July 25, 2022).

121. *Id.*

122. *See, e.g.*, Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 348 (2005).

123. *See* FELDMAN & SULLIVAN, *supra* note 24, at 34; *see also* U.S. CONST. art. III, § 2, cl. 1.

124. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

125. *See generally* Raines v. Byrd, 521 U.S. 811 (1997); Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).

capacity."[126] Even when a member of Congress brings the challenge, standing is often difficult to achieve in foreign affairs cases.[127] The Supreme Court's opinions in *Raines v. Byrd*[128] and *Campbell v. Clinton*[129] sharply limit the circumstances where members of Congress can challenge the validity of legislation or actions by the executive branch in court. In *Raines*, the Court found that there was no standing for members of Congress to challenge the Line Item Veto Act.[130] Though the members of Congress were able to assert an institutionalized grievance, the institutional injury was insufficient to confer standing.[131] This ruling asserted that the harm was to the congressional office itself, and, therefore, the individual congressmen did not have a personal claim to that harm.[132] Essentially, the Court determined that for legislators to have standing, they must allege a harm personal to themselves rather than the office they hold.[133]

The Court later applied this principle in *Campbell*.[134] In *Campbell*, thirty-one members of Congress challenged President Bill Clinton's bombing campaign against Yugoslavia.[135] The members of Congress claimed the campaign violated the Constitution because the bombing required congressional authorization prior to taking action since it was not a defensive use of force.[136] In *Campbell*, the Supreme Court found that the members of Congress had no standing because the President did not claim to be acting on congressional authorization but instead on his own Article II powers as Commander in Chief.[137] Since President Clinton justified his use of force under his Article II powers, the members of Congress could not articulate a personal harm.[138] President Clinton's bombing campaign was not in violation of congressional authorization; therefore, it did not result in a nullification of Congress's vote against the campaign.[139]

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126. Kevin M. Lewis, CONG. RSCH. SERV., LSB10317, THE SUPREME COURT'S LATEST WORD ON "LEGISLATIVE STANDING" AND LAWSUITS BY CONGRESSIONAL PLAINTIFFS 1 (2019).
127. *Campbell*, 203 F.3d at 27.
128. *Raines*, 521 U.S. 811.
129. *Campbell*, 302 F.3d 19.
130. *Raines*, 521 U.S. at 813.
131. *Id.* at 821.
132. *Id.*
133. *Id.* at 829.
134. *See generally Campbell*, 302 F.3d 19.
135. *Id.* at 19.
136. *Id.* at 20.
137. *Id.* at 23.
138. *Id.*
139. *Id.*

Ultimately, these two cases narrow legislative standing, especially in instances invoking *separation of powers* concerns.[140] The Court's narrowly tailored standing principles are reflective of the important role that standing plays in the separation of powers. In 1983, then-Judge Scalia articulated this role of standing as a doctrine which "roughly restricts courts to their traditional undemocratic role of protecting individuals . . . [while excluding courts] from the even more undemocratic role of prescribing how the other two branches should function . . . ."[141] Scalia's quote reflects the idea that standing serves to ensure appropriate powers remain within their designated branches. While this is consistent with general notions of *separation of powers*, it may result in the Executive being more likely to engage in unlawful activities due to a lack of oversight from any coordinate branch. Despite whether the Court has articulated the proper standard for conferring standing in cases involving foreign affairs, what remains undisputed is that in cases invoking *separation of powers*, the parties will often fail to have standing. Therefore, the issue may never be heard on the merits.[142]

2. Political Question

Even where a party has standing, a court may be reluctant to hear the case on its merits due to the issue's political nature.[143] Today, the modern political question doctrine stands for the principle that some issues are "committed to the unreviewable discretion of the political branches, and . . . that some otherwise legal questions ought to be left to the other branches as a matter of prudence."[144] Although *Baker v. Carr* is the landmark decision pertaining to political question doctrine,[145] the idea that political questions should be decided outside the court originated in *Marbury v. Madison*.[146] In *Marbury*, Justice Marshall explained: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive can

140. *See generally* Raines v. Byrd, 521 U.S. 811 (1997); *Campbell*, 203 F.3d 19.

141. FELDMAN & SULLIVAN, *supra* note 24, at 55 (alteration in original) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983)).

142. Many foreign affairs activities do not affect private citizens. Even when such activities do affect the lives of private individuals, they are often difficult to prove. *See generally* Clapper v. Amnesty Int'l USA, 566 U.S. 1009 (2012).

143. *See* FELDMAN & SULLIVAN, *supra* note 24, at 59.

144. *Id.*

145. Baker v. Carr, 369 U.S. 186 (1962).

146. Marbury v. Madison, 5 U.S. 137 (1803).

never be made in this court."[147] The Supreme Court rejected the idea that it ought to intervene in presidential decisions where the President has been afforded "constitutional or legal discretion . . . ."[148] While not all cases related to foreign affairs are political question cases, *Baker* established that cases touching foreign affairs are often political in nature because they turn on questions that "involve the exercise of a discretion demonstrably committed to the executive or the legislature . . . ."[149] As such, those questions "uniquely demand single-voiced statement[s] of the Government's views."[150] Therefore, these decisions are to be left to either the President or Congress.[151]

While a court's determination that a matter of foreign affairs is a political question does not grant a decision on the merits of the case, it yields a form of deference to the President.[152] Abstention from hearing a case based on the its political nature suggests that the President alone has the power to answer the question presented.[153] In effect, this results in accepting the President's determination of an issue as legally binding.[154] Therefore, in many circumstances, the courts, without hearing a case on its merits, afford deference to the executive.

3. Judicial Deference

If a court agrees to hear a case invoking foreign policy concerns on the merits, courts often afford deference to the views of the executive branch.[155] Generally speaking, courts have a "customary policy of

147. *Id.* at 170.
148. *Id.* at 166.
149. *Baker*, 369 U.S. at 211.
150. *Id.*
151. *Id.*
152. One example of this can be seen in the Court's resolution in *Goldwater v. Carter*. While Goldwater had unilaterally abrogated the treaty in question, the Court failed to weigh in on the merits of whether a President could take such an action unilaterally. Goldwater v. Carter, 444 U.S. 996 (1979). A number of justices in the plurality considered this a political question. *Id.* at 996–98. In effect, by failing to consider and articulate the role Congress was to play in treaty abrogation, the President's unilateral abrogation of the treaty at issue went unchallenged. The abstention and allowance of unilateral abrogation of the treaty, as a practical matter, can be viewed as affording deference to the President to act in this way.
153. *See, e.g.*, *id.*
154. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 660 (2000).
155. *See, e.g.*, Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 348 (2005).

deference to the President in matters of foreign affairs."[156] In attempting to explain the rationale behind affording deference to the Executive, the Supreme Court in *United States v. Curtiss-Wright Export Corp.* reasoned that the Executive requires flexibility in dealing with matters of foreign affairs and national security.[157] The idea is that affording this deference allows the President to respond to the ever-changing world conditions that often prove complex in nature.[158] Additionally, the Court saw questions of foreign affairs to be more political than legal, justifying the need to grant deference to the President.[159] In the case of AUMFs, this is particularly troublesome, as the President may often have an incentive to interpret force authorizations broadly to accomplish agendas with which Congress is likely to disagree. Practically, where the executive branch receives this sort of deference, the President prevails in court with a "great frequency."[160] This deference is exemplified in the overwhelming rate of success that presidents have had before the Court.[161] President Franklin Delano Roosevelt prevailed in roughly 67% of cases, President Ronald Reagan in nearly 80%, and President George W. Bush in 70%.[162] So long as the Executive can show that its interpretation is reasonable, courts are likely to defer to that interpretation.[163]

This judicial deference to the Executive is exemplified through the Supreme Court's decision in *Trump v. Hawaii*, where the Court considered the constitutionality of a presidential exercise of power in accordance with a congressional delegation.[164] On January 27, 2017, President Donald J. Trump issued Executive Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States.[165] The order barred visitors from Iraq, Iran, Syria, Libya, Somalia, Sudan, and Yemen for a period of 90 days.[166] Additionally, the executive order suspended the entry of Syrian refugees indefinitely and blocked refugees from all other countries for a period of 120 days.[167] This executive order was controversial because it

156. *Id.*
157. *See* U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 321 (1936).
158. *Id.*
159. *Id.*
160. Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 832 (2018).
161. *See id.* at 832–33.
162. *Id.*
163. *See* Bradley, *supra* note 154, at 663.
164. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).
165. *Id.* at 2436 (Sotomayor, J., dissenting).
166. *Id.* at 2403.
167. FELDMAN & SULLIVAN, *supra* note 24, at 324.

was allegedly motivated by anti-Muslim bias.[168] Following the stay of this executive order, President Trump revoked the order and signed an amended version.[169] President Trump then instated Executive Order No. 13,780.[170] The amended order removed Iraq from the list, created case-by-case waivers, and explained that the selection of the countries barred from entry was based on the fact that they were "state sponsor[s] of terrorism, ha[d] been significantly compromised by terrorist organizations, or contain[ed] active conflict zones."[171] Upon expiration of this order, President Trump issued Proclamation No. 9645, which placed entry restrictions on Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.[172] In issuing this proclamation, President Trump relied on 8 U.S.C. § 1182(f), a statutory provision of the Immigration and Nationality Act which authorized the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" whenever he "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States . . . ."[173] In response to these restrictions, three individuals with foreign relatives affected by the suspension, along with the Muslim Association of Hawaii, brought a claim arguing that the Proclamation violated several immigration statues and the Establishment Clause of the U.S. Constitution.[174]

One of the arguments the plaintiffs asserted was that the proclamation was not a valid exercise of presidential power.[175] In addressing this argument, Chief Justice John Roberts, writing for the majority, explained that the text of 8 U.S.C. § 1182(f) "exudes deference to the President in every clause."[176] The only pre-requisite under 8 U.S.C. § 1182(f) was that the President find that the entry of the aliens "would be detrimental to the interests of the United States."[177] According to Chief Justice Roberts, President Trump had made such a finding and, therefore, fulfilled the sole pre-requisite of issuing Proclamation No. 9645.[178] While the plaintiffs

168. *See Trump*, 138 S. Ct. at 2417.
169. *Id.* at 2403–04.
170. *Id.* at 2404.
171. *Id.*
172. *Id.* at 2404–05.
173. 8 U.S.C. § 1182(f).
174. *Trump*, 138 S. Ct. at 2400.
175. *Id.* at 2408; *see* 8 U.S.C. § 1182(f).
176. *Trump*, 138 S. Ct. at 2408; *see* 8 U.S.C. § 1182(f).
177. *Trump*, 138 S. Ct. at 2400 (quoting 8 U.S.C. § 1182(f) (2018)).
178. *See id.*

asserted that President Trump must not only make a finding but also explain that finding in detail for the purpose of judicial review, Chief Justice Roberts concluded that this premise was questionable.[179] Though the Court considered the explanation for President Trump's finding to be sufficient, Chief Justice Roberts seemed to reject the need for the President to explain his actions at all.[180] Here, the Court afforded deference to the President's finding, irrespective of the reasons for such a decision.[181] Additionally, the Court refused to inquire into the persuasiveness of the President's justifications for issuing Proclamation No. 9645.[182] Here, the Court cited *Sale v. Haitian Centers Council*, explaining that, "'[w]hether the President's chosen method' of addressing perceived risks is justified from a policy perspective is 'irrelevant to the scope of his [§1182(f)] authority.'"[183] Further, Chief Justice Roberts explained that "when the President adopts 'a preventive measure . . . in the context of international affairs and national security,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'"[184] Overall, the Supreme Court seemed to afford near-absolute deference to the Executive's decision when the Executive makes his decision pursuant to a congressional statute that permits him to make a discretionary finding in matters implicating national security.[185]

In *Trump v. Hawaii*, not only did the Court suggest that the President's finding alone was sufficient by questioning the need for an explanation for judicial review, but it also deferred to the President's methodology in making such a finding.[186] Ultimately, the Court seems to suggest, relying on prior opinions, that in cases of national security and international affairs, it affords judicial deference to presidential determinations.[187] While this Comment does not purport to address the correctness of the Court's decision, *Trump v. Hawaii* illustrates the sheer magnitude of deference courts afford to the President when Congress broadly drafts an authorization. In *Trump v. Hawaii*, the President was acting pursuant to a congressional authorization of power, which conferred

179. *Id.* at 2409.
180. *See id.*
181. *Id.*
182. *Id.*
183. *Id.* (second alteration in original) (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 187–88 (1993)).
184. *Id*. (alterations in original) (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 35 (2010)).
185. *See, e.g*., *Trump*, 138 S. Ct. 2392.
186. *See id.*
187. *See, e.g.*, *id.*; *see also Sale*, 509 U.S. 155; *Holder*, 561 U.S. 1.

discretion upon the Executive.[188] A president's use of military force under an AUMF is similarly situated since it too would be an act by the President pursuant to a congressional authorization of power, which would also confer discretion upon the executive.[189] For this reason, it is likely that even if a party were to have standing to challenge the constitutionality of a president's use of force under an AUMF, a court is likely to defer to the findings of the executive where national security is implicated. Affording this sort of deference is as if a thumb is being placed on the scale of executive power. A near-absolute deference, as in *Trump v. Hawaii*, makes it difficult for the executive to lose.[190]

4. A Weak Judicial Attempt to Limit Presidential Authority

Even in instances where the Court seeks to limit presidential authority, the result the Court reaches often does not create sufficient limitations.[191] Notably, the Supreme Court in *Youngstown Sheet & Tube Company v. Sawyer* attempted to meaningfully limit the power of the President.[192] In 1951, during the Korean War, President Harry S. Truman issued an executive order seizing the steel mills in the United States to support the war effort.[193] The President argued that this action was necessary to avoid a national disaster; therefore, he was acting within his constitutional capacity as the Commander in Chief and the nation's chief executive.[194] The mill owners argued that the President's actions amounted to lawmaking and, therefore, were legislative in function.[195] Thus, the Court had to determine whether the President was acting within his constitutional power when he ordered the seizure of the steel mills.[196] In deciding this issue, the majority held that the President's power to issue an order must either come from the Constitution itself or from an act of Congress.[197]

Even more notable is Justice Jackson's concurrence, which has become the most influential and most frequently cited opinion from

188. *See generally Trump*, 138 S. Ct. 2392.
189. Sullivan, *supra* note 75, at 244.
190. *See id.*
191. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
192. *Id.* at 579.
193. *Id.* at 583.
194. *Id.* at 582.
195. *Id.*
196. *Id.*
197. *Id.* at 585.

Youngstown.[198] In fact, "[the] Supreme Court over the years has come to treat Jackson's concurrence as though it were the opinion of the Court."[199] In his concurrence, Justice Jackson created a framework for analyzing problems arising from exercises of presidential powers.[200] Within this framework, he articulated three categories in which an exercise of presidential power can fall.[201] The category of exercise will determine how great or how little deference the court affords the President in asserting that power.[202]

The first category refers to the most common type of executive action, which occurs when the President acts pursuant to congressional authority.[203] Justice Jackson found that this is where a President's power is at its maximum.[204] The second category is when the President acts in the context of congressional silence.[205] This is what Justice Jackson considered the "zone of twilight" where the President and Congress have concurrent authority.[206] Finally, the third category encompasses presidential actions of which Congress has expressed disapproval.[207] This is where the President's power is at its "lowest ebb."[208]

Justice Jackson's framework attempts to limit the scope of the President's power when acting alone.[209] Further, it emphasizes the value of congressional and executive alignment.[210] In suggesting that the President is afforded the greatest level of discretion when acting within his own powers and those of Congress, Justice Jackson artfully presented the power of presidential and congressional alignment.[211]

Despite the Court's attempt in *Youngstown* to classify the weight of presidential powers, the Court has inconsistently applied the *Youngstown*

198. FELDMAN & SULLIVAN, *supra* note 24, at 307.

199. *Id.* (alteration in original) (quoting NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 360 (2010)).

200. *See generally Youngstown Sheet & Tube Co.*, 343 U.S. at 634–55 (Jackson, J., concurring).

201. *Id.* at 635–38.

202. *Id.*

203. *Id.* at 635.

204. *Id.*

205. *Id.* at 637.

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.* at 634.

210. *See id.*

211. *Id.*

Framework.[212] While Justice Jackson's concurrence is helpful to understand whether presidential action is lawful or unlawful, it fails to delineate a manageable standard for determining the scope of the President's authority when AUMFs are broadly drafted. Although instructive in theory, the framework is insufficient for the purposes of placing practical limitations on presidential power under AUMFs. Justice Jackson's framework is flexible and easily manipulated. While *Youngstown* is instructive as to how presidential power should be conceptualized, it does little to combat the deference doctrines that make it difficult to limit authorizations of force once they are drafted.

B. Legislative Impediments

Along with the various judicial impediments limiting the power of the President with respect to AUMFs, the legislative process also serves as a barrier to limiting broad authorizations of force once they are drafted and passed. Generally, Congress drafts AUMFs broadly because armed conflicts often unfold in unpredictable ways, and many aspects of such conflicts remain unknown at the time of passage.[213] Since congressional power is limited to law-making,[214] it may prove difficult both politically and procedurally to roll back AUMFs once they exist. Congress neither has the power to interpret the laws it makes nor the power to execute the laws.[215] These powers are left with the judicial and executive branches, respectively.[216] For this reason, the only avenue for congressional limitation on authorizations of force after they have been drafted and passed is through amendment or repeal.[217] Given the constraints of *bicameralism and presentment*, the process to repeal or amend takes a

212. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981). The Court has understood and applied Jackson's *Youngstown* framework inconsistently. Although Jackson's *Youngstown* framework was proposed as consisting of three categories, it was later applied in *Dames & Moore v. Regan* as a spectrum. In *Dames & Moore*, the Court seemed to blur the distinctions between the categories Jackson set forth, creating a more flexible standard for the Court to decide separation of powers issues. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 634–55; *see also Dames & Moore*, 453 U.S. at 669.

213. GRIMMETT ET AL., *supra* note 18, at 23–24.

214. *See generally* U.S. CONST. art. I, § 8.

215. *See id.*

216. *See id.* art. II, § 3; *id.* art. III.

217. *See generally id.* art. I, § 7 (detailing the process of bicameralism and presentment); *see also The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained/the-legislative-process [https://perma.cc/6Z9W-LUTC] (last visited July 4, 2022).

significant amount of time.[218] *Bicameralism and presentment*, as addressed previously, refers to the Article I, section 7 sequence, which sets forth requirements for federal law-making.[219] This process requires the consensus of a two-thirds majority of the House and the Senate, which can become a complicated process.[220] Additionally, following the process of presentment, the President must sign the bill for it to become law.[221] If he does not, he may send it back to the house in which it originated, beginning the process of congressional review all over again.[222] This process alone makes it difficult even for Congress to place limitations on AUMFs once they are drafted because it requires the consensus of both a significant majority of Congress and the President.[223]

Even in instances where Congress has attempted to claw back military power from the President, those attempts have often been in vain. One example of a congressional attempt to limit the power of the President is the War Powers Resolution.[224] The Nixon Administration enacted the War Powers Resolution in 1973 as an attempt to restore congressional war powers following the Tonkin Gulf Crisis.[225] The War Powers Resolution requires that the President consult with Congress prior to using force in "all possible instances," but it does not completely prohibit the President from acting unilaterally.[226] The President may still use force without consulting Congress, but if the President does so, he is required to report that use of U.S. military force to Congress within 48 hours.[227] While reporting uses of force to Congress may assist in presenting a unified front between the legislative and executive branches, it still results in Congress being excluded from the decisions to use force in the first place. The President retains his ability to use force unilaterally; therefore, it may be the case that Congress gets strong-armed into backing the President for purposes of appearing unified on decisions of foreign policy.

Overall, there remains a need for finding meaningful limitations on presidential ability to interpret AUMFs following their passage. The existence of judicial and procedural restraints creates a common barrier to

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218. *See* U.S. CONST. art. I, § 7.
219. Bershteyn, *supra* note 70.
220. U.S. CONST. art. I, § 7.
221. *Id.*
222. *Id.*
223. *See id.*
224. War Powers Resolution, 50 U.S.C. §§ 1541–1550.
225. GRIMMETT ET AL., *supra* note 18, at 25.
226. *Id.*
227. *Id.*

judicial and legislative pursuits to find such limitations.[228] These restraints have yielded the unexpected consequence of stifling the ability of the branches to restore the balance when it is disrupted. Since procedural restraints of both the judicial and the legislative processes prevent the finding of meaningful limitations on executive power, the only remaining alternative is to seek a solution where these procedural barriers do not exist. If, as a result of the presence of judicial and legislative procedures, the President is free to do as he pleases, then maybe that freedom ought to be where the solution lies. Therefore, it may be the case that the solution to creating meaningful limitations is in the last area not tied up by procedural restraints—the power of the President himself.

III. EXECUTIVE ORDERS: LIMITING THE SCOPE OF AUMFS WITH SELF-IMPOSED RESTRICTIONS

As previously noted, executive orders are subject to much debate because they are not subject to the legislative processes of *bicameralism and presentment*[229] even though they have the *force and effect of law*.[230] Despite controversy over the lack of procedural restraints associated with executive orders, the lack of restraint actually renders an executive order distinct from the processes that have failed to find meaningful restraints on presidential power. The lack of procedural restraints associated with executive orders acts as a useful advantage for meaningfully restraining executive power with respect to AUMFs. This is especially true when an executive order is of a limiting nature.

Although executive orders are not currently at "the top of the judiciary's interpretive toolbox," they have not been excluded from considerations completely.[231] For example, the D.C. Circuit Court in *Department of Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California v. Federal Labor Relations Authority* explained that when the court is unclear on the congressional intent of a statute, an executive order can be relevant in determining the scope of that statute.[232] Though the D.C. Circuit Court limited the use of an executive order only to times when congressional intent cannot otherwise be determined,[233] the

228. Namely, these procedural restraints include non-justiciability doctrines, deference doctrines, and bicameralism and presentment as discussed above.

229. Newland, *supra* note 20, at 2032–33.

230. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967).

231. Newland, *supra* note 20, at 2072.

232. Dep't of Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal. v. Fed. Lab. Rels. Auth., 877 F.2d 1036, 1041 (D.C. Cir. 1989).

233. *Id.*

court's willingness to seek guidance from executive orders reflects the desire of the judiciary to achieve and maintain unity amongst the branches. While executive orders have not been regularly used for the purposes of interpreting AUMFs, courts have alluded to the idea that they may be instructive when Congress' broad drafting yields ambiguity as to the scope of the AUMF.[234]

Amongst the difficulties of finding meaningful limitations on AUMFs once Congress drafts them, judges and scholars should look to self-imposed restrictions on the executive branch to meaningfully limit the power of the President. While Congress may afford discretion to the President through broad authorizations of force, executive orders of a limiting nature can be used to limit the discretion of the President. For this reason, where a pre-existing, self-imposed limitation on executive power exists, a broad AUMF should be interpreted in a manner consistent with executive orders, thereby meaningfully restricting the President's ability to use force unilaterally. Specifically, when determining the limitations on AUMFs, these authorizations should be interpreted with the intent to reach harmonization between the AUMF and the executive order. Harmonization suggests that the texts ought to be interpreted in a way that renders them compatible and not contradictory.[235] Reading broadly drafted grants of power to the Executive so as to make them compatible with the executive branch's self-imposed limitations will protect AUMFs from being appropriated to uses of which they were never intended. Further, it would serve the legal system by promoting unity amongst the branches of government and helping to prevent frustration of *separation of powers* that may result from AUMFs with unidentified limits.

Courts have accepted that executive orders are "equal in stature" to congressional statutes.[236] While this may present a theoretical fiction because executive orders are not subject to judicial restraint, the courts' practical acceptance of executive orders has not been disputed.[237] Their acceptance in court serves as the basis for allowing a statutory canon of interpretation, like harmonization, to be applied to executive orders. If executive orders have the same *force and effect*[238] as those laws Congress promulgates, it should not be controversial to consider them in light of one

234. *See generally id.*

235. *Canons of Construction*, UNIV. HOUS. L. CTR., https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf [https://perma.cc/G6U9-CNWV] (last visited Oct. 29, 2022).

236. Newland, *supra* note 20, at 2065.

237. *See* Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012); *see also* Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

238. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967).

another. Regardless of the distinctions between legislative law-making and executive law-making, courts have given executive orders the *force and effect of law*[239] and have repeatedly treated executive orders as equal to congressional statutes for the purposes of interpretation.[240] It is for these reasons that attempting to harmonize executive orders and AUMFs is appropriate.

A. Legislating Within a Backdrop

The strongest justification for reading executive orders and statutes in light of one another is that Congress does not draft laws in a vacuum.[241] In *Bond v. United States*, the Supreme Court explained that "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions."[242] The *Bond* Court explained this contention by looking to a criminal statute as an example.[243] In a criminal statute, regardless of whether the statute specifies a *mens rea*, common law guidance indicates that there is at least some required culpable mental state.[244] The Court explained that there are some things that "go without saying."[245] This idea applies not only to everyday life but also to the legislative process.[246] Ultimately, the Court in *Bond* highlighted the reality that a lack of limitations in the plain text of the statute does not suggest the absence of implied limitations based on the backdrop in which Congress drafted the legislation.[247]

The Court's reasoning in *Bond* stands for the proposition that Congress does not draft legislation in a vacuum.[248] Further, the statute's lack of specific limiting language does not imply that there are no pre-existing limitations that Congress considered when drafting the statute in the first place.[249] In applying this logic, when an AUMF is drafted and

239. *Id.* at 632.
240. *See* Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012); *see also* Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).
241. *See* Alexander v. Sandoval, 532 U.S. 275, 313 (2001) (Stevens, J., dissenting).
242. Bond v. U.S., 572 U.S. 844, 857 (2014) (quoting EEOC v. Arabian Am. Oil Co., 409 U.S. 244, 248 (1991)).
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *See, e.g.*, *id.*
248. Alexander v. Sandoval, 532 U.S. 275, 313 (2001) (Stevens, J., dissenting).
249. *See, e.g.*, *Bond*, 572 U.S. 844.

passed, Congress is assumed to be aware of pre-existing laws. This should include executive orders by way of analogy because executive orders are afforded the *force and effect of law*.[250] In cases where there are pre-existing, self-imposed limitations upon the executive, it is difficult to suggest that Congress, in drafting legislation, has not taken into consideration these pre-existing laws and regulations. Just as Congress in drafting a criminal statute with no expressed *mens rea* contemplates some form of mental state based on pre-existing legal norms, so too does Congress consider pre-existing law and legal norms when drafting AUMFs.[251] Namely, Congress drafts AUMFs against the backdrop of pre-existing statutes and executive orders, which might influence the law Congress plans to implement.[252]

Further, in cases where a pre-existing limitation exists within an executive order, Congress may not feel the need to restate a limitation it considered part of the backdrop when it was legislating. In the end, this would be something that would "go without saying," to echo the *Bond* Court.[253] Had Congress wanted to exclude any pre-existing laws or provisions from its consideration in drafting legislation, it could have expressed this intent when drafting. While Congress may choose to draft AUMFs to explicitly exclude the consideration of some instruments, where it fails to do so, the general presumption that it legislates within the backdrop of pre-existing law ought to prevail.[254] In the end, if Congress was averse to an existing executive order and had intended it not to apply, it would have explicitly conveyed that intent.

B. A Better Served Legal System: Unity & Alignment

In understanding executive orders as potential, meaningful limitations on the discretion broadly drafted AUMFs afford the President, the effects executive orders may have on the structure of the legal system should be considered. As previously noted, the Framers of the Constitution drew upon the Montesquiean principles of *separation of powers*.[255] The influence of a separation of powers theory was not the Framer's sole theoretical approach in drafting the Constitution.[256] While in theory a rigid *separation of powers* is attractive, it fails to account for the fact that

250. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967).
251. *See Bond*, 572 U.S. at 857.
252. *Id.*
253. *Id.*
254. *See, e.g.*, *id.*
255. FELDMAN & SULLIVAN, *supra* note 24, at 297.
256. *Id.*

government is a unit.[257] As such, government "depends upon the coordination of all parts to a common end."[258] It is thus that the Framers were influenced not only by the French model of *separation of powers* but also by the English system of shared powers.[259] The result of these two influences was the current U.S. system—some powers enumerated for specific branches of government and others, a shared power between the branches.[260] While there are three branches each responsible for its respective sphere, rigid separation is practically impossible.[261] The branches must coordinate, as government is a unit.[262]

As a result of this system of shared powers, it is inevitable that instances will arise where there is a "zone of twilight"[263] in the division of powers.[264] Essentially, where powers overlap, there are bound to be gray areas, which may cause controversy amongst the branches.[265] In instances such as this, each branch has been "wisely jealous of the encroachments by any other branch."[266] Most commonly, the branches at odds with one another are the legislative and executive branches.[267] The Executive has the duty to carry out the will of Congress in enforcing the laws that Congress drafts.[268] While the line between Congress and the Executive remains blurred, what is unmistakable is the overarching desire for unity amongst the branches so that they might function as one governmental unit.[269] This desire for unity was most apparent in the spirit of Justice Jackson's *Youngstown* concurrence.[270] Justice Jackson explained that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but

257. William Howard Taft, *Boundaries between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 600 (1916).
258. *Id.*
259. FELDMAN & SULLIVAN, *supra* note 24, at 297.
260. *Id.*
261. Taft, *supra* note 257, at 600.
262. *Id.*
263. The "zone of twilight" refers Justice Jackson's category two case, where the President acts in an area where Congress is silent. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
264. Taft, *supra* note 257, at 600.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
270. *Id.*

interdependence, autonomy but reciprocity."[271] Ultimately, the value of alignment and unity amongst the branches is apparent not only from a political perspective but also from a legal perspective. The desire for unity is not only theoretical but it also finds a meaningful place in examining how the nation views the validity of laws. If unity amongst branches is an overarching goal of the U.S. legal system, then it naturally follows that compatibility between executive law-making and legislative law-making ought to be a priority.

Viewing pre-existing, self-imposed limitations on executive orders as meaningful tools for interpreting the scope of AUMFs furthers the purpose of reaching unity and alignment between the executive and legislative branches. The effect of viewing executive orders as meaningful limitations on AUMFs does not favor one branch over the other.[272] Instead, it recognizes the important role of each and works to ensure that those goals are aligned, furthering the *Youngstown* majority's goals.[273] Overall, the legal system would be better served if self-imposed limitations on the Executive were understood as meaningful for interpreting the scope of AUMFs because it would promote unity and alignment between the branches. In contrast, failing to recognize these self-imposed limitations as such does not further the goals the majority articulated in *Youngstown*.[274] Instead, complete disregard for executive orders that have the *force and effect of law*[275] frustrates these goals by choosing to acknowledge one form of law-making over the other. This does not promote unity but instead welcomes disunity amongst the branches.

IV. AN ILLUSTRATION: LIMITING THE 2001 AUMF WITH EXISTING EXECUTIVE ORDERS

The theory and solution set forth in this Comment can ultimately be illustrated in its application to Executive Order No. 12,333; Executive Order No. 13,732; and the 2001 AUMF. Applying the principle of harmonization to these provisions clearly exemplifies the way in which executive orders should act as meaningful restrictions on the President's discretion in using force under a broadly drafted AUMF. To best illustrate this, the history and purpose of each provision must be considered.

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271. *Id.*
272. *See generally id.*
273. *Id.*
274. *Id.*
275. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967).

A. 2001 AUMF

As previously discussed, Congress passed Joint Resolution 107-40 authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ."[276] The goal of passing this joint resolution, now known as the 2001 AUMF, was to "prevent any future acts of international terrorism against the United States . . . ."[277] The broad drafting of the 2001 AUMF may subject it to even broader interpretations in practice because of presidential discretion to interpret what force is "necessary and appropriate."[278] The ability to broaden the AUMF through interpretation is not only true for the 2001 AUMF but also for AUMFs that have been or will be broadly drafted in the future. To limit the discretion afforded to the President and determine the scope of the "necessary and appropriate" language, the AUMF should be interpreted in a manner that is consistent with executive orders pertaining to the use of force.

B. Executive Order No. 12,333 & the 2001 AUMF

One example of an executive order capable of narrowing the scope of "necessary and appropriate" is Executive Order No. 12,333's prohibition on assassination.[279] Prior to Congress's issuance of the 2001 AUMF, President Reagan implemented Executive Order No. 12,333.[280] Executive Order No. 12,333 is viewed as having had a substantial effect on foreign policy and national security.[281] The purpose of the order was to hold agencies of the executive branch accountable for their actions.[282] Of particular relevance is Section 2.11 of Executive Order 12,333, which contains a prohibition on assassination.[283] This prohibition reads, "No person employed by or acting on behalf of the United States Government

276. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. §2, 115 Stat. 225 (2001) (enacted).

277. *Id.*

278. Exec. Order No. 12,333, 3 C.F.R. § 200 (1981).

279. *Id.*

280. Taran Molloy, *Qassem Soleimani, Targeted Killing of State Actors, and Executive Order 12,333*, 52 VICTORIA U. WELLINGTON L. REV. 163, 166 (2021).

281. Newland, *supra* note 20, at 2030.

282. Marc B. Langston, *Rediscovering Congressional Intelligence Oversight: Is Another Church Committee Possible Without Frank Church?*, 2 TEX. A&M L. REV. 433, 452 (2015).

283. *See* Exec. Order No. 12,333, 3 C.F.R. § 200 (1981).

shall engage in, or conspire to engage in, assassination."[284] While the working definition of what constitutes an assassination remains controversial, the clearest definition of assassination is found in W. Hays Parks' 1989 memorandum.[285] According to Parks, a peacetime assassination "encompass[es] the murder of a private individual or public figure for political purposes . . . ."[286] Though the definition of assassination[287] contains unique complexities, this Comment adopts the Parks memorandum definition as the working definition of assassination during peacetime.[288] Considering the previous discussion on the effect of issuing an executive order, Executive Order No. 12,333's prohibition on assassination seems to bar targeted killings against specific individuals where there is a political purpose for the killing.[289]

In attempting to harmonize the 2001 AUMF and Executive Order No. 12,333's prohibition on assassination, the backdrop in which Congress drafted and passed the 2001 AUMF should be considered. When Congress implemented the 2001 AUMF, Executive Order No. 12,333's prohibition on assassination had long been a part of the legal backdrop, specifically regarding the regulation of the internal affairs of the executive branch.[290] Various administrations have recognized this order, including the George W. Bush administration, during which the 2001 AUMF was passed.[291] Therefore, the prohibition on assassination would have been part of the

284. *Id.*

285. Molloy, *supra* note 280, at 168.

286. W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, 12 ARMY L. 4, 4 (1989).

287. Assassination is a subset of targeted killing, though one must differentiate it from the traditional understanding of a targeted killing. While targeted killings are not generally considered unlawful, assassinations have been deemed unlawful under International Humanitarian Law. In his memorandum, W. Hays Parks sets forth two definitions of assassination. Parks creates a dichotomy between how assassinations should be understood during wartime and during peace. While the memorandum broadly defines assassination as a murder that targets a specific individual for political purposes, the circumstances in which the targeting killing is authorized is determinative of whether the killing will fall within the definition of assassination and, therefore, be unlawful. *See* Parks, *supra* note 286, at 4–5; *see also* Molloy, *supra* note 280, at 166.

288. *See* Parks, *supra* note 286, at 4.

289. *Id.*

290. Exec. Order No. 12,333, 3 C.F.R. § 200 (1981). Executive Order No. 12,333's prohibition on assassination was issued 20 years prior to the passage of the 2001 AUMF.

291. Molloy, *supra* note 280, at 168.

backdrop in which Congress was legislating.[292] It is likely that in drafting legislation Congress was, or at least should have been, aware of the existence of this self-imposed limitation on the power of the Executive.

Finding that the executive order was part of the backdrop in which Congress was legislating, it would be reasonable to read the prohibition on assassination in light of the 2001 AUMF in attempting to determine the scope of the AUMF. The result would be as follows: on the one hand, the 2001 AUMF allows the Executive the discretion to use force that he determines is "necessary and appropriate."[293] On the other hand, Executive Order No. 12,333 prohibits an employee or agent of the United States from engaging or conspiring to engage in assassination.[294] Were these provisions interpreted to be compatible, the prohibition on assassination would place a limit on the ability of the Executive to determine what force is "necessary and appropriate"[295] but only to the extent that the force chosen would not amount to assassination. In the end, the harmonization would result in a meaningful limitation on a broadly drafted AUMF. Additionally, it would exemplify the unity amongst branches that Justice Jackson's framework in his *Youngstown* concurrence sought to endorse.[296]

C. 2001 AUMF & Executive Order No. 13,732

Another example of an executive order that limits the presidential discretion under the 2001 AUMF is Executive Order No. 13,732.[297] Executive Order No. 13,732 articulates the United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force.[298] Specifically, § 2(a)(iv) requires the President "take feasible precautions . . . in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population . . . [and] taking steps to ensure military objectives and

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292. *See generally* Bond v. U.S., 572 U.S. 844 (2014).

293. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. §2, 115 Stat. 225 (2001) (enacted).

294. Exec. Order No. 12,333, 3 C.F.R. § 200 (1981).

295. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. §2, 115 Stat. 225 (2001) (enacted).

296. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

297. Exec. Order No. 13,732, 81 C.F.R. § 44483 (2016).

298. *Id.*

civilians are clearly distinguished . . . ."[299] This language draws upon the Principle of Distinction.[300]

The Principle of Distinction in International Humanitarian Law requires combatants to make reasonable efforts to distinguish between those participating in armed conflict and civilians.[301] Unlike Executive Order No. 12,333, Executive Order No. 13,732 did not exist when the legislature passed the 2001 AUMF.[302] While this calls into question whether Congress could have legislated with the notion of avoiding civilian casualties in the backdrop, the idea was present because Executive Order No. 13,732 is a mere codification of a pre-existing and widely recognized International Humanitarian Law principle.[303] It is difficult to suggest that when drafting the 2001 AUMF Congress would have been blind to the pre-existing legal norms associated with conducting war and authorizing force in the international arena.

Additionally, the recency of Executive Order No. 13,732 could be grounds to afford a greater weight to its provisions. This is because it articulates modern U.S. policies concerning the use of force and gives instruction as to what is "necessary and appropriate"[304] when using force.

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299. *Id.*

300. The Principle of Distinction is a norm of customary international law that the International Committee of the Red Cross (ICRC) codified. The ICRC is an organization whose work is based on the Geneva Conventions of 1949 and their Additional Protocol. *See Mandate and mission*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/who-we-are/mandate [https://perma.cc/T7ZV-L5HG] (last visited July 26, 2022).

301. The ICRC's codification of the Principle of Distinction States: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." *Rule 1. The Principle of Distinction between Civilians and Combatants*, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1#refFn_D70F41D7_00003 [https://perma.cc/B4RR-75AR] (last visited July 26, 2022).

302. Executive Order No. 13,732 was not issued until 15 years after the passage of the 2001 AUMF. *See* Exec. Order No. 13,732, 81 C.F.R. § 44483 (2016); *see also* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. §2, 115 Stat. 225 (2001) (enacted).

303. The Principle of Distinction is a norm of customary international law applicable to both international and non-international armed conflicts. The principle dates back to 1868, where it was first set forth in the St. Petersburg Declaration. *See Rule 1. The Principle of Distinction between Civilians and Combatants*, *supra* note 301.

304. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. §2, 115 Stat. 225 (2001) (enacted).

If the 2001 AUMF's "necessary and appropriate" language was read in light of Executive Order No. 13,732, then the President would have to distinguish between civilians and military combatants for the use of force to be "necessary and appropriate."[305]

V. THE WEAKNESSES OF RELYING ON EXECUTIVE ORDERS TO LIMIT AUMFS

Although understanding an executive order as a meaningful limitation for interpreting the scope of an AUMF can further the goal of the legal system to unify the branches, there are still some practical concerns that are worth noting. One of the most prominent arguments against holding the President accountable to an executive order arising under the authority Article II of the Constitution grants is that an executive order does not create a private right of action in court. [306] In the end, there is no judicial enforcement mechanism that would hold the President accountable for a violation of that order.[307] For this reason, plaintiffs can do little to challenge the actions of the executive branch, or lack thereof, in accordance with an order.[308] The non-justiciability of executive orders is premised upon the notion that the President is to "take [c]are that the [l]aws [are] faithfully executed . . . ."[309] While this is theoretically consistent, it fails to address what recourse is available when the President chooses not to enforce or act in accordance with his own orders. This calls into question whether an executive order has the actual effect of law if it cannot be enforced. Additionally, the nature of an executive order is such that the President has the ability to unilaterally issue executive orders and also unilaterally repeal them if he so desires.[310] He may even repeal the order and act contrary to it without notifying anyone of the changes to this order.[311] The fact that the President has the ability at any moment to simply overturn or modify the executive order at his whim calls into question the enforceability of an executive order.[312]

While executive orders lack a true coercive means of attaining executive compliance, this does not mean that executive orders are inept for statutory interpretation. To suggest so is contrary to the courts'

305. *Id.*
306. Newland, *supra* note 20, at 2075.
307. *Id.*
308. *Id.*
309. U.S. CONST. art. II, § 3.
310. *What Is an Executive Order?*, *supra* note 21.
311. Newland, *supra* note 20, at 2081.
312. *Id.*

treatment of executive orders as being afforded the *force and effect of law*.[313] Executive orders often represent a policy of the Executive, and they purport to govern the internal affairs of the executive branch.[314] Additionally, one of the consequences of a president acting contrary to or altering an executive order secretly is that "the published Order stays on the books . . . ."[315] When a published order stays on the books, "it actively misleads Congress and the public as to what the law is."[316] While the presence of the executive order on the books may not grant it any greater legitimacy, whether Congress is misled directly relates to the notion set forth in *Bond* that Congress legislates within a backdrop.[317] Given that executive orders have the *force and effect of law*,[318] they too fall within the backdrop that Congress uses to draft new legislation. In the end, if Congress is led to believe that an executive order is still in effect, it may create legislation that accounts for the existence of that executive order. Thus, even if the President implicitly or explicitly overturns an executive order, compliance with that executive order may be enforceable through a law that Congress drafted and passed in light of that preexisting executive order. Further, repealing an executive order and acting in accordance with that repeal may serve as an express contradiction to the will of Congress in passing the statute premised upon the executive order.

Surely, an executive order is not the sturdiest limitation on the power of the President, since he can, at any moment, relieve himself of the duties to abide by the order. While not the strongest, the limitation still provides part of the backdrop for which Congress legislates, and it communicates to Congress things that ought to be considered in their drafting of legislation.[319] If this is assumed to be true, then the fact that an executive order is not the sturdiest limitation should not affect the value of using the executive order as a means for determining scope. Additionally, the fact that these limitations are not airtight might be beneficial, particularly regarding foreign policy. It is worth recognizing that foreign policy decisions often require some sort of latitude.[320] Since latitude is often necessary in determinations implicating foreign affairs, a limitation that is

313. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967); *see also* Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012); Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

314. *What Is an Executive Order?*, *supra* note 21.

315. Newland, *supra* note 20, at 2081.

316. *Id.*

317. Bond v. U.S., 572 U.S. 844, 857 (2014).

318. *Farkas*, 375 F.2d at 632 n.1.

319. *See generally Bond*, 572 U.S. 844.

320. Gaziano, *supra* note 32, at 275.

not airtight might be preferred. Essentially, a loose limitation would allow the President to adapt to unforeseen circumstances when such flexibility proves necessary for the purpose of effective foreign policy.[321]

Of the challenges presented, the greatest hurdle the approach faces is that it fails to address any method for enforcement. It proposes a better way to envision what law should be, but on its own it is insufficient to provide anything more than a theoretical solution to a complex issue of *separation of powers*. While law and its perception evolve, it does so gradually.[322] For this reason, effectuating a change in the way legal scholars view *separation of powers* and the role of the executive order will take more than one student comment proposing a solution steeped in theory. Suggesting that AUMFs be read in conjunction with pre-existing executive orders requires that there be some point in time where the AUMF is actually interpreted. Ultimately, the Office of Legal Counsel would be the interpreter.[323] Those who advise the President of the legalities of his choices would be the only parties who could, in practice, use this theory to interpret the force that the President may use.[324] Even then, the solution would remain theoretical since there are no guarantees that the Office of Legal Counsel would attempt to harmonize executive orders with authorizations of force. In effect, the only parties that could hold the President accountable would be the lawyers he has appointed himself—an accountability mechanism that does not bode well for the limitation of presidential powers.

VI. A LEGISLATIVE SOLUTION

Although largely theoretical, this solution can be made concrete if drafted into future AUMFs. Specifically, Congress should incorporate a clause in future AUMFs that requires the President to consult current legislation, executive orders, and other instruments given the *force and effect of law* when making determinations about the use of force. Further, the President should only make determinations that are consistent with all

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321. *See* U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936). The Court recognized the functional necessity of a relaxed judiciary with respect to foreign affairs. The Court emphasized the notion that the President ought be afforded more flexibility or discretion in foreign affairs since the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially . . . in time of war." *Id.*

322. *See* Randall T. Shepard, *The Importance of Legal History for Modern Lawyering*, 30 IND. L. REV. 1, 2 (1997).

323. *Id.*

324. *Id.*

existing legal instruments.[325] As articulated by the Supreme Court in *Bond*, Congress legislates within a backdrop that includes other legislation and executive orders.[326] While it would be impractical for Congress to express every provision it considered in drafting, it can include a methodology for presidential determinations that requires the President to look to the overall backdrop of the law in making decisions about the force that is "necessary and appropriate" under AUMFs.[327]

Following the passage of the War Powers Resolution, all AUMFs have shared a similar statutory construction.[328] Generally, an AUMF contains between two and four sections.[329] Common to all AUMFs is a section containing the actual language authorizing the President to use military force.[330] This section is the particular part of the joint resolution that Congress drafted broadly, affording the President a vast amount of discretion.[331] In addition to the authorization section of the AUMF, there is often a section entitled "Presidential Determination."[332] The Presidential Determination section contains instruction on presidential determinations to use force.[333] These requirements call on the President to use diplomatic and peaceful means prior to using force and show that those peaceful means were insufficient to resolve the issue.[334]

Since 1991, the determination requirements of an AUMF, if present at all, only require that the President first exhaust all peaceful diplomatic resources.[335] This section, when present, does not give the President any guidance or methodology for making the determination regarding when

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325. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967).

326. *See generally* Bond v. U.S., 572 U.S. 844 (2014).

327. *Id.*

328. Following the passage of the War Powers Resolution, AUMFs have been structured into sections. The sections generally include: (1) a short title; (2) language authorizing the president to use force; (3) requirements for presidential determinations to use force; (4) applicability of the War Powers Resolution; and (5) requirements for reporting uses of force to Congress. *See generally* Authorization for Use of Military Force Against Iraq Resolution, H.R.J. Res. 77, 102d Cong., Pub. L. No. 102-1, 105 Stat. 3 (1991); Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. §2, 115 Stat. 225 (2001) (enacted); Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong., 116 Stat. 1498 (2002).

329. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

330. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

331. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

332. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

333. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

334. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

335. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.

force ought be used and what force is appropriate.[336] Even in AUMFs where there is a specific requirement for the President to report to Congress, these reports do not effectively limit the discretion the President has in making his initial determination of force.[337]

To ensure that the President considers all instruments of law, including executive orders, to determine the appropriate use of force in accordance with an AUMF, Congress should add language to future AUMFs under the "Presidential Determination" section requiring the President to make force determinations in light of other instruments of law. The language included in the "Presidential Determination" section of future AUMFs should read as follows:

> SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES AUTHORIZATION
> REQUIREMENT FOR DETERMINATION THAT USE OF MILITARY FORCE IS NECESSARY
> Before exercising the authority granted in subsection (a), the President shall—
> Consider all instruments afforded the *force and effect of law* including but not limited to congressional statutes, executive orders, and treaties; and
> Exercise the authority granted in subsection (a) in a manner compatible with and not contradictory to the instruments afforded the *force and effect of law* in subsection (b)(1) of this provision.

The addition of this language makes the requirements for making force determinations explicit. While the language limits the discretion of the President in making force determinations to some extent, it only limits him to the extent that he is required to submit determinations of force that are not contrary to existing laws, international humanitarian principles, or existing executive branch policies. The President is tasked with faithfully executing the laws.[338] Therefore, requiring him to make a good faith determination of force in accordance with existing instruments of law is consistent with his role as executor of the law.[339] Additionally, this language would facilitate an understanding of executive orders as meaningful limitations on AUMFs where judicial and legislative impediments have failed to do so.

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336. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.
337. *See generally* 105 Stat. 3; 115 Stat. 225; 116 Stat. 1498.
338. U.S. CONST. art. II, § 1.
339. *See id.* art. II, § 1.

Even with a provision of this nature, there are concerns regarding the President's capability to not only unilaterally repeal executive orders but also to act contrary to an executive order without informing the public about such contrary action.[340] Theoretically, this would allow the President to consider the limiting executive order in light of the force he wishes to use, discard the executive order if he is displeased with the way it would affect his desired use of force, and then proceed to use force that would be contrary to that executive order.[341] While this seems to weaken the limiting mechanism presented, the nature of an executive order cannot be denied. The President, in having the ability to issue executive orders unilaterally, may also repeal them unilaterally. The nature of an executive order in this respect is an integral part in the President having the flexibility required to act in times of emergency or when national security is implicated.

The value in presenting legislation of this nature is that it strikes the balance between meaningfully limiting the President without tying his hands in a way that dilutes the efficiency of his position. The proposed solution requires the President consider existing instruments of law, including executive orders, and use force that is consistent with them. This forces the President to consider current executive orders in making his force determination. If the President wishes to use force in a way that contradicts an executive order, he must then repeal and act contrary to it. Even if the President chooses to act contrary to a limiting executive order, the statutory language still requires he stop and consider the force he wishes to use and whether it comports with current United States law and policy. He then must determine if his desired use of force warrants altering that law and policy. Ultimately, he is still afforded the authority to alter that law or policy, allowing him to remain flexible in times of national emergency where efficiency and flexibility may require a change in law or policy. The key is that, in making that determination, the President still has to stop, ponder, and weigh the use of force against the various legal instruments and foreign affairs policies of the United States. Even where the President chooses to disregard existing executive orders, requiring that they be considered slows the process and requires the President to consider the legal backdrop in which he uses force.[342] Even here, the requirement of stopping and thinking about the implications of actions can create a small yet meaningful limitation. Therefore, even where this legislative solution is rendered its weakest, it still creates a meaningful limitation on

340. Newland, *supra* note 20, at 2081.
341. *Id.*
342. *See generally* Bond v. U.S., 572 U.S. 844 (2014).

presidential power—one that respects the need for flexibility while promoting unity amongst the branches[343] and the legal backdrop in which Congress drafts legislation.[344]

CONCLUSION

The legal system values the alignment of the executive and legislative branches. The Supreme Court has expressed desire for unity amongst the branches in cases like *Youngstown* where there is a direct correlation between executive and legislative alignment and the legality the Supreme Court affords presidential actions.[345] This desire for alignment amongst the branches is achieved through the harmonization of executive orders and authorizations of force by ensuring that executive law-making and legislative law-making are unified. Further, this approach is consistent with the notion that Congress legislates within a backdrop of other pre-existing laws and regulations.[346] For this reason, the legal system would be better served if self-imposed limitations on the Executive were understood to serve as meaningful limitations on the scope of the President's ability to interpret broadly drafted AUMFs. Executive orders have the *force and effect of law*[347] and have been treated as equal in stature to congressional statutes.[348] This makes it doctrinally appropriate to apply statutory canons of interpretation in an attempt to harmonize executive orders and AUMFs for the purpose of determining the scope of the authorization.

Further, the harmony between executive orders and AUMFs should be facilitated through the implementation of a provision in all future AUMFs that requires the President to consider all existing legal instruments, including executive orders, when determining what force is appropriate. This ensures that the discretion of the President in interpreting broadly drafted AUMFs will be limited to uses of force consistent and not contradictory to the legal backdrop and current policies of the United States with respect to foreign affairs.[349]

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

344. *See generally Bond*, 572 U.S. 844.

345. *See generally Youngstown Sheet & Tube Co.*, 343 U.S. 579.

346. *See generally Bond*, 572 U.S. 844.

347. Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967).

348. *See* Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012); *see also* Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

349. *See generally Bond*, 572 U.S. 844.

Despite the limitations and questions that remain, AUMFs should be viewed in light of self-imposed limitations on the Executive for the purposes of limiting the scope of broad drafting. To ensure self-imposed limitations are meaningful restraints on executive discretion, future AUMFs should include a provision that requires the President to consider all existing instruments of law and use force in a way that is compatible with and not contradictory to those instruments. This provision will facilitate the use of executive orders as meaningful restraints on presidential power, creating the greatest juxtaposition—a limitation of the power of the President with his own power. Historically, executive orders have not been the first tool in the judicial toolbox for interpreting statutory law, but using these self-imposed limitations on the Executive is the solution to placing meaningful limitations on AUMFs once Congress has drafted them.