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Article

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INTRODUCTION

In the spring of 2013, when the Islamic State, or "ISIS," was still an unknown entity to most Americans, the Senate Armed Services Committee called a hearing over the conflict with al Qaeda.[1] The senators had two simple underlying questions for the executive branch officials before them, which surfaced often throughout the hearing: Who is the enemy, and how much power have we given the President to decide that question?[2]

The ambiguity traces to a statute passed in the immediate aftermath of the September 11 attack, the 2001 Authorization for Use of Military Force (AUMF). The AUMF authorizes the President to use force against the individuals and organizations that committed the September 11 attacks, or those who harbored them.[3] Though not explicitly named, these entities have been widely understood as signifying al Qaeda and the Taliban.[4] But since 2001, Presidents have invoked that statute to use force against other groups they determine are connected to al Qaeda, and in places far beyond the original Afghanistan battlefield.

The Senators' questions thus struck at the heart of one of the thorniest legal questions that has arisen in the prosecution of this novel war. When the enemy is a global terrorist group—such as al Qaeda or ISIS—rather than a state, how does the President's authority to wage war change as the organization expands, contracts, or splits apart, and as new individuals and groups support or join the fight?

To answer these questions, the Committee hauled before it the top lawyers from the Pentagon and State Department and peppered them with questions.[5] The lawyers' answers generally seemed to placate the Members. The President's power under the 2001 AUMF is not unlimited, they confirmed. But under the Executive's now longstanding interpretation, that statutory authority extends beyond core al Qaeda to groups that join the fight, or "co-belligerents," a claim they asserted stemmed from a "well-established" principle in international law. In other words, as executive officials interpret the

1. *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the S. Comm. on Armed Serv.*, 113th Cong. (2013) [hereinafter 2013 SASC Hearing]. The Islamic State, or "ISIS," which stands for the "Islamic State of Iraq and Syria," is also known as the "Islamic State of Iraq and the Levant" (ISIL), and "Daesh," which is the English transliteration of the Arabic acronym of al-Dawla al-Islamiya fi Iraq wa ash-Sham, the Islamic State of Iraq and al-Sham.

2. Though the Administration's lawyers were not prepared with a list of organizations considered to fall within the AUMF at the time of the hearing, the Committee notes state that the Administration subsequently provided a "classified paper" to Senate staff, which could have included such a list. *See* 2013 SASC Hearing, *supra* note 1, at 13. Two years later, in the spring of 2015, in a speech before the American Society of International Law, Department of Defense (DOD) General Counsel Stephen Preston presented a list of groups against whom the Administration deemed it had authority, under the 2001 AUMF, to use force at that point in time. *See* Stephen W. Preston, Gen. Counsel, Dep't. of Defense, Address to the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11(Apr. 10, 2015) [hereinafter Preston Speech].

3. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

4. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

5. 2013 SASC Hearing, *supra* note 1.

statute, Congress has authorized the President to use force against groups connected to al Qaeda whom international law would construe as enemies of the United States. The President's domestic statutory authority thus turns on his interpretation of international law. And this interpretation of Congress's intent, these government lawyers added at further prompting from the Senators, has been subject to litigation and ratified by the courts.[6]

Well, said the Senators, in so many words, in that case, carry on ….[7]

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This study suggests that the Senators should have probed deeper. Behind the executive branch assurances of a clear standard for interpreting the President's AUMF authority, founded in a "well-established" principle of international law called "co-belligerency," in fact lay an internally-contested amalgam of legal theories based in novel and in some instances flawed interpretations of international law. While that amalgam of theories and internal tension themselves may operate as some impediment to executive action, it is far from the solid and established—and clearly constraining—bright line legal principle the Executive has repeatedly suggested.

This Article traces the origins and evolving narrative of the Executive's modern co-belligerency theory to explore how the Executive shapes the boundaries of its war powers. This is also a study of how a creative legal theory—intended both to constrain and to defend presidential power—sprouted and took root within the executive branch, evolved internally into competing legal theories, became entrenched through ideologically opposed presidential administrations, judicial deference and congressional acquiescence, and

6. Scholars have referred to this kind of abdication of responsibility by the courts and Congress through over-zealous deference on matters they should be competent to resolve themselves as "a cycle of deferral" or "circular buck-passing." *See* Kristin A. Collins, *Deference and Deferral*, *in* THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL 79 (Kim Rubenstein & Katharine Young eds., 2016); David Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 129 (1993). Under Collins's and Strauss's theories, each branch defers to what is presumed to be the other's resolution of the matter, but in fact "no one ever addresses the constitutional issue." Strauss, *supra* at 129. In this case, the issue is one of statutory interpretation; yet these Members of Congress have generally deferred to the *courts'* view of *Congress's* intent.

7. Though many bills have been proposed in the three years since that hearing, particularly in light of the emerging threat from ISIS, Congress has yet to amend the 2001 AUMF, or pass new legislation, either restricting or expanding that grant of authority. It has, however, continued to appropriate funds for the ongoing conflict. *See* Defendant's Motion to Dismiss at 28, Smith v. Obama, No. 16-843 (D.D.C. July 11, 2016), ECF No. 9 (detailing Congress's appropriations and suggesting that this serves as a form of ratification of the Executive's activities). There have been subsequent exchanges between executive branch officials and senate and congressional committees, but I have uncovered none that have provided significant additional illumination. Shortly following the 2013 hearing, the Senate Armed Services Committee sent a letter to the Attorney General inquiring, inter alia: "If the United States is authorized to use military force against a state or non-state actor under domestic and international law, does that authority extend, without having to be explicit and without the need for further authorization, to co-belligerents who have aligned themselves with that entity and joined the fight against the United States?" SASC Letter of May 17, 2013 (on file with YJIL). The Committee did not clarify whether it was questioning the United States authority as a whole, or the President's, or whether the "authorization" at issue was the AUMF or some other domestic or international law authority, but it did request the Executive's supporting analysis. *Id*. The Executive has since released reports naming the groups it has determined to be associated forces of al Qaeda, and thus to fall within the AUMF. *E.g.*, DEP'T OF DEFENSE, REPORT ON ASSOCIATED FORCES (2014). In that report, the Executive explicitly reserves the right to label additional groups as associated forces "whenever a situation arises." *Id*. at 3.

ultimately became the poorly understood law of the land and a basis for perpetuating an aggressive scope of unilateral executive power and expanding war.

The role of interpretation is critical to our inquiry. Whatever the theoretical scope of the U.S. President's power to wage war, the President's own interpretation of his authority to use force—or more accurately, the interpretation of the lawyers and policy makers working on these matters within the executive branch—is often determinative of executive war powers in practice. In today's non-traditional conflict with al Qaeda and now, to an increasing degree, ISIS, the potential for novel interpretation is enormous. To this very day, debate continues both inside and outside the executive branch over the appropriate scope of the President's war powers in this conflict, from those who would have the President receive absolute deference to those who demand that the President return to Congress for any extension of the conflict beyond those core forces behind the 9/11 attacks.[8] And executive branch lawyers through two administrations have struggled to apply the laws developed for traditional state-to-state wars to this novel and evolving conflict with a non-state terrorist organization. There are few simple answers, and despite an unprecedented amount of public discourse in recent years over the Executive's wartime actions and legal positions, much remains undertheorized, secret, or both.

As a practical matter, the Executive's current ambiguity over its co-belligerency theory is likely borne in part out of the political tension between seeking to cabin the war, on the one hand, and providing sufficient flexibility to the Executive to meet an evolving threat without having to continuously face off against a hostile Congress, on the other. But whatever the reason for the Executive's opacity, as things stand today, the public can only discover that we are at war with a particular group not because Congress declares it, not because the Executive declares it, not even because the group attacks us,[9] but rather because *we* attack *them*.[10]

8. *See, e.g.*, Jennifer Daskal & Steve I. Vladeck, *After the AUMF*, 4 HARV. NAT'L SECURITY J. 115, 119 (2014) (arguing that statutory use-of-force authorizations be "carefully calibrated to the specific threat posed by an identifiable group, and limited in scope and duration"); Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2001) (arguing that the President has broad constitutional authority to determine when to use military force); Michael Ramsey, *Must Congress Approve Attacks on IS in Libya?*, ORIGINALISM BLOG (August 3, 2016, 6:37 AM), http://originalismblog.typepad.com/the-originalism-blog/2016/08/must-congress-approve-attacks-on-is-in-libyamichael-ramsey.html (arguing that in a defensive context, "[o]nce the war begins, the President may fight it, in the ways the President thinks best").

9. As I explain in Part I, it is not clear to what extent the Executive's current test for a group's entry into the conflict, and thus categorization as an "associated force" covered by the AUMF, relies upon a direct initiation of active violence or hostilities by that group.

10. Even then, the public learns this information only if the Executive discloses it or confirms it when uncovered by a third party. And we can infer from such an action only that the Executive has determined it has authority to attack a particular actor. We still cannot be sure of the legal theory for the Executive's use of force unless the Executive discloses *that* information. For example, as the discussion of al-Shabaab, *infra*, demonstrates, a U.S. strike does not always reveal a determination that the entire group is an "associated force" engaged in an armed conflict with the United States.

Reliance on co-belligerency to understand the scope of the AUMF has evolved in the course of the conflict with al Qaeda and new groups as they have gained prominence. This interpretive device will increasingly determine the course of today's conflict with ISIS, and perhaps even tomorrow's conflict with an entity as yet unknown to us. The Administration's claim in extending its AUMF authority to ISIS itself does not rest on co-belligerency, but the concept is equally applicable to the ISIS conflict. Executive officials claim that ISIS is a direct successor or splinter of al Qaeda, and, as such, the AUMF applies equally to the use of force against it just as it would if al Qaeda had simply changed its name.[11] The logic of that rationale suggests that legally, ISIS stands in al Qaeda's shoes, and *all* of the Executive's claimed AUMF authorities against al Qaeda should apply equally to ISIS. If the AUMF provides the President with the power to fight co-belligerents of al Qaeda (however "co-belligerent" might ultimately be defined), then it authorizes the President to fight co-belligerents of ISIS. And so too will it authorize the President to fight co-belligerents of any group the Executive deems a successor to al Qaeda or ISIS going forward, until the courts or Congress intervene to oppose or clarify this interpretation.

To be sure, the President does not claim unbounded authority. Executive branch officials have taken care to justify their legal position by reference to what they say are existing rules that both justify and *limit* their actions. This is an effective approach. In fact, it is through binding itself to a professed legal constraint that the Executive has at times managed to retain for itself significant flexibility.[12] As I have argued elsewhere, the Executive has throughout history softened its claims to enhanced domestic power by calling on limiting principles drawn from international law; yet these international law limiting principles do not always provide the clear constraints the Executive's invocation suggests.[13] The concerns I will address in this Article lie not, therefore, in the Executive's lack of a professed legal position. The problem is that the professed legal position—while generally accepted in principle at a superficial level by the courts and Congress—rests on an underlying theory that is at best poorly understood and at worst, a mélange of competing theories that executive officials have never been pressed to finally and firmly crystalize in one clear position.

This Article will proceed in four Parts. Part I lays the doctrinal foundation for our inquiry. It sifts through the public debris of executive branch decision-making to excavate the actual contours of the Executive's understanding of its statutory war powers. This excavation is itself no simple task. Much of executive branch national security lawyering occurs by necessity in secret. The information available to us is limited, and yet there are pockets of data that we

11. *See* Preston Speech, *supra* note 2.

12. *See, e.g.*, JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) (arguing that the existence of checks on presidential power legitimize presidential actions); Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49, 61 (2016) (arguing that the executive branch has at times invoked constraints on the state imposed by international law "as a means of softening its claim to enhanced *domestic* power").

13. *See* Ingber, *supra* note 12, at 49.

can curate and then assemble to construct a more comprehensive understanding of the government's evolving position. Specifically, this Part draws on statements by executive branch officials in speeches, congressional testimony, legal briefs, press briefings, letters to and from Congress (some uncovered through FOIA requests), executive branch reports, state practice, and even press reports of internal executive branch deliberation. This Part will demonstrate that the Executive's legal theory for interpreting the AUMF is not one clear test, but rather the ambiguous—and I'll argue largely unintentional—result of an internally evolving, and internally contested, spectrum of legal theories.

The daylight between the Executive's professed adherence to a strict limiting principle, on the one hand, and the reality of this internal tension and resulting operational ambiguity, on the other, suggests that the co-belligerency theory operates dangerously close to what David Dyzenhaus has termed a "legal grey hole." [14] As Dyzenhaus describes it, a grey hole is a "disguised black hole[]," a "façade . . . of the rule of law," in which legal hurdles serve to legitimize the government's positions while merely rubber stamping the government's actions.[15] Here it is not merely that the Executive has failed to explain its co-belligerency theory beyond a simple pronouncement; it is that there very likely is *not* one clearly crystalized operating legal theory at all. Yet because all evidence suggests that the government has intended even this messy standard to operate as some constraint, and, moreover, that executive officials have truly felt themselves hindered in some way by attempts to adhere to that standard, I will modify Dyzenhaus's term for this purpose, and suggest that the space in which the Executive's co-belligerency theory operates might be more accurately called grey-*ish*.

Part II traces the ambiguity in the co-belligerency approach to a tension between two potential theories for extending the Executive's AUMF authority beyond core al Qaeda. One theory, which I term here the "Support Test," traces to the middle of the Bush Administration, at a time when executive branch lawyers were first seeking to tie the President's war powers claims more explicitly to statutory authority. The concept makes its first public appearance in a few lines in a 2005 *Harvard Law Review* article by Jack Goldsmith and Curt Bradley.[16] There the authors derive the concept by analogizing to the historic international law of neutrality, arguing that a group becomes a "co-belligerent" of al Qaeda through the substantial provision of support for the group, similar to the level of support that historically would have made a neutral state a legitimate target by one of the state parties to a traditional armed

14. DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3, 42, 50 (2006) ("[A] grey hole is a space in which the detainee has some procedural rights but not sufficient for him effectively to contest the executive's case for his detention. It is in substance a legal black hole but worse because the procedural rights available to the detainee cloak the lack of substance."); *see also* Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016) (identifying as "rule of law tropes" areas where the executive branch professes adherence to a recognized legal standard, but in fact secretly operates under a modification of that standard).

15. DYZENHAUS, *supra* note 14, at 3.

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

conflict. This theory remains the most publicly elaborated of the Executive's approaches, but it rests on flawed doctrinal grounds, both in its application of largely obsolete neutrality law principles designed for states to a modern conflict with a non-state terrorist group, and in its overstating of the consequences of a neutrality breach under that historic body of law. At best, the Bradley and Goldsmith theory might shed light on the parties against whom Congress *could have* declared war in accordance with international law, not on the parties against whom Congress actually *did* declare war. Neutrality law is thus not an adequate source for determining the scope of the President's domestic AUMF authority.

A second theory, which I term the "Active Hostilities Test," represents an effort by some within the Obama Administration to further constrain the war's scope. It may also represent an effort, though this has never been made explicit, to tie the Executive's approach to an entirely *different* international law standard. That standard, which stems from the 1990s jurisprudence of an international criminal tribunal, has the benefit of having been fairly well-established at the time of the 2001 AUMF, but is not without its own problems, in particular that it may be too constraining for the particular question at hand. Part II dissects both tests and their likely sources and analyzes their policy implications, benefits and concerns, as well as their likely champions within the Executive.

At this point, I will have demonstrated that despite the Executive's claim to a strictly cabined and transparent statutory war powers theory guided by a "well-established" principle of international law, the Executive's co-belligerency theory is instead secret, malleable, shifting, and, to the extent it rests on any external legal foundation, it is a flawed one. Yet despite these problems, the Executive has successfully relied upon the concept of co-belligerency to entrench in both the courts and Congress the general principle that it should read its statutory authority broadly, even to cover groups which may not have existed at the time of the statute's enactment. Moreover, this broad reading of statutory wartime authorities has now survived two very different presidential administrations from ideologically opposing ends of the war powers spectrum;[17] it will likely continue to serve as the legal framework for this evolving conflict well into at least the next administration. Further still, considering the fondness of executive branch officials for executive precedent in the President's favor, we can readily envision that reliance on co-belligerency in interpreting the President's statutory war powers will survive

17. There is debate over the extent of this ideological divide. Some scholars now view the practice of the Obama Administration on war powers and executive unilateralism as more one of convergence with than divergence from the Bush Administration. *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010); MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT (2014); Jack Goldsmith, *Obama Has Officially Adopted Bush's Iraq Doctrine*, TIME (Apr. 6, 2016), http://time.com/4283865/obama-adopted-bushs-iraq-doctrine/. *But see* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing ACKERMAN, *supra*); Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and "First Use" in the Jus ad Bellum*, JUST SECURITY (Apr. 11, 2016, 8:47 AM), https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-ad-bellum/.

this conflict and will form the baseline for interpreting future congressional grants of wartime authority.[18]

Nevertheless, this is not a story of a simple power grab. The co-belligerency story is a useful case study through which to explore the messy reality of executive branch legal positioning and, at times, *unintentional* accretion of executive power. Part III will examine the counter-intuitive origins and evolution of this theory, and how we got to where we are today.

Finally, Part IV addresses the implications of this case study for executive power and the efficacy of legal constraint on the President. This co-belligerency case study reveals more than a doctrinal flaw in a war powers theory or an aggressive executive assertion of power during war. Rather, it brings to light the underexplored manner in which a creative executive interpretation evolves into a greyish legal space. Through the lens of this co-belligerency case study, this paper explores the roles that legal interpretation, misunderstanding, transparency and secrecy, substantive legal expertise in both international and domestic law, as well as internal executive disagreement and the institutional design of legal decision-making within the Executive, all play in determining the real dynamics of presidential power.

I. CO-BELLIGERENCY AND WAR POWERS TODAY

Technically, the Constitution assigns to Congress the power to declare war. But since the Second World War, the formal practice of declaring war has gone the way of the carrier pigeon, and the precise contours of the President's constitutional authorities to defend the state and engage in action short of actual "war" unilaterally are heavily debated. It is uncontroversial, however, that the President's powers are at their greatest when he acts in accordance with congressional authorization.[19] Thus, rather than press the outer bounds of constitutional power, and for reasons sounding in politics and policy as well as in law, presidents have tended to seek statutory authorizations to use force when engaging in conflicts of any magnitude, particularly those involving large-scale use of ground troops.[20]

18. *See, e.g.*, *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1 (2011) (relying on prior Office of Legal Counsel (OLC) memoranda to assert unilateral executive power); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010). For a rare counterexample, see JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 151-62 (2007), recounting his overturning, as the head of OLC, of what became known as the "torture memos," the legal memoranda from his predecessor's tenure authorizing maltreatment of wartime detainees.

19. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

20. Presidents have also historically acted "in accordance with" the War Powers Resolution, which requires congressional authorization for engagement in hostilities beyond sixty days, though most have not recognized its requirements as constitutionally mandated or even constitutionally permissible. *See, e.g.*, Letter from Barack Obama, President of the United States, to Paul Ryan, Speaker, U.S. House of Representatives (Dec. 11, 2015) (2015 WL 8488906) ("providing this . . . report, *consistent with* the War Powers Resolution (Public Law 93-148), as part of my efforts to keep the Congress informed . . .") (emphasis added) [hereinafter *Letter From The President: War Powers Resolution*]. The Carter Administration is a possible exception. *See A Review of the Operation and Effectiveness of the War*

There is much at stake in this allocation of authority between the President and Congress over the choice to go to war or enter hostilities. Yet despite the large stakes, or perhaps because of them, there is no clear arbiter. Courts are generally loath to interfere in presidents' decisions to use military force against an external actor.[21] Congress, for its part, has rarely if ever engaged its full capacities to interfere with presidential warmaking,[22] though this may be due in part to the fact that presidents have historically made efforts to justify their actions and explain the grounds for their authority.[23]

When feasible, presidents have thus typically justified their wartime actions by attempting to tie them to some statutory authority.[24] And because of the lack of external intervention, executive *interpretation* of the President's authority to use force under congressional authorization is often the whole ballgame. In recent years, this executive understanding of the scope of the President's authority to wage war has turned largely on an aggressive interpretation of the AUMF, which executive officials justify through the concept of co-belligerency.

In order to dissect that theory, it is necessary first to survey the domestic law surrounding the President's use of force against al Qaeda, ISIS, and associates.

A. *Statutory War Powers Today*

1. *The Authorization for Use of Military Force*

The President today rests his domestic wartime authority in the ongoing conflict with al Qaeda and ISIS primarily on the 2001 AUMF. To the extent

Powers Resolution: Hearing Before the S. Comm. on Foreign Relations, 95th Cong. 188-190 (1977) (statement of Herbert J. Hansell, Legal Adviser, Dep't of State) (expressing the "administration's support" for the act). In Kosovo, the NATO campaign went eighteen days past the sixty-day clock, and thus technically should have required congressional approval. In Libya, Obama administration officials argued that the U.S. participation in the NATO campaign after the sixty-day mark did not amount to "hostilities" under the act. *See Libya and War Powers*: *Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Harold Hongju Koh, Legal Adviser, Dep't of State).

21. This is true even when the target in question is an American citizen. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 35, 52 (D.C. Cir. 2010) (dismissing case for lack of standing and on political question grounds).

22. Congress has a range of options at its disposal for reining in executive overreach, including control over defense appropriations.

23. Another reason is that the same collective-action problems that may prevent Congress from enacting a wartime authorization may also hinder legislative attempts to thwart executive action.

24. Harold Koh calls this phenomenon "Find the Statute." *See* Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1, 14 (1995). Even early Bush Administration positions that are recalled as claims to expansive unilateral executive power often relied on a combination of constitutional and statutory authority. *See, e.g.*, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (relying on the "authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF]"); Brief for the Respondents, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) [hereinafter Hamdi Brief] (relying on both Article II and AUMF authority for detention). Others, of course, did not. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003) ("Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.").

that the President acts outside that statutory authority, he has some limited recourse to use force in accordance with the War Powers Resolution,[25] but beyond that he must assert some independent constitutional authority in order to act. An immediate response in self-defense to an attack would surely satisfy that requirement. But for an ongoing engagement in a conflict that has no end in sight, the President is on surer footing relying on statutory authority. Executive officials have therefore taken great pains—certainly in recent years—to assert that the President's actions in this conflict come fully within his statutory authority under the AUMF.[26]

The AUMF does not explicitly name its targets, crafted as it was in the tumultuous days just after 9/11. Instead, it authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[27]

The "organizations" in the AUMF are widely understood to represent al Qaeda and the Taliban. There is no mention of al Qaeda associates, or of new groups who might join the fray. In fact, in the days preceding the AUMF's enactment, executive officials had requested open-ended authority to use force to deter terrorism more broadly, but Congress limited the text to this language, tying the President's authority directly to the 9/11 attackers themselves.[28]

Nevertheless, since the early years after its enactment, the executive branch has—through two ideologically opposed administrations—interpreted this statutory authority to reach not only al Qaeda and Taliban forces, but also other groups that fight alongside or provide significant support to those forces. The Executive has at various points termed these groups "affiliates" or "associated forces" of al Qaeda. The Executive's explanation for this interpretation has shifted—in the early years arguing that such groups fall within the term "organization" itself[29]—but ultimately the Executive has settled

25. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (requiring that the President get congressional approval for hostilities lasting more than 60/90 days). Presidents have inconsistently embraced the War Powers Resolution. Nixon tried to veto it, but more generally, Presidents have acted "consistently" with its requirements: neither conceding nor challenging its constitutionality. *See supra* note 20.

26. *See, e.g.*, Hamdi Brief, *supra* note 24; Jeh Johnson, Gen. Counsel, Dep't of Def., Address Before Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) [hereinafter Jeh Johnson Speech]; Preston Speech, *supra* note 2.

27. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

28. *See* David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002).

29. *See, e.g.*, Brief for Respondent, Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008) (No. 06-1397) [hereinafter Parhat Brief] (quoting *Organization*, BLACK'S LAW DICTIONARY (8th ed. 2004)) (pointing to the reference to "organizations" in the AUMF, and arguing that "a group that joins forces with al Qaida or the Taliban becomes part of those covered 'organizations.' This result follows naturally from the plain meaning of the term 'organization,' which is a 'body of persons formed for a common purpose'").

on an argument that congressional grants of wartime authority should be understood to include groups that join the conflict. As justification, the Executive asserts that this interpretation is "based on the well-established concept of co-belligerency in the laws of war," and is thus grounded in legal principles and precedent.[30] In other words, the President's domestic statutory authority turns on executive branch interpretation of whom *international law* would construe as our enemies in the conflict with al Qaeda.

The thrust of the Executive's argument is that, in enacting this use of force statute, Congress must have intended this authority to apply not only to al Qaeda and Taliban forces, but also to all groups that join the fight against the United States alongside these forces. We can call those groups "associated forces" of al Qaeda, or al Qaeda's "co-belligerents," a term that has loosely identified states fighting on the same side of an armed conflict.[31] While the Executive points to the international laws of war as justification for its co-belligerency theory, the purpose here is very much a domestic one: the interpretation of a domestic statute granting authority to the President to use force.

2. *The AUMF and ISIS*

The Executive's legal theory for ISIS is distinct from its co-belligerency analysis and merits a brief detour here, because ISIS itself will soon be enmeshed in the co-belligerency story. The Executive's position on ISIS is that it essentially *is* or *was* al Qaeda and split off from the group.[32] That claim itself is highly fact-dependent and the government has not to date provided a standard for how it determined—or would in the future determine—that a new group was sufficiently connected to al Qaeda to be considered a successor to that group, beyond the conclusory language it has employed in declaring ISIS to be one.[33] Whether or not the government's succession position is a factually fair read of that relationship, the extension of the AUMF to ISIS does not itself hinge on co-belligerency.[34]But co-belligerency is nevertheless highly relevant

30. *The Framework Under U.S. Law for Current Military Operations: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. (2014) (statement of Stephen W. Preston, Gen. Counsel, Dep't of Def.).

31. Under the executive branch's recent explications of its AUMF authority, co-belligerents and associated forces are often used as interchangeable terms, but "co-belligerency" is also included as one piece of a two-part test defining associated forces. This could either be a drafting error, or could suggest that the term co-belligerent is intended as a subset of "associated forces," and that the Executive may have a more stringent test for identifying "associated forces." The reality of executive branch decision-making discussed in this article suggests that both theories may in fact coexist within the executive branch.

32. Preston Speech, *supra* note 2.

33. The factual question of whether ISIS is or is not truly a splinter offshoot of al Qaeda is debatable and beyond the scope of this paper.

34. As this Article went to print, new press reports stated that the Obama administration was about to disclose to Congress that it was now extending the AUMF to al Qaeda, which, if true, would suggest that the administration had decided to deem al Shabab an associated force. Charlie Savage, Eric Schmitt, & Mark Mazzetti, *Obama Expands War With Al Qaeda To Include Shabab in Somalia*, N.Y.TIMES (Nov. 27, 2016), http://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html?smprod=nytcore-iphone&smid=nytcore-iphone-share.

to the ISIS conflict for the simple reason that under the Executive's theory, ISIS legally stands in al Qaeda's shoes. Any legal theory regarding co-belligerents of al Qaeda applies equally to co-belligerents of ISIS. Like al Qaeda, ISIS is connected to a web of terrorist groups with varying allegiances and goals, perhaps even more so.[35] The group's interest in promoting remote acts of terror and "preauthorizing" lone wolf attacks further complicates the analysis.[36] Before long, if it has not already, the Executive will certainly face questions regarding the applicability of the AUMF to groups that either join or support ISIS, just as it has faced with al Qaeda.[37]

3. *International Law and Domestic Interpretation*

It is worth taking a moment to consider the role of international law in informing the AUMF. The question before us, as I noted above, is a domestic one: how to interpret which groups fall within the scope of the President's statutory AUMF authority. Scholars have suggested a variety of approaches to answer this. Some advocate a strict interpretation that would only include those persons and organizations explicitly named and no individuals who joined the conflict after 9/11, while others advocate reading flexibility in the term "organizations," looking perhaps to domestic criminal law to consider how to understand membership in al Qaeda sufficient to bring new members into the AUMF orbit. Some have argued that the President should simply get complete deference to decide who falls within the statute.[38]

For its part, the Executive's approach has fairly consistently been to look to international law to provide content to the terms of the statute.[39] The invocation of international law to understand potentially ambiguous statutory authority is not itself unusual. In fact, under the longstanding *Charming Betsy* canon of domestic statutory interpretation, courts faced with ambiguous statutes must credit the interpretation that would not violate international law.[40] Interpreting the AUMF in light of the *Charming Betsy* canon would entail construing the President's authority to use force under the AUMF as limited by international law prohibitions on the use of force or conduct of hostilities. For example, this would mean reading the AUMF to require the President to follow

35. *See, e.g.*, Ryan Goodman, *Associated Forces: Why the Differences Between ISIL and al-Qaeda Matter*, JUST SECURITY (Mar. 30, 2015, 12:57 PM), https://www.justsecurity.org/21621/forces-differences-isil-al-qaeda-matter/.

36. *Id*.

37. *See, e.g.*, Eric Schmitt, *U.S. Scrambles To Contain Growing ISIS Threat in Libya*, N.Y. TIMES (Feb. 22, 2016), http://www.nytimes.com/2016/02/22/world/africa/us-scrambles-to-contain-growing-isis-threat-in-libya.html (citing concerns by intelligence officials of "emerging evidence that the Islamic State had turned to its affiliate in Nigeria–the Islamic militant organization called Boko Haram . . . to poach young commanders and fighters from al Qaeda's affiliate in northwest Africa and from its Shabab franchise in Somalia").

38. *See* Delahunty & Yoo, *supra* note 8.

39. *See, e.g.*, Memorandum from Respondents Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 312 (D.D.C. 2009) (No. 08-mc-0442) [hereinafter March 13 Brief]; Hamdi Brief, *supra* note 24; Preston Speech, *supra* note 2.

40. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

the international law jus in bello principle of distinction, which prohibits the direct targeting of civilians who are not directly participating in hostilities.

This *Charming Betsy* canon, however, which operates to promote international law compliance, is not the interpretative mechanism at issue in the co-belligerency context. Under the Executive's co-belligerency theory, the Executive reads the AUMF expansively, not narrowly, to authorize force against groups not clearly contemplated by the domestic statute, on the grounds that international law itself *permits* such force, not that a different reading would somehow *violate* international law. An expansive reading of the AUMF is hardly necessary for international law compliance. In a prior work I have referred to this power-enhancing interpretive mechanism as a *Reverse Betsy*.[41] Relying on international law to enhance domestic power has less clear precedent than the *Charming Betsy* canon of constraining interpretation, but it is not novel.[42] Executive officials and scholars have long turned to international law to understand domestic grants of *both* constitutional and statutory wartime authority to the President, such as the contours of the commander-in-chief clause, or a declaration of war, and the extent to which that interplay serves as constraining or expanding depends on one's baseline.[43]

I have in prior work discussed potential dangers inherent in the Executive's invocation of international law to aggressively interpret its domestic powers, including that it enables a significant delegation of discretion to the President to interpret his own domestic authority.[44] But as a matter of practical reality, this component of the Executive's approach—that the AUMF should not only be understood as constrained by but also read expansively in light of international law—is fairly well-settled as a matter both of judicial precedent and congressional acquiescence.[45] Even more specifically, both the courts and Congress have accepted the Executive's assertion that the AUMF should be interpreted to extend to "associated forces" under a concept called "co-belligerency," which the Executive has assured them is a "well-established" principle derived from the international laws of war.[46]

41. *See* Ingber, *supra* note 12, at 62.

42. *Id*.

43. *See, e.g.*, David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 364, 379-80 (2003); Ingrid B. Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 63-64, 73-97 (2007); *see also* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (relying on international law to understand the President's wartime authority); Bradley & Goldsmith, *supra* note 16, at 2091 (arguing that it is likely "Congress intended to authorize the President to take at least those actions permitted by the laws of war" and arguing that this is supported by precedent and Executive practice).

44. *See* Ingber, *supra* note 12.

45. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011); Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (reading the AUMF implicitly to authorize detention in light of international law's acceptance of—and limitations on—detention of enemy fighters during "active hostilities").

46. Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009); 2013 SASC Hearing, *supra* note 1 (generally questioning executive officials on the concept of associated forces, but accepting the invocation of international law to expand the President's authority under the AUMF); Jeh Johnson Speech, *supra* note 26; Preston Speech, *supra* note 2.

4. *Divining The Executive's Co-Belligerency Theory*

Considering the significant work it does in enhancing the scope of the President's AUMF authority, it is critical to understand precisely what this "well-established concept of co-belligerency" actually is. And it is perhaps even more important to understand what the Executive intends by it, and how it informs the Executive's interpretation of the President's statutory war powers. After all, what the Executive means by "co-belligerency" in this conflict with al Qaeda and ISIS determines the bounds of whom the Executive may lawfully detain, target, and kill.

Taking as given the Executive's stated justification for an expansive reading of the 2001 AUMF—that it must include within its ambit groups that become parties to the conflict between the United States and al Qaeda—the key question becomes: *who* are these other existing parties to the conflict? "Co-belligerents" might be the right term to apply to such groups once we identify them, but what is our standard for determining who these groups are? What exactly does "co-belligerents" mean? Does it include only those who have sworn allegiance to al Qaeda, or can the President lawfully target other groups? Does it matter whether those groups have engaged in "active hostilities," or can the President also target with legal force groups who "supported" al Qaeda in its conflict? The scope of a fifteen-year conflict turns on the question, but surprisingly, the executive branch does not have a clear answer.

Considering the Executive's oft-stated reliance on "co-belligerency" as a limiting principle for its expansive AUMF interpretation, one might expect that this is a concept one could find defined in a treatise of either domestic or international law, and that this definition would provide clear content for determining when a non-state armed group becomes a party to a pre-existing armed conflict. But that is not the case. "Co-belligerent" is simply a fairly informal term of identification. It is a label for entities, historically states—and in particular *belligerent* states—that have joined an armed conflict on the side of one of the parties.[47] It is similar in meaning to "ally," though it lacks any requirement for the formal ties that label suggests. The label "co-belligerent" has been used historically, though without great frequency. The term makes a rare appearance in treaty language,[48] and some U.S. statutes,[49] as a means of identifying states that are parties on the same side of an armed conflict. And it is used today as a label for states that are partners in an armed conflict, including states that have joined the United States in its conflict with al Qaeda.[50] But there is little to no international law content elaborating further on

47. *See, e.g.*, MORRIS GREENSPAN, THE MODERN LAW of LAND WARFARE 531 (1959) (defining co-belligerent as "a fully fledged belligerent fighting in association with one or more belligerent powers").

48. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (distinguishing "nationals of a co-belligerent state" to the detaining power as individuals who do not qualify as protected persons under the Convention, along with nationals of neutral states, so long as "the State of which they are nationals has normal diplomatic representation in the State in whose hands they are").

49. *See* Military Commissions Act of 2009, 10 U.S.C. § 950(t) (2009).

50. *See id.*

the meaning of the term "co-belligerent" or on what precise conglomeration of activities would suffice to make an entity a "co-belligerent." In short, the term itself does no work in explaining when a non-state armed group becomes a party to the armed conflict. Instead we must look to other sources in international law in order to consider how to determine when an entity's actions render it a belligerent party to an armed conflict.

Since the use of the term itself does not provide this content, attempts to glean the Executive's understanding of what it intends by "co-belligerent" today require a degree of investigative work, to sift through and curate the trail of evidence the Executive leaves in its wake. This trail includes statements by executive branch officials in speeches, congressional testimony, legal briefs, letters to and from Congress, press briefings, executive branch reports, state practice, and even press reports of internal executive branch disputes. Divining the executive branch interpretation here also requires an analysis of the recent history and context that provide the backdrop against which the Executive now operates.

Let's begin our story at the end, or at least, today (which, when all is said and done in this conflict, will probably look more like the middle if not the beginning). Today the Obama executive branch interprets the AUMF to extend to associated forces through a theory it publicly laid out about halfway into the Administration.[51] This theory has two prongs: an associated force must be "(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) [] a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners." When the Administration announced this approach, it was (and remains) the most detailed explanation that executive officials had provided to date. On its face it seems to provide clear lines for determining which groups might fall within the "associated forces" theory. Yet upon closer examination and when read in conjunction with other pieces of data from the Executive trail, it becomes clear that there is much interpretive work happening behind the terms "entered the fight" and "co-belligerent" that is not immediately apparent on the surface, and which may affect the meaning of the Executive's theory dramatically.

Indeed, while the language of the Executive's theory—and specifically, phrases like "entered the fight," or "hostilities against the United States"—might suggest a threshold requirement of direct participation in hostilities against the United States before a group may be deemed covered, other evidence suggests that it may be employing a lower threshold.[52] These sources and the limited information we can gather from its practice[53] suggest that the

51. Jeh Johnson Speech, *supra* note 26. This article went to publication in December 2016, before the end of the Obama Administration.

52. *See id*.

53. We cannot know the entire set of groups the Executive today determines as falling within the associated forces umbrella. But the Executive has at various points publicly named certain groups as "associated forces" of al Qaeda. Under the Bush Administration, the Executive argued in briefing in the Guantanamo litigation that that East Turkestan Islamic Movement ("ETIM") and Lashkar-e-Taiba ("LET") were associated forces. *See* Parhat Brief, *supra* note 29; Respondents' Memorandum to Petitioners' Motions for Expedited Judgment on the Record, Boston v. Obama, 821 F. Supp. 2d 80

Executive may accept some level of support to al Qaeda, and thus as to ISIS as well, as sufficient to render a group a co-belligerent.[54]

Likewise, it is not clear whether "co-belligerent" is coterminous with "associated force" or if it is a subset of the latter term, as suggested by this two-prong approach in which it appears part of the definition in the second prong. The USG often uses the terms "associated forces" and "co-belligerents of al Qaeda" interchangeably, which suggests that the term "co-belligerent" and the standard the Executive imparts to it may be doing most of the work.[55] Either way, the Executive's stated associated forces theory does not provide the information necessary to assess the standard under which the Executive internally determines the groups that fall within the AUMF. But we can piece together additional information about this standard from executive statements in briefs, speeches, and other documents, and from the sources the Executive has relied upon in the few instances it has litigated this question.

With respect to executive branch practice, the Executive has not regularly provided a public accounting of the groups it deems covered under the President's AUMF authority as "associated forces" in this conflict. But there have been some occasions when it has released information that is relevant to our inquiry. First, in a speech in 2015, the DOD General Counsel Stephen Preston announced the entire set of groups that the Administration at that time considered to fall within AUMF authority.[56] There is some ambiguous wording in the list; in particular it is not clear whether Preston intended to include all of al Nusra under the associated force umbrella or only certain individuals within the group with particular ties to al Qaeda.[57] A decision to include the entire group would suggest that the Executive was asserting authority to target groups that did not necessarily first participate in active attacks against the United States. Similarly, we know from media reports that the Executive has had

(D.D.C. 2011) (No. 05-CV-883). Recently, in the spring of 2015, Stephen Preston listed the entire set of groups that the Administration at that time considered to fall within AUMF authority, which included, in addition to al Qaeda and the Taliban: insurgent groups in Afghanistan; al Qaeda in the Arabian Peninsula (AQAP), in Yemen; the Khorasan Group in Syria; and ISIL. *See* Preston Speech, *supra* note 2.

54. This accords with a phenomenon that is evident on the micro level as well: the Executive's reliance on support, in addition to direct or active participation in hostilities, to determine individual combatancy. *See infra* notes 107-09 and accompanying text.

55. *See, e.g.*, Government's Memorandum of Law in Support of Final Judgment Denying a Permanent Injunction and Dismissing This Action, Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012) (No. 12-3176).

56. This list from Spring 2015 is as follows: al Qaeda and the Taliban; "other terrorist or insurgent groups in Afghanistan"; individuals who are part of al Qaeda in Somalia and Libya; al Qaeda in the Arabian Peninsula (AQAP) in Yemen; "Nusrah Front and, specifically, those members of al Qa'ida referred to as the Khorasan Group in Syria"; and ISIL. *See* Preston Speech, *supra* note 2.

57. *Id.* Since that speech, executive officials have made similarly ambiguous statements with respect to al Nusra, which suggest that the group's status is not definitively resolved inside the executive branch. *See, e.g.*, Peter Cook, *Press Secretary Peter Cook in the Pentagon Briefing Room*, U.S. DEP'T DEFENSE (Apr. 4, 2016), http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/713174/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in (drawing a line between targeting an al-Nusra member who was also a member of al Qaeda, on the one hand, and targeting al Nusra as a group, on the other, but later stating, inexplicably, "[i]n this instance, we're talking about a historic—Al Qaida members who may be affiliated with al-Nusra. Now, al-Nusra has been an affiliate of Al Qaida, so it's in very much—one in [sic] the same").

longstanding internal debates about the status of groups that are somewhat more attenuated from the direct conflict with the United States: in particular groups like al-Shabaab, whose leaders might have ties with al Qaeda but whose foot soldiers may be more focused on a particular regional struggle.[58] These pieces of evidence suggest that the Executive's theory does not contain a hard and fast rule that a group must first directly attack the United States before coming within the orbit of the Executive's associated forces theory. These data points are useful for trying to glean the parameters of the Executive's asserted authority—at least for these particular points in time—but do not provide sufficient content to establish an underlying legal theory or understand how that theory would apply in specific cases going forward.

For this we must look elsewhere. The most specific publicly available content for the theoretical background for this theory comes from legal briefs the U.S. Government has filed in the context of the Guantanamo habeas litigation. These briefs suggest the Executive has looked, at least in part, to concepts drawn from neutrality law in understanding its modern co-belligerency approach. Some of these briefs directly reference neutrality law as a background source for the Executive's theory; more often they cite sources that themselves rely on neutrality law.[59] Taken together, these briefs and the Executive's known practice suggest that origins of the Executive's co-belligerency approach trace to a theory—or a modified form of a theory[60]—that Jack Goldsmith and Curt Bradley publicly debuted in their seminal piece on the AUMF in the *Harvard Law Review* in 2005.[61] This article is one of the few sources cited when the government raises the matter in briefs, and it is the only source cited that justifies the use of the co-belligerency concept to interpret the reach of the AUMF.[62]

I will return to a thorough discussion of the Bradley/Goldsmith theory in Part II, in which I attempt to excavate the origin story of the Executive's co-belligerency theory. But for the purposes of this section it is critical to know the following: first, the Bradley/Goldsmith test proposes that an armed group can become a co-belligerent of al Qaeda, and thus fall within the President's

58. *See, e.g.*, JAMES R. CLAPPER, SENATE SELECT COMM. ON INTELLIGENCE, STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 4 (2013) (calling al-Shabaab an "al-Qa'ida-affiliated insurgency" but stating that al-Shabaab "will remain focused on local and regional challenges"); CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 274-79 (2015) (reporting on ongoing internal debates between executive branch legal advisers over whether to brand al-Shabaab an associated force of al Qaeda); Letter From The President to Congress (Dec. 11, 2015), https://www.whitehouse.gov/the-press-office/2015/12/11/war-powers-resolution (noting a U.S. strike against "an al-Shabaab senior leader who is part of al-Qa'ida"). For additional discussion on nuances in the Executive's legal theory on al-Shabaab, see *infra* note 75 and accompanying text.

59. *See, e.g.*, Brief for Appellees at 31, Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051) [hereinafter Al-Bihani Brief] ("The international law concepts of *neutrality and co-belligerency* . . . confirm that the 'enemy' in an armed conflict can include the enemy's affiliates.") (emphasis added).

60. *See* Sinnar, *supra* note 14 (arguing that the Executive often creates secret modifications to terms of art it employs, despite the public's assumption of the terms' meaning under standard usage).

61. Bradley & Goldsmith, *supra* note 43.

62. *See, e.g.*, Al-Bihani Brief, *supra* note 59, at 31 (citing Bradley and Goldsmith for its reliance on neutrality law and co-belligerency in informing the AUMF); Parhat Brief, *supra* note 29.

AUMF authority, by providing "systematic or significant" support to al Qaeda. Second, Goldsmith and Bradley point to the historic body of international law known as neutrality law for support for this theory, analogizing from the repercussions that flow from a state violating its neutrality to how we should treat a non-state armed group that provides a similar level of wartime support to a group like al Qaeda. The third point is less relevant for understanding the Executive's theory but leaving it until later would too significantly risk burying the lede, so I note it here only briefly: I argue that there is a small flaw in the Bradley/Goldsmith description of the relationship between neutrality law violations and the implications for co-belligerent status, and that this has significant repercussions for the domestic law purpose for which it is used today.[63] In essence, I argue that the neutrality-based test does not define the parties to the conflict as a matter of either international or domestic law. Therefore, this international law-derived test does not fit the domestic law purpose.

The Obama Administration has not exactly embraced the Bradley/Goldsmith test with consistency. Aside from citing the article in some early briefs, executive officials have not generally referenced the test when discussing the associated forces or "co-belligerency" theory. This may be due to a combination of factors I will dissect further in Part II, including political reasons, such as the fact that both Goldsmith and Bradley had served under the prior Administration. But Executive distancing from this particular source may also be substantive, and may evince an intent to move away from the specific neutrality-law based theory espoused within the Bradley/Goldsmith law review article. This distancing, combined with the Executive's production of a new two-pronged approach that includes an "entered the fight" criterion, suggests that the Executive's position has either evolved some distance from the Bradley/Goldsmith theory of 2005, or that the Executive has taken great pains to suggest that its position has evolved from that period.

Taken together, we have the following data points on how the Executive interprets the scope of its AUMF authority: 1) the appearance of a strict approach, announced in speeches, which requires that a group must have "entered the fight" and must be a "co-belligerent of al Qaeda"; 2) some residual reliance in litigation on a theory first espoused by Goldsmith and Bradley, which suggests a neutrality law-derived, support-based test for associated forces; 3) ambiguous wording in executive speeches and press statements that suggests the Executive may be targeting groups that have provided support but have not necessarily first engaged in attacks against the United States;[64] 4) reports, practice, and ambiguous statements by executive officials, which together suggest that internal executive actors continue to debate the contours of which groups come under the AUMF umbrella, including groups, such as al-

63. *See infra* Part II(B).

64. *See* Preston Speech, *supra* note 2 (using ambiguous language about al Nusra and Khorasan group); *see also* Cook, *supra* note 57 (suggesting ambiguity surrounding classification of al Nusra members).

Shabaab, which are engaged in regional struggles but whose leaders may have strong ties with or support al Qaeda.

This constellation of data points is less complicated than it appears. In fact, we have narrowed our inquiry over the Executive's co-belligerency theory quite a bit. We can glean from this information that the Executive's internal position on which groups can be considered "associated forces" or "co-belligerents" is somewhere between the two following poles: 1) a more stringent rule that would cover only groups that directly engage in active hostilities against the United States, on the one hand, and 2) a lower threshold that would include groups that provide support to al Qaeda—through training, weapons, sharing of training camps, or even shared ideology or fighting against *some* common enemy—but have not necessarily as yet engaged in active hostilities against the United States. We can call these, respectively, the active hostilities test and the support test. As I will demonstrate in Part II, each of these legal theories can be traced to a specific source, as well as to distinct sides in policy debates, and these policy debates help explain why officials within the Executive may be inclined toward one position or the other.

The outward ambiguity in the Executive's approach is likely the result of continued internal uncertainty and tension over what the Executive's test should be. Decision makers at times employ "constructive ambiguity" to paper over real substantive disagreement with careful drafting, thus permitting the debate to continue for as long as feasible, to be decided only when absolutely necessary.[65] This ambiguity may account for the Administration's continuing internal arguments over the extent to which a group like al Shabaab falls within the AUMF (or may be the result of that debate), and may also account for the odd and ambiguous wording in the Preston speech on al Nusrah.[66] Perhaps internal actors were arguing about the Executive's position right up until the moment of the speech.[67]

All of this suggests that while the Executive has publicly announced a strict-sounding test to cabin its expansive AUMF interpretation, that announced test may mask significant continued ambiguity and fluidity in the test under the surface. Internal strife continues over the precise contours of the underlying

65. *See* Susan Biniaz, Comma But Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime 2-3 (June 2016) (unpublished manuscript), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/biniaz_2016_june_comma_diff_responsibilities.pdf (discussing the use of "constructive ambiguity" in multilateral treaty negotiation and drafting in order to reach agreement on matters still contested); Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, AM. J. INT'L L. (forthcoming 2016).

66. Preston Speech, *supra* note 2 (identifying the "Nusrah Front and, specifically, those members of al-Qa'ida referred to as the Khorasan Group in Syria" as an associated force). For an example of executive officials using ambiguous language to paper over internal disputes on a legal position, see SAVAGE, POWER WARS, *supra* note 58, at 341-42 (stating that executive officials remained "studiously ambiguous" on the legal theory for detaining a Somali prisoner, Ahmed Warsame, because different officials held different positions, but agreed that, at a minimum, he was detainable under either theory).

67. For a discussion of how speechmaking prompts the executive branch to congeal internal legal positions, see Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 397-403 (2013).

legal theory. Among the options executive officials are debating—and possibly relying upon—is a different and potentially lower threshold for finding a group targetable under the AUMF other than the one that the announced approach suggests. In the meantime, the constructive ambiguity that permits the continued existence of multiple legal theories preserves discretion for executive officials to act on either basis.[68] In other words, this continued tension over which legal theory will ultimately prevail preserves even more flexibility for executive officials to act than they would have if they were to choose one theory or the other.

Despite this ambiguity over its underlying legal theory, the Executive has, to date, entrenched the principle of expanding the AUMF to include associated forces in both the courts and Congress. And it has done so largely by asserting compliance with this limiting principle, a test that it has presented as clearly established, pedigreed, and constraining of executive action.[69] Ultimately, by asserting adherence to a legal principle—even one that has evidently been poorly understood or misjudged—the Executive has reserved for itself the ability to continue its internal arguments about what the precise contours of its theory will be, and perhaps also to continue pushing on the outer boundaries of that theory as facts on the ground evolve. And those evolving facts include not only the nature of the armed conflict but also the President's fraught relationship with Congress.

II. SOURCING THE MODERN TEST(S)

Now that we have established the competing executive branch legal theories over the concept of co-belligerency, this Part will dissect them, unearth the sources on which they rely, and identify the concerns, policy motivations, and practical implications associated with each.

A. *The Support Test*

The support test, under which the AUMF extends to groups that provide significant support, but do not necessarily directly attack, the United States, made its public debut in Goldsmith and Bradley's seminal Harvard Law Review piece in 2005.[70] As I will discuss in Part III, the support test likely traces to slightly earlier origins within the Bush Administration itself, but the law review article nevertheless was the first and remains the most detailed public exposition of that theory. Through two administrations it has been the Executive's key source for this support-based version of the co-belligerency concept.[71]

68. *See* Ingber, *supra* note 65.

69. For a discussion of the Executive's explicit reliance on strictly stated legal tests that do not necessarily accord with the looser interpretation it may take internally, see Sinnar, *supra* note 14.

70. Bradley & Goldsmith, *supra* note 43.

71. *See, e.g.*, Al-Bihani Brief, *supra* note 59, at 31 (citing Bradley and Goldsmith for its reliance on neutrality law and co-belligerency in informing the AUMF); Parhat Brief, *supra* note 29, at 28, 29, 33, 34.

At the time of their 2005 piece, Bradley and Goldsmith had both recently completed service in the executive branch. Bradley had left a position as counselor to the Legal Adviser at the State Department and Goldsmith had left his post as the head of the Office of Legal Counsel at the Department of Justice. Shortly after leaving the government they co-wrote the highly influential article that presented a theory for a flexible interpretation of the President's statutory war powers in the conflict with al Qaeda, which continues to guide interpretation of the AUMF today. As one small component of that theory, Bradley and Goldsmith proposed a reading of the 2001 AUMF that would extend to groups that supported al Qaeda in its fight against the United States, arguing that Presidents have historically read congressional authorizations broadly to include force against additional "entities [that] had a nexus to the named enemy."[72]

Bradley and Goldsmith termed these groups beyond core-al Qaeda that should be covered under the AUMF al Qaeda "co-belligerents." In seeking content for determining the scope of application of that concept, they suggested looking to principles in neutrality law, under which a state at war was historically permitted to respond—at times with force—to neutral states that violated their neutrality by supporting the state's enemies.[73] In particular, they pointed to the requirements "that the neutral state must not participate in acts of war by the belligerent, must not supply war materials to a belligerent, and must not permit belligerents to use its territory to move troops or munitions, or to establish wartime communication channels." According to Bradley and Goldsmith, "a state can become a co-belligerent . . . through systematic or significant violations of its duties under the law of neutrality," thus making it a lawful target of military force by the opposing party.[74]

Drawing on this test for modern purposes, the argument is that, just as historically under principles of neutrality law a nation might have responded with force to other states that systematically violated their neutrality obligations in supporting that nation's enemies, today the United States may use force against new entities that provide a certain level of support to its enemy, al Qaeda. Incorporating this argument into the domestic statute, in accordance with their view that domestic war authorizations should be read expansively, the authors suggest that the AUMF should be interpreted to provide the President with authority to use force against such supporting actors and groups in addition to the core groups explicitly contemplated by the 2001 AUMF, namely al Qaeda and Taliban forces.

72. Bradley & Goldsmith, *supra* note 43, at 2111-12. As evidence, they pointed to U.S. operations against Vichy France in World War II. In that conflict, their argument went, the U.S. President did not seek additional congressional authorization before attacking the Vichy forces in French North Africa, based in part upon their loose alliance with Germany. *But see* Ryan Goodman, *Debunking the "Vichy France" Argument on Authorization To Use Force against Co-Belligerents*, JUST SECURITY (Nov. 17, 2014, 10:37 AM), http://justsecurity.org/17516/debunking-vichy-france-argument-authorization-force-co-belligerents/ ("Vichy France should not count as a case of the President waging war against a co-belligerent without specific congressional authorization" because, *inter alia*, "the United States considered Vichy a "neutral" not a co-belligerent of Germany.").

73. *See, e.g.*, Bradley & Goldsmith, *supra* note 43, at 2111-12.

74. *Id*. at 2112.

1. *Practical Implications of a Support Test*

Under a support test for interpreting the AUMF, the Executive would be authorized to use force against groups that provide a certain level of support to al Qaeda, even if they do not first initiate direct attacks on the United States. Al Qaeda has a web of affiliates with different levels of connection to the specific conflict with the United States. Regional groups like al Shabaab, in Somalia, or the Libyan Islamic Fighting Group (LIFG), may have at various points in the last 15 years shared resources, or even ideology, with al Qaeda, but may nevertheless be focused primarily on a localized fight and not on attacking the United States. Members of these groups may *individually* join al Qaeda; reports suggest, for example, that internal disagreement within the executive branch over the use of force against al Shabaab have at times been resolved practically through a decision to use force against only particular actors in leadership roles who were also members of al Qaeda, in contrast to using force against the group as a whole, which would include foot soldiers who may have had no interest in fighting the United States.[75]

I noted in Part I reports of internal debates within the Executive regarding the scope of the associated forces theory. The Support Test bolsters the argument for using force against groups like al Shabaab and others who may not have directly initiated hostilities against the United States, but who are nevertheless engaged in the sharing of resources with al Qaeda. The extent to which such a group would fall within the original Bradley/Goldsmith model of this theory depends on the extent to which such a group engages in behavior that would be analogous, in a state-to-state conflict, to "systematic or significant violations of its duties under the law of neutrality."[76]

2. *Problems with the Support Test*

The neutrality-derived support test has some fairly significant doctrinal problems. Some concerns over a neutrality law-based approach to interpretation

75. *See, e.g.*, SAVAGE, POWER WARS, *supra* note 58, at 274-79. The legal theory governing force against al Shabaab has been complicated even further in recent strikes. In March 2016, an American airstrike on an al Shabaab camp killed about 150 low-level fighters, but U.S. sources attributed this not to a decision to label al Shabaab an associated force, but rather to a "tactical defense of U.S. and partner nation ground force units," based on the "imminent threat to U.S. and African Union Mission in Somalia (AMISON) forces" posed by those fighters. *See* Letter from Joe Sowers, Dep't of State, to Charlie Savage, N.Y. Times (Mar. 10, 2016), https://www.documentcloud.org/documents/2757459-shabab-dod- [hereinafter Sowers letter]; *see also* Letter from Barack Obama, President, U.S., to Speaker of the House of Representatives and President Pro Tempore of the Senate, (Jun. 13, 2016), https://www.whitehouse.gov/the-press-office/2016/06/13/letter-president-war-powers-resolution (reporting strikes in Somalia on "al-Qa'ida and associated elements of al-Shabaab" and specifically on members of al-Shabaab who are "part of al-Qa'ida," and other strikes in defense of the United States and AMISON forces). Sowers's letter carefully parsed that, while the U.S. forces were not at this time labeling al Shabaab an "associated force," they were also not saying that al Shabaab was *not* an associated force. Sowers letter, *supra* ("The fact that an al-Qa'ida-affiliated group has not been identified as an 'associated force' for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an 'associated force.' We are prepared to review this question whenever a situation arises in which it may be necessary to take direct action against a terrorist group.").

76. Bradley & Goldsmith, *supra* note 43, at 2112.

of the AUMF—such as the incongruity of applying old concepts developed for conflicts between states to conflicts with non-state groups such as al Qaeda—have by now been thoroughly ventilated, though only in recent years and possibly too late to gain much traction in curtailing reliance on the test.[77] These are legitimate concerns, but they almost prove too much. Much of the Executive's legal theories regarding the conflict with al Qaeda look to principles from bodies of law that may not have been designed with the current circumstances in mind. Jettisoning reliance on analogy as a means of understanding the legal rules for the conflict would mean dismantling the United States' entire legal architecture for the conflict with al Qaeda—in many cases the constraints along with the powers. It is hard to imagine the Supreme Court, Congress, and the President all suddenly reversing course on the overarching legal structure governing the conflict. That said, there are deeper flaws in the support test that have been overlooked in the scholarship and in other critiques of the test, and which there is reason to believe neither Congress nor the courts have generally considered.

3. *The Neutrality Law Problem*

Before taking on the neutrality-derived support test on its own terms, it is worth first pausing to flesh out the myriad problems inherent in the extension of neutrality law principles to a modern conflict between a state and a non-state actor such as the conflict with al Qaeda, which alone might be fatal to reliance on the test.

First, neutrality law as a general framework simply does not map onto the conflict between the United States and ISIS or al Qaeda, neither as a formal matter nor as a functional one. There is a reason that neutrality law does not tend to enter modern discourse with great frequency, unless one is chatting with a history buff. Many view neutrality law as generally obsolete in the modern era; at a minimum any right to use force in response to a violation of neutrality falling below an armed attack does not survive the U.N. Charter's regulation of the use of force.[78] Historically, in the pre-Charter era, neutrality law developed

77. *See, e.g.*, JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 40-41 (2015); Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L L.J. 75, 78, 81, 88-89, 96, 104 (2011); Jens David Ohlin, *Targeting Co-Belligerents*, *in* TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD 60, 70-72 (Finkelstein et al. eds., 2011) (questioning whether the concept of co-belligerency can be translated to apply to conflicts with non-state actors); Remarks by Hina Shamsi, 104 ASIL PROC. 165, 167 (2010).

78. The U.N. Charter contains exceptions to this prohibition—e.g. for a response in self-defense to an armed attack—but reprisals for neutrality law violations are not included among the exceptions. U.N. Charter arts. 2(4) & 51; *see also* Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 487-93 (Fleck ed., 1995) (recognizing that the U.N. Charter and the practice of states have "modif[ied] the traditional law of neutrality" and in particular noting that the U.N. Charter now prohibits reprisals against violations of neutrality); *c.f.* GREENSPAN, *supra* note 47, at 531 (stating that "[t]he traditional rules of neutrality continue to apply in international conflicts which are not subject to collective action under the United Nations Charter" though failing to elaborate on what that might mean for the prohibition on using force except under the circumstances provided by the Charter). Some elements of neutrality law appear to continue post-Charter. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (recognizing the existence of neutral powers, several years after the negotiation and signing of the UN Charter).

to regulate the relationship between states not at war (neutrals) and warring states (belligerents).[79] States that wished to avoid being drawn into the war could adopt "neutral" status. Neutral states were generally required to comport with the twin duties of non-participation in the conflict and impartiality as between the belligerent parties.

Neutrality law also governed the remedies for belligerent states to retaliate against violations of neutrality by neutral states. Such recourse ran the gamut from protest to financial compensation to reprisals to declarations of war.[80] A violation of neutrality did not by itself spell the end of neutrality.[81] And not every violation of neutrality brought about a right of reprisal by force in return.[82] Moreover, even violations of neutrality that were sufficiently extreme to warrant a use of force in return did not themselves bring about an end to neutrality.[83] Rather the choice was the victim state's; after a sufficiently extreme breach of neutrality, the victim state could then choose whether to use force or declare war in retaliation against the violator, or choose another remedy for the breach of neutrality.[84]

Today, scholars disagree over the extent to which any principles of neutrality law survive the U.N. Charter,[85] which prohibits the use of force outside of certain narrow exceptions.[86] Those codified exceptions include Security Council authorizations and self-defense in response to an armed attack. Not included are reprisals for neutrality law violations.[87] Even if some principles from the neutrality law era continue today, it is unlikely that the use of force against non-belligerent states in retaliation for purported neutrality law violations survives the Charter, if such acts would not otherwise qualify under the recognized exceptions like self-defense.

If the general obsolescence of neutrality law were not sufficient to render it inapplicable to today's conflict with al Qaeda, there are a few additional hurdles. One obvious distinction is that neutrality law developed to regulate the relationship between *states*, and as such did not apply—certainly as a formal

79. For a discussion of neutrality law and its relevance to the conflict with al Qaeda, see generally Ingber, *supra* note 77.

80. *Id.* at 88; *see, e.g.*, GREENSPAN, *supra* note 47, at 584 (discussing a range of remedies for breach of neutrality from protest to compensation to reprisals and declaration of war).

81. *See* Ingber, *supra* note 77, at 87-88*; see also* EMER DE VATTEL, THE LAW OF NATIONS BOOK III: OF WAR §§ 95-97 (1758) (States have a "right" to respond with force against those who assist their enemies in war, but that a state of war is not automatic; rather states may "overlook" such actions rather than "always coming to an open rupture with those who give such assistance to [their] enemy." The opposite result would be "highly inimical to the peace of nations!")

82. *See* Ingber, *supra* note 77, at 87-88.

83. *Id*.

84. *Id*.

85. Many scholars trace the "unwilling unable" test to neutrality law. Under that test, a state may use force to address a threat on a neutral state's territory when that latter state is "unwilling or unable" to mitigate the threat itself. The unwilling unable test is itself not without controversy, but many scholars and states consider it a norm of customary international law, or at least a "well-entrenched norm." *See* Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499-501 (2012).

86. *See* U.N. Charter arts. 2(4) & 51.

87. *Id.*

matter—to conflicts between a state and a non-state actor.[88] Even putting formalities aside, the *purpose* of neutrality law is to impose impartiality on neutral states as between the warring parties. No responsible party today would argue that states must remain *impartial* as between a legitimate state and a terrorist organization bent on destroying it and killing civilians in order to do so.

It is quite likely that actors within the executive branch have today recognized some of these criticisms of the support test. Executive officials seem to be at pains to suggest that the co-belligerency theory requires some measure of "join[ing] the fight" against the United States, which may suggest a test that is higher than "systematic violations of neutrality," but it is impossible to know without further explanation from executive officials. But if these arguments against the applicability of a concept developed for relations between states have not had much traction, this may be due in part to the fact that such arguments could well be levied against every component of the U.S. Government's legal theory for the conflict with al Qaeda. In fact, the entire legal architecture of the conflict, from detention to use of force, rests largely on analogy to the laws that developed to govern conflicts between states.[89]

Moreover, the neutrality law argument has some resonance; if states historically viewed certain acts and not others as amounting to acts sufficient to trigger a use of force in response, then that might be helpful in thinking about how to understand and define modern belligerent acts outside of clearly delineated or codified areas like the U.N. Charter. The Charter by its terms clearly regulates uses of force against the territory of sovereign states. It does not therefore formally regulate the use of force against non-state actors per se. Such uses of force raise sovereignty issues when non-state actors act from the territory of a sovereign state, and thus implicate the U.N. Charter on those grounds, but how to overcome that sovereignty hurdle is distinct from the question of force against the non-state armed group itself. The sovereignty question can be answered separately: for example, when the territorial state provides consent to the use of force in its territory in a way that does not provide an answer to what law governs the use of force against that non-state actor itself.

88. *See* Ohlin, *Targeting Co-Belligerents*, *supra* note 77, at 71. There are some notable exceptions to this general rule. During the U.S. Civil War, for example, states recognized the state of belligerency between the north and south and undertook obligations of neutrality toward the parties. *See* GREENSPAN, *supra* note 47, at 584. It is exceptionally unlikely, however, that states today will take a similar approach to the conflict between states and al Qaeda or ISIS.

89. *See, e.g.*, March 13 Brief, *supra* note 39; Memorandum from the Off. of Legal Counsel to the Att'y Gen. (Feb. 19, 2010), *Lethal Operation Against Shaykh Anwar al-Aulaqi*; Memorandum from the Off. of Legal Counsel to the Att'y Gen. (Jul. 16, 2010), *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* [hereinafter OLC Memorandum on al Aulaki, July 2010].

4. *The Wrong International Law Test for The Domestic Law Purpose*

Let us then take the neutrality law theory behind the support test on its face. Even assuming that neutrality law in some way informs modern understandings of the use of force, and assuming arguendo any applicability to a conflict with a non-state actor (a big lift, considering the foregoing), it is nevertheless the wrong international law test for this domestic purpose.

Recall for a moment that domestic law purpose: the interpretation of the appropriate outer parameters of a 2001 congressional force authorization to the President. The argument by those seeking to read the statute to extend beyond core al Qaeda is that congressional intent and common sense mandate it extend to groups that "join[] with the Taliban or al Qaida in its fight against the United States."[90] In other words, the argument goes, we should read the AUMF as extending to groups that become parties to this conflict.

The neutrality law-based support test does not answer this question, even if we accept some application of neutrality law principles to the current conflict today. Under neutrality law, a state that violated neutrality *could* in some instances become subject to attack in response, but did not automatically become a party to the conflict. The victim state had a choice of response, war being only one of the options. Violations of neutrality thus did not themselves end neutrality; only a subsequent declaration of war or direct attacks would bring neutrality to an end and turn the parties into belligerents.[91] Thus international law in the pre-Charter era may have made a significant violator of neutrality a *potential* target, but it did not make the violator an automatic party to the conflict. Put another way, the difference is analogous to the distinction in contract law between a contract that is merely *voidable* and one that is in fact *void.* A contrary rule—one that would immediately deem the neutrality violator a belligerent party to the conflict—would result in more war, or at least the inevitable expansion and perpetuation of existing wars. Instead, neutrality law created avenues for states to avoid war through recourse to alternative reparations.[92]

Recognizing that historic right of belligerents to respond with force to certain violations of neutrality, Goldsmith and Bradley make a seemingly small leap: they argue that under neutrality law, a neutral state was not merely *potentially* subject to attack, but indeed would "become a co-belligerent …

90. Parhat Brief, *supra* note 29, at 30; *see also* Jeh Johnson Speech, *supra* note 26.

91. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 358, at 752 (H. Lauterpacht ed., 7th ed. 1952). Similar rules governed and continue to govern neutral merchant vessels, which are understood to take on "enemy character" only when they are "owned or controlled by a belligerent," or take a "direct part in the hostilities on the side of the enemy." DEP'T OF THE NAVY & DEP'T OF HOMELAND SEC., THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS §§ 7.5-7.5.1 (2007) [hereinafter 2007 COMMANDER'S HANDBOOK].

92. *See* VATTEL, *supra* note 81, § 95 ("Some authors decide in general, that whoever joins our enemy, or assists him against us with money, troops, or in any other manner whatever, becomes thereby our enemy, and gives us a right to make war against him: - a cruel decision, and highly inimical to the peace of nations! It cannot be supported by principles; and happily the practice of Europe stands in opposition to it.").

through systematic or significant violations of its duties under the law of neutrality."[93] This is incorrect, however, and overstates the consequences of a neutrality breach. In fact, such a violator might *risk* becoming a target and ultimately a party to the conflict, a co-belligerent, but this result was far from inevitable. While it might seem like a small distinction, it is a distinction backed by a laudable goal: a historic desire to constrain war, rather than to amplify it, to the extent feasible.[94] And in fact, that desire to limit expansion of the war is the precise policy reason for pushback on the support approach today.[95]

If the Bradley/Goldsmith approach is a slight overstating of the international law effects of a neutrality breach, it is one with significant consequences for the *domestic* law argument. For under the Bradley/Goldsmith approach, once that support passes a certain threshold, the group is *automatically* a party to the conflict and covered by the congressional authorization. Yet the neutrality law does not answer that question; rather, were it to apply here, it would leave the decision of whether to declare war on a particular group to the victim state and its domestic processes. And who within the state makes the decision whether to declare war on a given entity? International law does not answer that question. Rather, that is a matter for a state's domestic processes. And thus we are right back where we started: trying to interpret the extent to which Congress has authorized the President to use force.

As a matter of *international* law, by contrast, neutrality law might shed light on which kinds of actions in the pre-Charter era might have rendered a state a potential target as a matter of international law. But it does not define which groups have already joined the fight. And thus, if we are to read the AUMF as covering groups that have joined the fight, neutrality law does not answer that question. Rather, the neutrality-derived support test might be relevant if the theory were that Congress intended to authorize the President not only to use force against existing parties to the conflict, but also against any parties that could *potentially* be subject to force under international law, even if international law itself would not consider them already to be parties to the conflict. This is neither a plausible reading of the statute, nor is it the government's position, upon which the courts and Congress have relied in ratifying or acquiescing to the Executive's interpretation of the statute to extend to associated forces. That position is that the AUMF should be read to apply to groups that have joined the fight alongside al Qaeda against the United States. International law does provide some content that may be useful in understanding that question, but it stems from a different source, and it is not a perfect fit, as I will explain in the section that follows.[96]

93. Bradley & Goldsmith, *supra* note 43, at 2112.

94. *See* VATTEL, *supra* note 81,§§ 95-97.

95. Harold Hongju Koh, *How to End the Forever War*, YALE GLOB. ONLINE MAG. (May 14, 2013), http://yaleglobal.yale.edu/content/how-end-forever-war (discussing the risk that an overly flexible "associated forces" theory could extend the war indefinitely).

96. *See* Part II.

B. *The Active Hostilities Test*

The Executive's "active hostilities test"—in contrast to the support test — requires that a group have engaged in active hostilities against the United States, alongside al Qaeda, or now presumably ISIS, before it may be labeled a "co-belligerent" or "associated force." We can derive the Executive's reliance on this test primarily from two of the data points I describe in Part I: 1) the language of the Obama Administration's professed "associated forces" standard, which includes a requirement that a group have "entered the fight alongside al Qaeda" and is "in hostilities against the United States"; and 2) media reports and practice that suggest that, despite internal debate and pressure, the Executive has not to date labeled as associated forces or targeted under that theory groups like al Shabaab that are engaged in regional struggles and not, as a whole, directly operating against the United States.[97] These data points—even the Executive's professed approach—are not dispositive. As discussed, it is not entirely clear that the Executive interprets the "entered the fight" language strictly to require real violence. And the reticence to label al Shabaab or others as associated forces may be as much related to policy as it is to law, though this is an area where policy and law are so intertwined that it is simply not possible to distinguish which is playing the constraining role.[98]

The Executive has never cited a specific foundation for its active hostilities test, yet there is good reason to think that it has derived this test from a different source in international law. The two prongs of the associated forces theory—the requirement that the group be "an organized, armed group" and that it has "entered the fight alongside al Qaeda" "in hostilities against the United States" —happen to map almost perfectly onto a different international law test, and one that more accurately fits the domestic law purpose the Administration relies upon for its AUMF interpretation. This is the two-pronged test that the International Criminal Tribunal for Yugoslavia put forward in the 1995 *Tadić* case for determining the existence of a conflict with a non-state actor, which I will discuss below.

While the Executive has never, to my knowledge, explicitly stated that it looks to the *Tadić* test in interpreting the "associated forces" covered by the AUMF, this test's relevance to the Executive's stated purpose here—determining whether particular entities have "entered the fight," or in other words, are party to an armed conflict with the United States—as well as the striking similarity between the language in the two tests, suggests that it is quite likely that the Executive officials who crafted and endorse the "active hostilities" approach have *Tadić* in mind.

97. *See supra* notes 58, 75. It is less clear what the Executive's position is toward groups like al Nusra that occupy a middle ground between initiating direct action against the United States and focusing on a regional struggle. *See supra* notes 56, 57 and accompanying text for a discussion of the ambiguous language in the Preston Speech.

98. *See, e.g.*, Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SECURITY J. 225, 229 (2014).

1. *The Tadić Test*

In 1995, in the admittedly very different international criminal law context, the International Criminal Tribunal for the Former Yugoslavia (ICTY) put forward in the *Tadić* case a standard for determining the existence of a non-international armed conflict (NIAC), in other words, a conflict with a non-state actor such as al Qaeda, which is today the most well-established test for that purpose.[99] This *Tadić* test has two prongs for establishing the existence of a NIAC: (a) "protracted armed violence," (b) between the state and "organized armed groups."[100] The ICTY's purpose in employing this test was in finding the existence of an armed conflict in order to determine the applicability of international humanitarian law. But the test's requirement that an armed conflict can only exist when a specified level of violence exists with parties that meet a certain threshold of organization means that it is also a test for determining the parties to a NIAC.

As noted above, the two prongs of the Government's stated "associated forces" theory share conspicuous similarities to the two prongs of the *Tadić* test. There is good reason, therefore, to think that the Administration—or the forces within the Administration that wanted to push the Executive's standard toward an active hostilities approach—had this test in mind when crafting the associated forces language. Recall that the Government's approach requires that an associated force be "an organized, armed group that has entered the fight alongside al Qaeda" and is "in hostilities against the United States."[101] That statement is strikingly similar to the *Tadić* requirements of "an organized armed group" and "protracted armed violence" between the parties.

One of many open questions—even if the Executive is relying on this and not the support test—is the extent to which the Executive's practice as well as its internal definitions of "entered the fight alongside al Qaeda" and "in hostilities against the United States" map directly onto the *Tadić* standard for "protracted armed violence."[102] Even if *Tadić* is the original source for this test,

99. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

100. *See Tadić*, *supra* note 99, ¶ 70.

101. Jeh Johnson Speech, *supra* note 26.

102. Subsequent ICTY jurisprudence has further fleshed out the meaning of the organization and protracted violence prongs, and what would be sufficient to meet each. *See, e.g.*, Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 40-49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf (discussing ICTY jurisprudence on the meaning of "protracted armed violence" and noting "indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones," as well as the "involvement of the UN Security Council"); *id*. ¶ 60 (stating that "an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means" and citing factors such as "command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accord"); *see also* Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶¶ 14, 20, 23 (Int'l Crim. Trib. for the Former

it is unlikely that the Executive feels bound by these strictures.[103] Regardless, there is good reason to believe, based on the mixed data discussed in Part I, that the appropriate source and legal theory behind the co-belligerency concept is a continuous fount of debate within the current Administration. The existence of that debate likely explains some potential for mixed practice, ambiguous statements, statements that sound in a *Tadić* test while separately making sporadic references to other sources such as the Bradley/Goldsmith test, as well as the lack of any explicit reference to *Tadić* in the Executive's discussions of co-belligerency.

2. *Practical Implications of an Active Hostilities Test*

Under an Active Hostilities test, only a group that initiated and directly participated in real violence against the United States could fall within the President's authority under the AUMF. And were the Executive to conform strictly to a *Tadić* /parties test, only an organized armed group engaged in protracted hostilities against the United States might be presumed covered, though there is no evidence that Executive officials read the test that strictly. Certainly a strict *Tadić* test, and even the modified version the Executive seems to be espousing, likely casts a narrower net than the neutrality-derived support test, which, as discussed above, includes groups that might not themselves be engaged in active or protracted hostilities, but which provide more indirect support to the war effort. A group like al Shabaab, which has not directly attacked the United States, would not come within this definition. A group like al Qaeda in the Arabian Peninsula (AQAP), however, that has launched multiple attempted attacks on the United States and U.S. interests abroad, such as U.S. embassies, would come within either definition of an "associated force" or "co-belligerent" of al Qaeda, though that group might not come within a strict textual approach to the AUMF if it were read to cover only core al Qaeda.[104]

3. *Problems with the Active Hostilities Test*

There are several potential problems with employing the *Tadić* test to interpret the President's domestic authority under the AUMF. First, the test has its origins not in *jus ad bellum* but in international criminal law, in the context of a judicial decision regarding the reach of its jurisdiction over alleged war crimes. The *Tadić* tribunal's ability to determine the commission of war crimes extended only so far as it determined the groups were parties to an armed

Yugoslavia Mar. 15, 2006), http://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315.pdf; Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 41, 343 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007), http://www.icty.org/x/cases/martic/tjug/en/070612.pdf; Prosecutor v. Mrkšić, Case No. IT-95-13/I-T, Judgment, ¶¶ 39, 40, 407, 408 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007), http://www.icty.org/x/cases/mrksic/tjug/en/070927.pdf.

103. *See* Modirzadeh, *supra* note 98 (discussing how the Executive borrows from different bodies of law, mixing law and policy, without necessarily strictly following any given body to the letter).

104. *al Qaeda in the Arabian Peninsula*, U.S. NAT'L COUNTERTERRORISM CTR., http://www.nctc.gov/site/groups/aqap.html (last visited Oct. 23, 2016).

conflict;[105] thus there is a reasonable argument to be made that its test for determining the existence of such a conflict was looser than it might have been in a different context, were its determination to be employed for the purposes of extending a war, rather than to extend its own ability to judge malfeasance.[106]

Second, the Executive has not to my knowledge explicitly endorsed the *Tadić* test as a limit on the parties to the conflict, though that is not fatal to its usefulness here. The Executive has referenced *Tadić* favorably in similar contexts.[107] And there is good reason to believe that the Executive would accept that a NIAC exists *at a minimum* under the conditions put forward by the ICTY in *Tadić*, and that if the U.S. Government departs at all from the test it is on the grounds that it is too narrow.[108] It is thus a reasonable read of both a widely accepted international law standard and the U.S. approach to that standard that a NIAC exists at a minimum when there is protracted armed violence between the state and an organized armed group.

Finally, there is an additional problem with the *Tadić* test that might suggest that it is too stringent for our purposes. *Tadić* is a test for determining the threshold for when hostilities have risen from mere acts of violence to the level of armed conflict, as a matter of international law. Once there is already a pre-existing armed conflict, however, some might argue that the threshold for determining whether new parties have entered this conflict should be lower. In other words, the "protracted violence" prong might not need to be met for each additional group entering the conflict, as long as the level of violence in the conflict overall met that threshold.

As a matter of considering congressional intent, the U.S. approach to *Tadić* is the most relevant, and thus the latter two points are most problematic. But neither of these caveats is fatal to employing the *Tadić* standard as a floor. Under each of these understandings, the parties to a conflict include *at a minimum* states and organized armed groups engaged in protracted armed violence. Thus, if the AUMF covers all existing parties to the conflict as that concept is understood under international law, then at a minimum it should be understood to cover those groups that would meet the *Tadić* threshold: organized armed groups engaged in protracted armed violence with the United States. Going beyond that minimum floor set by *Tadić*, I would argue, would require new statutory language, because while international law might *permit* use of force in such circumstances, there is no sufficiently well-established line to suggest congressional intent to incorporate.[109]

105. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 66-70 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

106. *Id*.

107. *See, e.g.*, OLC Memorandum on al Aulaki, July 2010, *supra* note 89, at 25-26 (looking to international law sources including jurisprudence from the International Criminal Tribunal for the former Yugoslavia for guidance on the existence and geographic scope of an armed conflict) (citing Prosecutor v. Tadić, Case No. IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995)).

108. *See id.* at 25, 26, 28.

109. *See supra*, Part I(A)(2).

III. THE CO-BELLIGERENCY STORY: FROM INTENDED CONSTRAINT TO GREYISH LEGAL SPACE

At this point I have attempted to demonstrate both that the Executive's position is not precisely what it suggests, and that it is not as clearly constraining as Executive officials have held it out to be. Parts I and II deduced the likely legal range within which the Executive is operating, the internal tension that lends itself toward continuing ambiguity and vacillation between legal theories, and the likely sources for each of the Executive's potential approaches. While all of the options for interpreting the AUMF are imperfect, Part II demonstrated that some are more doctrinally sound than others, and each advances different policy goals.

It is also evident, as I will discuss further in this Part, that the courts and Congress, many within civil society, and even some critical actors within the executive branch—in short, those responsible for overseeing and checking executive assertions of power—have not sufficiently scrutinized, or do not sufficiently understand, the Executive's actual approach or range of approaches to interpreting the President's AUMF authority.

So, the theory is ambiguous, the sources are flawed, and yet the Executive has not faced real pushback in this realm. How did this co-belligerency theory come to be, why does it continue to play such a prominent role in executive articulations of authority, and why have the courts and Congress not adequately questioned it?

A. *Executive Reliance on a Flawed Test*

Potential executive reasons for relying on an ambiguous or flexible theory to understand the scope of the President's AUMF authority are manifold. One simple answer is a purely instrumental one: executive officials may not want to foreclose options and thus prefer an approach that gives them as much discretion as possible. The neutrality-derived support test likely suggests broader authority for the President than an active hostilities test, as it does not require that a group actively attack, or participate in active hostilities against, the United States before the Executive may take action. Executive officials need only determine that the group has provided some level of "support"—maybe even a significant level of support but still not necessarily rising to active hostilities—to al Qaeda or ISIS.[110] The combination of these two approaches might provide greater discretion yet. Thus, a simple instrumentalist explanation for the current state of affairs is that the Executive declares itself constrained by a strict "active hostilities" test in order to stave off interference and project legitimacy, but that internally, it relies upon whichever test supports the action it seeks to take.

That hypothetical rationale intersects intriguingly with a controversial thread in the Executive's legal position on the micro level, in the Executive's

110. Whether co-belligerents of co-belligerents are covered raises additional questions.

approach to individual law of war detention.[111] The Executive's stated position on its detention authority includes a category of individuals who provide "support" for al Qaeda in addition to those who meet traditional conceptions of combatancy.[112] As with the Executive's co-belligerency test, it is not perfectly clear whether the Executive's actual internal position includes support as an independent basis for detention (or, for that matter, for related targeting authority); its litigation positions in Guantanamo habeas cases have suggested that it has attempted to avoid making support the sole basis for authority.[113] Nevertheless, support remains as a basis for detention in the stated position. This suggests that at both the micro and macro levels, internal debates over how much weight to place on provision of support for al Qaeda or ISIS in relation to the Executive's legal authority have resulted in constructive ambiguity in executive branch positions, and ultimately that has meant more flexibility and discretion for the Executive.[114]

There are good policy reasons to want to nip such support in the bud, and a legal argument that would permit the President to use his most aggressive tools against such actors is perhaps tempting. This goes beyond the use of force. The Executive has, through two administrations, relied upon the AUMF for a range of authorities as well as justification for finding exceptions to other domestic rules, in the realms of targeting and detention (including of American citizens),[115] as well as domestic surveillance.[116] Extension of the AUMF to groups beyond al Qaeda or ISIS—and on the individual level, to a broad range of actors providing support to these groups—means extension of all of these authorities more broadly as well.[117]

Nevertheless, the Executive's persistent reliance on co-belligerency is more complicated than a simple continuous power grab. Despite an understandable desire to use the maximum extent of his tools to fight these

111. The extent to which the following description carries over to targeting authority is unclear, but released documents and recent reporting suggests that the Executive's targeting standard relies in part upon the detention standard that evolved through the Guantanamo habeas litigation. *See, e.g.*, OLC Memorandum on al Aulaki, July 2010, *supra* note 89; SAVAGE, POWER WARS, *supra* note 58, at 282-83.

112. *See, e.g.*, SAVAGE, POWER WARS, *supra* note 58, at 148-52 (discussing debates over the extent to which "substantial support" for al Qaeda could provide a standalone basis for detention).

113. *See* Ingber, *supra* note 65.

114. *Id*.

115. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2014); OLC Memorandum on al Aulaki, July 2010, *supra* note 89.

116. *See, e.g.*, OFFICE OF INSPECTORS GEN., REPORT ON PRESIDENT'S SURVEILLANCE PROGRAM 505 (2009), https://oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf (quoting this modification as limiting the program to "al Qa'ida, . . . a group affiliated with al Qa'ida, or . . . another group that I determine for the purposes of this Presidential Authorization is in armed conflict with the United States and poses a threat of hostile action within the United States"); Charlie Savage, *George W. Bush Made Retroactive N.S.A. 'Fix' After Hospital Room Showdown*, N.Y. TIMES (Sept. 21, 2015), http://www.nytimes.com/2015/09/21/us/politics/george-w-bush-made-retroactive-nsa-fix-after-hospital-room-showdown.html (revealing that the Justice Department insisted on limiting the President's surveillance "program to investigations of Al Qaeda, rather than allowing it to be used for other types of international counterterrorism investigations, to make the argument that the program was legally justified as a wartime measure").

117. In fact, the legal authority for a controversial drone strike against an American citizen in Yemen, Anwar al Aulaqi, rested in part on a theory of co-belligerency between his group and al Qaeda.

threats (particularly in a conflict that does not appear to have an end in sight), the Executive has not since the early years of the Bush Administration generally asserted preclusive authority for the President's wartime actions.[118] Rather, executive officials and lawyers have gone to great pains to couch the President's actions within a statutory framework.

Moreover the concept of co-belligerency first appeared in executive usage (at least as a matter of public record) at a period within the Bush Administration when some executive officials were quite notoriously trying to roll back some of the more egregious assertions of executive power, and working to conform the Administration's actions to more plausible legal bases.[119] Consistent with this context, the turn toward an associated forces concept in its early incarnation was in fact an attempt *to narrow* the Executive's prior assertions of extraordinarily broad power, in order to bring the Executive's actions in line with statutory authority under the AUMF. Later the co-belligerency argument became part of an effort to retain that connection to the AUMF, without ceding authority that the Executive had already cemented *vis-à-vis* the courts and Congress.

Certainly the policy advantages of the current status quo play a role in executive branch decision-making, but this instrumentalist account is far too simplistic. The reality is more complex and ultimately counter-intuitive; it involves attempts to seek to constrain the President's power within realistic boundaries, the complex dynamics of executive bureaucracy, and the stickiness of executive decisions once taken.[120] To understand how these dynamics result in the use and persistence of this test, we must trace its origins and continued use by the executive branch over the course of a decade and more.

1. *Co-Belligerency: the Origin Story*

Let us first recall the backdrop against which the associated forces and co-belligerency language came into being. In the short days between the 9/11 attacks and the enactment of the AUMF on September 18, 2001, the Bush Administration first asked Congress for significantly broader statutory authority than it ultimately received. The Administration's proposed statute would have permitted the President to use force to "deter and pre-empt any future acts of terrorism or aggression against the United States."[121] The Administration failed to obtain that language, and received instead the more limited authority granted

118. For early examples see Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, at 34 (Mar. 13, 2002) ("We conclude that as Commander in Chief and Chief Executive, the President has the plenary constitutional power to detain and transfer prisoners captured in war."); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel Dep't of Defense, at 19 (Mar. 14, 2003) ("Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.").

119. *See* GOLDSMITH, *supra* note 18, at 141-76; SAVAGE, *supra* note 58, at 538-42 (discussing Goldsmith's overturning of the early torture memos, which were revised and reinstated after his departure); Savage, *supra* note 112.

120. Ingber, *supra* note 67.

121. *See* Abramowitz, *supra* note 28 and accompanying text.

by the 2001 AUMF,[122] tying the use of force clearly to those involved in the 9/11 attacks. Nevertheless, in subsequent months and years executive officials asserted broad authority, in part resting on the President's plenary Article II power.[123] In one early example, in November 2001, the President issued a "Military Order" that asserted extraordinary authority to detain militarily or try in a military commission any alien who "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism" or harbored such an individual.[124] The order contained no required link to al Qaeda, unlike the strictures of the AUMF.

References to "associated forces" or affiliates of al Qaeda came later, and when viewed against this history, they can be seen as attempts not to broaden but to limit the Executive's actions to some plausible connection to statutory authority under the AUMF, in order to move away from preclusive claims of wartime power. Executive officials first referred to "associated forces" publicly in a 2004 order establishing an administrative process to review detentions of military detainees at Guantanamo, issued partly in response to two Supreme Court decisions challenging the Executive's detention processes.[125] References to "associates" or "affiliates" of al Qaeda as a means of explaining the reach of the AUMF beyond core al Qaeda can be found in that 2004 order and in contemporaneous briefs asserting executive detention authority.[126] But they can also be found outside of core military activities like targeting and detention. Recently released language in an internal IG report on President Bush's surveillance program reveals that in March 2004, Department of Justice officials narrowed the reach of a particular component of the program, to tie it more clearly to AUMF authority. The new language restricted the program to "al Qa'ida, . . . a group affiliated with al Qa'ida, or . . . another group that I determine for the purposes of this Presidential Authorization is in armed conflict with the United States and poses a threat of hostile action within the United States."[127] These last two categories look like an early incarnation of

122. Many have likewise criticized as "sweeping" the more tailored version of the statute that was passed. *See, e.g.*, Daskal & Vladeck, *supra* note 8.

123. *See supra* note 111 and accompanying text.

124. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833-34 (Nov. 13, 2001). The Military Order relied on both the President's Article II authority, as well as the 2001 AUMF, but it notably did not cabin its scope to only those entities contemplated by the statute.

125. Memorandum from Paul Wolfowitz, Dep. Sec'y of Def., to Gordon R. England, Sec'y of the Navy (Jul. 7, 2004) (establishing combatant status review tribunals).

126. *See, e.g.*, Respondent's Reply Memorandum in Support of Motion to Dismiss, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d (Nov. 16, 2004) (defining "enemy combatant," as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners").

127. *See* IG Report on President's Surveillance Program (2009), *supra* note 116; *see also* Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005); SAVAGE, *supra* note 58, at 192 (stating that Goldsmith's insistence on narrowing the "Stellarwind" surveillance program to only AUMF-authorized activity "led to the first analysis inside the executive branch of which groups counted as *associated forces* or *co-belligerents* with al Qaeda," whom the NSA could monitor in addition to al Qaeda, under the AUMF).

what ultimately would become the Obama Administration's two-pronged associated forces approach.[128]

None of these documents suggest what test the Executive was then using to determine which groups might fall within this language. And the term "co-belligerent" itself does not at the time of these documents appear in conjunction with the "associated forces" language. But there is nevertheless publicly available evidence that suggests officials within the Executive were already grappling with the contours of the concept and considering its relevance to the endeavor to tie the President's actions to statutory authority. A published 2004 OLC memo discusses co-belligerency in a more traditional context: as connoting allies of the United States for the purposes of determining the reach of treaty provisions.[129] In seeking to determine which states might be appropriately construed as co-belligerents of the United States, the memo grapples with how to understand this concept.[130] In doing so, it looks to principles of neutrality law and hints at the ideas the Administration may have been considering at that time with respect to its associated forces theory.[131] Indeed, the author of the 2004 OLC memo and head of the office at that time, Jack Goldsmith, co-authored the 2005 law review article proposing the neutrality-derived support test shortly after leaving office. But the Administration itself did not reference co-belligerency publicly to support the associated forces claim until it was forced to defend its theory, in a 2008 brief supporting detention authority over a Uighur detainee at Guantanamo, Hufaiza Parhat.[132] That brief makes an argument that is recognizably similar to the one made by the Executive in briefs and speeches today: the AUMF should be read to cover groups that "join[] forces with al Qaeda or the Taliban" and that this interpretation was supported by the "established laws-of-war concept of 'co-belligerency.'"[133] The specific theory in that case was that Parhat had engaged in military training at a camp run by the Eastern Turkistan Islamic Movement (ETIM), a militant organization focused on a regional struggle particularly against China, but which had ties to and derived resources from al Qaeda, and which the government argued was a co-belligerent of al Qaeda.[134] As ETIM itself was not clearly contemplated by the AUMF, the Executive's detention

128. In the latter these are conjunctive; both are required pieces, not alternative sources of authority.

129. Office of Legal Counsel, "Protected Person" Status in Occupied Iraq under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 43 (2004) [hereinafter "2004 OLC Memo"].

130. *Id*.

131. Indeed, the predominant source referenced in this section of the memo is the very same later referenced in the Goldsmith and Bradley article suggesting the neutrality-derived co-belligerency test for interpreting the AUMF, and is later referenced in U.S. briefs on the same subject. *See, e.g.*, Hamlily v. Obama, 616 F. Supp. 2d 63, 74 (D.D.C. 2009); 2004 OLC Memo, *supra* note 129 (citing Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 385, 495 (Dieter Fleck ed., 1999)).

132. Parhat Brief, *supra* note 29, at 30 (citing the Bradley & Goldsmith article and its sources); *see infra*, Section B. There is also language in the 2006 Military Commissions Act simply referencing "co-belligerents of the enemy." Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

133. Parhat Brief, *supra* note 29, at 30.

134. *Id*. Parhat himself denied membership in ETIM, in addition to disputing the theory of co-belligerency with al Qaeda.

theory relied upon an interpretation of the AUMF that would extend to groups sharing resources with al Qaeda. This, and Bradley and Goldsmith's 2005 law review article, was the extent of the public discourse on the test during the course of the Bush Administration.

2. *The Test in Transition*

Obama Administration officials came into office prepared to thoroughly reconsider Bush-era practices, in part via a comprehensive review by Executive Order-established task forces.[135] Yet, those planned, deliberative processes were almost immediately overtaken by the urgent press of ongoing litigation in the Guantanamo habeas cases.[136] The new Administration's detention position, including its views on the extension of the AUMF to "associated forces," thus evolved not through the task forces it had established for such purposes, but through the course of litigation over legacy detention policies. As I have written elsewhere, the development of legal views in the course of defensive litigation is a very different process, and is likely to produce very different results, from other executive processes for determining a legal position.[137] In defensive litigation almost all factors—from the actors holding the pen, who are generally career litigators, to the institutional Justice Department biases in favor of protecting executive power and preserving room for senior policymakers to maneuver, to the task at hand, which is zealously defending executive practice—weigh in favor of pushing a legal position that is as protective as possible of prior executive policies and future executive flexibility.[138] This is not the forum in which the Executive is likely to produce its most forward-leaning, executive-constraining legal positions.[139] And it is all the more difficult, as we shall see in the next section, for executive officials in the midst of defense litigation to dial back executive positions that courts or Congress have already seemed to accept.

The Executive's initial 2009 brief—or the "March 13 Brief," as it is widely identified—made a few real[140] and some cosmetic[141] changes to the prior Administration's legal theory. But it continued to rely on the concept of "co-belligerency" as support for the government's argument that it could detain

135. *See* Exec. Order No. 13,492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities* (Jan. 22, 2009); Exec. Order No. 13,493, *Review of Detention Policy Options* (Jan. 22, 2009); Exec. Order 13,491, *Ensuring Lawful Interrogations* (Jan. 22, 2009); *see also* SAVAGE, *supra* note 58, at 101-04.

136. *See, e.g.*, March 13 Brief, *supra* note 39.

137. *See* Ingber, *supra* note 67, at 378-91.

138. *Id*.

139. *Id*. at 390-91.

140. In particular, it disavowed reliance on sole Article II authority for detention, thus tying the President's detention authority entirely to the 2001 AUMF, and it linked this authority to international law. The Administration also added the adjective "substantial" to the kind of support that would qualify to make someone detainable, but precisely what this change signifies has never been tested. March 13 Brief, *supra* note 39.

141. With this brief the Administration ceased use of the term "unlawful enemy combatant" though the legal theory for detention—that these individuals were analogous to regular combatants and thus detainable until the end of hostilities, but unlike privileged combatants did not receive POW status—remained the same. *Id*.

associated forces.[142] While the March 13 Brief merely mentioned the term, subsequent briefs sometimes sourced the concept to the Bradley and Goldsmith article and to principles of neutrality law.[143] Disparity between the initial brief and later references to the Bradley and Goldsmith article might be attributable to differences in the level of political or career control over the original and subsequent briefs. Recall that Bradley and Goldsmith had both served within the Bush Administration, and that the new Obama Administration was keen to draw a clear line in the sand from the prior Administration on these matters. Press reports suggest that the March 13 Brief reached the highest-level scrutiny imaginable for a district court filing; the President himself is said to have reviewed it.[144] Later briefs would hardly have seen the same level of political scrutiny; rather they would have been drafted and filed almost entirely by career civil servants, many of whom would have worked on these matters and filed similar briefs under the prior Administration. In fact, the top career litigators named on the Parhat brief, which first raised the co-belligerency theory during the Bush Administration, are the very same named on the only two briefs that explicitly cite the Goldsmith and Bradley source under the Obama Administration.[145] Though these career officials would have operated loosely under the supervision of political heads of office, those political appointees may not have noticed or cared about the subtle difference of choosing to cite a source that supported the very legal theory the President himself had previously signed off on espousing.[146]

As press reports and the Obama Administration itself suggested in its initial briefs, the Administration seems to have filed these first briefs in the Guantanamo cases assuming that it would later revisit its policies with the luxury of more time.[147] But as things so often happen in the government, this plan was overtaken by events; the Guantanamo litigation pressed forward as did other crises, and the Administration's detention position ultimately did not change much from that initial March 13 Brief.[148] If anything, the Executive's position hardened into a more permissive standard as the courts accepted ever-lower evidentiary burdens on the government, and detainee releases became more difficult and politically charged.[149]

142. *Id*. at 7.

143. *See* Al-Bihani Brief, *supra* note 59, at 31; Brief for Respondents-Appellees at 42 n.10, Khan v. Obama, 655 F.3d 20 (D.C. Cir. 2011) (No. 10-5306) [hereinafter Khan Brief].

144. *See* DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 59 (2012).

145. Al-Bihani Brief, *supra* note 59, at 31; Khan Brief, *supra* note 143; Parhat Brief, *supra* note 29.

146. Ingber, *supra* note 67, at 380-81 (discussing the significant authority wielded by career litigators in crafting legal positions on behalf of the U.S. Government).

147. *See* KLAIDMAN, *supra* note 144, at 58-60; SAVAGE, *supra* note 58, at 117-21.

148. *See, e.g.*, Government's Memorandum of Law in Support of Final Judgment Denying a Permanent Injunction and Dismissing This Action, Hedges v. Obama, 2012 U.S. Dist. Ct. Briefs LEXIS 10884 (arguing that the President "has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency").

149. *See, e.g.*, Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011) (upholding detention authority on scant evidence); Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2012) (upholding detention authority on

The Administration was simultaneously facing decisions over whom it could lawfully target, and heated debate reportedly raged internally over whether to deem certain groups "associated forces" of al Qaeda, which would mean that all of their members, not just those high-level officials who might have operational relationships with al Qaeda, could be targeted.[150] In the midst of this debate, Jeh Johnson gave a speech in which he outlined publicly for the first time the Administration's two-prong test for deeming a group an associated force.[151] As discussed above, that statement left questions open for the public, but it has been reported that questions remained open behind the scenes as well.[152] As the discussion of al Shabaab in Part II indicates, these questions are not yet resolved. Debate over the Executive's position continues, and it remains unclear where the executive branch will land on its view of whether the AUMF applies to groups that merely provide support to al Qaeda and now ISIS, or only to groups that directly initiate hostilities against the United States.

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This narrative suggests, perhaps counterintuitively, that certain Bush Administration officials turned to theories and rhetoric regarding "associated forces" and co-belligerency as a means of limiting what had been the Administration's early extraordinary assertions of executive authority, and of grounding the President's activities in statutory authority as opposed to claims of plenary constitutional power. Obama officials then came into power with these positions already entrenched—through a mixture of internal executive action, judicial involvement, congressional legislation, and otherwise—and thus entered offices that had already expressly linked the President's actions to congressionally-authorized wartime authority. They came into power with the intent, or at least the promise, of further constraining dialing back the Executive's wartime positions; yet, in many respects, they retained the status quo. More than that, the constructive ambiguity in the Administration's current approach may provide the President with even greater flexibility than the Bush-era support test, despite its flaws, leaving the Executive operating in this greyish space.[153]

scant evidence and ascribing a "presumption of regularity" to intelligence reports); SAVAGE, *supra* note 58, at 300 (noting that after the Christmas Day attack and Obama's moratorium on repatriating Yemeni detainees, "the Administration took increasingly aggressive stances in court").

150. *See* SAVAGE, *supra* note 58, at 274-79 (discussing debate regarding whether to label al Shabaab an associated force).

151. *See* Jeh Johnson Speech, *supra* note 26.

152. *See* SAVAGE, *supra* note 58, at 274-79 (discussing continuing unresolved debate over the status of al Shabaab).

153. We cannot ascertain with certainty the differences in the Administrations' *internal* positions, but Bush-era briefs from 2008 suggest the Administration's stated theory relied upon finding a group actually part of the al Qaeda organization, whereas Obama-era language suggests that an entirely distinct group—even one that had parted ways with al Qaeda—could still fall within the definition. *See* Parhat Brief, *supra* note 29. *Contra* Preston speech (arguing that the President's AUMF authority to use force against a group does not cease if there is a "split" or "disagreements between the group and al-Qa'ida's current leadership"). Moreover, it was the Obama Administration, not the Bush Administration, that relied upon this theory (in part) in legal analysis over the targeting and killing of a U.S. citizen abroad.

It is possible that Obama Administration officials initially retained the co-belligerency concept because they wanted to preserve the President's options, and were anxious about giving up this power too quickly, before they fully understood what they had inherited.[154] They may have later kept it either because, barring major events, executive decisions tend to stick,[155] or because changes in domestic politics and world events made them decide they needed to be able to exercise such power without going back to the congressional well. Internal debates over the ideal interpretation of the AUMF, and the existence of multiple internal theories, may have also played a role. Changing course is more difficult than retaining the status quo, and thus requires some degree of internal consensus or a firm decision maker; internal debate, particularly among disaggregated decision makers, will more often result in staying the course than a significant change in policy or legal position.[156] Executive officials may thus have opted for continuing to cite the concept "co-belligerency" for support, while continuing to disagree internally over what that concept should be interpreted to mean.

There is another counterintuitive factor that would have put pressure on an expansive interpretation of the AUMF. Recent statements by President Obama suggest that his reasons for relying on a broad reading of the 2001 AUMF for his wartime authority rather than returning to Congress for more specific authority, are likely less connected to a desire for more power or expanded war, but in fact the opposite: a fear that returning to Congress could result in an authorization to the President of *too much* power, and an *expansion* rather than a contraction of the war.[157]

And finally, this account does not mean that executive officials perceive the President's authority to be wholly unbounded by law. To the contrary, reporting on these internal deliberations suggests that executive officials genuinely perceived the Executive to be constrained by an interpretation of the AUMF, evolving though it may be, and that they have limited their operations, and the debate, at least to within the contours of the approaches I have outlined here.[158] But however constraining the Administration might feel those

154. *See* KLAIDMAN, *supra* note 144, at 58-60; SAVAGE, *supra* note 58, at 117-21 (discussing March 13 Brief).

155. *See* Ingber, *supra* note 67, at 366.

156. *See, e.g.*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001); Ingber, *supra* note 67, at 364-66 (discussing the "stickiness" of executive decisions). Political scientists refer to a related phenomenon as "status quo bias."

157. *See* President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) ("I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further."). Nevertheless, an aggressive reading of the President's wartime powers, even statutory powers, appears at least somewhat inconsistent with Obama's views as a presidential candidate. *See* Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE (Dec. 20, 2007), http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/ (quoting Obama as a candidate, saying that "[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation . . . [M]ilitary action is most successful when it is authorized and supported by the Legislative branch. It is always preferable to have the informed consent of Congress prior to any military action").

158. *See* SAVAGE, *supra* note 58, at 274-79, 341-42.

boundaries to be, their outer limits are far from clear to outside observers, and these reports suggest that they remain ambiguous, flexible, and evolving to insiders as well.

None of this narrative suggests a simple power grab on the part of either Administration. But it does suggest that there is much going on beneath the surface of executive branch legal positioning that informs and at times muddies how the Executive is interpreting the law that binds it, even its own stated legal positions. And yet even at a time of extraordinary calls for transparency from executive overseers like courts, Congress, and civil society, these groups often miss the subtler ambiguities in the Executive's positions that mask enormous legal and policy differences beneath the surface, differences on positions that, as with co-belligerency, may turn entirely on the Executive's internal interpretations.

B. *Failures in Judicial and Congressional Oversight*

This brings us to the other, symbiotic component to this narrative. The Executive could not have entrenched its expansive interpretation of the AUMF without assistance from the courts and Congress who have neither demanded a clear position from the Executive on the contours of its interpretation, nor suggested one for themselves. Thus this story is also one of failures in both judicial and congressional oversight over the President. A purely rational-actor view of executive action here—an argument that this is merely an example of the Executive making aggressive arguments about presidential power—cannot account for the extent to which Congress and the courts have acquiesced in the Executive's position on co-belligerency with virtually no real engagement with the substance.

This congressional and judicial abdication is not for lack of engagement generally by the courts and Congress in questioning the extent of the Executive's asserted authority in the conflict with al Qaeda and now ISIS.[159] And thus while the suggestion that the courts and Congress simply *want* to cede the President flexible, unilateral authority to act against any groups he thinks have a plausible connection to the conflict may explain the reasoning of some actors,[160] it cannot alone account for the inclination to find solace in the Executive's position by those who have otherwise acted to check executive authority.

There has been plenty of opportunity for both the courts and Congress to dissect and pass judgment on the Executive's co-belligerency theory. Throughout the evolving executive process discussed above, Congress was engaging the Administration in parallel, both for the purposes of pushing back against what were widely perceived as executive overreaches, as in the area of detainee mistreatment, and supporting executive prerogatives like detention and

159. *See, e.g.*, *supra* note 7 and accompanying text.

160. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (arguing that international law does not constrain the President in wartime).

military trial more generally.[161] In doing so, Congress blessed the associated forces concept, first obliquely, in the 2005 Detainee Treatment Act, by referencing the Combatant Status Review Tribunals, and then explicitly, in the 2006 Military Commissions Act, which defined its jurisdiction over persons who are "part of the Taliban, al Qaeda, or associated forces."[162] Recent congressional engagement suggests a continued interest in checking the Executive's assertions of authority in this conflict. Testimony over the Executive's understanding of its 2001 AUMF authority, for example, is rife with members' questions about which groups the President is targeting in this conflict, and about whether the Executive's interpretive expansion of the AUMF inappropriately encroaches on Congress's war powers authority.[163]

And yet at no point did any Member of Congress do more than skim the surface in an exchange over co-belligerency. In response to questions about the reach of the AUMF, both lawmakers and executive officials have simply stated that an extension of the AUMF to co-belligerents is supported by the international laws of war.[164] Even Senators skeptical about the Executive's asserted authority have appeared disinclined to question the international law content of the co-belligerency claim.[165] Virtually none of these exchanges has unearthed any additional content to the Executive's "co-belligerency" approach.[166]

Questions of co-belligerency have arisen as well for courts, primarily through the Guantanamo habeas litigation. Both the Bush and Obama Administrations litigated challenges in court over the detention of individuals who were part of forces "associated" with al Qaeda.[167] And like Congress, the courts have generally avoided dissecting the substantive legal theory behind the

161. *See, e.g.*, Military Commissions Act of 2009 Pub. L. No. 111-84 § 948(c), 123 Stat. 2199, 2576; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. No. 11-84, 123 Stat. 2574 [hereinafter Detainee Treatment Act of 2005].

162. *Id*.

163. *See, e.g.*, *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. (2014); 2013 SASC Hearing, *supra* note 1 (Senators questioning executive officials regarding the list of groups the Executive considered falling under the AUMF, but generally accepting, with no dissection, the concept of co-belligerency).

164. *See id.*

165. For example, in an exchange among Senators King, Levin, and DOD Acting General Counsel Robert Taylor, Senator King expressed skepticism about the Executive's interpretation of the AUMF to include groups not explicitly referenced. He accused the Administration of "invent[ing] this term 'associated forces' that is nowhere in this document," and asserting "unlimited" power, which he deemed "a very dangerous precedent." *See* 2013 SASC Hearing, *supra* note 1, at 28. In response, Senator Levin restated the Executive's position, that the domestic authority "to use force against a foreign country or an organization . . . automatically extend[s] under the law of armed conflict to co-belligerents . . . , to some entity that has aligned themselves [sic] with the specified entity against us, in the fight against us," to which DOD Acting General Counsel Robert Taylor replied, "That is my understanding. You have expressed it very well." *Id.* at 29.

166. *See supra* note 163. The lone substantive engagement uncovered on this involves an exchange between a senator and an advocate (*not* an executive official). Senator Levin asked Kenneth Roth, the Executive Director of Human Rights Watch, whether "under the law of war, for co-belligerents to be included in who the target or who the named source of attack is, they must, as I understand it, join with the named belligerent and that they must also be participating in an attack on the United States." Roth agreed, as long as the "original belligerent" (i.e. al Qaeda) continued to exist. *See* 2013 SASC Hearing, *supra* note 1, at 121.

167. *See* March 13 Brief, *supra* note 39; Parhat Brief, *supra* note 29.

co-belligerency concept or its limits, both when ratifying the government's theory, and even when pushing back against it.

As I discussed above, the Bush Administration first relied on co-belligerency publicly in its unsuccessful litigation defending the detention of a Uighur detainee, Huzaifa Parhat.[168] Parhat was part of a group of Uighur detainees who had fled human rights abuses in China, took shelter in camps in Afghanistan, fled the fighting during U.S. air strikes (which destroyed their camp), and were ultimately handed over to U.S. officials in Pakistan.[169] The Executive's argument for Parhat's continued detention was based on his alleged affiliation with the East Turkistan Islamic Movement (ETIM), which the Executive asserted was either an "associated force" of al Qaeda or part of the organization itself, under "the established laws-of-war concept of 'co-belligerency.'"[170] Though the Administration's internal reviewers of Parhat's case suggested release, he remained at Guantanamo until 2009.[171]

Parhat was the first, and ultimately the only, case decided by the D.C. Circuit in its statutorily-mandated review of the Bush Administration's Combatant Status Review Tribunal designations.[172] In noting the Administration's argument that a group associated with al Qaeda or the Taliban might fall within the term "organization" in the AUMF, the court assessed that it "need not decide the precise meaning of the term," because the Government's evidence was in any event insufficient to support its argument.[173] Thus the court found that the Government had not made its case, without ever grappling with the content of co-belligerency or with the outer parameters of the AUMF authority.[174]

More typically, courts have taken the opposite approach; they have simply ratified the Executive's co-belligerency claim in principle without scrutinizing the substance.[175] Some have explicitly referenced the concept's

168. *See* Parhat Brief, *supra* note 29.

169. *See* Parhat v. Gates, 532 F.3d 834, 837 (D.C. Cir. 2008).

170. *See, e.g.*, Parhat Brief, *supra* note 29, at 33-34. At this stage, the Administration's public argument regarding co-belligerency was that it required an equivalency between the organizations. *See, e.g.*, *Parhat*, 532 F.3d at 834 n. 4 ("Judge Sentelle: So you are dependent on the proposition that ETIM is properly defined as being part of al Qaida, not that it aided or abetted, or aided or harbored al Qaida, but that it's part of[?] Mr. Katsas: Correct . . . . in order to fit them in the AUMF.").

171. This was based in part on the inadvisability of repatriating Parhat to China, where he surely would have faced mistreatment. Parhat, 532 F.3d at 838.

172. *Id.* at 854; *see also* Detainee Treatment Act of 2005, *supra* note 160.

173. *Parhat*, 532 F.3d at 844.

174. *Id*.

175. *See, e.g.*, New York Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 140 (2d Cir. 2014); Hedges v. Obama, 724 F.3d 170, 179 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014); *see also* Hedges v. Obama, No. 12 Civ. 331 KBF, 2012 WL 1721124, at *23 (S.D.N.Y. May 16, 2012) (questioning the Government's interpretive theory generally but finding that position "strongest . . . with respect to the definition of 'associated forces.' The Government argued that there is an accepted definition of what constitutes 'associated force' under the Laws of War, which is defined in terms of principles of co-belligerency and the Laws of War. Specifically, 'associated forces' is understood, at least by the Government, to be 'individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency'").

purported link to neutrality law.[176] One of the few judges to elaborate on his ratification of the theory beyond mere recitation of the government's standard is Judge Bates of the D.C. District Court. Judge Bates justified his acceptance of the theory in a 2009 case by describing the neutrality law-derived theory put forward by Goldsmith and Bradley in their 2005 article, citing only that article and those sources it cites.[177] And yet, as I discussed above, it is not clear to what extent the Obama administration was, in that 2009 case, intending to rely upon or distance itself from the neutrality-derived test of the Goldsmith & Bradley article. Thus Judge Bates may have ratified the Executive's "co-belligerency" concept in principle, while relying on a substantive standard that was not then, or may not now be, the Executive's intended test.

So, why have Members of Congress or the Judiciary not engaged more thoroughly with the substantive content of the Executive's co-belligerency theory? One reason the co-belligerency concept has taken root and persisted despite its flaws is that it is poorly understood. And it is poorly understood in ways that do not always lend themselves to easy recognition. Part of this problem lies in its mixed origin in both domestic and international law. International law experts, outside of a small cadre of U.S. national security law wonks, are not generally inclined to follow or to wade into this debate because of its specific U.S. domestic law focus. And domestic law players, relying in part on the Executive's rhetoric about the "well-established" concept and perhaps lacking the international law expertise to dissect it themselves, may assume that the content has a more established pedigree under international law than is actually the case.[178]

This lack of substantive engagement with the underlying legal theory is exacerbated by the chameleon-like nature of the Executive's position, particularly as it is not clear what international law source is in fact guiding the Executive's approach. It is hard to challenge a source if you do not know what it is. And the only acknowledged source that the Executive has publicly relied upon—the law of neutrality—is not a body of law in which most modern lawyers, international or domestic, tend to have significant expertise. In fact, it is a fairly archaic body of law that is at least partially obsolete today. Congressmen and judges, as well as their staffers and advisers, may simply be insufficiently versed in the nuances of neutrality law to be able to spot not only its inapplicability, but also the ways in which it is being used improperly.

176. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010); Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009). Oddly the only judge to critique the international law underlying the co-belligerency theory is Judge Brown who, in an opinion in which she entirely dismissed the relevance of international law to the Executive's detention authority, stated that even were it to apply, "the laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 74 (1906). The [detainee's group] clearly was not a state, but rather an irregular fighting force present within the borders of Afghanistan at the sanction of the Taliban. Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons." *Al-Bihani*, 590 F.3d at 873.

177. *Hamlily*, 616 F. Supp. 2d at 72.

178. *See generally* Sinnar, *supra* note 14 (arguing that the Executive relies on "rule of law tropes" to suggest it is employing a clear legal standard even when it is not).

By contrast, the "active hostilities" test bears striking similarity to a well-established international law approach to determining the parties to the conflict: that of the ICTY's jurisprudence in the *Tadić* case.[179] And yet there the Executive has never expressed a link between its test and that case or subsequent ICTY jurisprudence that might provide additional analysis for how to approach these concepts of an "organized armed group" or the determination of hostilities sufficient to make a group a party to a conflict. Thus the courts and Congress and others have not themselves looked to that source in considering the merits of the Executive's position.

The Executive's position lacks transparency at every level: what is the legal theory, what is the source for that theory, and even whether it is truly being forthcoming about its position.[180] This is perhaps worse than a simple lack of transparency over the Executive's position. This is not simply a function of not providing particular information or a legal theory to the public or to other critical actors. The public has generally accepted that the Executive has not revealed the facts underlying many of its decisions in the conflict with al Qaeda.[181] But there has been increasing pressure on the Executive over the last decade and a half to provide, if not the underlying facts, then at a minimum, its legal positions in this conflict. The Executive has at times claimed that it has provided an extraordinary level of disclosure to the public regarding its wartime legal reasoning, and this may be true. Nevertheless, as the co-belligerency case study demonstrates, the Executive's public statements may not always align perfectly with its internal thinking.[182] Or more to the point, the Executive is not one unitary being, and the public statements and other pieces of evidence that come out of the executive branch do not always capture the full extent of the interpretive and policy disputes that may be occurring beneath the surface. Ambiguity or flexibility in executive pronouncements may be less about an intentional power grab by any one actor, and more about an inability to reach consensus internally, and thus a need to leave open room for different interpretations or paper over these differences between executive officials.[183] The result is that the public, courts and Congress are left with a false sense of transparency, the mere veneer of a legal rule.[184] This is worse than directly withholding information, because the public is less able to recognize that this withholding is taking place.

179. *See infra* Part II.

180. *Id*.

181. There are, of course, notable exceptions. Many NGOs and others have called on the Executive to release, for example, concrete information regarding the results of its drone strikes. Others have suggested a public accounting of the underlying facts the Government relies upon in reaching its targeting decisions. In the context of Guantanamo habeas, litigants have at the very least been successful in requiring the Executive to put forward factual information regarding the basis for detention. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 771 (2008).

182. *See generally* Sinnar, *supra* note 14.

183. Or perhaps the matter was decided definitively in 2012 when Jeh Johnson announced the "entered the fight" test, but subsequent debates and waffling within the Executive have muddied the extent to which that test is strictly construed. *See* Jeh Johnson Speech, *supra* note 26.

184. DYZENHAUS, *supra* note 14, at 3, 42, 50.

With its associated forces theory, the Executive has suggested a somewhat strict approach (to an already expansive reading of the AUMF) by asserting its two-pronged "entered the fight" approach. It has also left a trail of evidence suggesting that internal actors may read into that explicit approach more flexibility than it suggests, or that some officials may have a different test in mind altogether, and may simply be continuing to rely on the test that they had been using previously, and which they at times continue to reference. By relying on a concept of co-belligerency without explaining its content, its source, or the contours of the Executive's understanding, the Executive simultaneously suggests foundation in an established legal principle and muddies the waters.[185] It has not, after all, revealed what it means by co-belligerency in this context. And as this paper demonstrates, there are several possibilities. Perhaps the "Executive" in its many component pieces intends all of them.

C. *Alternatives to Co-Belligerency*

Reliance on principles drawn from international law and specifically this concept of co-belligerency—however it is understood—to understand the scope of the AUMF has become fairly entrenched through two presidential administrations, judicial deference and congressional acquiescence. But this result was not inevitable, and along the way there have been alternative possibilities for interpreting the scope of the AUMF available to the courts, Congress, and to the Executive.

One is a strict, text-driven approach. Some scholars have advocated reading the AUMF to apply only to those groups specifically referenced, namely the Taliban and al Qaeda (which are not explicitly named, but are widely understood to be the entities contemplated by the statute).[186] Under such an approach, the President would need to return to Congress for specific authorization in order to use force against other groups, whether or not they had an affiliation to al Qaeda.[187] Even a narrow reading, however, requires some interpretive approach to determining which actors fall within the orbit of al Qaeda and the Taliban. In a traditional armed conflict, such a question has a fairly straightforward answer: members of the armed forces typically identify themselves as such, wear uniforms, sleep in barracks. International law classifies such individuals as combatants, who may be detained or directly

185. *See generally* Sinnar, *supra* note 14 (describing how the Executive's public invocation of traditional "rule of law tropes," while deviating from them in secret, serves to protect executive branch national security decision-making from external review).

186. *See* Daskal & Vladeck, *supra* note 8, at 127-28.

187. *Id*. at 126 ("If new groups emerge that pose a threat sufficient to warrant independent use-of-force authority, the government should affirmatively and publicly identify them and obtain from Congress specific authorization to use force against *those* groups."). Another set of scholars advocates a new congressional statute that would provide more flexible authority to the President, requiring him to identify the list of groups he was targeting, but permitting him discretion to update that list based on Congressionally-provided criteria. *See* Robert Chesney et. al., *A Statutory Framework for Next Generation Terrorist Threats*, HOOVER INST. (2013), http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf.

targeted at almost all times, but who also have a right to participate in hostilities, as distinct from civilians. But in a conflict with a terrorist organization, even the simple question of who is a member, and specifically who is a detainable or a targetable member, is fraught. The current approach, constant across the Administrations, looks by analogy to international law for answers for this question as well. But this is not the only viable approach.

Other approaches for interpreting the AUMF appeal to areas of domestic law, rather than international law, to understand its scope. Early executive branch explanations of al Qaeda's structure and affiliations suggested that officials looked to the domestic legal definition of terms like "organization" in order to determine who might fall within al Qaeda's scope.[188] Other options include looking to analogues from criminal law, such as participation in a criminal enterprise. Analogues from criminal law generally require a greater degree of actual participation in the hostile acts of the organization before individuals may be held accountable, in contrast to the international laws of war, under which combatants are considered members of the armed force from the moment they enlist, regardless of their actual activities. Wartime analogies thus cast a generally wider net, and involve less process. For this and countless other reasons—including the longstanding precedent of looking to the laws of war to regulate the use of force abroad—international law may have appealed to decision makers as a better fit.

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None of the interpretive approaches I discuss in this paper foreclose the possibility of Congress providing new statutory authority that more clearly delineates the extent to which new groups or individuals may be covered under the AUMF or future force authorizations. This cuts in both directions. Congress could rein in the President's current interpretation of the statute; it could repeal or revise the 2001 AUMF, and craft a more explicitly tailored authorization in its place. Alternatively, Congress could instead clarify that it intends to delegate fairly flexible authority to the President to determine the groups that should come within the statute.

In the interim, the co-belligerency theory simply operates as an interpretive default rule for reading the President's use of force authority. This theory rests on a legal fiction of congressional intent: that Congress must have intended that executive officials understand the President's statutory war powers to extend to groups that join the fight, as that concept would be understood under international law. For this default rule to work effectively, however, Congress, courts, and the public need to understand precisely what the default presumption is. They need to know how the President and executive branch officials interpret such use of force authorizations, both for the purposes of determining whether to further expand or cabin the current AUMF, and to understand how the Executive will read future authorizations. Thus, while there are both doctrinal and policy reasons to prefer one test over another, the long-view imperative is that there be one clear theory by which all these actors

188. *See, e.g.*, Parhat Brief, *supra* note 29.

recognize that the Executive will construe this kind of force authorization, absent further clarification from Congress.

IV. IMPLICATIONS OF THE CO-BELLIGERENCY STORY

This article makes two primary claims. First, as a matter of both practice and doctrine, this article demonstrates that no one, including those within the executive branch, has a full understanding of the scope of the President's authority under the AUMF, or even the scope of what the President has asserted is his AUMF authority. This has obvious ramifications for our ability to understand, let alone to cabin, the current conflict. And if left unchecked, today's murky understanding will continue to govern an expansive interpretation of wartime force authorizations going forward.

Second, this article uses the co-belligerency story as a case study to explore how a self-created legal norm can serve simultaneously as both constraint and enhancement on executive power. Co-belligerency is an executive-made greyish space in the law, a phenomenon dangerously close but not quite equivalent to what David Dyzenhaus has called a "legal grey hole."[189] The co-belligerency story is a narrative of a creative idea that became entrenched law, but in the process lost much of its shape. The result has been neither a clear limit on Presidential power, nor an executive branch run completely amok, but rather an amorphously-defined pool of discretionary authority that few if any fully understand.

This case study also unearths a question about the invocation of international law to interpret domestic law. Specifically, how should international law inform domestic legal authorities that speak to foreign affairs powers, when the international law in question is vague or there is no one clear international law rule on point?

A. *The Scope of the President's Statutory War Powers*

The co-belligerency story suggests that no one really knows for sure how the Executive is interpreting its statutory powers in this conflict, including those within the executive branch itself. What is clear is that the courts and Congress have both failed in their investigation and oversight of the Executive's position. The scope of the President's statutory authority to use force is, after all, a question of domestic law—one of statutory interpretation—and the Executive's position is based at least in part on a legal fiction of congressional intent. Yet members of Congress have abdicated their responsibility to perform that oversight. Some have suggested concern over the scope of the Executive's statutory authority, only to then defer wholly to an executive interpretation of that statute without making any effort to understand that interpretation.[190] Even more tortuous, these very members have taken comfort in the idea that judicial sanction for the Executive's interpretation of

189. DYZENHAUS, *supra* note 14.

190. *See, e.g.*, *supra* notes 1-6 and accompanying text.

their own statute should somehow legitimize that reading and absolve them of the need to draw their own judgment of that interpretation or otherwise to clarify their intent.[191]

This Article has dissected the possible options for interpreting the AUMF, and discussed the relative merits and disadvantages to each. But whatever the precise test employed, what is most imperative is that there be one approach, and that it be transparent and understood by the relevant players: courts, Congress, NGOs, and also executive branch officials themselves. The substance of that test is important, surely, and scholars, members of Congress, judges, and NGOs, can and should debate what that test should be. But to do so effectively they must understand what they do and do not already know about the Executive's position. There are many potential approaches to both interpreting the current AUMF and to determining future authorizations to the President. International law may or may not be an appropriate source for determining the contours of a conflict with a non-state actor.[192] Perhaps a strictly-tailored approach in the text itself is ideal. Or perhaps after thorough debate Congress might vote to provide the Executive with significant flexible authority. But it is critical that those charged with checking executive authority know where that flexibility lies, and where the Executive is operating within clearly defined parameters. Wherever the approach ultimately lands, this interpretive mechanism is merely a default rule; Congress can draft around it. But Congress can only do so—and the courts and public can only judge its merits—if all understand how the interpretive mechanism actually operates. Today, the Executive's co-belligerency approach does not provide that clarity, and instead hovers dangerously close to a legal grey hole, a mere veneer of law that suggests a clearer rule than it truly provides, and which operates to stave off interference in the Executive's position while simultaneously affording the President significant discretion to act.[193]

B. *Invoking International Law to Interpret Domestic Authority*

The co-belligerency story demonstrates that there are reasons to be concerned with attempts at international law adventurism when interpreting domestic law. While the use of international law to inform domestic rules has an established pedigree, it can be abused.[194] This is particularly so in the modern era in which those charged with checking the Executive's domestic authority often lack expertise in international law. Reliance on international law to inform domestic law can instead help to create, intentionally or not, a legal grey hole of flexible and amorphous executive power. Here, the Executive's invocation of a little known concept from international law to interpret its domestic statutory authority enabled it to promote a flexible and ultimately

191. *Id*.

192. For a discussion of how to determine when international law is an appropriate tool for interpreting domestic constraints, see Ingber, *supra* note 12.

193. *See* DYZENHAUS, *supra* note 14, at 3, 42, 50.

194. *See* Ingber, *supra* note 12.

expansive understanding of that authority with very little pushback from the courts or Congress.

How should international law appropriately inform the domestic law in this context, namely the President's statutory authority under the AUMF? One question that this case study raises—and which I will have to reserve to future work—is, even when it is appropriate to look to international law to inform a particular domestic context, how does one determine which particular substantive norm is the appropriate norm to invoke and how does one define it? Among the questions packed into this are: Which body of international law is best suited to this task? In areas of controversy or disagreement, how does one determine *which* rule properly governs? When interpreting a congressional statute, is it necessary that Congress has appeared to have accepted a particular international law norm, or is it sufficient that the executive branch espouse it? And need the international law norm have been well-established at the time of the statute's enactment, or need it be a well-established consensus opinion today? Or is it enough simply that the Executive today deems the norm to be the best—or even just a plausible—reading of the law? What does one do when there is no appropriate international law test on point?

The co-belligerency story raises all of these questions. There exists no one clear and established international law test that is perfectly on point to determine when a non-state armed group joins a pre-existing conflict between a state and non-state actor. Executive officials have thus relied on different theories over the years. The early test that officials proposed during the middle of the Bush Administration relied upon a creative take on the historic body of neutrality law to understand the parameters of a domestic statute authorizing force against al Qaeda. [195] That body of law was not formally applicable to the al Qaeda conflict as a matter of international law, and thus it required a novel spin on that law in order to map it onto this context. Moreover, even putting aside the applicability of the body of neutrality law as a whole, the Bush-era theory required a tweaking of the neutrality law rule itself in order to craft a test for the domestic law purpose.

Under no circumstances could one argue that this novel theory of international law was an established or consensus approach to determining the parties to a conflict under international law in 2001, when the AUMF was passed. Nor was it, at the time, the U.S. Government's understanding of international law governing such conflicts. No evidence suggests that it was a consensus approach to international law at any point during the years in which the Bush Administration invoked the test to interpret the AUMF. Nor is there evidence to suggest that it is the international law governing such conflicts today.[196]

There nevertheless remains a question as to the extent to which the Executive might plausibly promote this understanding of the law governing force against non-state actors as a matter of *international* law. The U.S.

195. For the detailed discussion of this test and its problems, see *supra* Part II.

196. *Id*.

President has some real power to move custom in areas where there remains a lack of clarity over the international law rule. But that is not the question before us here. The question here is whether this creative theory should be employed to inform a domestic statute informing and constraining the President's power. For these purposes the presumption shifts: a lack of clarity in international law should not give the President license to interpret his domestic authorities with abandon. To the contrary, to the extent international law informs domestic powers, we must consider that we can only presume congressional intent to incorporate *existing* international law rules. The extent to which those rules must be in existence at the time of the statute's enactment or in existence at the time of interpretation may be an open question. But the neutrality theory fails under either theory.

The *Tadić* theory is also flawed for the reasons discussed in Part II. But at a minimum it may serve as a floor for a more tailored yet still expansive reading of the AUMF. *Tadić* has the benefit of being a well-established test, both now and at the time of the AUMF's enactment. Because *Tadić* creates a standard for determining the threshold point at which a NIAC comes into existence, and not for determining when parties join a pre-existing NIAC, it may well be that the test for the latter should be less stringent. International law may well permit parties to act beyond *Tadić*'s bounds. And states may wish to try to push on those bounds and develop custom in this area. But today there is no existing test for what that might be, and thus it cannot serve as a limiting principle for an expansive view of domestic authority. *Tadić* is the only theory that passes the brief guidelines I discuss above. This does not mean that Congress cannot go further to authorize more discretion to the President beyond what *Tadić* would permit, but without further action on its part we cannot assume it.

There is room for debate over how precisely international law should inform domestic law, and how we should define the international law norm in doing so.[197] I certainly find persuasive arguments in favor of importing a clearly established, longstanding principle of international law to help define the contours of an otherwise ambiguous domestic statute. I also find plausible arguments in favor of assuming congressional intent to keep up with changing times and incorporate a norm that has evolved over time to a new modern consensus. And I think it might be reasonable to argue the complete inverse as well: that we should interpret a statute as incorporating even a controversial international law norm that was in play at the time of the statute, if that norm was at the time clearly accepted by the United States. But I think it is a bridge too far for the Executive and others to assume congressional intent to import into an existing statute an international law theory that neither was the position of the United States at the time of the statute, nor long-standing generally, nor accepted today by the international community as an established norm. For our purposes here, while it may make sense to assume congressional intent to

197. This case study forms part of a broader project on the distinct ways that international law informs domestic law interpretation. A future work will consider how to determine the appropriate content of an international law norm when we look to it to inform domestic law.

authorize force against all *existing* parties to a conflict, I do not find it realistic that Congress intended in the 2001 statute to delegate to the President the authority to declare war against new actors, simply based on an argument that international law permits it.[198]

C. *Checking Executive Power from Without and Within*

Most broadly, the co-belligerency story complicates competing narratives today about the potential for the Executive to self-constrain in the absence of real external oversight. It is neither a cynical tale of an imperial power-hungry Executive, nor a happy account of a presidency perfectly restrained by the institutional forces promoting the rule of law humming away within the executive branch. Instead, this story both demonstrates and raises concerns about the phenomenon that has been called a second-best alternative check on executive authority: the internal separation of powers, the web of actors within the executive branch who operate to rein in executive prerogative.[199]

There has been much interest in recent years in what has seemed a demographic explosion of lawyers operating within the executive branch, and the significant involvement of these lawyers in all aspects of executive decision-making. Particular attention has focused on executive lawyering in the national security arena.[200] Presidential powers experts have noticed a decline of centralized power in legal offices like the Office of Legal Counsel at the Justice Department, in favor of a more disaggregated approach of lawyers meetings drawn from lawyers throughout the administration.[201] Some scholars have suggested that this decentralization of legal advice must lead to legal opportunism, strategic cherry-picking on the part of the President who might simply choose his preferred legal advice from among an array of his advisers' suggestions.[202]

The image of a unitary executive plucking his preferred legal advice from a lineup of his advisers provides an overly simplistic, and inaccurate, account of how decision-making functions inside an enormous behemoth such as the executive branch. It also misunderstands the consequences of a trajectory away from centralized decision-making. What this and other accounts of executive lawyering overlook is that today's disaggregated approach to legal decision-

198. It is not clear that Congress *could* have delegated away that authority entirely, even if it intended to do so.

199. *See, e.g.*, Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L. J. 2314, 2316 (2006) (identifying, and proposing a strengething of, the internal separation of powers); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L. J. 423, 426-35 (2009) (hailing the benefits of the internal separation of powers, and discussing its interdependency with external checks on the President).

200. New York Times journalist Charlie Savage has even written a 600-plus page popular tome on the subject. *See* SAVAGE, *supra* note 58.

201. *See, e.g.*, Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015, 6:11 PM), https://www.lawfareblog.com/decline-olc.

202. *See, e.g.*, Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a They Not an It*, 96 MINN. L. REV. 194, 257-60, 267-71 (2011); Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 21, 2011), http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html.

making resembles much *less* one decider choosing among many choices, but rather a group of disparate actors with differing instincts, biases, and goals working *together* to make a decision. The result is inevitably one of compromise. One of the results of such group decision-making is that when these disparate actors cannot agree on one clear position, they will of necessity employ ambiguous language to paper over their differences.[203] Flexible or ambiguous executive legal positions are often not necessarily the result of intentional, conscious power grabs, but rather represent the reality of group decision-making, and attempts to mask internal disagreement and come to a decision for the moment that permits continued debate among the actors until they are truly forced to decide. Because of this bias toward flexibility, a practice of leaving options open will inevitably, even if unintentionally, lead to a ratcheting up of power to the President.[204]

And yet, for all the problems inherent in relying on internal constraints to check an otherwise all-powerful Executive, in certain very important areas these internal constraints may well be our only hope. For the clearest message coming out of the co-belligerency story is that the courts and Congress—while purporting to provide active oversight of the Executive on this precise matter—have utterly failed to do so. Despite seeming to ratify the Executive's theory in principle, neither the courts nor Congress have shown sufficient inclination or ability to look behind the co-belligerency concept to understand its meaning or how the Executive is employing it.

A cynical view of this account is that Congress and judges have simply looked the other way rather than make difficult decisions about the proper limits of executive power in war. On this account, reliance on this co-belligerency concept—which they may not fully understand but which sounds in international law and suggests constraint—allows them to do so. A less cynical but equally disconcerting narrative might be that judges and members of Congress simply do not realize how little they know about co-belligerency and how the Executive uses it. Both narratives suggest that reliance on this term provides a "façade" of oversight, and that if the only operating constraints on the President were from these two branches, his authority in this area would truly be a legal grey hole.[205] I have therefore used the concept of a greyish space in this paper not because of the existence of effective external checks, but rather because of evidence that the executive branch has truly operated as if constrained to some extent by internal forces enforcing self-imposed limits, at least within this amorphous and evolving space that it itself has created.

CONCLUSION

Accounts of executive power today, particularly in the murkiest areas of national security law, often tend toward either the trusting or the cynical. Either

203. *See* Ingber, *supra* note 65.

204. *Id*.

205. *See* Dyzenhaus, *supra* note 14 (warning against the existence of legal black holes—lawless zones—as well as legal grey holes, where "there is the façade or form of the rule of law rather than any substantive protections"); Sinnar, *supra* note 14.

the internal organs of the executive branch are working efficiently to guide and constrain executive decision-making within legal limits, or else the story is an entirely different one of a presidency run rampant, unchecked by the other branches, perhaps even spurred from within by nefarious power-hungry bureaucrats.

The reality lies in a middle space. Nefarious actors may exist, but they are not the norm. Institutional players may truly see themselves as bound by the rule of law, but, in operating so entirely within their closed-off, exclusive, and cabined space, it is a rule of law that often only they are truly able to understand. (And as this Article explores, even those internal actors do not always understand the legal rules they feel constrained by.) Outsiders may see in this lack of transparency nefarious intentions. They may see in the lack of clear rules an intention to create these grey spaces or even legal black holes, rather than an intention to truly constrain the presidency. Neither of these accounts gets it precisely right, but that does not mean that the reality has settled yet on the appropriate balance.

This middle space should be no less concerning to those who fear the aggrandizement of executive power. Nefarious intentions are not a prerequisite to the inexorable ratcheting up of executive claims to authority. Indeed, this story suggests challenges for those Presidents who rise to power hoping to rein it in. Ultimately, it may be that internal forces simply will never be sufficient as the sole constraints on executive power. But until the courts and Congress step in, they may well be all we have.