Note

That Is What We Said, but This Is What We Meant: Putting the Meaning Back into Use-of-Force Legislation

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The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[1]

—Justice Louis D. Brandeis, Associate Justice of the Supreme Court of the United States

Introduction

Consider: The President takes the country to war following a devastating terrorist attack on U.S. soil. Congress quickly grows frustrated with the progress of the war and the perceived threats to civil liberties arising out of the acts that the President is taking pursuant to the power granted to him to respond to the attack. As a result, many in Congress want to amend the original grant of authority to make it clear that the President does not have the power to conduct military

* J.D., 2010, The George Washington University Law School. I would like to thank Chris Bruno for his comments on early drafts of this Note, and Scott Pollock and Andrew Pruitt for phenomenal editorial work. Special thanks to my family and, of course, Elisabeth, for unwavering patience and support.

1 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

tribunals or warrantless wiretapping programs. But Congress is closely divided—fifty-two Democrats to forty-eight Republicans—and any bill amending the original grant of authority will surely face an Article I presidential veto.

Sliding the provision into a spending bill could work, but the President might veto that as well, both defeating Congress's attempt to rein in the President and preventing money from getting to the troops, who are understaffed, underfunded, and overworked. Should Congress act knowing that the bill will be vetoed, or should it pull the bill from consideration and move on to other legislation, ending a highly publicized and important public debate on contentious issues?

Though this is only one circumstance where the question of the President's power relative to authority granted by Congress has come up, this scenario, based on the terrorist attacks of September 11, 2001, and the War on Terror, has brought very real issues to the forefront of the national debate about the separation of powers among the different branches of government.[2]

The U.S. Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*[3] set forth the framework by which the constitutionality of presidential action is to be measured. A critical question in any *Youngstown* analysis is whether Congress, explicitly or implicitly, supported the actions of the President. In analyzing this question, courts have typically looked at existing laws enacted by Congress and signed by the President on the subject matter related to the relevant act.[4] Less frequently, courts have looked at legislative history, or the lack thereof, to determine the will of Congresses, past and present.[5] Of course, Congress, together with the President, can generally authorize or reject an executive act or program via legislation.

There is a fundamental flaw, however, in assuming that Congress can manifest its will by enacting a statute limiting the authority of the President to act. Enacting a statute requires either presidential ap-

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2 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (considering the powers of the President under the Authorization for Use of Military Force Against Terrorists ("AUMF"), Pub. L. No. 107–40, 115 Stat. 224 (2001)); Greg Simmons, *Debate Rages over Legality of NSA Wiretap Program*, FOXNEWS.COM, Dec. 21, 2005, http://www.foxnews.com/story/0,2933,179323,00.html.

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

4 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 546 (2004) (Souter, J., concurring in part and dissenting in part) (relying on a statement by the sponsor of the Non-Detention Act ("NDA"), 18 U.S.C. § 4001(a) (2006), a statute at issue in the case, to conclude that "legislative history indicates that Congress was aware that [the NDA] would limit the Executive's power to detain citizens in wartime to protect national security").

5 *See, e.g.*, *id.*

proval or a supermajority of Congress willing to override a presidential veto.[6] A rational President would not sign such limiting legislation, and rarely does Congress have a supermajority to overcome such a veto.[7] Likewise, a rational Congress would probably not waste time drafting and debating a bill guaranteed to face a veto, which again highlights the issue that Congress faces in deciding whether to continue the public debate, though meaningless, or move on to other matters.

This Note argues that, for both separation of powers and, to a limited extent, public policy reasons, when determining the will of Congress in a *Youngstown* analysis, a court should look to bills that sought to clarify an existing, vague grant of presidential power but that, after passing both houses of Congress, were vetoed by the President. These bills would not carry the force of law, in that they would not legally preclude the President from acting, but would instead be tools for courts to use in scrutinizing the actions of the President.[8] Such bills are likely a more reliable source in determining congressional will than both older existing statutes and legislative history because of the process that a bill must go through to pass both chambers. Though this proposal sounds like an impermissible legislative veto, as proscribed by *INS v. Chadha*,[9] it is not because the bills are tools for a court, not binding directives to the President.[10] Part I of this Note explains the implications of the *Youngstown* case. It also analyzes other cases where courts have relied on old statutes, legislative history, or silence to determine the will of Congress. Part II establishes the problem inherent in vague grants of power by analyzing the recent perceived abuses of presidential authority in the War on Terror. It

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6 Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. CONST. art. I, § 7, cl. 2.

7 There have been, to date, 2562 vetoes in U.S. history, only 110 of which have been overridden by Congress. *See* GERHARD PETERS, THE AM. PRESIDENCY PROJECT, PRESIDENTIAL VETOES (John T. Woolley & Gerhard Peters eds., 2009), http://www.presidency.ucsb.edu/data/vetoes.php.

8 *See infra* text accompanying note 15 (describing Justice Jackson's concurrence in *Youngstown*).

9 INS v. Chadha, 462 U.S. 919, 958–59 (1983).

10 *See infra* text accompanying notes 111–25.

goes on to highlight some instances of congressional acquiescence to presidential veto threats, illustrating how congressional will can be overcome by unilateral presidential action. Additionally, Part II briefly mentions a specific instance of after-the-fact legislative history-making to show the dangers of relying on a bill's history to determine *Youngstown* constitutionality. Part III argues that courts should look to bills passed by both houses of Congress but vetoed by the President when seeking to determine congressional will. Part IV addresses alternatives and explains why they are not effective in this context. It also anticipates potential problems with the proposal, including concerns about the Presentment Clause and the legislative veto. Finally, Part V argues that there are inherent safeguards in the proposal that prevent it from being misused, and that the proposal aims to reinvigorate the Founders' notions of separation of powers.

I. Youngstown *and Separation of Powers*

A. Youngstown Sheet & Tube Co. v. Sawyer

The Supreme Court in *Youngstown* addressed the question of whether President Harry S. Truman acted constitutionally when he seized steel mills during the Korean War.[11] President Truman, after issuing an Executive order authorizing the seizure, "report[ed] his action" to Congress, but Congress remained silent on the issue and never enacted legislation that would have given President Truman the authority to seize the mills.[12] The government argued that President Truman's seizure of the mills was constitutional under his inherent Commander-in-Chief authority granted by Article II of the Constitution.[13] Ultimately, the Supreme Court disagreed and determined that President Truman's actions were unconstitutional.[14]

The more important aspect of *Youngstown* for contemporary constitutional analysis, however, is Justice Jackson's concurring opinion, in which he penned his famous three-category framework.[15] Justice Jackson argued that an action taken by the President will necessarily fall into one of three categories that correspond with his authority rel-

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11 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–84 (1952).

12 *See id.*

13 *See id.* at 582. The government's specific position was that "the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States." *Id.*

14 *See id.* at 587–89.

15 *See id.* at 635–38 (Jackson, J., concurring); *see also infra* Part I.B (explaining that the Court has since adopted Justice Jackson's influential concurrence as precedent, though in a slightly modified form).

ative to that of the Constitution and Congress. Specifically, Justice Jackson said:

> 1. 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 . . . .
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> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
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> 3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matters.[16]

To put it simply: When Congress and the President agree, the President has the most authority. When Congress neither agrees nor disagrees with the President, the President's authority depends on a number of circumstances, including congressional indifference and the nature of the situation. When Congress disagrees with the President, the President has only his constitutional powers to rely on. But despite the implication that express congressional will is to be determined by laws in existence at the time of the President's action, Justice Jackson did not specify what constitutes *implied* congressional authorization or how it is to be determined.

Within this framework, Justice Jackson said that Congress's silence, or failure to act, was a rejection of President Truman's claimed authority, and that the President's seizure of the mills fell into category three of the framework.[17] As such, President Truman had only his Commander-in-Chief authority, which Justice Jackson and the majority decided did not confer the power to seize a steel mill during a

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16 *See Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

17 *Id.* at 638–40.

time of war.[18] In short, the *Youngstown* Court interpreted congressional silence as a *rejection* of a grant of power.[19]

B. Dames & Moore v. Regan

Dames & Moore v. Regan[20] adopted Justice Jackson's influential concurrence as precedent when deciding whether the President acted constitutionally under a grant of authority from Congress.[21] In *Dames & Moore*, President Jimmy Carter seized assets of the government of Iran and blocked all lawsuits involving the country in an attempt to secure the release of hostages at the American embassy in Tehran.[22] President Carter, and later President Ronald Reagan, issued Executive orders implementing agreements with Iran that resolved the situation.[23] Dames & Moore filed suit, seeking declaratory and injunctive relief to prevent enforcement of the Executive orders, arguing that neither the Constitution nor authority granted by Congress gave the Presidents the power to enter into the disputed agreements.[24]

The Court held that the actions of Presidents Carter and Reagan were constitutional[25] because Congress granted the power to resolve emergency situations in the International Emergency Economic Powers Act ("IEEPA"),[26] the Hostage Act of 1868,[27] the Trading with the Enemy Act,[28] and through the implied authority to settle claims in the International Claims Settlement Act of 1949.[29] Although none of the statutes specifically granted the President the power to unilaterally settle claims pending in the courts, the Court read the statutes together as providing implied consent.[30] The Court noted: "Over the years Congress has frequently amended the International Claims Set-

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18 *See id.* at 587 (majority opinion); *id.* at 640–46 (Jackson, J., concurring).

19 *Id.* at 653 (Jackson, J., concurring).

20 Dames & Moore v. Regan, 453 U.S. 654 (1981).

21 *See id.* at 668–89.

22 *Id.* at 662–63.

23 *Id.* at 662–66.

24 *See id.* at 665–67.

25 *See id.* at 669–86.

26 International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (2006).

27 Hostage Act of 1868, 22 U.S.C. § 1732 (2006).

28 Trading with the Enemy Act, 50 U.S.C. app. §§ 1–44 (2006).

29 International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621–1645 (2006).

30 *See Dames & Moore*, 453 U.S. at 681–82 & n.10. Like Sherlock Holmes in "Silver Blaze," *see* ARTHUR CONAN DOYLE, MEMOIRS OF SHERLOCK HOLMES 1–28 (1903), the Court discovered what happened in Congress by noting what did not happen. Implied consent was based on Congress's consistent failure "to object to th[e] longstanding practice of claim settlement by executive agreement, even when it has had an opportunity to do so." *Dames & Moore*, 453 U.S. at 682 n.10.

tlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority."[31] Furthermore, the Court relied heavily on the legislative history of the named laws to dispel Dames & Moore's argument that the President did not have the authority to settle outstanding claims.[32]

Most important, the majority in *Dames & Moore* adopted a slightly modified version of Justice Jackson's concurrence in *Youngstown* as the method of evaluating the constitutionality of presidential action.[33] Justice Rehnquist, writing for the majority, altered Justice Jackson's concurrence by creating a continuum rather than three "black and white" categories.[34] Justice Rehnquist wrote: "[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[35] Justice Rehnquist, like Justice Jackson, however, did not clarify what would constitute congressional will, short of explicit authorization or prohibition.

Notably, *Dames & Moore* differs from *Youngstown* in one significant respect. In *Youngstown*, congressional silence was equated with tacit *disapproval* of granting authority to the President, whereas in *Dames & Moore*, congressional silence was equated with tacit *approval* of granting authority to the President.[36] This leaves courts in the unenviable position of either following the reasoning of the seminal *Youngstown* case, which has never been overruled, or the more recent *Dames & Moore* case. And, as noted by Dean Harold Koh, if a court construes congressional silence as approval, the court can effectively move all the actions taken by the President out of category three, virtually assuring a decision that the President acted constitu-

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31 *Dames & Moore*, 453 U.S. at 681.

32 The Court noted: "Though the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that '[n]othing in this act is intended . . . to interfere with the authority of the President to [block assets], or to impede the settlement of claims of U.S. citizens against foreign countries.'" *Id.* at 681–82 (alterations in original) (quoting S. REP. NO. 95-466, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4544; 50 U.S.C. § 1706(a)(1) (Supp. III 1976)).

33 *See id.* at 669.

34 *See id.*

35 *Id.*

36 *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1310–11 (1988).

tionally.[37] This greatly expands the power of the President relative to Congress.

C. War on Terror Cases

Dames & Moore is not the only case to look to old statutes to determine whether the will of Congress is working in favor of, or against, the President. *Hamdi v. Rumsfeld*[38] examined whether the Non-Detention Act of 1971 ("NDA")[39] was superseded by the Authorization for Use of Military Force Against Terrorists ("AUMF"),[40] passed in the wake of the September 11, 2001, attacks, in terms of the President's authority to detain U.S. citizens captured on the battlefield.[41] The Congressional Research Service published a report on the detention of U.S. citizens after the decision in *Hamdi* and concluded that the "[l]egislative debate, committee reports, and the political context of 1971 indicate that when Congress enacted Section 4001(a) [of the NDA] it intended the statutory language to restrict all detentions by the executive branch, not merely those by the Attorney General,"[42] and that "[l]awmakers, both supporters and opponents of Section 4001(a), recognized that it would restrict the President and military authorities."[43] The Court, on the other hand, found that the vague language of the later-in-time AUMF trumped the strict terms of the NDA.[44] Unlike in *Dames & Moore*, therefore, an existing statute was not determinative when assessing the vague language of the AUMF in *Hamdi*.[45]

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37 *See id.*

38 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

39 The NDA provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2006).

40 Authorization for Use of Military Force Against Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF provides:

> [T]he President is authorized 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.

Id. at 224.

41 *See Hamdi*, 542 U.S. at 515–17.

42 LOUIS FISHER, CONG. RESEARCH SERV., DETENTION OF U.S. CITIZENS 6 (2005), *available at* http://www.fas.org/sgp/crs/natsec/RS22130.pdf.

43 *Id.*

44 *See Hamdi*, 542 U.S. at 517–21; *see also id.* at 542, 547 (Souter, J., concurring in part and dissenting in part) (discussing the relative vagueness of the AUMF).

45 *See id.* at 517–21 (majority opinion); *see also* Dames & Moore v. Regan, 453 U.S. 654,

In *Padilla v. Rumsfeld*,[46] the Second Circuit disagreed with the Court in *Hamdi* and came to a different conclusion regarding the scope of the AUMF.[47] Specifically, the Second Circuit "conclude[d] that clear congressional authorization [was] required for detentions of American citizens on American soil because [the NDA] prohibits such detentions absent specific congressional authorization."[48] The court added that "Congress's [AUMF], passed shortly after the attacks of September 11, 2001, is not such an authorization, and no exception to [the NDA] otherwise exists."[49]

The Supreme Court subsequently dismissed the case on jurisdictional grounds.[50] After the case was refiled and appealed, the Fourth Circuit held that the President had authority under the AUMF to detain Mr. Padilla.[51] The circuit split on the exact same question not only highlights that courts often disagree about the meaning of the text of the same statute, but also shows that Congress should be given the opportunity to resolve vague language that exists in legislation granting power to the President.

Hamdan v. Rumsfeld[52] also dealt with the meaning of the AUMF as it relates to detainees.[53] This case, however, focused on the authority of the President and the Secretary of Defense to conduct military tribunals according to guidelines promulgated by the executive branch.[54] The Court determined that the Uniform Code of Military Justice ("UCMJ")[55] was the relevant statute on point and that it authorized military tribunals only in limited circumstances with certain procedural safeguards that were not present in the military tribunals in question.[56] In other words, the President acted contrary to the will

669–86 (1981) (relying on the IEEPA, the Hostage Act of 1868, the Trading with the Enemy Act, and the International Claims Settlement Act of 1949).

46 Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004).

47 *See id.* at 699.

48 *Id.*

49 *Id.*

50 *See* Padilla v. Rumsfeld, 542 U.S. 426, 451 (2004) (holding that Padilla should have challenged his detention in the District of South Carolina instead of the Southern District of New York because he was being held in a military brig in South Carolina).

51 Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005) (comparing *Hamdi* to *Padilla* and holding that, "[a]s the AUMF authorized Hamdi's detention by the President, so also does it authorize Padilla's detention").

52 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

53 *See id.* at 593–94.

54 *See id.*

55 Uniform Code of Military Justice, 10 U.S.C. §§ 801–947 (2006).

56 *See Hamdan*, 548 U.S. at 592–94, 613.

of Congress as expressed in the UCMJ,[57] placing his actions in category three of *Youngstown*.[58] Justice Thomas, in dissent, argued that the AUMF authorized the President to conduct military tribunals as he saw fit, and that the UCMJ was largely irrelevant to the constitutional analysis.[59] Again, the meaning of the AUMF was central to the outcome of the case, and the disagreement among the Justices of the Supreme Court and judges of the lower courts shows the precariousness in finding meaning in a later Congress's grant of authority by looking to statutes enacted before all but a handful of its members were sworn in.[60]

D. The Cases and Their Impact on the Meaning of Silence

The above cases make it clear that jurists can come to different conclusions when interpreting the will of Congress in light of an ambiguous statute and preexisting laws. Perhaps even less telling of the will of Congress, however, is looking to silence to determine what Congress has or has not authorized the President to do.

Dean Koh argues that, after the Court invalidated the legislative veto,[61] the reasoning in *Dames & Moore* takes on a whole new dimension and "dramatically alters the application of *Youngstown*'s constitutional analysis in foreign affairs cases."[62] This is so because after *Dames & Moore*, "a court may construe congressional inaction or legislation in a related area as implicit approval for a challenged executive action."[63] But after the Court struck down an early iteration of

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57 *See id.* at 622–23 (holding that the military commissions set up by the President did not meet the requirements set forth in the UCMJ).

58 *See id.* at 638–41 (Kennedy, J., concurring in part) (noting that the "President [had] acted in a field with a history of congressional participation and regulation" but had not met the requirements of that regulation).

59 *See id.* at 681–82 (Thomas, J., dissenting) ("Nothing in the language of Article 21, however, suggests that it outlines the entire reach of congressional authorization of military commissions in all conflicts—quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization.").

60 At the time Congress passed the AUMF, in 1971, only Senators Robert Byrd, Edward Kennedy, and Daniel Inouye had been in the Senate, *see* SENATE HISTORICAL OFFICE, SENATORS OF THE UNITED STATES: 1789–2009 (2009), at 69–70, http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf, when the NDA was passed, *see* Non-Detention Act, Pub. L. No. 92-128, 85 Stat. 347 (1971). But even Senator Byrd, who is the longest-serving member of Congress, was not sworn in until 1959, *see* SENATE HISTORICAL OFFICE, *supra*, at 69, a full three years after the revision of Article 21 of the UCMJ governing military commissions, *see* Act of Aug. 10, 1956, ch. 1041, Pub. L. No. 84-1028, 70A Stat. 1, 44.

61 *See infra* Part IV.A (discussing the Supreme Court's decision dealing with legislative vetoes).

62 Koh, *supra* note 36, at 1310–11 (footnote omitted).

63 *Id.* at 1311.

the legislative veto, "Congress may definitively *disapprove* an executive act only by passing a joint resolution by a supermajority in both houses that is sufficient to override a subsequent presidential veto."[64] Putting it differently:

> These rulings create a one-way "ratchet effect" that effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence. For by treating all manner of ambiguous congressional action as "approval" for a challenged presidential act, a court can manipulate almost any act out of the lower two Jackson categories, where it would be subject to challenge, into Jackson Category One, where the President's legal authority would be unassailable.[65]

Unless Congress explicitly forbids a President from acting, either with his signature or a veto override, the reasoning offered by the Court tends to "ratchet" all presidential actions into constitutional conformity, leaving little room for Congress to express or imply its will.

At the same time, however, the Court has recognized that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act."[66] Nevertheless, Dean Koh's ratchet theory is consistent with the *Dames & Moore* decision, where Justice Rehnquist stated for the Court that

> the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility,' . . . [a]t least . . . where there is no contrary indication of *legislative intent*.[67]

This, taken by itself, suggests that congressional silence, in cases where there is existing legislation seemingly related to the topic at issue, is interpreted to mean that the President does have authority granted to him by Congress. Justice Rehnquist did carve out an exception where legislative intent indicates otherwise, but, like Justice

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64 *Id.*

65 *Id.*

66 Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

67 *Id.* (emphasis added) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

Jackson in *Youngstown*, did not articulate how that legislative intent is to be determined.[68]

Such conflicting views on the meaning of congressional silence make it difficult for any judge to accurately rule on the constitutionality of the President's actions. But congressional silence is inherently suspect for other reasons as well. For example, common practice in the Senate makes it possible for a single Senator to place an anonymous "hold" on a bill.[69] The hold is a parliamentary tactic used to delay consideration of a bill until after the hold is removed.[70] Accordingly, if ninety-nine Senators approve of the passage of a bill restricting presidential authority—quite clearly a showing of congressional will sufficient to overcome a veto—the single Senator who opposes the bill can create congressional silence, read by the Court in *Dames & Moore* to be tacit congressional approval of the President's action.[71]

As such, attempts to determine Congress's will by looking to legislative history, old statutes, or silence, all of which are currently used in cases involving the constitutionality of a President's acts, are confusing at best. Whenever possible, courts should instead interpret Congressional will by looking to bills that passed through both houses but were vetoed by the President.

II. Why It Matters: 9/11 as a Case Study

Seven days after the terrorist attacks of September 11, 2001, Congress considered and passed the AUMF.[72] In relevant part, the authorization provided:

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68 *See id.*

69 Although the hold is not specifically authorized by the Senate rules, it is rooted in the reliance on unanimous-consent agreements and the filibuster. *See Requiring Public Disclosure on Notices of Objections ("Holds") to Proceedings to Motions or Measures in the Senate: Hearing Before the S. Comm. on Rules and Administration*, 108th Cong. (2003) [hereinafter *Hearings*] (statement of C. Lawrence Evans, Professor of Government, College of William and Mary) (explaining that "[h]olds, then, are inseparable from the filibuster and the process of unanimous consent").

70 *See id.*

71 *See Dames & Moore*, 453 U.S. at 678–79; *see also Hearings*, *supra* note 69 (explaining that in 1981–82, only one-third of the legislation subject to a hold ultimately passed the Senate). Under Standing Rule VII of the Senate, during "morning business[,] . . . no motion to proceed to the consideration of any bill . . . shall be entertained . . . unless by unanimous consent." STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, R. VII, cls. 2–3, at 5 (2007). As a result, when Rule XXII applies (precedence of motions), *id.* R. XXII, at 15–17, a single objection to proceed will prevent all debate on any issue.

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

> [T]he President is authorized 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.[73]

Just over a year later, Congress considered and passed the Authorization for Use of Military Force Against Iraq.[74] Although this second law gave the President the power to use force in Iraq, it, like the authorization passed on September 18, 2001, was justified in part as an effort to retaliate against those responsible for 9/11.[75] (Because both authorizations give the President power to pursue the War on Terror, the September 18, 2001, authorization and the October 14, 2002, authorization will be collectively referred to as the "Military Authorizations.")

During the War on Terror, President George W. Bush used the authority granted to him in the Military Authorizations, coupled with his claim to inherent constitutional authority, to conduct warrantless wiretapping, military tribunals, detainee detentions, and other controversial practices in the name of national security. For example, the Department of Justice's Office of Legal Counsel justified the implementation of a warrantless electronic surveillance program with authority conveyed by the AUMF.[76] Also per the AUMF, the President and the Justice Department justified trying a noncitizen enemy combatant by a military tribunal that did not meet the procedural specifications set up in the UCMJ.[77] Finally, the President argued that the AUMF gave him authority to indefinitely detain U.S. citizens labeled

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73 *Id.* at 224.

74 Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002). Section 3(b)(2) of the Authorization for Use of Military Force Against Iraq provides: "[A]cting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001." *Id.* at 1501.

75 *See id.*

76 *See* DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 2 (Jan. 19, 2006), *available at* http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf ("Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad.").

77 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593 (2006) (stating that "[t]he Government

"enemy combatants."[78] The President was apparently trying to utilize all potential authority in the AUMF to accomplish what he thought necessary in the fight against terrorism. And rationally so—perhaps no President charged with the defense of the nation as Commander-in-Chief wants to stand idly by while political wrangling on Capitol Hill prevents otherwise expedient decisions from being made.

While the President read the AUMF expansively, Congress attempted to rein in the broad interpretations offered by the executive branch.[79] Not surprisingly, Congress had difficulty clarifying the proper meaning and scope of the Military Authorizations because of the threat of a veto. In fact, Congress ultimately withdrew several pieces of clarifying legislation because of the outstanding veto threat looming over the Capitol. For example, Congress failed to enact an amendment to the Foreign Intelligence Surveillance Act of 1978 ("FISA")[80] even though it passed the House of Representatives by a vote of 213 to 197, a clear majority.[81] Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, issued a statement about the amendment and the President's power under the AUMF:

> This provision makes clear that the Government cannot claim authority to operate outside the law—outside of FISA—from legislative measures that were never intended to provide such exceptional authority. This administration argues that the [AUMF], passed after September 11, justified conducting warrantless surveillance of Americans for more than five years. That is not what was intended. With enact-

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would have us . . . find in . . . the AUMF . . . specific, overriding authorization for the very commission that has been convened to try Hamdan").

78 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) ("[W]e agree with the Government's alternative position, that Congress has in fact authorized [the] detention [of U.S. citizens labeled enemy combatants], through the AUMF.").

79 *See infra* note 82 and accompanying text (quoting Senator Leahy's comments on the scope of the AUMF as it pertains to warrantless wiretapping).

80 H.R. 3773, 110th Cong. (2007). The bill would have made FISA the exclusive means of electronic surveillance and would not have granted retroactive immunity to telecommunications companies for their participation in the National Security Agency wiretapping program authorized by the President under the AUMF. *See id* § 10(a).

81 *See* Tim Starks, *Revised FISA Bill Sneaks Through House*, CONG. Q. WKLY. REP., Mar. 17, 2008, at 725. Though the bill ultimately passed in a different form, *see* FISA Amendments Act, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified in scattered sections of 50 U.S.C.), it omitted several provisions that passed the House by a majority vote as a result of the veto threat; *Cf.* Andrew Ungberg, *House Passes Version of Controversial Wiretapping Legislation Without Telecom Immunity*, JOLT DIG., Mar. 19, 2008, http://jolt.law.harvard.edu/digest/legislation/house-fisa-bill-hr-3773 (reporting that the bill passed with 213 ayes in the House).

> ment of this strengthened exclusivity provision, we should not see similar arguments of circumvention in the future.[82]

According to Senator Leahy, the AUMF was not supposed to be used so expansively, and he intended to make that clear to the President.

In addition, Senators Specter and Leahy introduced the Habeas Corpus Restoration Act of 2007[83] to restore habeas review for enemy combatants after a long battle between Congress and the President.[84] The bill was attached as an amendment to the National Defense Authorization Act for Fiscal Year 2008.[85] Although a majority of the Senate favored the amendment, it fell 56–43 on a procedural cloture motion to vote on the amendment with the underlying legislation,[86] which required a vote of 60 Senators rather than a simple majority of 51.[87] The likely reason: the President threatened to veto the entire Defense Department Authorization Bill if the Habeas Corpus Restoration Act was attached.[88] Despite majority support, congressional attempts to clarify that the earlier grant of power to the President did not include the ability to wiretap without a warrant or detain without a habeas hearing failed because of a looming presidential veto.

Congress's institutional inability to clarify its will has even led to attempts by members of Congress to creatively alter legislative history for the purpose of influencing a court's analysis of the constitutionality of a President's act. Written statements of a Senator or Congressman are often admitted into the congressional record without ever having been subject to debate on the chamber floor.[89] Senators Lind-

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82 Press Release, Senator Patrick Leahy, House Consideration of FISA Legislation (Mar. 13, 2008), *available at* http://leahy.senate.gov/press/press_releases/release/?id=eb935ca5-3429-4cf1-b75d-2d7f71351287.

83 Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong. (2007).

84 *See* 153 CONG. REC. S179–81 (Jan. 4, 2007) (statement of Sen. Specter) (explaining that he offered an amendment, which received a majority of the votes in the Senate yet failed for other reasons, challenging the President to include habeas rights in the Military Commissions Act of 2006).

85 National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3; *see* U.S. Senate, Roll Call Vote on S. 185, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00340 (last visited Mar. 15, 2010).

86 *See* U.S. Senate, *supra* note 85.

87 *See* U.S. Senate Glossary: Cloture, http://www.senate.gov/reference/glossary_term/cloture.htm (last visited Mar. 15, 2010).

88 *See* David Welna, *Senate Debates Restoring Habeas Corpus*, NPR, Sept. 19, 2007, http://www.npr.org/templates/story/story.php?storyId=14521071.

89 *See, e.g.*, H.R. REP. NO. 104-235, pt. 19, at 35–44 (1995) (documenting a committee markup session in which four Congressmen inserted statements into the record without reading them aloud for the other members present at the hearing to consider). To better understand the

sey Graham, Jon Kyl, and Sam Brownback used this inventively, yet deceptively, to try to supplement the legislative history of an amendment to the Detainee Treatment Act of 2005 ("DTA")[90] in preparation for the Supreme Court decision in *Hamdan*.[91] They inserted a floor debate involving a colloquy among themselves that never actually occurred, and then submitted an amicus brief to try to convince the Supreme Court that, under the language of the statute and the intent of Congress, legislative history warranted dismissal of the case.[92] Specifically, the Senators wrote: "[L]egislative history confirms that Congress intended all pending claims to be governed by the DTA."[93] One of the parties to the case, however, spotted the Senators' attempt to modify the legislative history and alerted the Court.[94]

Though nothing suggests that this is a normal practice of Senators, it does highlight a potential problem with relying on legislative history to determine congressional will: the congressional record is easily manipulated.[95] Additionally, because there is no requirement that a submission to the record be made by more than a single member,[96] examining legislative history may, in actuality, be no more than examining the opinion of 1 person among more than 500.[97] Certainly, this is not an accurate expression of congressional will as envisioned

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phenomenon of off-the-floor debate, consider the efforts of Representative Ken Hechler, who made it clear that not all debate occurs on the floor by inserting a statement into the *Congressional Record* that read:

> I would like to indicate that I am not really speaking these words. . . . I do not want to kid anyone into thinking that I am now on my feet delivering a stirring oration. As a matter of fact, I am back in my office typing this out on my own hot little typewriter, far from the madding crowd.

OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 47 (1989) (quoting 117 CONG. REC. 36,506 (1971) (statement of Rep. Hechler)).

90 Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, §§ 1001–1006, 119 Stat. 2680, 2739–44.

91 *See* John Dean, *Senators Kyl and Graham's* Hamdan v. Rumsfeld *Scam: The Deceptive Amicus Brief They Filed in the Guantanamo Case*, FINDLAW, July 5, 2006, http://writ.news.findlaw.com/dean/20060705.html.

92 *See id.*

93 Brief for Senators Graham & Kyl as Amicus Curiae Supporting Respondents at 7, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184).

94 *See* Dean, *supra* note 91.

95 This applies equally to committee records, where members are able to submit written statements into the record despite never uttering a single word other than those necessarily involved in requesting permission from the chairman to enter a statement into the record. *See supra* note 89.

96 *See supra* note 89.

97 *See, e.g.*, United States v. Hayes, 129 S. Ct. 1079, 1088 (2009) (relying on the remarks of Senator Frank Lautenberg despite noting the "remarks of a single Senator are not controlling"

by Justice Jackson in *Youngstown*, yet the Court relies on such legislative history to determine the constitutionality of the actions of the President.[98]

As discussed above, in cases evaluating the constitutionality of the tactics employed in the War on Terror, the courts also turned to old statutes in analyzing the constitutionality of the President's actions or programs. For example, in *Hamdi* and *Padilla*, the Supreme Court and the Second Circuit, respectively, had to decide whether U.S. citizen enemy combatants could be detained indefinitely as an incident of the war powers the AUMF granted to the President, or whether, because of the lack of a clear statement overriding the NDA, the NDA controlled and precluded the detentions.[99] But is it really fair to assume that Congress was contemplating the NDA when it passed the AUMF in the aftermath of 9/11? The Supreme Court in *Hamdi* seemed to think so, and also thought that the vague language in the AUMF was a clear statement supplanting that statute.[100] This, however, seems unreliable at best, as it is difficult to show that Congress considered the thirty-five-year-old NDA and affirmatively omitted any change in policy because of its existence. Had Congress been able to clarify the meaning of the AUMF, as members attempted to do with other legislation, this question, along with the question of whether to rely on potentially deceptive legislative history, would have been made moot by a clear congressional statement to that effect.

As a result of Congress's unwillingness to act when the President threatens a veto, the inability of the legislative record to accurately convey the will of Congress, and the unreliability of determining congressional will based on old laws, courts have had little reliable evi-

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(internal quotation marks omitted)); Bartnicki v. Vopper, 532 U.S. 514, 530 n.16 (2001) (relying on the statement of a single Senator).

98 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 546 (2004) (Souter, J., concurring in part and dissenting in part) (relying on a statement by the sponsor of the NDA, a statute at issue in the case, to conclude that "legislative history indicates that Congress was aware that § 4001(a) would limit the Executive's power to detain citizens in wartime to protect national security"); *see also* Dames & Moore v. Regan, 453 U.S. 654, 676 (1981) (relying on individual statements of Senators William P. Fessenden and John Conness). This is not to say that reliance on legislative history is inappropriate in an exercise of statutory interpretation. It is only mentioned to argue that, if a bill has passed both Houses, it may reflect the will of Congress more accurately than a statement in the record or a committee report, even though the bill is not enacted as law because of a presidential veto.

99 *See Hamdi*, 542 U.S. at 517; Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003). The NDA provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2006).

100 *See Hamdi*, 542 U.S. at 515.

dence to turn to in determining the true meaning of the Military Authorizations within the framework of *Youngstown*.

III. The Case for Clear Congressional Will

In light of the shortcomings of the current methods of evaluating a President's authority, courts should instead determine congressional intent by looking to passed, but vetoed, bills that speak directly to the action being contested. More specifically, if Congress passes a bill clarifying a previous grant of authority, it should be considered as evincing congressional will more clearly than legislative history, old bills, or congressional silence. In the War on Terror context, this would mean that any bill that Congress passed clarifying the meaning of the AUMF would be more meaningful than the NDA, legislative history, or silence when determining whether the President could, among other things, wiretap, hold detainees indefinitely, or try them by military tribunals.

It is important to note that this proposal would only apply to authorizations for the use of force. Congress routinely delegates vague authority to the executive branch in the form of administrative decrees,[101] and the courts are instructed to defer to the executive branch's determination of the meaning of those statutes.[102] The reason for that deference, however, is not present in cases such as those involving the Military Authorizations.[103] Specifically, Congress grants authority to executive agencies, and courts defer to the meaning adopted by those agencies, because agencies have "great expertise" as a result of routine administration of the law within their particular and highly specialized jurisdictions.[104] That same rationale does not apply

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101 *See, e.g.*, 42 U.S.C. § 7402(a) (2006) ("The Administrator shall encourage cooperative activities by the States and local governments for the prevention and control of air pollution.").

102 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

103 Other academics have offered similar but less restrictive proposals that would apply a variation on this Note's solution to other contexts. For example, Professors Abner Greene, Jacob Gersen, and Eric Posner would allow Congress to use a concurrent resolution, or even a single-house resolution, to control decisions throughout the executive branch, agencies included. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 578, 607–08 (2008); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126 (1994). These proposals are distinguishable from the proposal made by this Note in two ways: first, by being applicable only to authorizations for the use of force, this Note's proposal does not undermine the efficiency and expertise rationale that justifies the general deference given to administrative agencies. Second, while these competing proposals would carry the force of law, for reasons addressed in Part IV.A, *infra*, congressional actions under this Note's proposal would not.

104 *See Chevron*, 467 U.S. at 865.

in instances involving authorizations for the use of force; in such situations, the President is not like an agency, blessed with greater understanding and expertise than Congress in this particular area of law. The ongoing debate about the President's authority during wartime[105] makes this Note's recommendation uniquely applicable to grants of authority to use military force.[106]

This Note's proposal works as follows:

Congress, faced with a perceived abuse of power granted to the President, considers and passes a bill that is sent to the President but vetoed. The bill would limit the authority of the President in certain circumstances not clearly addressed in the original act.

The bill could *only* serve to express congressional will with respect to a *limitation* of the President's authority, rather than an expansion of such authority. It could not be used "as an excuse to make other legislative moves."[107]

The bill could *only* clarify a grant of power that is vague. Though hard to define, courts are well equipped to handle this task after *Chevron*.[108] In this context, a statute may generally be considered vague where it does not specifically address what the President is trying to accomplish, as interpreted by either the plain meaning of the statute or by legislative, historical, precedential, or constitutional meanings given to terms of art and phrases such as "due process." If, for example, the original grant of power contained a provision explicitly permitting the President to wiretap without a warrant, the clear meaning of the original bill would supersede any vetoed measures passed by Congress attempting to limit warrantless wiretaps.

The bill could *only* be used where there is congressional silence or debate as to whether another law supersedes the present grant of

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105 *See, e.g.*, Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1551 (2009) (identifying that "scholarly and judicial debate about the constitutional power of the American Executive is broad and deep," particularly with respect to national security powers).

106 By limiting this proposal to congressional authorizations to use force, the potential issue of Congress changing the meaning of an original grant too far into the future is also mitigated, assuming that the authorization for use of military force is not intended to last beyond the time necessary to accomplish its goals and that the conflict is not everlasting.

107 Greene, *supra* note 103, at 194.

108 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973–74 (2004) (considering, in a *Chevron* analysis, whether the Federal Communications Commission had properly interpreted the Communications Act of 1934); *cf. Chevron*, 467 U.S. at 843 n.9 (instructing courts to defer to an executive agency's interpretation when Congress has not clearly addressed the issue, as determined by using "traditional tools of statutory construction").

authority. In the detainee cases discussed above, for instance, the issue was whether the NDA and UCMJ controlled.[109]

The bills would not in any way limit the authority of a President acting in his or her inherent constitutional capacity as Commander-in-Chief or in any other role defined in the Constitution. It is accepted, for instance, that Article II of the Constitution gives the President the authority to control battlefield movements of the military.[110] Under this proposal, a bill passed by Congress suggesting that the President does not have the authority to enter into a certain area of a battlefield, or a bill completely stripping the President of his or her accepted Commander-in-Chief functions, would not be relevant to a court's analysis of presidential authority.

Only if these elements were satisfied would a vetoed bill be capable of impacting a court's analysis.

IV. Potential Constitutional Challenges, and the Inadequacy of Alternatives

A. Potential Problems—Chadha*, Bicameralism, and Presentment*

Though this proposal promotes representative democracy and acts as a check in the scheme of separation of powers, there are several problems that any court would need to address when using it to determine the will of Congress. Namely, giving effect to bills rejected by the president may, at first, look similar to the legislative veto struck down by the Supreme Court in *INS v. Chadha*.[111]

The Court in *Chadha* found a provision of the Immigration and Nationality Act unconstitutional because it violated the Presentment and Bicameralism Clauses of the Constitution.[112] Specifically, that statutory provision authorized the Immigration and Naturalization Service ("INS") to suspend deportation of aliens continuously residing in the United States for at least seven years where the Attorney General, in his discretion, found that "deportation would . . . result in extreme hardship."[113] After such a finding by the Attorney General, a report would be transmitted to Congress and, pursuant to the statute,

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109 *See supra* Part I.C (discussing the Supreme Court's War on Terror decisions).

110 *See* William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916) (arguing that Article II of the Constitution makes it "perfectly clear that Congress [may] not order battles to be fought on a certain plan, and [may] not direct parts of the army to be moved from one part of the country to another").

111 INS v. Chadha, 462 U.S. 919 (1983).

112 *See id.* at 958–59.

113 *Id.* at 923–24.

either house had the power to veto the Attorney General's determination.[114]

The Supreme Court invalidated the veto provision, reasoning that any action that is legislative in nature must go through the "finely wrought . . . procedure[s]" set by the Framers, including passage by both houses (bicameralism)[115] and presentment to the President (presentment).[116] Furthermore, the Court defined an action as legislative if it has the "purpose and effect of altering the legal rights, duties, and relations" of a person outside of the legislative branch, or would otherwise require the passage of a law.[117] The House's ability to act unilaterally to keep Chadha in the United States contrary to the Attorney General's recommendation doomed the House's action as legislative in nature and, therefore, violated the Constitution's "finely wrought" procedures.[118]

But *Chadha*, although seemingly similar to the solution advocated by this Note, is inapplicable to the solution here for two reasons. First, unlike the situation in *Chadha*, this Note's proposal does not include delegation of legislative authority. A "legislative veto" means "a condition placed on delegated power, such as the one-house" veto in *Chadha*.[119] Thus, in the context of grants of power to the executive branch, a legislative veto could not exist unless Congress had delegated *legislative or judicial power* to the executive branch. In *Chadha*, for instance, the Immigration and Nationality Act granted legislative power to the Attorney General to make decisions about a person's immigration status that previously only Congress could make.[120] Congress had delegated its legislative authority in this area to the executive branch, and Congress could not take it back without following the "finely wrought" procedure in the Constitution.[121] In the context of the Military Authorizations, however, Congress never granted any legislative power to the executive branch. Congress merely gave the President the authority to use force, not create agency-like rules or adjudicate the status of noncitizens.

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114 *Id.* at 924–25.

115 U.S. CONST. art. I, § 7, cls. 2–3.

116 *Id*; *see Chadha*, 462 U.S. at 951.

117 *Chadha*, 462 U.S. at 952.

118 *See id.* at 951–54.

119 *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 275 (5th ed. 2007).

120 *See Chadha*, 462 U.S. at 954–55.

121 *See id.* at 951–54.

Second, an act of Congress expressing its will through a vetoed bill that has passed both houses has no legally binding effect like that of a law. Instead of altering the "legal rights, duties, and relations" of the President,[122] the vetoed bill would act merely as a useful tool for the courts in deciding whether to view a President's actions as contravening the will of Congress (*Youngstown* category three), or in concert with the expressed or implied will of Congress (*Youngstown* category one).[123] In fact, the bill would not mean that the President would be legally required to stop whatever action is being challenged or clarified by Congress. Instead, it would put the President on notice that his or her actions are not included in the original grant of authority, and that any further acts would have to find their authority in another source, such as the Constitution or an unambiguous statute.

To put it differently, although this proposal is more reliable than legislative history and should be considered before legislative history when possible, it would not have the effect of legally binding the President one way or another. When viewed in this light, it should also be noted that "courts routinely consult cases and treatises in the course of construing statutes, even though these extrinsic materials are not passed through bicameralism and presentment."[124] This proposal should not be seen as a legislative veto, but a reference tool to be used in the same manner that a court "might consider a litigant's brief, or a book, newspaper, or law review article."[125] A court should assess and give this proposal proper weight depending on the circumstances—like it would with any secondary source—but weight nonetheless. As such, the Court's ruling in *Chadha* does not apply to this proposal.

B. Inadequate Alternatives for Checking the President: Contrary Lawmaking, Oversight Hearings, Advice and Consent, and the Budget

There are many other ways that Congress checks the power of the President. Namely, Congress can pass laws to the contrary, conduct oversight hearings, exercise its advice-and-consent power, and make strategic use of the budgetary process, among others. Those powers, however, do not adequately accomplish what this proposal achieves: legislative clarity on an existing grant of power.

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122 *See id.* at 952.

123 *See supra* note 16 and accompanying text.

124 *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1460 (2000).

125 *See id.* at 1477.

If Congress could easily pass a law invalidating legislation that grants authority to the President, there would be no need for this Note's proposal. However, Congress is often unable to pass laws that limit the power of the President because of the supermajority requirements to override a presidential veto. Additionally, Congress frequently uses oversight hearings to send a message to the executive branch, or as a political shot across the bow. In controversies like the hiring and firing of U.S. Attorneys,[126] the hearings may be a valid way of ferreting out criminal activity or pressuring the President into making changes within agencies. Realistically, however, this check on the President's power may not have any real impact on the meaning of a grant of authority.

For example, in February 2006, the Senate Judiciary Committee held a hearing on the NSA wiretapping program and called then–Attorney General Alberto Gonzales to testify.[127] Despite the intense questioning,[128] there is no evidence that the hearing had any effect on the constitutionality of the President's initial decision to begin the NSA program or, for that matter, on whether the President's program was authorized by Congress in the AUMF. This example suggests that, generally, there is simply no identifiable nexus between committee oversight and the constitutionality of a President's actions or programs.

The Senate also uses its advice-and-consent power to influence the President. Article II of the Constitution states that the President

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall . . . with the Advice and Consent of the Senate, . . . appoint Ambassadors, . . . Judges of the supreme Court, and all other Officers . . . .[129]

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126 On December 7, 2006, seven U.S. Attorneys were fired by the Attorney General, allegedly for failing to prosecute cases favorable to the Republican Party. *See* Paul Kane & Dan Eggen, *Second Lawmaker Contacted Prosecutor*, WASH. POST, Mar. 6, 2007, at A1. In January and March of 2007, the Senate and House Judiciary Committees held hearings on the firing controversy. *See* Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2. By September 2007, the Attorney General had resigned. *See* Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzalez Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1.

127 *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10–129 (2006) (statement of Alberto R. Gonzales, Att'y Gen. of the United States).

128 *See id.*

129 U.S. CONST. art. II, § 2, cl. 2.

In 1987, President Reagan nominated Robert Bork, then a judge on the D.C. Circuit, to be an Associate Justice of the United States Supreme Court.[130] The Senate opposed Judge Bork's views, however, and used the power granted to it to confirm nominations under Article II to block his accession to the high Court.[131] Although the Senate was able to fulfill the constitutional checks-and-balances function associated with nominations in that circumstance, there is no corresponding ability to use the advice-and-consent power to curtail presidential excesses when operating within an affirmative grant of power such as the AUMF. Perhaps Congress could threaten to hold up any appointments in committee or vote them down on the floor until the President changes his views about the power granted to him, but even this would have no effect on a court's post hoc determination of the constitutionality of the President's actions. This Note's proposal not only deters legally questionable executive branch conduct, as might the advice-and-consent power, but it also facilitates the creation of judicial precedent that would limit Presidents who find themselves in similar situations in the future, thus extending well beyond Congress's powers of oversight or advice and consent.

Finally, manipulation of the federal budget to limit the exercise of presidential power may be the most useful method to rein in the President, but it is full of political risks. In 1973, Congress ended the Vietnam War with the passage of a joint resolution prohibiting any further appropriation or expenditure of funds for any combat in Vietnam and neighboring countries.[132] That year, the daring exercise in budget control worked. In 2006, however, it did not. When Congress tried to insert a withdrawal timetable into legislation that would have funded the war in Iraq, it was vetoed by the President.[133] In addition, many of the bill's supporters were impliedly chastised as unpatriotic and unsupportive of the troops at war.[134]

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130 *See* David Johnston, *Reagan Hints at Bork Nomination Strategy: Stress Credentials, Not Views*, N.Y. TIMES, July 5, 1987, at A14.

131 *See* David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1038 (2008) (book review) (explaining that the Democratically controlled Senate pushed back against President Reagan's nomination of Judge Bork, causing the President to appoint a more moderate candidate).

132 *See* Mark W. Mosier, Comment, *The Power to Declare Peace Unilaterally*, 70 U. CHI. L. REV. 1609, 1636 (2003) (discussing the passage and aftermath of H.R.J. Res. 636, 93d Cong. (1973)).

133 *See Bush Vetoes War-Funding Bill with Withdrawal Timetable*, CNN, May 2, 2007, http://www.cnn.com/2007/POLITICS/05/01/congress.iraq/index.html.

134 *See* Kate Zernike, *Senate Rejects Calls to Begin Iraq Pullback*, N.Y. TIMES, June 23,

Surely, this raises the question of why Congress cannot simply write the laws more clearly or inclusively. To this, the Supreme Court has an answer. Justice Rehnquist argued that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act."[135] Justice White, in dissent in *Chadha*, similarly argued that "[t]here is an inherent failure in any attempt to list those factors which should be considered . . . . It is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances."[136] Justice White maintained that political volatility and the "controversial nature of many issues would prevent Congress from reaching agreement on many major problems if specificity were required in their enactments."[137] Though this statement was made in the context of administrative law, Justice White's argument suggests that, even in the Military Authorizations context, it may not be possible to write sweeping legislation because of factional concerns holding up what is necessary for national security. Although Justices Rehnquist's and White's arguments may not satisfy those who would prefer that Congress write legislation more precisely, it does help to show why the Supreme Court itself may opt not to criticize Congress for failing to write the laws specifically enough to address all possible future transgressions by the President.

V. Safeguards, and Restoring Separation of Powers

The process necessarily involved in passing a bill in both houses provides safeguards against potential abuses of this Note's proposal. Before any bill is passed, it is subjected to a number of parliamentary and political constraints.

A. Parliamentary Constraints

There are two main parliamentary constraints that would prevent this Note's proposal from being abused: the hold and the filibuster.

As discussed above, the hold is a parliamentary maneuver that allows a single Senator to place an anonymous hold on almost any business before the Senate, preventing consideration, debate, and roll-

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2006, at A1 (quoting Senator Bill Frist as suggesting that the effort to withdraw troops from Iraq was "dangerous, reckless and shameless").

135 Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

136 INS v. Chadha, 462 U.S. 919, 973 n.10 (1983) (White, J., dissenting) (alteration in original) (internal quotation marks omitted).

137 *Id.*

call votes on the measure.[138] Additionally, the filibuster serves as another layer of protection, preventing the expression of congressional will from being used for personal gains or deceptive purposes in anticipation of litigation. In the Senate, when facing a filibuster, sixty votes are needed to invoke cloture in order to cut off debate on a measure so that it can be considered by the entire body for passage.[139] In recent practice, formal filibusters never occur; instead, the threat of a filibuster or unanimous-consent agreement can provide that without sixty votes, there will be no vote on the bill.[140] Therefore, the mere threat of a filibuster not only acts in many ways as a formal filibuster, but also increases the chances that sixty, rather than fifty, votes will be required to pass any piece of legislation. The ability to overcome these procedural tactics, among others, ensures that the legislation actually is a reflection of the will of Congress, while at the same time preventing Congress from easily changing its will at the slightest shift in political tides.

B. Political Constraints

All elected politicians are faced with the reality that they must be reelected if they are to continue their political career. Acting to restrain the President in a manner that is not politically popular may hurt their reelection chances and cause members of Congress to think twice before casting a vote against the President. For example, the Democratic politicians up for election in the 2002 midterms knew that the President and the war were popular. As a result, many decided to blur the distinctions between themselves and President Bush.[141] A stand against President Bush could have spelled defeat for a number of politicians in moderate districts or states.[142] Those politicians

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138 *See supra* note 69 and accompanying text; *see also* 152 CONG. REC. S2438-39 (Mar. 28, 2006) (statement of Sen. Wyden) (explaining that an Intelligence Reauthorization Bill has been held up for "months and months" because of a secret hold); RICHARD S. BETH & STANLEY BACH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE 22 (2003), *available at* http://www.senate.gov/reference/resources/pdf/RL30360.pdf.

139 *See* STANDING RULES OF THE SENATE, S. Doc. No. 110-9, R. XXII, at 15–17 (2007).

140 *See* BETH & BACH, *supra* note 138, at 22–23.

141 *See* Darryl West, *Interpreting the 2002 Election*, INSIDE POLITICS, http://www.insidepolitics.org/heard/report1102.html (last visited Mar. 17, 2010) ("Congressional Democrats made a conscious decision early in the 2002 election cycle to blur differences with President George W. Bush and the Republican Party. Rather than highlight differences and present a clear alternative to the GOP agenda, Democrats decided not to contest the Iraq war resolution.").

142 "Democrats hoped that by not being too confrontational on foreign policy and by keeping some contrasts alive on domestic policy issues, they could win close races in the House and Senate . . . ." *Id. See also* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 5 (2003) (explaining that the President's popularity going

would likely have been reluctant to vote for a measure restricting the ability of the President to fight a popular war. Under those circumstances, the expression of congressional will as envisioned by this Note would likely have been unsuccessful.

Additionally, compromise is a political reality for all members of Congress. In attempts to show how valuable they are to their districts, members attempt to include "earmarks," or "pork barrel spending," in yearly appropriations bills.[143] These projects send money home to the members' districts for all types of improvements, modifications, or even beautification. It is entirely within the realm of political reality that, should a President think he had been undermined by a bill limiting his authority, he may threaten to veto any spending bill for earmarks or pork spending. For example, in December 2007, the Democrats took control of Congress and attempted to limit President Bush's authority.[144] In response, the President issued a veto threat on an appropriations bill that included significant pork spending.[145] If the members were to get their spending projects, they would have to compromise with the President. This political reality would likely limit the willingness of the members to rein in the President, making it more difficult for Congress to pass the type of legislation envisioned by this Note.

C. Reliability

The type of showing of congressional will contemplated by this Note's proposal is more reliable than other sources currently relied upon by the Court. For example, it removes the incentives for a single Senator or group of Senators to silently insert a statement into the congressional record during or after a debate and cite it as evidence in submissions to a court. Furthermore, it can be seen as blending the views of those who favor legislative history and intent in discerning the meaning of a statute, and those who do not. Justice Scalia, for

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into the midterm elections benefited the Republicans, and not the Democrats, in a number of ways).

143 *See* Heritage Foundation, Sample Pork Projects in FY 2008 Appropriations Bills, http://www.heritage.org/Research/budget/upload/wm1660_table1.pdf (last visited Feb. 23, 2010) (revealing that Senator Kay Bailey Hutchison requested over $3 million for the LBJ Presidential Library in her district, and Representative Charles Rangel requested over $2 million for a public-service center in his name in New York City).

144 *See White House Threatens Veto over Spending Bill Even After Democrats' Iraq War Concessions*, FoxNews.com, Dec. 8, 2007, http://www.foxnews.com/politics/2007/12/08/white-house-threatens-veto-spending-democrats-iraq-war-concessions.

145 *See id.*

instance, holds the view that legislative history is largely irrelevant and that the only reliable evidence of meaning is the deal enacted as law itself.[146] Justice Breyer, on the other hand, takes the opposite view, often looking to legislative history and purpose to determine the meaning of a statute.[147] By using passed bills, some of Justice Scalia's concerns with only using the deals struck and passed by Congress would be accommodated, and Justice Breyer's interest in seeking the will and purpose of the legislature through legislative history would be enhanced.[148]

In addition, this Note's proposal more accurately reflects the will of the Congress that passed the underlying grant of authority at issue than statutes that are in existence as a result of the will of an earlier Congress. In a discussion on statutory construction, Judge Patricia M. Wald argues:

> [T]he old canon—Congress is assumed to know the state of the law when it legislates—is certainly open to dispute on a case-by-case basis, and properly so. As statutes proliferate and agency interpretations increase exponentially, the assumption becomes even more tenuous. . . . The presumption that courts rely on so heavily and so frequently—that an omniscient Congress legislates with knowledge of all laws it has ever passed and of all administrative and judicial interpretations thereof—may be a necessary fiction; and although the alternative is probably chaos, the presumption is nonetheless a fiction.[149]

Logically, this argument makes sense. The United States Code is expanding at a rapid pace, and it would require a considerable leap of faith to believe that all 535 members of the House and Senate know every law it contains.[150]

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146 *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005 (1992) (stating that "Justice Scalia refuses to consult legislative history because of his conception of the judicial role").

147 Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1726 (2006) ("Should courts rely only on a statute's literal text, or should they place an emphasis instead on statutory purpose and congressional intent? Sharply disagreeing with the more textually oriented Scalia, and again emphasizing pragmatic considerations, Breyer favors purpose and intent." (footnote omitted)).

148 Indeed, it is the ability of this Note's proposal to address some of the concerns of both Justices Scalia and Breyer that demonstrates why it is more effective than the use of legislative history alone.

149 Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 213 (1983).

150 *Cf.* Paul Singer, *Members Offered Many Bills but Passed Few*, ROLL CALL, Dec. 1, 2008, http://www.rollcall.com/issues/54_61/news/30466-1.html (reporting that, over a four-year period,

Applying it here, this potential "fiction" concerns the issue of relying on the NDA and UCMJ in the detainee cases mentioned above, where the Court was split on whether the AUMF, the NDA, or the UCMJ was the true will of Congress regarding the authorization of detention in the vague language of the AUMF.[151] This Note's proposal clarifies that problem, as well as the problem that the *Dames & Moore* Court faced: interpreting the implied meaning of centuries-old statutes.[152] Instead of creating an incentive for Congress to "hide behind existing statutory provisions instead of playing a serious role in the evolution of national security policy," or encouraging parties to "embark on a statutory treasure hunt designed to mine nuggets of past congressional behavior that can be transformed into ersatz authorizations or prohibitions,"[153] this Note's proposal gives Congress a more defined role in the separation of powers and helps courts overcome the difficult task of interpreting the meaning of congressional silence on an issue.[154]

D. Justifications Rooted in Law and Public Policy

The Framers of the U.S. Constitution were quite concerned about the balance of powers among the branches and the ability of Congress to check the power of the President. Though separation of powers has proven to be a novel and workable concept, the theory was never meant to be watertight. James Madison, in *Federalist No. 48*, argued that, "unless [the] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."[155] Justice Jackson, in his concurrence in *Youngstown*, seized upon this and expanded it when he wrote that, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its

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Congress passed more than 900 bills that were signed into law); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV 689, 718–19 (2008) (suggesting that "the sheer mass of preexisting statutes potentially applicable to the conflict with al Qaeda" makes interpreting implied congressional limitations all the more difficult).

151 *See supra* notes 38–60 and accompanying text.

152 *See* Dames & Moore v. Regan, 453 U.S. 654, 675–76 (1981) (looking to the Hostage Act of 1868 for guidance in interpreting the President's authority).

153 Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1113 (2006).

154 *See supra* Part I.D.

155 THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

branches separateness but interdependence, autonomy but reciprocity."[156]

Additionally, in the debates at the ratifying conventions, the Federalists countered the Anti-Federalist argument that the President could become a military despot by emphasizing that Congress was provided substantial powers to check the Executive. Federalist George Nicholas argued that the "President is to command. But the regulation of the army and navy is given to Congress. Our Representatives will be a powerful check here."[157] Madison claimed that Congress's funding and other enumerated powers would be a check on the President as well.[158] From this limited exchange and *Federalist No. 48*, we get a glimpse of the intent to have Congress act as a check on presidential authority, particularly in the war-making context.

However, Justice Jackson insightfully suggested that checks and balances no longer exist as the Framers originally envisioned. He argued:

> [The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.[159]

Madison's assumption that there would be "vigorous, self-sustaining political competition between the legislative and executive branches" where "Congress and the President would check and balance each other[,] officeholders would defend the distinct interests of their different institutions[, and] ambition would counteract ambition" no longer holds true.[160] Justice Jackson recognized that the rise of po-

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156 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (Jackson, J., concurring).

157 Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 421–22 (2008) (internal quotation marks omitted) (quoting 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1281 (John P. Kaminski & Gaspare J. Saladino eds., 1993)).

158 Madison declared: "The sword is in the hands of the British King; the purse in the hands of the Parliament. It is so in America as far as any analogy can exist." 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

159 *Youngstown*, 343 U.S at 654 (Jackson, J., concurring).

160 *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312 (2006).

litical parties had turned Congress against itself: simplistically, a member was either with the President or against him.[161]

The implications for circumstances like the War on Terror cannot be overstated. Congress is less likely to get upset about perceived instances of executive aggrandizement at the expense of the legislature, because it is party, rather than institutional, competition driving separation of powers.[162] In other words, Congress will not fight just to preserve its institutional role—arguably a circumstance more likely to produce the two-thirds majority necessary to pass a bill unfavorable to the President—when it is more concerned about party loyalties.[163]

When read together with Justice Jackson's *Youngstown* concurrence and Justice Rehnquist's *Dames & Moore* opinion, the repercussions of party, rather than institutional, loyalty are even more pronounced. In both *Youngstown* and *Dames & Moore*, the Court explained that "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent."[164] Though seemingly innocent on its face, this presumption ignores the political party system as recognized by Justice Jackson and adds to the dangers of equating silence with approval.[165] Like constitutional adverse possession, this presumption gives the President the ability to change the meaning of a statute or create new authority at will. But unlike adverse possession in property law, where a squatter must remain open and obvious,[166] the President need only rely on the party system to protect him while staying out of Congress's line of sight. And if Congress does find out about the "long-continued practice," it must still muster a two-thirds majority, a feat likely to grow more and more uncommon as political partisanship becomes increasingly entrenched. Accordingly, under the right circumstances, Congress is powerless to act unless it can convince members from across the aisle to rebuke their party's leader. A

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161 *See id.* at 2315.

162 *See id.*

163 *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 145 (1999) ("Presidents have both the will and the capacity to promote the power of their own institution, but individual legislators have neither and cannot be expected to promote the power of Congress as a whole in any coherent, forceful way.").

164 Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)) (internal quotation marks omitted); *see also Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President . . . .").

165 *See supra* text accompanying note 162.

166 *See, e.g.*, Porter v. Posey, 592 S.W.2d 844, 849 (Mo. Ct. App. 1979).

new approach to the Founders' blueprint for checks and balances is in order; this proposal offers that.

Furthermore, the Framers were interested in maintaining and promoting a spirited public debate on the issues facing the country at any given time. In fact, one of the reasons cited by Madison in *Federalist No. 10* for the creation of a republic rather than a true democracy was "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[167] Read in context with of the rest of *Federalist No. 10*, Madison was, in effect, espousing the virtues of public debate in the legislative branch because of the existence of "factious sentiments of average citizens," which thwart debate by society as a whole.[168] When Congress drops consideration of a bill because of a veto threat, the legislative branch is not fulfilling the role the Framers intended it to fill.

Conclusion

Congress is in a precarious position when it grants power to the Executive. If Congress fails to act following an important event, whether it be a stock market crash or terrorist attack, the public will cry foul and the President may not have the necessary tools to enact programs or take actions to remedy the crisis. On the other hand, if Congress acts too quickly, it likely will not have had the chance to schedule lengthy committee hearings to consider all the consequences of specific grants of power or, inversely, specific withholdings of power. Which method is ultimately better is up for debate. Recent history and the enactment of the Military Authorizations following September 11, 2001, however, have shown that Congress may act quickly to give the President power without taking the time to consider all potential problems, loopholes, or vague provisions that could result in presidential actions that are inconsistent with Congress's true will.

And it is Congress's true will that matters. Justice Jackson said so in his seminal *Youngstown* concurrence, and Justice Rehnquist reiterated it in *Dames & Moore*. Yet both left open the question of what

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167 *See* THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 1961).

168 *See* Kevin Mattson, *Do Americans Really Want Deliberative Democracy?*, 5 RHETORIC & PUB. AFF. 327, 328 (2002), *available at* http://muse.jhu.edu/journals/rhetoric_and_public_affairs/v005/5.2mattson.pdf.

express or implied congressional will actually is. For too long it has been interpreted only through existing statutes or legislative history. But the use of such sources does not create an incentive for Congress to clarify its will in cases of broad delegations of power, which effectively stops the public debate and gives free rein to the President to interpret Congress's vague language as he or she sees fit.

Though a novel interpretation of *Youngstown* and subsequent decisions, this interpretation does not contravene the Court's decisions. If Congress has expressed its will through the prescribed process for passing a law or joint resolution, only to have it stopped in its tracks on a President's desk, the courts should use this Note's solution to interpret the constitutionality of a President's actions. In this way, the proposal acts not as a legislative veto, but rather as a canon of construction.

Like Congress does when delegating authority to the President, Justices Jackson and Rehnquist failed to spell out the exact components of congressional will. A bill that passes both houses of Congress, overcoming procedural hurdles and surviving political compromises, is congressional will whether it contains a statement of presidential will or not. As such, it can and should be used by Congress to promote public debate, as envisioned by the Framers, and by the courts to ensure that all branches have a role in the constitutional schemes of checks and balances and separation of powers.