

NOTE

A Dangerous Custom: Reining in the Use of Signature Strikes Outside Recognized Conflicts

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ABSTRACT

It is well known that the U.S. Government has actively used drone strikes to target enemies abroad for years. The struggle between the powers of the President to provide security to our nation and the external restrictions imposed on those powers, however, is lesser known. For example, the Constitution grants Congress alone the power to declare war, yet numerous drone strikes have been conducted without congressional authorization. And although “personality strikes” are based on intelligence regarding specific targeted individuals, “signature strikes” are based on a combination of circumstances and observed target behavior, and are therefore more prone to error.

Based on a pattern of conduct initiated by George W. Bush and extended by Barack Obama, the President may unilaterally sign off on drone strikes outside recognized conflicts in which the United States is engaged (e.g., Afghanistan, Iraq). This pattern establishes customary authority for the President to continue these operations without congressional approval. Congress has known of such strikes for years, but has failed to take action over the course of four presidential terms. Now, President Donald Trump and future

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presidents may claim the power to conduct drone strikes outside of recognized conflicts absent congressional authorization.

This Note proposes legislation to effectively curb this customary authority in the context in which it is most likely to be abused—conducting signature strikes in areas outside of recognized conflicts. The proposed act delineates the circumstances under which signature strikes could be lawfully conducted. It limits the unilateral war powers of the President and curtails the adverse ramifications of continued U.S. drone campaigns in multiple countries.

TABLE OF CONTENTS

INTRODUCTION 621

 I. EXECUTIVE AUTHORITY AS COMMANDER IN CHIEF 626

 II. THE RISE OF DRONES AS A MAJOR CAPABILITY IN U.S. OPERATIONS OVERSEAS 631

 A. *The History and Introduction of Drone Strikes as a Use of Force* 631

 B. *Evolution of U.S. Drone Operations* 634

 III. DOMESTIC AUTHORITY TO CONDUCT DRONE OPERATIONS 640

 A. *The 2001 Authorization for Use of Military Force*... 640

 B. *The War Powers Resolution*..... 643

 IV. AN OPPORTUNITY EXISTS FOR THE PRESIDENT TO CLAIM AUGMENTED POWERS 644

 V. PROPOSED STATUTE ADDRESSING DRONE OPERATIONS OUTSIDE OF RECOGNIZED CONFLICTS 650

 A. *A Statutory Solution* 650

 B. *Counterarguments to Address* 652

 1. *It Would Be Simpler to Draft a New AUMF* ... 652

 2. *Restricting Signature Strikes Has Limited Value* 653

CONCLUSION 654

INTRODUCTION

There is a saying, some believe a curse, that goes, “May you live in interesting times.”¹ With advancements in technology, the world has become a smaller and more complicated place. American drones²

¹ See Nicholas D. Kristof, *A Chinese Curse?*, N.Y. TIMES: ON THE GROUND (Sept. 24, 2008), https://kristof.blogs.nytimes.com/2008/09/24/a-chinese-curse/?_r=0 [<https://perma.cc/FF4F-44VN>].

² The term “drone” refers to an unmanned aerial vehicle. Brendan Gogarty & Meredith Hagger, *The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air*, 19 J.L. INFO. & SCI. 73, 75 (2008).

conduct strikes in far-off countries while most of the American public remains blissfully unaware.³ This practice has increased over the years, first with President Bush and then with President Obama.⁴ In January 2017, Donald Trump inherited the most powerful presidency in the history of the United States,⁵ and began to authorize drone strikes at five times the rate of his predecessor.⁶

Drone operations necessarily entail a high level of secrecy due to their sensitive nature. Sometimes classified intelligence is used to designate targets,⁷ sometimes operations are not publicly acknowledged by the government,⁸ and the element of surprise often makes the strikes more effective.⁹ The secrecy shrouding drone operations, while necessary, creates an opportunity for a president to take advantage of, or even abuse, these deadly capabilities.¹⁰ To date, the United States

³ Cf. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [https://perma.cc/P5PF-FRWE] (stating that former Director of National Intelligence Dennis Blair observed that the damage of drone strikes to “the national interest only shows up over the long term,” as the United States is insulated from the casualties and upheaval that those on the receiving end of such strikes experience).

⁴ See Charlie Savage & Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, N.Y. TIMES (July 1, 2016), <https://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html> [https://perma.cc/NES7-5CSF]; see also Spencer Ackerman, *Obama Claims US Drones Strikes Have Killed up to 116 Civilians*, GUARDIAN (July 1, 2016, 2:00 PM), <https://www.theguardian.com/us-news/2016/jul/01/obama-drones-strikes-civilian-deaths> [https://perma.cc/R3XX-YSXN].

⁵ See, e.g., Glenn Greenwald, *Opinion, Trump Will Have Vast Powers. He Can Thank Democrats for Them.*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/postever/thing/wp/2016/11/11/glenn-greenwald-trump-will-have-vast-powers-he-can-thank-democrats-for-them/?utm_term=.432cee58fcd8 [https://perma.cc/3HEX-LK9W]; *Policy Perspectives of the Presidential Candidates: Executive Power and the Role of the Presidency*, CATO INST. (Aug. 5, 2016), <https://www.cato.org/events/policy-perspectives-presidential-candidates-executive-power-role-presidency> [https://perma.cc/J9QS-93Z3] [hereinafter *Policy Perspectives*] (Cato Sponsor e-Briefing).

⁶ Christopher Woody, *Trump Is Ordering Airstrikes at 5 Times the Pace Obama Did*, BUS. INSIDER (Apr. 4, 2017, 1:59 PM), <http://www.businessinsider.com/trump-is-ordering-airstrikes-at-5-times-the-pace-obama-did-2017-4> [https://perma.cc/UCV3-3W4Y].

⁷ See, e.g., Becker & Shane, *supra* note 3 (describing the targeted killing of Taliban leader Baitullah Mehsud in Pakistan and of American citizen and “Qaeda propagandist” Anwar al-Awlaki in Yemen).

⁸ See, e.g., Savage & Shane, *supra* note 4 (“It is an open secret that the majority of drone strikes have taken place [in Pakistan] as Central Intelligence Agency covert operations . . .”).

⁹ Cf. Jason Burke, *Bin Laden Letters Reveal al-Qaida's Fears of Drone Strikes and Infiltration*, GUARDIAN (Mar. 1, 2016, 9:22 AM), <https://www.theguardian.com/world/2016/mar/01/bin-laden-letters-reveal-al-qaidas-fears-of-drone-strikes-and-infiltration> [https://perma.cc/579Z-GYA9] (documents recovered from bin Laden's compound warned associates to be careful of tracking devices and not to go out of their house “except on a cloudy overcast day”).

¹⁰ Cf. Alex Emmons, *After 8 Years of Expanding Presidential War Powers, Obama Insists They Are Limited*, INTERCEPT (Dec. 6, 2016, 8:51 AM), <https://theintercept.com/2016/12/06/after->

has conducted drone operations in at least seven countries;¹¹ some of these programs were not brought to light until long after they began.¹²

Drone strikes are an effective means by which the United States combats its adversaries. The effect can be seen directly in communications between members of al Qaeda and in the disintegration of core al Qaeda leadership.¹³ As President Obama remarked, “Don’t take my word for it. In the intelligence gathered at bin Laden’s compound, we found that he wrote, ‘We could lose the reserves to enemy’s air strikes. We cannot fight air strikes with explosives.’ Other communications from al Qaeda operatives confirm this as well.”¹⁴ This Note does not seek to contest the use of drone strikes or their effectiveness in the conflicts in Iraq and Afghanistan, which were both well recognized by Congress.¹⁵ Rather, this Note seeks to shed light on a gap in the domestic legal authority authorizing strikes that are carried out in countries beyond these recognized conflicts.¹⁶

8-years-of-expanding-them-obama-insists-that-presidential-war-powers-are-limited/ [https://perma.cc/ED77-D7ES] (stating that Obama made an effort to reform the drone program before leaving office so that he didn’t “hand off a killing program with no oversight or controls. ‘You end up with a president who can carry on perpetual wars all over the world, and a lot of them covert, without any accountability or democratic debate,’ said Obama.”).

¹¹ See REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf [https://perma.cc/6MFD-TCTT] [hereinafter LEGAL AND POLICY FRAMEWORKS] (providing legal basis for military operations in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen); see also Missy Ryan, *A Reminder of the Permanent Wars: Dozens of U.S. Airstrikes in Six Countries*, WASH. POST (Sept. 8, 2016), https://www.washingtonpost.com/world/national-security/a-reminder-of-the-permanent-wars-dozens-of-us-airstrikes-in-six-countries/2016/09/08/77cde914-7514-11e6-be4f-3f42f2e5a49e_story.html?utm_term=.2cafe37942a0 [https://perma.cc/6UWT-F2ES] (describing ongoing airstrikes in Iraq, Syria, Libya, Yemen, Afghanistan, and Somalia as of late 2016); Scott Shane, *Drone Strike Statistics Answer Few Questions, and Raise Many*, N.Y. TIMES (July 3, 2016), https://www.nytimes.com/2016/07/04/world/middleeast/drone-strike-statistics-answer-few-questions-and-raise-many.html?_r=1 [https://perma.cc/KZL7-NZA7] (noting that drone strike data for Pakistan was not included in the Director of National Intelligence (“DNI”) report because those strikes are carried out by the CIA, not the military).

¹² Ackerman, *supra* note 4 (“Drone strikes outside of declared war zones are the province of the CIA and the US military’s secretive Joint Special Operations Command. The administration has treated them as an official secret, and for years would not even utter the word ‘drone’ or any of its associated acronyms.”).

¹³ President Barack Obama, Remarks at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [https://perma.cc/B6HM-CA6K] [hereinafter Obama NDU Speech].

¹⁴ *Id.*

¹⁵ See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1500; Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁶ See *infra* Section II.B.

The lack of legal boundaries on drone operations is particularly concerning considering the secrecy surrounding them. The Obama Administration acknowledged the use of “signature strikes” to target terrorist suspects based on conduct, as opposed to known identities.¹⁷ Further, in a 2016 effort to increase transparency,¹⁸ the Administration released data related to its drone operations in a report revealingly titled *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities*.¹⁹ Thus, by its own admission, the United States conducts drone strikes outside areas of recognized conflicts,²⁰ a tactic that appears to push the boundaries of lawful operations.²¹

The current legal framework in the United States does not adequately address the issues presented by unilateral signature strikes. U.S. Presidents have consistently read the 2001 Authorization for the Use of Military Force (“AUMF”),²² passed shortly after the attacks of September 11,²³ as a broad authorization to conduct drone strikes on various targets in various countries.²⁴ However, the authorization merely permits the use of force against those who planned, participated in, or otherwise aided those carrying out the attacks of September 11—namely, al Qaeda.²⁵ Despite its limited language, the AUMF is being used to justify attacks against groups that did not exist in

17 See, e.g., Becker & Shane, *supra* note 3 (relating a joke from inside the government regarding lax standards for signature strikes as quipping that “when the C.I.A. sees ‘three guys doing jumping jacks,’ the agency thinks it is a terrorist training camp”); Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES (Nov. 24, 2012), <https://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html> [https://perma.cc/46X8-BWF5].

18 See Savage & Shane, *supra* note 4.

19 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.pdf> [https://perma.cc/3PWB-ZKEU] [hereinafter DNI DRONE REPORT].

20 See *id.*

21 See Bruce Ackerman, Opinion, *Expanding Bombings in Yemen Takes War Too Far*, WASH. POST (Apr. 20, 2012), https://www.washingtonpost.com/opinions/expanding-bombings-in-yemen-takes-war-too-far/2012/04/20/gIQAq7hUWT_story.html?utm_term=.166229635fb3 [https://perma.cc/YM3V-49TJ].

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

23 See LEGAL AND POLICY FRAMEWORKS, *supra* note 11, at 3.

24 See *id.* at 3–7.

25 See *id.* at 3.

2001,²⁶ against groups denounced by al Qaeda,²⁷ and against diffuse targets around the globe.²⁸

Congress passed the War Powers Resolution (“WPR”)²⁹ in 1973 in response to the Vietnam War, which Congress perceived as an abuse of executive power.³⁰ The WPR aimed to prevent similar executive overreaches from occurring by placing time limits on military action taken in the absence of a declaration of war and imposing reporting requirements on the President to keep Congress apprised of such action.³¹ The restrictions of the WPR intended to rein in presidential action, however, do not effectively limit drone operations.³² For example, a requirement to cease any engagement in hostilities past a sixty-day limit without a congressionally authorized continuance³³ has no material effect on drones that can level camps and kill dozens before returning back to base that same day.³⁴ These drone operations therefore continue essentially unchecked by the WPR.

The intersection of national security and individuals’ civil liberties has always raised important concerns. One hundred and fifty years ago, the Supreme Court issued a dire warning:

²⁶ See, e.g., *Mapping Militant Organizations: Al Shabaab*, STAN. U., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61> [<https://perma.cc/HB9N-Q6TS>] (last updated Feb. 20, 2016) (noting that al-Shabaab was formed in December 2006 and was publicly endorsed by al Qaeda in 2012 in what was reported in the media as a merger, though the two groups “continue to identify as separate organizations”).

²⁷ See, e.g., Jack Goldsmith, *The ISIS Expulsion and the AUMF*, LAWFARE (Feb. 11, 2014), <https://www.lawfareblog.com/isis-expulsion-and-aumf> [<https://perma.cc/HT3W-UAVG>].

²⁸ Compare LEGAL AND POLICY FRAMEWORKS, *supra* note 11, at 5 (stating that Somalia-based al-Shabaab was “recently” determined to fall under the 2001 AUMF “because, among other things, al-Shabaab has pledged loyalty to al-Qa’ida in its public statements; made clear that it considers the United States one of its enemies; and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa”), and Press Release, U.S. Dep’t of State, Designation of al-Shabaab (Mar. 18, 2008), <https://www.state.gov/j/ct/rls/other/des/143205.htm> [<https://perma.cc/9ANQ-KTGT>], with *Counter Terrorism Guide: al-Shabaab*, NAT’L COUNTERTERRORISM CTR., https://www.dni.gov/nctc/groups/al_shabaab.html [<https://perma.cc/3U98-DMQ2>] (describing al-Shabaab as the group that “took over most of southern Somalia in the second half of 2006” but that, “[a]s evidenced by the constant levels of infighting among leadership, al-Shabaab is not centralized or monolithic in its agenda or goals. Its rank-and-file members come from disparate clans, and the group is susceptible to clan politics, internal divisions, and shifting alliances.”).

²⁹ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548 (2012)).

³⁰ See Alexander Chanock, *Fixing the War Powers Resolution in the Age of Predator Drones and Cyber-Warfare*, 78 J. AIR L. & COM. 453, 454–55 (2013).

³¹ See *id.*

³² See *id.* at 465–68.

³³ See 50 U.S.C. § 1544(b) (2012).

³⁴ See Chanock, *supra* note 30, at 465–68.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.³⁵

Today, these words are more pertinent than ever. Americans are waking up to the reality that years of congressional inaction allowed Presidents Bush and Obama to augment executive authority in the national security realm, particularly with respect to drone strikes, with dangerous results.

Part I of this Note introduces executive authority, discussing the inherent powers that the President enjoys by direct grants of power from the Constitution, as well as through the interpretation of the Courts. Part II provides a background on the development of drones, both as a technology and as a system to conduct military use of force by the United States. Part III discusses the domestic legal authority for drone strikes, as well as the ineffective statutory limitations placed on unilateral executive action. It further expands on the gap in domestic legal authority that gives rise to the issue at hand. Against that backdrop, Part IV argues that under the concept of customary authority, an opportunity exists for President Trump to claim augmented executive authority based on the custom established by Presidents Bush and Obama. In response, Part V proposes a statute to regulate the use of signature strikes in areas outside of active hostilities and addresses foreseeable counterarguments to the proposed statute.

I. EXECUTIVE AUTHORITY AS COMMANDER IN CHIEF

Article II of the United States Constitution describes the inherent powers of the Executive.³⁶ Among the greatest of these powers, it declares that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.”³⁷ The broad language of this clause could be read literally to confer all power relating to military affairs on the President, without need for consideration or participation of other parties.³⁸ However, other provisions of the document, as well as

³⁵ *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866) (referring to the writ of habeas corpus).

³⁶ See U.S. CONST. art. II.

³⁷ *Id.* art. II, § 2, cl. 1.

³⁸ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641–42 (1952) (Jack-

the historical context in which it was written, make clear that limitations exist on the executive power to conduct military affairs.³⁹

The Constitution, in Article I, enumerates the powers of Congress, many of which interact with the powers of the President.⁴⁰ One complex interaction between congressional and executive authority exists in the context of war powers.⁴¹ Congress possesses the sole power to declare war, indicating the Framers' desire for reasoned democratic input in the serious undertaking of waging war, rather than placing the power at the whim of an individual.⁴² Congress can

son, J., concurring) (noting that because the Commander in Chief clause "undoubtedly puts the Nation's armed forces under presidential command . . . this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy"); CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 11–12 (2005), http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf [<https://perma.cc/SW4D-G7S5>] (describing the single dissenter on the report committee as viewing the President's powers to include initiating a war if the nation's security interests were involved, even if there were time to obtain congressional authorization); *cf.* Argument for the Petitioner, *Ex parte Milligan*, 71 U.S. (4 Wall.) at 31–33 (interpreting the President's powers, in particular his war powers, as limited by the other parts of the Constitution as compared to the provisions of Article II).

³⁹ See CONSTITUTION PROJECT, *supra* note 38, at 10–12; *see also* *Milligan*, 71 U.S. (4 Wall.) at 120–21; *In re Neagle*, 39 F. 833, 858 (C.C.N.D. Cal. 1889) ("These provisions [of the Constitution] make [the President] the executive head of the nation, and give him all the authority necessary to accomplish the purposes intended—all the authority, necessarily, inherent in the office, not otherwise limited."), *aff'd*, 135 U.S. 1 (1890).

⁴⁰ See, e.g., U.S. CONST. art. I, § 3, cl. 4 (President of the Senate is the Vice President); *id.* cl. 6 (power to impeach); *id.* § 7, cl. 2–3 (veto powers); *id.* § 8, cl. 11 (power to declare war).

⁴¹ See *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) ("[The President] has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command."). See generally CONSTITUTION PROJECT, *supra* note 38.

⁴² See U.S. CONST. art. I, § 8, cl. 11; THE FEDERALIST NO. 69, at 460 (Alexander Hamilton) (Paul Leicester Ford ed., 1898) ("The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which, by the Constitution under consideration, would appertain to the legislature."); CONSTITUTION PROJECT, *supra* note 38, at 10 (noting that "[t]he best precaution against unilateral war-making by the executive was to require a collective decision to go to war," to be made by Congress); Michael I. Meyerson, *The War on Terrorism and the Constitution*, Md. B.J., Nov./Dec. 2002, at 16, 18–19; *cf.* *Youngstown*, 343 U.S. at 633 (Douglas, J., concurring) ("Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement.").

make a formal declaration of war, though it has not done so since World War II.⁴³ Alternatively, Congress may authorize the use of force through legislation.⁴⁴ Significant though this congressional power may be, the President is not hamstrung by congressional will because the tremendous authority and responsibility that comes with being Commander in Chief requires him to ensure the nation's security and oversee all military operations.⁴⁵

The boundaries separating the powers of the three branches are often oblique.⁴⁶ Where the Constitution does not explicitly draw lines between what is and is not permissible, courts of the United States may settle disputes.⁴⁷ Thus, since the 1800s, the bounds of executive authority in the areas of defense and national security have been shaped by the Supreme Court.⁴⁸ For example, in 1889, U.S. Attorney General William Henry Harrison Miller assigned a U.S. Marshal to protect a Supreme Court Justice and that Marshal subsequently used

43 JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1 (2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf> [<https://perma.cc/G24F-PWW9>].

44 See CONSTITUTION PROJECT, *supra* note 38, at 10–12. Congress can also implicitly authorize a war the executive has unilaterally started by later supplying funds and materials for the war effort. *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971).

45 Madison's Notes on Debates in the Federal Convention of 1787 (Aug. 17, 1787), AVALON PROJECT, http://avalon.law.yale.edu/18th_century/debates_817.asp [<https://perma.cc/4WVV-RABV>] (stating that “declare war” was changed from “make war” so that the President would have “the power to repel sudden attacks”); see also CONSTITUTION PROJECT, *supra* note 38, at 11; Becker & Shane, *supra* note 3 (detailing President Obama's role in determining who is targeted in drone strikes); Gene Healy, *President Obama's Legacy Is Endless War*, TIME (May 5, 2016), <http://time.com/4317122/president-obamas-war-legacy/> [<https://perma.cc/TP25-9S3U>]; cf. Jonathan Turley, *United States Bombs Syria in Latest Undeclared War*, JONATHANTURLEY.ORG (Sept. 23, 2014), <https://jonathanturley.org/2014/09/23/united-states-bombs-syria-in-latest-undeclared-war/> [<https://perma.cc/37G4-APNE>] (“The most serious acts of unilateral presidential action falls [sic] within war powers—powers that the Framers expressly and carefully limited to prevent precisely this type of attack.”).

46 See, e.g., *Youngstown*, 343 U.S. at 596–97 (Frankfurter, J., concurring) (observing that courts determining separation of powers questions are interpreting the Constitution itself which Justice Holmes described as “not establish[ing] and divid[ing] fields of black and white” (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))); see also *id.* at 610 (“The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers.”).

47 See generally U.S. CONST. art. III, §§ 1–2.

48 See, e.g., *In re Neagle*, 135 U.S. 1, 68–69 (1890) (finding the Executive had constitutional power to arrange for the protection of the Supreme Court Justices in carrying out the duty to faithfully execute the law); *The Prize Cases*, 67 U.S. (2 Black) 635, 641–42 (1863) (finding the President lawfully set blockade without congressional authorization in the face of Confederate insurrection).

deadly force in the line of duty.⁴⁹ No federal statute authorized the assignment of the Marshal,⁵⁰ but the Court upheld a challenge to the assignment finding that the assignment fell within the President's duty to "take care that the laws be faithfully executed."⁵¹ Though this use of executive authority occurred within the domestic law enforcement context, this case has been cited ever since as indicative of the executive's inherent power to protect the government and nation, even in ways not explicitly authorized by Congress or written in the Constitution.⁵²

Additionally, the Supreme Court approved of President Lincoln's constitutional authority to set up a blockade in the face of Southern insurgency without a congressional declaration of war.⁵³ The Court determined that the President is not required, when facing a direct threat to the nation's security, to simply sit by and wait for Congress to convene and hash out the matter.⁵⁴ It is within his authority as Commander in Chief to respond to imminent hostilities to protect the nation.⁵⁵

The Supreme Court elaborated on the boundaries of executive power, in the context of a presidential action found to be legislative in nature, in *Youngstown Sheet & Tube Co. v. Sawyer*.⁵⁶ In 1952, President Truman issued an executive order commanding the Secretary of Commerce to seize steel mills in the United States which were in jeopardy of ceasing operations due to unresolved labor disputes.⁵⁷ The military relied upon domestic steel for munitions and supplies for its troops in Korea, and President Truman cited national security as justifying the need to prevent the steel mills from shutting down.⁵⁸

The Court found that no statute authorized the presidential action, and when Congress had considered such a provision in earlier

⁴⁹ See *In re Neagle*, 135 U.S. at 48–51, 68–69.

⁵⁰ See *id.* at 58.

⁵¹ *Id.* at 68–69 (finding "[t]hat there is a peace of the United States [and] that a man assaulting a judge of the United States while in the discharge of his duties violates that peace" and thus the Marshal assigned as a body guard lawfully protected the Justice from attack).

⁵² See Harold J. Krent, *The Legacy of In re Neagle*, 125TH ANNIVERSARY MATERIALS 60 (2013), https://scholarship.kentlaw.iit.edu/docs_125/6/ [<https://perma.cc/5B9N-G36X>].

⁵³ See *The Prize Cases*, 67 U.S. (2 Black) at 636.

⁵⁴ See *id.* at 660–61 ("The function to use the army and navy being in the President, the mode of using them, within the rules of civilized warfare, and subject to established laws of Congress, must be subject to his discretion as a necessary incident to the use, in the absence of any Act of Congress controlling him.").

⁵⁵ See *id.* at 659–61.

⁵⁶ 343 U.S. 579 (1952).

⁵⁷ See *id.* at 583, 589–92.

⁵⁸ See *id.*

legislation, it had declined to include it.⁵⁹ Further, a seizure like the one ordered, on property located in the United States, without an imminent threat, is a “lawmaking power,” and therefore a power belonging only to Congress.⁶⁰ Neither the President’s power as Commander in Chief nor the general executive authority to “take Care that the Laws be faithfully executed,” justified the action.⁶¹ The Court therefore upheld the injunction preventing government seizure of the steel mills.⁶²

In his concurring opinion, Justice Jackson described the strength of the President’s authority in relation to the position of Congress in three main categories of action.⁶³ Where Congress has given authorization for a certain action, the President enjoys the peak of his authority, for he has both his own inherent powers and those conferred by congressional authorization.⁶⁴ Where Congress has neither authorized nor explicitly rejected the President’s authority to take such action, he must rely on his Constitutional powers while operating in a “zone of twilight” where both he and Congress may share authority.⁶⁵ In the final category, where congressional legislation prohibits the action in question, the President’s authority is at its most reduced because his actions can only be justified by his authority under the Constitution while taking into account any restrictions Congress has placed on the matter.⁶⁶

Actions taken in this third category are subject to the greatest judicial scrutiny and are therefore most likely to be overturned.⁶⁷ A recent victory of the executive branch in this category occurred in *Zivotofsky ex rel. Zivotofsky v. Kerry*.⁶⁸ Congress passed legislation contradicting the established State Department policy to not formally recognize Jerusalem as being located within a particular state.⁶⁹ Section 214 of the Foreign Relations Authorization Act, Fiscal Year

⁵⁹ See *id.* at 586.

⁶⁰ *Id.* at 589.

⁶¹ *Id.* at 587–89 (quoting U.S. CONST. art. II., § 3, cl. 1).

⁶² See *id.*

⁶³ See *id.* at 635–38 (Jackson, J., concurring).

⁶⁴ See *id.* at 635.

⁶⁵ *Id.* at 637.

⁶⁶ See *id.*

⁶⁷ Cf. *id.* at 640 (“This leaves the current seizure to be justified only by the severe tests under the third grouping Thus, this Court’s first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.”).

⁶⁸ 135 S. Ct. 2076 (2015).

⁶⁹ See *id.* at 2082.

2003⁷⁰ entitled *United States Policy with Respect to Jerusalem as the Capital of Israel*, allowed American citizens born in Jerusalem to record Israel as the place of birth on a passport.⁷¹ The State Department, however, only allowed such individuals to record Jerusalem as their place of birth.⁷² Although the State Department conceded that executive authority in taking this action rested in the third category of Justice Jackson's analysis, it also successfully asserted that at a minimum, the executive alone has the power to recognize foreign sovereigns.⁷³ The Court therefore found section 214 invalid because it infringed on the exclusively executive recognition power.⁷⁴

The constitutional powers of the executive and legislative branches are not delineated perfectly—at times they may overlap,⁷⁵ but at times there is a distinct line drawn in the sand.⁷⁶ Cases such as those discussed above show just how close a determination the separation of powers may be and that valid points can be argued well on both sides.⁷⁷ Importantly, Congress can, at times, prevail against executive acts which infringe upon the powers of the legislative branch.⁷⁸ The life and death repercussions of drone strikes, especially those carried out beyond the boundaries of recognized conflicts, suggest that the time has come for Congress to limit the President's unfettered authority to authorize drone strikes.

II. THE RISE OF DRONES AS A MAJOR CAPABILITY IN U.S. OPERATIONS OVERSEAS

A. *The History and Introduction of Drone Strikes as a Use of Force*

Though drones have made a huge impact in modern day warfare, attempts to use unmanned aerial vehicles to aid U.S. military forces date back to World War I.⁷⁹ Iterations over the first half of the twentieth

⁷⁰ Pub. L. No. 107-228, 116 Stat. 1350 (2002) (codified as amended in scattered sections of 22 U.S.C.).

⁷¹ See § 214, 116 Stat. at 1365–66.

⁷² See *Zivotofsky*, 135 S. Ct. at 2082.

⁷³ See *id.* at 2083–84, 2090–91, 2094.

⁷⁴ See *id.* at 2094–96.

⁷⁵ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁷⁶ See, e.g., *Zivotofsky*, 135 S. Ct. at 2094–96.

⁷⁷ See generally *id.*; *Youngstown*, 343 U.S. 579; *In re Neagle*, 135 U.S. 1 (1890); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

⁷⁸ See, e.g., *Youngstown*, 343 U.S. at 587–89.

⁷⁹ RICHARD WHITTLE, *PREDATOR: THE SECRET ORIGINS OF THE DRONE REVOLUTION* 19 (2014).

eth century ranged from small, balsa wood constructs used as targets for training anti-aircraft gunners to modified B-17 bombers designed to be flown by remote control.⁸⁰ During the Vietnam War, the Air Force flew over 3,000 missions with jet-powered drones to conduct reconnaissance and carry out other non-combat tasks, though these drones were dependent on conventional manned aircraft to become airborne.⁸¹

Military drones as we know them today evolved from the Predator, an unmanned aerial vehicle with high endurance capabilities, first used by the military for surveillance.⁸² In fact, the Central Intelligence Agency (“CIA”), in conjunction with the military, used the Predator to spy on and locate Osama bin Laden in a rural village in Afghanistan in 2000.⁸³ The Predator was not outfitted with missiles until the following year, and the weaponized version was first deployed in Afghanistan following the attacks of September 11, 2001.⁸⁴

Despite the now prevalent use of drones by the U.S. government, information regarding these drone operations is still difficult to obtain and validate. Due to the secrecy of drone operations, the government does not reveal detailed information about them. As the U.S. District Court for the District of Columbia noted, “The [CIA] engages in covert actions in foreign countries on behalf of the United States and, by necessity, practice, and statute, keeps its activities secret.”⁸⁵ The military conducts a large portion of U.S. drone operations, and it too operates under layers of necessary secrecy.⁸⁶ This secrecy has drawn harsh criticism from organizations and individuals seeking greater government transparency on what is often considered to be a controversial practice.⁸⁷ As President Obama acknowledged publicly, “this

⁸⁰ See *id.* at 19–20.

⁸¹ See *id.* at 21–22 (describing drones as having been “used as decoys to fool North Vietnamese air defenses, to drop propaganda leaflets, and to carry sensors able to eavesdrop on enemy communications”).

⁸² See Mark Bowden, *How the Predator Drone Changed the Character of War*, SMITHSONIAN MAG. (Nov. 2013), <http://www.smithsonianmag.com/history/how-the-predator-drone-changed-the-character-of-war-3794671/> [<https://perma.cc/K64H-F5PV>]; see also WHITTLE, *supra* note 79, at 2.

⁸³ WHITTLE, *supra* note 79, at 157–58; Bowden, *supra* note 82.

⁸⁴ See Bowden, *supra* note 82.

⁸⁵ ACLU v. CIA, 109 F. Supp. 3d 220, 225 (D.D.C. 2015); see also Pratap Chatterjee, *How Lawyers Sign Off on Drone Attacks*, GUARDIAN (June 15, 2011 6:00 PM), <https://www.theguardian.com/commentisfree/cifamerica/2011/jun/15/drone-attacks-obama-administration> [<https://perma.cc/58DQ-R2WH>].

⁸⁶ See Chatterjee, *supra* note 85.

⁸⁷ See, e.g., Jameel Jaffer, *Drone Disclosures, Official and Not*, JUST SECURITY (Oct. 19,

new [drone] technology raises profound questions—about who is targeted, and why . . . about the legality of such strikes under U.S. and international law.”⁸⁸

One way to attempt to garner drone strike information from the government is to request documents related to a particular topic under the Freedom of Information Act (“FOIA”).⁸⁹ The agency fielding the request, however, may avoid producing documents by providing a “Glomar response” to the requesting party.⁹⁰ This response indicates that the agency is neither confirming nor denying that the documents requested exist, and it is typically used when a FOIA request implicates sensitive matters such as national security.⁹¹ The agency fielding the request could also reply by acknowledging its possession of the documents requested but decline to disclose the documents by citing a specific exemption under FOIA for protected information.⁹²

For example, the American Civil Liberties Union (“ACLU”) filed a 2010 FOIA request seeking documents related to “the legal and factual basis for [the government’s] use of predator drones to conduct ‘targeted killings’ overseas.”⁹³ The initial request was sent to the CIA, Department of Justice (“DOJ”), State Department, and Department of Defense (“DOD”).⁹⁴ Each agency disclosed some, but not all,

2015), <https://www.justsecurity.org/26934/drone-disclosures-official/> [<https://perma.cc/3KXC-J6NY>] (lauding a leak of documents related to drone operations and criticizing the government’s failure to disclose this information itself); *see also* Doyle McManus, *U.S. Drone Attacks in Pakistan ‘Backfiring,’ Congress Told*, L.A. TIMES (May 3, 2009), <http://articles.latimes.com/2009/may/03/opinion/oe-mcmanus3> [<https://perma.cc/FZ8C-KLZB>]; *Targeted Killing*, ACLU, <https://www.aclu.org/issues/national-security/targeted-killing> [<https://perma.cc/D34U-U5TH>] (accusing the government of violating the law of armed conflict principle of minimization and referring to some drone strikes as “killings in violation of the Constitution and international law”).

⁸⁸ Obama NDU Speech, *supra* note 13.

⁸⁹ 5 U.S.C. § 552 (2012); *see* Jaffer, *supra* note 87. *See generally* U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: INTRODUCTION (2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/intro-july-19-2013.pdf#p2> [<https://perma.cc/6DAG-8DG4>].

⁹⁰ *See* U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 1 at 29 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption1.pdf> [<https://perma.cc/3N5Z-MEPN>].

⁹¹ *See id.*

⁹² *See* 5 U.S.C. § 552(b) (2012). In the context of a FOIA request for information on drone strikes, agencies frequently invoke the exemptions for classified or privileged information. *See, e.g.,* ACLU v. U.S. Dep’t of Justice, 844 F.3d 126, 131–33 (2d Cir. 2016).

⁹³ ACLU v. CIA—FOIA Case for Records Relating to Drone Killings, ACLU, <https://www.aclu.org/cases/aclu-v-cia-foia-case-records-relating-drone-killings> [<https://perma.cc/3N5Z-MEPN>] (last updated Dec. 30, 2016).

⁹⁴ *See id.*

of the documents in their possession, except the CIA, which responded to the ACLU's request with a Glomar response.⁹⁵ The ACLU filed suit against the CIA, but the court upheld the CIA's Glomar response to a narrowed request by the ACLU on remand.⁹⁶

For these very reasons, it is difficult to evaluate with certainty the breadth of U.S. drone operations. Because the government remains secretive about these programs, other groups have taken up the task of gathering statistics on the U.S. drone campaign.⁹⁷ And because these groups must rely on news reports and first-hand accounts to tally their numbers, the figures are, at best, mere estimates, not "hard facts."⁹⁸ Still, without official statistics, anecdotal documentation may be the best means available to estimate the impact of U.S. drone strikes that may otherwise be under- or unreported.⁹⁹

B. *Evolution of U.S. Drone Operations*

U.S. drone strikes were first confined to the conflicts in Afghanistan and Iraq, as well as conducted in the region of Pakistan bordering Afghanistan.¹⁰⁰ Over the years, however, the United States continued to expand its use of drones both in frequency as well as geographic reach.¹⁰¹ The use of U.S. drone strikes in Pakistan, Yemen, and Somalia increased significantly under the Obama Administration as compared to the Bush Administration.¹⁰² According to the New America Foundation,¹⁰³ President Bush conducted approximately 48 strikes in Pakistan as compared to President Obama's estimated 353

⁹⁵ *See id.*

⁹⁶ *ACLU v. CIA*, 109 F. Supp. 3d 220, 225, 244 (D.D.C. 2015), *aff'd*, *ACLU v. U.S. Dep't of Justice*, 640 F. App'x 9, 11–13 (D.C. Cir. 2016).

⁹⁷ *See, e.g., About*, NEW AM.: INT'L SECURITY, <http://securitydata.newamerica.net/about.html> [<https://perma.cc/B8RB-A95S>] (tracking drone strikes in Pakistan, Yemen, and Somalia); *Our Methodology*, BUREAU INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/explainers/our-methodology> [<https://perma.cc/62MR-Z766>] (tracking U.S. drone strikes in Pakistan, Somalia, Yemen, and Afghanistan).

⁹⁸ COLUMBIA LAW SCH., HUMAN RIGHTS CLINIC, COUNTING DRONE STRIKE DEATHS 4–5 (2012), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf> [<https://perma.cc/YE6K-89PJ>] (finding that independent groups, including the Bureau of Investigative Journalism and New America Foundation, typically make estimates that include data from news reports which is a methodology prone to error).

⁹⁹ *See id.* at 14.

¹⁰⁰ *See* LEGAL AND POLICY FRAMEWORKS, *supra* note 11; Peter Bergen et al., *Drone Strikes: Pakistan*, NEW AM., <https://www.newamerica.org/in-depth/americas-counterterrorism-wars/pakistan/> [<https://perma.cc/3M6N-AW5Z>].

¹⁰¹ *See* LEGAL AND POLICY FRAMEWORKS, *supra* note 11; Bergen et al., *supra* note 100.

¹⁰² *See* Bergen et al., *supra* note 100; Healy, *supra* note 45.

¹⁰³ The New America Foundation is a think tank focusing on U.S. political, social, and

strikes.¹⁰⁴ Similarly, there are estimates that President Bush conducted one strike in Yemen and zero in Somalia, while estimates suggest President Obama conducted 183 drone strikes in Yemen and 21 drone strikes in Somalia.¹⁰⁵

As the frequency of drone strikes has expanded, so too has the scope of U.S. drone operations. A central focus of eliminating top al Qaeda leaders diffused into an effort to combat terrorist groups in general.¹⁰⁶ Implementation of this less discriminating use of drone strikes has drawn criticism, particularly when the Obama Administration acknowledged that the CIA had been conducting signature strikes in which the agency targeted militants meeting certain threat criteria, instead of targeting specific individuals, as was customary in earlier drone campaigns.¹⁰⁷

Both the Bush and Obama Administrations took “the position that the United States is at war with Al Qaeda and its allies and can legally defend itself by striking its enemies where they are found.”¹⁰⁸ The need to solidify the rules seemed to become more important when the potential for a change in power became imminent.¹⁰⁹ The Obama Administration, for one, made an unsuccessful push to codify rules related to targeted killing ahead of the 2012 presidential election.¹¹⁰ President Obama expressed his thoughts on the complicated issues surrounding targeted killing more than once, remarking in one interview, “I think creating a legal structure, processes, with oversight checks on how we use unmanned weapons is going to be a challenge for me and for my successors for some time to come.”¹¹¹ In another interview, while referring to drone operations, Obama stated, “One of the things we’ve got to do is put a legal architecture in place, and we need Congressional help in order to do that, to make sure that not

economic policy issues, particularly as they relate to technology. *See Our Story*, NEW AM., <https://www.newamerica.org/our-story/> [<https://perma.cc/EY99-KAS2>].

¹⁰⁴ *See* Bergen et al., *supra* note 100 (estimating that Bush conducted 48 strikes over approximately five years and Obama conducted 353 strikes over approximately eight years).

¹⁰⁵ *See* Peter Bergen et al., *Drone Strikes: Yemen*, NEW AM., <https://www.newamerica.org/in-depth/americas-counterterrorism-wars/us-targeted-killing-program-yemen/> [<https://perma.cc/QJ7C-U6FX>]; *see also Drone Wars Somalia: Analysis*, NEW AM., <http://securitydata.newamerica.net/drones/somalia-analysis.html> [<https://perma.cc/N9LB-F7FJ>].

¹⁰⁶ *See* Shane, *supra* note 17.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ Bowden, *supra* note 82.

only am I reined in but any president's reined in terms of some of the decisions that we're making."¹¹²

When codifying these rules did not come to fruition,¹¹³ Obama issued an executive order outlining measures to limit drone strikes in ways so as to reduce civilian casualties.¹¹⁴ The executive order used broad strokes to outline policy measures and aspirational goals, such as developing weapons systems more discriminate than those currently in use¹¹⁵ and producing an annual report on drone strike casualties as well as the discrepancies in the number of such casualties as tallied by governmental and nongovernmental organizations.¹¹⁶

In August 2016, the Obama Administration released a declassified document outlining requirements that must be met and factors taken into consideration prior to the use of a drone strike.¹¹⁷ It also contemplated operational plans that would "propose[] variations from the policies and procedures set forth in this [Presidential Policy Guidance]."¹¹⁸ While this was a bold move toward greater transparency,¹¹⁹ the issues of authority and accountability that this Note raises still remain. As policy guidance, the document, entitled *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, did not itself have the power to grant legal authority for such strikes.¹²⁰ In fact, since Congress never codified these guidelines as law, they may be disregarded, augmented, or eliminated by any succeeding president.¹²¹

President Obama took an active role in the decisionmaking process leading up to individual drone strikes, personally approving

¹¹² Shane, *supra* note 17 (quoting Barack Obama during interview with Jon Stewart on "The Daily Show" on October 18, 2012).

¹¹³ *See id.*

¹¹⁴ Exec. Order No. 13,732, 81 Fed. Reg. 44,485 (July 7, 2016).

¹¹⁵ *Id.* at 44,485.

¹¹⁶ *Id.* at 44,486.

¹¹⁷ *See PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES* (2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [<https://perma.cc/HZ27-MJHG>] [hereinafter PRESIDENTIAL POLICY GUIDANCE]; Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html?utm_term=.ce27567edb67 [<https://perma.cc/95WC-XM94>].

¹¹⁸ PRESIDENTIAL POLICY GUIDANCE, *supra* note 117, § 1.C(7).

¹¹⁹ *See* DeYoung, *supra* note 117.

¹²⁰ *See* PRESIDENTIAL POLICY GUIDANCE, *supra* note 117; DeYoung, *supra* note 117.

¹²¹ *See* DeYoung, *supra* note 117.

changes to the so-called “kill lists,” which compiled names of those monitored as potential targets, as well as making the final call on particularly complicated strike or don’t-strike decisions.¹²² As Obama’s own national security adviser Thomas E. Donilon noted, “[President Obama] is determined that he will make these decisions about how far and wide these operations will go,” and President Obama is “determined to keep the tether pretty short.”¹²³ Although President Obama’s decision to place the final responsibility on his own shoulders may have been a show of restraint, his decision also served quite another purpose: President Obama crafted an unprecedented role for the President to actively order and see out targeted killing missions.¹²⁴

There were significant similarities between the Obama Administration’s national security operations and policies and those of the Bush Administration, particularly in the later Bush years.¹²⁵ The two administrations differed mainly in their presentation of similar national security programs and agendas—where Bush officials were aggressive and candid, Obama officials were more reserved and discrete.¹²⁶ Former Assistant Attorney General Jack Goldsmith under President Bush criticized the Bush Administration’s “damaging” habit of “frequently express[ing] desire to expand executive power in order, as Vice President Cheney put it, ‘to leave the presidency stronger than we found it.’”¹²⁷ Goldsmith rightfully observed that some of the policy consistency is very likely attributable to the Obama Administration facing an uphill battle in changing course.¹²⁸ Nevertheless, in the national security context, the two Administrations had much in common.¹²⁹

¹²² See Becker & Shane, *supra* note 3.

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ Jack Goldsmith, *The Cheney Fallacy*, NEW REPUBLIC (May 18, 2009), <https://newrepublic.com/article/62742/the-cheney-fallacy> [<https://perma.cc/J9QS-U2ST>].

¹²⁶ See *id.*

¹²⁷ *Id.*

¹²⁸ See *id.* (noting that it is very likely some of the similarities between Bush and Obama national security policies results because “Bush policies were woven into the fabric of the national security architecture in ways that were hard if not impossible to unravel”).

¹²⁹ See *id.* But see Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, *How to End the Forever War?*, Address at Oxford University 4 (May 7, 2013), <https://law.yale.edu/system/files/documents/pdf/Faculty/KohOxfordSpeech.pdf> [<https://perma.cc/LA96-GX43>] (asserting that “the Obama Administration’s approach to these [national security] issues has not been just like George W. Bush’s” because, for one thing, “the Obama Administration has not treated the post-9/11 conflict as a Global War on Terror to which no law applies, in which the United States is authorized to use force anywhere, against anyone”).

Through the efforts of Presidents Bush and Obama, the presidency has become a position of unprecedented power.¹³⁰ The War on Terror, for one, allowed both Presidents to expand executive powers under the premise of acting as Commander in Chief.¹³¹ While the national security field is particularly susceptible to expansion of executive power and claims of state secrecy due to the nature of the issues,¹³² this was not the only area in which Obama expanded his executive authority.¹³³ As former Vice President Joe Biden proudly stated in a radio address in November 2016, “when Republicans in Congress didn’t act, we used our executive authority to[] Extend overtime coverage for over 4 million workers—boosting their wages by \$12 billion over the next decade.”¹³⁴ At the time, a trend in polls indicated that the majority of Democrats, previously shown to oppose policies that worked to expand executive authority under Bush, supported those same policies under Obama.¹³⁵ Expansion of such authority, however, is more troubling in the national security context given the global implications and deadly repercussions it may have.¹³⁶ As one critic noted, “By the time Obama hit the dais at Oslo to accept the Nobel Peace Prize in 2009, our 44th president had already launched more drone strikes than [President Bush] carried out during two full terms.”¹³⁷

¹³⁰ *Policy Perspectives*, *supra* note 5.

¹³¹ See, e.g., *id.* (asserting that Obama inherited “the vast new powers [Bush and Cheney had] forged in the War on Terror and the financial crisis of 2008”); Goldsmith, *supra* note 125 (asserting that Obama has kept most of the substance of Bush national security programs and is “in the process of strengthening the presidency to fight terrorism”); Turley, *supra* note 45 (describing Obama’s “unchecked authority asserted in the national security arena” and asserting that in *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011), “President Obama insisted that he alone determines what is a war and therefore when he needs a declaration”).

¹³² Cf. Emmons, *supra* note 10 (describing how Obama expanded his executive powers through a combination of covert campaigns and broad interpretation and application of the AUMF).

¹³³ See Editorial, ‘Dreamers’ Shouldn’t Be Pawns in an Immigrant Purge, SUN SENTINEL (Nov. 18, 2016, 7:46 PM), <http://www.sun-sentinel.com/opinion/editorials/fl-editorial-dreamers-deport-20161116-story.html> [<https://perma.cc/JAG6-WQCX>] (describing Deferred Action for Childhood Arrivals program implemented by Obama through an executive order after Congress did not pass the DREAM Act); see also Vice President Joseph R. Biden Jr., Weekly Radio Address (Nov. 19, 2016), 2016 WL 6823543.

¹³⁴ Biden, *supra* note 133.

¹³⁵ See Greenwald, *supra* note 5 (“It is hard to overstate how complete the Democrats’ about-face on these [executive authority] questions was once their own leader controlled the levers of power.”). For example, polls cited showed that in 2007, fifty-seven percent of Democrats favored closing Guantanamo Bay, while in 2012, a Washington Post–ABC News poll showed fifty-three percent of Democrats favored Guantanamo Bay remaining in operation. *Id.*

¹³⁶ See Turley, *supra* note 45. See generally Greenwald, *supra* note 5.

¹³⁷ Healy, *supra* note 45.

Meanwhile, for more than a decade Congress has taken no effective action to curb executive power. Former Assistant Attorney General Goldsmith noted that “[r]endition and targeted killings have gone on for over a decade without congressional pushback.”¹³⁸ In 2011, ten members of Congress sued President Obama over his unilateral drone campaign in Libya, asserting, among other claims, that these operations violated the separation of powers because only Congress has the authority to declare war.¹³⁹ The District Court for the District of Columbia ruled that the plaintiffs lacked standing because the ten Representatives were not particularly injured by this, but rather claimed a “purely institutional injury.”¹⁴⁰ Rather than relying on the courts to resolve this dispute, the plaintiffs, as members of Congress, could have sought relief by proposing and passing legislation addressing these issues.¹⁴¹ Due to prolonged gridlock and partisan counteraction, however, legislation was not a politically viable option.¹⁴² Finally, because

¹³⁸ Goldsmith, *supra* note 125. Rendition here refers to “extraordinary rendition,” the U.S. government practice of taking custody of individuals overseas and transporting them to locations where they can be interrogated beyond the protections of U.S. law, such as in secret CIA detention centers or by turning them over to foreign governments. See Mark J. Murray, *Extraordinary Rendition and U.S. Counterterrorism Policy*, J. STRATEGIC SECURITY, Fall 2011, 15, 16–18; Max Fisher, *A Staggering Map of the 54 Countries That Reportedly Participated in the CIA’s Rendition Program*, WASH. POST (Feb. 5, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/02/05/a-staggering-map-of-the-54-countries-that-reportedly-participated-in-the-cias-rendition-program/?utm_term=.86ec7063518f [<https://perma.cc/LKU5-79K6>].

¹³⁹ See *Kucinich v. Obama*, 821 F. Supp. 2d 110, 113 (D.D.C. 2011); see also U.S. CONST. art. I, § 8, cl. 11.

¹⁴⁰ *Kucinich*, 821 F. Supp. 2d at 117–18.

¹⁴¹ See U.S. CONST. art. I, § 8, cl. 18 (Congress holds the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); cf. *Kucinich*, 821 F. Supp. 2d at 119 (finding that plaintiffs lacked standing on the claim that their votes were nullified by President Obama’s unilateral actions because “‘nullification’ necessitates the absence of legislative remedy” and thus “plaintiff legislators must be without legislative recourse before they may turn to the courts to seek their desired remedy”).

¹⁴² See, e.g., Scott Detrow, *Obama Warns Trump Against Relying on Executive Power*, NPR (Dec. 19, 2016, 5:00 AM), <http://www.npr.org/2016/12/19/505860058/obama-warns-trump-against-relying-on-executive-power> [<https://perma.cc/TGQ9-NA79>] (quoting Obama as stating, “If House Republicans are really concerned about me taking too many executive actions, the best solution to that is passing bills. . . . Pass a bill. Solve a problem.”); Ezra Klein, Opinion, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST: WONKBLOG (July 13, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/> [<https://perma.cc/LR94-49YR>] (noting that the 112th Congress was “hideously unpopular,” “incredibly polarized,” and shirked basic duties such as passing legislation); Thomas E. Mann & Norman J. Ornstein, Opinion, *Let’s Just Say It: The Republicans Are the Problem.*, WASH. POST (Apr. 27, 2012), https://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUIT_story.html?utm_term=.5c31ad6d6b01 [<http://perma.cc/>]

the Court never reached the merits of the case, it never determined whether or not President Obama's unilateral drone strikes in Libya were lawful.¹⁴³

III. DOMESTIC AUTHORITY TO CONDUCT DRONE OPERATIONS

A. *The 2001 Authorization for Use of Military Force*

Congress passed the 2001 AUMF in response to the attacks of September 11, granting the President broad authorization to target those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁴⁴ While the AUMF permits the president to use “all necessary and appropriate force” as he determines,¹⁴⁵ this generous language is more limited compared to what the Bush Administration drafted.¹⁴⁶ The original draft language included an additional grant of power to the president “to use all necessary and appropriate force . . . to deter and pre-empt any future acts of terrorism or aggression against the United States.”¹⁴⁷ Congress declined to authorize such a vast and amorphous grant of power.¹⁴⁸ However, the resulting statute provided the legal authorization necessary to pursue al Qaeda and the Taliban.¹⁴⁹ Still, limiting the statutory language in this way suggests congressional intent to require the President to seek additional authorization for action against terrorist targets not affiliated with the attacks of September 11.¹⁵⁰

President Obama subsequently interpreted the AUMF to authorize operations against new and diffuse targets with increasingly attenuated connections to those targeted by the original authorization.¹⁵¹

GS9A-63X8] (“We have been studying Washington politics and Congress for more than 40 years, and never have we seen them this dysfunctional.”).

¹⁴³ See *Kucinich*, 821 F. Supp. 2d at 125.

¹⁴⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁴⁵ *Id.*

¹⁴⁶ 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); Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J. 115, 115–16 (2014) (noting that “Congress pointedly refused to declare a ‘war on terrorism.’ The use of force Congress authorized was instead directed at those who bore responsibility for the 9/11 attacks—namely, al Qaeda and the Taliban.”); see also Ackerman, *supra* note 21.

¹⁴⁷ 147 Cong. Rec. 18,136 (2001); see Abramowitz, *supra* note 146, at 73.

¹⁴⁸ See Abramowitz, *supra* note 146, at 73–74.

¹⁴⁹ See Daskal & Vladeck, *supra* note 146, at 116.

¹⁵⁰ See Ackerman, *supra* note 21.

¹⁵¹ See ROBERT CHESNEY ET AL., HOOVER INST., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 2–4 (2013), <http://www.hoover.org/research/statutory->

For example, in February 2014, al Qaeda declared that it was no longer affiliated with or related to ISIS.¹⁵² This posed an issue for the Obama Administration, which had to determine if ISIS, no longer connected to al Qaeda, was still considered an authorized target under the 2001 AUMF.¹⁵³ Although some argue that ISIS does qualify as such due to its “long-standing al-Qaeda ties and parallel ambitions,” others disagree.¹⁵⁴ Former Assistant Attorney General Goldsmith, for one, raised concern over statements from government officials expressing the belief that this expulsion of ISIS from al Qaeda “removes the group from the short list of al-Qaeda ‘associates’ that the president has virtually unlimited powers to strike under [the 2001 AUMF].”¹⁵⁵ Such statements indicate that the administration had previously determined that the 2001 AUMF authorized ISIS as a target, even though the organization operated out of Syria and was not formed until 2004.¹⁵⁶ This decision to target ISIS under the AUMF indicates that the AUMF is used to target groups that do not clearly, or even remotely, fall within its scope.¹⁵⁷ In a 2013 hearing before the Senate

framework-next-generation-terrorist-threats [https://perma.cc/A768-QRK9] (asserting that the “[g]rowing [o]bsolescence of the AUMF” results from three main factors, including the deterioration of “core” al Qaeda, the decreased relevance of the Taliban, and “significant new threats . . . emerging, ones that are not easily shoehorned into the current AUMF framework”); see also *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 Servs.*, 113th Cong. 19 (2013) [hereinafter *Hearing Before the S. Comm. on Armed Servs.*] (statement of Sen. John McCain) (“We are now killing people in the Haqqani Network, right? Is that correct, Mr. Secretary? The reason why I bring that up, we did not even designate the Haqqani Network as a terrorist organization until 2012. There are published reports . . . that we killed people where their direct association with al Qaeda is tenuous.”).

¹⁵² See Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST (Feb. 3, 2014), https://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html?utm_term=.6f95010ec310 [https://perma.cc/K3S4-CUDG]; see also Karen DeYoung & Greg Miller, *Al-Qaeda’s Expulsion of Islamist Group in Syria Prompts U.S. Debate*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/world/national-security/al-qaedas-excommunication-of-islamist-group-in-syria-prompts-high-level-us-debate/2014/02/10/339d8654-8f4e-11e3-b46a-5a3d0d2130da_story.html?utm_term=.a0a23db587ce [https://perma.cc/UUF2-NXB6].

¹⁵³ See DeYoung & Miller, *supra* note 152; Goldsmith, *supra* note 27. The U.S. government did, in fact, determine that ISIS still fell within the bounds of the AUMF because, even though it was no longer affiliated with al Qaeda, it continued to fight the United States and laud bin Laden. See LEGAL AND POLICY FRAMEWORKS, *supra* note 11, at 5–6.

¹⁵⁴ DeYoung & Miller, *supra* note 152.

¹⁵⁵ Goldsmith, *supra* note 27 (quoting DeYoung & Miller, *supra* note 152).

¹⁵⁶ See Goldsmith, *supra* note 27; see also *Counterterrorism Guide: Islamic State of Iraq and the Levant (ISIL)*, NAT’L COUNTERTERRORISM CTR., <https://www.dni.gov/nctc/groups/isil.html> [https://perma.cc/E8RS-6G2Q].

¹⁵⁷ See, e.g., *Hearing Before the S. Comm. on Armed Servs.*, *supra* note 151, at 18–20 (state-

Committee on Armed Services, Senator John McCain, in response to Assistant Secretary of Defense Michael Sheehan—who testified that he did not think the AUMF needed to be amended—remarked:

So I must say I do not blame you because basically you have carte blanche as to what you are doing throughout the world, and we believe [the AUMF] does not need to be repealed. But it is hard for me to understand why you would oppose a revision of the AUMF in light of the dramatically changed landscape that we have in this war on Islamic extremism, al Qaeda, and others.¹⁵⁸

Similar arguments relate to targets within Yemen, even when they share the al Qaeda name.¹⁵⁹ For example, when former CIA Director David Petraeus sought expanded authorization to conduct signature strikes in Yemen, his request was criticized as an attempt to circumvent Congress’s refusal to authorize “waging an endless war on terrorism,”¹⁶⁰ as evidenced by Congress’s refusal to include the broader draft AUMF language originally sought by the Bush Administration.¹⁶¹ Although the text of the AUMF is broad and powerful,¹⁶² if there were no limits to the language, and consequently no limits on the military operations which the President would be authorized to carry out, the AUMF would essentially be a “blank check.”¹⁶³ Congress’s decision to amend the Bush Administration’s broad draft lan-

ment of Sen. John McCain); Goldsmith, *supra* note 27 (remarking that such statements “highlight[] the non-transparent method by which the Executive determines with whom we are at war. Does Congress know that the Executive branch had determined that the AUMF authorized force against ISIS? Did the Senate Arms Services Committee know? (When DOD officials suggested at a [Senate Armed Services Committee] hearing last May that the AUMF authorized force against the Nusra Front in Syria, many Senators on the SASC expressed surprise)”).

¹⁵⁸ *Id.* at 19–20.

¹⁵⁹ See Ackerman, *supra* note 21 (asserting that even if the Yemeni group shares the al Qaeda name, it is “on its own” as evidenced by the group’s continuation despite “al-Qaeda’s failure to replace bin Laden with a credible leadership structure”).

¹⁶⁰ *Id.* But see Robert Chesney, *AQAP Is Not Beyond the AUMF: A Response to Ackerman*, LAWFARE (Apr. 24, 2012, 10:12 AM), <https://www.lawfareblog.com/aqap-not-beyond-aumf-response-ackerman> [<https://perma.cc/6XDA-C75T>] (arguing that although AQAP conducts its day-to-day operations independent of “core al Qaeda,” its ties are still sufficient enough that it falls under the 2001 AUMF).

¹⁶¹ See Daskal & Vladeck, *supra* note 146, at 115–16.

¹⁶² See *id.*

¹⁶³ Ackerman, *supra* note 21; cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” (citation omitted)).

guage suggests that such an expansive reading of the AUMF is inappropriate. It is therefore not only sensible, but necessary, to draw lines in the sand past which the AUMF's legal authority may not extend.¹⁶⁴ One sensible line might prohibit drone operations in countries outside the Iraq and Afghanistan conflicts; another line might firmly eliminate AUMF authorization to target organizations that are offshoots or affiliates of al Qaeda and who took no part in the September 11 attacks or planning.¹⁶⁵

B. *The War Powers Resolution*

Congress passed the WPR following the end of the Vietnam War to prevent what it considered to be an abuse of executive war powers in an ongoing conflict.¹⁶⁶ The statute, therefore, delineates numerous reporting requirements that the President must fulfill in order to deploy and maintain U.S. forces in hostilities.¹⁶⁷ They include that the President must (1) consult with Congress, whenever possible, prior to inserting troops "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,"¹⁶⁸ and (2) provide a written report of such actions within forty-eight hours.¹⁶⁹

Historically, no U.S. President has accepted the WPR outright, generally viewing it as an infringement of the President's power as Commander in Chief.¹⁷⁰ When Presidents do take executive action, they often refer to the WPR with strategic language, such as "consistent with" the WPR instead of "pursuant to" the WPR.¹⁷¹ Some Presi-

¹⁶⁴ Cf. CHESNEY ET AL., *supra* note 151, at 12–13 (arguing that "a use of force authorization does not need to be unqualified, especially with respect to locations in the world in which U.S. troops are not in a day-to-day sense deployed and confronting the enemy").

¹⁶⁵ *See id.*

¹⁶⁶ *See* Chanock, *supra* note 30, at 454–55.

¹⁶⁷ *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548 (2012)); *see also* Chanock, *supra* note 30, at 455–56.

¹⁶⁸ 50 U.S.C. § 1542; *see* MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 1, 3–4 (2017).

¹⁶⁹ 50 U.S.C. § 1543(a) (applicable when Congress has not declared war).

¹⁷⁰ *See* Alan Greenblatt, *Why the War Powers Act Doesn't Work*, NPR (June 16, 2011, 1:01 PM), <http://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work> [<https://perma.cc/VL4L-6PFT>].

¹⁷¹ *See* Andrew Rudalevige, *War Powers and the White House*, WASH. POST: MONKEY CAGE (Sept. 10, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/09/10/war-powers-and-the-white-house/?utm_term=.34083dff5b7d [<https://perma.cc/H96F-RLVK>]; *see also* Greenblatt, *supra* note 170.

dents have even seemingly disregarded it as they carried out operations.¹⁷²

Regardless of the legitimacy of the statute or any potential efforts to mitigate its requirements, one major issue transcends these considerations: the statute does not contemplate the capabilities of today's technology, specifically the ability to carry out international drone strikes.¹⁷³ This is important for two main reasons. First, the limits set forth by the WPR do not provide realistic restrictions with regards to drone operations.¹⁷⁴ Drone strikes can be completed successfully within hours or days, rendering the WPR's sixty-day limit obsolete.¹⁷⁵ Second, based on the historical use of drones, as well as the patterns of behavior from previous Presidents, drone operations that are not well known to the public or Congress might not be reported as hostilities under the WPR.¹⁷⁶ Even a President who intends to comply with the WPR could reasonably interpret that the hostilities provision of the WPR does not require reports of drone strikes where there is no danger to U.S. personnel who conduct the strikes from a remote location.¹⁷⁷ Therefore, the limitations and monitoring provisions of the WPR can be easily circumvented in the context of drone operations.¹⁷⁸

IV. AN OPPORTUNITY EXISTS FOR THE PRESIDENT TO CLAIM AUGMENTED POWERS

The concept of customary authority is an uncommon, and sometimes quickly dismissed, aspect of constitutional law. Justice Frankfurter described customary authority in his *Youngstown* concurrence as

a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the

¹⁷² See, e.g., Chanock, *supra* note 30, at 456–60 (noting that President Clinton exceeded the sixty-day mark at which he was supposed to terminate operations during the conflict in Kosovo, while others have utilized questionable definitions of triggering events to confuse the start date of the sixty-day countdown); Press Release, John Boehner, Speaker of the House of Representatives, Boehner: “The Constitution Requires the President to ‘Take Care that the Laws Be Faithfully Executed,’ and One of Those Laws is the War Powers Resolution” (June 14, 2011), <http://www.speaker.gov/press-release/speaker-boehner-challenges-president-obama-legal-justification-continued-operations> [<https://perma.cc/QCX5-9CQY>].

¹⁷³ See generally Chanock, *supra* note 30.

¹⁷⁴ See *id.* at 465–68.

¹⁷⁵ See *id.* at 466.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 454–56, 465–68.

Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.¹⁷⁹

Though he explored the concept of customary authority, Justice Frankfurter dismissed the possibility that it existed in *Youngstown*, where only three comparable Presidential actions preceded the seizure at issue.¹⁸⁰ He explained that where a custom of executive land withdrawals in conflict with a statute existed in *United States v. Midwest Oil Co.*,¹⁸¹ the custom was based on 252 instances of land withdrawals spanning more than eighty years.¹⁸² What remained undetermined, however, was where the line between custom and insufficient practice lies.

In *Midwest Oil*, the President withdrew certain lands from tracts designated by statute to be free for occupation and purchase.¹⁸³ The withdrawal reserved for the government parcels of land rich in natural resources.¹⁸⁴ The Midwest Oil Company began extracting oil from one such parcel after the land had been withdrawn.¹⁸⁵ When the government filed a Bill in Equity against the company, Midwest sued to recover the land and revenue from oil it had extracted on the grounds that the withdrawal order was invalid.¹⁸⁶ The Court found the order valid because “the long-continued practice, the acquiescence of Congress, as well as the decisions of the courts, all show that the President had the power to make the order.”¹⁸⁷ The Court acknowledged that the President had no statutory authority for the action, but that Congress knew of Presidents making such withdrawals through “at least 252 Executive Orders . . . for useful, though non-statutory purposes.”¹⁸⁸ Explaining how “these facts and [supporting caselaw] prove a usage [but] they do not establish its validity,” the Court noted that

¹⁷⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

¹⁸⁰ *See id.* at 610–13 (Frankfurter, J., concurring). Indeed, the majority held that the President lacked constitutional authority to seize the steel mills and acknowledged that Congress had explicitly declined to give the Executive that power by law when previously considered, thereby invalidating the possible argument of congressional acquiescence. *See id.* at 585–89.

¹⁸¹ 236 U.S. 459 (1915).

¹⁸² *Youngstown*, 343 U.S. at 611 (Frankfurter, J., concurring).

¹⁸³ *Midwest Oil*, 236 U.S. at 467.

¹⁸⁴ *Id.* at 466–67.

¹⁸⁵ *Id.* at 467–68.

¹⁸⁶ *Id.* at 467–69.

¹⁸⁷ *Id.* at 483.

¹⁸⁸ *Id.* at 471.

officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that *in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself*—even when the validity of the practice is the subject of investigation.¹⁸⁹

The Court went on to caution that the existence of caselaw supporting such land withdrawals does not “mean that the Executive can by his course of action create a power,” but that through longstanding practice and congressional acquiescence, executive action can be seen as being done with congressional consent.¹⁹⁰

Certain aspects of *Midwest Oil* must be distinguished from the context of drone strikes. Land withdrawals occur domestically and fall far afield of the national security powers of the Executive.¹⁹¹ Because national security issues implicate more serious and time-critical concerns, the Executive necessarily tends to have greater powers in this realm.¹⁹² Further, while the *Midwest Oil* court cited caselaw supporting the precise kind of land withdrawals at issue,¹⁹³ comparable caselaw does not yet exist in the context of unilateral military action such as drone strikes, mainly because such cases have not survived to reach the merits stage.¹⁹⁴ Interpolation is therefore required to apply caselaw on executive authority to the context of drone strikes.

¹⁸⁹ *Id.* at 472–73 (emphasis added).

¹⁹⁰ *Id.* at 474.

¹⁹¹ *See id.* at 466–70.

¹⁹² *Cf.* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 117–19 (1990) (“This simple, three-part combination of executive initiative, congressional acquiescence, and judicial tolerance explains why the president almost invariably wins in foreign affairs.”). Koh provides this example: “If asked . . . whether the president can impose economic sanctions on Libya or can bomb Colonel Qaddafi’s headquarters, the president’s lawyer must answer three questions: (1) Do we have the legal authority to act? (2) Can Congress stop us? and (3) Can anyone challenge our action in court?” *Id.* at 117–18.

¹⁹³ *Midwest Oil*, 236 U.S. at 471–74.

¹⁹⁴ *See, e.g.,* *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007) (dismissing extraordinary rendition case because the state secrets doctrine prevented disclosure of information necessary to decide the case on the merits); *Conyers v. Reagan*, 765 F.2d 1124, 1127–29 (D.C. Cir. 1985) (congressman challenged invasion of Grenada but action had ceased and he failed to show that the case was “capable of repetition, yet evading review” (quoting *Sw. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911))); *Whitney v. Obama*, 845 F. Supp. 2d 136, 138–40 (D.D.C. 2012) (case challenging U.S. military action in Libya dismissed as moot where action had ceased and petitioner did not show that the alleged harm is “capable of repetition, yet evade-

The Supreme Court again acknowledged the existence of customary authority in *Dames & Moore v. Regan*,¹⁹⁵ when it evaluated the legality of an executive order suspending claims, nullifying Iranian attachments, and diverting those claims to a tribunal following the Iranian hostage crisis.¹⁹⁶ While the Court found statutory authority for the nullifications in the International Emergency Economic Powers Act,¹⁹⁷ no such statutory authority existed for the suspension of U.S. citizens' claims against Iran.¹⁹⁸ Instead, the Court looked favorably at the validity of the President's suspension of the claims because there was a "longstanding practice" of the President having the power to settle international claims and because Congress both knew of this practice and acquiesced to it.¹⁹⁹ Again, the Court did not go so far as to create a bright-line rule, but found that where Presidents had settled claims since as early as 1799, and at least eighty such instances occurred over the one-hundred-year span of 1817 to 1917, customary authority existed.²⁰⁰ Consequently, *Dames & Moore* illustrates that the concept of customary authority is one recognized by the highest court in the land, even specifically within the national security context.

Applying the *Dames & Moore* framework to unilateral drone strikes, President Trump and his successors can claim there is the customary authority to conduct these operations overseas, independent of congressional approval and even outside a theater of war. All three elements of customary authority—practice, congressional notice, and congressional acquiescence²⁰¹—are present.

First, there is now a longstanding practice of drone strikes conducted overseas to target terrorist organizations, their leadership, and their members.²⁰² At a minimum, this practice began in 2001²⁰³ and continues through the time of this writing.²⁰⁴ This practice has in-

ing review"); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (case challenging U.S. action in Libya under the WPR dismissed due to lack of standing); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45–47 (D.D.C. 2010) (finding political question doctrine barred petitioner's claim that would require the court to determine propriety of President's potential decision to authorize a specific drone strike).

¹⁹⁵ 453 U.S. 654 (1981).

¹⁹⁶ *See id.* at 660.

¹⁹⁷ Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701–1707 (2012)).

¹⁹⁸ *See Dames & Moore*, 453 U.S. at 675–78.

¹⁹⁹ *Id.* at 678–80, 686.

²⁰⁰ *See id.* at 679 n.8.

²⁰¹ *See id.* at 686.

²⁰² *See supra* Section II.B.

²⁰³ *See* Bowden, *supra* note 82.

²⁰⁴ *See, e.g., First Drone Strike Under Donald Trump Kills Two Militants in Pakistan,*

creased dramatically over the years, not just in the number of strikes and casualties but in the countries in which strikes are conducted.²⁰⁵ A 2016 report on drone data released by the Obama Administration regarding only strikes in “areas outside of active hostilities” (which, according to the report, excludes Syria, Iraq, and Afghanistan) declared that there were 473 strikes between January 20, 2009 and December 31, 2015.²⁰⁶

Second, congressional knowledge of these operations is beyond doubt. In recent years, media coverage and public criticism of these operations has increased.²⁰⁷ Even congressional hearings²⁰⁸ and presidential speeches have brought attention to the subject.²⁰⁹ But even more importantly, since 2009, congressional committees have been briefed on drone strikes outside areas of active hostilities.²¹⁰ President Obama confirmed, “After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike.”²¹¹ Further, the Obama Administration made an “unprecedented” move when it publicly released the 2016 report on strikes conducted outside recognized conflicts.²¹²

Third, Congress has not only declined to take action to curb or prevent these operations, but literally did nothing when presented with the opportunity to pass a new AUMF.²¹³ Voicing the frustration of the Obama Administration, Press Secretary Josh Earnest remarked, “[W]e see Congress eager to weigh in and advocate for the role that they should have that would prevent diplomacy, while at the

LIVEMINT (Mar. 2, 2017, 5:26 PM), <http://www.livemint.com/Politics/eZbRCT6VDQ8nm7s2udi5VN/First-drone-strike-under-Donald-Trump-kills-two-militants-in.html> [<https://perma.cc/4PKW-QXJN>]; Woody, *supra* note 6.

²⁰⁵ See *supra* Section II.B.

²⁰⁶ DNI DRONE REPORT, *supra* note 19, at 1.

²⁰⁷ See *supra* Section II.B.

²⁰⁸ See, e.g., *Hearing Before the S. Comm. on Armed Servs.*, *supra* note 151.

²⁰⁹ See, e.g., Obama NDU Speech, *supra* note 13.

²¹⁰ *Id.*

²¹¹ *Id.* It is important to note that Obama considers the AUMF to be the authorization for these strikes. See *id.* See generally LEGAL AND POLICY FRAMEWORKS, *supra* note 11.

²¹² Shane, *supra* note 11.

²¹³ See Scott Wong, *GOP: Obama War Request Is Dead*, HILL (Apr. 13, 2015, 1:24 PM), <http://thehill.com/policy/defense/238619-gop-obama-war-request-is-dead> [<https://perma.cc/36SC-6P8E>] (commenting that due to “McCarthy’s declaration [that the AUMF would not get the votes it needs], which was unscripted and came during his first pen-and-pad with reporters as House majority leader, means it’s now unlikely that Obama’s war powers measure will even get a vote on the House floor”).

same time you hear members of Congress who are unwilling to take any steps that would constrain the president's ability to wage war."²¹⁴ This echoed an earlier sentiment voiced by President Obama in a speech at the National Defense University where he stated, "America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us. We have to be mindful of James Madison's warning that 'No nation could preserve its freedom in the midst of continual warfare.'"²¹⁵ Voting down a particular measure, such as Obama's proposed 2015 AUMF to target ISIL, could reasonably be considered congressional refusal to authorize that action and would place the Executive's power at its weakest in the third *Youngstown* category; here, however, Congress took no such stance.²¹⁶ By declining to even vote on the proposed bill,²¹⁷ Congress comfortably remained neutral, and kept presidential authority in the second *Youngstown* category.²¹⁸

The most practical function of the statute proposed by this Note is to provide a mechanism with which to rein in executive abuses. A President may well disregard or dismiss this statute as a great many have done with the WPR.²¹⁹ The key difference here is that the proposed legislation provides a comparatively straightforward set of requirements that the President must satisfy before conducting specific types of operations in specific locations. This is much clearer metric than the well-intentioned but vague provisions of the WPR.²²⁰ The statute would also place executive action falling under its terms into *Youngstown* category three, where challenges to the merits of executive action are most likely to be sustained.²²¹ Violations of the proposed statute will be easier to spot, easier to prove, and therefore more effective in curbing executive abuses, whether that is simply through public political pressure or extended all the way to impeachment.

One need not subscribe to the concept of customary authority to recognize that extensive practice of legally questionable, or outright

²¹⁴ *Id.*

²¹⁵ Obama NDU Speech, *supra* note 13.

²¹⁶ See Wong, *supra* note 213.

²¹⁷ See *id.*

²¹⁸ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . .").

²¹⁹ See Greenblatt, *supra* note 170.

²²⁰ See generally War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2012)); Chanock, *supra* note 30, at 456.

²²¹ See *supra* notes 66-67 and accompanying text.

illegal, action is something that begs remedy. This call for change can be answered by those who simply desire above-board operations and are concerned about long-term repercussions for the United States both domestically and internationally. After all, President Obama concluded, "From our use of drones to the detention of terrorist suspects, the decisions that we are making now will define the type of nation—and world—that we leave to our children."²²²

V. PROPOSED STATUTE ADDRESSING DRONE OPERATIONS OUTSIDE OF RECOGNIZED CONFLICTS

A. *A Statutory Solution*

Because the President acquired the authority to conduct drone operations by congressional *inaction*, the 115th Congress must break this pattern and provide reparative legislation. This Note proposes legislation defining parameters for signature strikes conducted by drones and limiting the circumstances in which this use of force may be exercised. The legislation would effectively limit executive authority without posing serious separation of powers issues. Unlike the AUMF, instead of focusing on *who* the drone strike targets, the legislation focuses on the operation itself. Most importantly, it prevents potential misuse or abuse of signature strikes outside areas of active hostilities, where the current legal authority for use of force is the most questionable.²²³ The proposed language of the statute is as follows:

A bill to limit international drone strikes outside areas of active hostilities.

Whereas multiple terrorist organizations have attacked United States interests overseas and waged war on a stable, peaceful way of life for the people of Syria, Somalia, and Yemen, among others;

Whereas extremist threats are quickly evolving and diffuse with respect to geographic location, leadership, and specific agendas;

Whereas the United States seeks to eradicate the threat of terrorism through lawful, targeted action in addition to political and diplomatic measures through our international partnerships;

²²² Obama NDU Speech, *supra* note 13.

²²³ See *supra* Section II.B & Part III.

Section 1. Short Title

This Act may be cited as the “Signature Strike Act of 2018.”

Section 2. Authorized Operations

(a) Signature strikes²²⁴ shall not be conducted except in the following circumstances:

(1) Areas of active hostilities recognized by Congress through:

i. Authorization for Use of Military Force specific to the country or countries in which such strikes are to be carried out; or

ii. Indirect congressional authorization through the funding and supplying of such military efforts, so long as such appropriations contain the clause that such appropriations “constitute authorization for the purpose of the Signature Strike Act of 2018.”

(2) Established conflict areas in Iraq and Afghanistan.

(b) This Act does not limit personality strikes of known individuals based on classified intelligence.

Defining the operation works in a similar way to military rules of engagement or law enforcement uses of force policy—there are set criteria for when one can act, and the circumstances dictate the actions permitted.²²⁵ It is far easier to define the operation than it is to categorize the targets. The people on the ground could, at a glance, just as easily be local townspeople or insurgents. Additionally, the proposed statute seeks to limit the legal justifications made by stretching undefined words—such as “imminence”—which could lead to more diffuse operations.²²⁶ Because the operation is easier to define, it will be easier to know when and how statutory limitations apply.

²²⁴ The term “signature strike” refers to drone strikes targeting individuals based on their conduct and not on their specific, known identities. See Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 701 n.93 (2014); see also Paul D. Shinkman, *Obama, CIA Cornered into Troubling ‘Signature Strikes,’* U.S. NEWS & WORLD REP. (June 18, 2015, 10:54 AM), <https://www.usnews.com/news/articles/2015/06/18/obama-cia-returning-to-controversial-drone-signature-strikes> [<https://perma.cc/N89B-TSSF>]; David Rohde, *What the United States Owes Warren Weinstein*, ATLANTIC (Apr. 28, 2015), <https://www.theatlantic.com/international/archive/2015/04/warren-weinstein-drones/391655/> [<https://perma.cc/5WWG-LS7A>].

²²⁵ See generally *Police Use of Force*, NAT’L INST. JUSTICE, <https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx> [<https://perma.cc/7RQ4-ZJEK>]; *Rules of Engagement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/rules-of-engagement-military-directives> [<https://perma.cc/3VVH-Z756>].

²²⁶ See *Hearing Before the S. Comm. on Armed Servs.*, *supra* note 151, at 107 (statement of Kenneth Roth, Executive Director of Human Rights Watch), (“The policing power allows

The aim of these measures is not to cut down executive authority or tie the hands of U.S. operators overseas. Rather, the goal is to limit the actions a single, powerful individual who can authorize the use of force outside of recognized theaters of war. Under section 2(a)(2), signature strikes in the conflicts in Iraq and Afghanistan are unambiguously permitted. Where the limitations work to prevent the use of augmented, and continually augmenting, executive authority is in regulating uses of force outside of those congressionally recognized conflicts. Additionally, because the proposed statute applies only to signature strikes, it would not impede intelligence-driven personality strikes used to take out top leadership of terrorist organizations.²²⁷

B. Counterarguments to Address

1. It Would Be Simpler to Draft a New AUMF

There have been numerous calls for a new AUMF to solve gaps in the law as it relates to drone strikes. The Obama Administration pushed for a new AUMF for targeting ISIS and went as far as drafting a joint resolution that was introduced to Congress on February 11, 2015.²²⁸ The year prior, Representative Frank Wolf unsuccessfully proposed a new, sweeping AUMF that would have authorized targeting virtually anyone loosely tied to terrorism.²²⁹ The failure of these endeavors indicates the practical difficulty of passing a new AUMF.

Additionally, while rewriting the 2001 AUMF or creating a new one altogether might mark a step in the right direction, it does not eliminate the problems inherent to AUMFs. By their nature, AUMFs can be either dangerously overbroad or so narrow that they quickly become obsolete.²³⁰ Because a large part of their effectiveness derives

drones to be used to meet an imminent threat. But there is a real question as to whether even that limitation is being respected, given the lack of transparency and the vague standards being used.”).

²²⁷ See Rohde, *supra* note 224.

²²⁸ See Letter from President Barack Obama to Congress, Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [https://perma.cc/8AV7-2EGQ].

²²⁹ Hayes Brown, *Congressman Introduces Bill to Authorize Military Force Virtually Everywhere*, THINKPROGRESS (Sept. 4, 2014, 4:09 PM), <https://thinkprogress.org/congressman-introduces-bill-to-authorize-military-force-virtually-everywhere-c6c459c3d157#.7alvc53po> [https://perma.cc/924Y-JTSD].

²³⁰ See CHESNEY ET AL., *supra* note 151, at 8, 10 (“A central challenge in designing such a statute [as an AUMF] is to provide sufficient flexibility to meet the changing threat environment while at the same time cabining discretion to use force and subjecting it to the sort of serious constraints that confer legitimacy and ensure sound strategic deliberation.”).

from the chosen language, as well as the pace of change in the conflict environment, it is difficult to draft them in a way that avoids these pitfalls.²³¹ Further, due to the nature of the adversaries of the United States, it is difficult to particularly codify a target since terrorist groups are constantly evolving, breaking off, and forming different alliances.²³² The shortcomings of the AUMF model, coupled with congressional inaction, caused the current untenable situation.²³³ Drafting a new AUMF would not necessarily fix the current predicament, and perhaps might only extend the same consequences we face today.²³⁴

2. *Restricting Signature Strikes Has Limited Value*

Critics may also argue that the same ends of these signature strikes could be met by different means, such as through conventional bombing from manned aircraft. While true, this does not undermine the goal set forth by the proposed statute. Discrete operations, such as signature strikes, which in effect are more difficult to hold a party accountable for, raise legitimacy concerns.²³⁵ President Obama admitted as much, stating, “The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites. It can also lead a President and his team to view drone strikes as a cure-all for terrorism.”²³⁶ Given that drone strikes are generally more precise than conventional bombing,²³⁷ the U.S. Government should not be restricted from their use altogether. Rather, it is important to

²³¹ See generally *id.* at 8–12.

²³² See *id.* at 10 (“The emerging array of terrorist groups across North Africa, with varying types and degrees of links, and posing potentially different (and again, changing) threats to the United States, illustrates the difficulties of crafting force authorizations that are neither too narrow nor too broad.”).

²³³ See *supra* Section III.A.

²³⁴ See, e.g., CHESNEY ET AL., *supra* note 151, at 10 (recognizing that if Congress passed a new AUMF defining specific target groups, it would require Congress to “stay engaged politically and legally as threats evolve and emerge; it must debate and approve any significant expansions of the conflict. A downside of the retail approach is that Congress probably cannot or will not, on a continuing basis, authorize force quickly or robustly enough to meet the threat . . .”).

²³⁵ See *id.* at 13.

²³⁶ Obama NDU Speech, *supra* note 13.

²³⁷ See Michael V. Hayden, Opinion, *To Keep America Safe, Embrace Drone Warfare*, N.Y. TIMES (Feb. 19, 2016) https://www.nytimes.com/2016/02/21/opinion/sunday/drone-warfare-precise-effective-imperfect.html?_r=0 [https://perma.cc/NP5W-KSBW]. Many high-ranking government officials have lauded the precision of drone strikes and continuing to use them; if they are as imprecise as critics allege, it would mean the government has committed ongoing violations of international humanitarian law. *But see* Steven J. Barela & Avery Plaw, *The Precision of Drones: Problems with the New Data and New Claims*, E-INT’L REL. (Aug. 23, 2016), <http://www.e-ir.info/2016/08/23/the-precision-of-drones-problems-with-the-new-data-and-new-claims/>

set reasonable boundaries to ensure the lawfulness of these strikes. Therefore, in order to conduct operations above-board and maintain credibility in the international community, it is important for the United States to maintain and follow legitimate legal standards for its drone operations.²³⁸

CONCLUSION

President Trump inherited perhaps the most powerful presidency to date. This includes executive authority expanded by years of consistent, escalating practice on the part of his two predecessors in conducting international drone strikes. In isolation, none of these drone strikes can augment executive authority; however, the whole is greater than the sum of its parts—today, a Commander in Chief may act outside theaters of war, against those merely “affiliated” with the targets authorized by law,²³⁹ or both. This invites an opportunity for President Trump to assert that he can bypass the 115th Congress and address his international concerns with missiles and joysticks. Due to the serious and irreversible ramifications of such unilateral drone strikes, Congress must move swiftly to prevent further unchecked use of such operations.

[<https://perma.cc/G79M-YB5K>] (study into claims that drones were less precise than conventional airstrikes found that there was not enough drone data to support these claims).

²³⁸ See CHESNEY ET AL., *supra* note 151, at 5 (arguing that “at some point even strained interpretations of the AUMF will not be possible, and that even before we reach that point, the strained interpretations will call into question the legitimacy of congressional and democratic backing for the president’s uses of force”); see also Chanock, *supra* note 30, at 464 (noting that destruction and loss of life caused by drone strikes has turned some individuals towards extremism). Obama noted that special operations missions are not a feasible alternative to drone strikes in many situations and that even those missions’ value is complicated by international repercussions: while the raid on Osama bin Laden’s compound was successful, “even then, the cost to our relationship with Pakistan—and the backlash among the Pakistani public over encroachment on their territory—was so severe that we are just now beginning to rebuild this important partnership.” Obama NDU Speech, *supra* note 13.

²³⁹ Obama NDU Speech, *supra* note 13.