

NOTE

TO KNOW OUR ENEMY: HOW AND WHEN THE INTERNATIONAL LAWS OF WAR DEFINE WHOM THE PRESIDENT MAY FIGHT IN THE WAR ON TERROR

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Within one week of the terrorist attacks on September 11, 2001, the United States Congress authorized the President to hunt down those responsible. Through the Authorization for the Use of Military Force (AUMF), Congress granted the President the power to mobilize the military and destroy the terrorist organizations that planned and carried out the attack. The result: the “War on Terror”—a military engagement lasting almost two decades and three presidential administrations.

In response to critics of the war’s longevity, the Executive Branch has flashed its ace in the hole: “co-belligerency,” a theory stemming from the international laws of war that the Executive Branch relies upon to justify continued military action. Critical of such reliance, Boston University School of Law Professor Rebecca Ingber challenges the validity of the theory itself. In a fascinating and thought-provoking article in 2017, she argues that co-belligerency is not as well established under the international laws of war as the Executive Branch believes. She thus calls on the academic community to investigate whether alternative norms of international law may better apply to the AUMF.

This Note responds to Professor Ingber’s piece by suggesting that before engaging in her analysis, we must first ask

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whether it is even appropriate to rely upon any international law to determine the scope of Presidential authority in the War on Terror. Through an analysis of Judge Brett Kavanaugh's concurring opinion in Al-Bihani v. Obama, this Note asserts that international law may only influence Presidential wartime authority when Congress has explicitly incorporated it into domestic law.

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INTRODUCTION

Being “at war” today does not mean the same thing it meant twenty years ago. Prior to 2001, the United States military had a reputation for being engaged in defined conflicts. In fact, asking most twentieth-century combat veterans which war they served in warrants a rather predictable response: World War II, Korea, Vietnam, the Persian Gulf War. Each of these conflicts has a relatively clear start and end date.¹ We know what the major battles were, where these battles were fought, and we can clearly see how each conflict left concrete changes on a political map.² While these are all relevant facts in understanding United States military history, what is most

¹ For example, the United States entered military operations during World War II during the Japanese attack on Pearl Harbor on December 7, 1941, and concluded its military operations in 1945 upon the surrender of Germany and Japan. For further details on these dates and additional key events during World War II, see *The Timeline of World War II*, PBS (2007), https://www.pbs.org/thewar/at_war_timeline_1941.htm [<https://perma.cc/72PT-KPCK>].

² For example, the end of the Korean War solidified the political border between North and South Korea across the thirty-eighth Parallel Demilitarized Zone (DMZ), which was created at the end of World War II. See *Demilitarized Zone: North Korea*, BRITANNICA, <https://www.britannica.com/place/demilitarized-zone-korean-peninsula> [<https://perma.cc/8D2C-32KT>] (describing the effects of the

commonly known about each of these conflicts is with *whom* the United States fought. In each war, the United States had a clearly defined enemy, each of whom could be identified on any common atlas.

Post-9/11 veterans provide a different answer. As a nation, we have for almost twenty years committed troops, secured funding, and sacrificed lives—both American and foreign—in the “War on Terror.”³ While many of these veterans may identify as having served in Iraq or Afghanistan, it is not immediately clear *whom* they actually fought.⁴ “Terror” is not a valid location on Google Maps, nor is it a country upon which Congress will likely make a formal Article I declaration of war. As we understand it today, the enemy whom this elusive nation of terror harbors may be synonymous with those “terrorists” who committed the attacks on the United States on September 11, 2001. But even so, this definition fails to place a clear face on precisely who our enemies are.

The identification of the enemy carries legal implications. On September 18, 2001, just one week after the horrific attacks, the United States Congress sought to define our enemy by passing a joint resolution, referred to as the Authorization for the Use of Military Force (AUMF).⁵ The AUMF authorizes the President of the United States to wage war on “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁶ What is striking about the language of the AUMF is that it authorizes not only the President’s inherent discretion on whom to fight, but also the power to “use all necessary and appropriate force” against such parties.⁷ This is an enormous amount of power yet one that, significantly, Congress deemed necessary.⁸

DMZ on post-Korean War military and political tensions that continued throughout the twentieth century).

³ See Guy Raz, *Defining the War on Terror*, NPR (Nov. 1, 2006, 12:37 PM), <https://www.npr.org/templates/story/story.php?storyId=6416780> [<https://perma.cc/9YQX-YZLF>] (discussing the complexity involved in defining the parameters of the war on terror).

⁴ See *id.*

⁵ Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter, *AUMF*].

⁶ *Id.* § 2(a).

⁷ *Id.*

⁸ For example, although not expressly mentioning the AUMF, *The 9/11 Commission Report* outlines the plans of operation Enduring Freedom, which President George W. Bush, Jr., approved in the weeks after the 9/11 attacks—but after the AUMF was passed. President Bush’s call to action included a four-phase

Theoretically, however, the precise language of this authorization sets limits. The AUMF makes clear that the only nations, organizations, or persons whom the President is authorized to attack must be linked to the attacks on 9/11.⁹ In the immediate aftermath of 9/11, President George W. Bush used this authorization to fight Al-Qaeda and subsequently the Taliban.¹⁰ Yet, almost two decades since the 9/11 attacks, the AUMF is still a relevant source of executive authority. Throughout his presidency, President Obama relied upon the AUMF to target those he deemed relevant to the attacks on 9/11, engaging in operations in Afghanistan, Yemen, Libya, Somalia, Iraq, and Syria.¹¹ President Trump has continued the tradition by relying on the AUMF for authorization in the battle against the enemies of the United States, such as the Islamist State in Iraq and Syria (ISIS).¹² As such, this post-9/11 executive right-of-passage begs the obvious question: what do these individuals or groups have to do with 9/11?

attack against Al-Qaeda and every terrorist group around the world, calling for a worldwide coalition. These plans involved operations in several countries, including Uzbekistan, Pakistan, and Afghanistan. THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 337–38 (2004).

⁹ Specifically, the AUMF authorizes military action against “those nations, organizations, or persons [that the President] determines planned, authorized, committed, or aided, the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” *AUMF*, *supra* note 5, § 2(a).

¹⁰ See *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for the Use of Military Force: Hearing Before the Comm. on Armed Services*, 113th Cong. at 9 (2013) (joint prepared statement by Mr. Robert S. Taylor, Hon. Michael A. Sheehan, MG Michael K. Nagata, USA, and BG Richard C. Gross, JAGC, USA) [hereinafter *2013 Senate Hearing*] (“With [the AUMF], President Obama and President Bush before him, as Commanders in Chief, as well as four Secretaries of Defense, have directed military operations against al Qaeda, the Taliban, and associated forces.”).

¹¹ See WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 3 (2016) [hereinafter *2016 White House Report*] (identifying the AUMF as the appropriate legal authority to engage in global military operations); Rebecca Ingber, *Co-Belligerency*, 42 *YALE J. INT’L L.* 67, 75–76 (2017) (referencing President Obama’s reliance on the AUMF to fight Al-Qaeda and the Islamic State in Iraq and Syria (ISIS)).

¹² Rex Tillerson, Testimony to Senate Foreign Relations Committee on AUMF (Oct. 30, 2017), https://www.foreign.senate.gov/imo/media/doc/103017_Tillerson_Testimony.pdf [https://perma.cc/A7ZG-63MC]; Scott R. Anderson & Sabrina McCubbin, *Summary: Senate Foreign Relations Committee’s AUMF Hearing*, *LAWFARE BLOG* (Nov. 1, 2017, 7:00 AM), <https://www.lawfareblog.com/summary-senate-foreign-relations-committees-aumf-hearing#> [https://perma.cc/P4YZ-N9ZW].

Both the Obama and Trump administrations have responded to this question by relying on a principle of international law: the theory of co-belligerency.¹³ As utilized by the Obama administration, co-belligerency provides legal authorization under the *jus ad bellum*¹⁴ international laws of war for a nation to engage militarily groups or individuals that have “entered the fight alongside” those forces whom the nation is already lawfully engaging.¹⁵ As such, the Executive Branch views the AUMF as congressional authorization for the President to use “necessary and appropriate force”¹⁶ against those who were responsible for the 9/11 attacks *and all who enter the fight alongside them*.¹⁷ According to the Obama administration, and now President Trump’s administration, this includes ISIS and any other group or individual the President deems is sufficiently connected to the perpetrators of the 9/11 attacks.¹⁸

On several occasions, both in the federal court system and in front of Congress, the Executive Branch has been successful in defending its reliance on the theory of co-belligerency. For example, in a series of Guantanamo Bay habeas cases heard by the United States Court of Appeals for the D.C. Circuit, the federal judiciary seems to have acquiesced to the Executive’s

¹³ 2016 *White House Report*, *supra* note 11, at 4 (referencing the Obama administration’s reliance on the principle that the AUMF authorizes the United States to engage any organized group that is a “co-belligerent” of those falling under the purview of the AUMF); Ingber, *supra* note 11, at 68 (noting President Obama’s reliance on the theory of co-belligerency as a means to interpret the scope of Executive authority under the AUMF); Brief for Respondent at 14, *Doe v. Mattis*, 889 F. 3d 745 (D.C. Cir. 2018) (No. 1:17-cv-2069) (defending the Trump administration’s detention of Petitioner by relying on the co-belligerency theory); Tess Bridgeman, *How to Ensure New Congressional War Authorization Is Not a Blank Check*, JUST SECURITY (Apr. 20, 2018), <https://www.justsecurity.org/55147/stop-congressional-war-authorization-blank-check/> [<https://perma.cc/XH97-CD6H>] (referencing the Trump administration’s reliance on the co-belligerency theory in the *Doe v. Mattis* case).

¹⁴ See *What Are Jus Ad Bellum and Jus In Bello?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> [<https://perma.cc/G94R-EV5A>] (“*Jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general.”).

¹⁵ 2016 *White House Report*, *supra* note 11, at 5.

¹⁶ AUMF, *supra* note 5, § 2(a).

¹⁷ See Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School, February 22, 2012*, 31 YALE L. & POL. REV. 141, 146 (2012) (outlining the relationship between the theory of co-belligerency and the AUMF); 2016 *White House Report*, *supra* note 11, at 5 (similarly identifying the connection between the theory of co-belligerency and the AUMF).

¹⁸ See *supra* note 13.

use of the theory.¹⁹ Explored in greater detail below, in these cases the Executive Branch defended its authority to detain the petitioners with arguments grounded in the theory of co-belligerency.²⁰ Specifically, the Executive Branch argued that it had the legal authority under the AUMF to engage certain groups who were sufficiently tied to “associated forces” of those responsible for 9/11.²¹ The courts agreed.²²

The Senate Armed Forces Committee seemed to agree as well. In a hearing held on May 16, 2013, the Committee invited lawyers from the Obama administration to discuss the AUMF and its relevance to ISIS.²³ At issue in the hearing was President Obama’s continued reliance on the AUMF, more than eleven years after the 9/11 attacks.²⁴ The administration’s lawyers argued yet again that the AUMF is quite relevant and that the United States is authorized to fight ISIS under the co-belligerency theory.²⁵ Because ISIS is a “co-belligerent” that has entered the fight alongside Al-Qaeda, its members are legal targets under the AUMF.²⁶

However, the Executive’s reliance on the co-belligerency theory is not without critique. Notably, Boston University School of Law Professor Rebecca Ingber questions the validity of co-belligerency itself as a principle of international law.²⁷ Rather than focus on the surface-level question of whether ISIS truly meets the standard of being a co-belligerent of Al-Qaeda, in a particularly influential article, Ingber provides a complex and fascinating analysis that digs deeply into the principles behind the theory itself.²⁸ Particularly, she argues that reliance on the international legal principle of co-belligerency is not only one that has been insufficiently developed by the Executive Branch, but is also one that relies upon principles of international law that are underdeveloped themselves.²⁹ In doing so, she calls upon the academic community to answer the

¹⁹ See *Hamli v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); see also Johnson, *supra* note 17, at 146 (referencing *Hamli* and *Barhoumi* as cases in which the co-belligerency theory was “upheld by the courts in the detention context”).

²⁰ *Hamli*, 616 F. Supp. 2d at 67; *Barhoumi*, 609 F.3d at 419–20.

²¹ *Hamli*, 616 F. Supp. 2d at 67; *Barhoumi*, 609 F.3d at 423.

²² *Hamli*, 616 F. Supp. 2d at 78; *Barhoumi*, 609 F.3d at 432.

²³ 2013 Senate Hearing, *supra* note 10.

²⁴ *Id.* at 1–3 (statement of Sen. Carl Levin, Chairman).

²⁵ *Id.* at 10; see also Ingber, *supra* note 11, at 68.

²⁶ 2013 Senate Hearing, *supra* note 10, at 10; see Ingber, *supra* note 11, at 68.

²⁷ Ingber, *supra* note 11.

²⁸ *Id.*

²⁹ *Id.* at 69.

question of whether the executive relies upon the correct principles of international law in espousing the co-belligerency theory as justification for its actions under the AUMF.³⁰

At the heart of Professor Ingber's analysis is the premise that international law has a role to play in interpreting domestic statutes.³¹ She analyzes the development of both the principle of co-belligerency itself and the President's historical reliance on it,³² inviting a discussion as to what other principles under the international laws of war may be more applicable to the AUMF.³³ However, before even engaging in such an exercise we must first answer a more pressing question: do principles of international law even have a role in shaping the scope of presidential wartime authority?

This question is nothing new. While serving on the D.C. Circuit Court of Appeals, then-Judge Kavanaugh, who now serves as the newest Justice on the United States Supreme Court, issued a concurrence where he vehemently argued against the applicability of the international laws of war as limits on presidential wartime authority under federal common law and under the AUMF.³⁴ To Judge Kavanaugh, international law has a very specific place in domestic law, and neither federal common law nor the AUMF fit the bill.³⁵

This Note seeks to reconcile Ingber's critiques with the views of Judge Kavanaugh and in turn respond to Professor Ingber's article by setting forth the context in which her analy-

³⁰ See *id.* at 116.

³¹ It should be noted that Professor Ingber does acknowledge the limits of and problems with relying on international law to interpret domestic statutes. *Id.* at 115–16. However, the thrust of Ingber's analysis focuses on the "established pedigree" of international law's influence on domestic statutes. *Id.* at 115. It thus appears to navigate her call to action toward selecting the correct norm of international law, rather than questioning whether international law should be used at all.

³² See *id.* at 68–70.

³³ *Id.* at 116.

³⁴ *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

³⁵ *Id.* at 10. It should be noted that Judge Kavanaugh argues against the premise that the international laws of war serve as a *limit* on the President's AUMF authority. *Id.* at 9. However, the Executive Branch's reliance on the theory of co-belligerency could be viewed as a means to *expand* presidential authority under the AUMF by allowing the President to additionally target those individuals who are not directly responsible for the 9/11 attacks. Given that the context of the dispute in *Al-Bihani* only deals with the role of international law as a limiting factor on the President's AUMF authority, Judge Kavanaugh does not focus his arguments on whether international law can be used to expand such authority. However, as set forth below, Kavanaugh's arguments provide a helpful guide to address the proper place for international laws in interpreting domestic statutes, whether they be used as limitations or expansions on executive power.

sis is relevant. In pursuit of the answer, this Note explores the two contexts in which principles of international law may define the President's wartime authority. One is precisely the context addressed by Professor Ingber: the scope of Presidential authority under domestic statutes, such as the AUMF.³⁶ The other context, not addressed by Ingber, is the scope of Presidential authority under federal common law. If Ingber's call to arms is to be at all relevant, it will be within the realm of one or both of these two contexts.

Ultimately, this Note argues that Ingber's analysis is quite relevant, but only in the specific subcontexts in which Congress deems it to be so. Part I addresses the origin and the context in which the Executive Branch has relied on the co-belligerency theory. In particular, it outlines how the Executive Branch has defended its use of the theory in front of both the Judiciary and Congress and how various members of each branch have seemed to approve.

It ends with Professor Ingber's academic response to the government's co-belligerency argument. Specifically, it addresses her valid concerns on the development of this theory and analyzes the questions she raises for future research. In response to her work, Part I proposes a series of new questions that must be asked before addressing Ingber's concerns: are the international laws of war even relevant to outlining the scope of presidential authority during wartime, and if so, to what extent?

The remainder of this Note answers that question using Judge Kavanaugh's concurrence in *Al-Bihani*³⁷ and the views of his critics as a guide. Part II introduces the case and outlines the relevancy of Judge Kavanaugh's views as they pertain to the limits of international law on presidential authority. Part III investigates the role of international law under federal common law. It analyzes the current debate over the post-*Erie v. Tompkins*³⁸ relationship between federal common law and customary international law—the body of international law under which the laws of war, and thus the co-belligerency theory, fall. It concludes with the theory that under the *Sosa*³⁹ doctrine, the Supreme Court has effectively provided the President with a

³⁶ Ingber, *supra* note 11.

³⁷ 619 F.3d 1 (Kavanaugh, J., concurring).

³⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

³⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

directive to apply a *Youngstown*⁴⁰ Justice Jackson zone analysis. As such, customary international law defines the scope of presidential authority only when Congress “says” that it does.

Part IV addresses whether Congress has communicated such message to the President through the AUMF, specifically analyzing if and how Congress has incorporated the international laws of war into the statute. Because the text itself makes no explicit reference to international law, this Part argues that we must look to what Congress has said outside the immediate text of the AUMF to provide us with a complete answer.

Part V looks specifically at two key contexts in which Congress had sought to clarify the AUMF: the 2012 National Defense Authorization Act,⁴¹ where Congress explicitly addressed the laws of war as they pertain to the AUMF, and the 2013 Senate Armed Forces Committee Meeting, where it revisited the AUMF once again.⁴² It is through these contexts that Congress offers the clearest picture of how the international laws of war inform the scope of presidential authority under the AUMF. Reaching the conclusion of this Note, Part V argues that Congress has only limited the President’s AUMF authority by the international laws of war in the context of detaining enemy combatants. As such, Professor Ingber’s critique of the co-belligerency theory is relevant in this context alone (at least for now).

I

CO-BELLIGERENCY IN THE CONTEXT OF THE AUMF

A. Judicial Acquiescence to Co-Belligerency

The federal judiciary has been a key partner in garnering support for the Executive Branch’s reliance on the theory of co-belligerency.⁴³ In *Hamlily v. Obama*, the D.C. District Court heard the habeas petition of several Guantanamo Bay inmates who had been detained pursuant to President Obama’s alleged AUMF authority.⁴⁴ At issue in *Hamlily* was the scope of presidential authority to detain pursuant to the AUMF, as inter-

⁴⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

⁴¹ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

⁴² 2013 Senate Hearing, *supra* note 10.

⁴³ See Johnson, *supra* note 17, at 146 n.16 (noting a series of cases in which the federal courts have accepted the Executive’s reliance on the theory of co-belligerency).

⁴⁴ See *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

preted through the international laws of war.⁴⁵ To that end, President Obama's lawyers argued that the Executive had the legal authority to detain the petitioners because they could be factually connected to "associated forces" of Al-Qaeda,⁴⁶ as defined under the principle of co-belligerency.⁴⁷ The court held for respondents, denying the writ of habeas corpus and explicitly adopting the standard that principles of international law define the outer limits of the President's AUMF authority.⁴⁸

In *Barhoumi v. Obama*, the Court of Appeals for the D.C. Circuit followed a similar line of reasoning, affirming the legality of detaining "associated forces" under the AUMF.⁴⁹ The petitioner, Sufiyan Barhoumi, was an Algerian who had been captured by Pakistani police and later transferred to United States custody.⁵⁰ Ultimately, the court held that Barhoumi was "more likely than not" connected to an associated force of Al-Qaeda, thus denying Barhoumi's petition for habeas corpus.⁵¹

We thus see a series of decisions made by federal courts that directly agree with the Executive's belief that Congress incorporated the international law principle of co-belligerency—by means of the "associated forces" argument—when it drafted the AUMF. In addition to its success in these cases, what is particularly fascinating about the co-belligerency argument is how widely it has been accepted. For example, in *Barhoumi*, the petitioner did not even challenge the argument that the AUMF allows the President to detain associated forces of Al-Qaeda.⁵² Rather, he accepted the application of co-bellig-

⁴⁵ *Id.* at 66 ("The issue presently before the Court is a threshold legal question in these habeas proceedings: what is the scope of the government's authority to detain these, and other, detainees pursuant to the Authorization for Use of Military Force . . . as informed by the law of war?").

⁴⁶ *Id.* at 67.

⁴⁷ *Id.* at 74–75.

⁴⁸ *Id.* at 77 ("After careful consideration, the Court is satisfied that the government's detention authority is generally consistent with the authority conferred upon the President by the AUMF and the core law of war principles that govern non-international armed conflicts.").

⁴⁹ 609 F.3d 416, 424 (D.C. Cir. 2010) ("[T]he ultimate and relatively narrow question we must answer here is this: did the district court commit reversible error in finding that it is more likely than not that Barhoumi was 'part of Zubaydah's associate force?").

⁵⁰ *Id.* at 419.

⁵¹ *Id.* at 432.

⁵² *Id.* at 423 ("To begin with, as Barhoumi's counsel acknowledged at oral argument, Barhoumi does not challenge the detention standard advanced by the government and adopted by the district court: the President has the authority, pursuant to the AUMF, 'to detain persons who were part of,] or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in

erency to the AUMF as valid, thus striving to challenge his detention on separate grounds.⁵³ Yet, as great as this was for the Executive Branch, the support for co-belligerency was about to extend even further. Several years after *Hamliily* and *Barhoumi*, the co-belligerency theory made its debut in Congress with seemingly great success.⁵⁴

B. Congressional Approval of Co-Belligerency

In 2013, when the United States was engaged in military operations against ISIS, President Obama was essentially given the green light by the Committee to continue to fight all those deemed to be the co-belligerents of Al-Qaeda.⁵⁵ It had been almost twelve years since the 9/11 tragedy, and the United States was still engaging in operations against those enemies that “planned, authorized, committed, or aided the terrorist attacks.”⁵⁶ Growing curious as to the legality of such actions and whether the AUMF authorized the continued military conflict, the United States Senate’s Committee on Armed Services called a hearing to discuss these questions with President Obama’s legal team from the Department of Defense, Judge Advocate General’s Corps, and other executive departments.⁵⁷ Specifically, the hearing sought to “examine the legal basis for the use of military force in accordance with the law of armed conflict” in an effort to determine whom President Obama was authorized to fight under the AUMF.⁵⁸

The lawyers questioned by the committee presented legal justifications for two categories of enemies whom President Obama has been authorized by Congress to fight: the first being Al-Qaeda and the Taliban, the second being “associated forces”—the latter of which sparks the relevant controversy that this Note addresses.⁵⁹ In particular, the lawyers defended

hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported hostilities in aid of such enemy armed forces.” (alteration in original) (internal quotation marks omitted)).

⁵³ *Id.* (“[Barhoumi] asserts that the government failed to establish that he was ‘part of an associated force and that the district court therefore erred in denying his habeas petition.’”).

⁵⁴ See 2013 Senate Hearing, *supra* note 10.

⁵⁵ *Id.*; Ingber, *supra* note 11, at 69.

⁵⁶ AUMF, *supra* note 5, §2(a).

⁵⁷ See 2013 Senate Hearing, *supra* note 10.

⁵⁸ *Id.* at 2 (statement of Sen. Carl Levin, Chairman)

⁵⁹ *Id.* It is worth noting that although the opening remarks of Senator Levin, Chairman of the Committee, refer only to Al-Qaeda and its associated forces, throughout the hearing participants refer also to the Taliban as relevant to the

the position that the AUMF authorizes the President to engage militarily “al Qaeda, the Taliban, and associated forces,”⁶⁰ noting that federal courts have reinforced such interpretation, at least explicitly regarding military operations against Al-Qaeda.⁶¹ The general lack of push-back on the military engagement of Al-Qaeda and the Taliban in both the academic and judicial responses to AUMF-authorized actions implies that commentators agree on the instrumental role that these groups played in orchestrating the 9/11 attacks. Thus, there seems to be an overall consensus that Al-Qaeda and the Taliban fit unambiguously into the precise language of the AUMF.

However, in their legal justification for the argument that the AUMF authorizes the President to engage the “associated forces” of Al-Qaeda and the Taliban, the lawyers begin to enter what the Senate Armed Forces Committee seemed to view as controversial territory.⁶² In support of their view, the lawyers utilized in part the approach of Jeh Johnson, the former General Counsel to the Department of Defense.⁶³ In a speech given during a Dean’s Lecture at Yale Law School in February 2012, Johnson mirrored the approach of the *Hamliily* court, explaining that the associated force theory is “based on the well-established concept of cobelligerency in the law of war,”⁶⁴ and that federal courts have upheld this theory of AUMF interpretation.⁶⁵ Relying upon such justification, the lawyers at the Senate hearing, along with Johnson and members of the federal judiciary, thus espoused the view that the scope of the President’s authority under the AUMF can be determined using principles of international law.

discussion. As such, reference to the Taliban is made throughout the relevant parts of this Note.

⁶⁰ *Id.* at 9 (joint prepared statement by Mr. Robert S. Taylor, Hon. Michael A. Sheehan, MG Michael K. Nagata, USA, and BG Richard C. Gross, JAGC, USA).

⁶¹ *Id.* (“The Supreme Court and the Court of Appeals for the District of Columbia Circuit have also repeatedly recognized in a long string of cases that the United States can use military force in its armed conflict with al Qaeda.”).

⁶² *Id.* at 2 (statement of Sen. Carl Levin, Chairman) (“Does the AUMF extend to organizations which played no active role in the September 11 attacks and may not have even existed in 2001?”); *id.* at 19–20 (statement by Sen. John McCain) (voicing concern over the fact that the scope of military operations authorized by the AUMF has expanded well beyond reactions to the 9/11 attacks themselves).

⁶³ *Id.* at 10 (joint prepared statement by Mr. Robert S. Taylor, Hon. Michael A. Sheehan, MG Michael K. Nagata, USA, and BG Richard C. Gross, JAGC, USA).

⁶⁴ Johnson, *supra* note 17, at 146.

⁶⁵ *Id.* at 146 n.18 (referencing *Gherebi v. Obama*, 609 F. Supp. 2d 43, 63 (D.D.C. 2009); *Hamliily v. Obama*, 616 F. Supp. 2d 63, 74–75 (D.D.C. 2009); and *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir 2010)).

Throughout the hearing, President Obama's lawyers developed this theory further, expressing the view that international law's principle of co-belligerency provides the necessary justification for the President to attack any force that engages in military conflicts against the United States alongside Al-Qaeda or the Taliban.⁶⁶ Chairman of the Committee Levin reiterated the lawyers' position clearly, and in a way that Robert S. Taylor, then the Acting General Counsel of the Department of Defense, expressly endorsed during the hearing:⁶⁷

Where you are authorized to use force under domestic law, AUMF, and under international law against a foreign country or organization, [such] authority automatically extends under the law of armed conflict to a co-belligerent, to some entity that has aligned themselves with the specified entity against us, in the fight against us.⁶⁸

Thus, we see the Obama administration's continued reliance upon the *international law* principle of co-belligerency to determine the outer limits of presidential authority under the AUMF, a *domestic statute*. However, while this argument seemed to ultimately appease the Senate Armed Forces Committee in May of 2013, and various federal judges, it has become the subject of at least one significant point of academic critique.⁶⁹

C. Professor Ingber's Critique of Co-Belligerency

Not everyone endorses the co-belligerency theory as an accurate portrayal of what the AUMF authorizes the President to do.⁷⁰ In particular, Boston University School of Law Professor Rebecca Ingber published an influential and well-reasoned article on the role that the co-belligerency theory has played in determining the limits of the AUMF which demonstrates an important critique of this approach.⁷¹ One of Professor

⁶⁶ 2013 Senate Hearing, *supra* note 10, at 10 (joint prepared statement by Mr. Robert S. Taylor, Hon. Michael A. Sheehan, MG Michael K. Nagata, USA, and BG Richard C. Gross, JAGC, USA).

⁶⁷ *Id.* at 29 (statement by Robert S. Taylor).

⁶⁸ *Id.* (statement by Sen. Carl Levin, Committee Chair). In this statement, Representative Levin was reiterating what he believed Robert S. Taylor's to be, to which Taylor responded, "That is my understanding. You have expressed it very well." *Id.* (statement by Robert S. Taylor).

⁶⁹ See Ingber, *supra* note 11, at 69.

⁷⁰ See *id.*; Nele Verlinden, *Parliamentary Oversight and Democratic Control over Armed Forces with Regard to Military Deployments Abroad: Some Observations on Belgium and the US*, 55 MIL. L. & L. WAR REV. 283, 286–89 (2016) (arguing that the theory of co-belligerency is not a well-established principle of international law, contrary to what the United States has asserted).

⁷¹ Ingber, *supra* note 11.

Ingber's key contentions is that the co-belligerency principle is not as clearly defined as the Executive Branch has historically asserted.⁷² She argues that the principle of co-belligerency is quite complex and does not necessarily establish the necessary authority that the Executive Branch has claimed.⁷³ While Ingber does not actively deny that the co-belligerency theory can be utilized to authorize Presidential military action against enemies such as ISIS, she does call for an exploration of the "greyish legal space" in which the co-belligerency theory lives,⁷⁴ and calls for the legal community to investigate which norms of international law can provide the clearest standard.⁷⁵

Professor Ingber correctly emphasizes the importance of investigating the truth behind the theory.⁷⁶ She argues that given the "non-traditional" nature of the fight against ISIS, reliance upon an underdeveloped legal justification creates a "potential for novel interpretation [that] is enormous."⁷⁷ Given the potential effects of this problem, and the scale to which that may result in the loss of American and foreign lives, it is imperative that we take the caution that Ingber suggests.

But what is the best way to approach this task? Rather than challenging the Executive Branch's conclusion—that the co-belligerency theory is the correct principle of international law on which to rely—perhaps we should be questioning the premise upon which the Executive's entire argument rests: that principles of international law can or should be used to interpret the scope of presidential wartime authority. Without the assurance that international law can or should inform

⁷² *Id.* at 69 ("Behind the executive branch assurances of a clear standard for interpreting the President's AUMF authority, founded in a 'well established' principle of international law called 'co-belligerency,' in fact lay an internally-contested amalgam of legal theories based in novel and in some instances flawed interpretations of international law. While that amalgam of theories and internal tension themselves may operate as some impediment to executive action, it is far from the solid and established—and clearly constraining—bright line legal principle the Executive has repeatedly suggested.").

⁷³ *Id.* at 71 ("The problem is that the professed legal position—while generally accepted in principle at a superficial level by the courts and Congress—rests on an underlying theory that is at best poorly understood and at worst, a *mélange* of competing theories that executive officials have never been pressed to finally and firmly crystalize in one clear position.").

⁷⁴ *Id.* at 74, 98.

⁷⁵ *Id.* at 116 ("One question that this case study raises—and which I will have to reserve to future work—is, even when it is appropriate to look to international law to inform a particular domestic context . . . how does one define it? Among the questions packed into this task are: Which body of international law is best suited to this task?").

⁷⁶ *See id.* at 69.

⁷⁷ *Id.* at 70.

presidential authority in this manner, we are at best speculating as to the relevancy of Professor Ingber's question—albeit an important one. Consequently, before we apply Ingber's analysis, we must be certain of the contexts in which it may be used.

II

THE *AL-BIHANI* EFFECT

Investigating the fundamental role that international law plays in shaping Executive authority is by no means a new story. The D.C. Circuit dealt explicitly with this issue in a series of decisions in 2010 regarding a petition for habeas relief by Ghaleb Nassar Al-Bihani, a detainee at Guantanamo Bay, Cuba.⁷⁸ Al-Bihani was a cook working for the Taliban who was captured in a fight with the Northern Alliance and later placed in United States custody.⁷⁹ In arguing for habeas relief, he relied heavily on the argument that the international laws of war prohibited his detention, and thus President Obama's actions exceeded the limits of presidential AUMF authority placed by international law.⁸⁰ In an opinion by Judge Brown, the court denied Al-Bihani's petition on the grounds that the AUMF authorizes Al-Bihani's detention and that international law does not limit the President's power to detain in this case.⁸¹ To the court, the alleged violations of international law mentioned by Al-Bihani were not dispositive of the issue of whether President Obama overstepped his AUMF authority.⁸²

However, Judge Brown's reasoning was arguably overturned in the second *Al-Bihani* decision (hereinafter, *Al-Bihani II*), where the court denied Al-Bihani's petition for rehearing.⁸³

⁷⁸ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

⁷⁹ *Al-Bihani*, 590 F.3d at 869.

⁸⁰ *Id.* at 871. Specifically, petitioner Al-Bihani argued first, that because he was a chef and did not raise and fire his weapon at the coalition forces that he was not subject to capture under the international laws of war; second, that his unit did not fit within the definition of being a "co-belligerent" of the Taliban; third, that the armed conflict between the United States and the Taliban had ended, thus pursuant to the Third Geneva Convention he was not subject to capture; and lastly, that the United States has lost any authority to detain him by failing the "Clean Hands Theory" as a result of it not granting Al-Bihani prisoner of war status that he is entitled to under norms of international law. *Id.*

⁸¹ *Id.* at 873 ("We reiterate that international law, including the customary rules of co-belligerency, do not limit the President's detention power in this instance. But even if Al-Bihani's argument were relevant to his detention and putting aside all the questions that applying such elaborate rules to this situation would raise, the laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states.").

⁸² *Id.*

⁸³ *Al-Bihani*, 619 F.3d at 1.

This time the opinion, written by Chief Judge Sentelle, was a mere one sentence and explicitly stated that the question of whether international law applies to the AUMF is not dispositive of the issue.⁸⁴ As such, the court seemed to walk back its holding in the first *Al-Bihani* decision and refuse to take an affirmative stance on the relationship between international law and the AUMF.

In defiance of the majority, Judge Kavanaugh issued a concurrence where he decided to both ask and answer the question of whether federal courts can use principles of international law to limit the scope of presidential authority under the AUMF.⁸⁵ His answer was a definitive, yet lengthy, “no.”⁸⁶

Judge Kavanaugh’s views provided kindling for the concurring judges on the D.C. Circuit to engage in a fiery dialogue over the scope of the President’s AUMF authority and ignited a discussion of the fundamental role of international law in informing statutory construction in federal courts.⁸⁷ Consequently, Judge Kavanaugh’s concurrence widened the scope of what was truly at stake in *Al-Bihani*’s rehearing to include the fate of Presidential wartime authority as defined by international law.

By engaging in the discussion over the proper place of international law in statutory construction, Judge Kavanaugh set forth a line of reasoning that directly challenges the premise upon which Professor Ingber’s critique of the legitimacy of the co-belligerency theory relies: that Congress incorporated the international laws of war into the AUMF.⁸⁸ Furthermore, by setting forth the idea that principles of international law are merely helpful in defining AUMF authority, yet do not define the limits of such authority,⁸⁹ he opened the floodgates to academic and judicial discourse by essentially making irrelevant

⁸⁴ *Id.*

⁸⁵ *Id.* at 9 (Kavanaugh, J., concurring).

⁸⁶ *Id.*

⁸⁷ *See id.* at 53–55 (Williams, J., concurring) (dedicating a substantial portion of his concurrence to critiquing Judge Kavanaugh’s views on the relationship between international law and domestic law); *see also* JENS D. OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 44 (2015) (“In August 2010, open war broke out in the D.C. Circuit over how to apply and understand the AUMF after *Al-Bihani* sought a rehearing of his habeas petition claiming that his continued detention violated both international law and the Detainee Treatment Act.”).

⁸⁸ 619 F.3d at 9 (Kavanaugh, J., concurring).

⁸⁹ *Id.* at 43 (“As a practical matter, it would be quite odd to think that Congress, when passing the AUMF, did not intend to authorize at least what the international laws of war permit, subject of course to separate prohibitions found in domestic U.S. law. In that sense, international law can be said to inform judicial interpretation of the AUMF.”).

the question of whether co-belligerency is a sufficiently developed principle of international law to be applied as a means to define the limits of the AUMF.⁹⁰ In other words, if a principle of international law does not apply to an action taken by the President under his AUMF authority, Judge Kavanaugh would say, “who cares?” To Judge Kavanaugh, the AUMF is defined by whatever Congress says, and Congress never said that international law gets to form the outer limits of this definition.⁹¹ At most, the international laws of war are a helpful guide to understanding what Congress has authorized the President to do.⁹² At least, they are completely irrelevant.⁹³

In defense of this position, Judge Kavanaugh relies on an analysis of the two realms in which international law may enter the domestic sphere. First, he addresses international law under federal common law.⁹⁴ Second, he looks to the AUMF itself.⁹⁵ As such, a critique of Judge Kavanaugh’s comprehensive analysis in each of these contexts provides a helpful guide in answering the fundamental question of precisely when Professor Ingber’s call to challenge the co-belligerency argument is relevant.

III

IS INTERNATIONAL LAW A PART OF FEDERAL COMMON LAW?

Judge Kavanaugh’s argument is that international law can only be incorporated into domestic law through express acts of the political branches of government.⁹⁶ This notion is consistent with the principle of *dualism*, the idea that United States domestic law and international law are separate legal sys-

⁹⁰ For examples of the academic response to Judge Kavanaugh’s concurrence, see OHLIN, *supra* note 87, at 44–48; Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part II*, LAWFARE BLOG (December 31, 2011, 4:48 PM), <https://www.lawfareblog.com/ndaa-good-bad-and-laws-war-part-ii> [<https://perma.cc/T9FD-ESV5>] (“[T]he larger point going forward is the central role that such law-of-war analysis should play, in marked contrast to the views of Judges Brown and Kavanaugh, when the Executive and the courts construe the detention authority the AUMF confers upon the President.”).

⁹¹ *Al-Bihani*, 619 F.3d at 10 (Kavanaugh, J., concurring) (“But neither the AUMF’s text nor contemporaneous statement by Members of Congress suggest that Congress intended to impose judicially enforceable *international-law* limits on the President’s authority under the AUMF.” (emphasis in original)).

⁹² *Id.* at 43; see *supra* note 88.

⁹³ *Id.*; see *supra* note 88.

⁹⁴ *Id.* at 10.

⁹⁵ *Id.*

⁹⁶ *Id.* at 9 (“International-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President’s authority under the AUMF.”)

tems.⁹⁷ As such, there are only two ways for American obligations under international law to be incorporated into domestic law: either by statute or by self-executing treaty.⁹⁸

In keeping with the principles of dualism, Judge Kavanaugh rejects the argument that the international laws of war relied upon by Al-Bihani have been incorporated into domestic law via federal common law.⁹⁹ He bases his view on the *Erie* doctrine,¹⁰⁰ which stems from the Supreme Court decision *Erie Railroad Co. v. Tompkins* which held that when United States federal courts apply state law, the courts must apply *state* common law and thus not create a separate *federal* common law that applies state law as created by federal courts.¹⁰¹ In Judge Kavanaugh's view, *Erie* destroyed all general federal common law, which includes "customary international law"¹⁰²—the category of international law under which the laws of war fall.¹⁰³ This view, also referred to as the "revisionist" position,¹⁰⁴ is also supported by Professor Curtis A. Bradley and Professor Jack L. Goldsmith, who argued in their 1997 article against the "modern position" that customary international law has survived *Erie*.¹⁰⁵ In particular, they reason that although customary international law was once considered to

⁹⁷ JENS DAVID OHLIN, INTERNATIONAL LAW: EVOLVING DOCTRINE AND PRACTICE 103 (Robert C. Clark et al. eds., 2018) (describing the role and meaning of dualism in the U.S. legal system).

⁹⁸ *Al-Bihani*, 619 F.3d at 13 (Kavanaugh, J., concurring) ("In our constitutional system, international-law norms may achieve the status of domestic U.S. law through two mechanisms: incorporation into a statute (or legally binding executive regulation adopted pursuant to a statute) or incorporation into a self-executing treaty.").

⁹⁹ *Id.* at 18–19 (arguing that incorporation of customary international law into federal common law is impossible, given that the *Erie* Court eliminated federal common law, as confirmed by the *Sosa* Court).

¹⁰⁰ *Id.*

¹⁰¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹⁰² Customary international law is said to arise from the "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

¹⁰³ *Al-Bihani*, 619 F.3d at 17 (Kavanaugh, J., concurring) ("But as decided by the Supreme Court in its landmark *Erie* decision in 1938, the view that federal courts may ascertain and enforce international-law norms as part of the general common law is fundamentally inconsistent with a proper understanding of the role of the Federal Judiciary in our constitutional system. In *Erie*, the Supreme Court famously held that there is no general common law enforceable by federal courts.").

¹⁰⁴ OHLIN, *supra* note 87, at 45 (referring to Judge Kavanaugh's view as the "revisionist" position).

¹⁰⁵ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997).

be a part of United States federal common law,¹⁰⁶ the arguments to support the modern position suffer from various flaws.¹⁰⁷ Furthermore, they argue that the *Erie* doctrine eliminated the realm of general common law under which customary international law fell.¹⁰⁸ Relied upon by Judge Kavanaugh in *Al-Bihani II*,¹⁰⁹ Bradley's and Goldsmith's reasoning thus lends a rather complex and thoughtful line of support for the view that customary international law does not automatically become a part of domestic law by mere nature of its existence.

In further defense of his view, Judge Kavanaugh directs any critics to the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*.¹¹⁰ In holding that the Alien Tort Statute is merely a jurisdictional statute, the *Sosa* Court stated that those customary international law violations that fall under the purview of the Alien Tort Statute exist under federal law because the Alien Tort Statute itself incorporates them.¹¹¹ As such, Judge Kavanaugh interprets this to mean that customary international law must be incorporated into domestic law through such explicit Congressional authorization, because the federal common law that formerly incorporated customary international law no longer exists.¹¹² Consequently, it thus seems to be Judge Kavanaugh's view that if the President is going to be constrained by the international laws of war, it will be through a statute.

However, this argument has become subject to the academic critique of Cornell University Law Professor Jens Ohlin, who challenges Judge Kavanaugh's interpretation of *Sosa*.¹¹³ Ohlin argues that the Supreme Court in *Sosa* never actually adopted the view that *Erie* eliminated customary international law as federal common law.¹¹⁴ In his analysis of Judge Kavanaugh's concurrence, he believes it to be "telling" that Judge Kavanaugh fails to cite the specific language of the *Sosa* opin-

¹⁰⁶ *Id.* at 822–24.

¹⁰⁷ *See id.* at 822–37.

¹⁰⁸ *Id.* at 852–55.

¹⁰⁹ 619 F.3d at 18 (Kavanaugh, J., concurring).

¹¹⁰ 542 U.S. 692 (2004); *Al-Bihani*, 619 F.3d at 19 (Kavanaugh, J., concurring) ("In any event, no matter how one might previously have approached the debate about the post-*Erie* status of customary international law, the Supreme Court's 2004 decision in *Sosa* resolved it.").

¹¹¹ *Sosa*, 542 U.S. at 731–32.

¹¹² *Al-Bihani*, 619 F.3d at 19 (Kavanaugh, J., concurring) ("*Sosa* thus confirmed that international-law principles are not automatically part of domestic U.S. law and that those principles can enter into domestic U.S. law only through an affirmative act of the political branches.>").

¹¹³ OHLIN, *supra* note 87, at 45.

¹¹⁴ *Id.*

ion in making his argument.¹¹⁵ Ohlin's point seems to be getting at the fact that although the *Sosa* court mentioned that customary international law is relevant to the Alien Tort Statute, just as Congress wanted to be the case, that does not mean that the *Sosa* Court believes this to be the *only* situation in which customary international law is a part of United States common law.¹¹⁶ As such, Ohlin argues that the *Sosa* Court failed to affirmatively adopt the view that customary international law is no longer a part of federal common law.¹¹⁷

Ohlin's point is well taken and correctly challenges Judge Kavanaugh's *Erie* argument. In fact, the *Sosa* Court was presented with the chance to adopt the modern position and failed to do so.¹¹⁸ Rather, the Court stated that the "door" to allowing in customary international law as federal common law "is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."¹¹⁹ As such, the Court explicitly rejected the position that *all* of customary international law has been eliminated from federal common law and stated that a selective few norms of customary international law remain a part of our law.¹²⁰

However, the manner in which the *Sosa* Court requires these norms to be selected provides support for Judge Kavanaugh's greater point that the President is not automatically subject to the entire body of customary international law. Thus, outside the argument that the *Sosa* Court adopted the revisionist position, the *Sosa* holding supports Judge Kavanaugh's greater point in a different way—and in a manner with which Ohlin would not necessarily disagree. Rather than eliminate all of customary international law from federal common law, the specific holding in *Sosa* was that the United States will recognize customary international law, but only in certain circumstances.¹²¹ The "gatekeeper," so to speak, that keeps the

115 *Id.* ("The omission obscured the fact that the Supreme Court in *Sosa* never adopted the revisionist position.")

116 *See id.*

117 *Id.*

118 *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–32 (2004). While the Court did not expressly address the issue of having to select the modern or the revisionist position, its decision to base its reasoning on the "historical paradigms" of international law in existence when the Alien Tort Statute was enacted shows that it neglected to take an affirmative stance on either position. It is in this way that it had the opportunity to adopt the revisionist position (or the modern position) but failed to do so.

119 *Id.* at 729.

120 *Id.*

121 *See id.* at 732–33

door to customary international law “ajar,” as the *Sosa* Court suggests, is Congress.¹²² The Court reasoned that the only causes of action under customary international law actionable under the Alien Tort Statute are those which Congress intended to be included at the time of enactment of the statute.¹²³ As such, the Court is deferring greatly to Congress in selecting which norms of customary international law shall remain a part of United States domestic law.

When applying this holding to the context of the whether the international laws of war can bind Presidential authority outside of the AUMF, a more persuasive argument emerges in favor of not automatically limiting the President’s wartime authority by customary international law than Judge Kavanaugh’s view that the *Sosa* Court affirmed the elimination of all customary international law as federal common law. A better way to understand Presidential authority as limited by the principles of customary international law is through Justice Jackson’s *Youngstown* analysis.¹²⁴ As dictated by the *Sosa* Court, norms of customary international law are enforceable under domestic law as set forth by a Congressional act.¹²⁵ In this manner, if Congress has not incorporated any such norms into its statutes, then the President is in Zone II (in Justice Jackson’s *Youngstown* parlance) and thus not bound by those norms under domestic law.¹²⁶ If Congress did incorporate the international law of war into the AUMF, then the President risks entering Zone III if he chooses to disregard the international laws of war in his military endeavors,¹²⁷ where his power

¹²² *Id.* at 729.

¹²³ *Id.* at 732 (“[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

¹²⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (Jackson, J., concurring). In his concurrence, Justice Jackson describes three “zones” of presidential authority. The President’s authority is at its greatest in Zone I, where he “acts pursuant to an express or implied authorization of Congress.” *Id.* at 635. The President has comparatively less authority in Zone II, where he “acts in absence of either a congressional grant or denial of authority.” *Id.* at 637. The President’s authority is at its weakest in Zone III, where the President “takes measures incompatible with the expressed or implied will of Congress.” *Id.*

¹²⁵ *Alvarez-Machain*, 542 U.S. at 731–32.

¹²⁶ *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (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, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).

¹²⁷ *Id.* at 637 (“When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can

is at its lowest and arguably unconstitutional.¹²⁸ As such, the essential question that needs to be asked is: has Congress incorporated any norms of international law into the AUMF?

At the heart of every *Youngstown* analysis are the words and actions of Congress.¹²⁹ To properly understand under what level of authority the President's AUMF-based actions fall, it is thus essential to decipher what exactly Congress has "said" and "done" regarding the AUMF. This Note focuses on three key areas where Congress has voiced its opinion on the scope of the President's AUMF authority: the text of the AUMF itself, the 2012 National Defense Authorization Act (2012 NDAA),¹³⁰ and the May 2013 Senate Armed Forces Committee Hearing.¹³¹ It is through these three congressional actions that we may gain a clearer picture of how the laws of war inform presidential wartime authority and get closer to understanding when Professor Ingber's analysis is most relevant.

IV

DID CONGRESS INCORPORATE INTERNATIONAL LAW INTO THE AUMF?

In addition to his views that the President is not bound by the international laws of war under federal common law, Judge Kavanaugh argues that, similarly, the text of the AUMF does not incorporate such constraints.¹³² Under Judge Kavanaugh's approach to statutory interpretation, analysis is usually limited to the text of the statute.¹³³ He thus believes his task to be relatively easy in interpreting the AUMF, as the text is quite clear.¹³⁴ It simply grants the President the broad authority to use the type and amount of force that he deems

rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

¹²⁸ There is also an argument that in wartime the President as Commander in Chief has the discretion to act in a manner not explicitly dictated by Congress, under his inherent authority. See, e.g., Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 318–19 (2005) (addressing this argument in the context of government surveillance). While the analysis of this argument is outside the scope of this Note, it is an argument that warrants academic exploration in this context.

¹²⁹ 343 U.S. at 635–37 (Jackson, J., concurring).

¹³⁰ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

¹³¹ 2013 Senate Hearing, *supra* note 10.

¹³² *Al-Bihani v. Obama*, 619 F.3d 1, 24 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("Congress often incorporates international-law principles into federal law; it did not do so here. Courts must respect that decision.").

¹³³ *Id.* ("Interpretation of a statute begins (and often ends) with its text.").

¹³⁴ *Id.*

necessary to target those nations responsible for the 9/11 attacks.¹³⁵ As such, the text in no way suggests that these actions are limited to the international laws of war.¹³⁶ In defense of this interpretation, Judge Kavanaugh relies on other statutes passed by Congress that have specifically incorporated the laws of war into domestic law.¹³⁷ The difference between those statutes and the AUMF, Judge Kavanaugh argues, is that those statutes which have incorporated international law have explicitly referenced international law.¹³⁸ In stark contrast, he states that the AUMF makes no such reference.¹³⁹ To Judge Kavanaugh, that which Congress does not expressly state cannot be read into the statute.¹⁴⁰

The petitioner in *Al-Bihani II* challenges Judge Kavanaugh's interpretation of the AUMF in two key ways.¹⁴¹ First, he argues that under the *Charming Betsy* doctrine there is a default presumption that the AUMF *does* incorporate principles of international law as implied limits on Presidential authority.¹⁴² The *Charming Betsy* doctrine stems from the seminal case of *Murray v. Schooner Charming Betsy* where the Supreme Court, in an opinion by Justice Marshall, decided whether the sale of a United States ship and its cargo violated a federal act that prohibited commerce performed by United States citizens between the United States and France.¹⁴³ In holding that the sale did not violate the act, Justice Marshall

¹³⁵ *Id.* ("The AUMF affords the President broad discretion with respect to methods of force, use of military resources, timing, and choice of targets—except, of course, to the extent the U.S. Constitution or other federal statutes or self-executing treaties independently limit the President.")

¹³⁶ *Id.* at 25 ("There is no indication in the text of the AUMF that Congress intended to impose judicially enforceable international-law limits on the President's war-making authority under the AUMF.")

¹³⁷ *Id.* (referencing the acts mentioned in Section I of Judge Kavanaugh's concurring opinion at page 14, including the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 (2018) and the War Crimes Act, 18 U.S.C. § 2441(c)(3) (2018)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 31 ("Therefore, we should interpret the AUMF's textual silence with respect to international law as indicative of a congressional intent not to impose judicially enforceable international-law limits on the President's war-making authority.")

¹⁴¹ *Id.* at 32 ("Al-Bihani and amici seek to flip that default presumption by invoking the *Charming Betsy* canon of statutory construction. According to their articulation of that canon, ambiguities in federal statutes must be interpreted in accord with international-law norms that are not themselves domestic U.S. law."); *id.* at 42 ("Al-Bihani and amici cite *Hamdi v. Rumsfeld* to support their argument that the President's authority under the AUMF is limited by international law. They assert that *Hamdi* in effect already applied *Charming Betsy* to the AUMF.")

¹⁴² *Id.* at 32.

¹⁴³ 6 U.S. (2 Cranch) 64 (1804).

relied on the canon of construction that ambiguity in the text of domestic statutes should be interpreted so as to not contradict international law.¹⁴⁴ Applying this doctrine to the international laws of war on detainment, Al-Bihani argues that President Obama is violating his AUMF authority by detaining him in a manner that violates these international norms.¹⁴⁵

In response to this argument, Judge Kavanaugh provides three arguments as to why *Charming Betsy* does not apply in this context.¹⁴⁶ His first centers around his earlier point regarding *Erie's* relationship with customary international law. In particular, he argues that the international law applicable to *Charming Betsy* does not include customary international law nor self-executing treaties.¹⁴⁷ Rather, Judge Kavanaugh notes that post-*Erie*, the Supreme Court has only applied the *Charming Betsy* doctrine to support the narrow circumstances of the “extraterritoriality” principle—those cases in which a particular interpretation of domestic law would “conflict with the laws of another sovereign.”¹⁴⁸ As such, Judge Kavanaugh argues that *Charming Betsy* cannot be viewed as a “back door” way of incorporating customary international law or non-self-executing treaties into domestic law.¹⁴⁹

Judge Kavanaugh's second and third arguments against the application of *Charming Betsy* in the context of reading the international laws of war into the AUMF are based on the Executive's role in international affairs and role as commander in chief.¹⁵⁰ His second argument relies on the notion that the President has the inherent authority to decide how best to weigh the United States' international legal obligations in the face of domestic statutes that do not affirmatively incorporate international laws.¹⁵¹ Third, Judge Kavanaugh argues that *Charming Betsy* is even less applicable to a statute that authorizes a President to wage war.¹⁵² He bases this argument on

¹⁴⁴ *Id.* at 118 (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”).

¹⁴⁵ *Al-Bihani*, 619 F.3d at 32 (Kavanaugh, J., concurring).

¹⁴⁶ *Id.* at 32–38.

¹⁴⁷ *Id.* at 34.

¹⁴⁸ *Id.* at 35.

¹⁴⁹ *Id.* at 33 (“And it likewise makes sense to conclude that Congress would not want courts to smuggle those norms into domestic U.S. law through the back door by using them to resolve questions of American law.”).

¹⁵⁰ *See id.* at 36, 38.

¹⁵¹ *Id.* at 36.

¹⁵² *Id.* at 38.

the doctrine of judicial restraint in the context of national security.¹⁵³ In particular, Judge Kavanaugh cites Justice Jackson's concurring opinion in *Youngstown*, which stands for the principle that, in the words of Judge Kavanaugh, "the Judiciary should not interfere when the President is executing national security and foreign relations authority in a manner consistent with an express congressional authorization" absent a constitutional limitation.¹⁵⁴

However, Judge Kavanaugh's use of these three arguments, although persuasive, is unnecessary to defend his overall position that *Charming Betsy* should not apply to the context of the AUMF. Rather, his position can be defended solely by relying on and applying the fundamental tenant of *Charming Betsy* and demonstrating that the context of AUMF interpretation presents a fact pattern to which *Charming Betsy* cannot apply. To best understand the context in which *Charming Betsy* applies, it is essential to look at the precise words of Chief Justice Marshall:

[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.¹⁵⁵

What is key to understanding this doctrine is where the potential violation of the law of nations lies—that is, does it stem from what the statute authorizes, or does it stem from how the President may use such authorization? Incorrectly, the petitioner in *Al-Bihani II* relies on the former explanation, arguing that the AUMF itself could be interpreted in a manner that, in Chief Justice Marshall's words, "violate[s] the law of nations."¹⁵⁶

This would be a compelling argument if the AUMF were a statute that expressly authorized the President to undertake a predetermined list of actions. The logic in this theory is based on the notion that it would violate *Charming Betsy* if any action on this list could be construed as a violation of international law. However, this is an incorrect reading of what the AUMF truly authorizes. The AUMF does not provide the President with a list of actions but rather simply authorizes the President

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁵⁶ *Al-Bihani*, 619 F.3d at 32 (Kavanaugh, J., concurring).

to make a discretionary call.¹⁵⁷ A simple delegation of discretion can in no way “be construed to violate the law of nations.”¹⁵⁸ To hold Congress accountable for any violation of international law resulting from the President’s discretion would be to understand the AUMF as having authorized an exhaustive list of actions that the President may undertake. If the President were to violate international law by misusing this discretion, then such violation would be wholly based on the President’s actions and not on the authorization itself.

The second argument set forth by the petitioner in favor of reading the international laws of war into the AUMF is the belief that the Supreme Court in *Hamdi* held that the AUMF should be interpreted using principles of international law.¹⁵⁹ Al-Bihani points specifically to Justice O’Connor’s reference in the plurality opinion to international law when discussing the AUMF. Specifically, Justice O’Connor states, “[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”¹⁶⁰ Despite the fact that the Court did not attempt to clarify exactly *why* it chose to base its understanding on the laws of war, Al-Bihani argues that this statement clearly espouses the view that the international laws of war represent the limits on presidential authority under the AUMF.¹⁶¹

Labelling this interpretation as the “broad[]” view of the holding in *Hamdi*, Judge Kavanaugh chooses to adopt the “narrow[]” approach.¹⁶² Specifically, although conceding that the language is rather ambiguous, Judge Kavanaugh argues that the *Hamdi* Court’s reference to international law is nothing more than a helpful guide to better understand precisely what Congress has authorized the President to do under the AUMF.¹⁶³ In Judge Kavanaugh’s view, the AUMF “authorizes the President to command the U.S. military to kill, capture, and detain the enemy, as Commanders in Chief traditionally have

¹⁵⁷ *AUMF*, *supra* note 5, § 2(a).

¹⁵⁸ *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118.

¹⁵⁹ *Al-Bihani*, 619 F.3d at 42 (Kavanaugh, J., concurring).

¹⁶⁰ 542 U.S. 507, 521 (2004).

¹⁶¹ 619 F.3d at 43 (Kavanaugh, J., concurring) (“On the other hand, *Hamdi* is read far more broadly by Al-Bihani and amici to mean that international law conclusively defines the limits of the President’s war powers under the AUMF. On this view, the authority granted to the President by the AUMF is coextensive with the international laws of war.”).

¹⁶² *Id.* at 43

¹⁶³ *Id.*

done in waging wars throughout American history,”¹⁶⁴ and that the international laws of war are simply a reference point to understand the specifics included among this authorization.¹⁶⁵

However, to best understand Judge Kavanaugh’s position, it is important to understand a key line he uses that at first glance seems to contradict his views. He states that, “[a]s a practical matter, it would be quite odd to think that Congress, when passing the AUMF, did not intend to authorize at least what the international laws of war permit.”¹⁶⁶ Read on its own, this line appears to stand for the proposition that Judge Kavanaugh believes it would be “quite odd” to think that Congress did not at least intend to incorporate what the international laws of war permit as among the list of things the President is affirmatively authorized to do under the AUMF.¹⁶⁷ He thus appears to be saying that we cannot imply congressional intent to incorporate the international laws of war as limits, but we can imply congressional intent to affirmatively authorize all that international law allows. However, while admittedly Judge Kavanaugh’s phrasing here makes things a little unclear (and arguably to the point of contradiction), a close look at Judge Kavanaugh’s greater point suggests that he has not derailed from his main argument that Congress has not affirmatively incorporated the international laws of war into the AUMF.

Judge Kavanaugh’s statement should be viewed in the context of his immediately previous sentence, that “the international laws of war may be one potential indication that a longstanding Executive practice falls within that category.”¹⁶⁸ In other words, Congress is not saying through the text of the AUMF that the president can do what the international laws of war permit, among other things. Rather, Congress authorized a series of actions that Presidents traditionally use, and the *Hamdi* Court suggests that if one wants examples of such actions, the laws of war are a helpful guide, but are simply that—“one potential” guide—and not the basis of the congressional authorization.¹⁶⁹

What becomes most clear when attempting to understand the complexities of Judge Kavanaugh’s argument and subse-

¹⁶⁴ *Id.* at 10.

¹⁶⁵ *Id.* at 44–45.

¹⁶⁶ *Id.* at 43.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

quently comparing Al-Bihani's interpretation of *Hamdi* to that of Judge Kavanaugh's is that it would be much more helpful if the Supreme Court had provided us with more information.¹⁷⁰ Without such information, and with the underlying ambiguity in the Supreme Court's views on the matter, neither Al-Bihani's nor Judge Kavanaugh's arguments provide significant persuasive value. At most they offer merely compelling forms of speculation.

As such, it becomes clear that the *Hamdi* arguments in *Al-Bihani II* are not dispositive of the issue of whether the AUMF has implicitly incorporated the international laws of war.¹⁷¹ We are thus left with Judge Kavanaugh's persuasive argument that the language of the AUMF clearly fails to incorporate the international laws of war.¹⁷² Furthermore, as mentioned above, the inapplicability of *Charming Betsy* to the AUMF refutes any notion that the international laws of war can be implied from the language of the AUMF. However, the story is not over. If anything, Judge Kavanaugh's passion in *Al-Bihani II* only invited more discussion. Congress attempted to clarify the AUMF and its relationship with the international laws of war in the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA).¹⁷³ As such, we are today in a better position to understand Presidential authority under the AUMF than were Al-Bihani and Judge Kavanaugh at the time *Al-Bihani II* was decided. In the true spirit of Justice Jackson's *Youngstown* analysis, the more that Congress says, the better we can understand the President's AUMF authority.

V

DID CONGRESS INCORPORATE INTERNATIONAL LAW INTO THE AUMF AFTER IT WAS PASSED?

In Section 1021 of the 2012 NDAA, Congress provided ample opportunity for recalibration of the relationship between the international laws of war and the President's AUMF authority.¹⁷⁴ Congress stated inter alia that the President's power under the AUMF includes the ability to "detain covered persons . . . pending disposition under the law of war."¹⁷⁵ Furthermore, it stated that "disposition under the law of war" may

¹⁷⁰ See *id.* at 44.

¹⁷¹ See *id.* at 42–44.

¹⁷² *Id.* at 24.

¹⁷³ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

¹⁷⁴ *Id.* § 1021.

¹⁷⁵ *Id.* § 1021(a).

include “[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for the Use of Military Force.”¹⁷⁶ We thus see for the first time Congress’s express mention of norms of international law with regard to the AUMF.¹⁷⁷ The question thus remains: to what extent should this alter how we view the President’s authority to use “necessary and appropriate force”¹⁷⁸ against those who had a hand in the 9/11 attacks?

For University of Texas School of Law Professor Stephen Vladeck and Georgetown University Law Professor Marty Lederman, the reference to the laws of war in Section 1021 of the 2012 NDAA, as well as in Sections 1024(b)¹⁷⁹ and 1023(b)(1),¹⁸⁰ provides sufficient evidence to support the idea that the President’s authority under the AUMF is to be understood through the lens of the international laws of war.¹⁸¹ Vladeck and Lederman thus believe that Congress’s reference to the law of war in the 2012 NDAA confirms congressional intent to incorporate the international laws of war all along.¹⁸² They even believe that such express mention of the laws of war would go so far as to persuade Judge Kavanaugh to accept the idea that the laws of war inform the limits of the AUMF.¹⁸³ Furthermore, Professor Ingber cites the 2012 NDAA as evidence that Congress has acquiesced to the idea that the international laws of war inform the entirety of the AUMF.¹⁸⁴

However, while Vladeck and Lederman make a compelling argument that it was clearly Congress’s intention in this clarification of the AUMF to incorporate the international laws of war,¹⁸⁵ they fail to look at the specificity of Congress’s message. Rather than a blanket incorporation of the international laws of war, the 2012 NDAA more accurately represents a clarification

¹⁷⁶ *Id.* § 1021(c)(1).

¹⁷⁷ That is, we see Congress “speak” through its official capacity as Congress, rather than in the form of a Senate committee. Given the decade-long speculation as to whom exactly the AUMF authorized the President to engage, this clarification was likely welcomed by many.

¹⁷⁸ *AUMF*, *supra* note 5, § 2(a).

¹⁷⁹ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1024(b), 125 Stat. 1298 (2011).

¹⁸⁰ *Id.* § 1023(b)(1).

¹⁸¹ Lederman & Vladeck, *supra* note 90 (“Even under Judge Kavanaugh’s analysis, these statutory references to ‘law of war’ detention should be sufficient to clarify Congress’s intent that the AUMF authority be construed with reference to that body of international law.”).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Ingber, *supra* note 11, at 79 n.45.

¹⁸⁵ Lederman & Vladeck, *supra* note 90.

in the unique context of the President's authority to *detain* enemy combatants under the AUMF. The express mention of the international laws of war in Section 1021 of the 2012 NDAA are made solely in reference to the context of detainment of persons pursuant to the AUMF.¹⁸⁶ Congress chose its words carefully. It had the opportunity to clarify the AUMF and state that the entirety of the AUMF is to be understood as limited by the laws of war; however, it chose not to do so.¹⁸⁷

However, the 2012 NDAA is not the only time that Congress has addressed post-enactment how the international law of war informs the limits of AUMF authority. The 2013 Senate Armed Forces Committee hearing, mentioned above, also offers insight into how Congress views the AUMF.¹⁸⁸ At first glance, the Committee's failure to rebuke the Executive for its reliance on co-belligerency seems to support the notion that Congress has offered its approval.¹⁸⁹

But do the actions of a Senate *committee* count for the voice of *all of Congress* under a proper Justice Jackson *Youngstown* analysis? If they do, then the Executive has strong legal footing to continue fighting co-belligerents of Al-Qaeda and ISIS under the AUMF authority. As such, Ingber's analysis becomes relevant in more than just the context of detainment—it would apply to all actions taken by the Executive under the AUMF. If the Committee's voice does not, however, speak for all of Congress, then we must stick to only that which Congress has collectively said. In the context of the AUMF, that leaves us with the statute itself and the 2012 NDAA.

While there is no clear answer on what exactly constitutes the "voice" of Congress under Justice Jackson's *Youngstown* approach, when in doubt, it makes sense to rely on what we know Congress had said as a whole. Furthermore, the context of an Act itself carries more weight than a hearing that simply discusses and clarifies an issue. Consequently, the applicable circumstances in which we are to apply Ingber's analysis become those which Congress as a whole has communicated

¹⁸⁶ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), 125 Stat. 1298 (2011) ("Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war.").

¹⁸⁷ *Id.* Nowhere in the NDAA is there a reference to the laws of war extending to all those actions the President may take pursuant to the AUMF. Rather, the only reference to international laws of war is in the context of detainment.

¹⁸⁸ 2013 Senate Hearing, *supra* note 10.

¹⁸⁹ *Id.*

through the AUMF itself and the NDAA: detainment of enemy combatants. As such, it is in this context alone that we should be questioning the co-belligerency principle as it pertains to the AUMF, per Professor Ingber's request.

CONCLUSION

As Occam would probably suggest, the simplest route to understanding if, when, and how, the international laws of war factor into the AUMF would be to call up Congress and ask. However, short of such a fictional and ideal solution, Justice Jackson has provided us with a pretty good second option. Through both the AUMF and its clarification through the 2012 NDAA, Congress has acquiesced to the Executive reliance on the international laws of war, but only insofar as such reliance pertains to the context of detaining enemy combatants. As such, the Executive's reliance on co-belligerency must fall within this context if it is to survive a Jackson Zone I analysis.

However, while Professor Ingber's critique of the co-belligerency principle itself is, technically speaking, limited to this context, practically speaking this is not much of a limit at all. As *Hamdi*, *Hamlily*, and *Al-Bihani* suggest, detainment is precisely the context in which the issue of co-belligerency and the international law of war consistently arise. Viewed in this context, it appears that Ingber's approach has wide practical application even though technically limited to one context. Where we may begin to see the real limitations are those potential cases that fall outside the context of detainment—that is, until Congress seeks to clarify the AUMF yet again.

