

2012

Al-Bihani v. Obama & Congressional Testimony on Targeted Killings: Evaluating Custom as a Source of Law in the War on Terror

Chester H.L. Hutchinson
chutchin@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

Recommended Citation

Hutchinson, Chester H.L. (2012) "Al-Bihani v. Obama & Congressional Testimony on Targeted Killings: Evaluating Custom as a Source of Law in the War on Terror," *Saint Louis University Public Law Review*. Vol. 31 : No. 2 , Article 10.

Available at: <https://scholarship.law.slu.edu/plr/vol31/iss2/10>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**AL-BIHANI v. OBAMA & CONGRESSIONAL TESTIMONY ON
TARGETED KILLINGS: EVALUATING CUSTOM AS A SOURCE OF
LAW IN THE WAR ON TERROR**

TABLE OF CONTENTS

INTRODUCTION	580
I. SUPREME COURT PRECEDENT: RELYING ON CUSTOM AS A SOURCE OF LAW	583
A. Stuart v. Laird: <i>Early Origins</i>	584
B. Midwest Oil: <i>Modern Origins</i>	584
C. Youngstown: <i>A Framework for Using Custom as a Source of Law</i>	586
D. Agee and Dames & Moore: <i>Applying Custom as a Source of Law in the National Security Context</i>	589
1. <i>Haig v. Agee</i>	589
2. <i>Dames & Moore</i>	591
E. Hamdi: <i>Not an Example of Custom as a Source of Law</i>	593
II. ANALYSIS.....	594
A. <i>Summary & Critique of Supreme Court's Reliance on Custom as a Source of Law</i>	594
1. Summary & Critique	594
a. A Long-Continued, Systematic, and Unbroken Practice.....	595
b. Knowing Acquiescence by Congress in an Executive Practice	596
2. National Security Customary Law	598
B. <i>Custom as a Source of Law: Al-Bihani v. Obama</i>	600
1. <i>Al-Bihani I and II</i>	600
a. <i>Al-Bihani I</i>	600
b. <i>Al-Bihani II</i>	602
2. Evaluating the Use of Custom as a Source of Law: <i>Al-Bihani</i>	603

<i>C. Judicial & Executive Response to Al-Bihani</i>	605
<i>D. Custom as a Source of Law: Targeted Killings & Congressional Testimony</i>	606
1. Targeted Killings & Congressional Testimony	606
2. Evaluating the Use of Custom as a Source of Law for Targeted Killings	609
<i>E. Congressional Response to Al-Bihani & Targeted Killings</i>	612
1. A Benefit to Court Decisions Based on Custom as a Source of Law	612
2. Congress Should Not Silently Acquiesce in the War on Terror	613
CONCLUSION.....	614

INTRODUCTION

Under the principle of stare decisis, courts typically rely on prior case law as precedent when making their decisions.¹ However, the Supreme Court has also looked at the historical and administrative practices of the executive when making their decisions—what has been referred to as “non-judicial precedent” or “custom.”² Here, “custom” refers to a historical practice of the executive or legislative branch and knowing acquiescence in that practice by the other branch—an interaction that creates customary law.³ In this sense, custom is a

1. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 8 (2008). Stare decisis is “the Latin phrase for ‘to stand by things decided.’” *Id.* Lawyers use this phrase as “shorthand for either the Court’s basic respect for its prior decisions or the basic principle that legal reasoning should be consistent with judicial precedent.” *Id.*

2. Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 715 (2008). Gerhardt defines “non-judicial precedents as any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.” *Id.* For Gerhardt, these include historical practices, which “usually refer to the federal government’s longstanding or past exercises of powers over certain domains,” custom, which “refers to institutional or cultural habits and conventions,” and administrative practices, which “entail agencies’ constructions of ambiguous federal statutes.” *Id.* at 748–49.

3. Commentators have labeled the general pattern of historical practice by one branch of government and acquiescence in that practice by another branch a variety of terms. See, e.g., HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 66, 102 (2006) (referring to a “‘Madisonian’ acquiescence doctrine” that has “given us a kind of constitutional common law” which can “gloss the *Constitution*” and “alter[] the apparent meaning of a *statute*”); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 848–54 (1994) (describing a “customary national security law” that “evidences the political branches’ joint interpretation of

source of law that the Supreme Court has relied on throughout its history.⁴ The creation of this customary law occurs most frequently when the Court has interpreted congressional statutes that delegate broad authority to the executive branch.⁵ This has been especially evident in Supreme Court cases that concern national security and foreign affairs.⁶

Relying on this Supreme Court precedent, custom has been invoked as a source of legal authority in the national security context since 9/11. In *Al-Bihani v. Obama*, the D.C. Circuit Court of Appeals invoked custom as a source of law when interpreting the September 2001 Authorization for Use of Military Force⁷ (hereinafter “AUMF”).⁸ In *Al-Bihani*, the court considered whether past executive practice concerning wartime detention applied to the detention of Al-Bihani, a Guantanamo Bay detainee.⁹ In testimony before Congress, others have asserted that the executive branch practice of “targeted

the President’s constitutional or statutory authority”); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 70 (1990) (describing a “quasi-constitutional custom” generated by the historical interaction of two or more federal branches). While the executive can also acquiesce in a legislative practice, the focus in this Comment is on congressional acquiescence in executive branch practice.

4. See Gerhardt, *supra* note 2, at 749–54 (collecting cases); DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 108–112 (2010) (same); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 115–16 (1984) (same); see also cases discussed *infra* Part I. This use of “custom” is also distinguishable from customary international law (hereinafter “CIL”). CIL is an international common law that is a body of rules and principles said to arise informally from the general and consistent practice of nations. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986). Evidence of CIL includes judgments and opinions of international tribunals, such as the International Court of Justice, judgments and opinions of other nations’ judicial tribunals, and scholarly writings. *Id.* § 103. The idea behind custom as a source of international law “is that states in and by their international practice may implicitly consent to the creation and application of international legal rules.” MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 42–43 (3d ed. 1999).

5. See BRUFF, *supra* note 3, at 102–05; Raven-Hansen & Banks, *supra* note 3, at 849–50.

6. See cases discussed *infra* Part I.

7. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 cmt. (2006)). The AUMF was Congress’ response to the September 11, 2001 terrorist attacks. The text of the AUMF provides in pertinent part:

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

Id. § 2(a), 115 Stat. at 224.

8. 590 F.3d 866, 870–73 (D.C. Cir. 2010), *reh’g en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1841 (2011).

9. *Id.*

killings”¹⁰ by drones has strong legal authority in both the “domestic customary law of anticipatory self-defense” and in Congress’ broad delegations of authority in the AUMF and the National Security Act of 1947.¹¹ These congressional delegations have permitted Central Intelligence Agency (CIA) practices, such as targeted killing, with which Congress has acquiesced.¹² Also, Harold Koh, Legal Adviser to the U.S. Department of State, stated that government lawyers should first look to “Executive Branch precedent” when researching issues, including those related to detentions and targeted killing.¹³

These invocations of custom as a source of law by the *Al-Bihani* court, by those testifying before Congress, and by the U.S. Department of State Legal Adviser raise several questions: How has custom been used as a source of decisional authority by the Supreme Court? How did the *Al-Bihani* court use custom when interpreting the AUMF? Is custom a valid source of legal authority when considering other broad delegations of congressional authority, such as the National Security Act of 1947? What are some of the implications

10. In this Comment, “targeted killing” refers to the CIA and U.S. military practice of utilizing unmanned drones to kill persons suspected of terrorism in different countries (e.g., Afghanistan, Pakistan, and Yemen). See Scott Shane, *C.I.A. is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A1 (noting that “drone aircraft deployed in Pakistan are the leading edge of a revolution in robotic warfare that has already expanded to Yemen and Somalia, and that military experts expect to sweep the world”); Adam Entous, Julian E. Barnes & Siobhan Gorma, *CIA Escalates in Pakistan*, WALL ST. J., Oct. 2, 2010, at A1; Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 36. This definition is in line with a U.N. Human Rights Council Report which refers to targeted killing as the “intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.” Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

11. *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 40 (2010) (testimony of William C. Banks, Prof., Syracuse Law School) [hereinafter *Legality of Drones Hearings*].

12. *Id.* at 40–41.

13. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. Koh further indicated that the Obama administration finds legal authority for targeted killings by relying on both the authority of the AUMF and “when acting in self-defense” under domestic law and international laws of war. *Id.* It has also been argued that under the Model Rules of Professional Conduct it is permissible for government lawyers to cite “customary national security law” as an alternative source of legal authority when advising President Obama. Peter Margulies, *Changing of the Guard: The Obama Administration, National Security, and the Ethics of Legal Transitions* 25 (Roger Williams Univ. Sch. of Law Legal Studies Research Paper Series, Working Paper No. 95, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673989.

for the executive branch's current practice of targeted killings in Afghanistan, Pakistan, and Yemen?¹⁴ This Comment addresses these questions by analyzing the use of custom as a source of legal authority by the Supreme Court and through application of those Court decisions to *Al-Bihani* and the executive practice of targeted killing.

Part I discusses the Supreme Court precedent relied on by the *Al-Bihani* court, and other commentators, when citing custom as a source of law. These cases indicate precedential authority for using custom when interpreting congressional action and inaction. Based on this precedent, the appropriate use of custom as a source of law requires the executive practice in question to be (1) long-continued, systematic, and unbroken; and (2) Congress' knowing acquiescence in that practice.¹⁵

Part II begins with a summary of the Supreme Court precedent discussed in Part I. These cases are also critiqued for the inconsistencies within this body of law. Next, the *Al-Bihani* court's use of custom when interpreting the AUMF is explained. The use of custom as a source of law in *Al-Bihani* is then evaluated in light of the Supreme Court case law on custom and the critiques of that case law. This section then considers the persuasive influence of *Al-Bihani* and the ways in which the court's findings have been limited by the executive branch. Next, Part II describes the arguments of those asserting custom as a source of legal authority for targeted killings in testimony before Congress, and evaluates these arguments in light of the Supreme Court precedent on custom. Lastly, it is argued that Congress should speak clearly on national security matters in the war on terrorism, particularly as it applies to detention and targeted killings. Such congressional action would preclude any arguments that Congress has acquiesced in these executive practices.

I. SUPREME COURT PRECEDENT: RELYING ON CUSTOM AS A SOURCE OF LAW

The Supreme Court has relied on custom, or "non-judicial precedent," on a number of occasions.¹⁶ The cases discussed in this background section are those that were relied on the D.C. Circuit in denying the rehearing of *Al-Bihani* and by other commentators, who have invoked custom as a source of legal

14. See Scott Shane, Mark Mazzetti & Robert F. Worth, *A Secret Assault on Terror Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1 (discussing the use of targeted killings in Pakistan and Yemen).

15. See *infra* Part I; see also BEDERMAN, *supra* note 4, at 110–111 (finding that "proof of a binding constitutional custom is premised on two broad components. The first element is the objective extent, duration, and consistency of the practice" and a "subjective element" which "in U.S. constitutional law boils down to whether the opposing branch in the separation-of-powers-struggle has actually accepted or 'acquiesced' in the practice").

16. See Gerhardt, *supra* note 2, at 749–54; Glennon, *supra* note 4, at 115–16.

authority.¹⁷ This precedent provides standards that should be applied when using custom as a source of law and places these standards within the factual context in which they arose.

A. *Stuart v. Laird: Early Origins*

In 1803, the Supreme Court relied on custom to uphold the power of the Supreme Court Justices to sit as circuit judges.¹⁸ It was objected that “the judges of the supreme court ha[d] no right to sit as circuit judges, not being appointed as such,” and that “they ought to have distinct commissions for that purpose.”¹⁹ In response, the Court stated that the practice of justices sitting as circuit judges dated back to the beginning of the federal judiciary.²⁰ The Court further stated:

[T]hat practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and had indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical [instruction] is too strong and obstinate to be shaken or controlled.²¹

B. *Midwest Oil: Modern Origins*

United States v. Midwest Oil Co. concerned an 1897 congressional statute that allowed all public lands containing petroleum or oil to be “free and open to occupation, exploration and purchase by citizens of the United States.”²² Because the statute permitted exploration without fees and title could be obtained for nominal amounts, “many persons availed themselves of the provisions of the statute.”²³ As a result, large areas of California were explored, petroleum was found, and landowners began to rapidly extract oil from the land.²⁴ The rapid decrease in oil prompted the Department of Interior to issue a report on September 17, 1909, which indicated that the United States should suspend the filing of claims to oil lands, otherwise the “Government will be obliged to repurchase the very oil that it has practically given away.”²⁵

17. See *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010); Raven-Hansen & Banks, *supra* note 3, at 848–54.

18. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 300–09 (1803).

19. *Id.* at 309.

20. *Id.*

21. *Id.*

22. 236 U.S. 459, 466 (1915) (citation omitted).

23. *Id.*

24. *Id.*

25. *Id.* at 466–67. In more detail, the report indicated the petroleum would be needed for the U.S. Navy:

[A]t the rate at which oil lands in California were being patented by private parties it would be impossible for the people of the United States to continue ownership of oil lands

President Taft issued a proclamation ten days after this report that temporarily withdrew over three million acres of land in California and Wyoming from oil development.²⁶ Six months after this proclamation, the Midwest Oil Company and others bored wells and allegedly extracted 50,000 barrels of oil from public land in Wyoming that had been set aside by the President.²⁷ The government sought to recover the land and money for the oil already extracted.²⁸

The Court found that the case could be determined in “light of the legal consequences flowing from a *long continued practice* to make orders like the one” President Taft made in 1910.²⁹ The Court first referenced past examples “in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens.”³⁰ Specifically, the Court referenced executive orders that established or enlarged Indian reservations, military reservations, and bird reserves.³¹ Moreover, the Court found “Congress did not repudiate the [executive] power claimed or the withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though non-statutory purposes.”³²

The Court further found that in 1902, Congress was put on notice of the executive’s power to withdrawal land and that the executive had exercised that power.³³ The Court reasoned Congress had never “repudiate[d] the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.”³⁴ The Court also looked to prior

for more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away. In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government’s own use and pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended.

Id. (internal quotations omitted).

26. *Id.* at 467.

27. *Id.* at 467–68.

28. *Midwest Oil*, 236 U.S. at 468.

29. *Id.* at 469 (emphasis added).

30. *Id.*

31. *Id.* at 470.

32. *Id.* at 471.

33. *Id.* at 480–81.

34. *Midwest Oil*, 236 U.S. at 481. To counter the argument that executive practice might “prove a usage” but did “not establish its validity,” the Court found 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.” *Id.* at 472–73. To support this

Supreme Court precedent and found that these cases “clearly indicate that the long-continued practice [of the executive], known to and acquiesced in by Congress, would raise a presumption . . . of its consent.”³⁵ In sum, the Court found “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 [withdrawal] order.”³⁶

C. *Youngstown: A Framework for Using Custom as a Source of Law*

The *Youngstown Sheet & Tube Co. v. Sawyer* decision, which concerned President Truman’s seizure of the nation’s steel mills in 1952, resulted in numerous concurring opinions.³⁷ These concurrences established a framework for using history and custom as a source of authority when interpreting the Constitution and statutes.³⁸ The majority opinion rejected the use of historical precedent,³⁹ but it is the concurring opinions that have been most repeatedly quoted in subsequent cases in which the use of custom as a source of legal authority was validated.

In 1951, a dispute arose between steel companies and their employees over terms and conditions for collective bargaining agreements.⁴⁰ The dispute could not be settled, and the worker’s union gave notice of a nation-wide strike to begin on April 9, 1952.⁴¹ The President believed the strike would “immediately jeopardize [the nation’s] national defense” since steel was an indispensable component of substantially all weapons and other war materials.⁴² Hours before the strike began, the President issued an order directing the Secretary of Commerce to take possession of most of the nation’s steel mills and keep them running.⁴³ On April 30, the district court issued an injunction restraining the Secretary from continuing the seizure, and the court of appeals stayed the district court’s injunction that same day.⁴⁴ On June 2,

conclusion, the Court stated that “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 allowed to be so often repeated as to crystallize into a regular practice.” *Id.*

35. *Id.* at 474; *see, e.g.*, *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); *Fairbank v. United States*, 181 U.S. 283, 306 (1901).

36. *Midwest Oil*, 236 U.S. at 483.

37. 343 U.S. 579 (1952).

38. *See id.* at 635–38 (Jackson, J., concurring) (setting forth a three part framework for evaluating legality of executive action depending on whether it is 1) supported by congressional authorization; 2) done in the face of congressional ambiguity; or 3) contrary to congressional will).

39. *See infra* notes 49–51 and accompanying text.

40. *Youngstown*, 343 U.S. at 582.

41. *Id.* at 583.

42. *Id.*

43. *Id.*

44. *Id.* at 584.

less than two months after the initial order, the Supreme Court handed down its opinion.⁴⁵

Justice Black's majority opinion found that no statute authorized the seizure.⁴⁶ Thus, if the President had authority to issue the order, "it must be found in some provision of the Constitution."⁴⁷ He rejected arguments that reasoned the order could be sustained as the exercise of the President's military power as Commander in Chief of the Armed Forces.⁴⁸ In addition, the order could not be sustained under the President's power to see that the laws are faithfully executed since "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."⁴⁹ In this regard, Justice Black explicitly rejected arguments from historical precedent that "other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes."⁵⁰ "[E]ven if this be true," Justice Black wrote, "Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution."⁵¹

It is evident that Justice Black's approach primarily looks at the text of the Constitution.⁵² In contrast, the opinions of Justice Frankfurter and Justice Jackson claim to give the Constitution a "scope and elasticity . . . instead of the rigidity dictated by a doctrinaire textualism."⁵³ In this regard, Justice Frankfurter found that the content for understanding the separation of powers built into the Constitution "is not to be derived from an abstract analysis."⁵⁴ Rather, "[t]he Constitution is a framework for government," and "the way the framework has consistently operated fairly establishes that it has operated according to its true nature."⁵⁵ Thus:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. *In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress*

45. *Id.* at 583–84.

46. *Youngstown*, 343 U.S. at 582, 585–86.

47. *Id.* at 587.

48. *Id.*

49. *Id.* at 587–88.

50. *Id.* at 588.

51. *Id.* at 588–89.

52. *See Youngstown*, 343 U.S. at 587–88.

53. *Id.* at 640 (Jackson, J., concurring).

54. *Id.* at 610 (Frankfurter, J., concurring).

55. *Id.*

and never before questioned, engaged in by Presidents . . . may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.⁵⁶

Justice Frankfurter found support for his conclusions from *Midwest Oil*.⁵⁷ For him, *Midwest Oil* helped “draw a clear line between authority not explicitly conferred yet authorized to be exercised by the President and the denial of such authority.”⁵⁸ In contrast with *Midwest Oil*, where the Court found Presidents over a period of eighty years and in 252 instances had temporarily withdrawn land already entered for public use in order to enable Congress to deal with such withdrawals, “[n]o remotely comparable practice can be vouched for executive seizure of property at a time when this country was not at war.”⁵⁹

Similar to Justice Frankfurter, Justice Jackson found “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”⁶⁰ Thus, “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”⁶¹ In this regard, Justice Jackson identified “a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers.”⁶²

First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”⁶³ Thus, “[a] seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.”⁶⁴ In contrast, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its “lowest ebb.”⁶⁵ Thus, “[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”⁶⁶ Justice Jackson found that President Truman’s seizure fell within this category, and,

56. *Id.* at 610–11 (emphasis added).

57. *Id.* at 611.

58. *Youngstown*, 343 U.S. at 611.

59. *Id.*

60. *Id.* at 635 (Jackson, J., concurring).

61. *Id.* at 635.

62. *Id.*

63. *Id.*

64. *Youngstown*, 343 U.S. at 637.

65. *Id.*

66. *Id.* at 637–38.

thus, concurred in Justice Black's judgment.⁶⁷ In between these two areas is a "zone of twilight":

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, *congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility*. In this area, any actual test of power is likely to depend on *the imperatives of events and contemporary imponderables* rather than on abstract theories of law.⁶⁸

D. Agee and Dames & Moore: Applying Custom as a Source of Law in the National Security Context

1. *Haig v. Agee*

Philip Agee was an ex-CIA agent who, in 1974, announced a campaign to "fight the United States CIA wherever it [was] operating."⁶⁹ To accomplish his goal, Agee "repeatedly and publicly identified individuals and organizations located in foreign countries as undercover CIA agents, employees, or sources."⁷⁰ The Court found Agee's campaign violated his contract with the CIA, prejudiced the ability of the United States to obtain intelligence, and resulted in episodes of violence against the persons identified.⁷¹ In 1979, the Secretary of State revoked Agee's passport pursuant to a federal regulation and sent Agee a revocation notice, which made him aware of his right to an administrative hearing.⁷² The notice offered to hold a hearing in West Germany in five days, but Agee declined this offer and instead contested the revocation of his passport in federal court.⁷³

The district court held the regulation exceeded the statutory powers of the Secretary under the Passport Act of 1926 and ordered the Secretary to restore his passport.⁷⁴ A divided panel of the D.C. Circuit Court of Appeals affirmed, holding "the Secretary was required to show that Congress had authorized the

67. *Id.* at 640; see also Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 520 (1982) (finding that "a decisive majority of five Justices treated Congress' silence as speech—its *nonenactment of authorizing legislation* as a legally binding expression of *intent to forbid* the seizure at issue").

68. *Youngstown*, 343 U.S. at 637 (emphasis added).

69. *Haig v. Agee*, 453 U.S. 280, 283 (1981).

70. *Id.* at 284.

71. *Id.* at 284–85.

72. *Id.* at 286–87.

73. *Id.* at 287.

74. *Id.* at 287–88.

regulation either by an express delegation or by implied approval of a ‘substantial and consistent’ administrative practice.”⁷⁵ The appeals court did not find there to be a substantial practice since they could find only one passport revocation since 1926 and only five before that, which were “arguably” denied for national security or foreign policy reasons.⁷⁶

The Supreme Court began by interpreting the 1926 Passport Act.⁷⁷ The Court found this Act granted broad rule-making powers to the executive because the Act concerned the areas of “foreign policy and national security, where congressional silence is not to be equated with congressional disapproval.”⁷⁸ Thus, “a consistent administrative construction of [the 1926 Act] must be followed by the courts ‘unless there are compelling indications that it is wrong.’”⁷⁹ The Court further noted that Congress is not required to give specific direction to the executive in the area of foreign affairs:

[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, *Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.*⁸⁰

The Court considered the history of passport control in the United States.⁸¹ First, the Court found congressional recognition of executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy was shown from the “earliest days of the Republic.”⁸² Also, “[t]he President and the Secretary of State consistently construed the first [passport legislation] to preserve their authority to withhold passports on national security and foreign policy grounds.”⁸³ The Court next concluded “Congress, in 1926, adopted the longstanding administrative construction of the 1856 statute,” and the “Executive construed the 1926 Act to work no change in prior practice and specifically interpreted it to authorize denial of a

75. *Haig*, 453 U.S. at 288 (emphasis added) (quoting *Zemel v. Rusk*, 381 U.S. 1, 12 (1965)).

76. *Id.*

77. *Id.* at 290.

78. *Id.* at 291.

79. *Id.* at 291 (quoting *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977)).

80. *Id.* at 292 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). It is also important to note that the Court quickly dismissed Agee’s argument that “Executive policy [was] entitled to diminished weight because many of them concern the powers of the Executive in wartime.” *Id.* at 303. The Court responded by finding that “the statute provides no support for this argument” and that “[h]istory eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war.” *Id.*

81. *Haig*, 453 U.S. at 292–301.

82. *Id.* at 293.

83. *Id.* at 295.

passport on grounds of national security or foreign policy.”⁸⁴ The Court further stated,

Indeed, by an unbroken line of Executive Orders, regulations, instructions to consular officials, and notices to passport holders, the President and the Department of State left no doubt that likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions.⁸⁵

Thus, the Court held the regulations Agee had challenged were “‘sufficiently substantial and consistent’ to compel the conclusion that Congress had approved it.”⁸⁶

2. *Dames & Moore*

Dames & Moore v. Regan, decided a week after *Haig v. Agee*, concerned events surrounding the November 4, 1979, capture and hostage of U.S. diplomatic personnel in Tehran, Iran.⁸⁷ In response to this crisis, President Carter declared a national emergency under the International Emergency Economic Powers Act (IEEPA), froze all Iranian assets in the United States, prohibited prejudgment attachment on those assets unless licensed by the Treasury Department, and prevented entry of any final judgment affecting the frozen Iranian assets.⁸⁸

In December of 1979, Dames & Moore, an American company, filed suit against the Government of Iran, the Atomic Energy Organization of Iran (AEOI), and a number of Iranian banks.⁸⁹ Dames & Moore had contracted with the AEOI to “conduct site studies for a proposed nuclear power plant in Iran.”⁹⁰ As provided by the contract, AEOI terminated the agreement, and Dames & Moore sued seeking nearly \$3.5 million for services performed prior to contract termination.⁹¹

84. *Id.* at 297–98.

85. *Id.* at 298 (footnotes omitted). While indicating “congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy,” the Court found that the inference of congressional approval “is supported by more than mere congressional inaction.” *Id.* at 300 (quoting *Zemel*, 381 U.S. at 11–12). Specifically, the Court pointed to amendments made in 1978 to the Passport Act, which made it unlawful to travel abroad without a passport even in peacetime. *Id.* at 300 n.48. Thus, “[d]espite the longstanding and officially promulgated view that the Executive had the power to withhold passports for reasons of national security and foreign policy, Congress in 1978, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.” *Id.* at 301 (internal quotation marks omitted).

86. *Id.* at 306 (quoting *Zemel*, 381 U.S. at 12).

87. 453 U.S. 654, 662 (1981).

88. *Id.* at 662–63.

89. *Id.* at 663–64.

90. *Id.* at 664.

91. *Id.*

In January of 1981, President Carter negotiated an agreement by which all Government and private claims with Iran would be terminated or arbitrated by an Iran-United States Claims Tribunal in exchange for the release of the American hostages.⁹² President Carter then issued executive orders to implement this agreement, which revoked all previous judgments regarding Iranian funds, securities, or deposits, nullified all non-Iranian interests in these assets, and required banks holding Iranian assets to transfer them to a federal reserve bank.⁹³ In February, President Reagan “ratified” these orders and suspended all claims in U.S. federal courts in favor of the Iran-United States Claims Tribunal.⁹⁴ In response, Dames & Moore filed suit against the Secretary of the Treasury to prevent enforcement of the executive orders and argued the President went beyond his statutory and constitutional powers in making the agreement with Iran.⁹⁵

The Court found explicit congressional authorization in the IEEPA for the President’s ability to freeze Iranian assets.⁹⁶ However, the Court had more difficulties with the President’s authority to suspend claims pending in American courts.⁹⁷ The Court specifically rejected the notion that the President had the right to act with inherent power in the area of international relations; however, the Court did find that the “failure of Congress specifically to delegate authority does not, ‘*especially. . . in the areas of foreign policy and national security,*’ imply ‘congressional disapproval’ of action taken by the Executive.”⁹⁸ Thus, the Court effectively found the President’s suspension of private claims fell into Justice Jackson’s “twilight zone,” where Congress has neither explicitly approved nor disapproved of executive action.⁹⁹

The Court then explored the history of congressional acquiescence in the practice of claim settlement by executive agreement.¹⁰⁰ The Court found that since 1799, the executive branch had exercised the power to settle claims, and from 1817 to 1917, at least eighty executive agreements were entered into by the United States.¹⁰¹ The Court also cited ten binding settlements with foreign nations since 1952 in concluding “that the practice of settling claims continues today.”¹⁰² Also, crucial to the Court’s decision was the “conclusion that Congress [had] implicitly approved the practice of claim settlement by

92. *Id.* at 664–65.

93. *Dames & Moore*, 453 U.S. at 665–66.

94. *Id.* at 666.

95. *Id.* at 666–67.

96. *Id.* at 669–74.

97. *Id.* at 675.

98. *Id.* at 678 (emphasis added) (citing *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

99. *Dames & Moore*, 453 U.S. at 678.

100. *Id.* at 678–79.

101. *Id.* at 679 n.8.

102. *Id.* at 680 & n.9.

executive agreement.”¹⁰³ For example, Congress enacted the International Claims Settlement Act of 1949 (ICSA), and “[o]ver the years Congress has frequently amended the [ICSA] to provide for particular problems arising out of settlement agreements, thus demonstrating Congress’ continuing acceptance of the President’s claim settlement authority.”¹⁰⁴ The Court further noted that in 1972, Congress had entertained legislation relating to congressional oversight of claim settlements by executive agreement.¹⁰⁵ However, Congress left the area “untouched” and thus it “failed to object to this longstanding practice . . . even when it has had an opportunity to do so.”¹⁰⁶ Relying on Justice Frankfurter’s concurrence in *Youngstown* and the *Midwest Oil* precedent, the Court concluded that “[p]ast practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.’”¹⁰⁷

E. Hamdi: Not an Example of Custom as a Source of Law

In *Hamdi v. Rumsfeld*, the Court considered events stemming from the September 11, 2001 attacks against the United States by the al Qaeda network.¹⁰⁸ After this attack, Congress issued the AUMF, and soon thereafter the President ordered U.S. Armed Forces to Afghanistan with a mission to subdue al Qaeda.¹⁰⁹ In 2001, as part of that mission, the United States captured and detained Yaser Esam Hamdi, a U.S. citizen.¹¹⁰ Hamdi was originally detained in Afghanistan and then was brought to the United States, at which time his father challenged the detention.¹¹¹

The plurality opinion first considered as a threshold matter whether the United States had the authority to detain Hamdi.¹¹² In making this determination, the Court first looked at the text of the AUMF, which

103. *Id.* at 680.

104. *Id.* at 681.

105. *Dames & Moore*, 453 U.S. at 682 n.10.

106. *Id.*

107. *Id.* at 686 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). The use of executive branch practice as described in *Youngstown* and *Dames & Moore* has also been invoked more recently by the Supreme Court. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003). In this case, the Court stated that cases have recognized that the President has authority to make “‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic,” and “the practice goes back over 200 years, and has received congressional acquiescence throughout its history.” *Id.* at 415 (citing *Dames & Moore*, 453 U.S. at 682–83).

108. 542 U.S. 507, 510 (2004) (plurality opinion).

109. *Id.*

110. *Id.*

111. *Id.* at 510–11.

112. *Id.* at 516.

authorized the President “to use ‘all necessary and appropriate force’ against ‘nations, organizations, or persons’ associated with the September 11, 2001, terrorist attacks.”¹¹³ “There can be no doubt,” the Court found, “that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”¹¹⁴ The Court concluded that detention of enemy combatants was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”¹¹⁵ In this regard, the Court found the capture, detention, and trial of combatants by “universal agreement and practice” are “important incident[s] of war.”¹¹⁶

In *Hamdi*, the Supreme Court considered the fact that a President had conducted detentions in the past.¹¹⁷ However, the *Hamdi* Court did not consider whether there was an executive *practice* in which Congress acquiesced. *Hamdi* is discussed in this section since it is relied on by the court in *Al-Bihani* to support the conclusion that courts should look to custom as a source of authority when interpreting the AUMF. *Hamdi*, however, should not be categorized as Supreme Court precedent that provides standards for using custom as a source of law, which is summarized and critiqued in the next section.

II. EVALUATING CUSTOM AS A SOURCE OF LAW IN THE WAR ON TERROR

A. *Summary & Critique of Supreme Court’s Reliance on Custom as a Source of Law*

1. Summary & Critique

The Court in *Midwest Oil* found that “the long-continued practice [of the executive], known to and acquiesced in by Congress, would raise a presumption . . . of its consent.”¹¹⁸ Similarly, Justice Frankfurter’s

113. *Id.* at 518 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

114. *Hamdi*, 542 U.S. at 518.

115. *Id.*

116. *Id.* (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). The Court also found that there was no bar to the U.S. holding one of its own citizens as an enemy combatant. *Id.* at 519. For this part of its holding, the Court looked to Supreme Court precedent in *Ex parte Quirin*, which held that citizens could be considered belligerents within the meaning of the law of war. *Id.* (citing *Ex parte Quirin*, 317 U.S. at 20, 37–38). The Court also referenced the Lieber Code and its regulations concerning the Union’s detention of “captured rebels” as prisoners of war. *Id.*

117. *Id.* at 516–517.

118. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

concurrence in *Youngstown* found that a “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents . . . may be treated as a gloss on ‘executive Power’ vested in the President.”¹¹⁹ These cases were relied on by the Court in *Haig v. Agee* and *Dames & Moore* and suggest two major requirements when using custom as a source of legal authority.¹²⁰ First, there must be a practice that is long-continued, systematic, and unbroken. Second, there must be knowing acquiescence by Congress in such a practice.¹²¹ However, determining whether these two elements exist is a malleable process subject to criticism.

a. A Long-Continued, Systematic, and Unbroken Practice

In *Midwest Oil*, the Court indicated that the executive practice of land withdrawal occurred 252 times and occurred over an eighty-year period.¹²² By contrast, in *Youngstown* there were only three instances of comparable executive factory seizures, which were not deemed controlling because they occurred within a six-month period.¹²³ In *Haig v. Agee*, the lower court noted that only one passport had been revoked on national security grounds since 1926.¹²⁴ However, the Supreme Court traced a long history from “the earliest days of the Republic” in finding an “unbroken line” of executive action in withholding passports on national security and foreign policy grounds.¹²⁵ In *Dames & Moore*, the Court found that the executive branch had exercised the power to settle claims since 1799, and further referenced ten binding

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

120. See *Haig v. Agee*, 453 U.S. 280, 293–97 (1981); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

121. Scholars have suggested other requirements when determining whether a custom has legal authority. For example, Glennon indicates several factors that a court should consider when determining whether a custom exist: 1) consistency; 2) numerosity; 3) duration; 4) density; 5) continuity; and 6) normalcy. Glennon, *supra* note 4, at 128–133. However, consistency is the only one that “must be present to justify the conclusion that a custom exists.” *Id.* at 133. He further argues that U.S. customary law should be predicated on *opinio juris* which assumes the concurrence of three elements: first, the custom in question must consist of acts and not just mere assertions of authority to act; second, the coordinate branch must have been on notice of the acts occurrence; and third, the branch placed on notice must have acquiesced in the custom. *Id.* at 134; see also Raven-Hansen & Banks, *supra* note 3, at 853 (suggesting that there is a “typically unstated but universally assumed predicate of customary law: the executive practice must not violate any constitutional provision or statute” (footnotes omitted)).

122. 236 U.S. at 469, 471.

123. 343 U.S. at 613 (Frankfurter, J., concurring).

124. 453 U.S. at 288.

125. *Id.* at 293, 298.

settlements with foreign nations since 1952 in concluding that the practice of claims settlement was long-continued.¹²⁶

These cases reveal that the criteria for determining when a practice is long-continued and unbroken are not well-settled and are based on the circumstances of each case. Is it based on the number of times the executive has performed the practice, or is it dependent on the duration of a practice over a long period of time? Does it matter at what point in history the practice originated—from “the earliest days of the Republic”¹²⁷—or is a later date sufficient? Moreover, justification for a practice can be found on how the Court chooses to define the problem. This was evident in *Haig v. Agee*, where the Supreme Court pointed to a long history of *withholding* passports on national security grounds in refuting the lower courts determination that there was not a substantial and consistent practice of *revoking* passports on national security grounds.¹²⁸

b. Knowing Acquiescence by Congress in an Executive Practice

In *Midwest Oil*, the Court pointed to legislation in 1902, which put Congress on notice of the executive’s power to withdraw land, thereby indicating that Congress had subsequently acquiesced in the power by the President to withdraw land.¹²⁹ In *Haig v. Agee*, the Court indicated the executive “history of administrative construction was repeatedly communicated to Congress, not only by routine promulgation of Executive Orders and regulations, but also by specific presentations” to the Senate.¹³⁰ The Court found “silence in the face of an administrative policy” is enough to recognize congressional acquiescence; however, a conclusion based on silence was unnecessary because Congress impliedly authorized the passport statute when a 1978 amendment “left completely untouched the broad rule-making authority granted in the [1926] Act.”¹³¹ Similarly, the *Dames & Moore* Court found Congress had impliedly authorized settlements, because it had repeatedly amended the International Claims Settlement Act and because Congress had “failed to object to [the] longstanding practice” when it entertained legislation relating to congressional oversight of claim settlements

126. 453 U.S. 654, 679–80 & n.9 (1981).

127. *Haig*, 453 U.S. at 293.

128. *Id.* at 287–88, 297–98; *see also*, Jason T. Burnette, Note, *Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation*, 39 GA. L. REV. 1096–97 (finding that “[b]y merely refocusing the lens of historical inquiry—broadening or narrowing the level of generality, or creating ad hoc categories to distinguish inconsistent facts—lawyers and judges may invoke a tradition to support ‘almost any cause’” (footnote omitted)).

129. 236 U.S. 459, 481 (1915).

130. 453 U.S. at 299.

131. *Id.* at 300–01 (quoting *Zemel v. Rusk*, 381 U.S. 1, 11–12 (1965)).

by executive agreement.¹³² Determining whether Congress has acquiesced in an executive practice is subject to several criticisms.

First, using custom as legal authority “places improper weight on the inaction of subsequent Congresses in interpreting the meaning of prior legislation they had no part in enacting.”¹³³ Placing weight on the inaction of subsequent Congresses is “inconsistent with the traditional proposition that the legislative ‘intent’ relevant to statutory interpretation is the intent of the enacting Congress, not the continuing intent of subsequent Congresses.”¹³⁴ Thus, “[i]f subsequent legislative *statements* directly supporting a statutory interpretation are not valid evidence, how can subsequent legislative *silence*, usually just indirectly supporting a statutory interpretation, be considered any more authoritative?”¹³⁵

Second, determining congressional notice and acquiescence is a malleable process, subject to the ways in which a court reads the legislative history indicating congressional notice and acquiescence.¹³⁶ For example, the *Dames & Moore* Court was selective in both the original legislative history of the statute and subsequent legislative silence:

[The Court] read IEEPA’s language as unambiguously authorizing some of the executive acts under challenge, thereby ignoring the legislative history of the statute, which . . . clearly evinced the contrary legislative intent to narrow presidential power. [Also], rather than construe IEEPA’s silence regarding the suspension of claims as preempting the president’s claim of inherent power to act, [the Court] construed a history of unchecked executive practice, the fact of IEEPA’s existence, and the absence of express congressional disapproval of the president’s action to demonstrate that Congress had *impliedly* authorized the act, thereby elevating the president’s power from the twilight zone—Jackson’s category two—to its height in Jackson’s category one.¹³⁷

132. 453 U.S. at 681–82 & n.10.

133. Raven-Hansen & Banks, *supra* note 3, at 853–54.

134. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95 (1988).

135. *Id.* at 96.

136. *Id.* Eskridge further notes that:

Even contemporaneous legislative history may be unreliable and subject to manipulation. As legislators and lobbyists have begun to understand how much courts use legislative history, posturing and fabrication have become possible. The fight, if lost on the language of the statute, moves to the language of the committee report or perhaps to getting a scripted colloquy entered into the Congressional Record. The hope is that an unfavorable but likely interpretation will be limited, if not excluded, by the extra-statutory information.

Id. at 95 n.164.

137. KOH, *supra* note 3, at 139. The determination of acquiescence can also be determined by defining what the legislature acquiesces in. For example, the *Dames & Moore* Court could have struck down the agreement in question by noting the lack of congressional acquiescence

A third problem is the difficulty of making inferences “for a large collection of people, especially when their decisionmaking is as structured as that in Congress.”¹³⁸ As has been pointed out, “the structure of Congress makes it far more likely that something will not happen (inaction) than that it will (action).”¹³⁹ Since “[n]ational security disputes often ‘will not involve clear congressional affirmations and will thus require a determination of whether consent can be inferred from silence or no action,’” they are especially susceptible to this criticism.¹⁴⁰ Such inferences were evident in both *Haig* and *Dames & Moore*, which found implied authorizations for executive action based on subsequent legislation.¹⁴¹

2. National Security Customary Law

The Supreme Court precedent on custom also indicates the Court’s approval of broad, legislative delegations of power to the President in the area

surrounding the *general* practice of using executive agreements. Glennon, *supra* note 4, at 129–30. However, “[b]y particularizing the practice to executive claims settlement agreements, . . . the Court defined a custom consisting of a handful of specific agreements about which little controversy had occurred, thus ensuring that the custom was supported by self-selected precedents.” *Id.* at 130.

138. Eskridge, *supra* note 134, at 98. As Justice Scalia has also noted, legislative inaction may signify “(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.” *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

139. Eskridge, *supra* note 134, at 98. To make his point, Eskridge explains the legislative process:

The legislative agenda is severely limited; to gain a place on that agenda, a measure must not only have substantial support, but be considered urgent by key people (such as the President and/or the party leadership in Congress). Even if a proposal finds a place on the legislative agenda, it is usually doomed if there is substantial opposition, whether or not most legislators favor it, because of the variety of procedural roadblocks opponents may erect. A bill can effectively be killed by a hostile committee or subcommittee chair in either chamber, by a hostile House or Senate leadership, by a hostile Rules Committee in the House or by a filibuster in the Senate. Consequently, even if a majority of the members of Congress disagree with a judicial or administrative interpretation of a statute, it is very unlikely that they will be able to amend the statute quickly, if at all.

Id. at 99 (footnotes omitted).

140. Raven-Hansen & Banks, *supra* note 3, at 853 (footnote omitted).

141. See *Haig v. Agee*, 453 U.S. 280, 297–99 (1981); *Dames & Moore v. Regan*, 453 U.S. 654, 681–82 (1981). There is also a formal problem with relying on legislative acquiescence as implied Congressional approval. Typically before a legislative enactment is given authority, it must be passed by both chambers of Congress and presented to the President. Eskridge, *supra* note 134, at 96 (citing *INS v. Chadha*, 462 U.S. 919 (1983)). Thus, cases relying on implied Congressional authorization from silence or rejected proposals (as was the case in *Haig* and *Dames & Moore*) would not seem to have legislative effect since they did not follow the specific constitutional requirements of bicameralism and presentment. See *id.* at 96.

of national security and foreign affairs. For example, the Court in *Haig* stated, “Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”¹⁴² The Court indicated the reason for such a broad delegation was the “changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature.”¹⁴³ The *Dames & Moore* Court further confirmed this sentiment: “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act.”¹⁴⁴ These statements indicate the Supreme Court’s deferential attitude toward presidential action in the area of national security and foreign affairs. Thus, some scholars have concluded that when the President “acts with sufficient consistency over time and Congress knowingly acquiesces, this interaction may create customary national security law. The custom evidences the political branches’ joint interpretation of the President’s constitutional or statutory authority.”¹⁴⁵

Koh offers less generous reasons than the Supreme Court to explain congressional deference to the executive. Koh found that Congress has persistently acquiesced in executive efforts because of “legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional lack of political will.”¹⁴⁶ One example of legislative myopia that Koh indicated is the War Powers Resolution of 1973, which was “drafted principally to halt

142. 453 U.S. at 292 (emphasis omitted) (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

143. *Id.* (quoting *Zemel*, 381 U.S. at 17).

144. 453 U.S. at 678. Some have thus concluded, concerning *Haig* and *Dames & Moore*, that “[t]aken together, the message to Congress seems plain: Absent clear congressional disapproval, the Supreme Court will not interfere with executive decisions when they concern foreign affairs.” William P. Hovell et al., *Separation of Powers—Congressional Acquiescence and Executive Discretion in Foreign Affairs*, 57 NOTRE DAME LAW. 868, 881 (1982). It has also been argued that “Congress is poorly structured for initiative and leadership The presidency, in contrast, is ideally structured for the receipt and exercise of power.” KOH, *supra* note 3, at 118. For Koh, however, this does not explain why the President chooses to wield the power. The President does so because “[a]n entire generation of Americans grew up and came to power believing in the wisdom of the muscular presidential leadership of foreign policy,” and “a pervasive national perception that the presidency must act swiftly and secretly to respond to fast-moving international events has almost inevitably forced the executive branch into a continuing pattern of evasion of congressional restraint.” *Id.* at 119, 122.

145. Raven-Hansen & Banks, *supra* note 3, at 849–50. “Customary national security law” is not a term commonly referred to in the field of national security law, but some scholars do make use of it. See, e.g., Margulies, *supra* note 13, at 5 (indicating that government lawyers may consider customary national security law as a source of legal authority when advising the President).

146. KOH, *supra* note 3, at 123.

creeping wars like Vietnam, not short-term military strikes or covert wars of the kind that dominate modern warfare.”¹⁴⁷ Written in 1990, Koh’s words concerning legislative shortsightedness and the nature of covert warfare are pertinent when considering the *Al-Bihani* decision and a congressional response to the executive practice of targeted killing.

B. Custom as a Source of Law: Al-Bihani v. Obama

1. Al-Bihani I and II

Petitioners who request an en banc hearing from the U.S. Court of Appeals for the District of Columbia are generally denied, and these denials typically do not receive comment from the court. Yet, the court’s en banc denial in *Al-Bihani v. Obama* (*Al-Bihani II*) produced a short statement from seven of the judges and concurrences from each of the appellate panel judges who originally decided the case.¹⁴⁸ To understand the unusual en banc denial and the framework for interpreting the September 2001 AUMF that the *Al-Bihani* justices propose, one must first look to the original opinion in *Al-Bihani v. Obama* (*Al-Bihani I*).¹⁴⁹

a. Al-Bihani I

The panel considered the detention of Ghaleb Nassar Al-Bihani, a Yemeni citizen, who has been held at Guantanamo Bay, Cuba since 2002.¹⁵⁰ Al-Bihani accompanied the 55th Arab Brigade, a para-military group allied with the Taliban which included al Qaeda members within its command structure.¹⁵¹ He worked as the brigade’s cook and carried a brigade-issued weapon that he claimed to have never fired.¹⁵² Al-Bihani did not dispute these facts; rather, he challenged the statutory legitimacy of his detention and argued U.S. reliance on his “support” of al Qaeda or the Taliban as a basis for his detention violated international law, and thus, the “standard should not be read into the ambiguous provisions of the [AUMF].”¹⁵³

147. *Id.* at 123–24.

148. 619 F.3d 1 (D.C. Cir. 2010).

149. 590 F.3d 866 (D. C. Cir. 2010), *reh’g en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

150. *Id.* at 869. Circuit Judge Janice Brown wrote the opinion, which was joined by Circuit Judge Brett Kavanaugh. *Id.* at 868. Judge Williams, a senior Circuit Judge, concurred in the judgment, but wrote a separate opinion because he disagreed with the majority’s analysis. *Id.* at 882 (Williams, J., concurring in part and concurring in judgment).

151. *Id.* at 869 (majority opinion).

152. *Id.*

153. *Id.* at 870–71. Al-Bihani interpreted international law to require anyone not belonging to an official state military to be a civilian, and civilians, Al-Bihani argued, must directly participate in hostilities (e.g., fire a weapon in combat), before they can be lawfully detained. *Id.* at 871.

The court found Al-Bihani's arguments "rel[ied] heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war."¹⁵⁴ The court found this premise mistaken for two main reasons. First, the court found no indication in the AUMF or any other congressional statute that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF.¹⁵⁵ Furthermore, the majority wrote that, "[e]ven assuming Congress had at some earlier point implemented the laws of war as domestic law through appropriate legislation, Congress had the power to authorize the President in the AUMF and other later statutes to exceed those bounds."¹⁵⁶

Second, the court found that "[f]urther weakening their relevance to this case, the international laws of war are not a fixed code. Their dictates and application to actual events are by nature contestable and fluid."¹⁵⁷ "[T]here is 'no precise formula' to identify a practice as [customary international law] and . . . '[i]t is often difficult to determine when [a custom's] transformation into law has taken place.'"¹⁵⁸ "Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers."¹⁵⁹ Accordingly, since the court did not find "vague treaty provisions and amorphous customary principles" as valid sources, they looked to "sources courts always look to" when resolving cases: "the text of relevant statutes and controlling domestic caselaw."¹⁶⁰

What is not apparent in *Al-Bihani I*, but becomes apparent in *Al-Bihani II*, is that the court's reliance on "statutes and controlling domestic caselaw" also included considering custom as a source of law.

Because Al-Bihani did not fire a weapon or directly participate in hostilities, he contended that his detention was unlawful. *Id.*

154. *Id.*

155. *Al-Bihani I*, 590 F.3d at 871.

156. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1986)).

157. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. b & c).

158. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. b & c).

159. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004)).

160. *Id.* at 871–72. The court subsequently assessed Al-Bihani's detention under the AUMF, the Military Commission Acts of 2006 and 2009, and domestic cases in concluding that Al-Bihani's detention was lawful. *See id.* at 872–75.

b. *Al-Bihani II*

The *Al-Bihani II* opinion contained a short statement from the majority of judges that denied rehearing en banc and concurring opinions from each of the three judges who decided the case at the panel level, including a lengthy opinion from Judge Kavanaugh.¹⁶¹ Judge Kavanaugh's concurring opinion in *Al-Bihani II* is an explanation, endorsed by Judge Brown, for the conclusions of the court in *Al-Bihani I*.¹⁶² In *Al-Bihani II*, Judge Kavanaugh explained his framework for interpreting the AUMF. First, he noted "[i]nterpretation of a statute begins (and often ends) with its text."¹⁶³ In this regard, he found that the text of the AUMF was written in "broad terms" and "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."¹⁶⁴ But there was nothing in the text of the AUMF that indicated "Congress intended to impose judicially enforceable international-law limits on the President's war-making authority."¹⁶⁵

Judge Kavanaugh further found Congress had enacted many statutes that expressly referred to international law, but unlike those statutes, the AUMF contained no reference to international law.¹⁶⁶ He considered this omission "critically important" in light of the Supreme Court's recognition that "Congress knows how to accord domestic effect to international obligations when it desires such a result."¹⁶⁷ Thus, this "silence strongly suggests that Congress did not intend to impose judicially enforceable international-law constraints on the President's war-making authority."¹⁶⁸ "Rather," Judge Kavanaugh wrote, "in ascertaining what the AUMF authorizes, courts presume that Congress authorized the President, except to the extent otherwise prohibited by the Constitution or statutes, *to take at least those actions that U.S. Presidents historically have taken in wartime*—including killing,

161. See 619 F.3d 1 (D.C. Cir. 2010).

162. See *id.* at 9 (Kavanaugh, J., concurring in denial of rehearing en banc).

163. *Id.* at 24.

164. *Id.*

165. *Id.* at 25.

166. *Id.*

167. *Al-Bihani II*, 619 F.3d at 25 (Kavanaugh, J., concurring in denial of rehearing en banc) (quoting *Medellin v. Texas*, 552 U.S. 491, 522 (2008)).

168. *Id.* Judge Kavanaugh also addressed arguments that Congress' use of the phrase "all necessary and appropriate force" signaled an implicit intent to bind the President to international law norms. *Id.* at 25 n.11. He found that the Necessary and Proper Clause in the Constitution has been viewed expansively and that Congress has used the phrase in other legislation to refer to broad grants of power, and thus this phrase is "more naturally read as emphasizing the breadth of the authorization." *Id.* at 25.

capturing, and detaining the enemy.”¹⁶⁹ To support this proposition, he cited the Supreme Court cases of *Dames & Moore*, *Haig v. Agee*, and *Midwest Oil*.¹⁷⁰ Judge Kavanaugh further noted that the plurality in *Hamdi v. Rumsfeld* “‘looked to prior Executive Branch practice during wartime to inform its interpretation’ of the AUMF.”¹⁷¹ His framework thus moves from looking at the text of the congressional statute or authorization, recognizing any ambiguities or omissions in that text, to looking at the historical practices of the executive in which Congress has acquiesced.

2. Evaluating the Use of Custom as a Source of Law: *Al-Bihani*

Based on Supreme Court precedent, the framework of U.S. customary law requires (1) a long-continued practice and (2) knowing acquiescence in that practice.¹⁷² In *Al-Bihani II*, Judge Kavanaugh invoked the framework of relying on custom as part of Supreme Court precedent but did not employ this framework. First, he did not conduct any historical analysis as to whether there was a long-continued practice of detention by U.S. presidents in wartime. He merely presumed that “killing, capturing, and detaining the enemy” is an action that U.S. Presidents historically have taken in wartime.¹⁷³ While one would likely concede that “killing, capturing, and detaining” are generally accepted practices of Presidents in wartime, this statement begs further questions: Does the location of someone’s killing, capture, or detention affect the legality of the act? Does the manner in which the person is captured or killed (e.g., a U.S. Predator drone strike) change the analysis or would a court simply analogize to ‘targeted killing’ attempts conducted during previous

169. *Id.* at 26 (emphasis added).

170. *See id.*

171. *Id.* at 42 (quoting Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2085 (2005)). It is evident throughout Judge Kavanaugh’s opinion that his reading of the AUMF draws from Bradley and Goldsmith’s law review article. This article compares the AUMF to other authorizations to use force in U.S. history and proposes a framework for interpreting the AUMF:

[T]he meaning of the AUMF is determined in the first instance by its text, *as informed by a comparison with authorizations of force in prior wars*, including declared wars. In ascertaining the scope of the “necessary and appropriate force” that Congress authorized in the AUMF, courts should look to two additional interpretive factors: *Executive Branch practice during prior wars*, and the international laws of war.

Bradley & Goldsmith, *supra*, at 2048 (emphasis added). Judge Kavanaugh rejected using the international laws of war as an interpretive source for the AUMF and responded to Bradley and Goldsmith’s arguments in this regard. *See Al-Bihani II*, 619 F.3d at 44 n.23 (Kavanaugh, J., concurring in denial of rehearing en banc).

172. *See supra* Part II.A.1.

173. *See Al-Bihani II*, 619 F.3d at 26 (Kavanaugh, J., concurring in denial of rehearing en banc).

wars?¹⁷⁴ Has indefinite detention been a part of executive historical practice? Thus, some careful analysis as to whether the executive has conducted similar practices to those conducted since 2001 would be warranted instead of presuming that killing, capturing, and detaining the enemy is always permitted.

Moreover, Judge Kavanaugh's reliance on *Hamdi* is not helpful because the *Hamdi* plurality opinion did not consider any long-standing practice of the President. The *Hamdi* Court merely cited *Ex parte Quirin* for the proposition that capture and detention is a universal practice and a fundamental and accepted incident to war.¹⁷⁵ It has also been argued that *Quirin* was an aberration and should not indicate any executive historical practice.¹⁷⁶ Thus, neither Judge Kavanaugh nor the *Hamdi* Court pointed to any long-continued, systematic, or unbroken executive branch practice. In addition, neither Judge Kavanaugh nor the *Hamdi* Court considered whether Congress had acquiesced in any practice of the President relating to such detentions. Thus, Judge Kavanaugh stretched the scope of the Court's review when he stated that the *Hamdi* Court "'looked to prior Executive Branch practice during wartime to inform its interpretation' of the AUMF."¹⁷⁷

If one were to apply the standards of a long-continued practice and knowing acquiescence by Congress to Al-Bihani's detention, it would require more extensive analysis. First, a judge should determine whether the executive practice of detention during wartime rose to the level of an unbroken practice, and then determine whether Congress knowingly acquiesced in such a practice. Thus, if Judge Kavanaugh or others seek to rely on custom as a source of authority, then more historical analysis than was done in *Al-Bihani II* should take place to thoroughly assess whether a practice is long-continued and acquiesced in by Congress.

174. See, e.g., *Legality of Drones Hearings*, *supra* note 11, at 37 (stating that "[i]n appropriate circumstances the United States has engaged in targeted killing at least since a border war with Mexican bandits in 1916," in reference to assassination attempts on Poncho Villa by the U.S. Army).

175. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (citing *Ex parte Quirin*, 317 U.S. 1, 28–31 (1942)).

176. See LOUIS FISHER, *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS* 172–82 (2008). Also, as Justice Scalia noted in his dissenting opinion, *Quirin* was "not [the] Court's finest hour." *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting). This was in part because the Court upheld the military commission trial of eight German saboteurs "in a brief *per curiam* issued the day after oral argument concluded," and a "week later the Government carried out the commission's death sentence upon six saboteurs." *Id.*

177. *Al-Bihani II*, 619 F.3d at 42 (Kavanaugh, J., concurring in denial of rehearing en banc) (emphasis added) (quoting Bradley & Goldsmith, *supra* note 171, at 2085).

C. Judicial & Executive Response to Al-Bihani

Judge Williams, in his concurrence in *Al-Bihani I*, agreed with Judge Brown and Judge Kavanaugh that the AUMF authorized Al-Bihani's detention.¹⁷⁸ However, Judge Williams did not think the majority's statement concerning the applicability of international laws to the AUMF was necessary: "[T]here is no need for the court's pronouncements, divorced from application to any particular argument."¹⁷⁹ Williams further indicated that the government had argued "that the laws of war have . . . a role to play in the interpretation of the AUMF's grant of authority," and thus he stated that "the majority's dictum goes well beyond what even the *government* has argued in this case."¹⁸⁰ It would appear that a majority of the judges in *Al-Bihani II* also considered the *Al-Bihani I* majority's statements to be dicta. Their one-paragraph opinion denying rehearing en banc noted that they declined "to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits."¹⁸¹ Thus, in the view of one scholar, the majority's denial "amounted to a nullification of the more sweeping parts of the [*Al-Bihani I*] ruling without the court bothering to rehear it."¹⁸²

Obama administration lawyers also have not sought to use the *Al-Bihani I* ruling, even though it would give the executive branch more power.¹⁸³ In fact, Obama administration officials have criticized the reasoning of the ruling as vulnerable to reversal and have argued that the scope and limits of the AUMF are defined by the laws of war as translated to a conflict against terrorists.¹⁸⁴ And, as Judge Kavanaugh himself repeatedly emphasized in *Al-Bihani II*, "the Executive is free to follow international-law principles as a matter of policy," and is "free to adopt legally binding regulations pursuant to statutory authorization and may, within the bounds permitted by statute, seek to

178. See *Al-Bihani I*, 590 F.3d 866, 883–85 (D. C. Cir. 2010) (Williams, J., concurring in part and concurring in judgment).

179. *Id.* at 885.

180. *Id.* at 883, 885.

181. 619 F.3d at 1.

182. Charlie Savage, *Appeals Court Backs Away from War Powers Ruling*, N.Y. TIMES, Sept. 1, 2010, at A21 (citing Stephen I. Vladeck, an American University law professor who filed an amicus brief asking the court to rehear the case en banc).

183. See Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 29, 2010, at A1 (noting that Obama administration political appointees David Barron, Harold Koh, and Jeh C. Johnson have indicated that the administration should not abandon respect for the laws of war); Koh Address at the Annual Meeting of the American Society of International Law, *supra* note 13.

184. See Savage, *supra* note 183, at A21; Koh Address at the Annual Meeting of the American Society of International Law, *supra* note 13.

correspond those regulations to international-law principles.”¹⁸⁵ However, he was clear that he would not “give any legal weight to the Executive’s view” on whether the AUMF incorporates international law of war principles since “the Judiciary has the final word on the appropriate canons of construction or interpretive principles that courts are to employ in construing statutes.”¹⁸⁶ For Judge Kavanaugh, these “interpretive principles” include the use of custom as a source of legal authority when a statute is ambiguous or delegates broad powers.¹⁸⁷

The *Al-Bihani* court’s statements concerning international law will likely be considered dicta, and the concurring opinions in the denial for rehearing en banc do not have precedential value.¹⁸⁸ However, what is left intact is a framework in which custom is used to interpret the scope of authority that Congress delegated to the executive branch in the AUMF. This framework is also applicable to other broad delegations of power, such as the National Security Act of 1947, discussed in the following section, which has been asserted as a source of legal authority to support the executive practice of targeted killings.¹⁸⁹ Thus, *Al-Bihani I* and *II* retain persuasive value for judges, academics, and government lawyers who seek to rely on custom as a source of law in future cases.

D. Custom as a Source of Law: Targeted Killings & Congressional Testimony

1. Targeted Killings & Congressional Testimony

William C. Banks, in an April 2010 hearing before the House of Representatives Subcommittee on National Security and Foreign Affairs,

185. 619 F.3d at 45 (Kavanaugh, J., concurring in denial of rehearing en banc). For example, “Army Field Manuals seek to ensure that the military acts consistently with certain international-law norms.” *Id.* Judge Kavanaugh also noted “the limited authority of *the Judiciary* to rely on international law to restrict the American war effort does not imply that *the political branches* should ignore or disregard international-law norms.” *Id.* at 11. Instead, the United States is “well-advised to take account of international-law principles” since “breaching international obligations may trigger serious consequences, such as subjecting the United States to sanctions, undermining U.S. standing in the world community, or encouraging retaliation against U.S. personnel abroad.” *Id.* Also, “in our constitutional system of separated powers, it is for Congress and the President—not the courts—to determine in the first instance whether and how the United States will meet its international obligations.” *Id.* at 12.

186. *Id.* at 45.

187. *See id.* at 52.

188. *But see id.* at 2 (Brown, J., concurring in denial of rehearing en banc) (arguing that *Al-Bihani I* cannot be considered dicta, but instead must be considered precedent).

189. *See infra* notes 195–206 and accompanying text; Shane, *supra* note 10, at A1 (discussing “targeted killings”).

indicated that custom was a source of legal authority for targeted killings.¹⁹⁰ In his written statements, Banks posed the question: “Just what does distinguish lawful targeted killing from unlawful political assassination?”¹⁹¹ For Banks, the answer depended on whether the killing occurred during war, peacetime, or during the “nontraditional war on terrorism.”¹⁹² In the war on terrorism Banks found a legal basis for targeted killings in “a domestic law anticipatory self-defense custom” and “intelligence legislation regulating the activities of the CIA.”¹⁹³ Banks indicated that this law was “not well articulated or understood,” but did “supply adequate . . . legal authority for drone strikes.”¹⁹⁴

To make his argument that intelligence legislation supports targeted killing, Banks asserted that the National Security Act of 1947 authorized the CIA to “perform such other functions and duties related to intelligence affecting the national security as the President or National Security Council may direct”—what has been commonly referred to as the CIA’s Fifth Function.¹⁹⁵ “Although, the original grant of authority in 1947 likely did not contemplate targeted killing, the 1947 Act was designed as dynamic authority

190. *Legality of Drones Hearings*, *supra* note 11, at 36.

191. *Id.* at 42.

192. *Id.* at 42–43.

193. *Id.* at 40, 43. Banks’ argument for a “domestic law anticipatory self-defense custom” takes the following progression:

Under the Constitution, the President may order targeted killing in defense of the United States in war. The President’s authority as Commander in Chief to “repel sudden attacks” has traditionally had a real time dimension, or a sort of imminence requirement, by analogy to the doctrine of self-defense at international law. Yet a terrorist attack is usually over before it can be repelled in real time, and when the attack is a suicide attack, it is impracticable to strike back. In addition, the United States has learned to expect terrorists to pursue a course of continuing attacks against us. As such, over time *a domestic law anticipatory self-defense custom* has emerged that permits the President to use deadly force against a positively identified terrorist if he has exhausted other means of apprehending him.

Id. at 40 (emphasis added) (citing William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 677–81 (2003) (discussing the rubric of anticipatory self-defense within the “twilight zone” of terrorist attacks)).

194. *Id.* at 43. Others have argued that the United States Constitution and its due process provisions apply to the practice of targeted killings. See Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 411 (2009) (contending that *Boumediene v. Bush*, 553 U.S. 723 (2008), subjects the U.S. government to due-process restrictions wherever it acts in the world); see also *Legality of Drones Hearings*, *supra* note 11, at 39 (arguing before Congress that “[a]t bottom, the right to due process is the right to fair and reasonable procedures,” and “for CIA activities, the due process might come from some combination of CIA lawyers, the Inspector General, and the review boards within the CIA’s clandestine service”).

195. *Legality of Drones Hearings*, *supra* note 11, at 40 (quoting National Security Act of 1947, Pub. L. No. 80-253, § 102(d)(5), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. §§ 403–404a(d)(4) (2006))).

to be shaped by *practice* and necessity, and by the 1970s, the *practice* came to include targeted killing.”¹⁹⁶ Banks further indicated that Congress has not disapproved of targeted killings since the 1970s when Congress tightened their oversight of the CIA:

After the Church Committee¹⁹⁷ learned of and disapproved assassination plots of the CIA or its agents in the mid-1970s, President Ford issued an executive order prohibiting CIA involvement in assassination (but notably not restricting targeted killing) and Congress enacted intelligence oversight legislation that, as amended, continues to require reporting to Congress by the President of significant anticipated intelligence operations.¹⁹⁸

In line with this legislation, Banks further noted that in 1998 the Clinton administration authorized the CIA “to use covert means to disrupt and preempt terrorist operations planned by Usama bin Laden.”¹⁹⁹ This directive was affirmed by President Bush before 9/11 and authorized “lethal force for self-defense.”²⁰⁰ It was under this directive that the United States in 2002 targeted and killed an al Qaeda leader and five lower level operatives in the Yemeni desert pursuant to an executive finding.²⁰¹ Thus, Banks contended that, “at first blush, the relevant law is the law of intelligence,” which includes the Hughes-Ryan Amendment of 1974.²⁰² Under this amendment:

Congress has authorized CIA covert operations if findings are prepared and delivered to select members of Congress before the operation described, or in a “timely fashion” thereafter. So long as intelligence committees are kept “fully and currently informed,” the intelligence laws permit the President broad discretion to utilize the nation’s intelligence agencies to carry out national security operations, implicitly including targeted killing.²⁰³

Banks further asserted that a targeted killing operation “would follow intelligence law as an ‘operation in foreign countries, other than activities intended solely for obtaining necessary intelligence,’ and thus presumably would be conducted pursuant to statutory authority.”²⁰⁴

196. *Id.* (emphasis added).

197. The Church Committee was created by Congress in 1976 to investigate alleged U.S. involvement in assassination plots. Banks & Raven-Hansen, *supra* note 193, at 701.

198. *Legality of Drones Hearings*, *supra* note 11, at 40–41.

199. *Id.* at 41.

200. *Id.* at 41–42.

201. *Id.* at 38, 41–42.

202. *Id.* at 42 (citing Hughes-Ryan Amendment, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (1974) (repealed 1991)). Banks further stated that “[t]he amendment was a component of reforms in intelligence operations law designed to make U.S. covert operations decisions directly accountable to the decision makers.” *Id.* at 42 n. 18.

203. *Id.* at 42 (citing Banks & Raven-Hansen, *supra* note 193, at 713).

204. *Legality of Drones Hearings*, *supra* note 11, at 42 (citing quoting Hughes-Ryan Amendment § 32).

Banks' view is confirmed by Kenneth Anderson, who also testified before the same House subcommittee.²⁰⁵ In his statements, Anderson asserted that "[t]he lawfulness of the CIA's [targeted killing] operations under US domestic law is not at issue," because the CIA "has been tasked by direct orders of the President, under the authority of a complex statute that provides for oversight and accountability within and between the political branches."²⁰⁶

2. Evaluating the Use of Custom as a Source of Law for Targeted Killings

In their testimony before Congress (and in their other writings), both Banks and Anderson assessed Congress' broad delegations of authority under the 1947 National Security Act.²⁰⁷ In making their arguments, Banks and Anderson relied on executive branch historical practice and congressional acquiescence in those practices (or custom) as a source of legal authority for determining whether the CIA's practice of targeted killings is legitimate under U.S. law.²⁰⁸ Are their conclusions supported by the Supreme Court's

205. *Id.* at 7–17 (testimony of Kenneth Anderson, Washington College of Law, American University).

206. *Id.* at 11. In other writings, Anderson finds that the National Security Act of 1947 that created the CIA and granted it authority to engage in intelligence activities also authorized the performance of "additional services of common concern and such other functions and duties related to intelligence affecting the national security as the President and the National Security Council may direct." Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (manuscript at 21) (Brookings Inst., Georgetown Univ. Law Ctr. & Hoover Inst., Working Paper 2009) (internal quotations omitted), available at http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx. Anderson finds that while the "reference to other functions and duties . . . is deliberately obscure," the breadth of known incidents under these words is "sufficient to suggest that the executive branch has interpreted the legislative mandate broadly and Congress has regularly acquiesced." *Id.* (emphasis added) (internal quotations omitted). "Whether rightly or wrongly, justly or unjustly," Anderson writes, "the United States has often used force, not under color of law enforcement or in the context of IHL armed conflicts to which the U.S. was a party, but instead under domestic statutory authority." (manuscript at 22). After reviewing Congressional reforms to intelligence legislation, Anderson concluded:

Notwithstanding the reforms that have strengthened Congressional oversight and other watchdog functions over the past several decades, nothing in the basic statutory arrangement challenges this fundamental assumption that U.S. domestic law permits in certain circumstances the uses of force, including targeted killing, by civilian agents of the government in circumstances that implicate self-defense under international law but do not necessarily constitute an IHL armed conflict.

Id.; see also Peyton Cooke, *Bringing the Spies in from the Cold: Legal Cosmopolitanism and Intelligence Under the Laws of War*, 44 U.S.F. L. REV. 601, 646–47 (2010) (making similar arguments to Anderson and citing *Dames & Moore* for the conclusion that covert activities are "well within historical tradition" and would receive support from authoritative Supreme Court precedent).

207. See *supra* Part II.D.1.

208. See *supra* Part II.D.1.

customary law standards of (1) an executive practice long-pursued and (2) Congress' knowing acquiescence in such a practice?²⁰⁹

In other writings, Banks conducted this analysis and stated that CIA involvement in assassination in the years before 1974 may or may not have been a "systematic, unbroken, executive practice, long pursued."²¹⁰ But, "[f]or the purposes of establishing customary law, . . . it cannot be said that congressional acquiescence was knowing."²¹¹ This is because "[t]he system for congressional oversight of CIA activities, including covert operations, helped assure that Congress as a whole did not know what the CIA was doing."²¹² "Thus, the CIA activities of the 1950s, 1960s, and early 1970s cannot be supported by customary law."²¹³ However, Banks argued that later intelligence legislation contributed to recognition by Congress that authority for covert action existed and was supported by a dynamic construction of the National Security Act of 1947's Fifth Function activities.²¹⁴ "The dynamic construction of the Fifth Function permitted the development of customary law to support the covert action capability, in part because Congress was informed at least generally concerning such activities."²¹⁵ Thus, Congress' "knowing acquiescence may extend to targeted killing."²¹⁶ Banks does not definitively conclude that Congress has acquiesced in targeted killings. However, as evidenced by his statements before Congress, Banks found support for targeted killings within the structure of complex intelligence laws governing congressional oversight of CIA action.²¹⁷

Banks appears to honestly evaluate whether there is an executive practice long-pursued and whether Congress has acquiesced in such a practice. However, his analysis is subject to the general criticisms of inferring intent from the inaction or silence of a subsequent Congress.

First, improper weight is placed on the inaction or silence of subsequent Congresses when interpreting the meaning of the original enactment of the National Security Act in 1947. Banks argued that the 1947 Act was "designed

209. *See supra* Part II.A.1.

210. Banks & Raven-Hansen, *supra* note 193, at 708 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

211. *Id.*

212. *Id.*

213. *Id.* at 709. Banks and Raven-Hansen provide a fuller discussion of these conclusions within their article. *See id.* at 699–705, 708–09.

214. *Id.* at 712.

215. *Id.* at 713.

216. Banks & Raven-Hansen, *supra* note 193, at 713. These authors further argue that subsequent legislation has increased Congressional knowledge of covert activities and that subsequent domestic laws have not forbidden targeted killings. *Id.* at 726–33.

217. *See Legality of Drones Hearings, supra* note 11, at 42–43.

as dynamic authority to be shaped by *practice* and necessity.”²¹⁸ While Banks does evaluate the intent of the enacting legislature, it becomes evident that this intent is presumed to continue to later legislatures based on their silence. For example, when interpreting the amendments to the National Security Act of 1947, such as the Hughes-Ryan Amendment, Banks presumes that subsequent legislatures also wanted a dynamic construction of the Fifth Function activities based on congressional silence and the absence of changes made to the 1947 Act.²¹⁹

Also, Banks presented a view of the legislative history of intelligence legislation that ultimately supported a finding that targeted killing is warranted under this law.²²⁰ While this might be a valid conclusion, it is not a straightforward one, and thus there could be a reading of the legislative history that would support a different conclusion. For example, is the mere fact that the Church Committee investigated CIA assassinations a statement that Congress would not want a dynamic interpretation of the Fifth Function supporting the CIA’s involvement in the practice of targeted killing? Regardless, it appears that Banks’ view of the legislative history rests on the absence of congressional action. Thus, to borrow from Koh’s analysis of *Dames & Moore*, Banks construes the “history of unchecked executive practice, the fact of [the National Security Act of 1947’s] existence, and the absence of express congressional disapproval of the president’s [findings concerning lethal force] to demonstrate that Congress had *impliedly* authorized the act.”²²¹

Furthermore, it is clear that any acquiescence or implied authorization of Congress rests on making inferences. Making such inferences for “a large collection of people, especially when their decisionmaking is as structured as that in Congress,”²²² is especially dangerous in light of the fact that the intelligence findings of Congress are not shared with Congress as a whole, but with small groups within Congress. Thus, for this reason, and based on the general structure of Congress discussed earlier,²²³ it is far more likely that there will be inaction concerning intelligence legislation than there will be changes to such legislation. Yet, as is indicated in the following section, one hopes Congress will speak clearly concerning the executive practices of detentions and targeted killings of suspected terrorists.

218. *Id.* at 40 (emphasis added).

219. *See id.* at 40–41.

220. *Id.* at 40–42.

221. KOH, *supra* note 3, at 139.

222. Eskridge, *supra* note 134, at 98.

223. *See supra* text accompanying notes 138–41.

E. Congressional Response to Al-Bihani & Targeted Killings

1. A Benefit to Court Decisions Based on Custom as a Source of Law

There are many reasons to criticize the use of custom as a source of legal authority. However, there is a benefit for court decisions based on historical executive branch practice because they do not require courts to make decisions that rely on the Constitution.²²⁴ “Because an acquiescence argument is both context-specific and contingent on continuing congressional approval, its acceptance by the Court does not create so troubling a precedent as does an endorsement of a new category of ‘inherent’ executive power”²²⁵ Thus, if courts find congressional acquiescence in an executive practice, it “allows the courts to minimize their articulation of constitutional precedent, which only the Supreme Court or the amendment process can change. And, if the courts misread congressional assent to an executive practice, Congress may legislate to alter or stop it.”²²⁶ For example, Congress eventually retracted the authority for executive withdrawal of land (the issue in *Midwest Oil*) in 1976.²²⁷

This benefit is applicable to arguments that rely on custom as a source of law for detention (*Al-Bihani I and II*) or for targeted killing (Banks and Anderson’s congressional testimony). If the Court were to make a decision based on the President’s Article II powers, then it could only be changed by a subsequent Supreme Court decision or the amendment process.²²⁸ But, if a court later found justification for targeted killings based on executive practice and congressional acquiescence under the AUMF and subsequent congressional silence, then Congress could “legislate to alter or stop” such practices.²²⁹ Regardless of this benefit, it is hoped that Congress would not seek to react to a court decision or an executive act, but would proactively

224. For example, a court could determine, as Judge Kavanaugh argued, that the executive branch has authority under Article II to detain individuals in wartime. *Al-Bihani II*, 619 F.3d 1, 52 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc). However, as indicated in Harold Koh’s address, the Obama administration has not relied on the President’s inherent Commander-in-Chief power under Article II as a basis for detention. Koh, *supra* note 13.

225. BRUFF, *supra* note 3, at 104. Bruff further noted that “[a] finding of acquiescence, which ordinarily mixes in statutory elements, is less momentous than creation of a precedent based solely on the Constitution, because it leaves open an avenue of retreat for Court and Congress alike.” *Id.* at 105.

226. *Id.* at 104.

227. See Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (codified as amended at 43 U.S.C. §§ 1701–1784) (2006). In this Act, Congress provided that “the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress . . . [is] repealed.” *Id.* (citing *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

228. See BRUFF, *supra* note 3, at 104.

229. *Id.* at 104.

legislate concerning the executive practices of detention and targeted killings in the current war on terror.

2. Congress Should Not Silently Acquiesce in the War on Terror

In *Al-Bihani I*, Judge Brown herself questioned whether the “court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation,” because the “common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supply”—factors that Judge Brown does not think exist in the context of Guantanamo habeas’ detentions.²³⁰ Judge Brown maintained though that Congress should legislate in this area:

But the circumstances that frustrate the judicial process are the same ones that make this situation particularly ripe for Congress to intervene pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution. These cases present hard questions and hard choices, ones best faced directly. Judicial review, however, is just that: *re-view*, an indirect and necessarily backward looking process. And looking backward may not be enough in this new war.²³¹

William Banks also asked Congress to legislate concerning the war against terrorism.²³² In his testimony before Congress, he contended that “[c]ontemporary laws have not kept up with changes in the dynamics of military conflicts,” and nowhere is this “more glaring than in its treatment of targeted killing.”²³³ “The United States now finds itself engaged in military conflicts with non-state groups, and such conflicts were not the subject of the extensive international framework for warfare negotiated after the World Wars,” and “[t]hese new battlefields require adaptation of old laws, domestic and international.”²³⁴ Thus, “Congress would do all of us an important favor

230. 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring).

231. *Id.* at 882. Judge Brown further stated that:

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.

Id.

232. *Legality of Drones Hearings*, *supra* note 11, at 43.

233. *Id.* at 45.

234. *Id.* at 46. Banks also noted that his “testimony has shown how the legal authority to permit and regulate targeted killing may be found within the existing legal corpus.” *Id.* However, he admitted that “the foundational authorities are not well formed, and there has been little deliberative attention to modernizing the law to reflect the modern battlefield.” *Id.*

by devoting attention to articulating policy and legal criteria for the use of force against non-state terrorists.”²³⁵

In *Al-Bihani II*, Judge Kavanaugh set up a framework which looked to executive practices during previous wartimes when interpreting the AUMF.²³⁶ In testimony before Congress, it was asserted that the AUMF and the 1947 National Security Act provided support for the executive practice of targeted killing.²³⁷ Thus, using custom as a source of law, both the court in *Al-Bihani II* and Banks argue that Congress has impliedly authorized executive practices through its silent acquiescence. In response to such arguments, Congress could either remain silent and acquiesce, or it could legislate to alter or stop executive practices currently carried out under the alleged authority of the AUMF and the National Security Act of 1947. If Congress takes the first option, they might find themselves reacting to court decisions that invoke custom as a source of law in later years. Under the second option, Congress could proactively implement legislation that governs detention and targeted killings adapted to the terrorist networks operating in the world today.²³⁸ Such congressional action would preclude any arguments that Congress has acquiesced in the executive practices of detention and targeted killings. One hopes Congress will not remain silent.

CONCLUSION

Reliance upon custom as a source of law is “inevitably backward-looking”²³⁹ since it evaluates (1) whether an executive practice is long-continued, systematic, and unbroken and (2) whether Congress has knowingly acquiesced in such a practice. An honest assessment of these two requirements that does not manipulate the history of the executive practice or the history of congressional action (or inaction) is necessary if courts seek to follow Supreme

235. *Id.*

236. *See supra* Part II.B.1.b.

237. *See supra* Part II.D.1.

238. For example, Congress could delineate the precise scope of what is permitted under the “necessary and appropriate” phrase of the AUMF. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 cmt. (2006)).

239. *See* Glennon, *supra* note 4, at 148.

Court precedent faithfully. Such assessment, however, would be unnecessary if Congress took the forward-looking approach by establishing legal criteria for detentions and targeted killings in the war on terror.

CHESTER H.L. HUTCHINSON*

* J.D., Saint Louis University School of Law, May 2011; B.A., Covenant College, May 2003. I thank Prof. Monica Eppinger for guiding me through the field of national security law and for her helpful comments on this note. I thank my sons (Harkins, Cedar, and Finlay) for being their joyful, jolly selves, and for helping me to always keep life in proper perspective. Lastly, I am deeply grateful to my wife, Erin C.A. Hutchinson, for her patience and fortitude during our years at law school, the writing of this note, and my time away at JAG school.

