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**THESIS**

**FAREWELL TO ARMS: A PLAN FOR EVALUATING  
THE 2001 AUTHORIZATION FOR USE OF MILITARY  
FORCE AND ITS ALTERNATIVES**

by

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September 2014

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ALTERNATIVES**

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## **ABSTRACT**

On September 14, 2001, Congress passed the 2001 Authorization for Use of Military Force (AUMF). Over the past 13 years, the AUMF has served as the primary legal foundation for the use of force against terrorist organizations and other counterterrorist operations. Since its passage, threats facing the United States have evolved and new groups have emerged. Yet, Congress has failed to reexamine the statute.

This thesis examines whether the AUMF serves as the proper foundation for addressing current terrorist threats or whether an alternative legal tool is more appropriate. To conduct this examination, it details and applies a methodology, or analytical framework, for assessing the status quo application of the AUMF and its potential alternatives. This thesis evaluates and ascertains the best among proposed courses of actions for the future of the AUMF by analyzing the evolution of terrorist threats, constitutional concerns, the consequences of altering the legal structure upon which national counterterrorism strategies rely, international legality, and precedent. Ultimately, this thesis recommends that Congress both sunset the AUMF and implement a tailored approach to force authorization, one that balances constitutional protections and security, while providing a foundation for crafting future force authorizations.

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# TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>A.</b>	<b>PROBLEM STATEMENT .....</b>	<b>2</b>
<b>B.</b>	<b>RESEARCH QUESTIONS.....</b>	<b>6</b>
<b>C.</b>	<b>LITERATURE REVIEW .....</b>	<b>7</b>
	1. Literature Focus.....	7
	2. Developing Research and Proposals Regarding Continued Utilization of the AUMF .....	9
	3. International Standards .....	12
	4. Additional Research Questions That Need to Be Addressed .....	14
	5. Conclusion .....	16
<b>D.</b>	<b>METHODOLOGY .....</b>	<b>17</b>
	1. Sample.....	17
	2. Sample Selection.....	17
	3. Data Sources .....	17
	4. Type and Mode of Analysis.....	18
	5. Policy Options Analysis–The Status Quo .....	18
	6. Alternatives.....	18
	7. Criteria.....	20
	8. Output .....	21
<b>E.</b>	<b>ORGANIZATION .....</b>	<b>21</b>
<b>II.</b>	<b>OVERCOMING INSECURITY: CONSIDERATIONS CENTRAL TO EVALUATING THE AUMF AND ALTERNATIVES BASED ON U.S. SECURITY IMPLICATIONS.....</b>	<b>23</b>
<b>A.</b>	<b>INTRODUCTION.....</b>	<b>23</b>
<b>B.</b>	<b>13 YEARS LATER: A THREAT EVOLVED .....</b>	<b>24</b>
	1. AUMF Authority and Dynamic Threats.....	25
	2. Categorizing Current Threats .....	27
	3. Prioritizing Threats .....	33
	4. The Threat Environment Has Evolved Since 9/11.....	37
<b>C.</b>	<b>COUNTERTERRORISM MEASURES SUPPORTED BY AUMF AUTHORITY .....</b>	<b>37</b>
	1. Overview of Executive Branch Reliance on AUMF Authority.....	37
	2. Action Against Associated Forces.....	40
	3. Enemy Combatant Designation and Detentions .....	47
	4. Forces in Afghanistan .....	48
	5. Targeted Killings.....	49
<b>D.</b>	<b>CONSIDERING SECURITY .....</b>	<b>54</b>
<b>III.</b>	<b>DOMESTIC LEGALITY CONSIDERATIONS .....</b>	<b>57</b>
<b>A.</b>	<b>INTRODUCTION.....</b>	<b>57</b>
<b>B.</b>	<b>CONSTITUTIONAL CHECKS AND BALANCES .....</b>	<b>57</b>

1.	<b>Background: Executive and Congressional War Powers Authorities</b> .....	59
2.	<b>The AUMF: When War Powers Collide</b> .....	61
3.	<b>War Powers Resolution</b> .....	63
4.	<b>Judicial Deference</b> .....	65
5.	<b>Congress’s Balancing Act</b> .....	68
C.	<b>CONSTITUTIONAL DUE PROCESS PROTECTIONS</b> .....	69
1.	<b>Notice and Evidentiary Standards</b> .....	70
2.	<b>Challenging Authorities</b> .....	73
3.	<b>Due Process Conclusion</b> .....	74
D.	<b>CONCLUSION</b> .....	74
IV.	<b>INTERNATIONAL LAW CONSIDERATIONS</b> .....	77
A.	<b>INTRODUCTION</b> .....	77
B.	<b>SELF-PRESERVATION AND ATTACKS FROM NON-STATE ACTORS</b> .....	79
C.	<b>MAINTAINING INTERNATIONAL PEACE AND SECURITY BY PREEMPTING AN IMMINENT ATTACK . . . WITH FORCE</b> .....	82
D.	<b>WAR HAS LAWS?</b> .....	86
1.	<b>Armed and Conflicted</b> .....	87
2.	<b>The Privilege of Combat</b> .....	89
E.	<b>THE IMPORTANCE OF INTERNATIONAL LEGAL CONSIDERATIONS</b> .....	94
F.	<b>CONCLUSION</b> .....	95
V.	<b>PRECEDENT-SETTING CONSIDERATIONS</b> .....	97
A.	<b>VERSATILE USE OF FORCE: CAPITALIZING ON MILITARY AND LAW ENFORCEMENT TOOLS IN U.S. COUNTERTERRORISM OPERATIONS</b> .....	97
1.	<b>Maximum v. Minimum Force</b> .....	99
2.	<b>The Evolving U.S. Approach to Military and Law Enforcement Efforts Abroad</b> .....	102
3.	<b>Conclusion</b> .....	104
B.	<b>PROMOTING GOVERNMENT TRANSPARENCY</b> .....	105
C.	<b>POLICY REASSESSMENT AND AVOIDING CONFIRMATION BIAS</b> .....	107
VI.	<b>METHODOLOGY FOR EVALUATING THE AUMF AND ALTERNATIVES</b> .....	111
A.	<b>DOMESTIC LEGALITY</b> .....	112
B.	<b>SECURITY</b> .....	113
C.	<b>INTERNATIONAL LEGALITY</b> .....	114
D.	<b>PRECEDENT</b> .....	115
E.	<b>CONCLUSION</b> .....	116

VII.	COUNTERING EVOLVING TERRORIST THREATS: EVALUATING CONTINUED AUMF APPLICATION AND ALTERNATIVE APPROACHES .....	119
A.	THE STATUS QUO APPROACH—CONTINUED UTILIZATION OF THE AUMF.....	120
1.	Description.....	120
2.	Analysis .....	122
a.	<i>Domestic Legality</i> .....	122
b.	<i>Security</i> .....	125
c.	<i>International Legality</i> .....	128
d.	<i>Precedent</i> .....	132
e.	<i>Conclusion</i> .....	135
B.	THE GENERAL CRITERIA PLUS LISTING APPROACH—CONGRESSIONAL DELEGATION OF AUTHORITY TO THE EXECUTIVE BRANCH .....	135
1.	Description.....	135
2.	Analysis .....	136
a.	<i>Domestic Legality</i> .....	136
b.	<i>Security</i> .....	139
c.	<i>International Legality</i> .....	140
d.	<i>Precedent</i> .....	141
e.	<i>Conclusion</i> .....	142
C.	THE ARTICLE II APPROACH—LEANING ON LAW ENFORCEMENT .....	143
1.	Description.....	143
2.	Analysis .....	144
a.	<i>Domestic Legality</i> .....	144
b.	<i>Security</i> .....	148
c.	<i>International Legality</i> .....	150
d.	<i>Precedent</i> .....	151
e.	<i>Conclusion</i> .....	152
D.	THE TAILORED APPROACH .....	152
1.	Description.....	152
a.	<i>Riding into the Sunset</i> .....	153
b.	<i>Renovation of the WPR</i> .....	154
c.	<i>Assess the Necessity of a Narrowly Tailored Force Authorization against AQAP Based on the Organization’s Intent and Capability</i> .....	156
d.	<i>Assess the Necessity of a Narrowly Tailored Force Authorization against ISIL Based on the Organization’s Intent and Capability</i> .....	156
e.	<i>Review of Law Enforcement Authorities</i> .....	159
2.	Analysis .....	160
a.	<i>Domestic Legality</i> .....	160
b.	<i>Security</i> .....	163

c.	<i>International Legality</i> .....	165
d.	<i>Precedent</i> .....	166
3.	<b>Recommendation</b> .....	166
<b>VIII.</b>	<b>CONCLUSION: TAKING RESPONSIBILITY FOR ACTION—AND INACTION</b> .....	169
	<b>LIST OF REFERENCES</b> .....	175
	<b>INITIAL DISTRIBUTION LIST</b> .....	187

## LIST OF FIGURES

Figure 1.	Map Depicting Regional Influence of Core AQ and Its Affiliates .....	30
Figure 2.	ISIL Strongholds in Syrian Rebel-Held and Contested Areas .....	33
Figure 3.	Balance of War Powers.....	61

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**LIST OF TABLES**

Table 1. Executive Branch Reliance on the AUMF.....39

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## LIST OF ACRONYMS AND ABBREVIATIONS

2012 NDAA	2012 National Defense Authorization Act
AQ	Al Qa'ida
AQAP	Al Qa'ida in the Arabian Peninsula
AQIM	Al Qa'ida in the Islamic Maghreb
AUMF	Authorization for Use of Military Force
AUMF of 2002	2002 Authorization for Use of Military Force in Iraq
BH	Boko Haram
CIA	Central Intelligence Agency
COIN	counterinsurgency
CRS	Congressional Research Service
DOD	Department of Defense
ETIM	East Turkistan Islamic Movement
FBI	Federal Bureau of Investigation
IS	Islamic State
ISIL	Islamic State in Iraq and the Levant
ISIS	Islamic State of Iraq and Syria
POW	prisoner of war
TTP	Tehrik-e-Taliban Pakistan
UN	United Nations
UN Charter	United Nation's Charter
U.S.	United States
U.S. DOJ	U.S. Department of Justice
WPR	War Powers Resolution

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## EXECUTIVE SUMMARY

### A. INTRODUCTION

The Authorization for Use of Military Force (AUMF) is the primary legal foundation for the use of force against terrorist organizations. It provides the president with the authority to use all necessary and appropriate force against the nations, organizations, and persons whom the president determines planned, authorized, committed, or aided the 9/11 attacks. The political and judicial branches have interpreted the AUMF as extending to forces “associated with” al Qaeda (AQ) and the Taliban.

Despite the broad reach of the AUMF, its continued applicability to today’s terrorist threats is questionable. Since its passage over 13 years ago, the threat landscape has evolved. United States (U.S.) forces have degraded AQ and removed the Taliban from power in Afghanistan. Political officials and legal experts question whether the AUMF provides adequate legal authority to fight contemporary versions of AQ that did not exist on September 11, 2001. In addition, the decentralization of AQ has made it difficult to determine which groups have connections to AQ sufficient to bring them within the AUMF’s targeting authority.

Two primary camps have emerged as offering the most reported on options for addressing “next-generation terrorist threats,” and both agree that the 2001 AUMF is obsolete.<sup>1</sup> Yet, neither camp offering models for new counterterrorism frameworks addresses how these proposals will both mitigate specific threats posed by groups or individuals that do not fall within the AUMF and provide a sustained approach to preserving constitutional principles. Development of an analytical framework to identify and prioritize counterterrorism goals while addressing constitutional concerns will assist Congress in evaluating the AUMF and its alternatives.

---

<sup>1</sup> Robert Chesney et al., “A National Security and Law Essay—A A National Security and Law Essay—A Statutory Framework for Next-Generation Terrorist Threats,” Jean Perkins Task Force on National Security and Law, Hoover Institution, Stanford University, 2013, 1, <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>; Greg Miller and Karen DeYoung, “Administration Debates Stretching 9/11 Law to Go After New Al-Qaeda Offshoots,” *Washington Post*, March 6, 2013, [http://articles.washingtonpost.com/2013-03-06/world/37500569\\_1\\_qaeda-drone-strikes-obama-administration](http://articles.washingtonpost.com/2013-03-06/world/37500569_1_qaeda-drone-strikes-obama-administration).

## **B. RESEARCH QUESTIONS**

To address this issue at its most comprehensive level, the primary question posed by this thesis is “does the 2001 AUMF provide the most appropriate and beneficial legal authority for the United States to mitigate emerging terrorist threats, and if not, what alternative should be implemented?” In analyzing this overarching inquiry, the following questions are also addressed.

- How has the terrorist threat landscape evolved since the passage of the AUMF?
- How can U.S. lawmakers create the most appropriate and beneficial legal architecture for addressing terrorist threats while navigating humanitarian legal standards required for armed, non-state actors in conflict?
- What criteria may be used to assess the AUMF and its alternatives, and how should they be prioritized?

## **C. METHOD**

Congressional members did not have much time to reflect on the AUMF before they approved it in 2001. Congress debated the AUMF only three days after the 9/11 attacks and immediately prior to being rushed to a memorial service for the victims of the attacks. Senators considered the AUMF in the face of a national crisis. The circumstances surrounding AUMF passage forestalled extensive deliberation regarding the full extent of potential repercussions pertinent to the passage of the AUMF. Now, Congress is afforded the luxury of time and hindsight for thoughtful analysis of the U.S. government’s use of force moving forward.

The modes of analysis used for this thesis are policy analysis, policy options analysis, and legal analysis. The object of study is the law itself. However, law and policy intertwine, as laws are often enacted to effectuate policy and deter contrary action. Thus, the heart of this research focuses on policy, but this focus, in turn, requires an examination of how to build a legal framework that supports this policy.

The AUMF has weathered criticism on a variety of grounds. Noteworthy critiques focus on the AUMF’s erosion of constitutional protections preserving the balance of powers between the executive and legislative branches and due process protections. In

addition, questions have arisen regarding the international legality of counterterrorism actions conducted under AUMF authority. As such, this thesis develops criteria to apply to the status quo AUMF and proposed alternatives. The criteria by which these alternatives will be judged include 1) domestic legality, 2) security, 3) international legality, and 4) precedent.

#### **D. OPTIONS**

Ultimately, this thesis evaluates and seeks to ascertain the best among a number of leading proposed courses of actions for the future of the AUMF. The current policy of relying on the AUMF as the legal authority upon which counterterrorism measures rely needs to be examined. In addition to analyzing the status quo, several alternatives are available. The first is the General Criteria Plus Listing Approach, which involves a congressional delegation of force authorization authority to the executive branch via a robust administrative process. The second approach, the Title II Approach, calls for the repeal or sunset of the AUMF and promotes reliance on the president's constitutional authority to defend the country from imminent threats. The third approach, or the Tailored Approach, proposes an AUMF sunset, consideration of narrowly tailored force authorizations to counter current threats, and revisions of the War Powers Resolution.

#### **E. RECOMMENDATION AND CONCLUSION**

The Tailored Approach proves most successful in satisfying the criteria. The primary goal of this thesis, however, is to convince congressional decision makers to consider and apply the criteria developed in this thesis to the AUMF discussion. Analysis of the repeal of or amendment to the AUMF deserves more in-depth analysis than it has thus far received, and the above criteria should play a central role in establishing a framework for comprehensive analysis aimed at predicting potential consequences of the modification of the AUMF. By examining each approach from the perspective of whether it is likely to preserve domestic legality, security, international legality, and promote positive precedent, lawmakers will have a framework with which to determine the most advantageous approach for mitigating terrorist threats while preserving democratic principles.

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## I. INTRODUCTION

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands.

–President Barack Obama<sup>1</sup>

President Barack Obama made this statement during a speech at the National Defense University on May 23, 2012. During his speech, President Obama acknowledged that this nation had been at war for well over a decade. He described the evolution of counterterrorism measures and the compromises made in the interest of security. Nonetheless, as of the date of publication, the United States still relies upon the authority granted via the 2001 Authorization for Use of Military Force (AUMF) for a variety of counterterrorism measures, such as the use of military and special operations force, drone strikes, targeted killings of U.S. citizens abroad, warrantless surveillance, and the preventive detention of suspected terrorists for the duration of hostilities.

This thesis first focuses on whether the AUMF serves as the proper foundation for addressing current terrorist threats or whether an alternative legal tool is more appropriate. To conduct this analysis, it details and applies a methodology, or analytical framework, for assessing the status quo application of the AUMF, the possible repeal of the AUMF, and potential alternatives to the AUMF. In assessing the AUMF and possible changes to it, it is necessary to consider the evolution of terrorist threats, constitutional concerns, the consequences of altering the legal structure upon which national counterterrorism strategies rely, international legality, and precedent. Ultimately, this thesis evaluates and seeks to ascertain the best among a number of leading proposed courses of actions for the future of the AUMF.

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<sup>1</sup> Barack Obama, “Remarks by the President at the National Defense University” (speech, Washington, DC, May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; Spencer Ackerman, “Exclusive: Congressman Preps Bill to End Terror War Authority,” *Wired*, May 23, 2013, <http://www.wired.com/dangerrom/2013/05/schiff-aumf>.

## A. PROBLEM STATEMENT

The AUMF serves as the legal justification for U.S. counterterrorism policy and provides the architecture upon which other counterterrorism measures rely.<sup>2</sup> Nonetheless, reliance on the AUMF has resulted in the war on terror arguably being waged within an ambiguous legal structure. Representative Adam Schiff, a member of the House Intelligence Committee, claims this architecture is “ill-suited to the nature of the threats we face now” and is “straining at the edges to justify the use of force outside the war theater.”<sup>3</sup>

As the primary legal foundation for the use of force against terrorist organizations, the AUMF provides the president with the authority to “[u]se 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.”<sup>4</sup> As the foundation for U.S. counterterrorism, the AUMF should be assessed in relation to current and prospective threats to determine whether it is still the most viable legal mechanism to accomplish counterterrorism objectives.

The Bush and Obama administrations, as well as the legislative and judicial branches, have interpreted the AUMF as extending to “co-belligerents” and groups “associated with” al Qa’ida (AQ) and the Taliban.<sup>5</sup> Since the passage of the AUMF over 13 years ago, however, the United States has removed the Taliban from power in

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<sup>2</sup> Chesney, Robert, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes. “A National Security and Law Essay—A A National Security and Law Essay—A Statutory Framework for Next-Generation Terrorist Threats,” Jean Perkins Task Force on National Security and Law, Hoover Institution, Stanford University, 2013, 1, 4, <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

<sup>3</sup> Ackerman, “Exclusive: Congressman Preps Bill.”

<sup>4</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 1; *Authorization for Use of Military Force* (AUMF), Pub. L. No. 107–40, 115 Stat. 224 (2001), <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>; Jack Goldsmith, “What to Do About Growing What to Do About Growing Extra-AUMF Threats?” Hoover Institution, Stanford University, January 23, 2013, <http://www.advancingafreesociety.org/the-briefing/what-to-do-about-growing-extra-aumf-threats>; Jennifer Daskal and Stephen I. Vladeck, “After the AUMF,” draft working paper, Lawfare (May 2013): 1, <http://lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf>.

<sup>5</sup> Goldsmith, “What to Do About Growing Extra-AUMF Threats?”; Chesney et al., “A National Security and Law Essay—A Statutory Framework.”

Afghanistan and degraded AQ, which makes continued military involvement in Afghanistan questionable.<sup>6</sup> AQ's fragmentation has made it difficult to determine which groups qualify as its associates.<sup>7</sup> Representative Buck McKeon asserted that the AUMF does not provide legal authority to fight contemporary versions of AQ in Yemen and East Africa.<sup>8</sup> Groups, such as al Qaeda in the Islamic Maghreb (AQIM), and the Jabhat al-Nusra, may not qualify as appropriate targets under the AUMF because they have no direct links to AQ, and their connections to its affiliates are uncertain.<sup>9</sup> In this manner, the AUMF is already lacking.

In addition, shifting organizational commitments have made the AUMF's application to current terrorist organizations questionable. Groups that were at one time connected to AQ are now independently organized and operated. Organizations that were once autonomous of AQ, such as al Shabaab, have now established formal ties to the group. Moreover, the United States has considered using force against groups with unclear affiliations. For instance, some armed groups fighting in Syria do not have clearly identifiable organizational links; they may work in connection with AQ affiliates, may be sympathetic to AQ's goals, or may operate completely independent from AQ.<sup>10</sup>

To further complicate matters, new threats to U.S. interests have emerged that have no direct link to AQ or its affiliates.<sup>11</sup> Many terrorist threats originate from "self-radicalized individuals and groups" that are not covered by the AUMF.<sup>12</sup> Thus, the United States is faced with the question of whether the 2001 AUMF provides adequate

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<sup>6</sup> Jennifer Daskal and Stephen I. Vladeck, "Don't Expand the War on Terror," *New York Times*, May 15, 2013; Chesney et al., "A National Security and Law Essay—A Statutory Framework," 1–2; George Zornick, "Will Obama Have an Afghanistan Problem in 2014?," *Washington Post*, December 30, 2013; Tim Craig and Karen DeYoung, "Karzai Tells Susan Rice of More Demands for Accord Extending U.S. Troop Presence," *Washington Post*, November 25, 2013, [http://www.washingtonpost.com/world/national-security-adviser-susan-rice-visits-afghanistan-amid-tension-over-troop-accord/2013/11/25/fd0f8460-55dd-11e3-835d-e7173847c7cc\\_story.html](http://www.washingtonpost.com/world/national-security-adviser-susan-rice-visits-afghanistan-amid-tension-over-troop-accord/2013/11/25/fd0f8460-55dd-11e3-835d-e7173847c7cc_story.html).

<sup>7</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 4.

<sup>8</sup> Ackerman, "Exclusive: Congressman Preps Bill."

<sup>9</sup> Daskal and Vladeck. "Don't Expand."

<sup>10</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 1, 4.

<sup>11</sup> *Ibid.*; Goldsmith, "What to Do About Growing Extra-AUMF Threats?"

<sup>12</sup> Daskal and Vladeck, "After the AUMF Draft," 1; Daskal and Vladeck. "Don't Expand."

authority to counter new terrorist threats. If not, policymakers are confronted with the question of when and how to authorize the use of force against these emerging groups and evolving threats.<sup>13</sup>

In addition, the AUMF as applied supports a range of counterterrorism measures. For instance, the executive branch has relied on it to authorize warrantless electronic surveillance of citizens, pursue targeted killings of terrorists who are also U.S. citizens, and detain terrorist suspects for the duration of hostilities.<sup>14</sup> Obviously then, operations under the AUMF intersect with legal authority stemming from this nation's constitution and judicial precedent, or for short, domestic legal authority. Thus, without the AUMF, domestic legal authority for continuing such operations will be undermined.

Further considerations are not limited to the domestic legal sphere. Legal experts have debated the legality of counterterrorism measures according to international law.<sup>15</sup> The AUMF created the foundation for utilizing elements of the laws of war in the global fight against AQ, including preventative detention of enemy combatants and their trial for humanitarian violations.<sup>16</sup> However, the AUMF authorizes the use of force against non-state actors. The application of laws of war to non-state actors in the context of international armed conflicts remains an unsettled and controversial issue.<sup>17</sup> Questions

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<sup>13</sup> Goldsmith, "What to Do About Growing Extra-AUMF Threats?"

<sup>14</sup> Ackerman, "Exclusive: Congressman Preps Bill"; David S. Kris, "Law Enforcement As a Counterterrorism Tool," *Journal of National Security Law and Policy* 5, no. 1 (June 2011): 1, 37, 40, 55, 64; Robert Chesney, "Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism," *University of Texas School of Law, Public Law Research Paper* no. 227 (August 2012): 9, 33, 46; John B. Bellinger III and Vijay M. Padmanabhan, "Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law," *The American Journal of International Law* 105, no. 2 (April 2011): 218–19; Samuel Issacharaoff and Richard H. Pildes, "Targeted Warfare: Individuating Enemy Responsibility," *New York University Law Review* 8, no. 5 (November 2013): 1536, 1543, <http://ssrn.com/abstract=2129860>; David Levine, "A Time for Presidential Power? War Time and the Constrained Executive," *Michigan Law Review* 111, no. 6 (April 2013): 1203; Deborah N. Pearlstein, "Detention Debates," *Michigan Law Review* 110, no. 6 (2012): 1051–52; Robert Chesney, "Does the Armed-Conflict Model Matter in Practice Anymore?," *Lawfareblog*, May 24, 2013, <http://www.lawfareblog.com/2013/05/does-the-armed-conflict-model-matter-in-practice-anymore>.

<sup>15</sup> Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review* 118, no. 7 (May 2005): 2047, 2089–90.

<sup>16</sup> David W. Glazier, "A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantanamo Military Commissions," *12 Lewis & Clark Law Review* (Spring 2008): 147.

<sup>17</sup> Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, "International Law and Armed Non-State Actors in Afghanistan," *International Review of the Red Cross* 93, no. 881 (March 2011), <http://www.icrc.org/eng/assets/files/review/2011/irrc-881-bellal-giacca-casey-maslen.pdf>.

remain regarding the following: the concept of “enemy combatant” as applied to terrorist threats, humanitarian protections to which armed, non-state actors may be entitled, and the circumstances under which preemptive state action may be taken against non-state actors within another sovereign territory.

As the clarity of what constitutes peace, war, and a battlefield have blurred in the context of hostilities against terrorist threats, so has the understanding of a state’s authority to use lethal force to protect its citizens.<sup>18</sup> This situation will continue to be an issue as the United States pursues armed groups in sovereign territories without declaring war on a state.<sup>19</sup> Terrorist threats have challenged notions of war being waged on a battlefield against state actors, complicating the analysis of force authorization, as force may be used against non-state actors who cannot easily be identified as combatants.

Confusion regarding when and how force may be used against non-state actors could come to a head in the context of international courts that may assert jurisdiction over such actions. The United States has refused to acquiesce to the jurisdictional authority of several international legal forums. Nonetheless, the United States is subject to customary international law and is a signatory on numerous treaties that contain provisions implicated by the use of force. Consequently, U.S. force could be reviewed and members of the military indicted by international courts. So that the United States can provide the best defense possible to its actions and those that order and perform them, the nation must justify its use of force by crafting legal determinations that are well founded in international authority.

Further, the type of force most effective for countering threats has arguably evolved. Of course, the 2001 AUMF authorized *military force*, and in effect, served as an example or extension of Congress exercising its war powers. Despite the focus on the use of military force in countering terrorism threats, however, uses of different degrees of force have met with varying levels of success. Thus, any new proposal for revising,

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<sup>18</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the Armed Services Committee*, 113th Cong., 1 (2013) (statement of Kenneth Roth, Executive Director of Human Rights Watch), <http://www.hrw.org/news/2013/05/16/us-statement-senate-armed-services-committee-aumf-targeted-killing-guantanamo>.

<sup>19</sup> *Ibid.*

repealing, or replacing the AUMF must account for and potentially accommodate varying types of U.S. force.

Identifying and addressing threats that arguably do not fall within the 2001 AUMF poses a homeland security issue because the AUMF serves as the legal justification for a variety of U.S. counterterrorism policies. Examination of this topic is warranted because of its potential impact on U.S. counterterrorism strategies, the balance of power between the legislative and executive branches of government, the utilization of preemptive force, international and domestic notions of using force against non-state actors, and the potential for review by international courts.

## **B. RESEARCH QUESTIONS**

As the above problem statement indicates, examination of the 2001 AUMF will result in a variety of considerations, as it involves a “known” though not fully understood problem and an “unknown” solution.<sup>20</sup> To address this issue at its most comprehensive level, the primary question posed by this thesis is: Does the 2001 Authorization for Use of Military Force (AUMF) provide the most appropriate and beneficial legal authority for the United States to mitigate emerging terrorist threats, and if not, what alternative should be implemented? In analyzing this overarching inquiry, the following questions are also addressed.

- How has the terrorist threat landscape evolved since the passage of the AUMF?
- How can U.S. lawmakers create the most appropriate and beneficial legal architecture for addressing terrorist threats while navigating humanitarian legal standards required for armed, non-state actors in conflict?
- What criteria may be used to assess the AUMF and its alternatives, and how should they be prioritized?

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<sup>20</sup> Lauren Wollman, “NS2013 What is Inquiry?” (online lecture, Naval Postgraduate School, Monterey, CA, Summer 2012).

## C. LITERATURE REVIEW

The AUMF mandate is examined to determine whether it is the proper foundation for addressing current threats or whether another tool is more appropriate. To conduct this examination, a growing collection of literature relevant to AUMF authority must be examined. This literature review focuses on: 1) common areas of literary focus that relate to the AUMF, 2) new and developing literature that provides substantive review of AUMF application, and 3) necessary additional areas of study. The resources discussed in this review are relied upon to develop criteria that may be applied to evaluate the AUMF and alternatives.

### 1. Literature Focus

Available AUMF literature analyzes the framework for the AUMF and discusses its history, scope, and purpose.<sup>21</sup> For instance, the Congressional Research Service (CRS) has issued memoranda describing actions taken under AUMF authority and related counterterrorism measures.<sup>22</sup> Nonetheless, in most academic articles, the AUMF is not the focus of substantive research, perhaps because only recently has attention centered on its continued application to terrorist groups whose associations with AQ are arguable. Rather, it is cited in support of discussions pertinent to other counterterrorism measures. Although these resources do not focus discussion on the AUMF, they are still relevant to the question of continuing force authorization, as each of these counterterrorism measures will be impacted by changes to the AUMF.

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<sup>21</sup> Bradley and Goldsmith, “Congressional Authorization,” 2047, 2049; Goldsmith, “What to Do About Growing Extra-AUMF Threats?”; Daskal and Vladeck. “Don’t Expand”; Jennifer Elsea and Matthew Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (CRS Report No. RL31133) (Washington, DC: Congressional Research Service, 2014), <https://www.fas.org/sgp/crs/natsec/RL31133.pdf>, [also available for other years].

<sup>22</sup> Matthew Weed, *The 2001 Authorization for Use of Military Force: Background in Brief* (CRS Memorandum from Matthew Weed to the Honorable Barbara Lee) (Washington, DC: Congressional Research Service, 2013), <http://fas.org/sgp/crs/natsec/aumf-071013.pdf>; Jennifer Elsea, Michael John Garcia, and Thomas J. Nicola, *Congressional Authority to Limit Military Operations* (CRS Report No. R41989) (Washington, DC: Congressional Research Service, 2013), <http://fas.org/sgp/crs/natsec/R41989.pdf>; Jennifer Elsea, *Detention of U.S. Persons as Enemy Belligerents* (CRS Report No. R42337) (Washington, DC: Congressional Research Service, 2014), <http://fas.org/sgp/crs/natsec/R42337.pdf>; Michael John Garcia et al., *Closing the Guantanamo Detention Center: Legal Issues* (CRS Report No. R40139) (Washington, DC: Congressional Research Service, 2013), <http://fas.org/sgp/crs/natsec/R40139.pdf>.

For example, the AUMF is cited as part of an ongoing discussion regarding the executive and legislative exercise of powers.<sup>23</sup> In some journal articles, the AUMF is analyzed against the backdrop of the “Steel Seizure Case,” a Supreme Court decision known for its presidential powers theories.<sup>24</sup> The AUMF has also been cited in support of the legality of targeted killings, or drone attacks.<sup>25</sup> It is also analyzed in relation to the use of military commissions to try individuals apprehended under AUMF authority, for treating these individuals as enemy combatants, and for detaining them for the duration of hostilities.<sup>26</sup>

These counterterrorism measures will be impacted if the AUMF is repealed.<sup>27</sup> For instance, the AUMF is often cited in discussions regarding detention authority.<sup>28</sup> Terrorists may be held under the AUMF until the end of hostilities.<sup>29</sup> Thus, without AUMF authority, authority will no longer exist to detain combatants. Further, status-based targeting under the AUMF, on the basis of membership in an enemy force, will cease.<sup>30</sup>

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<sup>23</sup> Bradley and Goldsmith, “Congressional Authorization,” 2072–78; David Abramowitz, “The President, the Congress and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism,” *Harvard International Law Journal* 43, no. 1 (Winter 2002): 79; Major Dana M. Hollywood, “Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism,” *Hastings International and Comparative Law Review* 36, rev. 1 (Winter 2013).

<sup>24</sup> Andrew D. Cohen, “The AUMF and the Steel Seizure Case: Does Congress Need to Revisit the Issue?,” (June 7, 2013): 2–3, SSRN: <http://ssrn.com/abstract=2276261> or <http://doi.org/10.2139/ssrn.2276261>, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Graham Cronogue, “A New AUMF: Defining Combatants in the War on Terror,” *Duke Journal of Comparative & International Law* 22, no. 3 (April 2012): 391.

<sup>25</sup> John O. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” (speech, Wilson Center in Washington, DC, April 30, 2012), [wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy](http://wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy); Daskal and Vladeck, “After the AUMF Draft,” 5.

<sup>26</sup> Bradley and Goldsmith, “Congressional Authorization,” 2055, 2071; Glazier, “Self-Inflicted,” 147; David W. Glazier, “Playing by the Rules: Combating al Qaeda within the Law of War,” *William and Mary Law Review* 51 (2009): 960, 988.

<sup>27</sup> Chesney, “Does the Armed-Conflict.”

<sup>28</sup> Kris, “Law Enforcement,” 9, 33, 46.

<sup>29</sup> *Ibid.*, 64. Bellinger III and Padmanabhan, “Detention Operations,” 218–19 (April 2011); Issacharaoff and Pildes, “Targeted Warfare,” 15, 22; Levine “Presidential Power,” 1203; Pearlstein, “Detention Debates,” 1051–52.

<sup>30</sup> Chesney, “Does the Armed-Conflict.”

Other journal articles relevant to the analysis of the AUMF do not explicitly mention the AUMF. Nevertheless, they provide information on related issues, such as the use of preemptive force against non-state actors in the Bush administration's National Security Strategy after the attacks of 9/11.<sup>31</sup> This strategy emphasized that the United States "must adapt the concept of imminent threat to the capabilities of today's adversaries."<sup>32</sup> Articles also discussing the term "imminent" in relation to the president's authority to engage military action in defending this nation relates to executive power considerations and the analysis of potential AUMF alternatives.<sup>33</sup>

While many of these publications analyze the AUMF or related issues in the context of counterterrorism measures, they do not propose ideas for how to address threats that have evolved, which arguably fall outside of the AUMF.

## **2. Developing Research and Proposals Regarding Continued Utilization of the AUMF**

Congress has taken an interest in the continued operation of the AUMF in the face of evolving threats and terrorist organizations, and it has recently held hearings on the matter.<sup>34</sup> U.S. officials and administration legal experts are concerned that the AUMF is being "[s]tretched to its legal breaking point, just as new threats are emerging . . . ."<sup>35</sup> As Senator John McCain stated, "None of us, not one who voted for the AUMF, could have envisioned we were about to give future Presidents the authority to fight terrorism as far flung as Yemen and Somalia."<sup>36</sup> Consequently, arguments regarding how best to address this issue have recently developed in several journals.

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<sup>31</sup> Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Center for Strategic and International Studies and the Massachusetts Institute of Technology, Washington Quarterly* 26, no. 2 (Spring 2003): 89–90.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

<sup>35</sup> Miller and DeYoung, "Administration Debates."

<sup>36</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

Two primary camps have emerged as offering the most reported on options for addressing “next-generation terrorist threats,” and both agree that the AUMF is obsolete.<sup>37</sup> The first proposal suggests a new approach that utilizes a congressional delegation of authority to authorize force to the executive branch via an administrative process. The second approach asserts that a new authorization of force is not likely necessary. In addition, a third proposal set forth in a Duke University law review article has garnered some reference in the AUMF discussion.

The leading proposal originates from Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes of Stanford University’s Hoover Institution.<sup>38</sup> It argues that Congress should delegate broad authority to the executive branch to create a list of terrorist groups against which the United States may utilize force.<sup>39</sup> Under this approach, Congress would offer statutory criteria for executive use of force and require the executive branch to identify particular groups covered by that force authorization through a “robust” administrative process.<sup>40</sup> This model would be based on the State Department’s foreign terrorist organization designation process.<sup>41</sup>

Proponents argue that this model is a stable alternative to the current AUMF, as it offers flexibility, yet includes constraints to support its legitimacy.<sup>42</sup> This proposal is criticized, however, for providing too much authority to the executive branch, arguing that this would provide the executive branch with the power to both declare and wage war, which were powers the founding fathers intentionally separated to provide checks and balances on the use of force.<sup>43</sup>

Jennifer Daskal and Stephen I. Vladeck articulate the alternative view. Daskal is a human rights lawyer and Department of Justice appointee who served on an Obama

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<sup>37</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 1. Miller and DeYoung, “Administration Debates.”

<sup>38</sup> Daskal and Vladeck, “After the AUMF Draft,” 2; Daskal and Vladeck. “Don’t Expand.”

<sup>39</sup> Daskal and Vladeck. “Don’t Expand.”

<sup>40</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 10.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 7–8.

<sup>43</sup> Daskal and Vladeck. “Don’t Expand.”

administration task force reviewing the status of Guantanamo detainees, and Vladeck was part of the legal team that challenged the Bush administration's use of military tribunals in *Hamdan v. Rumsfeld*. They utilize a perspective expressed by Department of Homeland Security Secretary and former Department of Defense General Counsel Jeh Johnson, who stated that war should "[b]e regarded as a finite, extraordinary and unnatural state of affairs."<sup>44</sup> They argue that Congress should reject an open-ended war by repealing the AUMF.<sup>45</sup> In contrast to the Hoover Institution's model, supporters argue that law enforcement techniques and intelligence gathering mechanisms have improved over the past decade and should be utilized as the first line of defense against terrorist threats.<sup>46</sup> They assert that this position does not restrict the use of military force because the president can utilize force in self-defense, without congressional approval, if other means will not stop an attack.<sup>47</sup>

While both proposals have effectively begun the discussion of viable legal alternatives to support future counterterrorism policy, the proponents of the second proposal have offered more detailed examples and authority to support their position. For instance, the Hoover Institution literature states that locals should not be entrusted with the responsibility for addressing terrorism threats because they are "unwilling" or "incapable" of taking on this responsibility. However, they fail to cite authority supporting this claim.<sup>48</sup> The proponents of the alternative model, however, cite statistics supporting their assertion that local jurisdictions have successfully thwarted terrorist attacks.<sup>49</sup> Literature supporting the second option also addresses unintended consequences of extending force authorization, such as diminished information sharing with allies and broad use of force by other countries against organizations they broadly

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<sup>44</sup> Daskal and Vladeck, "After the AUMF Draft," 3.

<sup>45</sup> Daskal and Vladeck. "Don't Expand."

<sup>46</sup> Daskal and Vladeck, "After the AUMF Draft," 3.

<sup>47</sup> Daskal and Vladeck. "Don't Expand."

<sup>48</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 5.

<sup>49</sup> Daskal and Vladeck, "After the AUMF Draft," 3.

define as terrorist.<sup>50</sup> The Hoover Institution literature, as currently drafted, does not address these counterarguments.

In addition to the two main categories of proponents, a law student from Duke University published an article that has been cited by others in AUMF discussions. His article attempts to articulate an alternative to the AUMF by utilizing concepts from both domestic and international law related to combatants, state-actors, and self-defense.<sup>51</sup> His proposal most closely resembles ideas proposed by Benjamin Wittes of the Hoover Institution. However, the article fails to address the repercussions of his proposed approach, such as the potential end to legal support for certain counterterrorism measures. The article also repeatedly assumes the validity of certain assertions related to terrorist threats without citing support.<sup>52</sup>

Finally, CRS reports and media articles have recently focused on the proposed authorization to use military force in Syria and evolving security concerns in Iraq. Such articles, as well as commentary from Congress and the executive branch, have renewed discussions regarding the president's authority as Commander in Chief and congressional war powers.<sup>53</sup> Observation of the continuing debate and discussion regarding the potential use of force in Syria and Iraq will likely affect the analysis of AUMF alternatives.

### **3. International Standards**

States have created rules to limit the effects of armed conflict through mechanisms, such as the Geneva and Hague Conventions, Protocols, and customary

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<sup>50</sup> Daskal and Vladeck, "After the AUMF Draft," 15–16.

<sup>51</sup> Cronogue, "A New AUMF."

<sup>52</sup> Ibid.

<sup>53</sup> *Proposed Authorization to Use Military Force in Syria, Hearing Before the U.S. House of Representatives, Committee on Armed Services*, 113th Congress, 1 (2013) (statement of John Kerry), <http://www.state.gov/secretary/remarks/2013/09/214028.htm>; Christopher M. Blanchard and Jeremy M. Sharp, *Possible U.S. Intervention in Syria: Issues for Congress* (CRS Report No. R43021) (Washington, DC: Congressional Research Service, 2013), <http://fas.org/sgp/crs/mideast/R43201.pdf>; Transcript, "Should U.S. Trust Russia on Syria?" *Crossfire* (aired September 10, 2013), <http://transcripts.cnn.com/TRANSCRIPTS/130910/cfr.01.html>.

international law.<sup>54</sup> These mechanisms aim to restrict certain warfare methods and protect noncombatants.<sup>55</sup> Nonetheless, the application of humanitarian law standards to non-state actors in the context of international armed conflicts remains an unsettled and controversial issue.<sup>56</sup> In analyzing such standards, it seems the main issues that will need to be addressed are the application of the concept of “enemy combatant” to current terrorist threats, the protections afforded to armed, non-state actors, and the utilization of preemptive state action against non-state actors within another sovereign territory.

Numerous articles and court cases discuss the concept of “enemy combatant.” Further, available literature debates theories regarding which humanitarian laws apply to armed, non-state actors in international conflicts.<sup>57</sup> Nonetheless, this literature arguably falls short of proposing workable standards for applying international humanitarian law to armed, non-state actors within other states.

Self-determination is enshrined in the United Nations (UN) Charter (UN Charter) and international covenants, as well as upheld by legal decisions.<sup>58</sup> While a state’s right to self-defense has been suggested as the appropriate response to terrorist attacks, this expectation has arguably changed since states want to take a proactive approach to protecting their populations from terrorist threats before attacks occur.<sup>59</sup> As the line between peacetime and war has blurred, so has the understanding of a state’s authority to

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<sup>54</sup> “War and International Humanitarian Law,” International Committee of the Red Cross, accessed August 28, 2014, <http://www.icrc.org/eng/war-and-law/index.jsp>.

<sup>55</sup> Ibid.

<sup>56</sup> Bellal, Giacca, and Casey-Maslen, “International Law and Armed Non-State Actors.”

<sup>57</sup> Ibid.

<sup>58</sup> United Nations General Assembly, Resolution 42/159, “Measures to Prevent International Terrorism,” December 7, 1987, <http://www.un.org/documents/ga/res/42/a42r159.htm>; “United Nations Charter (UN Charter),” United Nations Human Rights, Office of the High Commissioner for Human Rights, June 26, 1945, <http://www.un.org/en/documents/charter/>; International Covenant on Civil and Political Rights (ICCPR), March 23, 1976, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Legal Consequences of the Construction of a Wall, International Court of Justice Advisory Opinion (July 9, 2004).

<sup>59</sup> Resolution 1368, “Security Council Condemns, ‘In Strongest Terms’, Terrorist Attacks on United States,” United Nations Security Council, September 12, 2001, <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm> (SC Res. 1368); Resolution 1373, “Reaffirming Condemnation of Terrorist Attacks,” United Nations Security Council, September 28, 2001, <http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%282001%209.pdf> (SC Res. 1373).

use lethal force to protect its citizens.<sup>60</sup> This topic will continue to be an issue as the United States pursues armed groups in other territories without declaring war on a state, or engages in hostilities on an identifiable battleground.<sup>61</sup> Establishing standards for addressing the engagement of armed, non-state actors in international conflicts will improve consistency in the application of humanitarian concepts, and eventually, reduce the impact of such conflicts on civilians.

#### **4. Additional Research Questions That Need to Be Addressed**

Additional research and literature is needed to further detail these developing proposals. Specifically, the concepts of self-defense, imminent threat, and the application of proposed approaches to associated forces or threats should be addressed. Related to these concepts are international legal considerations relative to preemptive state action, or the doctrine of anticipatory self-defense, and the use of force against non-state actors.<sup>62</sup> In addition, an analytical framework should be developed and applied to the AUMF and potential alternatives.

Much of the well-developed AUMF research, as well as the currently developing models for post-AUMF action, reference utilization of force for “self-defense.”<sup>63</sup> They state that the president has “unchallenged” authority to prevent imminent threats to the country.<sup>64</sup> However, the ideas of “self-defense” and what constitutes an “imminent threat” are not well defined in this literature. Related to both concepts are international legal considerations relative to preemptive state action, or the doctrine of anticipatory self-defense, and the use of force against non-state actors.<sup>65</sup> U.S. policy in this arena will

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<sup>60</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Arend, “Preemptive Use of Military Force,” 89–90; Weed, *The 2001 Authorization for Use of Military Force.*

<sup>63</sup> Chesney, “Does the Armed-Conflict.”

<sup>64</sup> Abramowitz, “The President,” 78.

<sup>65</sup> Arend, “Preemptive Use of Military Force,” 89–90; Weed, *The 2001 Authorization for Use of Military Force.*

not only have an impact on domestic legal interpretations pertaining to legislative and executive powers, but potentially to the development of international law as well.<sup>66</sup>

In addition, resources, including articles and journals, mention so-called “associated forces” in conjunction with the AUMF and the utilization of presidential powers, yet most do not define this term.<sup>67</sup> Current literature fails to explain the process whereby a group is determined to be an “associated” force, likely because the government lacks transparency in its application of this concept.<sup>68</sup> These sources discuss the fragmentation of AQ, and note the difficulty in determining what groups are sufficiently tied to AQ to fall within the AUMF.<sup>69</sup> They also suggest that current terrorist threats originate primarily from “self-radicalized individuals and groups” not covered by the AUMF.<sup>70</sup> Yet, neither camp offering models for new counterterrorism frameworks addresses how these proposals will provide a sustained approach to mitigate specific threats posed by groups or individuals that do not fall within the AUMF, while preserving constitutional principles. Development of an analytical framework to identify and prioritize counterterrorism goals and evaluate proposal effectiveness will assist in framing such analyses.

Finally, CRS reports and media articles have recently focused on the proposed authorization to use military force in Syria. Such articles, as well as commentary from Congress and the executive branch, have renewed discussion regarding the president’s authority as Commander in Chief and congressional war powers.<sup>71</sup> A deteriorating security situation in Iraq involving a former AQ affiliate has also impacted AUMF

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<sup>66</sup> Arend, “Preemptive Use of Military Force,” 89–102.

<sup>67</sup> Cohen, “The AUMF and the Steel Seizure Case,” 2–3, *citing* Kenneth Anderson and Benjamin Wittes, “Speaking the Law,” Hoover Institution, Stanford University (2013), <http://www.hoover.org/taskforces/national-security/speaking-the-law>; Daskal and Vladeck. “Don’t Expand.”

<sup>68</sup> Daskal and Vladeck, “After the AUMF Draft,” 7.

<sup>69</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 4.

<sup>70</sup> Daskal and Vladeck, “After the AUMF Draft,” 1; Daskal and Vladeck, “Don’t Expand.”

<sup>71</sup> Kerry, *Proposed Authorization*; Sharp and Blanchard, *Possible U.S. Intervention in Syria*; Transcript, “Should U.S. Trust Russia on Syria?”

considerations. The considered use of force in both regions will likely factor into the consideration of AUMF alternatives.

## **5. Conclusion**

President Obama has commented on the AUMF's mandate, by saying, "[I] will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end."<sup>72</sup> While most of the available literature pertaining to the AUMF does not focus on the AUMF itself, it is cited as a legal underpinning of other counterterrorism measures. Nonetheless, national security experts are beginning to research and develop options specifically relevant to new counterterrorism justifications that address evolving terrorist threats. With additional focus on the development of an analytical framework to prioritize counterterrorism objectives, the effectiveness of these proposals may be more efficiently analyzed.

To develop this framework and analyze these proposals, gaps in current research need to be filled. While several camps have proposed AUMF alternatives, none of them has offered a mechanism for weighing the impacts of AUMF modification. A sound mechanism requires a detailed examination and analysis of a wide variety of AUMF impacts, as well as a study of how these impacts relate to one another, rather than piecemeal critiques of the statute. In addition, current proposals focus on AUMF alternatives, but they neglect to identify considerations for securing a long-lasting approach to force authorization that preserves constitutional principles while protecting security. Without a deeper foundational change to force authorization approaches, any reprieve from issues offered by such an alternative will be temporary at best and superficial at worst.

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<sup>72</sup> Ackerman, "Exclusive: Congressman Preps Bill."

## **D. METHODOLOGY**

### **1. Sample**

Addressing this inquiry requires the study of policy options. The object of study is the law itself. However, law and policy intertwine, as laws are often enacted to effectuate policy and deter contrary action. Thus, the heart of this research focuses on policy, which, in turn, requires an examination of how to build a legal framework that supports this policy.

### **2. Sample Selection**

Focus on this subject emerged from an interest in the evolving international humanitarian law standards applicable to conflicts focused on combating terrorist actors, who may operate independent of states. When a Naval Postgraduate School alumnus suggested focusing on the 2001 AUMF, it seemed a thesis on this topic would require consideration of a variety of legal and policy concerns, both domestic and international. Studying this sample provides an opportunity to address not only issues crucial to the U.S.' continued use of force to combat terrorist threats, but also to offer actionable policy solutions.

### **3. Data Sources**

Most of the data for this thesis originates from literature relevant to the AUMF. Numerous academic and law review articles provide a basis for both AUMF criticism and alternative approaches. Cases focusing on counterterrorism measures are also examined. Some cases, like *Hedges v. Obama* and *Parhat v. Gates*, highlight the scope of AUMF authority. Others, including *Padilla v. Hanft*, *Lebron v. Rumsfeld*, and *Hamdi v. Rumsfeld*, illustrate the executive branch's reliance on AUMF authority for enemy combatant designations, due process concerns, and constitutional checks and balances and issues. Finally, domestic and international law addressing use of force issues are utilized.

#### **4. Type and Mode of Analysis**

The modes of analysis used for this thesis are policy analysis, policy options analysis, and legal analysis. Policy analysis is necessary because to understand the implications of altering the AUMF fully, the strengths and weaknesses of current policy need to be fully understood to permit variables that may influence policy outcomes to be identified. As the legislative and executive branches continue to develop counterterrorism strategies to address evolving threats, policy options for continued authority for such counterterrorism measures should be considered. Consequently, this thesis evaluates alternative policy options in terms of their potential ability to improve on the status quo, achieve counterterrorism security objectives, and withstand legal scrutiny. As all these policy options have a basis in legal authority to execute government action, legal analysis is utilized to analyze these options.

This process involves synthesizing information regarding the 2001 AUMF and current counterterrorism policies supported by its authority. This information is analyzed and contributes to the proposal of several policy alternatives. These alternatives, as well as the status quo, are evaluated through a qualitative cost-benefit analysis focusing on domestic legality, security, international legality, and precedent. Finally, as applicable, a recommendation regarding potential AUMF modification is made based on the evaluation of alternatives in relation to their predicted impacts.

#### **5. Policy Options Analysis–The Status Quo**

The current policy of relying on the AUMF as the legal authority upon which counterterrorism measures rely needs to be examined. This examination requires the identification of current terrorist threats to the United States. Identifying the strengths and weaknesses of applying the AUMF to such threats will clarify the potential consequences of implementing alternative options.

#### **6. Alternatives**

In addition to analyzing the status quo, several alternatives are available to the continued use of the AUMF: 1) repealing the AUMF, 2) congressional delegation of war

making authority to the executive branch, and 3) new authorizations for the use of military force.

The first policy alternative involves repealing the AUMF. Under this option, Congress would not issue a new authorization of force. Instead, the United States would rely on the executive branch's authority to use force in self-defense to combat imminent threats. Law enforcement mechanisms that have been arguably bolstered since 9/11 would be utilized as the first line of defense against threats. The parameters of what constitutes an "imminent" threat are explored to deduce how the executive branch might interpret such authority to support counterterrorism measures.

The second policy alternative would not involve a repeal of the AUMF; the AUMF would remain in effect, and Congress would delegate broad authority to the executive branch to create a list of terrorist groups against which the United States could utilize force.<sup>73</sup> Under this approach, Congress would offer statutory criteria for the executive use of force and require the executive branch to identify particular groups covered by that force authorization through a "robust" administrative process. This option may offer flexibility in preserving security. It would, however, provide the executive branch with the power to both declare and wage war, powers the founding fathers separated between the executive and legislative branches.

The third policy alternative would involve retaining the AUMF, while proposing that Congress pass new force authorization(s) applicable to groups posing current threats to the United States. By preserving the AUMF, this option would prevent adverse consequences to those counterterrorism measures that require continuing authority. By also requiring Congress specifically to authorize the use of force against those groups that present a threat to the United States but are not "associates" of AQ, checks and balances between the executive and congressional branches may be better preserved and consideration of force authorizations would arguably be subject to public scrutiny.

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<sup>73</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 10.

## **7. Criteria**

The criteria by which these alternatives are judged include: 1) domestic legality, 2) security, 3) international legality, and 4) precedent.

The first two criteria are arguably related, as they involve authority and how such authority relates to security. The primary criterion that is applied to policy alternatives is domestic legality, or how well the approach preserves constitutional principles. The primary constitutional principles implicated by force authorizations are checks and balances and due process protections. AUMF alternatives could impact the current understanding of checks and balances between the legislative and executive branches. Application of this criterion requires the analysis of constitutional separation of powers principles. In addition, the AUMF implicates due process concerns because of its use in justifying detention and lethal force. Cases arising out of preventive detention challenges are useful in this section, as they contain arguments from the executive branch regarding war powers authority, as well as due process standards. Open-source information disclosed by the executive branch regarding its legal authorities for conducting certain counterterrorism measures is also analyzed. Through this research, the legal architecture of the status quo and alternatives are analyzed with respect to the ability to achieve counterterrorism related objectives while withstanding legal scrutiny.

The second criterion focuses on security effects, or how the option enables the U.S. government to mitigate threats. This consideration encompasses the impact each alternative has on counterterrorism measures that arguably require AUMF authority. The text of the AUMF is applied to evolving terrorist threats, to determine if the status quo has potential weaknesses. This criterion facilitates the overlay of the current threat analysis with the legal analysis, as changing legal authority may arguably have unintended consequences for continuing certain counterterrorism measures.

The third criterion focuses on respect for international legality. U.S. policy involving action against non-state actors and the utilization of preemptive force is at times at odds with international law and receives a less than warm reception. International legal considerations involving the concepts of “enemy combatant,”

protections afforded to armed, non-state actors, and the utilization of preemptive state action against non-state actors within another sovereign territory are arguably at issue.

Finally, the fourth criterion focuses on precedent considerations. Congress's future approach to force authorizations will set precedent in several respects. Namely, it will influence the type of force used by the U.S. government abroad, government transparency, and future opportunities to reassess force authorization policy. By utilizing this criterion, Congress can seek to promote positive precedent in these areas.

## **8. Output**

This thesis provides a comprehensive resource for understanding the effects of AUMF modification. It also provides a recommended course of action. Regardless of whether policy makers choose to pursue this recommendation, at a minimum, the thesis serves as a reference that may aid in the decision-making process.

## **E. ORGANIZATION**

The chief objective of this thesis is to compare the AUMF and alternatives by applying several criteria to each, ultimately providing a recommended approach to U.S. policymakers. Thus, much of the thesis focuses on providing a context for the problem and criteria; this context assists in validating their development, application, and prioritization. This process not only serves to support the ultimate thesis recommendation, but to provide policymakers with a well-reasoned method to evaluate this AUMF and its future.

An evaluation of the terrorist threats the United States faces comprises Chapter II, which also examines how terrorist threats have evolved since the AUMF was passed shortly after 9/11. The necessity and challenges of identifying AQ "associates" is discussed because of this term's importance to AUMF authority. Without a thorough appreciation of the terrorist threats faced by the United States, it arguably is not possible to understand why or what kind of force authorization is needed.

In Chapter IV, the international laws of war and challenges in applying them to terrorist threats, are investigated, with a focus on issues of preemptive use of force, use of

force against non-state actors, and classification of enemy combatants. This chapter offers context for analyzing the AUMF and alternatives within the framework of international law, which is useful in understanding the international precedent criterion section in Chapter VI.

Whereas the first five chapters of this thesis provide information and analysis necessary for addressing the research questions posed, Chapter VI describes the criteria by which the AUMF and alternatives are evaluated. This method, which is meant to advance a meaningful comparative analysis of the AUMF and alternatives, incorporates the following criteria: domestic legality, security, international legality, and precedent. Defining these criteria and their prioritization according to consequence is necessary for a fundamental understanding of the approaches presented.

In Chapter VII, the criteria discussed in Chapter VI are applied to the status quo and three alternatives. The first alternative is to repeal, or sunset the AUMF and issue a congressional delegation of authority to the executive branch to add force authorizations through an administrative process. The second alternative is to repeal the AUMF and issue no new authorization to use military force, and instead rely on the executive branch's self-defense authority to prevent imminent attacks. The third alternative is a tailored approach that entails sunseting the AUMF, statutory modifications, and creating new congressional authorizations to use force specific to emerging threats, if necessary.

The thesis concludes with Chapter VIII, which recommends that Congress pursue the Tailored Approach. Although the Tailored Approach is the ultimate recommendation based on the criteria and methodology developed in this thesis, the greatest priority of this thesis is two-fold, to promote congressional consideration of the status of the AUMF and alternatives, and to advocate a method of evaluation that considers domestic legality, security, international legality, and precedent. It has been 13 years since Congress passed the AUMF; it is time that Congress examines its continued application.

## **II. OVERCOMING INSECURITY: CONSIDERATIONS CENTRAL TO EVALUATING THE AUMF AND ALTERNATIVES BASED ON U.S. SECURITY IMPLICATIONS**

### **A. INTRODUCTION**

The threat landscape has evolved since Congress enacted the AUMF. This makes sense, considering the immense counterterrorism pressure that the United States and its allied forces have exerted upon AQ, its affiliates, and the Taliban since 2001.<sup>74</sup> Although threats faced by the United States have evolved, the legal architecture used to address these threats has remained static, which begs the following question. Should the AUMF be changed to adapt to the changing threat landscape?

Determining the security implications of altering the AUMF requires accurate information on the evolving threat environment. This chapter summarizes dynamic threats relevant to whether or not the AUMF should be repealed or modified. This information is utilized in the “security criterion” section of Chapter VI. Although it would be advantageous for policymakers to analyze a broad scope of threats when reevaluating the AUMF, both this chapter and the security criterion section are limited to a discussion of threats originating from AQ, its affiliates, the Taliban, and the groups these organizations inspire. Since the AUMF does not concern itself so much with state actors or geographic boundaries as it does with terrorist organizations, threats from state actors, such as China, North Korea, and Iran, are not addressed in this thesis.

In addition to understanding how the threat environment has evolved since the AUMF’s passage, Congress must identify counterterrorism measures supported by AUMF authority so that it may predict the security consequences of any AUMF modification. This identification is extraordinarily important because the executive branch has relied upon AUMF authority to conduct a variety of counterterrorism measures. Consequently, repealing or amending the AUMF may adversely affect the

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<sup>74</sup> Seth G. Jones, “A Persistent Threat: The Evolution of al Qa’ida and Other Salafi Jihadists,” Prepared for the Office of the Secretary of Defense, RAND National Defense Institute, 2014, 9, [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR600/RR637/RAND\\_RR637.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR637/RAND_RR637.pdf).

executive branch's ability to continue using these measures. Should the AUMF be repealed or amended, Congress must preserve a mechanism with which to address the constantly changing threat environment. Thus, Congress must identify defense strategy goals, determine what counterterrorism measures are needed to achieve these goals, and tailor an approach to force authorization to address those needs. This information is utilized in Chapter VI to craft a criterion that focuses on the security implications of any AUMF modification.

## **B. 13 YEARS LATER: A THREAT EVOLVED**

As for me here in Yemen, whenever I move around with Explosives  
around my waist, I wish I am in America.

–Sheikh Ibrahim Ar-Rabaysh

The above quote, which concludes a poem titled “Mujahid’s Wish,” published in the Spring 2013 issue of AQ’s *Inspire* magazine,<sup>75</sup> highlights the wish of one terrorist, and by extension, the challenge that the United States faces in crafting counterterrorism policy. Many threats originate from non-state actors, and their competencies are uncertain. For example, disagreement occurs about the strength, capabilities, and configuration of AQ, its affiliates, and others who share its aspirations. As Senator Feingold queried during the actual debates that would lead to the existence of the AUMF, “Our fight against a faceless, shadow enemy also raises another difficult dilemma, for how will we know when we have defeated this enemy?”<sup>76</sup>

Congress must constantly adapt to and understand the ever-evolving threat landscape if and when it reexamines the AUMF. Congress must 1) recognize how threats have evolved since 2001, 2) identify current threats and determine how the AUMF applies to them, and 3) determine how to prioritize action against threats to help Congress

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<sup>75</sup> Jones, “A Persistent Threat,” 82.

<sup>76</sup> Congressional Record, “Proceedings and Debates of the 107th Cong.,” 1, 147, no. 120 (September 14, 2001), <http://www.gpo.gov/fdsys/pkg/CREC-2001-09-14/pdf/CREC-2001-09-14-senate.pdf>.

determine whether the AUMF needs to be altered to authorize force against additional groups or individuals.

### **1. AUMF Authority and Dynamic Threats**

Threats still exist. While the known perpetrators of the 9/11 attacks have been apprehended or killed, the United States was reminded in late 2013 that terrorist groups still target U.S. persons and interests, and these threats may originate from groups that did not have direct links to those attacks. On August 2, the State Department issued a worldwide travel alert warning citizens of potential terrorist attacks by AQ and affiliated groups against Americans and U.S. allies in the regions of the Middle East, South Asia, North Africa, and beyond.<sup>77</sup> Representative Peter King indicated that the focus of the alert centered on a terrorist group operating primarily out of Yemen, al Qaeda in the Arabian Peninsula (AQAP).<sup>78</sup> Chairman of the Joint Chiefs of Staff, Army General Martin Dempsey, described the threat as precise and said that the government was reacting to a significant threat stream.<sup>79</sup> Twenty-one U.S. embassies and consulates were temporarily closed.<sup>80</sup>

On April 10, 2014, the Department of State expressed its continued concern regarding the threat of “[t]errorist attacks, demonstrations, and other violent actions against U.S. citizens and interests overseas,” emphasizing that kidnappings and hostage events targeting U.S. citizens have grown “[i]ncreasingly prevalent as al Qaeda and its affiliates have increased attempts to finance their operations through kidnapping for ransom operations.”<sup>81</sup> It focused this alert on the activities of AQAP and al Qaeda in the

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<sup>77</sup> Nicole Gaouette and David Lerman, “Terrorism Threats Cited as U.S. Issues New Travel Alert,” *Bloomberg*, August 2, 2013.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> “Worldwide Caution,” U.S. Department of State Bureau of Consular Affairs, April 10, 2014, <http://travel.state.gov/content/passports/english/alertswarnings/worldwide-caution.html>.

Islamic Maghreb (AQIM).<sup>82</sup> It continues, stating that AQ and affiliates continue to plan terrorist attacks against U.S. interests in multiple regions outside of U.S. borders.<sup>83</sup>

Although the AUMF specifically authorizes conflict against those who committed and aided the September 11 attacks, it has been interpreted to extend to members of AQ, the Taliban, their supporters, and associated forces.<sup>84</sup> In 60 words, the AUMF authorizes the use of force against:

... [n]ations, 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.<sup>85</sup>

Today, the threat landscape consists not only of those groups that directly contributed to the 9/11 attacks, but other less affiliated organizations.

According to the 2014 Quadrennial Defense Review, the “[t]errorist threat to our Nation’s interests persists and has evolved greatly since 2001.”<sup>86</sup> The Obama administration has sought to draw down forces in Afghanistan.<sup>87</sup> Many of those AQ leaders who planned and perpetrated the 9/11 attacks have been captured or killed, and core AQ and its leadership have been “severely degraded.”<sup>88</sup> These actions have disrupted coordination and funding streams and have degraded AQ’s ability to execute disastrous attacks against the United States.<sup>89</sup> As a result, AQ has decentralized, with

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 1.

<sup>85</sup> AUMF.

<sup>86</sup> “Quadrennial Defense Review 2014,” Department of Defense, 8, March 4, 2014, [http://www.defense.gov/pubs/2014\\_Quadrennial\\_Defense\\_Review.pdf](http://www.defense.gov/pubs/2014_Quadrennial_Defense_Review.pdf).

<sup>87</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 1.

<sup>88</sup> “Country Reports on Terrorism 2013,” U.S. Department of State Bureau of Counterterrorism, 6, April 2014, <http://www.state.gov/documents/organization/225886.pdf>.

<sup>89</sup> Ibid., 303; James R. Clapper, “Worldwide Threat Assessment of the U.S. Intelligence Community,” Prepared by the Director of National Intelligence for the Senate Select Committee on Intelligence, Statement for the Record, 4, January 29, 2014, [http://www.dni.gov/files/documents/Intelligence%20Reports/2014%20WWTA%20%20SFR\\_SSCI\\_29\\_Jan.pdf](http://www.dni.gov/files/documents/Intelligence%20Reports/2014%20WWTA%20%20SFR_SSCI_29_Jan.pdf).

affiliates operating more independently from core AQ, with varying focus on objectives affecting local, regional, and other interests.<sup>90</sup> In addition, new terrorist groups have emerged whose connections to AQ are unclear or non-existent.<sup>91</sup> For instance, one of the most dangerous groups, the Islamic State of Iraq and the Levant (ISIL), is a former AQ affiliate, but it has since cut ties with AQ. In sum, the threat situation has transitioned to a more diverse variety of groups.<sup>92</sup>

This transition is only part of the dynamic threat landscape. The landscape continues to evolve in other ways. Tension endures in parts of the Middle East in which the Sunni-Shi'a divide continues to widen and regional conflicts continue to escalate.<sup>93</sup> In Tunisia, Libya, Yemen, and Egypt, traditional power structures have been upended to the point at which terrorist organizations have increased their influence due to internal strife.<sup>94</sup> This disruption has resulted in "safe havens" in which terrorist groups have proliferated because they can operate unobstructed due to inadequate governance, political will, or both.<sup>95</sup> Simply put, threats facing the United States and its allies are complicated, uncertain, unpredictable, and dynamic, as unrest in certain regions provides environments conducive to the proliferation of sectarian conflicts and extremist groups.<sup>96</sup>

## **2. Categorizing Current Threats**

Congressional leaders must identify current threats relative to the continued application of the AUMF when analyzing the AUMF discussion. For the purposes of analyzing the evolution of terrorist threats facing the United States, these groups can be divided into four categories: 1) core AQ, 2) the Afghan Taliban, 3) AQ affiliates, 4) other groups inspired by AQ.<sup>97</sup> While Congress and academics may estimate the current threats

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<sup>90</sup> "Country Reports on Terrorism," 6.

<sup>91</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 2.

<sup>92</sup> "Worldwide Threat Assessment," 4.

<sup>93</sup> "2014 Quadrennial Defense Review," 5.

<sup>94</sup> *Ibid.*, III, 5.

<sup>95</sup> "Country Reports on Terrorism," 236; Jones, "A Persistent Threat," 54.

<sup>96</sup> "2014 Quadrennial Defense Review," III, 3.

<sup>97</sup> Jones, "A Persistent Threat," 10.

these groups pose, the executive branch will possess the most up-to-date threat information by function of its authority to direct the military and wage war. The executive branch needs to be frank with lawmakers about threats to U.S. persons and interests so that lawmakers can craft appropriate legal authority. Although most are not privy to the most up-to-date threat information, much of which is presumably classified, open source information still paints a picture of the evolving threat that is useful in considering AUMF modifications.

The first category of threats facing the United States originates from what is commonly referred to as “core” AQ, and the AUMF provides adequate authority to mitigate threats originating from this group. Disagreement occurs between government officials and media sources regarding how to define core AQ. Some define core AQ as AQ network members who were active before the 9/11 attacks.<sup>98</sup> Most Obama administration officials, however, advise that the small group of AQ leaders in Pakistan constitutes AQ’s core. Ayman al-Zawahiri leads core AQ.<sup>99</sup> While counterterrorism measures have weakened AQ’s core, instability and weak governance in regions of the Middle East and North Africa have enabled AQ affiliates to propagate. Core AQ retains some influence over these affiliates, most of which have emerged within the past decade.<sup>100</sup>

The second category of threats includes AQ affiliates. Some debate occurs regarding whether AQ affiliates qualify as “associated forces” under the AUMF, and the executive branch’s distinction between these labels is unclear. Nonetheless, the political branches and courts have arguably interpreted AUMF authority as extending to AQ affiliates. These groups become branches of AQ by swearing allegiance to the

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<sup>98</sup> Katherine Zimmerman, “A New Definition for al-Qaeda,” *Washington Post*, January 31, 2014, [http://www.washingtonpost.com/opinions/a-new-definition-for-al-qaeda/2014/01/31/31283002-83a7-11e3-9dd4-e7278db80d86\\_story.html](http://www.washingtonpost.com/opinions/a-new-definition-for-al-qaeda/2014/01/31/31283002-83a7-11e3-9dd4-e7278db80d86_story.html).

<sup>99</sup> Jones, “A Persistent Threat,” 10.

<sup>100</sup> *Ibid.*; “2014 Quadrennial Defense Review,” 8; “Country Reports on Terrorism,” 6.

organization, which is officially recognized by AQ leaders.<sup>101</sup> Aggressive AQ affiliate groups have emerged in Yemen (AQAP), Syria (Jabhat al-Nusra), Algeria (AQIM), and Somalia (al Shabaab).<sup>102</sup> Between 2007 and 2013, a significant increase in attacks by such groups occurred, most of which were perpetrated by ISIL,<sup>103</sup> which has since disaffiliated from AQ.<sup>104</sup> ISIL has since eclipsed core AQ and its affiliates as one of the most dangerous terrorist groups in existence. AQIM is a violent extremist group in Mali, but French and allied African forces successfully disrupted its regional operations in 2013.<sup>105</sup> Al-Shabaab in East Africa poses a regional threat by targeting attacks in Somalia, Uganda, and Kenya.<sup>106</sup> Almost all the attacks in 2013 were perpetrated against local or regional targets.<sup>107</sup> Dr. Seth G. Jones, director of the International Security and Defense Policy Center at the Rand Corporation, and expert in counterinsurgency and counterterrorism, has completed extensive research and analysis on the relationships between these groups and the potential threats they pose to U.S. persons and interests. In an article published in early 2014 titled “A Persistent Threat: The Evolution of al Qa’ida and Other Salafi Jihadists,” he uses Figure 1 to illustrate the regional connections of core AQ and its affiliates.

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<sup>101</sup> Jones, “A Persistent Threat,” 10.

<sup>102</sup> Ibid.; “Country Reports on Terrorism,” 6.

<sup>103</sup> ISIL is also known as the Islamic State of Iraq and Syria (ISIS) and the Islamic State (IS).

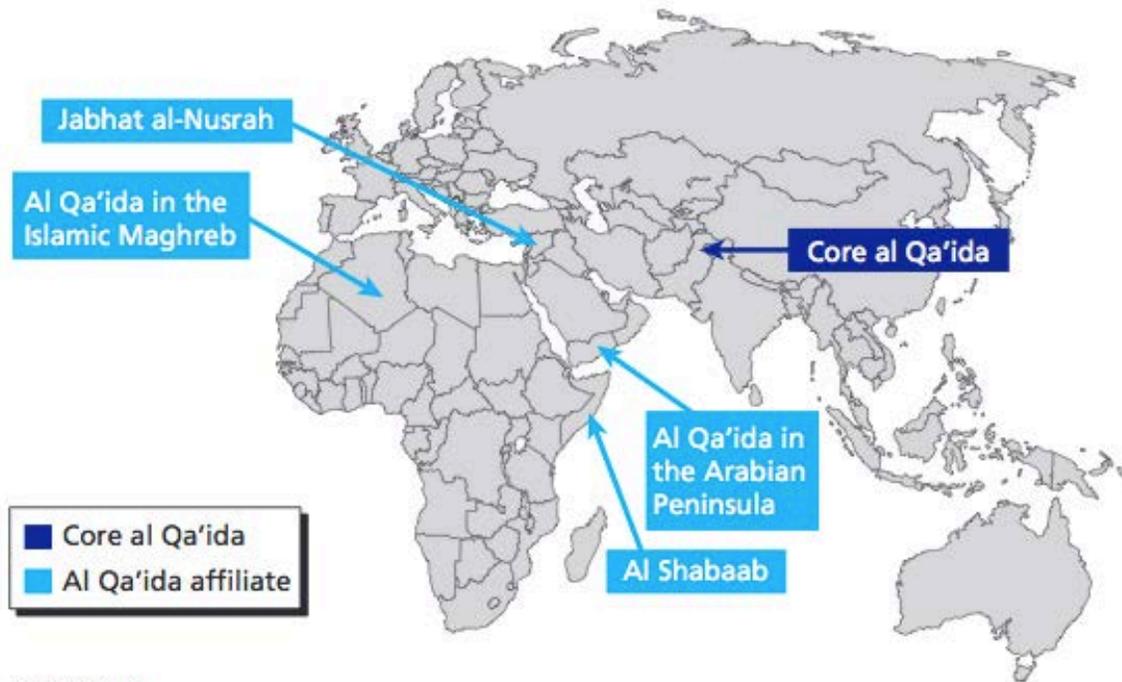
<sup>104</sup> Jones, “A Persistent Threat,” x, 34.

<sup>105</sup> “Country Reports on Terrorism,” 12–13.

<sup>106</sup> Ibid., 9.

<sup>107</sup> Jones, “A Persistent Threat,” x.

## Core al Qa'ida and Its Affiliates



RAND RR637-2.1

Figure 1. Map Depicting Regional Influence of Core AQ and Its Affiliates<sup>108</sup>

Although most AQ affiliates prioritize regional maneuvers, threats to U.S. persons and interests endure.<sup>109</sup> AQAP, for instance, operates primarily in Yemen, but it has attempted to attack the United States directly three times.<sup>110</sup> In December 2009, AQAP tried to blow up an airplane traveling to Detroit, and in 2010, it plotted to use bombs to destroy U.S. bound aircraft.<sup>111</sup> AQAP's ties to core AQ are strong, as demonstrated by Nasir Wahishi, AQAP's leader, designation as Zawahiri's deputy in 2013. AQAP reportedly conducted about one hundred attacks in Yemen in 2013, and according to the Department of State and Director of National Intelligence, the organization continues to pose a threat to U.S. citizens, interests, and possibly, the U.S. homeland.<sup>112</sup>

<sup>108</sup> Jones, "A Persistent Threat," 11.

<sup>109</sup> "Worldwide Threat Assessment," 4.

<sup>110</sup> Ibid.; Zimmerman, "A New Definition for al-Qaeda."

<sup>111</sup> "Country Reports on Terrorism," 7–8.

<sup>112</sup> Ibid., 8; "Worldwide Threat Assessment," 4.

While core AQ and AQAP have significant ties, the lack of control of AQ leadership over affiliates has called into question the AUMF's application to some AQ affiliates because of the statute's nexus to the perpetrators of the 9/11 attacks. AQ leadership has failed to maintain cohesion amongst other AQ affiliates, with guidance issued by Zawahiri consistently defied.<sup>113</sup> AQ has failed to deter groups willing to perpetrate hideous violence that even AQ deems unacceptable to its mission, and divisions between core AQ and such affiliates may result in an inability to target these groups under AUMF authority.<sup>114</sup> Core AQ's inability to manage affiliates became apparent when Zawahiri failed to resolve a clash between ISIL and the Jabhat al-Nusrah in Syria.<sup>115</sup> ISIL was expelled from AQ in February 2014, and ISIS is arguably now at its strongest.<sup>116</sup>

The third category of organizations includes groups that have seemingly established relationships with AQ or share its ideology but are not formal AQ affiliates.<sup>117</sup> While arguments may be asserted that these groups fall within AUMF authority, targeting these groups is not a legally sound option due to their uncertain ties to core AQ. Most of these groups focus on regional operations; some may pose threats to U.S. interests in those regions. For instance, Answar al-Shari'a operates in Tunisia and Libya, and focuses on local operations, the Jamal Network operates in Egypt, and al-Mulathamun operates in the Sahel.<sup>118</sup> In addition, Boko Haram (BH) conducted a number of attacks in 2013 in Nigeria and reportedly crossed borders into Chad, Cameroon, and Niger to conduct operations.<sup>119</sup> It trained with AQIM,<sup>120</sup> but its indiscriminate killing and kidnapping is arguably inconsistent with AQ's current push to avoid such actions for fear

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<sup>113</sup> "Country Reports on Terrorism," 6.

<sup>114</sup> Adam Nossiter and David D. Kirkpatrick, "Abduction of Girls an Act Not Even Al Qaeda Can Condone," *New York Times*, May 7, 2014, [http://www.nytimes.com/2014/05/08/world/africa/abduction-of-girls-an-act-not-even-al-qaeda-can-condone.html?\\_r=0](http://www.nytimes.com/2014/05/08/world/africa/abduction-of-girls-an-act-not-even-al-qaeda-can-condone.html?_r=0).

<sup>115</sup> "Country Reports on Terrorism," 6; Jones, "A Persistent Threat," 8.

<sup>116</sup> "Country Reports on Terrorism," 6.

<sup>117</sup> Jones, "A Persistent Threat," 11.

<sup>118</sup> "Country Reports on Terrorism," 9.

<sup>119</sup> *Ibid.*

<sup>120</sup> Jones, "A Persistent Threat," 39.

of alienating possible followers.<sup>121</sup> Finally, the Tehrik-e-Taliban Pakistan (TTP) focuses primarily on regional operations, but it has also shown an interest in attacking the U.S. homeland. This group was implicated in the attempted bombing of Times Square in 2010.<sup>122</sup>

Many organizations arguably share similar ideologies to AQ, but they do not have direct ties to core AQ; targeting these groups under current AUMF authority would also be problematic. Significant differences exist between these groups. In particular, they disagree about whether to target the United States or its allies.<sup>123</sup> Consequently, threats from these groups vary, with some retaining their focus on local operations and others remaining intent on attacking U.S. interests.<sup>124</sup> Thus, while some groups may present threats to U.S. interests, many do not intend to target the United States or its allies.<sup>125</sup>

Since ISIL has been disavowed by AQ,<sup>126</sup> ISIL now falls within this third category. Consequently, the AUMF does not authorize force against ISIL.<sup>127</sup> Yet, this group appears to pose more of a threat to the United States than most, if not all, AQ affiliates. ISIL has an incredible reputation for brutality, and it is the primary group fighting the Syrian and Iraqi governments.<sup>128</sup> ISIL has expanded its control into large portions of northern Iraq and eastern Syria.<sup>129</sup> The map in Figure 2, published by the *BBC News*, illustrates the permeation of ISIL control throughout the region.

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<sup>121</sup> Nossiter and Kirkpatrick, "Act Not Even Al Qaeda Can Condone."

<sup>122</sup> Zimmerman, "A New Definition for al-Qaeda."

<sup>123</sup> Jones, "A Persistent Threat," 9.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, 26.

<sup>126</sup> While ISIL has disaffiliated with AQ, recent media reports indicate that AQAP may have expressed support for ISIL. See Kristina Wong, "Al Qaeda in Yemen Declares Support for Isis," *The Hill*, August 19, 2014, [thehill.com/business-a-lobbying/215480-al-qaeda-in-yemen-declares-support-for-isis](http://thehill.com/business-a-lobbying/215480-al-qaeda-in-yemen-declares-support-for-isis).

<sup>127</sup> As will be discussed in Chapter VII, the Obama administration would disagree with this assertion. See Steven Dennis, "Here's Obama's Legal Justification for ISIS War," Rollcall, Posted at 3:55 p.m. September 11, 2014, <http://blogs.rollcall.com/white-house/heres-the-administrations-legal-justification-for-isis-isil-war/?dcz=>.

<sup>128</sup> "Syria Iraq: The Islamic State Militant Group," *BBC World News*, August 2, 2014, <http://www.bbc.com/news/world-middle-east-24179084>.

<sup>129</sup> "Syria Conflict: Islamic State 'Seizes Tabqa Airbase,'" *BBC World News*, August 24, 2014, <http://www.bbc.com/news/world-middle-east-28918792>.

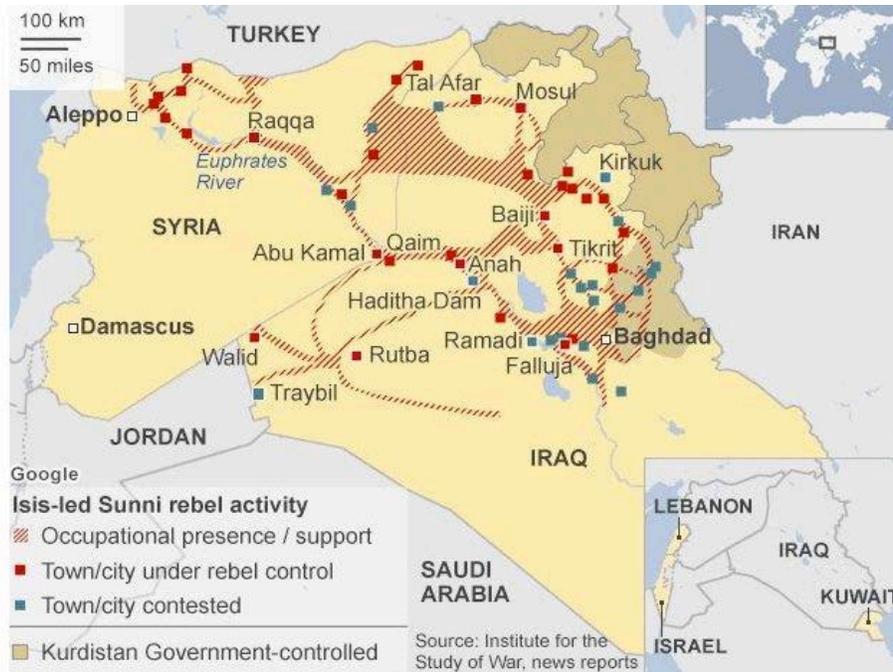


Figure 2. ISIL Strongholds in Syrian Rebel-Held and Contested Areas<sup>130</sup>

The final category, the Afghan Taliban, was included in the AUMF because it provided AQ a safe harbor in Afghanistan before and subsequent to the 9/11 attacks.<sup>131</sup> As noted above, core AQ now primarily operates out of Pakistan. The United States and coalition forces removed the Taliban from power in Afghanistan, and the United States has endeavored to draw down its forces in that country.<sup>132</sup> Considering these changes in the threat landscape over the past 13 years, Congress should reassess whether AUMF authority is necessary to support continued U.S. military operations in Afghanistan.

### 3. Prioritizing Threats

In analyzing the AUMF discussion, policymakers need to evaluate terrorist threats to the United States in a way that considers risk and probability, to preserve security without placing the nation on a perpetual war footing. This analysis should be continuous and dynamic, considering the non-static nature of terrorist threats. Dr. Jones has

<sup>130</sup> “The Islamic State Militant Group.”

<sup>131</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 3.

<sup>132</sup> *Ibid.*

described one approach to conducting such an analysis, and his assertions are based on the seemingly most comprehensive open source information compiled. He proposes an approach that implicitly acknowledges defense strategy and threat prioritization based on risk, and it may be incorporated into congressional consideration of terrorist threats and associated force authorizations. It focuses on organizational intent to conduct attacks on U.S. persons or interests and the capability to do so successfully. With intent and capability as the cornerstones of this analysis, Dr. Jones divides current threats into three categories: 1) groups posing a high threat to the United States because they are actively plotting against the U.S. homeland and have the capability to execute an attack, 2) organizations presenting an intermediate threat because they plot attacks against U.S. facilities and citizens abroad, and 3) groups exhibiting a low threat because they do not focus on U.S. targets, although they may focus on local or regional institutions.<sup>133</sup>

While it would behoove lawmakers to consult with the executive branch regarding classified threat information when it considers continued AUMF application, the information and classifications provided by Dr. Jones are useful for considering the evolving terrorist threat environment for the purposes of developing a methodology as part of the AUMF discussion. Applying this method, even with open source information, AQAP falls within the highest threat category because of its capabilities and intent to target the United States and its interests overseas.<sup>134</sup> This conclusion is in harmony with the Director of National Intelligence's 2013 Intelligence Community Worldwide Threat Assessment; AQAP is the only group described in this assessment as having the intent and ability to perpetrate attacks on the U.S. homeland.<sup>135</sup> AQAP has successfully placed bombs on aircraft bound for the United States, and it has forced heightened airport and

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<sup>133</sup> Jones, "A Persistent Threat," 40.

<sup>134</sup> *Ibid.*, 40.

<sup>135</sup> Jennifer Daskal and Stephen I. Vladeck, "After the AUMF," *Harvard National Security Journal* 5, no. 1, (January 2014): 128, citing James Clapper, "Worldwide Threat Assessment of the U.S. Intelligence Community," Prepared by the Director of National Intelligence for the Senate Select Committee on Intelligence, Statement for the Record, 3–4, March 12, 2013, <http://www.intelligence.senate.gov/130312/clapper.pdf>.

embassy security alerts worldwide.<sup>136</sup> According to Dr. Jones, core AQ falls within a high threat category because of its desire to attack the U.S. homeland, although its current ability to perpetrate such an attack is doubtful.<sup>137</sup>

Although no longer affiliated with AQ, ISIL falls within this high threat category. ISIL conquered several cities in Syria and Iraq, but it was ISIL's military success in taking over Mosul in June 2014 that solidified the group's regional preeminence. It controls approximately 35,000 square miles of territory across Iraq and Syria, and it utilizes U.S. military equipment that it took from the Iraqi army.<sup>138</sup> After taking over several Syrian military bases, on August 24, 2014, media outlets reported that the group seized Tabqa airbase, a key Syrian government airbase in Raqqa province.<sup>139</sup> The downfall of this base will seriously impede the Syrian government's ability to counter ISIL via air power in northern Syria.<sup>140</sup> Not only has the group taken over military assets; it is flush with cash. It is estimated that ISIL now has cash and assets worth around \$2 billion.

ISIL's execution of American journalist James Foley, which it publicized in a video titled "A Message to America,"<sup>141</sup> marked an escalation in hostilities. ISIL released a video titled "second message to America" that shows the killing of American journalist Steven Sotloff.<sup>142</sup> The group has also called for attacks on U.S. interests via social media.<sup>143</sup> U.S. Defense Secretary Chuck Hagel has warned that ISIL has an "apocalyptic,

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<sup>136</sup> Shashank Joshi, "Islamic State: Biggest Threat to United States?" *BBC News*, August 22, 2014, <http://www.bbc.com/news/world-middle-east-28896348>.

<sup>137</sup> Jones, "A Persistent Threat," 40–41.

<sup>138</sup> Joshi, "Islamic State."

<sup>139</sup> "Syrian Conflict."

<sup>140</sup> *Ibid.*

<sup>141</sup> Rukmini Callimachi, "Militant Group Says It Killed American Journalist in Syria," *The New York Times*, August 19, 2014, <http://www.nytimes.com/2014/08/20/world/middleeast/isis-james-foley-syria-execution.html>.

<sup>142</sup> Chelsea J. Carter and Ashley Fantz, "ISIS Video Shows Beheading of American Journalist Steven Sotloff," *CNN*, September 3, 2014, <http://www.cnn.com/2014/09/02/world/meast/isis-american-journalist-sotloff/>.

<sup>143</sup> *Ibid.*

end-of-days strategic vision” and poses “an imminent threat to every interest we have.”<sup>144</sup> The group’s “apocalyptic” ideology makes deterrence unlikely.<sup>145</sup>

While the intent of ISIL to target U.S. interests is apparent, it is unclear whether the group has the capability to attack the U.S. homeland. Some government officials and counterterrorism experts have questioned the group’s ability to conduct a major attack against the U.S. homeland.<sup>146</sup> As the Pentagon press secretary, Rear Adm. John Kirby commented, the Department of Defense (DOD) does not believe that ISIL has “the capability right now to conduct a major attack on the U.S. homeland.”<sup>147</sup> While the U.S. intelligence community must paint a clearer picture of the group’s capabilities, due to its intent to harm the United States, its resources, and its recent rise to dominate broad territory in Iraq and Syria, ISIL falls within the high threat category at this time.

Groups arguably fall within the intermediate threat category when they intend to target and are capable of targeting U.S. interests overseas. Such groups include Ansar al-Sharia Tunisia, Ansar al-Sharia Libya, AQIM, al Shabaab, and Jabhat al-Nusrah.<sup>148</sup>

While core AQ remains a concern from a U.S. security perspective, AQAP has evolved to be one of the most intent and capable groups targeting the United States. In addition, ISIL’s actions and resources demand immediate Congressional attention. Other groups may evolve to pose more of a threat to the United States if their capabilities improve. Consequently, congressional analysis of AUMF options from a security perspective should consider these shifting terrorist threats in the context of intent and capability.

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<sup>144</sup> Joshi, “Islamic State.”

<sup>145</sup> Ibid.

<sup>146</sup> Mark Mazzetti and Helene Cooper, “U.S. Officials and Experts at Odds on Threat Posed by Isis,” *The New York Times*, August 22, 2014, <http://www.nytimes.com/2014/08/23/us/politics/us-isnt-sure-just-how-much-to-fear-isis.html>.

<sup>147</sup> Ibid.

<sup>148</sup> Jones, “A Persistent Threat,” 41–42.

#### **4. The Threat Environment Has Evolved Since 9/11**

Little doubt exists that the threat landscape has evolved since the inception of the AUMF, as is evident in the current state of AQ and its progeny. AQ has become a decentralized organization with dispersed affiliates, and it serves as an inspiration for other groups. Core AQ and some of its affiliates arguably pose threats to the United States and its interests.<sup>149</sup> Moreover, not all these groups threaten the United States, as many focus on regional operations. Consequently, policymakers should determine how to address such threats based not on static and antiquated views of a 9/11 threat landscape, but with a methodology that prioritizes current risk analysis.

#### **C. COUNTERTERRORISM MEASURES SUPPORTED BY AUMF AUTHORITY**

Should Congress alter the AUMF, current counterterrorism operations will likely be impacted. To understand how AUMF changes may impact security, Congress must identify which measures the executive branch supports with AUMF authority and determine, in conjunction with the executive branch, whether these measures are still needed to accomplish U.S. defense strategy goals. This section focuses on several counterterrorism measures recently utilized by the U.S. government under AUMF authority. Such measures include but are not limited to actions directed at AQ's associated forces, the military detention of enemy combatants, the government's use of military force in Afghanistan, and targeted killings, which are often executed via drone strikes.

##### **1. Overview of Executive Branch Reliance on AUMF Authority**

As of 2013, administration representatives indicated that the AUMF was conducive to accomplishing defense objectives. In fact, Major General Michael Nagata, Deputy Director for Special Operations/Counterterrorism, J-37, Joint Staff, and Brigadier General Richard Gross, Legal Counsel, Chairman of the Joint Chiefs of Staff, agreed in a 2013 Senate Hearing that the AUMF has proven satisfactory to counter enemy forces and

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<sup>149</sup> "2014 Quadrennial Defense Review," 8; "Country Reports on Terrorism," 6.

that changes may inhibit necessary operations.<sup>150</sup> Both the Bush and Obama administrations have relied on AUMF authority to support diverse counterterrorism measures conducted across the globe. According to a 2013 CRS memorandum, there were 30 publicly disclosed occurrences of executive reliance on the AUMF to take military or related action.<sup>151</sup> The following CRS table, Table 1, lists these occurrences. Certain measures listed refer to a categorization of AUMF use, rather than individual incidents. For instance, the entry for October 9, 2001 references action against “al Qaeda; other terrorist organizations,” which implies that multiple actions were authorized on that date.

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<sup>150</sup> Micah Zenko, “The AUMF and America’s Forever War,” *Micah Zenko’s Blog on Politics, Power, and Preventive Action*, Council on Foreign Relations, May 19, 2013, <http://blogs.cfr.org/zenko/2013/05/19/the-aumf-and-americas-forever-war/>.

<sup>151</sup> Weed, *The 2001 Authorization for Use of Military Force*, 3.

**Table 1. List of Presidential Notifications Referencing AUMF**

Date	Relevant Country, Geographic Area, Targeted Group, or Type of Action
9/24/2001	Afghanistan; the Taliban
10/9/2001	al Qaeda; other terrorist organizations
11/13/2001	Military detention and trial of terrorist suspects
9/20/2002	Afghanistan; Philippines; Georgia; Yemen; Guantanamo Bay
3/20/2003	Yemen; Djibouti; Guantanamo Bay
9/19/2003	Afghanistan; Philippines; Georgia; Yemen; Guantanamo Bay
3/20/2004	Afghanistan; Guantanamo Bay; Georgia; Djibouti; Yemen; Kenya; Ethiopia; Eritrea; high seas
11/4/2004	Afghanistan; Guantanamo Bay; Iraq; Yemen; Ethiopia; Kenya; Eritrea; Djibouti; high seas
5/20/2005	Afghanistan; Guantanamo Bay; Iraq; Djibouti; Yemen; Kenya; Ethiopia; Eritrea; high seas
12/7/2005	Afghanistan; Guantanamo Bay; Iraq; Djibouti; Yemen; Kenya; Ethiopia; high seas
6/15/2006	Afghanistan; Guantanamo Bay; Iraq; Djibouti; Yemen; high seas
12/15/2006	Afghanistan; Guantanamo Bay; Iraq; Djibouti; Yemen; high seas
2/14/2007	Executive Order 13425: includes Military Commissions
6/15/2007	Afghanistan; Guantanamo Bay; Iraq; Horn of Africa; Somalia; high seas
7/20/2007	Executive Order 13440: includes detention and interrogation of terrorist suspects
12/14/2007	Afghanistan; Guantanamo Bay; Iraq; global counterterrorism; Horn of Africa; high seas
6/13/2008	Afghanistan; Guantanamo Bay; Iraq; global counterterrorism; Horn of Africa; high seas
12/16/2008	Afghanistan; Guantanamo Bay; Iraq; global counterterrorism; Horn of Africa; high seas
6/15/2009	Afghanistan; Guantanamo Bay; Iraq; global counterterrorism; Horn of Africa; high seas
12/15/2009	Presidential Memorandum includes Guantanamo Bay issues
12/16/2009	Afghanistan; Guantanamo Bay; Iraq; global counterterrorism; Horn of Africa; high seas
6/15/2010	Afghanistan; Guantanamo Bay; Djibouti; Horn of Africa; global counterterrorism; high seas
12/15/2010	Afghanistan; Guantanamo Bay; global counterterrorism; high seas
3/7/2011	Executive Order 13567: includes detention at Guantanamo Bay
6/15/2011	Afghanistan; Guantanamo Bay; global counterterrorism; high seas
12/15/2011	Afghanistan; Guantanamo Bay; global counterterrorism; high seas
2/28/2012	Military detention of terrorist suspects
6/15/2012	Afghanistan; Guantanamo Bay; global counterterrorism; Somalia; Yemen; high seas
12/14/2012	Afghanistan; Guantanamo Bay; global counterterrorism; Somalia; Yemen; high seas
6/14/2013	Afghanistan; Somalia; Yemen; Guantanamo Bay; high seas

Sources: Federal Register; Compilation of Presidential Documents.

Table 1. Executive Branch Reliance on the AUMF<sup>152</sup>

Although telling to a degree, the descriptions of counterterrorism measures authorized by AUMF authority on this list remain vague. Based on court cases, media

<sup>152</sup> Weed, *The 2001 Authorization for Use of Military Force*, 3.

accounts, academic articles, and government documents, counterterrorism measures may be more specifically identified.

## **2. Action Against Associated Forces**

The AUMF had been interpreted to provide the executive branch with the authority to take action against AQ's associated forces. Congress's understanding of what constitutes an associated force will help it determine whether it needs to adjust the AUMF's scope to include or exclude certain groups on which counterterrorism action may be taken. Unfortunately, determining what groups constitute AQ associated forces is anything but straightforward. First of all, the AUMF's 9/11 nexus is an important congressional limitation on its scope.<sup>153</sup> Second, as described in the previous section, AQ has decentralized, and some groups that currently pose threats to U.S. interests did not exist on September 11, 2001.

Therefore, what kind of a relationship do groups need to have with AQ or the Taliban to be targeted under the AUMF?<sup>154</sup> To answer this question, Congress should consider the possible root of confusion regarding the definition of associate forces. Interpretations regarding appropriate definitions vary and stem from sources as disparate as the executive branch, public officials, the 2012 National Defense Authorization Act (2012 NDAA), and legal experts. Although AQ does not "give out t-shirts or membership cards,"<sup>155</sup> formal loyalty oaths between AQ and other groups have been made public and are telling of affiliation. Self-described affiliations certainly contribute to a determination that a group is an associated force.<sup>156</sup>

Challenges in labeling groups "associated forces" originate, in part, from applying both international and domestic notions of traditional warfare to terrorist threats. Traditional warfare implicates two or more state parties. For example, in World War II, the United States was at war with Germany, Italy, and Japan, as well as their "co-

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<sup>153</sup> Bradley and Goldsmith, "Congressional Authorization," 2055.

<sup>154</sup> Zimmerman, "A New Definition for al-Qaeda."

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

belligerents.”<sup>157</sup> The United States declared war against all of these parties, including co-belligerents Bulgaria, Hungary, and Rumania.<sup>158</sup>

Application of the “co-belligerent” designation in the context of terrorist groups is more convoluted because the United States is not at war with state actors. Unlike in WWII, when war was declared against co-belligerents, the executive branch today refuses to disclose which groups constitute co-belligerents. Nevertheless, the executive branch has applied this idea of being at war with “co-belligerents” to the armed conflict against those nations, organizations, and persons that perpetrated the 9/11 attacks.<sup>159</sup> A U.S. Department of Justice (U.S. DOJ) white paper justifying targeted killings describes AQ associated forces as including groups that qualify as co-belligerents under international laws of war,<sup>160</sup> and Obama administration officials maintain that the AUMF provides domestic authority to target these forces in whatever countries they operate in, including Somalia, Libya, and Syria.<sup>161</sup>

The Obama administration defines associated forces as 1) organized armed groups that are 2) co-belligerents with AQ in hostilities against the United States or its coalition partners.<sup>162</sup> Congress effectively ratified this interpretation concerning detention authority via the 2012 NDAA.<sup>163</sup> Holding views sympathetic to AQ will not alone qualify a group as an associated force.<sup>164</sup> Groups with no direct affiliation with AQ or the Taliban do not fall within the executive branch’s definition of associated forces, and

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<sup>157</sup> Daskal and Vladeck, “After the AUMF,” 122.

<sup>158</sup> “Official Declarations of War by Congress,” U.S. Senate: Art & History, accessed July 28, 2014, [http://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_tasers/WarDeclarationsbyCongress.htm](http://www.senate.gov/pagelayout/history/h_multi_sections_and_tasers/WarDeclarationsbyCongress.htm).

<sup>159</sup> Daskal and Vladeck, “After the AUMF,” 122.

<sup>160</sup> U.S. Department of Justice (U.S. DOJ) White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” draft November 8, 2011, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf), citing *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74–75 (D.C. Cir. 2009).

<sup>161</sup> Zenko, “America’s Forever War.”

<sup>162</sup> When speaking at a senate hearing about the AUMF in 2013 on behalf of the Obama administration, Robert Taylor, former Acting Defense General Counsel, stated that a group is an “associated force” if it satisfies these two requirements. Zenko, “America’s Forever War”; Daskal and Vladeck, “After the AUMF,” 123.

<sup>163</sup> Daskal and Vladeck, “After the AUMF,” 123.

<sup>164</sup> Zenko, “America’s Forever War.”

therefore, they cannot be targeted under the AUMF. For instance, groups that share ideological similarities with AQ but do not engage in hostilities against the United States would not qualify as an associated force. In addition, individuals inspired by AQ who are not members of an organized, armed group—such as the perpetrators of the Boston Marathon bombings—do not meet the executive branch’s definition of an associated force.<sup>165</sup>

While lawmakers and the public may deduce that certain entities and individuals do not meet the executive branch’s definition of associated forces, the administration’s criteria perpetuate uncertainty regarding which groups are covered by the AUMF. The executive branch refuses to disclose which terrorist organizations qualify as associated forces by citing security reasons.<sup>166</sup> Obama administration officials have made statements suggesting that the executive branch maintains a list of covered groups, but it is unclear whether action is being taken against these groups under the AUMF because they qualify as part of AQ or its associated forces or whether these groups are being pursued under separate legal authority, the reasoning behind which has not been publicly disclosed.<sup>167</sup>

Confusion only increases the harder we look. For instance, it is unclear whether the executive branch considers all or parts of AQIM, al Shabaab, or the Jabhat al-Nusrah to be AQ associated forces subject to the AUMF.<sup>168</sup> An exchange between State Department spokeswoman Jen Psaki and members of the press at a briefing about the Benghazi attack investigation illustrates this confusion:

QUESTION: But Jen, the leader of Ansar al-Sharia, Bin Qumu, he has ties to bin Ladin, he trained with him in camps in Pakistan in 1993. Doesn’t that give him ties to al-Qaida?

MS. PSAKI: Well again, Lucas, there’s no indication at this point that core al-Qaida was involved or planned these attacks, and these are not official affiliates of al-Qaida, so –

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<sup>165</sup> Daskal and Vladeck, “After the AUMF,” 124.

<sup>166</sup> *Ibid.*, 123.

<sup>167</sup> *Ibid.*, 124.

<sup>168</sup> *Ibid.*

QUESTION: If you're an alumnus of al-Qaida, doesn't that give you ties to al-Qaida? I mean, I'm just curious what it takes to have –

QUESTION: (Inaudible.) (Laughter.)

QUESTION: What does it take to have ties to al-Qaida? Is it an email? Is it a certificate of completed training? I'm just curious what it takes to have ties to al-Qaida.

MS. PSAKI: They don't give out t-shirts or membership cards, as you know . . . .

[...]

QUESTION: But, you see, you're making a statement that there's no indication that they are official affiliates. What is an official affiliate of—I mean, how does one—how do you—who is an official affiliate of core al-Qaida in the administration's view? What group is?

[...]

QUESTION: And I'm just wondering—I mean, I don't think it's an irrelevant question as to what makes one an official affiliate –

MS. PSAKI: I don't have any –

QUESTION: -- as opposed to an unofficial or a wanna-be affiliate.

MS. PSAKI: I don't have any criteria to outline for you.

QUESTION: Well, then how –

MS. PSAKI: I'm happy to check with our counterterrorism team and see if that's –

QUESTION: Okay, because if you don't have –

MS. PSAKI: -- something that's publicly available.

QUESTION: Okay, because if you don't have criteria for what an official affiliate is, then I'm not sure how you can say that one isn't an official affiliate.<sup>169</sup>

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<sup>169</sup> Jen Psaki, "Daily Press Briefing—January 8, 2014," Department of State, January 8, 2014, <http://www.state.gov/r/pa/prs/dpb/2014/01/219481.htm>.

Some members of Congress have disagreed with the administration’s AUMF interpretation. Senator Durbin explains, “None of us, not one who voted for [the AUMF], could have envisioned . . . that we were about to give future presidents the authority to fight terrorism as far flung as Yemen and Somalia. I don’t think any of us envisioned that possibility.”<sup>170</sup> Senator McCain echoed this by asserting that AUMF authority “[h]as grown way out of proportions. . . .”<sup>171</sup> Other members of Congress have expressed similar sentiments. In 2013, Senator King asserted that the executive branch has effectively revised the constitution because Article 1, Section 8, Clause 11 provides Congress the power to declare war, and the AUMF is a limited delegation of authority.<sup>172</sup> In arguing this point, he specifically points out that the term “associated forces” is not in the AUMF.<sup>173</sup> Congress’s intent in delegating authority to the president via the AUMF is important because the president’s wartime authority is strongest when the sitting president acts in accordance with congressional authorization.

Despite these criticisms, Congress effectively ratified the executive’s interpretation of the AUMF in the 2012 NDAA, at least in relation to detention authority. The 2nd Circuit recently examined the scope of AUMF authority and the 2012 NDAA’s impact on it in *Hedges v. Obama*. The court explains that the NDAA did not expand the president’s scope of authority under the AUMF, but it clarifies the executive’s authority in several respects.<sup>174</sup> First, the NDAA confirms that the AUMF applies to organizations and persons responsible for the 9/11 attacks, as well as those who substantially supported AQ, the Taliban, and associated forces.<sup>175</sup> Second, the 2012 NDAA reiterates that the

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<sup>170</sup> One Congresswoman, Representative Barbara Lee did know, and she expressed her views on September 14, 2001: “[W]e must be careful not to embark on an open-ended war with neither an exit strategy nor a focused target.” Glenn Greenwald, “Barbara Lee and Dick Durbin’s ‘Nobody-Could-Have-Known’ Defense,” *The Guardian*, May 17, 2013.

<sup>171</sup> Zenko, “America’s Forever War.”

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *2012 National Defense Authorization Act* (2012 NDAA), Pub. L. No. 112–81, 125 Stat. 1298 (December 31, 2011), section 1021(d).

<sup>175</sup> Jennifer K. Elsea and Michael John Garcia, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings* (CRS Report No. R41156) (Washington, DC: Congressional Research Service, 2014), 37, <http://fas.org/sgp/crs/natsec/R41156.pdf>.

president may use all necessary and appropriate force against these groups, pursuant to the AUMF. Further, the 2012 NDAA defines “covered persons” as individuals “who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.” In sum, the 2012 NDAA settles that the president may utilize force pursuant to the AUMF against those persons who are a part of or substantially support the Taliban, AQ, or associated forces engaged in hostilities against the United States or its coalition partners.<sup>176</sup>

Parallels exist between this 2012 NDAA language and domestic criminal laws. For instance, individuals can be held liable for being an accomplice to a crime in the domestic criminal justice system. An accomplice is an individual who actively aids in the commission of a crime, and this individual faces the same criminal responsibility as the principal perpetrator. Criminal liability also applies to those who assist a criminal in evading arrest and to co-conspirators who agree to perpetrate a crime and act in furtherance of such a plan. Despite these parallels, however, due process protections that apply in the domestic legal context—and assist in determining whether an individual has actually assisted in the commission of a crime—are often greatly diminished in proceedings involving persons apprehended under the AUMF or 2012 NDAA. These due process implications are discussed in the next chapter.

In addition to decisions relevant to NDAA language interpretation, other courts specifically interpret the AUMF as providing authority for executive action against AQ associates, those with a sufficiently close relationship to organizations that clearly fall within the AUMF because of their direct involvement in the 9/11 attacks.<sup>177</sup> Reasoning from court opinions that have more specifically considered what qualifies as an associated force may also be utilized in outlining the parameters regarding what groups the president can target under the AUMF. *Parhat v. Gates* serves as one such reference. In December 2001, Huzaifa Parhat, an ethnic Uighur, was captured in Pakistan.<sup>178</sup> Parhat

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<sup>176</sup> 2012 NDAA.

<sup>177</sup> Bradley and Goldsmith, “Congressional Authorization,” 2055.

<sup>178</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 26.

fled his home in China to escape Chinese government policies.<sup>179</sup> He was not a member of AQ or the Taliban, and he did not participate in hostilities against the United States or its allies.<sup>180</sup> He was detained as an “enemy combatant” at Guantanamo based on his alleged affiliation with the East Turkistan Islamic Movement (ETIM), a Uighur independence group.<sup>181</sup>

The government alleged that ETIM was “associated” with both AQ and the Taliban, and that ETIM had been engaging in hostilities against the United States.<sup>182</sup> To support this claim, the government presented four classified documents describing ETIM activities and its ties to the Taliban and AQ.<sup>183</sup> The D.C. circuit held that these documents lacked indicia of reliability.”<sup>184</sup> Parhat prevailed on his claim that the government’s evidence was insufficient to support the determination that he was an enemy combatant. In essence, the evidence presented did not sustain the conclusion that Parhat was a member of an associated force.<sup>185</sup>

Despite the broad discretion afforded the executive branch, determining precisely which groups fall within AUMF authority is a daunting task. As Michael Sheehan, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, stated in 2013, “when a group aligns itself with al-Qaida and al-Qaida has an express intent to attack Americans, home and abroad, but then do not take the next step to be involved in that co-belligerency then we have a judgment to make.”<sup>186</sup>

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<sup>179</sup> *Parhat v. Gates*, 532 F.3d 834, 835 (D.C. Cir. 2008).

<sup>180</sup> *Ibid.*, 835–36.

<sup>181</sup> *Ibid.*, 835; Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 26.

<sup>182</sup> *Parhat v. Gates*, 839.

<sup>183</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 26.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*; *Parhat v. Gates*, 836.

<sup>186</sup> Zenko, “America’s Forever War”; *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force*.

### 3. Enemy Combatant Designation and Detentions

A primary consideration in evaluating the AUMF issue is the impact AUMF modification may have on the government's authority to designate individuals as enemy combatants and detain them. The Non-Detention Act requires that no citizen be imprisoned or detained by the United States, unless pursuant to an act of Congress.<sup>187</sup> The AUMF provides the necessary congressional authorization. Courts have interpreted the AUMF as providing the executive branch with the authority to detain members of AQ, the Taliban, and affiliated groups, as well as those who provide sufficient support to such entities in their fight against the United States.<sup>188</sup> Case law also indicates that the executive branch can detain persons captured on U.S. soil who had been "armed and present in a combat zone in Afghanistan as part of Taliban forces during the conflict there with the United States." These individuals may be detained under AUMF authority for the duration of the armed conflict.<sup>189</sup> Consequently, Congress needs to plan for the loss of this authority, should it decide to repeal or modify the AUMF.<sup>190</sup>

Courts have held that the AUMF provides authority to take action against persons who are "part of forces associated with Al Qaeda or the Taliban" and "those who purposefully and materially support such forces in hostilities against U.S. Coalition partners."<sup>191</sup> In a plurality opinion, the Supreme Court held in *Hamdi* that the AUMF authorized the president to detain "enemy combatants" for the duration of hostilities, even if these combatants were U.S. citizens. The DOD and the Navy both define an "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its

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<sup>187</sup> *Non-Detention Act*, Pub. L. 92-128, 62 Stat. 847, amended by 85 Stat. 347 (1971).

<sup>188</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 2.

<sup>189</sup> *Ibid.*, citing *Padilla v. Hanft*.

<sup>190</sup> The USA Patriot Act may provide an alternative source of detention authority, but that is altogether another discussion and will not be considered in this analysis. Stephen I. Vladeck examines such authority in "Detention After the AUMF." Stephen I. Vladeck, "Detention After the AUMF," *Fordham Law Review* 82 (2014): 2189-2207.

<sup>191</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 8.

coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>192</sup>

In *Hamdi*, five justices determined that the detention of individuals who fought in Afghanistan against U.S. forces is a fundamental and accepted incident to war, and consequently, qualifies as “necessary and appropriate force” under the AUMF.<sup>193</sup> The court determined that the president has authority under the AUMF to capture such persons and detain them without charge for the duration of the conflict.<sup>194</sup> The court based its reasoning, in part, on the president’s need to prevent enemy combatants from returning to the battlefield.<sup>195</sup>

Since the basis of legal authority for Guantanamo detentions is the AUMF and associated laws of war based on armed conflict, the release of detainees will be required when hostilities cease. The authority for military detention prior to federal prosecution may also be eliminated if the AUMF is repealed.<sup>196</sup> Congress needs to plan for the possible loss of this authority, specifically with regard to detainees. Should it then rely on alternative authorities, such as the USA Patriot Act? In this severe scenario, Congress must determine potential procedures and mechanisms for the release of detainees.

#### **4. Forces in Afghanistan**

In 2001, President George W. Bush notified Congress that he was deploying U.S. military forces to Afghanistan to defeat the Taliban and eliminate AQ resources in the country, pursuant to AUMF authority.<sup>197</sup> The Taliban governed Afghanistan, and it had supported and harbored AQ within the country.<sup>198</sup> After 13 years, U.S. ground forces are

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<sup>192</sup> *Parhat v. Gates*, 837–38, citing DOD Order Establishing Combatant Status Review Tribunal (July 7, 2004) and Implementation of Combatant Status Review Tribunal Procedures at 2 (July 29, 2004) (Navy Memorandum).

<sup>193</sup> *Hedges v. Obama*, 724 F.3d 170, 175 (2d Cir. 2013).

<sup>194</sup> Bradley and Goldsmith, “Congressional Authorization,” 2052–53. Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 2.

<sup>195</sup> Bradley and Goldsmith, “Congressional Authorization,” 2053.

<sup>196</sup> Daskal and Vladeck, “After the AUMF,” 144.

<sup>197</sup> CRS 2001 AUMF Background in Brief Memo at 3; *Hedges v. Obama*, 174.

<sup>198</sup> *Parhat v. Gates*, 837.

still present in Afghanistan, and the AUMF remains the principal legal authority supporting military operations in that country.<sup>199</sup> Should U.S. forces leave the country, the relevance of the AUMF will be weakened.

This scenario is not a far-flung possibility. Since Congress passed the AUMF, the Taliban regime has been removed from power in Afghanistan.<sup>200</sup> The DOD has expressed that it intends to transition from operations in Afghanistan and it has begun a drawdown of U.S. ground forces.<sup>201</sup> The withdrawal of forces from Afghanistan was scheduled for the end of 2014, although this schedule has recently come into question due to instability in the country and throughout the region.<sup>202</sup> U.S. policymakers will have to consider whether it is still necessary to utilize U.S. military forces in Afghanistan to protect U.S. persons and interests. Congress must retain the AUMF so long as it wants to keep U.S. military forces in Afghanistan.

## **5. Targeted Killings**

The executive branch has relied on the AUMF to authorize targeted killings of senior leaders of AQ and associated forces, irrespective of whether these leaders are within Afghanistan and without regard to their citizenship. The Obama administration relies on the AUMF as the principal authority supporting targeted killing operations in Pakistan, Yemen, and Somalia.<sup>203</sup> It also effectuates drone strikes on U.S. citizens who are deemed members of AQ or its associated forces using AUMF authority. These operations and the Obama administration's reluctance to release legal reasoning supporting them have stirred public controversy.<sup>204</sup>

The AUMF plays an integral part in the authorization of targeted killings; such operations are undertaken pursuant to the executive's war powers and congressional

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<sup>199</sup> Daskal and Vladeck, "After the AUMF," 143.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*, 122; "2014 Quadrennial Defense Review," VII.

<sup>202</sup> "2014 Quadrennial Defense Review," VII. Daskal and Vladeck, "After the AUMF," 142.

<sup>203</sup> Daskal and Vladeck, "After the AUMF," 143.

<sup>204</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

authorization via the AUMF.<sup>205</sup> When the president acts pursuant to congressional authorization, the president acts with maximum authority, and courts afford great deference. The AUMF authorized the use of all necessary and appropriate force against the 9/11 perpetrators.<sup>206</sup> Thus, by conducting a targeted killing of an organizational leader who falls within the AUMF, the administration is acting in accordance with AUMF statutory authority, and courts defer to the president's decisions relevant to these operations.<sup>207</sup>

While the executive branch has been successful in overcoming courtroom challenges to its targeted killing operations, it has been criticized for failing to adhere to its self-professed drone strike policies. The Obama administration has maintained that the AUMF authorizes drone strikes against senior operational leaders of AQ, the Taliban, and associated forces who are plotting imminent violent attacks against U.S. interests.<sup>208</sup> On September 6, 2012, President Obama asserted that a threat has to be “serious and not speculative,” one in which “[w]e can’t capture the individual before they move forward on some sort of operational plot against the United States.”<sup>209</sup> Reports show, however, that the drone program has not adhered to this policy. McClatchy newspapers did an assessment of strikes between 2006 through 2008 and 2010 through 2011. Of the up to 482 people killed from September 2010 through September 2011, approximately six were top AQ leaders. Individuals from groups other than AQ were targeted in numerous strikes. Such individuals included unidentified “foreign fighters” and “other militants.”<sup>210</sup> Christopher Swift, a professor of national security affairs at Georgetown University said, “I have never seen nor am I aware of any rules of engagement that have been made public that govern the conduct of drone operations in Pakistan, or the identification of

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<sup>205</sup> 2010 U.S. DOJ Legal Memorandum disclosed in *The New York Times Company v. U.S.*, Docket Nos. 13–422 (Decided June 23, 2014), 67.

<sup>206</sup> *Ibid.*, 77.

<sup>207</sup> *Ibid.*

<sup>208</sup> Jonathan S. Landay, “Obama’s Drone War Kills ‘Others,’ Not Just al Qaida Leaders,” McClatchy Newspapers, April 9, 2013, <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

individuals and groups other than al Qaida and the Afghan Taliban.”<sup>211</sup> Consequently, the AUMF needs to be reevaluated to determine whether refinement is necessary to limit the executive branch’s use of drone strikes.

In addition, U.S. drone strike operations are not limited to a traditional battlefield, or area of active hostilities. The Obama administration combines AUMF domestic authority with international legal arguments to support the legality of targeted killings outside of Afghanistan.<sup>212</sup> Administration lawyers argue, “The President has authority to respond to the imminent threat posed by al-Qa’ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self defense under international law, Congress’s authorization of the use of all necessary and appropriate military force against this enemy [the AUMF], and the existence of an armed conflict with al-Qa’ida under international law.”<sup>213</sup> The U.S. DOJ deduces that the president may authorize drone strikes against appropriate targets outside of Afghanistan because the AUMF does not limit the use of force to geographic boundaries and because it permits the president to use all force necessary and appropriate to prevent future acts of international terrorism against the United States.<sup>214</sup>

The executive branch also maintains that the AUMF authorizes lethal force against U.S. citizens abroad.<sup>215</sup> Administration attorneys argue that such action is lawful when three conditions are met:

- (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
- (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and
- (3) the operation would be conducted in a manner consistent with applicable law of war principles.<sup>216</sup>

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<sup>211</sup> Landay, “Obama’s Drone War Kills ‘Others,’ Not Just al Qaida Leaders.”

<sup>212</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

<sup>213</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 1.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

The executive argues that in such circumstances, the government's interest in protecting citizens from attack permits the use of lethal force.<sup>217</sup> For instance, the U.S. DOJ reasoned that the killing of AQAP leader Anwar al-Aulaqi was within AUMF authority because he was an organizational leader of AQAP, which is a group associated with AQ, and his activities posed a continuous imminent threat of violence to the United States.<sup>218</sup> The U.S. DOJ concluded that al-Aulaqi's U.S. citizenship did not provide him with protection from being targeted with force otherwise authorized by the AUMF.<sup>219</sup>

The executive branch's use of targeted killings implicates a complicated balancing of interests. The precision of these strikes arguably minimizes civilian casualties. As such, they arguably promote compliance with international legal requirements to maintain proportionality in defending against armed attacks by minimizing the threat to civilians.<sup>220</sup> They also reduce risk to service members, as they decrease the need for ground forces. Courts have strongly deferred to the executive's decisions in ordering such strikes.

On the flip side, the executive's authority to order drone strikes also provides a disincentive to perform capture operations; if a drone strike is authorized under the AUMF, why would the executive branch risk service member lives by conducting a capture operation? Nonetheless, CIA Director John Brennan and other officials have emphasized that the Obama administration would rather capture than kill targets.<sup>221</sup> Further, international human rights law in the context of non-traditional battlefields requires the United States to capture enemies, whenever possible.<sup>222</sup>

Yet, the Obama administration has not detailed how much risk it is willing to accept before authorizing a drone strike under the AUMF.<sup>223</sup> Human Rights Watch

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<sup>217</sup> U.S. DOJ, "Lawfulness of a Lethal Operation," 6.

<sup>218</sup> 2010 U.S. DOJ Legal Memorandum, *The New York Times Company v. U.S.*, 77.

<sup>219</sup> *Ibid.*

<sup>220</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

Director Kenneth Roth explains how the U.S. government's failure to demonstrate a clear preference for capturing enemies rather than killing them in the context of non-traditional armed conflict can lead dangerous consequences; it may bolster other states to circumvent this requirement too. States could essentially "[s]ummarily kill suspects simply by announcing a 'war' against their group without there being a traditional armed conflict anywhere in the vicinity."<sup>224</sup> He explains that this concern is not farfetched; China has already utilized drones to capture a Burmese drug trafficker. Prior to capturing him, China considered utilizing a drone to kill the trafficker while he was in another country.<sup>225</sup>

In addition to the legal controversies inherent in the U.S. drone program, targeted killings may evoke other critiques. Namely, drone strikes and decapitation strategies may not be effective at countering terrorist groups.<sup>226</sup> By shifting to a decentralized structure, organizations may survive such strikes.<sup>227</sup> In addition, drone strikes fuel anti-American anger, which can assist in terrorist group recruitment efforts and destabilize U.S.-backed governments.<sup>228</sup> On the other hand, such strikes enable the United States to target key leaders within these organizations with precision; these leaders may pose particularized threats to U.S. interests because of their skill sets or the power they wield within the organization. Further, the decentralization of AQ and associated groups proffers evidence that, despite their organizational survival, these strikes have forced terrorist groups to alter their structure and operations.

The administration relies on the AUMF in its justification for targeted killings, arguing that the United States is conducting a congressionally authorized armed conflict with AQ and associate forces, and that under constitutional and international law, the

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<sup>224</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

<sup>225</sup> Brendon Hong, "How China Used Drones to Capture Notorious Burmese Drug Lord," *The Daily Beast*, April 17, 2014, <http://www.thedailybeast.com/articles/2014/04/17/how-china-used-drones-to-capture-a-notorious-burmese-drug-lord.html>.

<sup>226</sup> Jones, "A Persistent Threat," 59.

<sup>227</sup> *Ibid.*

<sup>228</sup> Landay, "Obama's Drone War Kills."

nation may utilize lethal force against operatives, even if they are U.S. citizens, to protect the United States.<sup>229</sup> The U.S. DOJ notes that combatants killed in times of war in a manner consistent with the rules of warfare constitute lawful killings. However, the executive branch is utilizing an exceedingly broad interpretation of the AUMF to justify these strikes. The AUMF's lack of geographic and temporal boundaries is fueling this broad interpretation. Lawmakers need to reevaluate the AUMF with the drone program in mind. It needs to determine whether this program should continue under a force authorization, and if so, whether it should limit the executive branch's use of this program.

#### **D. CONSIDERING SECURITY**

The AUMF language is simultaneously too broad and too narrow, and herein lies a vast problem. Congress's attempt at limiting the scope of the AUMF—by including language limiting action to those nations, organizations, or persons who perpetrated the 9/11 attacks or harbored those that did—has failed to narrow the statute meaningfully because the executive and judicial branches have interpreted this language broadly to include associated forces. Concurrently, the AUMF language is not broad enough to counter threats today—threats that originate from ISIL and like groups, groups that are not AQ associated forces. Since Congress passed the AUMF over 13 years ago, the threat environment has evolved. U.S. forces removed the Taliban regime from power in Afghanistan, killed Osama bin Laden, and degraded AQ.<sup>230</sup> Some terrorist organizations that may pose threats to the United States today did not exist on September 11, 2001, and the application of AUMF authority to such threats was arguably not the intent of Congress upon its passage. Tailoring force authorization language to define the enemy more accurately may be one way to shore up the deficiencies from the slippery slopes of this nation's interpretation of the AUMF. Another way to shore up these deficiencies is to grant the president power to identify which enemy targets require sustained operations.

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<sup>229</sup> U.S. DOJ, "Lawfulness of a Lethal Operation," 14.

<sup>230</sup> Daskal and Vladeck, "After the AUMF," 116.

Such measures should be considered only after a decision is made regarding whether a force authorization is still necessary.

Congress needs to reexamine the AUMF and decide whether to revise it or repeal it. For as explained in previous sections, deficiencies do occur in how the AUMF is currently applied. To consider all the variables, all the cause and effects of every possible alternative, the executive branch must assist Congress in confirming the counterterrorism operations it is still conducting under AUMF authority and substantiate how these operations comport with current terrorist threats and defense strategy. Through this discussion, lawmakers can determine if the AUMF is still the best authority to mitigate threats, or whether an alternative approach is preferable.

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### **III. DOMESTIC LEGALITY CONSIDERATIONS**

#### **A. INTRODUCTION**

Our response will be judged by friends and foes, by history, and by ourselves. It must stand up to the highest level of scrutiny: It must be appropriate and constitutional.

–Senator Russell Feingold<sup>231</sup>

As he considered the AUMF joint resolution just three days after the 9/11 attacks, former Senator Russ Feingold predicted that Congress’s response would face a deluge of challenges. He was right. Moreover, the theme common to most of the AUMF challenges has been whether the U.S. government can prevent terrorist attacks on the United States while preserving the principles of the U.S. Constitution.

In its debates regarding AUMF modification, Congress has failed to consider criticisms of the AUMF on domestic legality grounds. Plaintiffs and academics have challenged the AUMF by alleging that it violates constitutional checks and balances and due process protections. The executive has broadly interpreted the AUMF, stretching its authority to a breaking point, diminishing congressional control over the use of military force, and threatening constitutional checks and balances. In addition, numerous plaintiffs have challenged the AUMF by alleging due process violations. As these criticisms are central to the U.S. Constitution and the principles underlying U.S. democracy, they are weighed heavily in the Chapter VII analysis of the AUMF and its alternatives.

#### **B. CONSTITUTIONAL CHECKS AND BALANCES**

Congress must weigh the preservation of the separation of powers heavily when it reexamines the AUMF because constitutional checks and balances—the responsibility and abilities of the separate branches of government to keep each other in check—are central to the democratic foundation of the U.S. Constitution. During the development of the AUMF, congressional members focused on the separation of powers between Congress—that has the power to declare and fund war—and the executive—that has the

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<sup>231</sup> “Congressional Record, Proceedings and Debates of the 107th Cong.”

power to wage war and defend the nation from attack. While Congress provided the executive branch with broad wartime authority via the AUMF, members explicitly determined that the War Powers Resolution (WPR) was a satisfactory limitation on the executive branch's authority.

Prior to embarking on an AUMF war powers analysis, a few assumptions and clarifications must be mentioned. For the purposes of this analysis, an assumption is made that a state of war may exist without a formal declaration. This assumption is made for several reasons. First, while neither the U.S. Constitution nor the AUMF define "war," U.S. code defines an "act of war" as including any act occurring in the course of "armed conflict between military forces of any origin."<sup>232</sup> Congress authorized armed conflict against the perpetrators of the 9/11 attacks via the AUMF. As Senator McCain declared, "These were not just crimes of mass murder against the United States; they were acts of war. The American people know that we are at war."<sup>233</sup> Further, the Supreme Court has indicated that the AUMF implicated the executive branch's war powers, so long as the executive branch exercises these powers within congressional limitations. Finally, each branch of government has suggested that this conflict is a war requiring a military response.<sup>234</sup> Consequently, the AUMF provides the political branches with authorities comparable to those afforded in declared wars.<sup>235</sup> This section does not address the uniform code of military justice or international law, and it is not intended to provide a complete review of all actions that the president and Congress may take in armed conflicts. Instead, it focuses on maintaining a constitutional balance of powers in the context of the counterterrorism activities supported by the AUMF.

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<sup>232</sup> 18 U.S.C. section 2331.

<sup>233</sup> "Congressional Record, Proceedings and Debates of the 107th Cong."

<sup>234</sup> Cronogue, "A New AUMF," 390. David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding," *Harvard Law Review* 121, no. 3 (January 2008): 731, citing *Hamdan and Hamdi* cases. Bradley and Goldsmith, "Congressional Authorization," 2054.

<sup>235</sup> Bradley and Goldsmith, "Congressional Authorization," 2054.

## 1. Background: Executive and Congressional War Powers Authorities

The founding fathers crafted the constitution to ensure checks and balances would be applied to the exercise of war powers.<sup>236</sup> Abraham Lincoln artfully explained the reasoning behind this separation of powers between the legislative and executive branches. Shortly after commencing his term in Congress in 1847, he opposed President James Polk’s decision to go to war with Mexico. He argued that it was unconstitutional. William Herndon, Lincoln’s law partner, criticized Lincoln for this stance. In a letter to Herndon, Lincoln argued, “Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and allow him to do so whenever he may choose to say he deems it necessary for such purpose . . . and you allow him to make war at pleasure.” He concluded, “Kings had always been involving and impoverishing their people in wars . . . This, our Constitution understood to be the most oppressive of all kingly oppressions . . . no man should hold power of bringing this oppression upon us.”<sup>237</sup>

The president has a duty to serve as the Commander in Chief of military forces, and Congress is allocated the power to declare war. Congress is also afforded other powers that influence military forces and action.<sup>238</sup> According to James Madison’s notes, while the constitution authorizes the executive branch to repel sudden attacks against the U.S. homeland, Congress has the responsibility to decide when to authorize the use of force abroad.<sup>239</sup>

As the Commander in Chief, the president is fully authorized to use military forces to respond to an armed attack against the United States.<sup>240</sup> In such circumstances,

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<sup>236</sup> Ryan C. Hendrickson, “Clinton, Bush, Congress and War Powers: A Comparative Analysis of the Military Strikes on Iraq and Bin Laden,” Woodrow Wilson International Center for Scholars, accessed July 10, 2014, 2, <http://www.wilsoncenter.org/sites/default/files/hendrickson.pdf>.

<sup>237</sup> Houghton Library, May 4, 2012, (9:30 a.m.) “You’ve Got Mail: Congressman Lincoln Stands Against the Mexican War,” *Houghton Library Blog*, May 4, 2012, <http://blogs.law.harvard.edu/houghton/2012/05/04/youve-got-mail-congressman-lincoln-mexican-war/>; Cronogue, “A New AUMF,” 377; “Congressional Record, Proceedings and Debates of the 107th Cong.”

<sup>238</sup> Hendrickson, “Clinton, Bush, Congress,” 1.

<sup>239</sup> *Ibid.*, 2.

<sup>240</sup> Abramowitz, “The President,” 72; *War Powers Resolution*, Pub. L. No. 93–148, 87 Stat. 555 (1973) (50 U.S.C. sections 1541–1548).

the president has the power to respond out of necessity, when it is infeasible to obtain congressional consent before acting to preserve national security.<sup>241</sup> As David Abramowitz explains, “the constitution is not a suicide pact, and the President has unchallenged authority to prevent an imminent threat to the United States.”<sup>242</sup>

In addition, Article II of the constitution provides supplementary powers to the executive branch, which may be exercised during wartime.<sup>243</sup> Some of these powers are regulated by statute, and others are derived from the executive branch’s “core” powers.<sup>244</sup> The core powers provide the power to act in the absence of congressional dissent and afford a great deal of discretion.<sup>245</sup> For instance, the president may “[d]irect the movements of the naval and military forces placed by law at his command, and . . . employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”<sup>246</sup>

To balance this presidential wartime authority, the founding fathers provided Congress with critical decision-making responsibilities in waging war.<sup>247</sup> Congressional power to “declare war” provides the authority to limit the nature and scope of the military’s engagement in hostilities.<sup>248</sup> Article I, section 8 of the U.S. Constitution enumerates congressional war authorities. It states that Congress has the authority “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” Congress also has the power “To raise and support Armies . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions . . . .”<sup>249</sup> Congressional control of

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<sup>241</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 697.

<sup>242</sup> Abramowitz, “The President,” 77.

<sup>243</sup> *Ibid.*, 726; U.S. Const. Art. II.

<sup>244</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 726.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*, at 730.

<sup>247</sup> Hendrickson, “Clinton, Bush, Congress,” 3.

<sup>248</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 726.

<sup>249</sup> U.S. Const., Art. I, Sect. 8.

military appropriations provides another check on the president’s war powers. Further, Congress may punish and define “offenses against the Law of Nations,” or determine what actions violate international law and make those actions illegal in the United States.<sup>250</sup> In short, Congress has broad authority to craft rules and apply them to the country’s military.<sup>251</sup> Figure 4 illustrates, however simply, the wartime authorities of the political branches:



Figure 3. Balance of War Powers

## 2. The AUMF: When War Powers Collide

When Congress passed the AUMF, it provided the executive branch with its war powers, which resulted in broad executive power and limited judicial recourse to challenge it. In essence, when Congress authorized the president to exercise wartime authority, congressional and executive war powers intersected. The executive branch’s power is at its greatest when exercising war powers within the authority of congressional authorization; courts afford the broadest judicial deference to the executive branch when the president acts in accordance with congressional authorization.<sup>252</sup> Without this

<sup>250</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 734.

<sup>251</sup> *Ibid.*, 733.

<sup>252</sup> Bradley and Goldsmith, “Congressional Authorization,” 2050.

authorization, the executive branch can only rely on independent powers under Article II to support the legality of the use of force.<sup>253</sup> If the president does not act in accordance with congressional authorization, this judicial deference will not be afforded to the executive branch.<sup>254</sup>

This broad executive authority and deference arguably contradicts Congress's original intent in passing the AUMF. During negotiations regarding AUMF language, Congressional leaders made efforts to respect the separation of powers by limiting the delegation of war powers to the executive branch, while promoting security. In fact, Congress did not provide the Bush administration with the degree of authority originally proposed by White House representatives, indicating that it would provide the executive with the authority that "he needed," but no more.<sup>255</sup> David Abramowitz, former chief counsel to the House International Relations Committee, was a member of the team that argued on behalf of Congress in negotiations with the Bush administration regarding language in the AUMF. In 2002, he published his recollections of the negotiations, stating:

Beyond the black-letter rules and principles of constitutional law [the AUMF] constitutes part of an ongoing dialogue between the executive and legislative branches on the exercise of their various powers, in principle and in practice, and on their respective expectation as to how such powers will be used. That this dialogue continued even at the onset of the current crisis reflects well on the continuing vitality of the Founders' vision of a government characterized by branches with separate and distinct powers.<sup>256</sup>

Congress's struggle to maintain its war powers is also evidenced by Senate floor deliberations of the AUMF. On September 14, 2001, senators explicitly discussed this balance of powers when considering the joint resolution that eventually established the AUMF. During this session, Senator Feingold steered the discussion to several of the same points made by Lincoln. He described Congress's ownership of the war power, and

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<sup>253</sup> Barron and Lederman, "The Commander in Chief at the Lowest Ebb," 698.

<sup>254</sup> Bradley and Goldsmith, "Congressional Authorization," 2050.

<sup>255</sup> Abramowitz, "The President," 72–73.

<sup>256</sup> *Ibid.*, 79.

he emphasized that through the AUMF, Congress simply loaned this power to the executive branch during an emergency.<sup>257</sup> After delivering a lengthy commentary on war powers, Feingold explained his focus, “I take pains to raise these issues because they matter, they go to the core of our Constitution and the brilliant separation of powers that guard our democracy.”<sup>258</sup>

### **3. War Powers Resolution**

The executive branch has taken over wartime authorities in the past as well, often without any force authorization. Despite authorities enumerated to Congress in the Constitution, the executive branch has dedicated forces without declarations of war in Korea, Vietnam, and other contexts, which has caused controversy regarding the nature of congressional and executive war powers. Congress has the power to create laws necessary and proper for executing all other constitutional powers, which arguably applies to the execution of executive powers.<sup>259</sup> Consequently, in 1973, Congress passed the WPR in an effort to limit the increasingly broad exercise of executive powers.<sup>260</sup> The purpose of the law is to:

fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities.<sup>261</sup>

The law includes several provisions aimed at preserving congressional war powers. It declares that the president’s constitutional Commander in Chief powers are limited to situations in which Congress has declared war, issued a specific statutory authorization, or where an attack has occurred upon the United States or its armed

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<sup>257</sup> “Congressional Record, Proceedings and Debates of the 107th Cong.”

<sup>258</sup> *Ibid.*

<sup>259</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 735.

<sup>260</sup> Hendrickson, “Clinton, Bush, Congress,” 3.

<sup>261</sup> 50 U.S.C. section 1541.

forces.<sup>262</sup> It requires the executive to 1) “consult” with Congress whenever possible, prior to and during the utilization of military force,<sup>263</sup> 2) notify Congress of any military action within 48 hours of engagement,<sup>264</sup> and 3) obtain congressional support of the use of force within 60 days.<sup>265</sup> If Congress does not provide such support, the executive branch is required to cease military action abroad.<sup>266</sup>

The executive branch’s respect for the WPR has been lacking. Congress passed the WPR over President Richard Nixon’s veto. At the time, the nation was in the midst of the Watergate Scandal and the country was divided over the Vietnam War. Distrust of the executive branch likely resulted in the very restrictive view of executive branch war powers. Critiques of the WPR’s narrow definition of presidential war powers do not originate solely from the executive branch; constitutional law experts have criticized the WPR on similar grounds.<sup>267</sup> As a result, most presidents have simply ignored its provisions, exploited loopholes in its consultation and reporting requirements, or asserted that it is illegal.<sup>268</sup>

Nonetheless, accounts of AUMF consideration and passage indicate that senior congressional leaders considered the WPR sufficient to protect congressional interests. Consequently, they prioritized the need to approve the AUMF quickly, without certification or reporting requirements.<sup>269</sup> Senator Levin emphasized this point while considering the AUMF:

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<sup>262</sup> 50 U.S.C. section 1541(c).

<sup>263</sup> 50 U.S.C. section 1542.

<sup>264</sup> 50 U.S.C. section 1543.

<sup>265</sup> 50 U.S.C. section 1544; Hendrickson, “Clinton, Bush, Congress,” 3; Abramowitz, “The President,” 75.

<sup>266</sup> Hendrickson, “Clinton, Bush, Congress,” 3.

<sup>267</sup> Constitution Project Staff, “Deciding to Use Force Abroad: War Powers in a System of Checks and Balances,” Constitution Project, 2005, [http://www.constitutionproject.org/wp-content/uploads/2012/10/28.pdf?utm\\_source=PR%3A+Release++Letter+on+S1939+War+Powers&utm\\_campaign=Release++Letter+on+S1939&utm\\_medium=email](http://www.constitutionproject.org/wp-content/uploads/2012/10/28.pdf?utm_source=PR%3A+Release++Letter+on+S1939+War+Powers&utm_campaign=Release++Letter+on+S1939&utm_medium=email).

<sup>268</sup> Scott Bomboy, “The Constitutional Debate Over Obama’s Move Against ISIS,” *Constitution Daily*, <http://blog.constitutioncenter.org/2014/08/the-constitutional-debate-over-obamas-move-against-isis/>.

<sup>269</sup> Abramowitz, “The President,” 77.

[t]he last ‘Whereas’ clause relating to the constitutional authority of the President to take action to deter and prevent acts of international terrorism against the United States is to be read in conjunction with the War Powers Resolution. That is why words in earlier drafts of this joint resolution, which might have been interpreted to grant a broader authority to use military force, were deleted and that is why the references to the War Powers Resolution were added. It does not recognize any greater presidential authority than is recognized by the War Powers Resolution nor does it grant any new authority to the President.<sup>270</sup>

Despite debate regarding whether the WPR resolution has proven effective at limiting the presidential use of military force abroad, lawmakers considered its limitations sufficient to reign in executive power in applying the AUMF.<sup>271</sup> Considering that Congress passed the AUMF 13 years ago, history has accumulated enough application of the AUMF for a study as to whether the WPR adequately preserves congressional authority in the face of expansive AUMF interpretations and application by the executive branch.

#### **4. Judicial Deference**

Judicial review of executive actions during war provides another important check on the balance of powers between the political branches. In *Marbury v. Madison*, the Supreme Court set forth the power of the judicial branch. The case acknowledged the arguably anemic nature of courts as institutions, since they do not have powers to commit appropriations or wage war.<sup>272</sup> Nonetheless, it established the independence of the judiciary and its ability to provide a check on the other political branches, thus balancing its powers with those institutions.<sup>273</sup>

In the context of judicial review of executive action dependent on the AUMF, however, the judiciary has consistently deferred to executive decisions.<sup>274</sup> The U.S. DOJ’s white paper justifying targeted killings of U.S. citizens abroad notes that an

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<sup>270</sup> “Congressional Record, Proceedings and Debates of the 107th Cong.”

<sup>271</sup> Hendrickson, “Clinton, Bush, Congress,” 4.

<sup>272</sup> Shahid Buttar, “*Hedges v. Obama*: The Supreme Court Digs Its Head Deeper Into the Sand,” *Huffington Post*, April 29, 2014, [http://www.huffingtonpost.com/shahid-buttar/hedges-v-obama\\_b\\_5234382.html](http://www.huffingtonpost.com/shahid-buttar/hedges-v-obama_b_5234382.html); *Marbury v. Madison*, 5 U.S. 137.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

appropriate judicial forum does not exist for reviewing constitutional considerations pertaining to such actions, as it is “[w]ell-established that ‘[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.’”<sup>275</sup> An example can be found in cases involving Jose Padilla.

Jose Padilla was alleged to have attended an AQ training camp in Afghanistan, traveled to Pakistan, and then returned to the United States.<sup>276</sup> President Bush designated Padilla an enemy combatant in a letter to the Secretary of Defense.<sup>277</sup> The Fourth Circuit decided in *Padilla v. Hanft* that despite his capture in the United States, Padilla could be detained pursuant to the AUMF because he was “armed and present in a combat zone” as part of the Taliban forces. As the Supreme Court considered whether to grant review of this decision, the government charged Padilla with conspiracy; a charge different from the allegations used to support his military detention. When the 4th Circuit denied the government’s request to authorize Padilla’s transfer from military custody, the Supreme Court directly authorized the transfer.<sup>278</sup> The Supreme Court then denied Padilla’s appeal for its review of his detention, and concluded that the challenge no longer presented a controversy since Padilla had been transferred to civilian custody.<sup>279</sup> In effect, this transfer mooted the appeal for a Supreme Court decision regarding executive power, despite the government having detained Padilla for years in solitary confinement based on allegations that were not prosecuted.<sup>280</sup>

Padilla and his family sought a judicial declaration saying that Padilla’s detention and treatment were unconstitutional in *Lebron v. Rumsfeld*.<sup>281</sup> The court explained that the separation of powers principles prevented it from implying any remedy in the absence of clear congressional intent and when special circumstances advise caution.<sup>282</sup>

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<sup>275</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 10, citing *Haig v. Agee*, 453 U.S. 280, 292 (1981).

<sup>276</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 33.

<sup>277</sup> *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), at 389.

<sup>278</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 33.

<sup>279</sup> *Lebron v. Rumsfeld*, 670 V.3d 540, 546 (4th Cir. 2012).

<sup>280</sup> Buttar, “*Hedges v. Obama*.”

<sup>281</sup> *Lebron v. Rumsfeld*, 544.

<sup>282</sup> *Lebron v. Rumsfeld*, 548, citing *Bivans v. Lucas*, 462 U.S. 367, 380 (1983).

Specifically, the court refused to imply a cause of action for enemy combatants held in military detention.<sup>283</sup> As the court explained, judicial involvement would “[s]tray from the traditional subjects of judicial competence” because the U.S. Constitution provides the legislative and executive branches with authority regarding military matters, but it does not provide the judicial branch with any analogous responsibility.<sup>284</sup> The court further hesitated out of a fear that such litigation might disrupt military operations, which would be especially unacceptable after Congress provided the executive branch with a broad delegation of wartime authority under the AUMF.<sup>285</sup> The court further explains its deference:

[S]upporting judicial deference is the Constitution’s parallel commitment of command responsibility in national security and military affairs to the President as Commander in Chief . . . judges ‘traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.’ [citation omitted] As a result, the Supreme Court has consistently shown ‘great deference’ to what ‘the President—the Commander in Chief—has determined . . . is essential to national security.’<sup>286</sup>

Courts in other circuits have reached similar conclusions. The 7th Circuit has held that even if constitutional rights, treaties, and laws prohibiting the mistreatment of detainees are violated, lawsuits establishing a right of action for damages “come at an uncertain cost in national security.”<sup>287</sup>

When Congress reexamines the AUMF, it should look to recent rulings to determine if courtroom interpretations of its delegation of authority to the executive branch via the AUMF are within its intent. Court decisions relevant to this conflict should influence a future legislative approach regarding how to govern armed conflict. Specifically, Congress should consider the judicial deference shown to the executive

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<sup>283</sup> *Lebron v. Rumsfeld*, 548; Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 35.

<sup>284</sup> *Lebron v. Rumsfeld*, 549.

<sup>285</sup> *Ibid.*, citing *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005); Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 35.

<sup>286</sup> *Lebron v. Rumsfeld*, 549, citing *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988).

<sup>287</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 38.

branch regarding AUMF application when determining whether to repeal or modify the law for future conflicts.<sup>288</sup> Congress may craft law to limit government actions undertaken under executive authority,<sup>289</sup> as courts have been willing to require the executive branch to comply with such restrictions, where they exist.<sup>290</sup>

## 5. Congress's Balancing Act

Criticism regarding the AUMF's erosion of constitutional checks and balances need to be addressed; the fact that the executive branch has a history of stretching its wartime authorities beyond their bounds does not mean it should do so again. It is imperative that Congress's reexamination of the AUMF and analysis of alternative approaches consider the constitutional balance of powers between the political branches. John Adams said, "Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There was never a democracy yet that did not commit suicide."<sup>291</sup>

The judiciary has deferred to the political branches of government in consideration of cases pertaining to broad AUMF authority. The executive branch has displayed an ability to avoid judicial review and take advantage of procedural strategy to remove cases from certain forums prior to courts reaching substantive decisions regarding the limits of executive powers. Thus, the executive branch has displayed an incredible acumen to exercise broad war powers with minimal checks on its power. Further, legislative branch members have asserted that the authority the president has exercised under the AUMF is not what was originally envisioned when they passed the law. For instance, Senator McCain has stated that the authority "[h]as grown way out of proportions and is no longer applicable to the conditions that prevailed that motivated the United States Congress to pass the Authorization for the Use of Military Force that we

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<sup>288</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 50.

<sup>289</sup> U.S. DOJ, "Lawfulness of a Lethal Operation," 12.

<sup>290</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 50.

<sup>291</sup> "Democracy or a Republic?" George Mason University, accessed July 16, 2014, <http://econfaculty.gmu.edu/wew/articles/fee/democracy.htm>.

did in 2001.”<sup>292</sup> Congress need not sit idle. It can and should balance executive authority; it should employ its lawmaking authority to provide a check on executive power.

Since judicial involvement in the war powers context of challenging the executive is arguably rare, an assumption seems to have been made in literary contexts that the executive and legislative branches will articulate the balance of power via negotiating language, such as that included in the AUMF, without much regard to a constitutional analysis of the balance of war powers.<sup>293</sup> As Professor Mark Tushnet has articulated, “[w]hatever the political process produces is what the Constitution requires (or permits, if you prefer).”<sup>294</sup> As such, balance of powers considerations are addressed in Chapter VI’s “domestic legality criterion” section, for such considerations must be at the forefront of any debate Congress entertains about the AUMF discussion.

### C. CONSTITUTIONAL DUE PROCESS PROTECTIONS

The Fifth Amendment of the U.S. Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law.”<sup>295</sup> Due process rights attach to U.S. citizens whether they reside in the United States or abroad.<sup>296</sup> The primary inquiry policymakers need to make when determining whether the AUMF or its alternatives preserve due process requirements of the Constitution is whether the status quo and alternatives are specific to such a degree as to put individuals on notice of the reasons for which the executive branch may deprive them of life or liberty. In analyzing this issue, policymakers should look to judicial interpretations of the AUMF for guidance regarding how courts may interpret potential force authorization modifications.

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<sup>292</sup> Zenko, “America’s Forever War.”

<sup>293</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 722.

<sup>294</sup> *Ibid.*

<sup>295</sup> U.S. Const. Amend. V.

<sup>296</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 5, citing *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269–70 (1990), *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170, n.7 (2d Cir. 2008).

## 1. Notice and Evidentiary Standards

The AUMF afforded broad authority to the executive branch to act against organizations and individuals, as evidenced in the congressional record of AUMF consideration. Senator Levin noted that the AUMF was a “truly noteworthy action” as the law “would authorize the use of force even before the President or the Congress knows with certainty which nations, organizations, or persons were involved in the September 11 terrorist acts.”<sup>297</sup> He expressed that its passage was a “demonstration of our faith in the ability of our Government to determine the facts and in the President to act upon them.”<sup>298</sup> This passage provides exceptional authority, considering the executive branch has relied on the AUMF to support the use of lethal force against U.S. citizens abroad, as well as detainment.

U.S. DOJ reasoning regarding the use of lethal force against U.S. citizens utilizes the AUMF for legal support. That the U.S. DOJ notes that no private interest exists that is greater than individuals’ interest in preserving their life<sup>299</sup> is offset by the U.S. DOJ’s assertion that this private interest must be balanced against the executive branch’s goal of mitigating the threat of violence to other Americans; threats that arise from those operational leaders of AQ and associated forces that plot against the United States and its interests.<sup>300</sup> The U.S. DOJ cites *Hamdi* and the Supreme Court’s use of the balancing test in *Mathews v. Eldridge* to analyze due process rights of those who are captured and wish to challenge their status as enemy combatants. According to the U.S. DOJ, the Supreme Court explained that the due process rights owed in a given situation are determined by weighing the private interest that will be impacted against the government’s interest in accomplishing the function involved and avoiding burdens associated with providing more comprehensive process.<sup>301</sup>

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<sup>297</sup> “Congressional Record, Proceedings and Debates of the 107th Cong.”

<sup>298</sup> *Ibid.*

<sup>299</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 1.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*, 6, citing *Hamdi*, 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Backed by the Supreme Court’s reasoning, the U.S. DOJ applies the same framework for assessing the due process of a citizen challenging detention as it does in assessing the rights of U.S. citizens who are operational leaders of AQ or associated forces planning violent attacks against the United States before undertaking targeted killings.<sup>302</sup> It characterizes this balancing test as being between the “uniquely compelling” private interest of preserving the accuracy of processes that protect a person’s liberty or life and the government’s interest in removing threats from enemy forces to protect its citizens.<sup>303</sup>

Numerous detainees have challenged executive authority under the AUMF, and the Supreme Court has determined that detainees have a constitutional right to challenge the basis of their detentions.<sup>304</sup> Courts have afforded the executive branch wide discretion in cases that consider the due process rights of detainees held under AUMF authority by broadly construing statutory language. They have consistently held that the AUMF provides details adequate to put potential detainees on notice, which satisfies due process requirements. Judicial precedent has established that the executive branch may detain persons who are a “part of” AQ, the Taliban, and affiliated groups, as well as those who support these entities.<sup>305</sup>

A court’s determination regarding whether a person is part of AQ, the Taliban, or associated forces, “must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.”<sup>306</sup> In essence, a “conditional probability analysis” is permitted when considering the sufficiency and reliability of government evidence that a person is lawfully detained under the AUMF.<sup>307</sup> D.C. circuit judges have invoked a “walks like a duck test” to determining whether individuals challenging their detention under the

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<sup>302</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 6.

<sup>303</sup> *Ibid.*, 6, citing *Hamdi*, 542 U.S. at 529 and *Ake v. Oklahoma*, 470 U.S. 68, 178 (1985).

<sup>304</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008), 771.

<sup>305</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 2.

<sup>306</sup> *Ibid.*, 14; *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

<sup>307</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 10.

AUMF are more likely than not a member of AQ or the Taliban, which makes detention lawful.<sup>308</sup>

In addition, the judiciary has afforded the executive branch wide latitude by applying relaxed evidentiary standards. In sum, the executive branch must provide evidence to justify detention under AUMF authority and to satisfy due process requirements. Courts relax evidentiary procedures when the executive branch demonstrates a need based on national security interests and shows that an undue burden would occur if the executive were compelled to produce more reliable evidence.<sup>309</sup> A preponderance of the evidence standard applies to habeas petitions from persons detained pursuant to the AUMF. In other words, the executive branch must show the detainee is more likely than not a member of AQ, the Taliban, or associated forces.<sup>310</sup> Further, reliable hearsay evidence may be admitted as evidence, and the government is arguably not required to provide positive evidence that detainees fit within the AUMF language at the actual time of capture.<sup>311</sup>

Unsurprisingly, the application of the AUMF to persons captured in the United States, and the resulting evidentiary reliability standard, is still uncertain.<sup>312</sup> Courts have afforded the executive branch less leeway in relaxing rules of evidence when the detainee challenging detention is captured in the United States. The remedies available for constitutional challenges based on due process may also be affected if the detainee involved is a U.S. citizen.

The 2012 NDAA is also relevant to the due process analysis, as it elaborates on executive detention authority under the AUMF. The language is broader than that included in the actual AUMF, but it arguably codifies judicial interpretations of the AUMF language. The 2012 NDAA permits the executive branch to detain persons who have “substantially supported al-Qaeda, the Taliban, or associated forces that are engaged

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<sup>308</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 23.

<sup>309</sup> *Ibid.*, 34.

<sup>310</sup> *Ibid.*, 13.

<sup>311</sup> *Ibid.*, 13, 23.

<sup>312</sup> *Ibid.*, 35.

in hostilities against the United States or its coalition partners, including any person who has . . . directly supported such hostilities in aid of such enemy forces.”<sup>313</sup> This language differs from the AUMF in two primary ways. First, Congress explicitly added that the executive branch may detain individuals who have “substantially supported” the Taliban, AQ, and “associated forces.” Second, it authorizes the detention of individuals who have “directly supported” hostilities engaged in by the United States or its allies, even if they did not participate in the 9/11 attacks.<sup>314</sup>

## 2. Challenging Authorities

Despite the success of the executive branch in the courts, both AUMF language and related phrasing in the 2012 NDAA have faced due process challenges both inside and outside the courtroom. For instance, El Paso County in Colorado passed a resolution expressing its concerns about 2012 NDAA language violating constitutional due process requirements. The resolution aptly describes due process:

One of our most fundamental rights as American citizens is to be free from unreasonable detention without due process of law, a right afforded to us by our Founding Fathers and guaranteed to us by over two centuries of sacrifice by our men and women in the Armed Forces whom we daily recognize and honor. . . .<sup>315</sup>

In addition, a case filed in 2013 challenging 2012 NDAA language on due process grounds brought public attention to these concerns. Journalists and activists initiated the litigation.<sup>316</sup> They challenged the government by arguing that their lawful activities, which included journalism, advocacy, and human rights work, had to be altered to avoid being subject to possible military detention without trial under the 2012 NDAA.<sup>317</sup> The district court judge enjoined government detention under the NDAA and found that the statute was too vague to satisfy due process requirements to provide adequate notice

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<sup>313</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 10.

<sup>314</sup> *Ibid.*, 36.

<sup>315</sup> El Paso County, “Colorado, Resolution to Preserve Habeas Corpus and Civil Liberties, 11–428,” accessed July 16, 2014, <http://bcc.elpasoco.com/Documents/Resolution%20to%20Preserve%20Habeas%20Corpus%20and%20Civil%20Liberties%2011-428.pdf>.

<sup>316</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 36.

<sup>317</sup> *Ibid.*

regarding conduct to be avoided.<sup>318</sup> As U.S. District Judge Katherine Forrest explained in her injunction to prevent NDAA detention provisions from going into effect:

The due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity—and that specificity is absent. . . .”<sup>319</sup>

The Court of Appeals for the Second Circuit, however, reversed, by holding that the plaintiffs lacked standing to bring the lawsuit.<sup>320</sup> It further explained that the 2012 NDAA did not have any bearing regarding whether citizens could be detained under the authority of the AUMF and found the 2012 NDAA language to be unambiguous.<sup>321</sup> Instead, the court held that the language of the 2012 NDAA clarified parts of the AUMF that had been debated.<sup>322</sup> The Supreme Court declined the plaintiffs’ request for review.

### **3. Due Process Conclusion**

It is important for Congress to keep these due process considerations in mind when determining whether to continue implementing the status quo or alternatives to the AUMF. Judicial determinations in this arena should influence Congress if it crafts new force authorization language. Such language must ensure that the due process requirements enshrined in the Fifth Amendment are clearly satisfied.

## **D. CONCLUSION**

The evolution of threats facing the United States since the Founding Fathers drafted the constitution has since challenged constitutional notions of war powers and due process. As Senator Lott said during discussions on September 14, 2001 of SB 23, “I have never seen a better example of Members standing together, working together,

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<sup>318</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 36–7.

<sup>319</sup> Buttar, “*Hedges v. Obama*.”

<sup>320</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 37.

<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid.*

swallowing our legalistic desires and our budgetary restraint feelings. These are difficult times. We have got to act decisively.” He continued, “In a perfect world, maybe we would do it differently—with more money, less money, more language, less language—but the world has changed, and we are acting appropriately.”<sup>323</sup> While Congress is still far from operating “in a perfect world,” it does enjoy the advantage now that it did not have on September 14, 2014, 13 years of experience in AUMF implementation. Currently, Congress can and should tailor its approach based on gained knowledge, and it definitely should not swallow its “legalistic desires” when it does so.

These legalistic considerations should not be limited to the domestic realm. As mentioned in the constitutional balance of powers section above, Congress has the responsibility to define “offenses against the Law of Nations,” or more specifically, determine which acts violate international law and then make those acts illegal in the United States.<sup>324</sup> A thoughtful and well-reasoned approach to defining and enforcing these laws may help protect U.S. military officials, should their actions be challenged in international legal forums. In addition, the legality of U.S. actions in an armed conflict should factor into Congress’s decision-making process when it considers force authorizations. As such, the international legality of U.S. policy in this regard should be assessed.

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<sup>323</sup> “Congressional Record, Proceedings and Debates of the 107th Cong.”

<sup>324</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 734.

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## IV. INTERNATIONAL LAW CONSIDERATIONS

Just three days removed from these events, Americans do not yet have the distance of history. But our responsibility to history is already clear: to answer these attacks and rid the world of evil. War has been waged against us by stealth and deceit and murder. This nation is peaceful, but fierce when stirred to anger. The conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing.

—President George W. Bush<sup>325</sup>

### A. INTRODUCTION

This complex statement does not merely detail the collective grief and anger of the nation just days after 9/11, but it foreshadows the realities of a determined adversary; an adversary who does not respect the customs of conflict, and that, in beginning a war against the United States, sets the stage for the nation to respond to its threats on the nation's own terms. President George W. Bush made this statement during prayer services at the National Cathedral on September 14, 2001, the same day Congress debated the AUMF. Approximately one year later, the Bush administration used this quote to frame the third chapter of the 2002 National Security Strategy, the chapter introducing the controversial Bush Doctrine.<sup>326</sup> The Bush Doctrine set the stage for U.S. counterterrorism actions abroad in an effort that became known as the Global War on Terror.<sup>327</sup>

Framing the nation's global counterterrorism strategy in the context of international law arguably presents a no-win situation. International law as it applies to terrorist threats is an ill-defined legal arena with neither clear enforcement nor consistent

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<sup>325</sup> “Transcript of President George W. Bush’s Prayer Service Remarks, National Day of Prayer and Remembrance for the Victims of the Terrorist Attacks on September 11, 2001 at the National Cathedral, September 14, 2001,” U.S. Office of Personnel Management, 2001, <http://archive.opm.gov/guidance/09-14-01gwb.htm>.

<sup>326</sup> National Security Strategy of the U.S.A., Office of President Bush, September 2002, 13.

<sup>327</sup> *Ibid.*; National Security Strategy of the U.S.A., Office of President Bush, March 2006; Transcript of President Bush’s Address to Congress, September 20, 2001, *CNN*, <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>; Scott Wilson and Al Kamen, “‘Global War on Terror’ is Given New Name,” *Washington Post*, March 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

application. This ill-defined legal arena applies to the evaluation of the U.S.'s global counterterrorism efforts, and it is under this uneven light that U.S. global actions have garnered great controversy. In the realm of mitigating terrorist threats, state actors face an uphill battle in determining how to preserve their security while remaining faithful to international legal tenants. Despite this daunting balancing act, it is imperative that the U.S. government strives to adhere to the international norms in place. The importance of following international law is nowhere more evident than in the verbiage of the Obama administration, whose officials have repeatedly voiced their desire to garner international acceptance of U.S. counterterrorism actions. For example, on May 21 2014, Mary E. McLeod, Principal Deputy Legal Advisor at the U.S. Department of State, emphasized the importance of complying with international law: “[a]s we consider the future of the AUMF, it will be critical to ensure that U.S. actions continue to be grounded firmly in international law.”<sup>328</sup>

Still, the administration's actions have resulted in international controversy, especially in its use of force in areas outside of active hostilities. Complicating matters, representations made by the Obama administration's top attorneys in AUMF hearings and court battles regarding targeted killings run counter to McLeod's and other like statements. Moreover, a closer analysis of administration statements show that despite focusing on different counterterrorism measures, most statements of this sort implicate a particularly controversial scenario under international law; that of determining when one state can violate another state's sovereignty by using lethal force within the latter's borders against non-state actors in self-defense.

It is crucial that Congress appreciate the international legal constructs within which the United States maneuvers, if for nothing else, to administer its operations with the most support possible. Adherence to international law will impact whether other countries view U.S. actions as legitimate, and in turn, impact international support. It is also important from the standpoint of protecting U.S. military personnel; international or

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<sup>328</sup> *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the Committee on Foreign Relations, U.S. Senate, 113th Cong., 2 (2014)* (testimony of Mary E. McLeod, Principal Deputy Legal Advisory, U.S. Department of State).

foreign courts may claim prosecutorial jurisdiction based in international human rights law or the laws of war. As such, this chapter helps explain the controversy regarding U.S. actions under the AUMF from an international law context.

The primary international law considerations relevant to Congress's reexamination of the AUMF are actions against non-state actors, the right to self-defense, the preemptive use of force, and humanitarian law (also known as the Laws of War). Since these areas of international law are ill defined in their application to terrorist threats, the United States has an opportunity to develop a well-reasoned approach and contribute to the evolution of customary international law in this arena.

## **B. SELF-PRESERVATION AND ATTACKS FROM NON-STATE ACTORS**

Congressional and executive policymakers have maintained that international law is at least a consideration in AUMF application.<sup>329</sup> Nonetheless, how states should apply international law to terrorist threats is unsettled; it is difficult to comply with laws relative to war when the laws have not evolved to address contemporary armed conflict.

International law is the product of treaties, conventions, judicial decisions, and customs that have received international acquiescence.<sup>330</sup> These sources focus predominantly on armed conflict between international state actors. However, many terrorist threats to the United States originate from non-state actors beyond its borders. In such an environment, it is often perplexing to differentiate between combatants and non-combatants, military objectives and law enforcement goals, war and peace, and international and non-international armed conflict.<sup>331</sup> In sum, it is difficult for states to preserve their interests while adhering to international legal obligations when these obligations are in flux and the very nature of armed conflict has changed.

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<sup>329</sup> Abramowitz, "The President," 75.

<sup>330</sup> *United States of America v. Alstötter et al.* ("The Justice Case") 3 T.W.C. 1 (1948), reprinted by the Library of Congress, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949, vol. III, [http://loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-III.pdf](http://loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf) at 966–67.

<sup>331</sup> Cornelius Friesendorf, "International Intervention and the Use of Force: Military and Police Roles," The Geneva Centre for Democratic Control of Armed Forces, 2012, 19, <http://www.dcaf.ch/Publications/International-Intervention-and-the-Use-of-Force-Military-and-Police-Roles>.

A state's right to territorial integrity is firm under customary international law, and UN Charter article two, paragraph four expressly prohibits states from using force against each other.<sup>332</sup> This prohibition is also a norm of customary international law.<sup>333</sup> Thus, the use of force in another state is only permitted under international law if it fits within an exception to this fundamental tenet.<sup>334</sup> UN Charter Article 51 provides an exception; it recognizes the inherent right of self-defense in case of armed attack by one state against another state.<sup>335</sup>

A state may exercise this right to self-defense until the UN Security Council takes measures necessary to maintain international peace and security.<sup>336</sup> In a situation in which another state's acquiescence to the presence of a group within its territory constitutes a threat to international peace and security, it is the Security Council's role to mandate the use of force under Article 42 against that acquiescing state.<sup>337</sup>

In exercising self-defense rights, a state's use of force is subject to a number of arguably vague restrictions. In general, states must: 1) refrain from actions that risk aggravating the situation, and consequently, endangering the maintenance of international peace and security, and 2) report all measures taken under Article 51 to the UN Security Council.<sup>338</sup> More specifically, Article 51 and Security Council Resolution 2233 bind the

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<sup>332</sup> UN Charter; Legal Consequences of the Construction of a Wall; Resolution 25/2625, "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations," United Nations General Assembly, October 24, 1970, <http://www.un-documents.net/a25r2625.htm> (Declaration on Friendly Relations).

<sup>333</sup> Michael Bothe, "Terrorism and the Legality of Pre-emptive Force," *European Journal of International Law* 14, no. 2 (2003): 228.

<sup>334</sup> *Ibid.*

<sup>335</sup> UN Charter, art. 51; Legal Consequences of the Construction of a Wall, 40.

<sup>336</sup> UN Charter, art. 51.

<sup>337</sup> UN Charter, art. 42; Angus Martyn, "The Right to Self-Defense under International Law-the Response to the Terrorist Attacks of 11 September," Law and Bills Digest Group, 2002, <http://www.aph.gov.au/LIBRAR/Pubs/cib/2001-02/02cib08.htm>.

<sup>338</sup> UN Charter, art. 51; Declaration on Friendly Relations.

use of this right to strict conditions of necessity and threat proportionality.<sup>339</sup> In short, the right to use force in self-defense depends on the scope of the initial attack.<sup>340</sup> The response must balance military advantage and defensive goals with collateral effects, such as civilian casualties.<sup>341</sup>

Abiding by these principles can prove easier said than done in the context of combatting guerilla fighters and terrorists. Such groups may threaten state interests and cause death and destruction, but they often do not possess military forces comparable to state powers. Consequently, it is difficult to identify when a state's leverage of its military advantage against these groups is justified. Nonetheless, state concerns regarding the potential of such groups to acquire weapons of mass destruction have heightened fears about the magnitude of terrorist threats.<sup>342</sup>

The AUMF is revolutionary in that it authorizes the executive branch to utilize wartime authority against non-state actors, as well as states, but it did not specifically name all non-state actors and states that could be targeted.<sup>343</sup> Utilization of the right to self-defense is arguably unsettled when an armed attack is not imputable to a foreign state.<sup>344</sup> Nonetheless, a state's Article 51 right to self-defense may authorize it to use force in another state's territory in response to terrorist attacks.<sup>345</sup> The use of state-sponsored armed forces and weapons may not be necessary for an assault to qualify as an

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<sup>339</sup> Legal Consequences of the Construction of a Wall, 40; The Avalon Project, "Caroline Incident," *Yale Law School*, accessed September 2, 2014, [http://www.avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://www.avalon.law.yale.edu/19th_century/br-1842d.asp); United Nations General Assembly, Resolution 59/565, "A More Secure World: Our Shared Responsibility," Report of the High-Level Panel on Threats, Challenges, and Change December 2, 2004, [http://www.un.org/en/peacebuilding/pdf/historical/hlp\\_more\\_secure\\_world.pdf](http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf).

<sup>340</sup> Dissenting Opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 (July 8), 514.

<sup>341</sup> Final report of prosecutor by committee established to review NATO bombing campaign against Yugoslavia. Final Report of Prosecutor by Committee Established to Review NATO Bombing Campaign against Yugoslavia, 39 ILM 1257.

<sup>342</sup> Constitution Project Staff, "Deciding to Use Force Abroad," 7.

<sup>343</sup> CRS 2001 AUMF Background in Brief Memo, 1.

<sup>344</sup> Legal Consequences of the Construction of a Wall, 40.

<sup>345</sup> SC Res. 1368; SC Res. 1373.

armed attack under Article 51, as non-state actors are capable of conducting assaults that are of such gravity that they amount to such an attack.<sup>346</sup>

An example occurred on September 11, 2001, when terrorists used box-cutters, pepper spray, and airplanes to perpetrate an attack that not only caused devastating death and destruction, but also targeted U.S. financial, political, and military cores.<sup>347</sup> Despite these attacks not being executed by traditional armed forces, the UN Security Council affirmed the United States' right to defend itself under Article 51 in two resolutions.<sup>348</sup> The United States continued to rely upon this right in initiating a military response in Afghanistan,<sup>349</sup> with the support of the North Atlantic Council and the Organization of American States.<sup>350</sup> Although Article 51 was crafted with state-to-state conflict in mind, 9/11 clarified that factors, such as the scale, destruction, and perception of the assault as being analogous to a military attack, will weigh into the determination of whether the right to self-defense is applicable.<sup>351</sup>

### **C. MAINTAINING INTERNATIONAL PEACE AND SECURITY BY PREEMPTING AN IMMINENT ATTACK . . . WITH FORCE**

The right to self-defense under international law is intertwined with controversy regarding the preemptive use of force. According to Abramowitz, the preventive terrorism goal of the AUMF corresponds to international standards forbidding the use of force for retaliation but permitting it for prevention. He continues, stating that “reliance on international law as a predicate for future U.S. action was one of the few times that

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<sup>346</sup> *Nicaragua v. United States*, Military and Paramilitary Activities, 1986 I.C.J. 14, 103 (June 27).

<sup>347</sup> Sean Murphy, “Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter,” 43 *Harvard International Law Journal* 41, 41–44 (2002).

<sup>348</sup> S.C. Res. 1368, U.N. SCOR 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR 4385th mtg., U.N. Doc. S/RES/1373 (2001).

<sup>349</sup> Letter from John Negroponte, Permanent Representative of the United States of America to the United Nations to the President of the Security Council, October 7, 2001.

<sup>350</sup> NATO, “Statement by North Atlantic Council,” press release, updated September 15, 2001, <http://www.nato.int/docu/pr/2001/p01-124e.htm>; “Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas,” Organization of American States, September 21, 2001, [http://www.oas.org/Rev/en/Documents/Resolutions/doc\\_rc\\_24\\_res\\_1\\_01\\_eng.pdf](http://www.oas.org/Rev/en/Documents/Resolutions/doc_rc_24_res_1_01_eng.pdf).

<sup>351</sup> Martyn, “The Right of Self-Defence.”; Murphy, “Terrorism and the Concept of ‘Armed Attack,’” 47.

international law was specifically considered during the drafting of the resolution.”<sup>352</sup> The assertion that prevention is permitted under international law, however, is arguably incorrect.

This debate of whether prevention is permitted centers on whether a state may act in self-defense when an attack is threatened but has not yet occurred. The U.S. DOJ is steadfast in claiming that the operations ordered by the president under AUMF authority are legal under international law by claiming an inherent right to national self-defense against imminent attack.<sup>353</sup> Evaluation of whether such operations are actually lawful, however, is convoluted. According to Article 31 of the Vienna Convention on the Law of Treaties, treaty terms must be given “ordinary meaning.”<sup>354</sup> Interpreting Article 51 using the ordinary meaning of its terms, a threat of an attack would not equate to an actual attack. Thus, the threat of an attack would arguably not justify the unilateral use of force in self-defense.<sup>355</sup>

Nonetheless, persuasive international legal authorities have interpreted the Article 51 right to self-defense as supporting state action if it is required to deflect an “imminent” attack.<sup>356</sup> In essence, the act of self-defense must be the “only way for the State to safeguard an essential interest against grave and imminent peril.”<sup>357</sup> The necessity of the self-defense must be instant, overwhelming, and leave the state no choice of means or chance for deliberation.<sup>358</sup> The principle behind this interpretation is that the threat of an attack may be so overwhelming that a state should not wait for an attack before defending itself.<sup>359</sup>

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<sup>352</sup> Abramowitz, “The President,” 75.

<sup>353</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 2.

<sup>354</sup> Bothe, “Terrorism and the Legality of Pre-emptive Force,” 227–240.

<sup>355</sup> *Ibid.*

<sup>356</sup> Legal Consequences of the Construction of a Wall, 40; Caroline Incident; “A More Secure World: Our Shared Responsibility.”

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.*

<sup>359</sup> Bothe, “Terrorism and the Legality of Pre-emptive Force,” 227–240.

Both the Bush and Obama administrations have asserted a broader interpretation of what constitutes an imminent threat by adapting the doctrine to apply to perceived terrorist threats abroad to the interests of both the United States and its allies.<sup>360</sup> This argument is not new; Paul Wolfowitz and others espoused it in the early 1990s via the U.S. Defense Planning Guidance.<sup>361</sup>

According to the executive branch's most recent assertions via the U.S. DOJ, clear evidence that a specific attack will occur in the immediate future is not required<sup>362</sup> to initiate self-defense actions. The United States can "act in self-defense in circumstances where there is evidence of further imminent attacks by terrorist groups even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack."<sup>363</sup> The U.S. DOJ argues that the government will only have a limited window of time to defend itself and that refraining from action until attack plans have concluded would not provide the United States adequate time to do so.<sup>364</sup> Thus, the administration considers an adversary's continual plotting of attacks against the United States when determining when to utilize lethal force.<sup>365</sup> The administration argues that delaying action until some terrorist planning end stage could result in American casualties.

The Obama administration continues to rely on the AUMF for operations; it relies on the AUMF to target members of enemy forces outside of Afghanistan. The executive branch's use of lethal force outside of areas of active hostilities is limited to targets that it claims pose an imminent threat to the United States and its interests.<sup>366</sup> For instance, the

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<sup>360</sup> National Security Strategy of the U.S.A., Office of President Bush, September 2002, 13; Bothe, "Terrorism and the Legality of Pre-emptive Force," 227; *Authorization for Use of Military Force After Iraq and Afghanistan*.

<sup>361</sup> Patrick E. Tyler, "U.S. Strategy Plan Calls for Insuring No Rivals Develop a One-Superpower World: Pentagon's Document Outlines Ways to Thwart Challenges to Primacy of America," *New York Times*, March 7, 1992, <http://work.colum.edu/~amiller/wolfowitz1992.htm>.

<sup>362</sup> U.S. DOJ, "Lawfulness of a Lethal Operation," 6-7.

<sup>363</sup> Landay, "Obama's Drone War Kills."

<sup>364</sup> *Ibid.*, 7.

<sup>365</sup> *Ibid.*, 8.

<sup>366</sup> *Authorization for Use of Military Force After Iraq and Afghanistan* (testimony of the Honorable Stephen W. Preston, General Counsel, Department of Defense).

U.S. military takes lethal actions under AUMF authority in Yemen and Somalia. The administration's attorneys argue that targeted killings may be consistent with international rules regarding sovereignty if conducted with the consent of the host state.<sup>367</sup> However, the U.S. DOJ's claim that the government may conduct such operations when the "[h]ost nation is unable or unwilling to suppress the threat posed by the individual targeted" is misleading.<sup>368</sup> The administration argues that even in an international armed conflict when a neutral state has been unable to prevent violations by troops of a belligerent enemy that uses another territory for operations, the other nation is justified in attacking belligerent enemy forces in that neutral territory.<sup>369</sup> Thus, if terrorist groups, such as AQ, move their operations among countries, the United States may be justified in attacking enemy forces within those countries.<sup>370</sup>

These arguments, however, do not comport with international law regarding self-defense. The UN's human rights panel determined that the U.S. targeted killings program utilizes force in another state's territory without that state's consent and consequently, violates international law preserving sovereignty.<sup>371</sup> Morris Davis, a Howard University Law School professor, former Air Force attorney, and prosecutor in terrorism trials commented, "I'm thankful that my doctors don't use their [the administration's] definition of imminence when looking at imminent death. A head cold could be enough to pull the plug on you."<sup>372</sup>

It is also worth noting that many of the international law sources the U.S. DOJ cites in support of its position in a white paper providing legal justification for targeted killings originates from American and British scholars and military resources. This stance results in a one-sided interpretation of international law.

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<sup>367</sup> U.S. DOJ, "Lawfulness of a Lethal Operation," 1.

<sup>368</sup> *Ibid.*, 2.

<sup>369</sup> *Ibid.*, 4.

<sup>370</sup> *Ibid.*

<sup>371</sup> Landay, "Obama's Drone War Kills."

<sup>372</sup> *Ibid.*

The UN has noted the divisions amongst member states on the appropriateness of the use of force to address terrorist threats.<sup>373</sup> Nonetheless, the UN itself has maintained that a state is only authorized to utilize preemptive force under extreme circumstances. In a UN report of the Secretary General’s High-Level Panel on Threats, Challenges and Change, the UN provides the example of a situation involving terrorists armed with nuclear weapons. This report emphasizes that if a state has arguments for preventative military action, it should present them, along with evidential support, to the UN Security Council for force authorization under UN Charter Chapter VII. It reasons that the interest and risks to be balanced in such situations favors the norm of non-intervention to preserve global order. Nonetheless, the UN itself acknowledges that member states have violated prohibitions on the use of force hundreds of times, and that a “paralysed” Security Council has passed very few Chapter VII resolutions.<sup>374</sup> Nonetheless, the UN does not favor the reinterpretation of Article 51 to extend its reach to permitting preventive action.<sup>375</sup>

#### **D. WAR HAS LAWS?**

International humanitarian law governs both international and internal armed conflicts, and obligations under humanitarian law apply regardless of whether a state is engaged in hostilities.<sup>376</sup> The rights afforded to those involved in conflicts are dependent on the type of conflict and the actors involved. Unfortunately, terrorist threats and responses to those threats do not fit tidily into categorizations of international and internal armed conflicts provided by the Geneva Conventions and related protocols. Specifically, the understanding of rules governing classification of prisoners of war (POWs) under the third Geneva Convention has been hotly debated when applied to terrorists.

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<sup>373</sup> “A More Secure World: Our Shared Responsibility.”

<sup>374</sup> *Ibid.*, 54.

<sup>375</sup> *Ibid.*, 55.

<sup>376</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Motion for Interlocutory Appeal on Jurisdiction, 26 (October 2, 1995).

## 1. Armed and Conflicted

An armed conflict is required<sup>377</sup> for international humanitarian laws to apply. An armed conflict exists during protracted armed violence between government authorities and organized armed groups.<sup>378</sup> The Third Geneva Convention applies in international armed conflicts, or “cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties.”<sup>379</sup> The Third Geneva Convention affords qualified combatants who are captured and detained during the duration of hostilities to the highest level of humanitarian legal protections. International armed conflicts also implicate the protections of the Fourth Geneva Convention and Protocol I, while a non-international armed conflict would entitle actors to protections under Common Article 3 and Protocol II. Arguably, lower standards of care and protections are afforded to actors captured during internal armed conflicts. Calls have been made to better apply the standards of humanitarian law to internal conflicts. Yet, despite both a rise in internal armed conflicts and a decrease in the number of conflicts qualifying as international, an adequate humanitarian law framework is lacking for conflicts classified as internal.<sup>380</sup>

To determine which legal rights must be afforded to actors in an armed conflict, the question of whether the conflict is international or internal must be resolved. If an armed conflict occurs between two or more states, it is international.<sup>381</sup> While this situation may seem straightforward, determining whether a conflict is between two states in the context of terrorist threats is often complicated because the level of control states exercise over terrorist groups varies and may be difficult to establish.

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<sup>377</sup> *Prosecutor v. Tadic*, Decision.

<sup>378</sup> *Ibid.*, 28.

<sup>379</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Art. 2., August 12, 1949, 75 U.N.T.S. 135.

<sup>380</sup> “United Nations Subcommission on Prevention of Discrimination and Protection of Minorities’ Minimum,” United Nations Human Rights, Office of the High Commissioner for Human Rights, November 25, 1996, [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=6940](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=6940).

<sup>381</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Judgment, 34 (July 15, 1999).

To attribute acts of a paramilitary group to a state, it must be proved that the state has *overall control* over the group.<sup>382</sup> For instance, in *Nicaragua v. United States of America*, the International Court of Justice considered whether the United States should be held responsible as a state for its support of rebels who conducted attacks against Nicaraguan targets. The court noted that for a state to be held responsible for such attacks, it must have had effective control over operations when attacks were committed.<sup>383</sup> In sum, the state must pay the offender, coordinate, or supervise activities, and issue specific attack instructions. The court found that the U.S. military provided pay, instructions, supervision, and intelligence to execute tasks, and the court imputed these acts to the United States. It did not, however, impose responsibility because the United States did not provide specific instructions to carry out attacks.<sup>384</sup>

The International Criminal Tribunal for the former Yugoslavia also examined this issue. In *Prosecutor v. Tadic*, the court considered whether the Federal Republic of Yugoslavia exercised control over the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.<sup>385</sup> The court held that for a state to be held responsible for an individual or non-military organized group's actions, the state either had to issue specific instructions or publicly endorse the group's actions after the fact. The actions of armed forces, militias, and other militarily organized groups may be imputed to the state, and consequently, internationalize a conflict.<sup>386</sup> Applied in this case, if another country exercises requisite control over a terrorist group, the conflict could be internationalized, thereby requiring the United States to apply more expansive legal protections to opposing privileged combatants.

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<sup>382</sup> Resolution A/3314, "Definition of Aggression," United Nations General Assembly, December 14, 1974, <http://www.un.org/documents/ga/res/29/ares29.htm>; *Prosecutor v. Tadic*, Judgment, 56; Bothe, "Terrorism and the Legality of Pre-emptive Force," 230.

<sup>383</sup> *Nicaragua v. United States*, para. 115; James G. Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict," *IRRC* 85. no. 850 (June 2003): 323–27.

<sup>384</sup> *Nicaragua v. United States*, para. 75–80, 115.

<sup>385</sup> *Prosecutor v. Tadic*, Judgment, para. 72.

<sup>386</sup> Stewart, "Towards a Single Definition of Armed Conflict," 325.

The classification of the U.S.’s counterterrorist measures as “international” versus “internal” is important because it affects legal responsibilities and authority. The administration asserts that the United States is in a non-international armed conflict with AQ and associated forces.<sup>387</sup> In *Hamdan*, the Supreme Court held that because the United States is battling a transnational non-state actor operating from abroad, its engagement constitutes an armed conflict that is not international in character because it is not a “clash between nations.”<sup>388</sup> Consequently, the U.S. government argues that U.S. operations conducted outside of areas of active hostilities are still part of this non-international armed conflict.<sup>389</sup> The United States also cites the lack of geographic limitations on the use of force authorized by the AUMF in support of this assertion.<sup>390</sup>

This position undermines the fundamental international norm of non-intervention, which aims to preserve global order. The U.S. government’s rationalization that it is authorized to pursue non-state actors who are members of terrorist organizations wherever they may be located because this conflict is not a “clash between nations” is a slippery slope. Kenneth Roth, executive director of Human Rights Watch, summarized this concern succinctly when he asked the Senate Armed Services Committee in 2013, “Does the United States really have the right to attack anyone it might characterize as a combatant against the United States anywhere in the world?”<sup>391</sup>

## **2. The Privilege of Combat**

The protections in the Third Geneva Convention are expansive and entitle POWs to numerous protections, in addition to those protections offered by human rights law and Common Article 3. Enemy combatants may be divided into two categories, lawful and unlawful combatants. Under the laws of war, lawful combatants are persons who take

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<sup>387</sup> Stewart, “Towards a Single Definition of Armed Conflict,” 3, citing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), 628–31.

<sup>388</sup> *Ibid.*, 3.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.*

<sup>391</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

direct part in an armed conflict within the laws of war, and who upon capture by enemy forces, qualify as POWs under the Third Geneva Convention. In contrast, an unlawful combatant is a civilian who takes a direct part in the hostilities and does not satisfy the criteria for POW status described in Article 4 of the Third Geneva Convention.<sup>392</sup> These designations entail a host of complexities.

Lawful combatants are persons who fall into one of the following categories: 1) members of the armed forces of a party to the conflict, or 2) members of other militias or volunteer corps, including those of organized resistance movements, belonging to a party of the conflict.<sup>393</sup> To qualify as a member of an organized resistance movement, members must: 1) be commanded by a person responsible for his subordinates; 2) have a fixed distinctive sign recognizable at a distance; 3) carry arms openly; and 4) conduct operations in accordance with the laws and customs of war. Combatants who operate outside of a command structure, lack a distinctive uniform, hide arms, and ignore the laws of war by targeting civilians or using civilians as shields, are unlawful combatants. Accordingly, unlawful combatants do not have to be treated in accordance with POW standards under the Geneva Conventions. If any doubt arises as to whether a person benefits from “combatant status,” the person must be treated as a POW under the Third Geneva Convention until a “competent tribunal” decides the issue.

In an asymmetric conflict in which a few combatants can kill many innocent civilians, a deliberate application of the laws of war and law enforcement mechanisms is required. Experts have argued over the proper application of the Geneva Conventions, as well as whether terrorists should be treated as criminals as opposed to enemy combatants. The executive branch has deemed members of AQ and its associated forces as unlawful combatants, in part because they are non-state actors who target civilians and arguably attempt to blend into the civilian population to evade target or capture. In sum, they do not adhere to the customs of war.<sup>394</sup> Further, while a firm definition of terrorism does not

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<sup>392</sup> William Haynes, “Enemy Combatants—Council on Foreign Relations,” accessed August 25, 2014, <http://www.cfr.org/international-law/enemy-combatants/p5312>.

<sup>393</sup> Geneva Convention Relative to the Treatment of Prisoners of War.

<sup>394</sup> Kevin Cirilli, “10 Facts about Enemy Combatants,” *Politico*, April 22, 2013, <http://www.politico.com/story/2013/04/what-is-an-enemy-combatant-90436.html>.

exist, international institutions have declared that the deliberate murder of innocents is never justifiable, even in the name of self-determination or national liberation.<sup>395</sup> Consequently, the executive branch has determined that alleged terrorists do not have POW rights under the Third Geneva Convention.<sup>396</sup> In addition, while the Obama administration has prosecuted terrorist suspects in domestic criminal courts, this has not always been the case. The law of war permits measures that criminal law procedures do not afford, such as the detention of enemy combatants for the duration of hostilities without charge.<sup>397</sup> On the flip side, enemy combatants must be released after the cessation of hostilities. The importance of whether a member of AQ or its associated forces is deemed a lawful or unlawful combatant, or a criminal defendant, likely has more to do with due process protections and military proceedings than the conditions of detention. While military tribunals may be an acceptable means to try unlawful combatants, lawful combatants are arguably entitled to more substantive procedural protections.<sup>398</sup>

Since AQ and associated forces target civilians, the United States is not required to afford them full POW protections. Even if a terrorist actor or group does not fall within categories affording protections to POWs under the Third Geneva Convention, other legal securities may provide protection. For instance, any person who is not considered a POW arguably has rights under the Geneva Civilian Convention.<sup>399</sup> In addition, the core of Additional Protocol II is customary international law.<sup>400</sup> Finally, Common Article 3

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<sup>395</sup> Resolution 1556, “Peace and Security—Terrorist Acts,” United Nations Security Council, October 8, 2004, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1566%20\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1566%20(2004)).

<sup>396</sup> “Findings Report: Enemy Combatants and the Geneva Conventions,” Council on Foreign Relations, December 12, 2002, <http://www.cfr.org/international-law/findings-report-enemy-combatants-geneva-conventions/p5842>.

<sup>397</sup> Ruth Wedgwood and Kenneth Roth, “Combatants or Criminals? How Washington Should Handle Terrorists,” *Foreign Affairs*, May/June 2004, <http://www.foreignaffairs.com/articles/59902/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists>.

<sup>398</sup> Michael C. Dorf, “What Is an ‘Unlawful Combatant,’ and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters,” January 23, 2002, <http://writ.news.findlaw.com/dorf/20020123.html>.

<sup>399</sup> Jordan J. Paust, “Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,” 43 *Columbia Journal of Transnational Law* 811, 817 (2005).

<sup>400</sup> Tadic, “Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction,” 40, 46.

should be applied as widely as possible to provide protection as a sort of a catch-all doctrine.<sup>401</sup>

Common Article 3 of the Geneva Conventions applies to low intensity and open armed confrontations between relatively organized armed forces or groups that occur in a state's territory.<sup>402</sup> It applies to "parties to the conflict."<sup>403</sup> The obligation to apply Article 3 is absolute for both parties and independent of the obligation of the other.<sup>404</sup> It also protects persons who no longer take part in the hostilities.<sup>405</sup> Like Protocol II, Article 3 protects persons who did not directly participate in, or who have ceased to take part in hostilities.<sup>406</sup> It reflects "elementary considerations of humanity" applicable under customary law to any armed conflict or internal strife.<sup>407</sup> Article 3 assures that detainees have rights "in all circumstances" and "at any time and in any place whatsoever," whether the detainee is a POW, an unprivileged belligerent, terrorist, or noncombatant.<sup>408</sup> Article 3 preserves the rights of all detainees to be treated humanely, and it prohibits violence to life and person, cruel treatment and torture, and outrages upon personal dignity, including humiliating and degrading treatment.<sup>409</sup> It also preserves rights to minimum due process. Similarly, Protocol II prohibits violence to the life, health, and physical or mental well-being of persons, outrages upon personal dignity, and threats to commit such acts.<sup>410</sup>

Even if an incident does not constitute an armed conflict, individuals, regardless of their enemy-status designations, are protected by non-derogable human rights. For

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<sup>401</sup> *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., OEA/Serv.L/V/II.98, doc. 6 rev., 31 (1998).

<sup>402</sup> *Ibid.*

<sup>403</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, art. 3.

<sup>404</sup> *Abella v. Argentina*, 35.

<sup>405</sup> *Ibid.*, 36.

<sup>406</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 609, art. 4, para. 1.

<sup>407</sup> Tadic, "Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction," 42.

<sup>408</sup> Geneva IV, art 10; Paust, "Executive Plans," 817 2005.

<sup>409</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 2.

<sup>410</sup> Geneva Conventions; Protocol II.

instance, freedom from torture and cruel, inhuman and degrading treatment and punishment is preserved in numerous international treaties, and the prohibition on torture is *jus cogens*, or a preemptory norm of international law.<sup>411</sup> In addition, due process rights are granted in numerous human rights treaties.<sup>412</sup> Human rights protections apply during both peacetime and times of armed conflict.<sup>413</sup> Human rights treaties, such as the International Covenant on Civil and Political Rights, Convention Against Torture and International Covenant on Economic, Social, and Cultural Rights, are applicable to state acts in the exercise of its jurisdiction outside of its own territory, even if the state does not exercise ultimate sovereignty over the area.<sup>414</sup>

The U.S. government asserts that its operations under the AUMF comprise part of an internal armed conflict. Therefore, the heightened protections afforded to enemy combatants in the Third Geneva Convention do not apply. While this designation may be advantageous to the United States as it decides what protections to afford detainees, this line of thinking could set a reciprocal precedent for the future treatment of U.S. service members detained by others. While U.S. law prohibits war crimes, it does not codify many laws of war.<sup>415</sup> Congress should codify a well-reasoned approach that both respects international law while recognizing that armed conflicts has changed. Doing so will clarify obligations for the U.S. military, provide a defense in the event that the United States is challenged in an international forum, and potentially, contribute to the development of international law.

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<sup>411</sup> Paust, “Executive Plans,” 822–23.

<sup>412</sup> “Universal Declaration of Human Rights,” United Nations, December 10, 1948, <http://www.un.org/en/documents/udhr/>; ICCPR; “European Convention on Human Rights,” European Court of Human Rights, 1950, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf); “Pact of San Jose, Costa Rica,” American Declaration on the Rights of the Individual, and American Convention on Human Rights, accessed September 2, 2014, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Conventino\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Conventino_on_Human_Rights.htm).

<sup>413</sup> Legal Consequences of the Construction of a Wall, 29; *Abella v. Argentina* 32.

<sup>414</sup> Legal Consequences of the Construction of a Wall, 31; United Nations Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, May 18, 2006, UN Doc. CAT/C/USA/CO/2, <http://www.state.gov/documents/organization/133838.pdf>; *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>415</sup> 18 U.S.C. section 2441.

## **E. THE IMPORTANCE OF INTERNATIONAL LEGAL CONSIDERATIONS**

In consideration of the AUMF discussion, or if it is decided that the AUMF does indeed need to be modified or repealed, whatever remains standing in the current AUMF's place must consider international legality. It is specifically important to consider international perception in the AUMF discussion. According to the 2014 Quadrennial Defense Review, the United States will place a greater emphasis on building partnership capacities, especially in fragile states where threats may proliferate.<sup>416</sup> International reception will inevitably impact defense strategies connected to building these partnership capacities. If the United States is seen as stretching international law too far, it could be viewed negatively by both allied governments and opponents, as well as non-governmental organizations.<sup>417</sup> If this limits international support of U.S. efforts, or bolsters opponents' recruiting efforts, U.S. security will be undermined.

International reception will be more welcoming and constructive if Congress's global counterterrorism policies are shown to be legitimate under international law and if the executive power is checked against the abuse of international legal constructs. At its best, the United States can contribute to shaping customary international law as it pertains to armed, non-state actors acting across borders.<sup>418</sup> However, if the U.S. approach diverges too much from international legal precedent, the United States could arguably lose an opportunity to influence development.

While it may benefit the U.S. government to phrase and interpret force authorizations broadly in ways that provide leverage and flexibility, exploiting ambiguities in international law may not always be advantageous. Gray areas of international law made even more nebulous by the stretching and manipulations of the United States may ultimately set precedence that will enable other groups to exploit ambiguities similarly.<sup>419</sup> What is advantageous to the United States now may be

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<sup>416</sup> "2014 Quadrennial Defense Review," VII.

<sup>417</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 7.

<sup>418</sup> *Ibid.*

<sup>419</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

disastrous for the United States later. It can be imagined that broad interpretations of laws pertinent to drone strikes are advantageous to the United States when it is the one commanding such strikes, and perhaps less so should enemy groups evolve technologically to use drones against the United States. In essence, other countries may also take liberties with their interpretations of international law and respect for human rights, and the U.S. exploitation of these legal ambiguities will degrade its leverage in future international efforts to curb such actions when utilized against the United States. As Micah Zenko of the Council on Foreign Relations argues, other countries will adopt U.S. legal justifications and hypocrisy could set “precedent that other countries will emulate.”<sup>420</sup>

## F. CONCLUSION

To recap, the UN remains steadfast in adhering to limited interpretations of the right to self-defense, yet deadlocked in its consideration of force authorizations. It argues that additional protections are needed for combatants in non-international armed conflict, but it has not agreed upon these terms. Moreover, the United States faces evolving terrorist threats from armed, non-state actors. So, what should the U.S. do?

Despite a lack of consensus on these issues, proportionality and necessity in threat response are required,<sup>421</sup> and respecting human rights and the rule of law is of fundamental importance, even in response to terrorism.<sup>422</sup> As Congress reexamines the AUMF, the status quo and alternatives should be analyzed in the context of these international legal norms. It is the hope that by doing so, the U.S. will craft policy that is both effective and legitimate. In turn, the United States will contribute to the development of international law that can be applied to contemporary armed conflict.

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<sup>420</sup> Landay, “Obama’s Drone War Kills.”

<sup>421</sup> Friesendorf, “International Intervention and the Use of Force.”

<sup>422</sup> Resolution 59/191, “Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,” United Nations General Assembly, March 10, 2005, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/59/191&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/191&Lang=E).

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## V. PRECEDENT-SETTING CONSIDERATIONS

Precedent plays an important role in promoting stability and evenhandedness.

—Supreme Court Chief Justice John Roberts<sup>423</sup>

Congress must consider the precedent it will set in several key areas as it reexamines the AUMF and decides which alternative to implement. First, Congress must consider the preservation of government flexibility in the type of force to be used for countering terrorist threats, namely, the ability of the U.S. government to use both military force and law enforcement resources to mitigate terrorist threats. The ability to transition between these types of forces—military and law enforcement—is referred to as “versatile use of force.” Second, Congress will set precedent when it comes to government transparency regarding force authorizations. Finally, reassessment of Congress’s chosen approach is crucial, as this affects accountability. While each of these precedent considerations relate to one another because of their influence on U.S. counterterrorism policy, they encompass considerations independent of each other.

### A. VERSATILE USE OF FORCE: CAPITALIZING ON MILITARY AND LAW ENFORCEMENT TOOLS IN U.S. COUNTERTERRORISM OPERATIONS

Military force is not always the most advantageous course of action in mitigating threats; sometimes law enforcement operations prove more successful in threat mitigation. To address the dynamic security environment, it will behoove the United States to be agile in how it postures its assets, including its military forces, to ensure that it can address a broad spectrum of conflict.<sup>424</sup> Adapting to any point on this broad spectrum will allow the United States to address unorthodox threats, such as those conflicts that originate from groups utilizing asymmetric approaches, or conflicts specific

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<sup>423</sup> Chief Justice John Roberts, “Transcript: Day Two of the Roberts Confirmation Hearings,” *Washington Post*, September 13, 2005.

<sup>424</sup> “2014 Quadrennial Defense Review,” III, VII.

to more technologically advanced states.<sup>425</sup> Ultimately, in any prolonged counterterrorism military action, the military will aim to shift its actions from “large scale prolonged stability operations” towards preparations for a variety of smaller, more tailored, better balanced, or more sustained operations.<sup>426</sup> Thus, review of the AUMF and potential alternatives must consider whether the option permits the use of different types of force to promote counterterrorism efforts, rather than pure reliance on military force. Permitting the versatile use of force will promote U.S. objectives to rebalance and sustain U.S. counterterrorism efforts.

U.S. military operations in Iraq and Afghanistan have highlighted shortcomings in countering an enemy that conceals itself within a civilian population. The military’s role in counterterrorism efforts should be examined to determine a more advantageous approach, considering the evolving nature of terrorist threats. As former Secretary of Defense Robert Gates observed, “[w]hat is dubbed the war on terror is, in grim reality, a prolonged, worldwide irregular campaign . . . . In the long-term effort against terrorist networks and other extremists, we know that direct military force will continue to have a role. But we also understand that over the long term we cannot kill or capture our way to victory.”<sup>427</sup>

The focus of international law on armed conflict between state actors complicates these challenges, as laws of war become difficult to apply when military forces try to counter threats disguised within civilian populations. Counterstrategies must be tailored to the specific threat faced while considering the intricacies of possible applicable legal constructs.<sup>428</sup> As counterterrorism expert Audrey Kurth Cronin explains, terrorism exploits “[t]he vulnerable seam between domestic law and foreign war . . . .”<sup>429</sup> Thus, in

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<sup>425</sup> “2014 Quadrennial Defense Review,” VII.

<sup>426</sup> Ibid.

<sup>427</sup> Geraint Hughs, *The Military’s Role in Counterterrorism: Examples and Implications for Liberal Democracies*, The Letort Papers (Carlisle, PA: U.S. Army War College Strategic Studies Institute, 2001), 121.

<sup>428</sup> Friesendorf, “International Intervention and the Use of Force,,” 13.

<sup>429</sup> Hughs, *The Military’s Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 25.

responding to terrorist threats, state policies should include concepts from both criminal justice and warfare models, in varying degrees, dependent on each state's institutional frameworks.<sup>430</sup> In further developing U.S. counterterrorism policy, it is important to utilize force and precision by leveraging both the criminal justice and war fighting models.<sup>431</sup>

The DOD has declared its commitment to finding creative and effective ways to protect U.S. interests, including identifying new “presence paradigms.”<sup>432</sup> According to the 2014 Quadrennial Defense Review, the United States plans to help its partners counter terrorist threats, so that these threats may be mitigated long before they find their way to the U.S. homeland.<sup>433</sup> One way to mitigate threats is to utilize a layered approach to counterterrorism that incorporates law enforcement mechanisms.

### **1. Maximum v. Minimum Force**

In examining the varying degrees of force used to counter terrorist threats, maximum force usually describes the military combat function, and minimum force refers to a policing role more focused on criminal justice.<sup>434</sup> It comes as no surprise that states usually use maximum force in relation to war strategy. Military personnel often have the training to operate in hostile environments and are prepared to endure considerable risk. The military may be utilized in counterterrorism measures to provide state security, as well as to bolster support to civilian entities.<sup>435</sup> In addition, militaries have considerable technology to counter terrorist threats, which makes them a logical and desirable counterterrorism asset abroad.<sup>436</sup>

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<sup>430</sup> Hughs, *The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 25.

<sup>431</sup> *Ibid.*, xi.

<sup>432</sup> “2014 Quadrennial Defense Review,” VI.

<sup>433</sup> *Ibid.*, 11.

<sup>434</sup> Nadav Morag, *Comparative Homeland Security: Global Lessons* (Hoboken, NJ: John Wiley & Sons, 2007), 64.

<sup>435</sup> Hughs, *The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 58.

<sup>436</sup> *Ibid.*

However, when battling a threat that does not abide by international humanitarian law and is difficult to distinguish from the civilian population, overreliance on maximum military force presents shortcomings. Use of maximum force often results in civilian lives lost and lost support of local citizens.<sup>437</sup> Proportionality in threat response remains an obligation under international and constitutional law.<sup>438</sup> Maximum force response often incites criticism as being disproportionate and indiscriminate due to issues in gathering accurate intelligence and launching precise military measures.<sup>439</sup> Use of military power in counterterrorism operations may also cause negative strategic and political effects, as the civilian population may grow resentful of the military, and terrorist groups can capitalize upon this resentment for recruitment efforts.<sup>440</sup> In sum, relying on maximum military force in countering terrorist threats may have destabilizing effects that result in escalated tension.<sup>441</sup> Consequently, maximum force efforts should be integrated within a counterterrorism strategy that also addresses the resentment and grievances that terrorist groups exploit.<sup>442</sup>

In contrast, the use of minimum force may be preferable in certain situations, as community policing by military overseas may be necessary. Minimum force utilizes caution and focuses on making arrests, with the goal of gaining the trust and support of the local population.<sup>443</sup> The U.S. government's promotion of law enforcement resources can also improve the policing capabilities of local governments—thereby bolstering their ability to govern and impeding the ability of terrorist groups to flourish.

Many states employ maximum and minimum force in counterterrorism strategy along a continuum.<sup>444</sup> However, the United States has not proven adept at using force in

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<sup>437</sup> Friesendorf, "International Intervention and the Use of Force," 5.

<sup>438</sup> *Ibid.*

<sup>439</sup> Hughs, *The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 71.

<sup>440</sup> *Ibid.*, xv.

<sup>441</sup> *Ibid.*, 80, 85.

<sup>442</sup> *Ibid.*, 12.

<sup>443</sup> Friesendorf, "International Intervention and the Use of Force," 14.

<sup>444</sup> Morag, *Comparative Homeland Security: Global Lessons*, 63.

a versatile way that capitalizes on maximum and minimum force and the gamut in between. The primary domestic legal framework that has discouraged the development of versatile use of force in U.S. military operations abroad is arguably the *Posse Comitatus* Act of 1876. This act prohibits the military from performing domestic police functions in most circumstances, which keeps the boundaries between armed forces and policing distinct.<sup>445</sup> This act is valuable in that it prevents military and policing roles from blurring in a domestic setting. Military personnel are prohibited domestically from investigating crimes and conducting law enforcement activities in most situations.<sup>446</sup> The National Guard has been deployed in exceptional circumstances domestically, during riots and after natural disasters, to establish public order, under the command of the respective state and not under the command of the federal government.<sup>447</sup> Ultimately, however, boundaries between law enforcement and U.S. military efforts are strictly observed. Due to these restrictions, police and military roles are kept distinct, with personnel from each entity being trained almost exclusively in the force customarily utilized for that institution. Thus, police are primarily trained in the use of minimum force and associated criminal justice laws, while the military is trained in the use of maximum force and the laws of war.

In terms of countering overseas threats, the deployment of military combat troops has historically been prioritized over personnel utilizing minimum force. Recently, forms of combat less reliant on personnel have been increasingly utilized, including drone strikes and long-range fire.<sup>448</sup> Nonetheless, the irregularities of terrorist threats has resulted in pressure being imposed on military personnel to become involved in policing, a skill set in which they are not well versed or trained.<sup>449</sup> In addition, the federal government lacks a mechanism for deploying police officers abroad.<sup>450</sup> As such, there

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<sup>445</sup> Morag, *Comparative Homeland Security: Global Lessons*, 25; 18 U.S.C. § 1385.

<sup>446</sup> Hughs, *The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 13.

<sup>447</sup> Friesendorf, "International Intervention and the Use of Force," 27.

<sup>448</sup> *Ibid.*, x.

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*, 26, 29.

exists a demand for skilled law enforcement personnel abroad, as well as a scarcity of such resources in the U.S. military.

## **2. The Evolving U.S. Approach to Military and Law Enforcement Efforts Abroad**

Generally, U.S. military and police are not versatile in their use of force.<sup>451</sup> Up until the release of the 2014 Quadrennial Defense Review, the United States had arguably failed to set forth an overarching strategy to counter terrorist threats that adequately addresses the versatile use of force. Through this review, the United States has adapted its defense strategy to include counterterrorism methods that are both dynamic and promote the versatile use of force. Versatile use of other types of force, such as intermediary police/military force and special force operations, may prove similarly beneficial as a counterterrorism strategy, and as such, must be accounted for in a new AUMF approach.

Historically, the United States has relied on maximum military force. The killing of 18 U.S. rangers in Somali in 1993 bolstered the perceived need to utilize maximum force in U.S. military operations to avoid that sort of tragedy. The resulting Powell-Weinberger doctrine made military involvement dependent on “political objective, decisive victory, an exit option, and threats to vital U.S. interests.”<sup>452</sup>

After the 9/11 attacks, George W. Bush declared a War on Terror, and the administration relied predominantly on the use of maximum military force. This was not necessarily the approach near the commencement of action in Afghanistan; in late 2001, the United States relied more on Special Forces and the Central Intelligence Agency (CIA) than on maximum military force. Often, small units of Special Forces would deploy, identify targets, and direct airstrikes. In response to a worsening security situation, the U.S. government eventually increased its use of maximum military force, including “kill or capture” operations.<sup>453</sup> This use of force was hindered, however, because terrorists and insurgents were difficult to distinguish from the general population,

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<sup>451</sup> Friesendorf, “International Intervention and the Use of Force,” 5.14.

<sup>452</sup> *Ibid.*, 29–30.

<sup>453</sup> *Ibid.*

which resulted in civilian casualties.<sup>454</sup> Looking back, excessive reliance on military force was arguably counterproductive, as it led to civilian casualties and stagnant local support.<sup>455</sup> British Foreign Secretary David Miliband later condemned U.S. counterterrorism policy by declaring that it relied too heavily on a military strategy.<sup>456</sup>

Force needs to be calibrated to comply with the proportionality requirements of international law and the U.S. constitution, as well as to win the hearts and minds of populations.<sup>457</sup> In 2009, the United States adopted the COIN (counterinsurgency) strategy in Afghanistan.<sup>458</sup> This strategy increased the focus on protecting the local population, preserving the rule of law, and bolstering local security forces.<sup>459</sup> Under COIN, U.S. soldiers were more often expected to switch between roles encompassing combat roles, fostering trust with the local population, and coordinating law enforcement related activities.<sup>460</sup> This transition has been a difficult one, as the majority of U.S. forces are not generally trained to perform police functions or utilize versatile force.

Since instituting the COIN strategy, the executive branch has hinted at the need to rely on methods besides maximum military force to counter terrorist threats, but it has not wholeheartedly endorsed this approach (at least publicly). The counterterrorism strategy set forth by President Obama in his 2013 speech at the National Defense Institute incorporates a more comprehensive approach to counterterrorism efforts, but most of the policies set forth still focus on the use of maximum force measures. As President Obama acknowledges, “the use of force must be seen as part of a larger discussion we need to have about a comprehensive counterterrorism strategy—because for all the focus on the use of force, force alone cannot make us safe.”<sup>461</sup> The President hints at the use of

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<sup>454</sup> Friesendorf, “International Intervention and the Use of Force,” 60.

<sup>455</sup> *Ibid.*, Hughs, *The Military’s Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 4.

<sup>456</sup> *Ibid.*, 1.

<sup>457</sup> *Ibid.*, 16.

<sup>458</sup> *Ibid.*, 1.

<sup>459</sup> *Ibid.*, 4; Friesendorf, “International Intervention and the Use of Force,” 30.

<sup>460</sup> Friesendorf, “International Intervention and the Use of Force,” 65.

<sup>461</sup> Obama, “National Defense University.”

minimum or versatile force when he notes, “[o]ur best counterterrorism cooperation results in the gathering and sharing of intelligence, the arrest and prosecution of terrorists.”<sup>462</sup>

### 3. Conclusion

Relying on military firepower when a high risk of casualties is possible may violate international law and lead to local resentment (to put it mildly) that bolsters terrorist group recruitment, and ultimately, undermines U.S. security. As Farea al-Muslimi, a journalist from Yemen stated, “AQAP recruits and retains power through its ideology, which relies in large part on the Yemeni people believing that America is at war with them.”<sup>463</sup> Other senior U.S. military officials have also warned that excessive reliance on maximum, military force may galvanize groups that threaten the United States.<sup>464</sup>

The use of maximum military force may also further destabilize fragile governments, increase international scrutiny, and result in reduced international cooperation.<sup>465</sup> For instance, Germany limited its intelligence exchanges with the United States after German Islamists in Waziristan were killed by U.S. drone strikes.<sup>466</sup> This action was a response to public outcry over the U.S. government’s actions and the possibility that the intelligence Germany shares with the United States could result in the deaths of German citizens.<sup>467</sup>

As Daskal and Vladeck argue, congressional force authorization may increase the likelihood that the U.S. government would use military force, especially if the force authorization mirrors the AUMF in lacking temporal, geographic, and group-specific

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<sup>462</sup> Obama, “National Defense University.”

<sup>463</sup> Daskal and Vladeck, “After the AUMF,” 139.

<sup>464</sup> *Ibid.*, 139–40.

<sup>465</sup> *Ibid.*, 140.

<sup>466</sup> *Ibid.*; Holger Stark, “Drone Killing Debate: Germany Limits Information Exchange with U.S. Intelligence,” *Spiegel Online*, May 17, 2011, <http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html>.

<sup>467</sup> Stark, “Drone Killing Debate.”

boundaries. This thesis does not analyze military strategy. However, in battling enemies that flout international laws of war and hide amongst civilian populations, the United States must reevaluate its approach to mitigate these contemporary threats while doing its utmost to respect international law. Moreover, Congress should be receptive to examining balanced options as it looks to revise the AUMF. The ability to operate on a continuum of law enforcement and military force can prove beneficial in countering terrorist threats. Targeted special operations or law enforcement approaches that prioritize arresting the enemy may prove more fruitful than utilizing military force because the local population may feel more protected with law and order. The local population may be more willing to cooperate with counterterrorism fact gathering if risks to the population are eradicated with minimal civilian losses.

## **B. PROMOTING GOVERNMENT TRANSPARENCY**

Congress must ensure that it sets a positive precedent in promoting government transparency, which has been lacking in the application of the AUMF. A lack of transparency impedes the ability of Congress and the public to provide effective oversight of the AUMF and associated counterterrorism measures.<sup>468</sup>

This lack of transparency has manifested itself in the years since Congress passed the AUMF. The executive branch has shown reluctance in clarifying its legal rationales for a variety of security measures implicating AUMF authority. For instance, the U.S. DOJ White Paper providing legal justification for the targeted killings of U.S. citizens was only leaked after much public wrangling, and the administration provided the full legal reasoning only after a court ordered its disclosure. Another example occurred in *Parhat v. Gates*, in which the executive branch refused to provide any of the underlying reporting forming the basis of its assertion that Parhat was an enemy combatant.

In addition, the executive branch has refused to disclose publicly what groups qualify as associated forces, or groups that it may use lethal force against under the

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<sup>468</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force.*

AUMF. The list of such groups is classified.<sup>469</sup> The executive branch claims that disclosing this information would result in an upsurge in recruitment.<sup>470</sup> The administration's secrecy regarding which individuals it is targeting under AUMF authority makes it difficult for Congress and the public to determine whether those targeted are "combatants" under international law.<sup>471</sup> This lack of transparency may be interpreted as a violation of due process.

Further, courts considering issues pertaining to the AUMF and executive wartime powers have deferred to executive claims of secrecy, despite the need to review the constitutionality of executive action.<sup>472</sup> Evidence rules are relaxed in support of detention of persons based on the AUMF. Nonetheless, plaintiffs are required to provide evidence despite its unavailability and executive secrecy.<sup>473</sup> Consequently, the courts have taken a backseat in providing a constitutional check on the executive branch. In habeas cases challenging the legality of detentions, courts have generally permitted a "presumption of regularity" to apply to government intelligence documents. According to Judge Tatel's dissent in *Latif v. Obama*, this presumption, which authenticates documents as true or trustworthy, is usually applied to government documents "familiar, transparent, generally understood as reliable, or accessible."<sup>474</sup> As such, Judge Tatel argued that this presumption should not apply to intelligence documents "[p]roduced in the fog of war by a clandestine method that we know almost nothing about." He continued, saying such a presumption may come, "[p]erilously close to suggesting that whatever the government says must be treated as true. . . ."<sup>475</sup>

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<sup>469</sup> Daskal and Vladeck, "After the AUMF," 125.

<sup>470</sup> *Ibid.*, 123.

<sup>471</sup> *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force*.

<sup>472</sup> Buttar, "*Hedges v. Obama*."

<sup>473</sup> *Ibid.*

<sup>474</sup> Elsea and Garcia, *Judicial Activity Concerning Enemy Combatant Detainees*, 22; *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), 677 F.3d 1175 (reissued), cert. denied, 132 S. Ct. 2741 (2012).

<sup>475</sup> *Ibid.*

The executive branch has shrouded actions taken under AUMF authority in secrecy. This lack of government transparency threatens the preservation of constitutional principles and renders appropriate debate about force authorizations impossible. As the Constitution Project aptly describes, “When national security decisions are said to rest on secret information not widely shared with Congress, the temptation to defer to the President only increases.”<sup>476</sup> Consequently, Congress must ensure the promotion of positive precedent in the realm of government transparency when it considers alternatives.

### C. POLICY REASSESSMENT AND AVOIDING CONFIRMATION BIAS

Confirmation bias references the tendency to seek or interpret information in ways partial to an individual’s existing belief, expectation, or decision.<sup>477</sup> This bias manifests via preferential treatment of information supporting existing opinions, an overreliance on positive confirmatory events, and a tendency to ignore contradictory evidence.<sup>478</sup> This bias is arguably perpetuated and worsened due to the psychological effects of terrorism. As Associate Professor of Intelligence Studies at Mercyhurst University and retired U.S. Army Foreign Area Officer Kristan J. Wheaton explains, “[t]he more important the decisions” the stronger the impact of confirmation bias.<sup>479</sup>

Terrorism can create an enduring apprehension, that when combined with confirmation bias, contributes to the rationalization of ill advised policy based on a perception of risk not rooted in reasonable probabilities.<sup>480</sup> Terrorists seek to provoke a

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<sup>476</sup> Constitution Project Staff, “Deciding to Use Force Abroad,” 3.

<sup>477</sup> Raymond S. Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises,” *Review of General Psychology*, Tufts University 2, no. 2 (1998): 175.

<sup>478</sup> *Ibid.*, 178–79.

<sup>479</sup> Timothy Coleman, “Gaming for Clarity Recognizes Intelligence Biases,” *HS Today*, March 11, 2014, <http://www.hstoday.us/briefings/daily-news-analysis/single-article/gaming-for-clarity-recognizes-intelligence-biases/099f52d9db046e88b0c9bb1e77a81e50.html>.

<sup>480</sup> James N. Breckenridge and Philip Zimbardo, “The Strategy of Terrorism and the Psychology of Mass-Mediated Fear, Terrorism and Fear,” in *The Psychology of Terrorism*, ed. Bruce Bongar, Lisa M. Brown, Larry E. Beutler, James N. Breckenridge, and Philip G. Zimbardo (Oxford UK: Oxford University Press 2007), ch. 9, 125–226.

disproportionate, collective sense of fear that can spread rapidly through society.<sup>481</sup> Consequently, terrorism has an exceedingly calamitous influence on psychological functions, in comparison with other disasters.<sup>482</sup> It can completely disrupt the way a society and the individuals that comprise it function and relate.<sup>483</sup> According to experts on the psychology of terrorist strategy James Breckenridge and Philip Zimbardo, heuristics and biased responses can exacerbate fear throughout a society.<sup>484</sup> Emotions can bias judgments, frame perceptions, and even impact policy making.<sup>485</sup>

Fully informed debate is necessary to promote political accountability and prevent confirmation bias. Congress's force authorization via the AUMF should have signified its commencement of exercising its war power.<sup>486</sup> Instead, Congress passed a broad statutory authorization and has remained passive since. The statute, in effect, fails to afford an opportunity for review and accountability. The United States has relied on the same law authorizing military force against perpetrators of the 9/11 attacks to support counterterrorism measures for 13 years, despite the evolution of terrorist threats facing the nation and arguably waning public support for some counterterrorism measures.<sup>487</sup>

While continued reliance on the AUMF is not solely sourced in confirmation bias, it may arguably be a contributing factor. Policy rationalization has been described as a way that confirmation bias manifests itself in government actions.<sup>488</sup> As Barbara Tuchman argued in *The March of Folly*, “[o]nce a policy has been adopted and

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<sup>481</sup> Adrienne Stith Butler, Allison M. Panzer, and Lewis R. Goldfrank, “Understanding the Psychological Consequences of Traumatic Events, Disasters, and Terrorism,” in *Preparing for the Psychological Consequences of Terrorism: A Public Health Strategy*, ed. Adrienne Stith Butler, Allison M. Panzer, and Lewis R. Goldfrank (Washington, DC: National Academies Press 2003), ch. 2, 34, <http://www.ncbi.nlm.nih.gov/books/NBK221643/pdf/TOC.pdf>.

<sup>482</sup> *Ibid.*, 45.

<sup>483</sup> *Ibid.*, 47.

<sup>484</sup> Breckenridge and Zimbardo, “The Strategy of Terrorism and the Psychology of Mass-Mediated Fear, Terrorism and Fear,” 2.

<sup>485</sup> *Ibid.*, 8, citing Marcus, 2000, 2003.

<sup>486</sup> Constitution Project Staff, “Deciding to Use Force Abroad,” 7.

<sup>487</sup> AUMF.

<sup>488</sup> Nickerson, “Confirmation Bias,” 191, citing Tuchman (1984).

implemented, all subsequent activity becomes an effort to justify it.”<sup>489</sup> For instance, terrorism can strengthen the public’s support for militant counterterrorism measures, as well as policies restricting civil liberties in the name of increased security.<sup>490</sup> While support for such measures may later wane, justification of continued implementation may continue.

Counterterrorism efforts should not be static; the United States should reassess its approach when the threat environment changes or the receptiveness of local governments to counterterrorism measures evolves.<sup>491</sup> Unrecognized biases may lead to a self-perpetuating cycle of ill-advised decisions and policy.<sup>492</sup> Since terrorists seek to exploit fear and apprehension on a grand scale, homeland security professionals need to understand the psychological impacts this approach may have on decision making to avoid creating policy based on emotion and perpetuating such policy due to biases that promote adherence to preconceived notions.<sup>493</sup> As Jeh Johnson has expressed, great value exists in challenging weaknesses in a decision-makers logic chain, as “group think . . . is dangerous, because it makes us lazy and complacent in our thinking, and can lead to bad results.”<sup>494</sup> Congress must ensure that the self-perpetuation of ill advised policy does not manifest in such an important decision as the U.S. government’s use of military force. It must ensure that the approach it implements provides an opportunity for regular reassessment.

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<sup>489</sup> Barbara W. Tuchman, *The March of Folly: From Troy to Vietnam* (New York: Random House Trade Paperback ed., 2014, original copyright Random House Publishing 1984), 245.

<sup>490</sup> Breckenridge and Zimbardo, “The Strategy of Terrorism and the Psychology of Mass-Mediated Fear, Terrorism and Fear,” 10.

<sup>491</sup> Jones, “A Persistent Threat,” 59.

<sup>492</sup> Coleman, “Gaming for Clarity Recognizes Intelligence Biases.”

<sup>493</sup> Breckenridge and Zimbardo, “The Strategy of Terrorism and the Psychology of Mass-Mediated Fear,” 3–4.

<sup>494</sup> Jeh Johnson, “Jeh Johnson’s Speech on “National Security Law, Lawyers and Lawyering in the Obama Administration,” *Council on Foreign Relations*, February 22, 2012, <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.

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## VI. METHODOLOGY FOR EVALUATING THE AUMF AND ALTERNATIVES

We will be principled and selective when using military force and do so only when necessary and in accordance with all applicable law, as well as with U.S. interests and values.

—2014 Quadrennial Defense Review<sup>495</sup>

The U.S. government’s principled use of force, its respect of laws, and its balancing of U.S. values goes to the heart of this thesis. The goal of this particular chapter is to set forth a principled and selective approach that Congress can use when it reviews the AUMF and proposed alternatives. To be described in Chapter VIII, academics, politicians, and legal experts have offered or endorsed several alternatives to the AUMF. While this thesis recommends an alternative, the ultimate goal is to provide lawmakers with a methodology for evaluating and comparing all approaches. By establishing a set of criteria to evaluate the status quo and its alternatives, Congress will be better equipped to determine the most advantageous approach. This thesis uses four criteria for its analysis. These criteria can be used to determine if each approach 1) adheres to domestic law, 2) protects security, 3) respects international law, and 4) promotes positive precedent and avoids setting negative precedent. Each option is evaluated to determine whether it satisfactorily meets or does not meet the standards established in each criterion. These criteria have been developed using the information, critiques, and literature set forth in Chapters I through V. Their inherent importance should be familiar but is worth repeating under the discussion of methodology for evaluating the AUMF and its alternatives.

The effectiveness of the AUMF and its alternatives should be balanced with constitutional considerations.<sup>496</sup> An inverse relationship often exists between the preservation of security and that of constitutional protections.<sup>497</sup> Hence, Congress must consider narrowly tailored approaches to mitigating threats while respecting the legal

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<sup>495</sup> “2014 Quadrennial Defense Review,” 11.

<sup>496</sup> *Ibid.*, 13.

<sup>497</sup> Stephanie Blum, “Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution” (master’s thesis, Naval Postgraduate School, 2008), 142.

protection of personal liberty. The most advantageous approach is the one that best balances these two elements. Consequently, the criteria focusing on security and domestic legality are weighed heavily in this analysis.

#### **A. DOMESTIC LEGALITY**

The domestic legality criterion comprises several crucial considerations. It is the first criterion analyzed in this methodology for two reasons. First, if the approach fails to adhere to domestic law, it is unfeasible to expect that courts and the public will permit continued application of the approach. Second, this criterion focuses on the preservation of constitutional principles that form the foundation of the U.S. legal system and promote the preservation of liberty.

In the context of the AUMF, domestic legality considers two crucial elements: 1) constitutional checks and balances, and 2) due process protections. Of course, the U.S. government has asserted that constitutional protections must be weighed against the executive branch's responsibility to mitigate threats of violence to Americans. Consequently, the application of this criterion intersects with concepts incorporated into the security criterion section. Nonetheless, approaches are evaluated based on how well they preserve the separation of powers and due process principles into their legal architecture. As President Obama stated, "Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states."<sup>498</sup>

With respect to checks and balances, Congress must ask whether the proposed approach preserves constitutional separation of war powers between Congress and the executive branch. Constitutional checks and balances are central to the democratic foundation of the U.S. Constitution, as they protect against the accumulation of influence in one branch and minimize the abuse of power by government officials.<sup>499</sup> At the same time, debate between competing political representatives may lead to reduced expediency

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<sup>498</sup> Obama, "National Defense University."

<sup>499</sup> Blum, "Preventive Detention in the War on Terror," 145.

in defending the country. As such, Congress must protect its war authorities, and it must not infringe on the executive branch's constitutional powers to defend the country when it is infeasible for the president to seek authorization prior to utilizing force. War powers between the political branches have been discussed in literature pertaining to the AUMF and in court decisions examining the statute. Despite the need for an independent judiciary to provide a check on the executive branch's exercise of authority, the courts have shown a great deal of judicial deference to executive action under the AUMF. Thus, it is up to Congress to limit the executive branch's exercise of wartime authority. As such, this criterion focuses on an approach's likelihood that it will ensure that the executive branch does not erode the war powers of Congress.

The due process inquiry must address whether an approach will satisfy Fifth Amendment requirements by providing potential detainees and targets with adequate notice regarding what actions will result in the deprivation of their liberties. Evidentiary standards are also considered because the judiciary has determined that relaxed evidentiary standards apply to the government when its actions are authorized by the AUMF. The AUMF has been utilized to support the detention and use of lethal force against U.S. citizens. Thus, Congress must consider an alternative approach's adherence to Fifth Amendment protections aimed at preventing persons from being deprived of liberty without due process of law.

## **B. SECURITY**

According to the Obama administration, the AUMF has served as an effective authority to support counterterrorism operations around the world. Thus, Congress must consider whether proposed AUMF alternatives will preserve U.S. security. The security criterion focuses on whether a proposed approach is 1) narrowly tailored to mitigate current threats, 2) likely to maintain flexibility necessary for the executive branch to address a dynamic threat environment, 3) likely to promote the identification of threats based on a risk and probability analysis, and 4) likely to impact current counterterrorism operations, including the use of force against associated forces, enemy combatant detention, the use of military force in Afghanistan, and targeted killings.

When applying this criterion, Congress must consider criticisms regarding counterterrorism operations authorized under broad AUMF language. The executive branch's use of counterterrorism measures as supported by the AUMF implicates a complicated balancing of interests, and courts have strongly deferred to executive judgment in ordering these operations. As President Obama commented, "To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance."<sup>500</sup> This statement is true. Although the executive branch has benefited from broad interpretations of its authority and from nebulous definitions of associated forces and imminent attack, policymakers and academics have debated the effectiveness of some of these far-reaching interpretations and how they translate to counterterrorism measures. For instance, policymakers have argued whether U.S. drone strikes and organizational decapitation strategies actually increase security. Some believe these measures benefit terrorist recruitment and merely force groups to revise their organizational structures. Although Congress must consider current strategy and counterterrorism measures supported by the AUMF, Congress cannot simply assume that all these measures are effective in mitigating current terrorist threats.

### **C. INTERNATIONAL LEGALITY**

Under this criterion, Congress should compare the status quo and alternative approaches based on the likelihood that they would respect the identifiable norms of international law in several key capacities, including 1) self-preservation in the face of attacks from non-state actors residing abroad, 2) preemptive use of force, and 3) the laws of war. Common themes found in each of these categories are whether alternative approaches conform to international legal norms pertaining to proportionality and necessity in self-defense, whether they respect territorial sovereignty and the norm of non-intervention, and if enemy combatant protections are afforded to enemy forces depending on whether the conflict is considered internal or international in nature. By incorporating international legality into its evaluation of alternative approaches, Congress can do its utmost to ensure that it protects U.S. interests while pursuing an approach

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<sup>500</sup> Obama, "National Defense University."

accepted as credible by the international community. By doing so, Congress can contribute to the development of international legal norms as they apply to contemporary armed conflicts.

#### **D. PRECEDENT**

Congress's approach to force authorization will set precedent in several important areas, including the weaning off U.S. military force and its replacement with a more normative law enforcement authority, a goal that may be accomplished through the "versatile use of force." Precedent will also be set on issues of transparency and opportunities for reassessment. All three of these precedent-setting opportunities relate to one another, although they are addressed separately within this criterion.

As demonstrated in Chapter V, military force is not always the most advantageous recourse in mitigating threats. Sometimes, law enforcement tools prove more successful in threat mitigation. U.S. operations in Iraq and Afghanistan have highlighted difficulties in countering a threat that conceals itself in a civilian population. Overreliance on military force can result in civilian casualties and increased terrorist group recruitment. In addition, it is anticipated that the United States will undertake a layered approach to countering terrorist threats. Therefore, it needs to be agile in how it postures and utilizes assets. Congress should examine how each approach affects the executive branch's ability to promote the versatile use of force.

Regarding transparency and accountability, the more the executive branch is held accountable to Congress and the judiciary in its exercise of authority, the more likely it will be mindful of and conscientiously balance the preservation of constitutional principles with U.S. security interests.<sup>501</sup> The extent to and manner with which the executive branch should accomplish such balance is difficult to ascertain, for political branches tend to hedge towards secrecy when dealing with matters related to security. Consequently, this factor is weighed with an awareness of the tension between government transparency and the preservation of security. Regardless of the extent and

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<sup>501</sup> Blum, "Preventive Detention in the War on Terror," 144.

manner, greater transparency will promote debate and reassessment of congressional and executive action.

On a broader level, Congress must continuously reevaluate force authorizations. Reevaluation must be promoted to prevent dogged loyalty to an established policy, for blind loyalty in a policy is by definition no longer objective decision making. Blind loyalty invites tunnel vision in this nation's leaders and fosters a desire for information consistent with policy, rather than for objective information. If reevaluation is not built into an approach and understood by this country's leaders as a necessary part of the policymaking process, then policy rationalization at the highest levels will occur. Ill advised policies must not be perpetuated simply to justify past decisions.

## **E. CONCLUSION**

Congressional members did not have much time to reflect on the AUMF before they approved it in 2001. Congress debated the AUMF only three days after the 9/11 attacks and immediately prior to being rushed to a memorial service for the victims of the 9/11 attacks. Before Congress commenced deliberating this momentous vote, Senator Daschle set forth logistics of getting to the 9/11 prayer and remembrance service to be held that day, "we want to get on the buses just as quickly as possible after this vote [on the AUMF]. For those who are going to be attending the memorial service, they will be right down in front of the steps. So we can accommodate all Senators by quickly going, as soon as the vote has been completed, to the buses for transportation to the National Cathedral."<sup>502</sup> Senators considered the AUMF in the face of a national crisis. The circumstances surrounding AUMF passage forestalled extensive deliberation regarding the full extent of potential repercussions pertinent to the passage of the AUMF.

Now, 13 years later, Congress is afforded the luxury of time and hindsight for thoughtful analysis of the U.S. government's use of force moving forward. The primary goal of this thesis is to convince Congressional decision makers to consider and apply the criteria in this chapter to the AUMF discussion. However, Congress decides to act on the AUMF, it goes without saying that evaluations of its effectiveness and possible

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<sup>502</sup> "Congressional Record, Proceedings and Debates of the 107th Cong."

modifications or use of alternatives will be subject to perceptions about current terrorist threat level information.<sup>503</sup> Nonetheless, analysis of the repeal or modification of the AUMF deserves more in-depth analysis than it has thus far received, and the above criteria should play a central role in establishing a framework for a comprehensive analysis aimed at predicting potential consequences of AUMF modification. By examining each approach from the perspective of whether it is likely to preserve domestic legality, security, international legality, and promote positive precedent, lawmakers will have a framework with which to determine the most advantageous approach for mitigating terrorist threats while preserving democratic principles.

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<sup>503</sup> Bradley and Goldsmith, “Congressional Authorization,” 2056.

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## VII. COUNTERING EVOLVING TERRORIST THREATS: EVALUATING CONTINUED AUMF APPLICATION AND ALTERNATIVE APPROACHES

So America is at a crossroads. We must define the nature and the scope of this struggle, or else it will define us. We have to be mindful of James Madison’s warning that ‘No nation could preserve its freedom in the midst of continual warfare.’ Neither I, nor any President, can promise the total defeat of terror. We will never erase the evil that lies in the hearts of some human beings, nor stamp out every danger to our open society. What we can do—and must do—is dismantle networks that pose a direct danger, and make it less likely for new groups to gain a foothold, all while maintaining the freedoms and ideals that we defend. And to define that strategy, we have to make decisions based not on fear, but on hard-earned wisdom.

—President Barack Obama<sup>504</sup>

Members of Congress have criticized the continued application of the AUMF and called for its repeal or modification. Even the president has acknowledged that the AUMF must be altered, saying in 2012 that he intends “[t]o engage Congress about the existing [AUMF], to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.”<sup>505</sup> The AUMF has been the subject of numerous academic articles, but relatively few have evaluated it substantively in terms of continued application.

Academics, politicians, and legal experts have offered or endorsed several alternative approaches to the AUMF. Proposals generally argue for the expansion or narrowing of the authorization. However, among these proposals two leading approaches have emerged. Both deliver substantive detail in their proposals and thoughtful analysis of counterarguments, while maintaining very divergent views on how Congress should proceed.

The leading approach argues that Congress should repeal or sunset the AUMF and enact a new law delegating force authorization to the executive branch to enable it to

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<sup>504</sup> Obama, “National Defense University.”

<sup>505</sup> *Ibid.*

designate groups as targets through a robust administrative process (“General Criteria Plus Listing Approach”). The second proposal advocates that Congress should repeal the AUMF and issue no new force authorization, though it recommends examination of the threat posed by AQAP. Instead, the U.S. government should rely on law enforcement and the president’s Article II powers to mitigate terrorist threats (“Article II Approach”). This thesis recommends an alternative approach that involves sunseting the AUMF, statutory modifications, the issuance of a new force authorization narrowly tailored to achieve security goals, if necessary, and exploration of law enforcement authorities (“Tailored Approach”). This chapter compares and evaluates the status quo AUMF, the two leading approaches, and the alternative approach proposed by the author using the methodology described in Chapter VI, whose cornerstones are domestic legality, security, international legality, and precedent considerations.

## **A. THE STATUS QUO APPROACH—CONTINUED UTILIZATION OF THE AUMF**

### **1. Description**

A single sentence comprises the force authorization against those who perpetrated the 9/11 attacks, 60 words. These words have been described in detail in prior chapters. National security journalist Gregory D. Johnson’s depiction of the AUMF as “the most dangerous sentence in U.S. history”<sup>506</sup> is apt. From the use of military forces, to drone strikes, to preventive detention, both the Bush and Obama administrations have relied on this sentence to support a variety of counterterrorism measures, without regard to geographic or temporal boundaries.

No one would ever know that the Bush and Obama administrations counted on this sentence based on the May 21, 2014 testimony of the Obama administration’s top lawyers before the Senate Committee on Foreign Relations. Mary E. McLeod, Department of State Principal Deputy Legal Advisor, and Stephen W. Preston,

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<sup>506</sup> Gregory D. Johnson, “60 Words and a War without End: The Most Dangerous Sentence in U.S. History,” BuzzFeed, January 16, 2014, <http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most>.

Department of Defense General Counsel, claimed that the President does not need congressional authorization to attack terrorists abroad.<sup>507</sup>

In an effort to pinpoint whether any counterterrorism measures would be affected if Congress repeals the AUMF, senators hammered the witnesses with inquiries regarding whether the president relies upon AUMF authority. According to the witnesses, repealing the AUMF will not adversely affect the executive branch's use of counterterrorism measures in most cases. This assertion directly contradicts representations made by Obama administration officials at a senate hearing in 2013.<sup>508</sup>

As such, what remains are two positions at odds with each other, the AUMF as the source of the executive branch's use of such measures—as cited in recent history and judicial doctrine—and the aforementioned witness' argument that the source of the executive branch's use of such measures stems from the powers inherent in the presidency.

As these two positions are at odds with each other, clarification is required. As discussed in Chapter III, the executive branch has relied extensively upon the AUMF to support its detention authority, and published court opinions cite this law in authorizations to detain enemy combatants for the duration of hostilities. If the AUMF is repealed, the administration's detention authority arguably ceases to exist in a variety of contexts. In addition, the U.S. DOJ relied upon AUMF authority in its legal reasoning supporting the legality of targeted killings of U.S. citizens abroad. The law was cited extensively in the recent dismissal of a lawsuit challenging the targeted killing of U.S. citizen Anwar al-Aulaqi. As Jeh Johnson explained in a 2012 speech, “[i]n the conflict against al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the use of Military Force . . . .”<sup>509</sup>

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<sup>507</sup> *Authorization for Use of Military Force After Iraq and Afghanistan*; Eli Lake, “Obama Administration Channels Cheney, Claims Unlimited War Powers,” *The Daily Beast*, May 21, 2014, <http://www.thedailybeast.com/articles/2014/05/21/obama-admin-channels-cheney-claims-unlimited-war-powers.html>.

<sup>508</sup> Zenko, “America's Forever War.”

<sup>509</sup> Johnson, “National Security Law, Lawyers and Lawyering in the Obama Administration.”

When it comes to reliance upon the AUMF, the executive branch has boxed itself in; the truth is that when challenged in court, both the Bush and Obama administrations have relied upon AUMF authority to support a variety of counterterrorism measures. As Senator Kaine said at the May 21st hearing, Congress needs to evaluate continued application of the AUMF, and “if there is an effort to refine [the AUMF], we have to refine around . . . concerns.” Congress and the executive branch must work together to frankly identify and evaluate such concerns to conduct an effective appraisal of continued AUMF application. An analysis follows of what should be pertinent in that discussion.

## **2. Analysis**

### ***a. Domestic Legality***

In applying Domestic Legality to this assessment of continued application of the AUMF, the discussion returns to considerations analyzed in Chapter III. While the AUMF has weathered extensive judicial review, it fails to protect constitutional principles preserving checks and balances and the due process of law. The executive branch has stretched interpretations of AUMF language to a breaking point, and courts, which have afforded the executive branch great deference, have broadly interpreted AUMF language. The executive branch’s application of the AUMF to groups not envisioned by Congress as falling within its authorization makes suspect further executive action taken under the AUMF.

The executive branch’s broad application of the AUMF is eroding congressional war powers. Fundamentally, Congress has the power to declare war and the executive branch has the power to wage it. Historically, the interpretation of these constitutional powers has allowed that the president is fully authorized to use military force to respond to armed attacks against the United States. However, the executive branch has since used the AUMF to target members of groups that did not exist on September 11, 2001. Targeting these groups runs contrary to the AUMF’s 9/11 nexus language, the same language through which Congress sought to limit the force authorization’s scope. Further, the executive branch has not demonstrated how such actions fall within its Article II powers. It is unclear whether these groups pose threats of such an imminent nature that it

would be infeasible for the president to obtain congressional consent prior to using lethal force against them. Thus, while the AUMF itself would likely be deemed legal if challenged in court, continued stretching of its language to cover groups with nebulous ties to AQ does not support its domestic legality from the perspective of putting potential targets on notice that their liberty may be deprived under the Fifth Amendment.

When Congress passed the AUMF, its war powers collided with those of the president, which provided the president with a peak level of authority. This authority resulted in courts exercising great judicial deference to the executive branch and limited recourse in challenging executive action. This collision of war powers itself is not a blunder. The primary purpose of a force authorization is to provide the president with more wartime authority. However, the AUMF is too broad in that it does not specifically name nations or groups—it gives this power, indeed, responsibility to the president—thereby, eroding Congress’s power to declare war. When combined with exceptionally broad executive interpretations of an already expansive statute and judicial deference, constitutional checks and balances are effectively annulled.

Although Congress hastily deemed the WPR sufficient to reign in executive power in applying the AUMF, the statute has proven ineffective at limiting the presidential use of military force abroad. The vague statutory phrasing of requirements imposed upon the executive branch does not provide much in the way of limiting the executive use of military force. Specifically, the statute does not address how the executive branch must “consult” with Congress, if possible, prior to the use of military force. The statute also does not describe what constitutes an imminent threat to the United States. Congress’s reliance on the WPR to provide a check on the executive branch’s use of force under the AUMF needs to be revised.

The same AUMF attributes that transgress checks and balances threaten the preservation of due process rights. Due process rights have long been one of the first constitutional protections sacrificed in the name of security. While Congressman Abraham Lincoln took a stand against the executive branch’s excessive extension of war powers, Lincoln as president felt it necessary to rescind basic constitutional due process protections during the U.S. civil war to preserve security. He defended his decision to

Congress by asking whether when an insurrection had undermined the “whole of the laws . . . are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”<sup>510</sup>

Courts have held that the AUMF itself satisfies due process requirements by providing details adequate to put potential detainees on notice. Nonetheless, the secrecy with which the executive branch has classified which groups qualify as associated forces runs contrary to the due process protections the constitutional framers aimed to preserve. Such secrecy fails to adhere to the due process principle requiring fair notice since the executive branch refuses to pinpoint exactly which groups qualify as the enemy in this armed conflict.<sup>511</sup>

Also troubling are relaxed evidentiary standards applied to the designation, detention, and targeting of enemy combatants—including U.S. citizens—during war. Some courts have even invoked a “walks like a duck test” to determine whether individuals challenging their detention under the AUMF are more likely than not a member of AQ or the Taliban. Thus, the AUMF in and of itself is legal, but broad interpretations of its scope, combined with its lack of notice about those targeted, as well as the low evidentiary standards applied to the executive branch’s justification of actions that result in the deprivation of liberty, ultimately degrade constitutional protections of due process.

While the AUMF, 9/11 nexus, and WPR implications seemingly preserved the constitutional balance of powers and due process, broad application and interpretation since passage of the AUMF have eroded these constitutional principles. When the AUMF was passed, only Representative Barbara Lee voted against it, warning, “[a]s we act, we must not become the evil we deplore.”<sup>512</sup> Her reasoning needs to be revisited, as the

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<sup>510</sup> Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (San Jose, CA: Simon & Schuster, 2006), 355.

<sup>511</sup> Daskal and Vladeck, “After the AUMF,” 142.

<sup>512</sup> John Knefel, “A Baffling Hearing on Endless War,” *Rolling Stone*, May 21, 2014, <http://www.rollingstone.com/politics/news/a-baffling-hearing-on-endless-war-20140521>.

continued application of the AUMF to emerging terrorist threats is not legally sound. Consequently, the AUMF does not satisfy the domestic legality criterion.

***b. Security***

In evaluating the AUMF and its effects on security, it is worth mentioning again that the AUMF has proven effective in degrading the capabilities of AQ and the Afghan Taliban. It also bears repeating that core AQ may still pose a threat to the United States, although the group's capabilities are questionable. In addition, the court's broad AUMF interpretations support its applicability to the primary AQ affiliate that threatens the U.S. homeland: AQAP.<sup>513</sup> The AUMF provides the president with broad and flexible authority to mitigate threats from these groups. If Congress repeals or sunsets the AUMF, the president's authority to conduct sustained operations against them would cease.

Despite the AUMF's effectiveness at countering these groups, dire concerns have been raised about the AUMF, which have been covered in this thesis thus far. As Michael B. Mukasey testified before the Senate Armed Services Committee on May 21, 2014, "Events since September 11, 2001, including success of two administrations in combating both al Qaeda and the Taliban, have made the AUMF not only obsolete, but dangerously so; future events—including the current administration's decision to cease the war in Afghanistan by mid-December 2014—threaten to make it even more irrelevant."<sup>514</sup> Core AQ's relocation to Pakistan has left the continuing use of force against the Afghan Taliban under AUMF authority in doubt.<sup>515</sup>

The AUMF is quickly becoming obsolete because of its explicit nexus to the 9/11 attacks 13 years ago. The decentralization of AQ has resulted in the proliferation of terrorist groups that did not exist on 9/11 but may threaten the United States today, and the AUMF's coverage of such groups is wearing thin. Mukasey articulated this concept well, noting that it has become "increasingly difficult to identify [groups] with any

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<sup>513</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 2.

<sup>514</sup> *Authorization for Use of Military Force After Iraq and Afghanistan* (testimony of Michael B. Mukasey, former Attorney General of the United States).

<sup>515</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 3.

certainty as ‘affiliates’ or ‘supporters’ of al Qaeda, and we find ourselves going through increasingly fanciful contortions in order to fit them within the definitions of the AUMF so as to permit action to be taken against them.”<sup>516</sup> Even entities affiliated with AQ may nonetheless operate with a substantial degree of independence.<sup>517</sup>

Efforts to link groups to AQ aside, Congress must consider another question crucial to security - how does the executive factor risk and probability into its analysis of which groups it can target under the AUMF? This analysis impacts the U.S. government’s ability to narrowly tailor counterterrorism measures to mitigate terrorist threats to the United States. Considering Congress delegated the responsibility to the executive branch to authorize force against specific groups within AUMF parameters, it would benefit Congress to know how this designation occurs as it reevaluates the AUMF. The executive branch refuses to specify what constitutes an imminent threat. Currently, it will not disclose what groups it has determined constitute AQ associated forces, much less the reasoning supporting these decisions. As such, the extent to which the executive branch weighs both the intent and the capability of potential threats is unclear.

While this broad designation of authority is beneficial in that it provides the executive branch with agility in decision-making, the actual threat analysis utilized by the executive branch may affect U.S. security. For instance, if the executive branch is utilizing military force against groups that it has determined pose a threat to the interests of U.S. allies, and the group is not capable of threatening U.S. interests or the U.S. homeland, U.S. counterterrorism measures may breed resentment and instability and little to no decipherable security benefit. If the executive branch is only targeting groups under the AUMF that intend to attack the U.S. homeland and have the capability to do so, the executive branch has a better argument that it is narrowly tailoring its security measures, and as a result, passes legal muster. While acknowledging that valid security concerns indeed exist with releasing too much threat information, the fact that the AUMF does not have a mechanism for ensuring some modicum of transparency in this process may ultimately hinder security efforts.

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<sup>516</sup> *Authorization for Use of Military Force After Iraq and Afghanistan.*

<sup>517</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 4.

Despite uncertainty regarding how the executive branch decides whether to use military force against certain groups under the AUMF, it is clear that the president currently relies on AUMF authority for counterterrorism operations. As already described, repealing or amending the AUMF will adversely affect the executive branch's domestic authority to continue using certain counterterrorism measures. Specifically, detention of enemy combatants and targeted killings under the AUMF would have to cease.

Recent events in Iraq also factor into the application of the security criterion. On May 21, 2014, Obama administration officials publicly acknowledged that the 2002 Authorization for Use of Military Force in Iraq (AUMF of 2002) is obsolete and supported its repeal.<sup>518</sup> The AUMF of 2002 provided domestic legal support for American operations in Iraq, which commenced in early 2003.<sup>519</sup> U.S. troops completed their withdrawal from the country in late 2011.<sup>520</sup> On June 10, 2014, fighters from ISIL seized Mosul.<sup>521</sup> The security situation in the country has continued to devolve. President Obama responded by ordering military forces to strike ISIL targets in Iraq. Such events may ultimately discourage AUMF repeal or revision, at least in the near term, because of the risk that security could further disintegrate.

The president's use of airstrikes in Iraq against ISIL has again brought checks and balances and security to the forefront of discussion. Constitutional law experts have debated whether the president is authorizing military force in Iraq under the AUMF of 2002, under his Article II powers, or under other authority.<sup>522</sup> Regardless, the AUMF against the perpetrators of 9/11 does not authorize force against ISIL because AQ severed ties with the former affiliate. While the AUMF of 2002 remains on the books, members

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<sup>518</sup> *Authorization for Use of Military Force After Iraq and Afghanistan*.

<sup>519</sup> AFP, "Iraq Crisis: Timeline since 2003 U.S. Invasion," *The Telegraph*, June 11, 2014, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10891635/Iraq-crisis-timeline-since-2003-US-invasion.html>.

<sup>520</sup> *Ibid.*

<sup>521</sup> "Timeline: Tracking ISIS' Onslaught in Iraq over the Last Two Weeks," *FirstPost*, June 24, 2014, <http://www.firstpost.com/world/timeline-tracking-isis-onslaught-in-iraq-over-the-last-two-weeks-1585907.html>.

<sup>522</sup> Bomboy, "Constitutional Debate."

of Congress have argued that President Obama must obtain new congressional authorization for the current Iraq air strikes.<sup>523</sup> While some members of Congress have demonstrated an interest in proposing legislation to authorize continuing operations against ISIL,<sup>524</sup> others have expressed a reluctance to get involved.<sup>525</sup>

To summarize, the AUMF has increased U.S. security by enabling the executive branch to degrade AQ, the Taliban, and associated forces. The broad authority provided in the AUMF, the flexibility it affords the executive branch, and the broad application of the statute to groups like core AQ, and arguably, AQAP make continued AUMF application a viable option under this criterion. However, the AUMF's language does not apply to ISIL, and its application to groups that did not exist on 9/11 is questionable and erodes checks and balances by effectively permitting the executive branch to identify targeted groups within very broad, questionable AUMF parameters. Although the AUMF has proven effective at promoting U.S. security in the past, it no longer satisfies the security criterion.

### *c. International Legality*

Chapter IV has already discussed the general issue of international law considerations as applied to the current AUMF; this section, which applies international legality to the course of action that would maintain the AUMF as it is, obviously covers similar ground. Although the two discussions greatly overlap, it is worth recasting it in a different light in the spirit of forecasting and assessment.

As detailed earlier, the Bush and Obama administrations have invoked self-defense authorities under international law, along with the AUMF, to support counterterrorism measures abroad aimed at protecting interests of the United States and its allies. Unfortunately, the executive branch's presumptive public statements declaring

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<sup>523</sup> Niels Lesniewski, "Tim Kaine: Obama Needs Congress to OK Iraq Air Strikes," Iraq News, August 12, 2014, <http://blogs.rollcall.com/wgdb/obama-congress-air-strikes-iraq-kaine/?dcz=>.

<sup>524</sup> Brett Logiurato, "Key Democratic Senator Wants Obama to Bomb ISIS in Syria after Journalist's Brutal Killing," *Business Insider*, September 2, 2014, <http://www.businessinsider.com/bill-nelson-isis-legislation-syria-airstrikes-obama-2014-9>.

<sup>525</sup> Jake Sherman and John Bresnahan, "Hill Leaders Duck ISIL," *Politico*, September 8, 2014, <http://www.politico.com/story/2014/09/congress-isis-110727.html>.

that these measures fall within an international legal right to self-defense under Article 51 of the UN Charter are flawed. Preemptive U.S. actions conducted outside of the area of active hostilities under AUMF authority conflict with the norm of non-intervention. In addition, the U.S.'s categorization of an armed conflict abroad as internal, presumably to avoid the broader humanitarian law protections otherwise afforded when categorized as "international armed conflicts," is incongruent with its self-defense assertions and could ultimately hinder the development of contemporary international law in this arena. While the United States faces an uphill battle in preserving its interests while adhering to international obligations, it is crucial that the United States develop policy in accordance with the general norms of non-intervention, respect for state sovereignty whenever possible, and the preservation of the highest humanitarian standards.

The language of Article 51 permits self-defense only in the event of an armed attack by one state against another state. As such, counterterrorism measures against states that have not conducted an armed attack on the United States are not permitted under a technical reading of Article 51. A narrow interpretation of the right to self-defense would preclude AUMF counterterrorism measures against many groups linked to AQ that have not directly attacked the U.S. homeland and whose actions are not imputable to a state actor. Seen in this light, international law has yet to evolve to address contemporary armed conflict.

Congress should afford a more moderate interpretation of international law to U.S. policy. As Geoffrey S. Corn and Eric Talbot Jenson argue in "Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror,"

If . . . the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context

of transnational counterterrorist combat operations serves to frustrate that purpose.<sup>526</sup>

The fundamental norms of international law should be respected, but lawmakers may also utilize shifts in the international legal landscape since 9/11 to best preserve U.S. security through an approach acceptable to the international community. This approach is now possible because international institutions, such as the UN, adjusted their narrow reading of Article 51 after the 9/11 attacks, as evidenced by their endorsement of the U.S.’ use of force against the non-state actors who perpetrated the 9/11 attacks and those who harbored them.

Central to this shift—and to the conflict between U.S. counterterrorism efforts under the AUMF and international law—is the idea that a state can deploy force abroad to prevent imminent attack from a non-state actor. Specifically at issue is the definition of an “imminent threat,” one that might justify self-defense and the resulting violation of another state’s sovereignty under international law. Dominant interpretations of this right agree that peril must be grave and immediate, leaving the state no chance for deliberation before defending itself.<sup>527</sup>

U.S. counterterrorism strategy assumes a broader interpretation of what constitutes an imminent threat, and this definition results in uncertainty regarding whether the U.S. government’s response to threats are necessary and proportional to the dangers presented by terrorists. According to the U.S. DOJ, clear evidence that a specific attack will occur in the immediate future is not required to invoke the international right of self-defense.<sup>528</sup> Instead, a group’s continual plotting of attacks against the U.S. homeland, U.S. allies, or their interests justifies actions taken under the AUMF. The Obama administration continues to rely on this reasoning to conduct operations outside areas of active hostilities. For instance, the U.S. military takes such actions under AUMF

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<sup>526</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 5, quoting Geoffrey S. Corn & Eric Talbot Jensen, “Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror,” *Temple Law Review* 81 (2008): 799.

<sup>527</sup> Resolution 42/159, “Measures to Prevent International Terrorism”; Caroline Incident; “A More Secure World: Our Shared Responsibility.”

<sup>528</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 6–7.

authority in Yemen and Somalia. It is unclear, however, how such operations protect the United States from a grave, instant, and overwhelming peril, as required by international law. Granted these targets may threaten U.S. interests, but open source information fails to substantiate that these threats are imminent enough to flout the norm of non-intervention under international law, and it does not demonstrate that the U.S. response is really necessary and proportional to the threat posed.

Disagreement has also occurred in the international realm regarding how to apply the laws of war to terrorist actors. As described in Chapter IV, armed conflict with terrorist groups does not fit nicely into Geneva Convention categorizations of international and internal armed conflict. The classification of AUMF counterterrorism efforts as international versus internal is important because it affects legal responsibilities. The protections afforded to qualified combatants captured in internal conflicts are lower than those detained in international conflicts.

The United States categorizes its conflict with AQ, the Taliban, and associated forces as an internal armed conflict because it is not a “clash between nations.”<sup>529</sup> The United States cites the AUMF’s lack of geographic limitations to support this claim.<sup>530</sup> This enables the United States to afford detainees only those protections applied in internal armed conflicts. In addition, the U.S. government argues that because this conflict is not an international armed conflict, it may conduct operations outside of areas of active hostilities.<sup>531</sup>

This perspective on international law affords the U.S. government a great deal of discretion in conducting counterterrorism operations under the AUMF, but it also, in effect, negates international legal norms related to non-intervention and protection of state sovereignty. In addition, it has led many international human rights groups to criticize the lower detainee protections afforded in this armed conflict under the AUMF. As Zeke Johnson, the director of Amnesty International’s security and human rights

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<sup>529</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

<sup>530</sup> U.S. DOJ, “Lawfulness of a Lethal Operation,” 3.

<sup>531</sup> *Ibid.*

program asserted, the AUMF is a “[c]entral pillar of the U.S. government’s fundamentally flawed ‘global war’ theory that weakens humans rights protections for all of us.” He further explains, “Armed groups should be countered through the criminal justice system in compliance with human right standards.”<sup>532</sup> While countering armed groups through the criminal justice system may not always be feasible in the context of armed conflict, every effort should be made to preserve such a system to provide legitimacy and reduce resentment. Adherence to international norms may impact international support for U.S. counterterrorism policy, as well as support from U.S. allies.

In sum, the United States is in a tough spot because international law does not adequately address how states may mitigate terrorist threats from non-state actors. Consequently, it is justified in utilizing a moderate reading of international law to protect its security. However, the Bush and Obama administrations’ overbroad interpretations of what constitutes an imminent threat results in violations of the international norm of non-intervention. While the AUMF’s initial passage and utilization met international legality standards, keeping the AUMF will continue to strain its application’s tenuous harmony with international law. As such, the AUMF does not satisfy the international legality criterion.

*d. Precedent*

The AUMF has had a precedent-setting influence in the realm of the versatile use of force, government transparency, and opportunity for statutory reassessment of the policy. The most troubling precedent setting concerns that have arisen, and are likely to proliferate in both current AUMF application and possible continued application, concern the latter two considerations.

The AUMF has afforded the executive branch expansive discretion and flexibility regarding the use of force for counterterrorist threats anywhere in the globe. The lack of geographic and temporal limitations in the authorization ensures that the president has the authority needed to be agile in where and how it postures military assets. In addition, the AUMF arguably permits the use of different types of force, as demonstrated in the U.S.

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<sup>532</sup> Knefel, “A Baffling Hearing on Endless War.”

government's transition from use of maximum force to more counterinsurgency-based operations in Afghanistan. However, how AUMF application translates to addressing a broad spectrum of conflict is questionable.

It may be argued that by authorizing the president's use of military force to counter terrorist threats, the president will opt to utilize maximum military force exclusively. Moreover, such force may not be the most effective in contemporary conflicts where enemies may hide amongst civilians. The AUMF's lack of temporal boundaries has also enabled the use of military force in other countries for extended engagements. As Gates observed, in this conflict "[w]e cannot kill or capture our way to victory."<sup>533</sup>

In sum, the AUMF does afford the executive branch with a great deal of flexibility and discretion in employing varying degrees of force abroad. However, the statutory authorization for military force and its lack of an end date promote the sustained use of maximum military force in other countries, while this approach may not be the most advantageous to countering terrorist targets. Continued application of the AUMF will continue to allow this broad discretion, and possibly pave the way for even greater use and abuse of force powers.

As an extension of the analysis of precedence on this option, some revision to the status quo is urged to head off the direst pitfalls of continued utilization of the AUMF. First, Congress should consider denoting a termination date for the AUMF, and second, it must refine statutory authority for the use of a law enforcement mechanism abroad for future terrorist conflicts. These addenda will aid the U.S. government by allowing it to adjust to asymmetrical terrorist warfare, all the while promoting adherence to the proportionality and necessity requirements of international law.

Congress's failure to include an end date in the AUMF has effectively abrogated opportunities for reassessment. Thus, it is 13 years later, and Congress has still not amended the AUMF. The lack of reassessment impedes accountability in ensuring that

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<sup>533</sup> Hughs, *The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies*, 121.

the policy underlying the AUMF is still sound. The lack of an AUMF sunset permits the self-perpetuation of policy that may be informed by groupthink and fear, rather than logic. The decision to go to war is arguably one of the most important a country can make, and its continued decision to stay at war should be treated as just as important.

Continuing the status quo also exacerbates issues of transparency. Currently, the public cannot even debate the versatile use of force if the executive branch refuses to disclose the groups with which the nation is at war. Most disconcerting is the secrecy regarding which terrorist groups the executive branch classifies as “associated forces.”<sup>534</sup> The public should be afforded the opportunity to debate the groups against which the U.S. military uses lethal force.<sup>535</sup> Recently, Obama administration attorneys refused even to discuss what groups they currently deem covered by AUMF authority.<sup>536</sup>

In addition, the executive branch has refused to provide numerous other details regarding its operations abroad under the AUMF. For instance, the legal reasoning supporting the targeted killings of U.S. citizens abroad was only released after it was leaked to the media, and the administration provided its full justification only after a rare court order to do so. As the AUMF provides such broad authority to the executive branch to make wartime decisions, courts have been reluctant to force the executive branch to disclose information. This judicial deference is especially concerning when it effectively permits the executive branch to shroud evidence supporting preventive detention in secrecy from those challenging their detentions. This lack of government transparency threatens the preservation of constitutional principles, including those preserving checks and balances and due process rights.

While the AUMF permits flexibility in the versatile use of force, it fails to set positive precedent in the areas of government transparency and accountability. As such, it does not satisfy the precedent criterion.

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<sup>534</sup> Daskal and Vladeck, “After the AUMF,” 142.

<sup>535</sup> *Ibid.*

<sup>536</sup> Knefel, “A Baffling Hearing on Endless War.”

*e. Conclusion*

Batting 0 for 4, the AUMF does not satisfy any of the criteria set forth in this thesis. The AUMF should no longer serve as the principal authority supporting counterterrorism measures because it does not narrowly tailor force authorization to a threat in a manner that preserves constitutional principles. Gideon Welles, Secretary of the Navy during Lincoln’s presidency, understood the complex balancing of powers between faithful execution of the constitution and security. His commentary on another armed conflict that defied traditional norms of warfare at the time—the U.S. Civil War — seems particularly relevant to the situation at hand, “government will, doubtless, be stronger after the conflict is over than it ever has been, and there will be less liberty.”<sup>537</sup>

In addition, the AUMF stretches the boundaries of international law in a way that will likely result in lost credibility amongst the international community and a lost opportunity to shape international law that to date is unclear. Finally, although the law may permit the use of versatile force, it sets negative precedent when it comes to accountability and the transparent use of force. As such, Congress should work towards repealing the AUMF, and it should modify its provisions in the meantime in the manner mentioned above.

**B. THE GENERAL CRITERIA PLUS LISTING APPROACH—  
CONGRESSIONAL DELEGATION OF AUTHORITY TO THE  
EXECUTIVE BRANCH**

**1. Description**

The leading alternative approach—the General Criteria Plus Listing Approach—was crafted by Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes of Stanford’s Hoover Institution. It is outlined in a national security and law essay titled “A Statutory Framework for Next-Generation Terrorist Threats.”<sup>538</sup> In this approach, Congress provides statutory criteria for the executive use of force against

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<sup>537</sup> Goodwin, *Team of Rivals*, 355.

<sup>538</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework.”

terrorist threats.<sup>539</sup> The executive branch must then identify groups covered by that force authorization through a robust administrative process.<sup>540</sup> Proponents suggest modifying the U.S. State Department’s Foreign Terrorist Organization designation process for this purpose. This process entails the Secretary of State consulting with other departments and notifying Congress prior to designating groups as terrorist organizations.<sup>541</sup> This designation results in certain statutory repercussions for these groups.<sup>542</sup>

In essence, this approach will serve as an AUMF expansion aimed at providing the executive branch with the means to address emerging terrorist threats—threats that the AUMF arguably does not cover. Proponents of this approach argue that it limits the current overbroad executive power while preserving the flexibility for the president to mitigate evolving threats.<sup>543</sup> They also argue that this system promotes transparency by standardizing a process through which force is authorized against terrorist groups and their members.<sup>544</sup>

## **2. Analysis**

### ***a. Domestic Legality***

The General Criteria Plus Listing Approach presents significant checks and balances and due process challenges. Congress’s delegation of authority to the president to identify and authorize military force will erode congressional power to declare war all the while expanding executive war powers. It also may appear to place the United States on a permanent war footing and diminish the potential for continued congressional involvement in force authorizations after it develops the listing criteria. Nonetheless, it does preserve Congress’s role to some degree because of the control it would have over the crafting of statutory criteria.

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<sup>539</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 10.

<sup>540</sup> *Ibid.*

<sup>541</sup> *Ibid.*

<sup>542</sup> *Ibid.*

<sup>543</sup> *Ibid.*

<sup>544</sup> *Ibid.*

This approach diminishes checks and balances by essentially delegating the congressional power to declare war on non-state actors to the executive branch. Proponents counter this point by arguing that Congress often affords the president great discretion in deciding against whom to use force.<sup>545</sup> This point is well taken, as the AUMF effectively does allow this discretion. However, the fact that Congress has a history of providing the executive branch with such discretion does not mean it should continue to do so. They further articulate that Congress reserves its authority by specifying the criteria for the use of force, as well as the administrative reporting and temporal limitations on the listing process.<sup>546</sup> They argue that this process “best cabins presidential power while at the same time giving the president the flexibility he needs to address emerging threats.”<sup>547</sup>

To delegate future force authorizations to the executive branch via statute—as opposed to affording the executive branch discretion within an authorization issued by Congress—negates the separation of war powers in the U.S. Constitution.<sup>548</sup> In essence, this delegation of authority to the president bypasses Congress’s constitutional power to declare war. As critiques Daskal and Vladeck explain, the Founding Fathers understood that military force authorization should not be “an *ex ante* delegation to the President to make unreviewable decisions to go to war a some future date against some as-yet-unidentified entity . . . The proposal to delegate such force authorizations to the President threatens the carefully calibrated balance of powers enmeshed within the Constitution, essentially asking Congress to surrender one of its most important functions to the Executive.”<sup>549</sup>

The statutory criteria in this approach would need to preserve checks and balances specifically, as well as due process protections. Such specificity can mitigate the risk of

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<sup>545</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 10.

<sup>546</sup> *Ibid.*, 10–11.

<sup>547</sup> *Ibid.*, 10.

<sup>548</sup> Daskal and Vladeck, “After the AUMF,” 138.

<sup>549</sup> *Ibid.*

the executive branch acting counter to congressional intent. It also may provide notice to potential targets for due process purposes.

The proponents of this approach provide an example of such specificity, asserting that Congress might “authorize force against ‘an organization with sufficient capability and planning that it presents an imminent threat to the United States.’”<sup>550</sup> Utilizing such language would help Congress retain some control over the definitions used by the executive branch in authorizing military force against terrorist groups. However, this approach would likely suffer from a shortcoming already discussed in relation to the AUMF; the executive branch will likely assert broad interpretations of what constitutes an imminent threat, and an extension of executive authority may result. In addition, this sort of vague language may not provide adequate notice for due process purposes.

This approach is especially concerning because of the deference courts will be obligated to afford to the executive branch and the due process concerns raised. Since this approach involves a broad Congressional delegation of authority to the president, the president’s war powers will be at their peak. Thus, if the President’s actions are challenged in court, the President will be able to justify them using both Congressional and executive war powers. As shown through litigation pertinent to AUMF challenges, courts will strongly defer, or even refuse to review, executive action in such circumstances. This deference will extend to executive action depriving enemy combatants of liberty and due process of the law. Courts will hesitate to question the decisions of the Commander in Chief making security decisions in a time of war under congressional authorization.

Not only will this approach result in Congress delegating its war powers to the executive branch to authorize military force, but the executive branch’s actions will be virtually incontestable. When combined with the erosion of evidentiary due process standards and judicial deference to the executive in times of war, this delegation of authority is especially troubling. Supreme Court Justice Thurgood Marshall argued, “grave threats to liberty often come in times of urgency, when constitutional rights seem

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<sup>550</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 11.

too extravagant to endure.”<sup>551</sup> The proponents of this approach claim that the executive branch needs to be able to respond quickly to emerging terrorist threats, and that waiting for Congress to issue a force authorization may undermine security. However, mechanisms for dealing with urgency are built into the constitution; namely, the president’s Article II defense authority. When such a situation arises, urgency should be addressed within the current structure of this nation’s constitution, not by risking due process and the preservation of checks and balances. The General Criteria Plus Listing Approach does not do so, and therefore, it does not satisfy the domestic legality criterion.

***b. Security***

Proponents of this approach argue that it provides the president with the most flexibility to mitigate terrorist threats.<sup>552</sup> Congressional delegation of authority to the executive branch to determine what threats justify the use of military force would likely improve the president’s agility in responding to threats. The executive branch—the branch most privy to threat information—could act swiftly and likely with minimal oversight in authorizing such force. While the president already maintains the authority to use force in self-defense, this approach would allow the executive branch to conduct sustained operations against terrorist groups without seeking congressional approval.

On the other hand, if Congress issues another force authorization—especially an open-ended one—counterterrorism could be undermined in several ways. First, excessive reliance on military force and targeted killings can increase resentment towards the United States.<sup>553</sup> In a world in which terrorist group members blend with the civilian population, in which not every member can be killed, in which groups have proven resilient in the face of decapitation strategies, this resentment against the United States can ultimately undermine U.S. security. Terrorist groups capitalize on resentment to bolster recruitment efforts and foster goodwill amongst civilian populations. In addition, unwarranted dependence on military force can further destabilize fragile governments

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<sup>551</sup> Goodwin, Goodwin, *Team of Rivals*, 355.

<sup>552</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 10.

<sup>553</sup> Daskal and Vladeck, “After the AUMF,” 140.

and foster international criticism, and both may ultimately result in decreased international cooperation.<sup>554</sup>

Nonetheless, due to the General Criteria Plus Listing Approach's preservation of presidential powers and flexibility to mitigate threats, this approach satisfies the security criterion.

*c. International Legality*

The proponents of this approach rightly assert that a new congressional force authorization articulating the "U.S. view of international law" could contribute to the development of customary international law.<sup>555</sup> It is unclear exactly how this proposal will be perceived from an international law standpoint because the precise parameters for the utilization of force by the executive have not been set forth. It is likely, however, that this designation of authority to the executive branch would result in increased use of force abroad due to the minimal congressional involvement in the force approval process, and this use of force may violate the international legal norm of non-intervention by overextending a preemptive approach to threat mitigation.

In actuality, it seems this approach is concerned with mitigating threats before they reach a level at which the president would need to defend the country from an imminent attack, which implicates preemptive use of force issues. The argument that the president's Article II authority is insufficient to preserve U.S. security and that this authorization is needed to protect the country does not bode well for its international legality. U.S. and international law already contain provisions for the use of force in self-defense, so it seems the only reason this delegation of authority would be needed is for sustained operations against threats. Thus, it seems this approach will likely run afoul of the international norm of nonintervention, the requirements preserving necessity, and depending on the precise implementation of the particular operation, proportionality in armed responses.

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<sup>554</sup> Daskal and Vladeck, "After the AUMF," 140.

<sup>555</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 7.

As evidenced in the AUMF analysis, just because the executive branch labels something as international law compliant does not make it so. The U.S. government's perception of international law, as corroborated through interpretations of the AUMF, is problematic. Consequently, Congress's delegation of authority would have to mirror the international use of force rules closely to be accepted by the international community. Considering the international community has failed to address how to handle terrorist threats adequately in a way that satisfies most nations, if the United States proposes a balanced approach that respects international law yet alters it to address terrorist threats in a well-reasoned and rational way, it could help shape international law for the better. If, however, it continues to stretch international law, especially regarding the preemptive use of force, its legitimacy may suffer.

Proponents of this approach acknowledge that the U.S. government's interpretations of international law relevant to self-defense and the laws of war are broader than the interpretations of other countries, including this nation's allies. To mitigate the negative reception to U.S. armed actions under this approach, international legal authorities must be adhered to and presidential power constrained. As proponents argue, "[f]rom a diplomatic and international legal-policy standpoint it is important that the United States government as a whole make clear that this is not an open-ended "global war on terror" but a cabined application of traditional self-defense to the new realities of non-state threats."<sup>556</sup> The General Criteria Plus Listing Approach's satisfaction of the international legality criterion is unclear because the approach does not include a specific force authorization proposal, nor has a robust administrative process for designating targeted groups been established. However, due to the preemptive use of force concerns inherent in this approach, it is doubtful that it satisfies the international legality criterion.

*d. Precedent*

This approach provides the executive branch with the flexibility to order counterterrorism operations, but it may discourage the use of minimum force, or law

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<sup>556</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 11.

enforcement. Although the creators of this approach do not assert that all terrorist threats should be mitigated using military force, their proposed designation of force authorization authority may make it easier for the executive branch to authorize and use military force quickly. Since 9/11, this concern has been historically justified. Indeed, this seems to be the point. If the executive branch is afforded this authority, the president will likely take advantage of it.

Proponents argue that the approach will render the process by which the executive branch authorizes force against terrorist organizations more transparent and standardized.<sup>557</sup> It could be the case, if Congress adopts the robust consultive procedures proposed.<sup>558</sup> For instance, proponents argue in favor of reporting and auditing procedures with which the president has to provide detailed information to Congress to justify why groups have been included on the force authorization list.<sup>559</sup>

The General Criteria Plus Listing Approach is also critiqued for its potential to codify an everlasting war by creating a self-perpetuating use of force with minimal opportunities for reassessment. Proponents assert that this is not the case because Congress can, and should place specific limitations on the executive branch. It also proposes a review and renewal process to avoid the immense political incentive not to de-list groups.<sup>560</sup> If Congress were to craft very specific statutory criteria, this proposal might set positive precedent in the areas of transparency and accountability. Consequently, it satisfies the precedent criterion.

*e. Conclusion*

The General Criteria Plus Listing Approach satisfies the security and precedent criteria, but it fails to adequately address concerns central to the domestic and international legality criteria. As such, Congress should not adopt the open-ended listing approach. If it does, Congress must be very specific in crafting language that delegates

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<sup>557</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 10.

<sup>558</sup> *Ibid.*, 11.

<sup>559</sup> *Ibid.*

<sup>560</sup> *Ibid.*, 12.

authority to the executive branch, and it must maintain strict temporal limits on this authorization. While the AUMF should be modified or repealed, it should not be replaced with congressional authorization permitting the executive branch to alone determine the groups against which the nation will obligate U.S. force. When Congress provides the president with force authorization, the president's war powers are at their greatest; courts show great deference to the president's actions and refrain from becoming involved in analyzing military matters. Therefore, the General Criteria Plus Listing Approach would not only impinge on constitutional checks and balances by providing the executive branch with congressional powers essentially to declare war against specific groups, but it would provide the president with expansive authority, virtually unassailable in court.

### **C. THE ARTICLE II APPROACH—LEANING ON LAW ENFORCEMENT**

#### **1. Description**

Jennifer Daskal and Stephen I. Vladeck of American University Washington College of Law have proposed another alternative (Article II Approach). Their refinement of this approach can be found in several articles. The most recent article was published in 2014 in Harvard's National Security Journal and is titled "After the AUMF."<sup>561</sup>

The Article II Approach calls upon Congress to reject an open-ended war by repealing or sunseting the AUMF.<sup>562</sup> Proponents argue that law enforcement should be utilized as the primary tool to mitigate terrorist threats. In the event that civilian law enforcement tools prove ill suited to accomplish this task, the president can take immediate military action to defend the country under Article II.<sup>563</sup> If a terrorist organization poses a significant and sustained threat to the U.S. homeland or persons, then Congress should utilize its war powers to craft a narrow and specific force authorization.<sup>564</sup> In their more recent articles, they recommend that Congress consider three options: a more transparent AUMF, an Afghanistan-based AUMF sunset, or

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<sup>561</sup> Daskal and Vladeck, "After the AUMF."

<sup>562</sup> Daskal and Vladeck. "Don't Expand."

<sup>563</sup> Daskal and Vladeck, "After the AUMF," 136.

<sup>564</sup> *Ibid.*, 138.

repealing the current AUMF and replacing it with an AQAP specific force authorization.<sup>565</sup>

Daskal and Vladeck base this approach on the premise that war should be finite, and it should be used only as a last resort.<sup>566</sup> They use a fundamental premise Jeh Johnson set forth in late 2012, in which “Peace must be regarded as the norm toward which the human race continually strives.”<sup>567</sup> Given this premise, they argue that a new statute replacing the AUMF is unnecessary and counterproductive because it will perpetuate a permanent wartime footing.

## **2. Analysis**

### ***a. Domestic Legality***

This approach is the most legally justifiable because it preserves constitutional checks and balances, and it relies on law enforcement for operations, a realm in which due process of law protections are enforced by institutional mechanisms. In contrast to the General Criteria Plus Listing Approach, Article II Approach supporters argue that law enforcement techniques and intelligence gathering mechanisms have improved over the past decade and should be utilized as the first line of defense against terrorist threats.<sup>568</sup> This approach does not restrict the use of military force because the president can utilize force in self-defense under Article II of the U.S. Constitution, without Congressional approval, if other means will not stop an attack.<sup>569</sup>

If the executive seeks a force authorization, then the burden must be on the executive to demonstrate that these current authorities are inadequate.<sup>570</sup> Congress should only grant such authority after extensive debate and careful calibration to ensure that the

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<sup>565</sup> Daskal and Vladeck, “After the AUMF,” 141–45.

<sup>566</sup> *Ibid.*, 118; Daskal and Vladeck, “After the AUMF Draft,” 3.

<sup>567</sup> Daskal and Vladeck, “After the AUMF,” 118.

<sup>568</sup> Daskal and Vladeck, “After the AUMF Draft,” 3.

<sup>569</sup> Daskal and Vladeck. “Don’t Expand.”

<sup>570</sup> Daskal and Vladeck, “After the AUMF,” 119.

authorization is narrowly tailored to an identifiable terrorist organization.<sup>571</sup> Proponents for this approach argue that until the political branches publicly identify a group that poses a threat that requires military force to quell, “[t]he many other counterterrorism tools at the government’s disposal—including law enforcement, intelligence-gathering, capacity-building, and, when necessary, self-defense capabilities—provide a much more strategically sound (and legally justifiable) means of addressing the terrorist threat.”<sup>572</sup>

Though this approach is the most legally sound concept because it seeks a basic application and preservation of constitutional frameworks, the Bush administration’s expansive interpretations of Article II authorities, which were recently echoed by Obama administration officials, calls into question whether this approach will best preserve the separation of war powers between Congress and the executive branch. Daskal and Vladeck make a crucial statement in *After the AUMF*:

Nor do we think, as the Hoover proposal authors suggest, that this approach merely will result in an expansive view of self-defense that itself provides an outlet for the inevitable uses of force that would be legitimized through a new authorization. [citation omitted] Rather, we think that self-defense—*properly defined* [emphasis added]—provides a critical, and necessary, means of safeguarding the nation against those truly dangerous and imminent threats that cannot reasonably be dealt with using alternative means, without also authorizing the broad-scale use of force against all members of a threatening group or their close associates. [citation omitted]”<sup>573</sup>

The key idea is that the use of *properly defined* self-defense authority is required for this proposal to, in practice, be the most legally sound. The problem is that this approach does not include adequate mechanisms to delineate self-defense authority. Proponents argue that should a response require extended force engagement, the president must obtain a statutory force authorization from Congress in accordance with the War Powers Resolution.<sup>574</sup> Further, should such a situation arise, Congress should use its war powers to issue a force authorization narrowly tailored to the threat at hand.

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<sup>571</sup> Daskal and Vladeck, “After the AUMF,” 119.

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.*, 131.

<sup>574</sup> *Ibid.*, 137.

However, Congress relied on the WPR to provide a check on executive authority in executing the AUMF. It proved unsuccessful in limiting the expansion of executive action taken under the AUMF, and its dearth of definitions result in half-hearted compliance.

The risk of expansive Article II interpretation affects analysis from the due process angle as well. Again, this proposal is ideal on paper when it comes to the protection of due process because it relies on the use of law enforcement mechanisms as the chief means to countering terrorist threats. Due process protections are already built into law enforcement and criminal justice mechanisms; the reliance on law enforcement will serve to protect due process rights much more effectively than reliance on military force. In practice, however, this approach could result in broad reliance on Article II authorities. The president may not be inclined to identify groups targeted publicly, which detracts from notice requirements. In addition, executive action under Article II authorities may include the use of lethal force to protect the country. Since this approach would not provide the executive branch with long-term detention authority (at least initially), it may inadvertently incentivize targeting killing over detention, a potential outcome that directly negates constitutional due process protections.<sup>575</sup> Again, this is not due to the language on the face of the proposal. Rather, this is based on the potential repercussions that could occur if future administrations utilize interpretations of Article II authorities similar to those asserted by both the Bush and Obama administrations.<sup>576</sup>

An important consideration, however, is that should the president take action under Article II authority, courts will be less likely to defer to the president's decisions than if Congress issued a new force authorization, because, unlike the General Criteria Plus Listing Approach, the president's powers will not be at their maximum. Without a

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<sup>575</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 6.

<sup>576</sup> Obama administration officials recently suggested that all U.S. counterterrorism measures abroad fall within the president's authority to defend the country from an "imminent attack," a phrase that remains nebulous. In a Senate Armed Services Committee Hearing on May 21, 2014, administration attorneys asserted that the president could utilize military force against imminent threats. While not news, several convoluted responses on the part of the administration's attorneys were surprising. They minimized Congress's role in the authorization of the use of military force. The attorneys refused to distinguish the difference between the president's inherent self-defense authority under Article II and the actual AUMF.

new force authorization, the president will have to rely solely on Article II powers to justify actions, which will, in effect, provide more preservation of constitutional checks and balances because courts will be less likely to defer to executive action and more likely to review and critique it. In sum, more recourse to challenge executive action will arguably be available.

However, a drawback to this approach does exist. Namely, the president's actions have more legitimacy when based on both congressional authorization and Article II powers.<sup>577</sup> The General Criteria Plus Listing Approach proponents argue:

Article II actions leave the president without overt political support of Congress, which can later snipe at his decisions, or take actions to undermine them. We saw this happen, for example, in response to many of the Bush administration's unilateral assertions of authority, and also to some degree in response to President Obama's unilateral assertion of authority in Libya. This is a problem that grows with reliance on Article II over time.<sup>578</sup>

This congressional feedback, however, is not necessarily a bad thing. In fact, it encourages the separation of powers and the preservation of war authority between political branches. The president is only supposed to use military force under Article II to protect the country from an imminent attack. If Congress does not think that the executive branch's use of military force is authorized under Article II, and it does not deem a threat worthy of a force authorization, it should foster debate and inquiry. Congressional gridlock and shortcomings aside, legislators are under incredible pressure to preserve U.S. security. While this type of interaction may be cumbersome, it goes to the heart of preserving constitutional checks and balances, and it should be protected. The Article II approach goes a long way towards preserving these principles. Thus, it satisfies the domestic legality criterion.

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<sup>577</sup> Chesney et al., "A National Security and Law Essay—A Statutory Framework," 6.

<sup>578</sup> *Ibid.*

*b. Security*

Proponents of this approach assert that law enforcement tools have proven effective in mitigating terrorist threats for several reasons. First, the U.S. DOJ has successfully prosecuted over 500 terrorists in the past 10 years in civilian courts, including several dozen apprehended abroad who were members of AQ or its affiliates.<sup>579</sup> Second, these arrests and prosecutions within the context of a civilian criminal justice system have resulted in improved intelligence gathering because some defendants will cooperate with prosecutors in exchange for plea deals.<sup>580</sup> In addition, proponents of this approach cite improvements to law enforcement since the 9/11 attacks that have improved its capability to deter terrorist threats. Namely, statutory reforms have improved the ability of law enforcement and intelligence officials to cooperate in efforts to prevent terrorism.<sup>581</sup>

Critiques of this approach allege that law enforcement and intelligence tools do not provide the capacity needed to capture individuals or mitigate threats in some circumstances.<sup>582</sup> In addition, these tools are insufficient for long-term operations to dismantle organizations.<sup>583</sup> This insufficiency can lead to an increased risk of threats developing in areas in which local governments cannot or will not alleviate these threats themselves.<sup>584</sup>

Further, critics assert that if a threat to the U.S. homeland or persons emerges that originates abroad, Congress will not be able to authorize force quickly enough to mitigate the threat.<sup>585</sup> Proponents of the General Criteria Plus Listing Approach argue that “Congress probably cannot or will not, on a continuing basis, authorize force quickly or robustly enough to meet the threat, which is ever-morphing in terms of group identity and

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<sup>579</sup> Daskal and Vladeck, “After the AUMF,” 130.

<sup>580</sup> *Ibid.*, 130–31.

<sup>581</sup> *Ibid.*, 131.

<sup>582</sup> Chesney et al., “A National Security and Law Essay—A Statutory Framework,” 5.

<sup>583</sup> *Ibid.*

<sup>584</sup> *Ibid.*

<sup>585</sup> Daskal and Vladeck, “After the AUMF,” 138.

in terms of geographic locale.”<sup>586</sup> Considering the speed with which Congress passed the AUMF in 2001, this critique is untenable (although Congress may avoid issuing authorizations for political reasons). Further, while Congress crafts an approach, the President may respond under Article II authority.<sup>587</sup> In effect, the General Criteria Plus Listing Approach aims to mitigate new, emerging threats before they pose an imminent threat to the U.S. homeland or interests. Thus, the General Criteria Plus Listing Approach would likely not offer much added security when it comes to preventing imminent threats, but it would better enable the executive branch to preserve U.S. security by preempting those threats from developing to a point at which they would be considered imminent at all.

The Article II approach has especially important implications in the realm of current counterterrorism measures. The repeal of the AUMF will remove domestic legal authority for detaining enemy combatants at Guantanamo Bay. It will also signal the cessation of hostilities. In other words, the authority to detain enemy combatants under international law will also end. Consequently, the U.S. government will need to release Guantanamo detainees, and some of these detainees may be ineligible for prosecution due to evidentiary issues or the scope of criminal laws at their time of capture.<sup>588</sup>

The Obama administration certainly seems aware of this situation, considering the recent exchange of five Taliban detainees for the last American prisoner of war, Sgt. Bowe Bergdahl. President Obama explained, “This is what happens at the end of wars.” He continued, “That was true for George Washington; that was true for Abraham Lincoln; that was true for FDR; that’s been true of every combat situation—that at some point, you make sure that you try to get your folks back. And that’s the right thing to do.”<sup>589</sup> Some disagreement may still exist, however, amongst the military and members of Congress as to whether the war is truly over. As Duke University professor and former

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<sup>586</sup> Daskal and Vladeck, “After the AUMF,” citing Chesney et al., 10.

<sup>587</sup> Daskal and Vladeck, “After the AUMF,” 138.

<sup>588</sup> *Ibid.*, 143.

<sup>589</sup> Zachary A. Goldfarb and Juliet Eilperin, “Obama: ‘No Apologies’ for Bergdahl Release,” *Washington Post*, June 5, 2014. [http://www.washingtonpost.com/politics/obama-no-apologies-for-bergdahl-release-deal/2014/06/05/a4c15fca-ec2a-11e3-9f5c-9075d5508f0a\\_story.html](http://www.washingtonpost.com/politics/obama-no-apologies-for-bergdahl-release-deal/2014/06/05/a4c15fca-ec2a-11e3-9f5c-9075d5508f0a_story.html).

National Security Council special advisor for the Bush administration explained, “The deal the president struck is a deal you strike when the war’s over.” He continued, “The military, they’re thinking about, ‘We’re still fighting this war.’ For them the war’s very much still on, and the question of will we win or not is up for grabs.”<sup>590</sup> Consequently, the implementation of the Article II approach will require careful consideration of a process for dealing with this loss of detention authority.

The repeal of the AUMF will also remove domestic legal authority for operations against AQ, AQAP, the Taliban, and associated forces. Some may argue that a force authorization is still needed against these groups. The Article II Approach allows a new force authorization to be formed addressing AQAP, should the facts warrant. Nonetheless, the U.S. military’s authority for continued operations against these groups would cease upon the repeal of the AUMF. In addition, authority supporting the targeted killings of members of these groups would terminate. Consequently, this approach would terminate legal authority for a variety of counterterrorism measures. Thus, while this approach satisfies the security criterion, its support of security is not as strong as the General Criteria Plus Listing Approach.

*c. International Legality*

The international legality analysis for the Article II Approach is similar in nature to the domestic legality analysis in that the Article II Approach conforms to international law as proposed. However, concerns emerge with regard to how the approach is actually implemented by the executive branch. Specifically, the risk of the executive branch’s broad use of force under Article II could implicate both international legal norms of non-intervention, and proportionality and necessity in threat response.

The Article II Approach’s assertion that the president has the authority under Article 51 of the UN charter to utilize force consistent with necessity and proportionality requirements to defend the country in response to an armed attack comports with international law.<sup>591</sup> However, the assertion that the president can utilize lethal force

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<sup>590</sup> Goldfarb and Eilperin, “Obama. “

<sup>591</sup> Daskal and Vladeck, “After the AUMF,” 136–37.

against a terrorist organization “poised to carry out a lethal attack on the U.S. homeland or U.S. persons at some point in the near future . . .”<sup>592</sup> is arguable. Like the other approaches, the definition of what constitutes an “imminent attack” in this situation is crucial to a determination of whether the president’s use of lethal force in another state’s territory is justified under international law. This approach does not promote the executive’s legal justification of action against imminent threats.

Nonetheless, the Article II Approach’s regard for international law and fundamental tenant of avoiding armed conflict will prove more palatable from an international law perspective than both the status quo approach and the General Criteria Plus Listing Approach. Potential shortcomings in conforming to international law do not lie in the proposal itself, but in the potential for the executive branch’s overbroad reading of Article II and international self-defense authorities. Thus, the proposal itself satisfies the international legality criterion.

*d. Precedent*

The Article II Approach succeeds in preserving positive precedent in the areas of the versatile use of force, transparency, and accountability. In terms of the versatile use of force, the Article II Approach promotes the use of a minimum force through law enforcement that is lacking in other popular proposals. At the same time, the approach acknowledges that maximum military force may be necessary in certain circumstances.

The Article II Approach also preserves transparency and accountability in decision making regarding this transition from reliance on law enforcement to military forces because it advocates that all such decisions be conducted by Congress and open to public debate. Such debate promotes accountability and the opportunity for reassessing lawmakers’ decisions. In addition, the proponents of this approach articulate that should a force authorization become necessary to mitigate threats from AQAP, such authorization must be narrowly tailored to meet the threat, which implies that such an authorization would have temporal limits that promote future congressional reassessment of the

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<sup>592</sup> Daskal and Vladeck, “After the AUMF,” 137.

authorization. As this approach promotes positive precedent in these three areas, it satisfies the precedent criterion.

*e. Conclusion*

This approach satisfies all the criteria, although its performance under the security criterion is weaker than the General Criteria Plus Listing Approach. The Article II Approach provides a solid alternative to the AUMF that effectively balances constitutional protections and security considerations. However, the strong protection of constitutional protections and respect for international law does result in some potential adverse affect on security, as the opportunity to preempt the emergence of terrorist threats abroad is not accounted for in this approach as it is in the General Criteria Plus Listing Approach. In addition, the primary weakness from domestic and international legality perspectives arises not from the approach itself, but from the potential for expansive executive interpretations of its authority under Article II. Contemplating these considerations, elements of the Article II Approach are utilized in the Tailored Approach that follows.

**D. THE TAILORED APPROACH**

**1. Description**

The Tailored Approach provides a more comprehensive proposal for Congress. It is aimed at sustaining a force authorization paradigm that respects constitutional principles without sacrificing security. This proposal adapts several components of the approaches previously discussed. It also modifies recent recommendations made by Harold Hongju Koh, Yale Law School Sterling Professor of International Law, at a Senate hearing on May 21, 2014 and the Constitution Project, to which he has contributed.

The Tailored Approach moves for the following alterations: 1) an AUMF sunset and interim modifications, 2) an overhaul of the WPR, and 3) a narrowly tailored force authorization(s), if necessary, against AQAP and ISIL. The approach also recommends

that Congress examine the potential gains—and drawbacks—of using non-military assets to counter terrorist threats.

*a. Riding into the Sunset*

Congress should amend the AUMF to include a sunset clause that coincides with the withdrawal of U.S. forces from Afghanistan, and it should ensure that the 2012 NDAA provisions linking to AUMF authority are no longer operative after this sunset date. At its heart, the AUMF was a specific instrument created for attaining a specific, if difficult to define end. As such, several legal experts and members of Congress have advocated for the sunset or repeal of the AUMF.<sup>593</sup> Adding a sunset clause to the AUMF is a crucial first step that Congress must take to regain its constitutional war powers, preserve democratic principles, and appropriately prioritize threats to U.S. security. A sunset would effectively end force authorization against AQ and associated forces, which should provide finality to the original mission of the AUMF. In addition, unlike a more abrupt repeal of the statute, a sunset date affords Congress the time to transition current operations instead of a going cold turkey approach, so to speak. During the interim, Congress must begin to shift, eliminate, or reconsider the use of military force, detention, and other counterterrorism measures currently supported by the AUMF.

Prior to the AUMF's sunset, Congress must make AUMF application more transparent by requiring the executive branch to disclose information regarding its past use of the AUMF. This approach has value, both in terms of transparency, and in terms of reestablishing balance in the public's eye of working constitutional checks and balances. In addition, Congress should require the president to notify it when he subsequently invokes the AUMF. Example language for such a requirement can be found in the House resolution introduced by Congresswoman Barbara Lee on May 8, 2014.<sup>594</sup> Finally, Congress should make AUMF application more transparent by requiring the president to disclose determinations regarding what groups qualify as "associated forces." Daskal and

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<sup>593</sup> "Text of H.R. 4608: War Authorization Review and Determination Act (Introduced Version)," GovTrack.us, May 8, 2014, <https://www.govtrack.us/congress/bills/113/hr4608/text>; Daskal and Vladeck, "After the AUMF," 137.

<sup>594</sup> War Authorization Review and Determination Act, H.R. 4608, (May 8, 2014).

Vladeck provide details regarding this requirement in their Article II Approach, and it is worth repeating that such a practice is sound and responsible governance.

With all this information, Congress will be better able to craft and implement transition procedures for counterterrorism operations currently supported by AUMF authority. In light of constitutional concerns regarding the associated forces designation, Congress should consider more specifically delineating which groups qualify as associated forces. The executive's report will assist Congress in determining whether specific delineation of associated forces is advantageous for AUMF application, prior to its sunset.

***b. Renovation of the WPR***

The Tailored Approach differs most substantially from the other alternatives in its combination of force authorization options with amendments to the WPR. If the AUMF and its kin are meant for a specific end with an inherently understood expiration date, the WPR is the broader, more unyielding foundation applied to specific force authorizations. It is the author's opinion that simply implementing an AUMF alternative focused solely on force authorization will fail to provide a sustained system that will set positive precedent and ensure the preservation of constitutional principles, security, and international law. As such, several sweeping WPR changes are recommended.

This thesis recommends an approach to WPR overhaul similar to the one proposed by the Constitution Project<sup>595</sup> in 2005, with modifications. This approach obligates the political branches to perform several actions: 1) the president must justify the use of force to Congress via an Attorney General opinion, threat assessment information, and estimates of anticipated costs, prior to initiating the use of force, 2) Congress must develop procedures for the expedited consideration of force authorizations, and 3) Congress should craft a requirement stating that force initiation can

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<sup>595</sup> The Constitution Project is based at Georgetown University's Public Policy Institute, and it conducts bipartisan analysis and education on constitutional law and governance issues. It created the War Powers Initiative to examine how the U.S. government should make the decision to use U.S. military force abroad. Constitution Project Staff, "Deciding to Use Force Abroad," vii–viii.

only be authorized via a narrowly tailored statute or formal declaration.<sup>596</sup> In addition, Congress should codify laws of war that have domestic implications (i.e., procedures for the detention and trying of enemy combatants), condition force authorization with respect to international law, and require the president to justify and report on its use of force under Article II authorities within specified timeframes.

The WPR currently perpetuates the problem of Congressional inaction and the president's usurpation of wartime authority. As discussed in Chapter III, the WPR has failed to facilitate effective checks and balances between the executive and legislative branches.<sup>597</sup> The consulting and reporting mechanisms in the WPR have been ineffective or ignored, and the meaning of "hostilities" debated. The Constitution Project provides a succinct summary of the WPR's shortcomings:

The WPR has failed for multiple reasons. It defines the President's defensive war powers too narrowly; its consultation and reporting provisions leave loopholes that presidents have exploited; its never-used provision for two-house veto of a use of force is probably unconstitutional . . . and the sixty-day clock at its heart has been misconstrued to give the President a sixty-day "free pass" to use force without congressional authorization and to allow Congress to do nothing.<sup>598</sup>

While Congress cannot impose upon the president's tactical command of U.S. military forces, it may legislate limits on the use of military force, and it controls the purse strings of the U.S. armed forces.<sup>599</sup> With this power, Congress can, and should, overhaul the WPR to preserve constitutional principles and promote the deliberation of force authorizations.<sup>600</sup>

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<sup>596</sup> Constitution Project Staff, "Deciding to Use Force Abroad," vii–viii.

<sup>597</sup> *Ibid.*, 31.

<sup>598</sup> *Ibid.*, 32.

<sup>599</sup> *Ibid.*, 2.

<sup>600</sup> Congressional interest does exist in amending or replacing the WPR. Members introduced five separate bills in the 113th Congress about reforming the WPR, presumably due in part to frustration over AUMF discussions. Michael P. Noonan, "A More Sensible Set of War Powers," *U.S. News*, February 3, 2014, <http://www.usnews.com/opinion/blogs/world-report/2014/02/03/the-war-powers-resolution-is-ripe-for-reform>.

**c. *Assess the Necessity of a Narrowly Tailored Force Authorization against AQAP Based on the Organization's Intent and Capability***

Congress should seek information from the executive branch about the threat from AQAP and conduct its own investigation. It should then conduct a risk-based analysis of AQAP threat information to determine the group's current intent and ability to attack the United States. If Congress determines that AQAP poses a threat that requires force authorization, then it should craft an authorization narrowly tailored to that threat.

The scope of this authorization must be clear, its terms unambiguous. These terms should address the range of resources dedicated to the armed conflict. The authorization should also include temporal limits—such as a sunset clause—based on estimates regarding conflict duration and cost. By providing this level of detail in its force authorization, Congress may avoid allocating excessive authorization to the executive branch.

**d. *Assess the Necessity of a Narrowly Tailored Force Authorization against ISIL Based on the Organization's Intent and Capability***

Similarly, Congress must continue to assess the threat ISIL poses to the United States and determine whether a force authorization is needed. Currently, the U.S. military is waging airstrikes against ISIL in Iraq, and it will likely wage airstrikes against ISIL in Syria.<sup>601</sup> It was unclear until recently what authority the executive branch was relying upon to wage these airstrikes, although initial reports indicated that the administration might have been asserting Article II powers.<sup>602</sup> Recently, however, Obama administration officials asserted that the AUMF provides necessary legal authority to wage sustained operations against ISIL. Regardless, existing legal justifications for U.S. military action against ISIL prove problematic.

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<sup>601</sup> Peter Baker and Michael D. Shear, "U.S. Weighs Direct Military Action Against ISIS in Syria," *The New York Times*, August 22, 2014, <http://www.nytimes.com/2014/08/23/world/middleeast/obama-adviser-says-military-action-possible-against-isis.html?hp&action=click&pgtype=Homepage&version=LedeSum&module=first-column-region&region=top-news&WT.nav=top-news>; "Statement by the President on ISIL," President Barack Obama, September 10, 2014, [www.whitehouse.gov/the-press-office/2014/09/10-remarks-president-barack-obama-address-nation](http://www.whitehouse.gov/the-press-office/2014/09/10-remarks-president-barack-obama-address-nation).

<sup>602</sup> Ilya Somin, "Assessing Possible Legal Justifications for U.S. Airstrikes Against ISIS," *Washington Post*, August 8, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/assessing-possible-legal-justifications-for-us-airstrikes-against-isis/>.

Three primary legal arguments exist for supporting sustained operations against ISIL. First, the president could utilize the AUMF of 2002 for legal support. However, the administration publicly supported repeal of this statute on May 21, 2014 - just weeks before ISIL overtook Mosul. In addition, comments made by the president indicate that he intends to act beyond this authority, as he has emphasized the humanitarian need to prevent the genocide of the Yazidi minority.<sup>603</sup> Further, the administration seems to be moving towards conducting airstrikes outside of Iraq, in Syria. Consequently, the authority provided by the AUMF of 2002 would be inadequate for sustained operations against ISIL.

Second, the Obama administration could argue that the executive branch's Article II authority to defend the United States from armed attack justifies military action. This justification is problematic because the actual or imminent threat to the nation posed by ISIL is unclear. President Obama recently stated that ISIL poses a threat to "American citizens, personnel and facilities" in the region, and that "[t]hese terrorists could pose a growing threat beyond that region, including to the United States."<sup>604</sup> Such language, indicating that ISIL "could" pose a threat beyond the region, arguably falls short of demonstrating that the group's capabilities are of such a nature that sustained operations are justified under Article II. In addition, ISIL controls a significant amount of territory, and as such, such continued operations may be needed to deter ISIL. A force authorization from Congress would be necessary to conduct such sustained operations.

Finally, just prior to the thirteenth anniversary of the 9/11 attacks, administration officials laid out a legal argument asserting that the AUMF provides the executive branch with the authority to use sustained military force against ISIL.<sup>605</sup> According to White House Press Secretary Josh Earnest, the AUMF applies to ISIL:

It is the view of . . . the Obama administration that the 2001 AUMF continues to apply to ISIL because of their decade-long relationship with al-Qaida, their continuing ties to al-Qaida; because . . . they have

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<sup>603</sup> Somin, "Assessing Possible Legal Justifications for U.S. Airstrikes Against ISIS."

<sup>604</sup> "Statement by the President on ISIL."

<sup>605</sup> Dennis, "Here's Obama's Legal Justification for ISIS War."

continued to employ the kinds of heinous tactics that they previously employed when their name was al-Qaida in Iraq. And finally, because they continue to have the same kind of ambition—aspiration that they articulated under their previous name.<sup>606</sup>

The Obama administration maintains this argument despite the fact that ISIL did not exist on September 11, 2001 and in the face of the public spilt between ISIL and AQ. Simply put, the executive branch’s reasoning for applying the AUMF to ISIL is weak, at best. This justification is not grounded in AUMF language, and it reaches well-beyond judicial interpretations of AUMF application. In addition, the support for this reasoning is flawed. ISIL did not have a decade long relationship with AQ; the group formed in 2006 and disaffiliated from AQ in early 2014. This disaffiliation was due, in part, due to disagreement over the heinous tactics ISIL employed. Further, while ISIL’s “aspiration” must be considered, military action against ISIL must also be justified based on the group’s capabilities.

In sum, the Obama administration’s legal justifications for conducting sustained operations against ISIL are limited, and Congress must examine whether it needs to issue a force authorization against the group. While ISIL’s explicit threats aimed at the United States show its intent to harm the nation, Congress will need to focus its analysis on the group’s capabilities. It must evaluate the threat ISIL poses to U.S. interests and persons in the region, as well as U.S. allies, and it must consider whether the group could perpetrate an attack on the U.S. homeland. The Obama administration asserts that the group’s execution of James Foley constitutes a terrorist attack against the United States, and ISIL could “pivot” to attacks similar to those carried out by AQ on 9/11.<sup>607</sup> Its ability to pivot at this time, however, is uncertain. As White House Deputy National Security Advisor Ben Rhodes explained, “To date, we have not seen them focus on that type of planning, but that doesn’t mean we’re not going to be very mindful that they could quickly aim to pivot to attacks against Western targets outside of the region . . . If they show the intent

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<sup>606</sup> Dennis, “Here’s Obama’s Legal Justification for ISIS War.”

<sup>607</sup> Joel Gehrke, “White House: ISIS Could ‘Pivot’ to 9/11 Style Attack,” *National Review Online*, August 22, 2014, <http://www.nationalreview.com/corner/386084/white-house-isis-could-pivot-911-style-attack-joel-gehrke>.

or they show plotting against the United States, we'll be prepared to deal with that as necessary.”<sup>608</sup>

*e. Review of Law Enforcement Authorities*

Obama administration representatives have recently asserted that the president has adequate legal authority to mitigate terrorist threats without an AUMF. As Koh explained, “Substantial legal authorities for both targeting and incapacitation of terrorists were available to the Executive branch before the 2001 AUMF. These authorities have been significantly strengthened since then, and would remain in its absence.”<sup>609</sup> It is unclear precisely what authorities the president may be relying on to conduct non-military counterterrorism operations abroad. Congress may surmise that this authority originates from the president’s Article II powers. However, it is likely that the executive branch is authorizing non-military counterterrorism measures abroad—utilizing certain civilian resources rather than military resources—to mitigate terrorist threats.

The authorities supporting such action should be identified and reviewed to determine how they can best be leveraged to mitigate terrorist threats and how they fit within the methodology applied in this thesis. For instance, Federal Bureau of Investigation (FBI) agents may make arrests if they have reasonable grounds to believe that a person has committed a felony under domestic law.<sup>610</sup> Domestic law prohibits the provision of material support to foreign terrorist organizations.<sup>611</sup> Moreover, statutory authority provides for the exercise of extraterritorial jurisdiction over this offense.<sup>612</sup> Consequently, domestic law may already provide for the utilization of law enforcement abroad to mitigate terrorist threats. Whatever actions are taken thereunder should be analyzed in the context of force authorization with a healthy dose of skepticism. Such authority could be used to support the proportional use of force and to promote law

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<sup>608</sup> Gehrke, “White House: ISIS Could ‘Pivot’ to 9/11 Style Attack.”

<sup>609</sup> *Authorization for Use of Military Force After Iraq and Afghanistan* (statement of Harold Hongju Koh, Sterling Professor of International Law at the Yale Law School).

<sup>610</sup> 18 U.S.C. section 3052.

<sup>611</sup> 18 U.S.C. section 2339B.

<sup>612</sup> *Ibid.*

enforcement actions. Nonetheless, it is necessary to be wary of that which can be called by another name: civilian involvement—FBI, law enforcement—must not be a guise for military practices, especially if conducted for the purpose of shirking military force responsibilities.

## **2. Analysis**

### ***a. Domestic Legality***

The Tailored Approach will promote constitutional checks and balances by clarifying and then repealing the obsolete and overbroad AUMF. Through WPR changes, it will demand Congressional consideration of force authorization and use, which will help protect constitutional principles of checks and balances and due process. Finally, Congress will better fulfill its responsibilities for deciding when to go to war by implementing a narrowly tailored force authorization, if necessary, against AQAP or ISIL. Tailoring such authorizations will also help preserve constitutional separation of powers and due process protections.

The AUMF's sunset with the end of hostilities in Afghanistan would result in the executive branch no longer exercising authority under the overbroad AUMF. It would preserve democratic principles by ending an obsolete law that arguably threatened due process rights, as described in the status quo analysis earlier in this chapter. Similarly, Congress's clear statement in any future force authorization, such as one directed at AQAP, will prevent the executive branch from exceeding congressional intent by exploiting language ambiguities in the authorization. Temporal limits will encourage Congress to act if it wants to continue authorization, rather than complacently permitting continued military operations. In effect, the executive branch can go about its counterterrorism measures in a framework that institutionally fosters more precision than when conducted under the gray nebula under which it is currently authorized, and under which it may have previously strayed.

WPR changes will also promote congressional action. Under the proposed changes, the president would be required to seek congressional force authorization before

deploying U.S. forces, unless the president is acting under his Article II powers. The changes also require collective threat evaluation and decision-making.

The first component of this approach—that promotes information sharing from the executive branch to Congress—is crucial. The executive branch’s disclosure of an Attorney General opinion is a key part of this equation, as it will show the justification for entering the conflict and the authorities under which the executive branch may take action. This justification must be provided prior to the initiation of force, unless the executive branch is acting under Article II authority. If the president is acting under Article II authority, Congress must set a specific timeframe within which to acquire the opinion. While the executive branch may try to evade this requirement, congressional pressure to disclose such reasoning may be persuasive, from a political standpoint. The public’s recent demands for disclosure of the legal reasoning supporting the U.S.’ targeted killing program punctuate this point.

In the WPR revision, Congress should spell out what information must be contained in this legal memorandum. It is recommended that Congress require the Attorney General to include: 1) laws supporting force deployment, 2) the specific threat the president seeks to mitigate, 3) domestic legal ramifications of the force authorization, and 4) international legal authorities supporting such action. This memorandum should be submitted to Congress prior to the initiation of force, unless the president is acting under Article II authority. If the president is employing Article II authority to defend the nation from an imminent threat, the memorandum must provide the definition of “imminent” under which it is acting, and justify why the threat justifies self-defense action.

As noted by the Constitution Project, this memorandum will not ensure that the executive branch is acting in accordance with constitutional or international law principles, but it will force the executive branch to justify its actions under both. Since this justification will be provided to Congress, as well as to the public, it will provide an opportunity for constituents to voice their concerns to their representatives, and it will provide their representatives with the opportunity to protest. These Attorney General opinions will also help Congress track the evolution of the legal justification for armed conflict; if Congress identifies domestic legal ramifications that it would like to address

legislatively, it may do so. All these effects will enhance the preservation of constitutional principles, while affording Congress the opportunity to evaluate threats.

The WPR changes should also include the codification of law of war authorities in statute. The domestic impacts of executive actions relevant to armed conflict are difficult to predict, and the judiciary is then left with the unenviable task of reviewing executive decisions in a time of war without correlated legislative guidance. For instance, in the context of the AUMF, numerous courts had to address laws of war issues pertaining to enemy combatant detention and evidentiary issues, with little statutory guidance from Congress. Congress's codification of laws of war as they apply domestically will promote due process protections by putting individuals on notice of the domestic legal standards applicable in times of armed conflict.

Finally, it bears mentioning that a great deal of time in the consideration of the AUMF discussion is spent determining how best to prevent the executive branch from interpreting self-defense powers too broadly, and thereby, negating the constitutional separation of war powers. To limit the executive branch's defense powers by codifying what constitutes an "imminent threat" arguably runs contrary to the Constitution and might have unintended consequences that could reduce the Commander in Chief's ability to respond quickly to threats. Thus, no such recommendation is made in this thesis.

Nonetheless, implementing the recommended changes to the WPR will help address this issue because these changes promote congressional consultation in the context of force initiation and sustainment. Should Congress determine that continuing Article II operations are ill advised, Congress may consider utilizing its appropriation powers to prevent the continued funding of operations. In addition, Congress may consider seeking a judicial decision, should the political branches reach a standstill in addressing the issue. Hopefully, a reasonable decision will not elude the courts regarding whether a specific initiation of force by the executive branch is constitutionally sound.

Finally, domestic principles may be better preserved if law enforcement tools are utilized to mitigate terrorist threats because law enforcement processes have established due process procedures in place. This approach admittedly may open up a whole new can

of worms, for it is unclear how such authorities would affect the constitutional separations of power. Some of the difficulty in predicting this impact lies in the ambiguity regarding exactly what authorities the executive branch is utilizing to mitigate terrorist threats abroad. These threats should be identified so that Congress may determine whether the executive branch's deployment of law enforcement authorities abroad could implicate constitutional checks and balances issues.

The Tailored Approach will promote public debate between the political branches regarding the scope of armed conflict force authorizations. It also promotes checks and balances by requiring the exchange of information and legal justification for executive and congressional decision-making. These aspects ensure that the Tailored Approach satisfies the domestic legality criterion.

***b. Security***

The executive branch had scheduled the withdrawal of military forces from Afghanistan for the end of 2014, but recent events in Afghanistan and the region have brought this date into doubt. Nonetheless, Congress's prediction of a withdrawal date and sunset of the AUMF accordingly will enable the military to transition forces from the area and determine if additional legal authorities are needed to mitigate threats in the region.<sup>613</sup>

Some may argue that sunset of the AUMF will leave gaps in threat mitigation authority. It is true that the AUMF's repeal will reduce executive authority in certain regards. This option may limit the executive's flexibility in utilizing military force, which, in turn, may impede the president's ability to respond to dynamic threats. Again, when the AUMF sunsets, the executive's ability to utilize force for sustained operations against AQAP as an associated force ceases.

This argument does not warrant the abandonment of the Tailored Approach, far from it. This approach does nothing to preclude the president from using Article II authority to respond to imminent threats or to repel sudden attacks, nor does it hinder the

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<sup>613</sup> Daskal and Vladeck, "After the AUMF," 142.

president's authority to request authorization for sustained operations. In fact, this approach will promote security because force initiation decisions will be evaluated and debated by more than one institution. An added opportunity will be provided to evaluate the threat and determine the most advantageous ways to mitigate it. For example, if Congress implements the Tailored Approach, it will have a great deal more information to consider. In addition, a narrowly tailored authorization will prevent excessive force authorization. In addition, if the circumstances of a threat are so exigent and dire as to require swift and mighty action, the executive branch, again, is unimpeded in utilizing its Article II authority.

An important consideration arises, however, when it comes to continued detention. This approach would require the release of Guantanamo detainees within a reasonable time after the AUMF's sunset, and it would remove the authority for military detention prior to prosecution.<sup>614</sup> Some members of Congress may argue that this approach would hurt U.S. security, as some of these detainees may still be dangerous. Nonetheless, if the cessation of hostilities has occurred, the United States is obligated to return detainees. To extend an armed conflict based primarily on the premise that to release detainees would be dangerous arguably runs contrary to both domestic and international law. As Daskal and Vladeck explain, "Wars justify detention of enemy armed forces. Detention cannot and should not justify war; that would be a perverse example of the tail wagging the dog."<sup>615</sup>

While it may not promote the same level of executive branch flexibility as the General Criteria Plus Listing Approach, the Tailored Approach promotes a positive balancing of constitutional considerations with security protections. It does not inhibit the executive branch's ability to protect the nation from imminent attack; it promotes a transition period from AUMF reliance, and it encourages Congress to consider force authorizations narrowly tailored to AQAP and ISIL immediately. As such, this approach satisfies the security criterion.

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<sup>614</sup> Daskal and Vladeck, "After the AUMF," 144.

<sup>615</sup> *Ibid.*, 143.

*c. International Legality*

A sunset provision in the current AUMF would show the international community that the United States is willing to comply with international law by ceasing armed conflict after mitigating a threat. It will provide assurance to the international community that the country is willing to put an end to armed conflict, even against an asymmetrical adversary, when the conflict can no longer be justified based on self-defense. In addition, the enactment of a narrowly tailored force authorization against AQAP, which has attempted to attack the U.S. homeland on multiple occasions, will help justify necessity and preserve proportionality in threat response.

Congress may punish and define “offenses against the Law of Nations.” In other words, Congress may determine what actions violate international law and make those actions illegal in the United States.<sup>616</sup> The U.S. government has been accused of misinterpreting and misapplying international law by applying broader notions of targetability and imminence than what is permitted in the international community. To enhance legitimacy, Congress should codify relevant “offences against the Law of Nations.” Specifically, it should interpret and codify the laws of war because they have domestic implications when it comes to detention and the use of military tribunals.<sup>617</sup> A codification of laws will promote adherence to them, and a reasonable interpretation and application of international law will enhance the legitimacy of U.S. counterterrorism actions.

The Tailored Approach aims to promote necessity and proportionality in force authorization. It also encourages Congress to consider international law explicitly in legislative efforts aimed at clarifying international legal obligations in armed conflicts. By doing so, it satisfies the international legality criterion.

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<sup>616</sup> Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 734.

<sup>617</sup> Constitution Project Staff, “Deciding to Use Force Abroad,” 41.

*d. Precedent*

The Tailored Approach addresses each of the considerations described in the precedent discussion in Chapter V. First, the evaluation of law enforcement authorities that may be utilized to mitigate threats abroad, such as those afforded the FBI, brings the issue of terrorist threat mitigation via both law enforcement and military authorities to the forefront.

In addition, the Tailored Approach promotes government transparency and accountability. Including sunset clauses in future force authorizations will force Congress to analyze unforeseen or unintended consequences of force authorizations, rather than remain complacent after issuing a force authorization. The Tailored Approach's emphasis on the need for Congress to provide precise statements of authority in future force authorizations will also promote political accountability. Additionally, changes to the WPR encourage public debate about future force authorizations. The reporting mechanisms will increase government transparency and encourage a collective decision-making process that promotes political accountability. Consequently, the Tailored Approach satisfies the precedent criterion.

**3. Recommendation**

A variety of ideas for AUMF modification have been presented. Some expand military force authorization while others drastically narrow or eliminate it. However, Congress does not have to adopt one of these approaches wholesale; in fact, it is unrealistic, based on the spirits of compromise and adversarial democracy, that any such modification to the AUMF will cement into code as they appear now, verbatim in their gestating forms. Instead, the most optimal AUMF modification should combine a more holistic approach to force authorization with the elements of the aforementioned approaches that best address the criteria laid out in this thesis. The Tailored Approach proposed by the author is an attempt to do so.

Congress should implement the Tailored Approach to force authorization. A variety of statutory approaches may be utilized—different elements combined in different ways—but the Tailored Approach's holistic considerations not only shores up weak and

out-of-date legal authority, but it strengthens legal doctrine that will apply to future force authorizations. The Tailored Approach combines elements from and modifications of other proposals to balance security and constitutional protections, all the while maintaining respect for international legal frameworks and precedent setting concerns. As Justice Kennedy states in his majority opinion in *Boumediene v. Bush*, “The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the nation from terrorism.”<sup>618</sup> In sum, the Tailored Approach protects and promotes such genuine debate, while protecting the independent responsibilities of the executive branch and Congress.

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<sup>618</sup> Daskal and Vladeck, “After the AUMF,” 146.

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## VIII. CONCLUSION: TAKING RESPONSIBILITY FOR ACTION— AND INACTION

There must be some of us who say, “Let’s step back for a moment and think through the implications of our actions today—let us more fully understand the consequences.”

—Representative Barbara Lee<sup>619</sup>

Congress passed the AUMF a few short days after the 9/11 attacks to counter its perpetrators. Since then, it has served as the legal foundation for the use of force against terrorist organizations. Over a decade later, the U.S. government still relies on the AUMF as the primary domestic authority supporting counterterrorism measures, despite changes to the threat environment. AQ has decentralized and been degraded, and the president has expressed his desire to remove U.S. forces from Afghanistan within the next year. New threats have emerged that have nebulous or non-existent ties to the perpetrators of the 9/11 attacks. Thus, the AUMF is not the most appropriate legal mechanism to counter terrorist threats today.

Most sources agree that the AUMF resulted from a compromise between Congress and the executive branch. The Bush administration initially requested congressional authorization to use force to pre-empt future terrorist acts or aggression against the United States. Members of Congress—both democrats and republicans—rejected this request for expansive authority.

Despite these efforts, the AUMF has been broadly interpreted and applied. As former Congressman Paul McHale recently explained, “Through a combination of evolving defense policies, spanning many years and multiple presidential administrations, the United States is now capable of going to war without the consent of the governed. The implications of that reality are deeply troubling for our democracy and ultimately our national character.”<sup>620</sup> Since 9/11, the executive branch has been criticized for

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<sup>619</sup> Bill Hogan, “Alone on the Hill,” *Mother Jones*, September 20, 2001, <http://www.motherjones.com/politics/2001/09/alone-hill>.

<sup>620</sup> Noonan, “A More Sensible Set of War Powers.”

overstepping its wartime authority in applying the AUMF; this thesis has certainly partaken in this criticism to a certain degree. However, Congress is an enabler; it created and perpetuated conditions that led to the executive branch's broadening interpretation and application of AUMF authority. Congress must cease its passivity. This nation cannot afford to have Congress take the easy way out when it comes to deciding whether to initiate and perpetuate war. By issuing broad force authorizations, or delegating authority to the executive branch, Congress effectively removes itself from the decision-making process, and thereby, escapes most political liability in the process.

In considering AUMF modification, Congress should consider a new approach to force authorization; one that pushes Congress past its inaction to challenge the president if need be. Congress must fulfill its responsibility to represent the governed rather than take a backseat to the president, while driving the nation to war, however righteous or misled. A new approach is needed, and it needs to be one that motivates, or forces, the political branches to work together to form a collective judgment regarding the use of military forces.

In determining the most advantageous approach, Congress must first perform its due diligence and examine all available information, and identify all potential consequences of its actions. This thesis provides a compilation of resources and considerations that Congress may build off to fully appreciate the implications of modifying the AUMF.

Primary among these considerations is determining exactly how the threat environment has changed since Congress passed the AUMF. Congress must determine whether repeal or sunset of the AUMF will have adverse repercussions in countering current terrorist threats, and it must plan accordingly to phase-out certain affected operations. Open source information indicates that the primary threats to the United States currently originate with AQAP and ISIL. Consequently, consultation between Congress and the executive branch regarding these groups to determine both their intent and capability to attack the United States is necessary.

These security considerations must be balanced with constitutional protections, or domestic legality. Individuals and academics have alleged via numerous forums that the AUMF offends constitutional checks and balances provisions and due process protections. Several factors combine to create major concerns in this arena. Namely, the president's war powers are at their peak when the president operates within a congressional force authorization. The president is currently operating within such an authorization via the AUMF, and this authorization is broad. When a president operates with peak war powers, the judiciary affords the executive branch incredible levels of deference in all matters pertaining to armed conflict. When this peak power is combined with the decreased due process procedures applicable during armed conflict—that enable the president to detain individuals without charge and relaxes the evidentiary standards the executive branch must meet when such detention is challenged—serious constitutional concerns arise. In sum, this situation results in an inordinate concentration of power with the executive branch.

Checks on force utilization exist on the international level as well. While the application of international law to terrorist threats and the states that face them is unsettled, several preemptory norms in international law should be considered during the congressional decision-making process, namely, the norm against non-intervention, the self-defense requirement of necessity and proportionality, and laws of war protections for combatants. Consideration of these norms will increase U.S. credibility in the world community, and it will provide the United States with a well-reasoned defense, should its military or service members be challenged for such acts in international forums. Further, Congress has the opportunity to help shape international law. It should take advantage of this opportunity by developing policies and laws that are mindful of changes in contemporary armed conflict, yet respectful of international law.

Finally, congressional consideration of how its actions will affect precedent in several key areas is necessary. First, Congress should consider the promotion of alternative methods of threat mitigation, such as law enforcement authorities or the versatile use of force. Second, transparency must be considered because it promotes full debate regarding force authorizations. A lack of transparency impedes Congress's ability

to oversee force authorizations effectively. Transparency promotes accountability, specifically, the threat of political accountability. Such accountability will decrease the likelihood that lawmakers will fall victim to the tendency to rationalize policy based on an unsubstantiated perception of risk.

All these considerations should be incorporated into the methodology Congress uses to evaluate the AUMF and alternatives: domestic legality, security, international legality, and precedent. Application of these criteria will help ensure that Congress will identify a sustainable approach. Such an approach must address the holistic issue of force authorization, and specifically, establish political accountability between the executive and legislative branches, by way of continued consultation and cooperation.

Politicians, academics, and legal experts have endorsed several AUMF alternatives. Two leading proposals have emerged. The General Criteria Plus Listing Approach delegates force authorization to the executive branch through a robust administrative process. The Article II Approach eliminates force authorization altogether. Application of the criteria developed in this thesis to these approaches reveals that each has specific strengths and shortcomings.

In applying the criteria to the General Criteria Plus Listing Approach, it becomes apparent that implementing this approach—that arguably expands force authorization authority—is ill advised because the criticisms hurled at the AUMF will undoubtedly apply to an expanded approach as well. In fact, expanding the delegation of force authorization authority to the executive branch will exacerbate these issues. Again, when the president acts in accordance with a congressional delegation of authority, the president’s war powers are at their peak. The president’s decisions in this context have proven virtually unassailable in court. Thus, a congressional delegation of authority to the executive branch to determine which groups should be targeted with military force will provide the executive branch with incredible authority, even if a robust administrative process is implemented. While Congress would arguably be able to adjust this process via legislation, Congress has shown from its passivity in amending the AUMF that it is unlikely to act unless it is under a specific obligation to do so, as decisions made by Congress regarding waging war carry a great deal of political accountability.

On the other hand, an approach that fails to safeguard against the possibility of the executive branch stretching its Article II powers to a breaking point is not desirable either. At first, the Article II Approach seems to provide a viable alternative to the status quo. On its face, it satisfies the criteria in this thesis. The Title II Approach resorts back to constitutional principles centered on the president's authority to protect the nation from attack and Congress's authority to authorize force. It precludes neither force authorization if a situation warrants, nor prevents the executive branch from defending the country. In addition, if the president acts solely under Article II authority—without a congressional authorization—it is more likely that the judicial branch would entertain challenges to these acts because the president would not be acting with peak powers. Nonetheless, the risk for broadened assertions of executive power could hinder the satisfaction of the thesis criteria in practice.

This thesis proposes an alternative approach that capitalizes on the strengths of current proposals and minimizes their shortcomings: the Tailored Approach. This approach will accomplish the president's goal of "refining, then repealing" the AUMF, while establishing a sustainable approach for future force authorizations. It calls upon Congress to sunset the AUMF, effectively ending the U.S. war against AQ and the Taliban. The sunset of the AUMF, rather than its immediate repeal, provides time to transition out of Afghanistan. Clarification of AUMF terms in the interim promotes transparency and accountability.

In addition, it recommends that Congress consult with the executive branch in the consideration of force authorizations against AQAP and ISIL. Debate regarding the issuance of such force authorizations should not be limited to the intent of these groups; it should focus on the capability of these groups to successfully target the United States. Any force authorization issued against these groups must be narrowly tailored to the threat. It also must include a temporal limitation to force Congress to reassess the authorization prior to a specific date to promote continued transparency in considering the force authorization and accountability for continued assessment.

Further, the Tailored Approach promotes sustainable change in several ways. First, it proposes an overhaul of the WPR. Recommended changes aim to preserve

constitutional protections and promote informed debate between the political branches regarding force authorization. These changes would also require the executive branch to justify its actions legally under both domestic and international law via an analysis that would be made public and provided to Congress. In addition, the approach's recommended review of law enforcement authorities will help Congress keep apprised of potential executive action under these authorities, and it may provide Congress with potential alternatives to military force. In sum, the Tailored Approach provides the most satisfactory alternative to the AUMF because it best satisfies the criteria set forth in this thesis while providing a mechanism for sustainable change.

While this thesis ultimately recommends the Tailored Approach, its greatest value is the methodology with which it is possible to evaluate the status quo and its alternatives. Congress may ultimately implement bits and pieces of the Tailored Approach or the other approaches as it deems fit. More crucial is that Congress makes AUMF modification decisions based on a well-reasoned methodology, in an effort to predict all reasonable consequences of its actions. The effects of the AUMF are widespread and sometimes difficult to pinpoint. By applying the criteria of domestic legality, security, international legality, and precedent when evaluating the AUMF and alternative approaches, Congress will be able to identify the most advantageous course of action.

Congress cannot rely upon the executive branch to change the AUMF and end the conflict against AQ and the Taliban. Congress must fulfill its responsibilities by exercising its war powers in accordance with the constitution. As Koh states, this war has “[b]ecome so protracted that it has come to feel like a ‘Forever War.’ It has changed the nature of our foreign policy, consumed our new Millenium, and made it hard to remember what the world looked like before September 11.”<sup>621</sup> After 13 years, it is time for Congress to end this “forever war” and find more appropriate ways to mitigate terrorist threats.

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<sup>621</sup> *Authorization for Use of Military Force After Iraq and Afghanistan.*

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