

ARTICLE

After the AUMF

Jennifer Daskal* & Stephen I. Vladeck**

Introduction***

On September 18, 2001, one week after the deadliest terrorist attacks in U.S. history, President George W. Bush signed into law the Authorization for Use of Military Force (“AUMF”). The AUMF authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹

Although its delegation of power to the President was sweeping, the AUMF in fact reflected a compromise between Congress and the Bush Administration, which had sought an even broader and more open-ended grant of authority. Even as fires continued to burn at Ground Zero, Congress pushed back, only authorizing military force against those who could be

* Assistant Professor of Law, American University Washington College of Law. B.A., Brown University, 1994; B.A., University of Cambridge, 1996; M.A., University of Cambridge, 2001; J.D., Harvard Law School, 2001.

** Professor of Law and Associate Dean for Scholarship, American University Washington College of Law. B.A., Amherst College, 2001; J.D., Yale Law School, 2004.

*** For helpful conversations, feedback, and support, special thanks go to Rosa Brooks, Sarah Cleveland, David Cole, Wells Dixon, Rebecca Ingber, Harold Koh, Martin Lederman, Wendy Patten, and Andrea Prasow.

¹ Authorization for Use of Military Force § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note) (2001) [hereinafter AUMF].

tied to the groups directly responsible for the September 11 attacks.² Thus, despite widespread misrepresentations to the contrary,³ Congress pointedly refused to declare a “war on terrorism.” The use of force Congress authorized was instead directed at those who bore responsibility for the 9/11 attacks—namely, al Qaeda and the Taliban. It was also for a specific purpose: preventing those “nations, organizations, or persons” responsible for the September 11 attacks from committing future acts of terrorism against the United States.

Over a dozen years later, the AUMF—which has never been amended—remains the principal source of the U.S. government’s domestic legal authority to use military force against al Qaeda and its associates, both on the battlefields of Afghanistan and far beyond. But even as the statutory framework has remained unchanged, the facts on the ground have evolved dramatically: the Taliban regime in Afghanistan—behind which al Qaeda had taken refuge—has been removed from power; Osama bin Laden has been killed; the remaining masterminds of 9/11 are either deceased or in U.S. custody; and, perhaps most importantly, the “ranks” of al Qaeda have been “decimated,” to quote former Defense Secretary Leon Panetta,⁴ such that it no longer poses the threat that it did in the weeks and months before and after September 11.

This is not to suggest that the United States has eliminated the terrorist threat. To the contrary, a number of tragic events, including recent

² The authorization initially proposed by the Bush Administration included the broad-based authority to “deter and pre-empt *any* future acts of terrorism or aggression against the United States.” David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73–75 (2002). Congress rejected the Administration’s initial proposal as overbroad and instead crafted a resolution targeted at those responsible for the September 11 attacks, and those countries harboring the responsible parties. *Id.* at 74–75.

³ See, e.g., Grenville Byford, *The Wrong War*, FOREIGN AFFAIRS, July/Aug. 2002, at 34 (“Wars have typically been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war on terrorism, unfortunately, falls into the second category.”).

⁴ Hon. Leon Panetta, Sec’y of Def., “The Fight Against Al Qaeda: Today and Tomorrow,” Speech Before the Center for a New American Security (Nov. 20, 2012), available at <http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547>, [http://perma.law.harvard.edu/088s3gtLhg].

attacks in Boston,⁵ Algeria,⁶ and Kenya,⁷ underscore the extent to which terrorists—both self-radicalized individuals and organized groups—continue to present a threat to U.S. persons and interests, both at home and overseas. But in an area of law and policy in which there is seldom deep consensus, the one point upon which all seem to agree is the increasing extent to which those who threaten us the most are *not* those against whom Congress authorized the use of force in September 2001. This has led some to call for a new AUMF.⁸

One widely discussed proposal is that contained in a Hoover Institution white paper by Robert Chesney, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes. Titled “A Statutory Framework for Next-Generation Terrorist Threats,” the paper proposes a new statute wherein “Congress sets forth general statutory criteria for presidential uses of force against new terrorist threats but requires the Executive Branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force.”⁹ Modeled on the existing process for State

⁵ See President Barack Obama, Remarks by the President at the Nat'l Def. Univ. (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>, [<http://perma.law.harvard.edu/02qzrZuZiXw>] (describing the Boston Marathon bombings as being carried out by radicalized individuals, operating independent of al Qaeda).

⁶ See, e.g., Benjamin Weiser, *U.S. Charges Algerian in Deadly Gas Plant Attack*, N.Y. TIMES, July 19, 2013 (describing a former leader of al Qaeda in the Islamic Maghreb as being deemed responsible for the January 2013 attack on a gas plant in Algeria that killed dozens).

⁷ See, e.g., Nicholas Kulish and Jeffrey Gettleman, *U.S. Sees Direct Threat in Attack at Kenyan Mall*, N.Y. TIMES, Sept. 25, 2013 (describing al Shabaab as being responsible for the September 2013 attack on a Kenyan mall that killed over sixty civilians).

⁸ See, e.g., *The Law of Armed Conflict and the Use of Military Force*, Hearing Before the S. Comm. on Armed Servs., 113th Cong. (2013) (statement of Sen. McCain) (“[T]he fact is, that this authority [under the AUMF] . . . has 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 did in 2001.”); *id.* (“Wouldn’t it be helpful to—to the Department of Defense and the American people if we updated the AUMF to make it more explicitly consistent with the realities today, which are dramatically different from [sic] they were on that fateful day in New York?”); *id.* (statement of Sen. King) (“I’m not disagreeing that we need to attack terrorism wherever it comes from and whoever’s doing it. But what I’m saying is let’s do it in a constitutional way, not by putting a gloss on the document that clearly won’t support it.”).

⁹ ROBERT CHESNEY ET AL., HOOVER INST., A STATUTORY FRAMEWORK FOR NEXT GENERATION TERRORIST THREATS 10 (2013), available at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>, The authors are all members of the Hoover Institute’s Task Force on National Security and the Law.

Department designation of Foreign Terrorist Organizations (“FTOs”),¹⁰ the proposal would have Congress enact a new blanket framework statute authorizing the use of military force against as-yet-undetermined future terrorist organizations, and delegate to the Executive Branch the authority to designate those organizations against which such force may be used if and when the relevant criteria are met.¹¹ If press reports are accurate, the Hoover paper is but one of a number of competing proposals that have been circulated in favor of a “new”—or, at least, expanded—AUMF.¹²

This Essay offers an alternative vision for the future of U.S. counterterrorism policy. We start from the fundamental premise that, as Secretary of Homeland Security and former Department of Defense (“DoD”) General Counsel Jeh Johnson said in a speech in late 2012, war should “be regarded as a finite, extraordinary and unnatural state of affairs” that “violates the natural order of things.”¹³ In Johnson’s words: “Peace must be regarded as the norm toward which the human race continually strives.”¹⁴

With that animating principle in mind, we explain in the pages that follow that the future of U.S. counterterrorism policy should be one in which use-of-force authorizations are a last, rather than first, resort. Given the evolving sophistication of our law enforcement and intelligence-gathering tools over the past decade, along with the President’s settled powers under both domestic and international law to use military force in self-defense, the burden should—indeed, *must*—be on those seeking additional use-of-force authority to demonstrate why these existing

¹⁰ See 8 U.S.C. § 1189 (2012); *see also* 18 U.S.C. § 2339B (2012) (making it a crime to knowingly provide material support to a designated FTO).

¹¹ See Greg Miller & Karen DeYoung, *Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots*, WASH. POST, Mar. 7, 2013, at A1 (summarizing debates within the Obama Administration over the scope of the AUMF).

¹² See, e.g., Andrew Rosenthal, *Revisiting Post-9/11 Law*, N.Y. TIMES, May 7, 2013, <http://takingnote.blogs.nytimes.com/2013/05/07/revisiting-the-a-u-m-f/>, [<http://perma.law.harvard.edu/0E68urVY75o>]; Juana Summers, *Thornberry: Fix Post-9/11 Use of Force Rule*, POLITICO, May 10, 2013; *see also* *Counterterrorism Policies and Priorities: Addressing the Evolving Threat*, Hearing Before the S. Comm. on Foreign Relations, 113th Cong. (2013).

¹³ Hon. Jeh Charles Johnson, General Counsel, U.S. Dep’t of Def., “The Conflict Against Al Qaeda and its Affiliates: How Will It End?,” Speech Before the Oxford Union (Nov. 30, 2012), *available at* <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>, [<http://perma.law.harvard.edu/06hrMWJpiRE>].

¹⁴ *Id.*

capacities are inadequate. And even then, any use-of-force authority should be enacted by Congress only after public debate and extensive deliberation, carefully calibrated to the specific threat posed by an identifiable group, and limited in scope and duration—much as Congress seemed to recognize in its initial response to the President’s proposed authorization to use force in Syria¹⁵—so as to avoid making the very mistake that Congress so assiduously sidestepped after September 11.

In short, calls for a new framework statute to replace the AUMF are unnecessary, provocative, and counterproductive; they perpetuate war at a time when we should be seeking to end it. Congress certainly may choose, as it did in the AUMF, to authorize the use of military force against specific, organized groups so as to address an established and sustained threat that existing authorities are inadequate to quell. But until and unless the political branches publicly identify a group that poses such a threat, the 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.¹⁶

In what follows, we provide background on the AUMF and its interpretation over time (Part I), explain why the Hoover proposal and other calls for an expanded AUMF are unnecessary and unwise (Part II), and outline three alternative approaches for the next generation of U.S. counterterrorism policy (Part III).

I. Background

A. The AUMF, al Qaeda, and the Taliban

As noted above, Congress in the AUMF rejected alternative

¹⁵ See, e.g., Jennifer Daskal, *Limitless Wars: A Lesson from 9/11 for Syria (and Vice-Versa)*, AMERICAN CONSTITUTION SOCIETY BLOG (Sept. 11, 2013), available at <http://www.acslaw.org/acsblog/limitless-wars-lessons-from-911-for-syria-and-vice-versa>, [http://perma.law.harvard.edu/0CLwjVkJCwG].

¹⁶ See, e.g., Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, Remarks to a Security Council Briefing on Counterterrorism (Mar. 13, 2013), available at <http://usun.state.gov/briefing/statements/209314.htm>, [http://perma.law.harvard.edu/058xpaVfUzg] (describing the multi-pronged approach to combating terrorism in Africa).

language proposed by the Bush Administration that would have authorized the broad-scale use of force to punish those responsible for September 11 and “deter and pre-empt *any* future acts of terrorism or aggression against the United States.”¹⁷ Instead, Congress chose its words carefully, focusing only on those “nations, organizations, or persons” that the President “determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”¹⁸ Shortly after he signed the AUMF into law, President Bush confirmed what by then had been widely reported: that convincing evidence identified the responsible parties as al Qaeda and the Taliban.¹⁹

From its inception, then, the AUMF was not an open-ended force authorization; it was a specific authorization to use military force against those entities that attacked the United States on September 11: al Qaeda, the Taliban, and, by interpretation, the so-called co-belligerents of these organizations.²⁰ Congress did not authorize hostilities against a common noun, but a proper one.²¹ Moreover, as the Supreme Court later emphasized in *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*, such force was only authorized to the degree it was consistent with the traditional incidents—and international laws—of war.²²

This understanding has been the driving force behind the past decade of U.S. counterterrorism policy. Thus, regardless of where they have been arrested, terrorism suspects who are *not* part of al Qaeda, the Taliban, or associated forces have consistently been prosecuted in U.S. courts,

¹⁷ Abramowitz, *supra* note 2 (citing AUMF § 2(a), 115 Stat. at 224) (emphasis added); *see* 147 CONG. REC. S9950-51 (daily ed., Oct. 1, 2001) (statement of Sen. Robert Byrd) (providing the text of the administration’s initial proposal); *id.* at S9949 (“[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.”).

¹⁸ AUMF § 2(a), 115 Stat. at 224.

¹⁹ President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), *in* 2 PUB. PAPERS at 1347, 1347-48.

²⁰ *See infra* Part II.B.

²¹ *See, e.g.*, Byford, *supra* note 3, at 34.

²² *See Hamdan v. Rumsfeld*, 548 U.S. 557, 594-95 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004) (plurality opinion).

transferred to other countries for trial, or released.²³ Conversely, all three branches of the U.S. government have agreed that anyone who *is* a member of al Qaeda or the Taliban can be detained without charge, and also, according to the views of the past two administrations, subject to lethal force in appropriate circumstances.²⁴ The AUMF has thus been the principal source of authority for U.S. military operations in Afghanistan and, so far as can be gleaned from public reports, targeted killing operations in Pakistan, Yemen, and Somalia.²⁵

Over twelve years after the AUMF was signed into law, we have also witnessed a significant shift in the threat landscape. The entity that attacked the United States on September 11, 2001—what is often described as “al Qaeda core”—has been effectively eviscerated. It is a group President Obama describes as “a shadow of its former self,”²⁶ and which the Director of National Intelligence described in testimony before Congress as being

²³ See, e.g., Greg Miller & Karen DeYoung, *Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots*, WASH. POST, Mar. 7, 2013, at A1 (noting that law of war authorities pursuant to the AUMF do not extend beyond al Qaeda, the Taliban, and associated forces; the key debate, then, is over the scope of “associated forces”). Moreover, others who are covered by the AUMF were prosecuted by federal, civilian court—at times as a precondition for extradition. See, e.g., Dan Eggen, *Dutch Citizen Pleads Not Guilty to Terrorism Charges*, WASH. POST, Jan. 30, 2007 (describing prosecution in civilian court as a precondition to the extradition of Wesam al-Delaema).

²⁴ See, e.g., John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at Woodrow Wilson Int’l Ctr. for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), *available at* <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>, [http://perma.cc/5UNE-3HXA] (emphasizing that “individuals who are part of al-Qaida or its associated forces are legitimate military targets”); *see also* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(1), 125 Stat. 1298, 1562; Al Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010). See generally Curtis A. Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (explaining the central role of the AUMF in debates over most of the Bush Administration’s counterterrorism policies).

²⁵ See, e.g., The White House, Presidential Letter – 2012 War Powers Resolution 6-Month Report (June 15, 2012) [hereinafter War Powers Report], *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>, [http://perma.law.harvard.edu/0VwpeBCCmqy] (describing “direct action” taken in Somalia and Yemen); Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, at A1, *available at* <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>, [http://perma.law.harvard.edu/0R6rwWuo6E7/].

²⁶ President Barack H. Obama, State of the Union Address (Feb. 12, 2013), *available at* <http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html>, [http://perma.law.harvard.edu/0anmdWrVzui].

“probably unable to carry out complex, large-scale attacks in the West.”²⁷ At the same time, the Taliban has been removed from power in Afghanistan, with the impending withdrawal of U.S. ground troops heralding in a new phase in U.S. policy there.

Increasingly, then, legal and policy debates over the AUMF have focused less and less on al Qaeda’s core and the Taliban, and more and more on those groups and other actors that had nothing to do with the September 11 attacks, but nonetheless pose threats to U.S. interests today. The debate over the future of the AUMF has become one dominated by a discussion of “associated forces,” that is, the question of which entities qualify as “co-belligerents” of al Qaeda and are therefore covered by the AUMF even if they were not themselves responsible for September 11. This debate, in turn, revolves around two distinct but inter-related questions: (1) the appropriate scope and identification of associated forces; and (2) the purported need for new use-of-force authorities to neutralize threats that cannot be appropriately subsumed under the notion of associated forces. And both of these inquiries are dramatically complicated by the government’s lack of transparency as to which groups qualify as associated forces.²⁸

B. The Problem of “Associated Forces”

Most modern wars have involved more than two parties. Thus, in World War II, the United States was not just at war with Germany, Italy, and Japan; rather, the United States was also at war with their “co-belligerents,” for example, Bulgaria, Hungary, and Romania, among others.²⁹ The Bush and Obama Administrations have also applied this notion of co-belligerency to the conflict authorized by the AUMF. Thus, whereas Congress in the AUMF referred only to “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist

²⁷ See Worldwide Threat Assessment of the U.S. Intelligence Cmty.: Statement for the Record Before the S. Select Comm. On Intelligence, at 4 (2013) (statement of Hon. James R. Clapper, Dir. of Nat’l Intelligence), *available at* <http://www.intelligence.senate.gov/130312/clapper.pdf>, [<http://perma.law.harvard.edu/0PMpMeHxzVq>].

²⁸ See, e.g., Hearing, *supra* note 8 (witnesses from the Department of Defense offering to provide the Senate Armed Services Committee with the list of “associated forces” but declining to answer suggestion that it be made public).

²⁹ See, e.g., Declarations of War Against Bulgaria, Hungary and Rumania, chs. 323–25, 56 Stat. 307 (1942).

attacks that occurred on September 11, 2001, or harbored such organizations or persons,”³⁰ the past two administrations—with subsequent ratification by Congress with respect to detention authority³¹—have understood this language to encompass not just al Qaeda and the Taliban, but also those groups that are “associated forces” thereof. As Jeh Johnson explained in a 2012 speech, the U.S. government defines an associated force as an (1) “organized armed group” that is (2) “a co-belligerent with al Qaeda in the hostilities against the United States and its coalition partners.”³²

A key difference is that Congress declared war against the United States’ co-belligerent enemies in World War II, whereas the Executive Branch has, since 2001, read co-belligerents into the AUMF without ever going back to Congress for subsequent authorization. In fact, it has *refused* to publicly acknowledge what groups qualify as associated forces, asserting that doing so would “inflate” that group’s recruitment efforts.³³ Not only does such a justification seem unconvincing—after all, potential members would be on alert that the Pentagon considers the group and its members legitimate lethal targets, which, among other things, would make membership in the group a dangerous proposition—but there is something highly undemocratic about the President engaging the nation in a long-term conflict without disclosing to the public who the enemy is.³⁴

³⁰ AUMF § 2(a), 115 Stat. at 224.

³¹ See FY2012 NDAA § 1021(b)(2), 125 Stat. at 1562 (authorizing detention of “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces”).

³² See Johnson, *supra* note 13.

³³ See Cora Currier, *Who are We at War With? That’s Classified*, PROPUBLICA, July 26, 2013, available at <http://www.propublica.org/article/who-are-we-at-war-with-thats-classified>, [<http://perma.law.harvard.edu/0VDu9hkuti>] (citing Pentagon spokesperson, Lt. Col. Jim Gregory: “Because elements that might be considered ‘associated forces’ can build credibility by being listed as such by the United States, we have classified the list . . . we cannot afford to inflate these organizations that rely on violent extremist ideology to strengthen their ranks.”).

³⁴ For an excellent critique of the United States’ justification for keeping the list of “associated forces” secret, see Jack Goldsmith, *DOD’s Weak Rationale For Keeping Enemy Identities Secret*, LAWFARE, July 26, 2013, <http://www.lawfareblog.com/2013/07/dods-weak-rationale-for-keeping-enemy-identities-secret/>, [<http://perma.law.harvard.edu/0wbGpQiLURT>].

Thus, while certain entities and individuals clearly fall outside of the Administration’s definition of “associated forces” (for example, a group of two or more terrorists with no direct affiliation with al Qaeda, such as the two brothers responsible for the 2013 Boston Marathon bombing; or entities that share ideological affinities with al Qaeda but do not engage in any hostilities against the United States or its coalition partners), there is a total lack of transparency as to who *is* covered. Even with respect to al Qaeda in the Arabian Peninsula (“AQAP”), the government has never clarified whether operations against its members are covered by the AUMF because they are deemed to be “part of” al Qaeda or because the group qualifies as an “associated force.”³⁵

Public statements by DoD officials have only served to confuse matters more, suggesting that there may be a long list of covered groups—while remaining unclear as to whether such references are to “associates” covered by the AUMF or “affiliates” that fall under a separate (heretofore non-public) definition that have ties with al Qaeda, but are not in fact subsumed under the 2001 AUMF.³⁶ As a result, there is no clarity as to which, if any, of the many groups operating in the tribal areas of Northwest Pakistan qualify, or whether and under what circumstances entities such as al Shabaab,³⁷ al Qaeda in the Islamic Maghreb (“AQIM”), or the Nusra Front—or parts of such groups—might also be encompassed within the definition of “associated forces.”

³⁵ See Opposition to Plaintiff’s Motion for a Preliminary Injunction and Memorandum of the United States in Support of Defendants’ Motion To Dismiss at 1, *al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (“The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda. . . .”).

³⁶ See Hearing, *supra* note 8.

³⁷ While the United States has acknowledged taking “direct action” against members of al Shabaab who are *also* members of al Qaeda, *see* War Powers Report, *supra* note 25, it has never stated whether al Shabaab itself is deemed covered by the AUMF. *See also* Marty Lederman, *The Capture of Abu Anas and an Attack on an al Shabaab Leader*, JUST SECURITY (Oct. 6, 2013, 9:48 AM), available at <http://justsecurity.org/2013/10/06/capture-abu-anas-al-liby-attack-shabaab-leader/>, [http://perma.law.harvard.edu/0czfdcu6SMS] (suggesting that the main target of the October 5, 2013 operation in Baraawe, Somalia was deemed a member of al Shabaab who was *also* a member of al Qaeda and could therefore be targeted under the same rationale). For an argument that the AUMF should not be expanded to cover al Shabaab absent congressional debate and explicit authorization, *see* Jennifer Daskal & Steve Vladeck, *Westgate, al Shabaab, and the AUMF*, JUST SECURITY (Sept. 23, 2013, 6:15 AM), available at justsecurity.org/2013/09/23/westgate-al-shabaab-aumf/, [http://perma.law.harvard.edu/0FViTj1uCik].

The pervasive secrecy surrounding the government's application of that concept has led some to speculate that the Executive Branch will simply subsume "extra-AUMF" cases within the existing AUMF framework, shoehorning emerging threats into the increasingly outdated ambit of the original statute simply by labeling the groups that pose them as "associated forces."³⁸ Were this to happen, the government could—despite the incapacitation of those responsible for the September 11 attacks and the pending withdrawal of all U.S. ground troops from Afghanistan—seek to rely on the AUMF as authority for offensive military operations in Mali, Syria, or Somalia, even if the targets were not also deemed members of al Qaeda, to say nothing of operations in other corners of the globe with loose affiliations with al Qaeda and little to no connection to the September 11 attackers.³⁹

To be clear, we are not suggesting that this shift has already taken place. Indeed, we do not and would not know if it did, as the list of covered groups remains classified.⁴⁰ There is, however, relatively widespread agreement that such a shift would be unsatisfactory.⁴¹ The more that the AUMF is used to justify the use of military force against those with no connection to the September 11 attacks and the ensuing armed conflict, the more it becomes an essentially limitless authorization, allowing the President to use force as a matter of first resort in a wide range of conflicts, untethered to the self-defense justification for the post-9/11 use of force, and irrespective of constitutional limits that give Congress, not the Executive, the authority to declare war.⁴² As we explain in Part II below,

³⁸ See, e.g., CHESNEY ET AL., *supra* note 9, at 4 ("[I]n a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult (and hence subject to debate) in some cases, and downright impossible in others.").

³⁹ Indeed, at a 2013 Senate Armed Services Committee hearing, Robert Taylor, Acting General Counsel of the Department of Defense, stated that the AUMF *could* authorize lethal force against al Qaeda's associated forces in places as far-flung as Mali, Libya, and Syria. *See Hearing*, *supra* note 8.

⁴⁰ *See id.* Despite offering an expansive interpretation of what the AUMF *would* permit, the Administration has not yet stated that it *does* extend to groups engaged in mostly local conflicts in places such as Mali, Libya, and Syria. *See, e.g., id.* (indicating that the Pentagon was "looking very hard" at the Syria-based al Nusra Front, but had not yet defined it as an "associated force" of al Qaeda).

⁴¹ *See, e.g.*, Miller & DeYoung, *supra* note 11 ("U.S. officials said administration lawyers are increasingly concerned that the law is being stretched to its legal breaking point, just as new threats are emerging in countries including Syria, Libya and Mali.").

⁴² *See U.S. CONST. art. I, § 8, cl. 10.*

this is not an appropriate interpretation of the statute, and it is not an appropriate exercise of presidential power. If new groups emerge that pose a threat sufficient to warrant independent use-of-force authority, the government should affirmatively and publicly identify them and obtain from Congress specific authorization to use force against *those* groups. If, in contrast, no special use-of-force authority is needed to respond to these groups, then this only underscores our more fundamental point: that a new, expanded AUMF is unnecessary.

The proponents of the Hoover proposal, however, have seized upon an alternative possibility: in their view, the government *will* seek to use force against so-called “extra-AUMF” threats regardless of the underlying statutory authorization. They rely upon this presumed fact, coupled with a concern about the lack of transparency as to which groups fall within the AUMF, to justify a new approach presented as a moderate solution: Congress delegates to the President the power to identify those groups against which military force is necessary pursuant to specific statutory criteria. In other words, Congress delegates its war-declaration authority to the Executive Branch, subject to specified criteria. The proposal further requires such delegations to be public—with *ex post* auditing and reporting to address the current transparency deficit. As the Hoover proposal concludes:

a listing system modeled on this approach best cabins presidential power while at the same time giving the president the flexibility he needs to address emerging threats. Such a listing scheme will also render more transparent and regularized the now very murky process by which organizations and their members are deemed to fall within the September 2001 AUMF.⁴³

The Hoover proposal thus rests on a view—which we share—of the insufficient transparency of the identification of “associated forces.” Its solution, however, is a new use-of-force regime in which Congress enacts a wholesale delegation to the President of the power to identify the groups against which armed conflict is authorized, rather than case-by-case authorizations of such force by Congress.

⁴³ CHESNEY ET AL., *supra* note 9, at 10.

Although we agree that greater transparency and accountability are necessary limitations on the government's scope of authority to use force against "associated forces" under the AUMF, we fail to see how the transparency concern justifies the type of open-ended or broad force authorizations that the Hoover paper advocates.⁴⁴ To the contrary, as we explain below, such an approach rests on two assumptions that we vigorously dispute: that an expansive and expanding war is inevitable and that no alternative means exist for achieving a comparable result. Indeed, not only do such alternatives exist, but an ever-expanding armed conflict paradoxically threatens to make the nation *less* safe in the long term.

II. The Case Against Open-Ended Authority to Use Force

The underlying assumption behind the Hoover proposal and other similar undertakings seems to be that expansion, not curtailment, of the military response to terrorism—including the targeted killing program and detention without charge—is required to keep the nation safe. These efforts, however, should be rejected for at least five reasons.

First, it is not at all clear that the threat these "extra-AUMF" groups pose has evolved to justify a new declaration of armed conflict; notably, the Executive not only is *not* saying it is needed, but the President has recently spoken about the possibility of "refin[ing], and ultimately repeal[ing]" the AUMF's mandate.⁴⁵ *Second*, repeated claims to the contrary notwithstanding, law enforcement tools, coupled with international counterterrorism cooperation, capacity building of partner states, and strategic initiatives to reduce violent extremism, are and have proven to be a highly effective means of deterring, incapacitating, and gathering intelligence from terrorists; they can, and should, be the tools of first resort against these groups and their members. *Third*, to the extent that law enforcement tools are insufficient to prevent terrorist attacks against U.S. interests in a particular circumstance, the President's self-defense authorities, appropriately applied, should provide more than adequate authority to take necessary action. *Fourth*, if an organized armed group emerges that poses the type of sustained, intense threat that justifies a

⁴⁴ Other proposals floating behind the scenes in Congress also reportedly rest on the need for new, broad-based force authorizations. See Rosenthal, *supra* note 12; Summers, *supra* note 12; Hearing, *supra* note 12.

⁴⁵ Remarks of the President at Nat'l Def. Univ., *supra* note 5.

declaration of armed conflict, Congress can pass a new and appropriately circumscribed authorization to use military force—just as it did with the AUMF. *Fifth*, and most importantly, it is not at all clear that the expanded use of military force as a matter of first resort achieves the United States’ ultimate security goal of protecting the nation from terrorist threats; to the contrary, it likely undermines it.

A. The Evolving Nature of the Threat

The push for a new AUMF is premised on the notion that, as the Hoover paper puts it, although the “original objects of the AUMF are dying off, newer terrorist groups that threaten the United States and its interests are emerging around the globe.”⁴⁶ We agree with this claim. The threat the United States faces from terrorism has not been and cannot be eliminated. As President Obama quite eloquently put it:

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.⁴⁷

But while we need to do what we can to minimize the terrorist threat, it does not necessarily follow that wartime authorities are needed or are the preferred tools for doing so. Although threats no doubt persist, it is not yet evident that any particular emerging terrorist group poses the kind of threat that requires an open-ended authorization of military force and the invocation of the laws of armed conflict, that is, the kind of threat to the United States that al Qaeda posed on September 11. In fact, according to the Director of National Intelligence’s recently released Intelligence Community Worldwide Threat Assessment, only AQAP is described as having the intent and capacity to launch attacks on the U.S. homeland.⁴⁸ This is not to say that other terrorist groups are less dangerous; as the recent

⁴⁶ CHESNEY ET AL., *supra* note 9, at 1–2.

⁴⁷ Obama, *supra* note 9, at 1–2.

⁴⁸ See Clapper, *supra* note 27, at 3–4.

attacks in Kenya and Algeria illustrate, they are perhaps only *more* so. But their immediate focus appears, at least based on the available information, to be local and regional, rather than directed at the U.S. homeland. And although reasonable people may disagree about whether it should be the policy of the United States to use military force to prevent acts of terrorism against our overseas allies, there is no question that the AUMF adopted a much narrower lens—and predicated the use of force on the threat specifically faced by the *United States*. At the very least, the decision to engage law of war tools and to justify the use of force as a first resort against new, emergent threats—many of which appear to be focused on regional targets—should be made after public discussion and debate, just as happened with regard to al Qaeda and the Taliban in the days after the 2001 attacks.

Meanwhile, it is worth remembering that under well-established rules of international law, a threat alone does not trigger an armed conflict absent hostilities that reach a certain threshold level of intensity involving an organized, armed group.⁴⁹ This is for good reason; if any group of violent criminals triggered an armed conflict, virtually every nation-state would be in a perpetual state of war. A declaration of armed conflict against a long and/or open-ended list of emerging terrorist groups undermines the important distinction between war and peace, as well as the efforts to cabin war that have been the heart of the international community’s collective engagement since the end of the Second World War. Simply put, such an

⁴⁹ See, e.g., Prosecutor v. Tadic, Case No. IT-91-1, Decision on Defence Motion of Interlocutory Appeal on Jurisdiction, par. 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); see also Laurie Blank & Geoffrey Corn, *Losing the Forest Through the Trees: Syria, Law, and the Imperatives of Conflict Recognition*, 46 VAND. J. INT’L L. 693, 737 (2013) (persuasively critiquing the international community’s interpretation and rigid application of the *Tadic* ruling, yet arguing for a totality of the circumstances test that makes these factors the “essential guideposts”).

approach would change the default from peace to war.⁵⁰ As President Obama put it: “Unless we discipline our thinking and 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.”⁵¹

1. The Expansion of Law Enforcement Capacities and Capabilities since 2001

Claims to the contrary notwithstanding, law enforcement tools, coupled with other counterterrorism capabilities, are—and have proven to be—effective in dealing with a wide array of terrorist threats, including those also subject to military force under the AUMF. According to the Department of Justice’s own statistics, for example, the United States has successfully prosecuted approximately 500 terrorists over the past decade in our ordinary civilian courts, including several dozen who were apprehended overseas and/or arguably had connections to al Qaeda or its affiliates.⁵²

More than just taking dangerous terrorists off the streets, these arrests and prosecutions have also been the source of valuable intelligence about terrorist groups and their operations, due in part to the strong incentives for defendants to provide accurate, reliable information in

⁵⁰ Even if it is not the intention of the Hoover proposal’s authors, experience under the FTO designation process suggests that the list of groups with which the United States is engaged in an armed conflict would grow, not shrink, over time—with every incentive pushing the Executive to expand, not curtail its own authority to use force; both the Executive and Congress are loath to delist groups that might someday pose a risk of harm, and there is little to no meaningful opportunity to correct flaws in either the process or substance of individual designations. *Cf.* United States v. Afshari, 446 F.3d 915, 917–22 (9th Cir. 2006) (Kozinski, J., dissenting from the denial of rehearing en banc) (critiquing FTO designation process). *But see* Jack Goldsmith, *Response to Jennifer and Steve on Statutory Authority and Next Generation Threats*, LAWFARE, Mar. 18, 2013, <http://www.lawfareblog.com/2013/03/response-to-jennifer-and-steve-on-statutory-authority-and-next-generation-threats>, [<http://perma.law.harvard.edu/06kBkYoSkaA>] (asserting that the Hoover proposal contains “stricter substantive and temporal limits than the unilateral Executive Branch expansions of the AUMF combined with unilateral Article II authorities”).

⁵¹ Remarks by the President at Nat'l Def. Univ., *supra* note 5.

⁵² These statistics come from Department of Justice data obtained by Human Rights First in response to a FOIA request (on file with authors).

exchange for plea deals.⁵³ Recent examples include Ibrahim Suleiman Adnan Adam Harun, an al Qaeda operative who was captured in Italy last year, extradited to the United States, and is reportedly cooperating with investigators;⁵⁴ David Headley, who committed to continued cooperation after providing valuable information about the terrorist organization Lashkar-e-Tayyiba and Pakistan-based terrorist leaders prior to being sentenced to thirty-five years for his role in the 2008 terrorist attack in Mumbai and another planned, but thwarted attack, in Denmark;⁵⁵ and Ahmed Warsame, who was captured off the coast of Yemen in 2011, transferred to the United States after a short period of military detention,⁵⁶ and reportedly provided the government extensive intelligence and evidence prior to pleading guilty to providing material support to terrorism, among other charges. Even more recently, the United States has prosecuted Abu Ghaith, Osama bin Laden's son-in-law, who was taken into custody in Jordan in February 2013, in federal civilian court in New York for conspiring to kill Americans abroad;⁵⁷ and Abu Anas al Libi, who was captured in Libya in October 2013, and, like Warsame, was held for a brief

⁵³ See, e.g., David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, app. 1 at 80–95 (2011) (providing examples of intelligence obtained from terrorism targets in law enforcement custody between approximately 1998 and 2010).

⁵⁴ Mosi Secret, *Man Charged with Plotting Against U.S. Abroad*, N.Y. TIMES, Mar. 20, 2013, at A28.

⁵⁵ U.S. Dep't of Justice, David Headley Sentenced to 35 Years in Prison for Role in Indian and Denmark Terrorist Attacks, Jan. 24, 2013, <http://www.justice.gov/opa/pr/2013/January/13-nsd-104.html>, [<http://perma.law.harvard.edu/0NZteyyTbTi/>]; U.S. Dep't of Justice, Fact Sheet: The Criminal Justice System as a Counterterrorism Tool, Jan. 26, 2010, <http://www.justice.gov/opa/pr/2013/January/13-nsd-104.html>, [<http://perma.law.harvard.edu/0M49iTd2zQJ>].

⁵⁶ This initial sixty day period of military detention appears to be justified as permissible under the AUMF. Absent the AUMF, or some other basis for allowing an initial period of law-of-war detention in such circumstances, the sixty day delay in presentment would be difficult to justify, and perhaps even unconstitutional. *See generally* County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

⁵⁷ U.S. Att'y Office, S.D.N.Y., Guilty Plea Unsealed in New York, Mar. 25, 2013, <http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shabaab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations>, [<http://perma.law.harvard.edu/0toP4TLTTUr/>].

period in military detention before being transferred to civilian court where he is facing trial for his role in the 1998 Embassy bombings.⁵⁸

To be sure, as critics will be quick to point out, law enforcement did not stop the September 11 attacks. But this response is a red herring, particularly when one considers just how much our counterterrorism capacities have increased over the past decade.⁵⁹ Since 2001:

- The so-called Foreign Intelligence Surveillance Act (“FISA”) wall, which was sharply criticized by the 9/11 Commission for inhibiting the sharing of intelligence and law enforcement information and thereby contributing to pre-September 11 law enforcement failures,⁶⁰ has come down. Thanks to amendments included in the USA PATRIOT Act of 2001, FISA now explicitly permits the coordination of law enforcement and intelligence officials to protect against acts of international terrorism,⁶¹ and various statutory reforms over the past decade have only further facilitated such interagency cooperation.⁶²

⁵⁸ See Marc Santora & William K. Rashbaum, *Bin Laden Relative Pleads Not Guilty in Terrorism Case*, N.Y. TIMES, Mar. 8, 2013, available at <http://www.nytimes.com/2013/03/09/nyregion/sulaiman-abu-ghaith-bin-ladens-son-in-law-charged-in-new-york.html>, [<http://perma.law.harvard.edu/0ZPTeP8gsM7/>].

⁵⁹ We do not express a view as to the merits of this or any of the other authorities listed herein; rather, our aim is to illustrate the range of “peacetime” law enforcement and intelligence gathering tools at the government’s disposal under existing law and doctrine that do not depend upon the existence of any ongoing armed conflict. We leave the debate over the proper scope of these authorities for another day.

⁶⁰ See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 78–80, 270–72 (2004).

⁶¹ See 18 U.S.C. § 1806(k); see also Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (overruling the “primary purpose” doctrine, pursuant to which FISA had been interpreted to require that “the purpose” of FISA surveillance be to collect foreign intelligence information, and replacing it with a requirement that foreign intelligence be a “significant purpose” of such surveillance).

⁶² See generally JEROME P. BJELOPERA, CONG. RES. SERV., THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS (2013), available at <http://www.fas.org/sgp/crs/terror/R41780.pdf>, [<http://perma.law.harvard.edu/0Fn2A2S4HkZ/>] (describing the enhanced investigative tools, authorities, and capabilities provided and employed by the FBI since September 11, 2001).

- The FISA Amendments Act (“FAA”) of 2008 further authorized the government, albeit not without significant controversy,⁶³ to engage in the warrantless interception of communications that take place in the United States if the targets are foreigners overseas.⁶⁴ Senator Dianne Feinstein, Chairwoman of the Senate Intelligence Committee, has described FISA-related authorities as having “produced and continu[ing] to produce significant information that is vital to defend the nation against international terrorism and other threats”—including information relied upon in making recent terrorism-related arrests.⁶⁵ The Director of the National Security Agency recently asserted that programs initiated pursuant to the FAA authorities and a separate business records provision⁶⁶ have

⁶³ Thanks in large part to the Snowden disclosures, there is an active and ongoing debate about the scope and nature of such surveillance activities carried out by the U.S. government. *See, e.g.*, James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 23, 2013, <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html>, [http://perma.law.harvard.edu/0U2R8pPXA5r] (suggesting the need to introduce an adversarial process into the Foreign Intelligence Surveillance Court). But this debate, while important, is immaterial for present purposes; the relevant point is that these authorities do exist, and are much more robust today than they were on September 11, 2001.

⁶⁴ A separate 1998 amendment, further refined in 2001 as part of the PATRIOT Act, allows the government to seek a FISA court order requiring production of documents or other tangible things when they are relevant to an authorized national security investigation. This provision has been the source of significant controversy, given recent revelations that it has been relied on to authorize the bulk collection of telephonic metadata. *See, e.g.*, Press Release, U.S. Senate, Udall, Wyden Propose Limiting the Federal Government’s Ability to Collect Vast Amounts of Data from Americans (June 14, 2013); *cf.* Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Rep. F. James Sensenbrenner, Jr. (July 16, 2013) (defending bulk collection of telephonic metadata), available at http://www.lawfareblog.com/wp-content/uploads/2013/07/ag_holder_response_to_congressman_sensenbrenner_on_fisa.pdf, [http://perma.law.harvard.edu/0bGM9WChGUeJ]. As this Article went to press, a federal district court judge in Washington, D.C., issued a preliminary injunction against the metadata program, holding that there is a substantial likelihood that the program violates the Fourth Amendment. *See* Klayman v. Obama, No. 13-0851, 2013 WL 6571596 (D.D.C. Dec. 16, 2013). Eleven days later, a different federal judge reached the opposite conclusion. *See* ACLU v. Clapper, No. 13-3994, 2013 WL 6819708 (S.D.N.Y. Dec. 27, 2013). Both decisions were subsequently appealed.

⁶⁵ Ellen Nakashima, *Senate Approves Measure to Renew Controversial Surveillance Authority*, WASH. POST., Dec. 28, 2012, http://www.washingtonpost.com/world/national-security/senate-approves-measure-to-renew-controversial-surveillance-authority/2012/12/28/4353905c-50fc-11e2-8b49-64675006147f_story.html, [http://perma.law.harvard.edu/0rJbb4UGzzQ].

⁶⁶ Philip Bump, *The Senate Presses the NSA’s Buttons on the Record, Even While Trying Not To*, THE WIRE, June 12, 2013, <http://www.thewire.com/politics/2013/06/nsa-senate-appropriations-committee-hearing/66177/>, [http://perma.cc/0hdFVJJaAbD].

helped to thwart a plot to blow up the New York Stock Exchange, among others.⁶⁷

- Substantive criminal laws have evolved to respond to the changing nature of the threat. Material support statutes, for example, which have been interpreted broadly,⁶⁸ were expanded to cover overseas conduct in October 2001, with further expansions in 2004.⁶⁹ Additional substantive expansions to these laws were also added in 2004, including the addition of a new crime of “receiving military-type training from a foreign terrorist organization.”⁷⁰
- In 2009, the High-Value Intelligence Group (“HIG”) was put into effect for the purposes of designing and conducting intelligence interviews of high-value terrorism detainees. The HIG pulls together the expertise of top intelligence professionals across the government, including from the FBI, CIA, and DoD, so as to maximize the effectiveness of the intelligence interviews.⁷¹

⁶⁷ See Courtney Kube, *NSA Chief Says Surveillance Program Helped Disrupt 54 Plots*, NBC NEWS, June 27, 2013, available at http://usnews.nbcnews.com/_news/2013/06/27/19175466-nsa-chief-says-surveillance-programs-helped-foil-54-plots?lite, [<http://perma.law.harvard.edu/0ea23nNHZdX/>]; Josh Gerstein, *Prism Stopped NYSE Attack*, POLITICO, June 18, 2013, <http://www.politico.com/story/2013/06/nsa-leak-keith-alexander-92971.html>, [<http://perma.law.harvard.edu/0753z7xbuZE/>]. Subsequently, the government clarified that it could only identify one *specific* attack that had been thwarted by these authorities. See, e.g., Charlie Savage & David E. Sanger, *Senate Panel Presses N.S.A. on Phone Logs*, N.Y. TIMES, Aug. 1, 2013, at A1, <http://www.nytimes.com/2013/08/01/us/nsa-surveillance.html?pagewanted=all>, [<http://perma.law.harvard.edu/0eU1BEEd9bq6/>].

⁶⁸ See Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding 18 U.S.C. § 2339B against First and Fifth Amendment challenges).

⁶⁹ See Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (amending 18 U.S.C. § 2339B(d)); USA PATRIOT Act of 2001 § 805(a)(1)(F), 115 Stat. at 377 (amending 18 U.S.C. § 2339A(a)).

⁷⁰ See IRTPA § 6602, 118 Stat. at 3761–62 (codified at 18 U.S.C. § 2339D).

⁷¹ See, e.g., Carol Cratty & Pam Benson, *Special Terror Investigation Group Used 14 Times in the Last Two Years*, CNN SECURITY BLOG, Mar. 7, 2012, available at <http://security.blogs.cnn.com/2012/03/07/special-terror-interrogation-group-used-14-times-in-last-two-years/>, [<http://perma.law.harvard.edu/0uTRMJTcfN/>].

- Federal courts have recognized an expanded “public safety” exception to *Miranda* to allow for the limited introduction into evidence of unwarned statements.⁷²
- An increasing cohort of judges and civilian prosecutors has successfully navigated the handling of classified information. Examples include the recent closed-door arraignment of three European men apprehended en route to Yemen and accused of supporting al Shabaab⁷³ and the extensive handling of classified information in the prosecution of Ahmed Ghailani, now serving a life sentence for his role in the 1998 embassy bombings.⁷⁴ Other examples abound.⁷⁵
- Meanwhile, widely cited fears about the potential harm of bringing high-profile terrorism suspects into federal court have proven baseless. Not a single terrorist trial has been attacked, and not a single terrorism suspect or convict has escaped.

To be sure, intelligence gathering capacities are still imperfect, as the November 2009 Fort Hood shootings, April 2013 Boston Marathon bombings, and September 2013 attack on Kenya’s Westgate mall showed all too harshly. But these episodes underscore a critical point lost on many critics: this is a problem that affects law enforcement and military uses of force *alike*. Where the government *does* have knowledge of a threat to the

⁷² See, e.g., *United States v. Khalil*, 214 F.3d 111, 115–21 (2d Cir. 2000) (upholding questioning of terrorism suspect pursuant to public safety exception); *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243 (E.D. Mich., Sept. 16, 2011) (relying on the public safety exception to *Miranda* in rejecting motion to suppress statements obtained under fifty minutes of unwarned questioning).

⁷³ See U.S. Atty’s Office, E.D.N.Y., Three Supporters of Foreign Terrorist Organization al Shabaab Charged in Brooklyn Federal Court, Face Life in Prison, Dec. 21, 2012, <http://www.fbi.gov/newyork/press-releases/2012/three-supporters-of-foreign-terrorist-organization-al-shabaab-charged-in-brooklyn-federal-court-face-life-in-prison>, [http://perma.law.harvard.edu/0rNdspfNVKu/].

⁷⁴ See Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 25, 2011, at A18, <http://www.nytimes.com/2011/01/26/nyregion/26ghailani.html>, [http://perma.law.harvard.edu/0TSSFouSiqf/].

⁷⁵ See, e.g., *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008). See generally Steve Vladeck, *The National Security Courts We Already Have*, JOTWELL, Sept. 23, 2013, <http://courtslaw.jotwell.com/the-national-security-courts-we-already-have/> (reviewing a Federal Judicial Center report that exhaustively documents the experiences of post-September 11 U.S. federal courts in handling high-profile terrorism prosecutions).

nation's security, law enforcement tools have proven to be effective in both incapacitating threatening actors and gathering intelligence that can help thwart other attacks.

2. The President's Unquestioned Self-Defense Authorities

Our support of law enforcement tools notwithstanding, we do not claim that the law enforcement approach is the **only** possible response to terrorism, or that the nation's hands are tied if law enforcement tools are unavailable (given the location of the individual) or ineffective (given the scale or nature of the threat). To the contrary, we recognize the possibility that groups or individuals will come to light that pose a significant, strategic, and imminent threat that the criminal law cannot adequately address. But if and when this situation presents itself, the Executive has the authority and the responsibility to act.

Indeed, it is well settled that the President has the authority under Article II of the U.S. Constitution and Article 51 of the U.N. Charter to take immediate—and, where necessary, lethal—action in defense of the nation in response to an “armed attack.”⁷⁶ As the Supreme Court has explained: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”⁷⁷ President Bush would have required no statute to shoot down the planes headed to the World Trade Center on September 11; President Obama would have required no statute to defend U.S. diplomats from attack in Benghazi. The failure to do so in either tragic episode was not the result of insufficient authority, but insufficient intelligence in advance of the attacks—a problem that is in no way solved by an expansive declaration of armed conflict.

⁷⁶ Although Article 51 refers to the right of self-defense in response to an “armed attack,” most scholars agree that this does not require a nation to wait until the attack has already occurred and encompasses the right to respond to an imminent attack as well, although there is significant debate about what constitutes “imminence.” UN CHARTER, art. 51; *see* Ashley Deeks, *Unable or Unwilling: Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L LAW 483, 492 n.23 (2012).

⁷⁷ *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

Take the type of situation with which the Hoover proposal seems most concerned: a terrorist organization that does not neatly fall within the AUMF but is poised to carry out a lethal attack on the U.S. homeland or U.S. persons at some point in the near future from a part of the world in which nonmilitary means of thwarting the attack are unavailable. In such a situation, the President could—and should—take action, consistent with the international law requirements of necessity and proportionality, without waiting for a new congressional authorization to use force. We, too, worry about such a scenario, but we fail to see why, on those facts, self-defense authorities would be inadequate. Moreover, to the extent that the response requires an extended engagement with the threatening organization, the President should—and, some would argue, *must*, under the War Powers Resolution⁷⁸—obtain specific statutory authorization to address the specific threat.

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.⁷⁹ Rather, we think that self-defense—properly defined—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.⁸⁰

⁷⁸ See 50 U.S.C. §§ 1541–1548.

⁷⁹ In his essay *Postwar*, Robert Chesney similarly argues that U.S. targeting authority will look pretty much the same whether it is engaged in an armed conflict or acting in self-defense. But as Chesney also acknowledges, this is because as a matter of policy, the Administration is limiting who qualifies as a lawful target in armed conflict in a manner that begins to approach who qualifies as a lawful target as a matter of self-defense; there is, in our opinion, a significant difference between limits that are imposed as a matter of policy—and can be readily overridden—and those that would apply as a matter of law. Other so-called “soft-constraint mechanisms” are likely, in our opinion, to have greater effect than Chesney acknowledges. See Robert M. Chesney, *Postwar*, 5 HARV. NAT'L SEC. J. 305, 333 (2014).

⁸⁰ In a future article, we aim to set out in more detail a comprehensive understanding of the limits of the President’s self-defense authorities under Article II of the Constitution. See GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY (2008) (looking at this issue from an international law perspective).

3. Congress's Ability to Pass a Group-Specific AUMF If and When It Is Needed

Moreover, if and when an organized armed group poses the type of sustained, significant threat justifying the affirmative declaration of an armed conflict, nothing would or should stop Congress from providing a narrow and specific authorization to use force against that group, just as it did within three days of the September 11 attacks. The proposal to bypass Congress and instead delegate such future—and momentous—decisions to the President lacks *any* historical precedent, and for good reason. It is *Congress*, not the Executive, that is given the authority under our Constitution to declare war.⁸¹ As our Founding Fathers understood well, an authorization to use military force is a measure that should be undertaken solemnly, after public debate and with buy-in from representatives of a cross-section of the nation, based upon a careful and deliberate evaluation of the nature of the specific threat. It should not be an *ex ante* delegation to the President to make unreviewable decisions to go to war at 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.

The Hoover proposal counters that Congress cannot be expected to act with sufficient dispatch: “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 in terms of geographic locale.”⁸² And yet, there are no cases in which Congress either could not or would not provide the necessary authority in response to a grave threat to our security—or why, in the interim, the President’s Article II authorities, criminal laws, and other existing counterterrorism authorities were not sufficient to meet the threat. Until and unless Congress is besieged with requests to authorize the use of military force against a range of terrorist groups—each of which presents a threat akin to that posed by al Qaeda a decade ago—and fails to act on them, it is difficult to see why case-specific use-of-force authorizations would be inadequate.

⁸¹ U.S. CONST. art. I, § 8, cl. 10.

⁸² CHESNEY ET AL., *supra* note 9, at 10.

4. Why a New AUMF Would Also Be Unwise

Our analysis has to this point focused on the many reasons why a new AUMF is not needed. Such a measure would also be counterproductive and unwise. An open-ended declaration of armed conflict carries with it the likely exercise of increased force and actually runs the risk of *undermining* our principal counterterrorism goal: protecting this and future generations of Americans from the threat of international terrorism.

In testimony before a subcommittee of the Senate Judiciary Committee, Farea al-Muslimi, a freelance journalist from Wassab, Yemen, provided a stark reminder of this risk. Al-Muslimi painted a vivid description of the ways in which a 2013 drone strike in his village invoked terror of the United States. As he put it: “Had the United States built a school or hospital, it would have instantly changed the lives of my fellow villagers for the better and been the most effective counterterrorism tool.”⁸³ Instead, he warns that the strikes are strengthening AQAP’s standing and undercutting U.S. security: “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.”⁸⁴

Al-Muslimi is not alone in his views. He is joined by General Stanley McChrystal, former commander of U.S. forces in Afghanistan; General James E. Cartwright, former Vice-Chairman of the Joint Chief of Staff; and Admiral Dennis Blair, former Director of National Intelligence—all of whom have warned of the ways in which excessive reliance on uses of force in general, and targeted killings in particular, can increase or

⁸³ *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killings*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Human Rights, 113th Cong. (2013) (statement of Farea Al-Muslimi), available at <http://www.judiciary.senate.gov/pdf/04-23-13Al-MuslimiTestimony.pdf>, [http://perma.law.harvard.edu/0vJWTfrJtBH/].

⁸⁴ *Id.*

otherwise engender resentment toward the United States.⁸⁵ These men echo the lessons of the U.S. Army's Counterinsurgency Manual, which describes the recuperative power of insurgent groups, the impossibility of killing every insurgent, and the potential counterproductive consequences of such attempts.⁸⁶

Other counterproductive consequences include the risks of further destabilizing already unstable regimes, increased international condemnation, and the very real possibility of reduced counterterrorism cooperation as a result. Already, there are indications that some key allies are nervous about providing the United States with intelligence information that might be used as a basis for drone strikes.⁸⁷ In fact, Germany reportedly restricted the type of information it can pass on to its American counterparts in response to concerns about its intelligence being used to support what it

⁸⁵ See Dennis Blair, Op-Ed, *Drones Alone Are Not the Answer*, N.Y. TIMES, Aug. 15, 2011, at A21 (describing the United States' "reliance on high-tech strikes that pose no risk to our soldiers [as being] bitterly resented in a country that cannot duplicate such feats of warfare without cost to its own troops"); David Alexander, *Retired General Cautions Against Overuse of Hated Drones*, REUTERS, Jan. 7, 2013, available at <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608O20130107>, [http://perma.law.harvard.edu/07px9cf6QeV/] (quoting retired General Stanley McChrystal as warning of the "resentment created by American use of unmanned strikes"); Mark Mazzetti & Scott Shane, *As New Drone Policy is Weighed, Few Practical Effects Are Seen*, N.Y. TIMES, Mar. 22, 2013, at A11 (quoting General Cartwright as warning of "blowback" resulting from targeted killings); *see also* MICAH ZENKO, REFORMING U.S. DRONE POLICIES, COUNCIL OF FOREIGN RELATIONS: SPECIAL REPORT NO. 65, at 10–11 (2013), available at <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736?co=C009601>, [http://perma.law.harvard.edu/0MJEkCQi16X/] (describing the strong correlation in Yemen between increased targeted killings since December 2009, heightened anger toward the United States, and sympathy with or allegiance to AQAP).

⁸⁶ U.S. Dep't of the Army, Field Manual No. 3-24: Counterinsurgency ¶ 128 (2006) ("[K]illing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge."); *see also id.* at ¶ 129 ("Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power" by increasing their own legitimacy at the expense of the insurgent's).

⁸⁷ See, e.g., Ravi Somaiya, *Drone Strike Prompts Suits, Raising Fears for U.S. Allies*, N.Y. TIMES, Jan. 30, 2013, at A4, available at <http://www.nytimes.com/2013/01/31/world/drone-strike-lawsuit-raises-concerns-on-intelligence-sharing.html?pagewanted=all>, [http://perma.law.harvard.edu/0KbE5vtksJs/].

deemed to be illegitimate drone strikes.⁸⁸ Meanwhile, it sets a disturbing precedent for other sovereigns—strengthening the claims of Russia and China, among others, to use force as a matter of first resort against any member of groups they deem to be “terrorist,” broadly defined.⁸⁹

III. The Better Way Forward

Ultimately, we ought to be having a discussion not about how to perpetuate the conflict that al Qaeda began, but about how to end that conflict and shift away from a permanent state of war. To that end, we urge policymakers to consider three possible alternatives:

A. A More Transparent AUMF

For all of the reasons described in Part I, the AUMF (coupled with law enforcement and intelligence tools and backstopped by the President’s inherent Article II authorities) has proven to be a more-than-adequate basis for addressing the threat posed by organized terrorist groups since September 11. To the extent there have been failures, they have resulted from gaps in intelligence, not authorities. Should an organized armed group emerge that cannot adequately be dealt with through these existing authorities, the President would be able to ask for, and Congress would be in a position to grant, authorization to deal with the threat posed by that specific group. Notably, the Obama Administration does not appear to think that such a situation exists at the present and is not asking for new, expanded authority. To the contrary, President Obama has explicitly warned against it, stating that he would “not sign laws designed to expand [the AUMF’s] mandate further;” rather, he looks forward to working with Congress to “refine, and ultimately repeal, the AUMF’s mandate.”⁹⁰ Never

⁸⁸ See, e.g., Holger Stark, *Drone Killing Debate: Germany Limits Information Exchange with US Intelligence*, DER SPIEGEL, May 17, 2011, available at <http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html>, [<http://perma.law.harvard.edu/0bawJQzWc72/>].

⁸⁹ John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), available at <http://www.lawfareblog.com/2012/04/brennanspeech/>, [<http://perma.law.harvard.edu/0bFn6NGJXfW/>] (acknowledging that “we are establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians”).

⁹⁰ Obama, *supra* note 5.

before has Congress declared war against an enemy when the President has not asked it to do so.

That said, as noted above, we share others' concern about the lack of transparency in how the AUMF is being interpreted, especially with regard to which groups qualify as "associated forces." Such secrecy flies in the face of the most fundamental aspect of the rule of law—fair notice—while also generating suspicion and distrust. The American public should be aware of, and consequently be able to publicly discuss and debate, the groups that we are fighting as part of the armed conflict with al Qaeda. Meanwhile, innocent civilians should be given the benefit of notice as to which groups qualify as the enemy in this conflict, thereby allowing them to take steps to disassociate themselves from those groups (and the members thereof) with which the United States deems itself to be in an armed conflict. Either the President should take it upon himself to make public any determination that a particular group qualifies as an associated force of al Qaeda or the Taliban under the AUMF, or Congress should demand such public disclosure. This is one of the "refine[ments]" that the Obama Administration should be working toward.

B. An Afghanistan-Based AUMF Sunset

Another option would be for Congress to write a sunset provision into the AUMF—one that is tethered to the withdrawal of forces from Afghanistan, currently scheduled for the end of 2014.⁹¹ This approach has appeal, given the range of concerns about an open-ended and ever-expanding armed conflict without an identifiable battleground or core center of operations. The long lag time before the authorities actually sunset would provide the Executive ample opportunity to determine what, if any, additional authorities are needed to deal with the threat posed by organized terrorist groups, and Congress ample time to respond.⁹²

⁹¹ See, e.g., David Alexander, *U.S. Poised to Ramp Up Withdrawal of Gear from Afghanistan*, REUTERS (Sept. 13, 2013), available at <http://www.reuters.com/article/2013/09/13/us-usa-afghanistan-withdrawal-idUSBRE98C05L20130913>, [http://perma.law.harvard.edu/0Q4jyGpSufK/].

⁹² Representative Adam Schiff (D-CA) has introduced precisely the type of legislation we are urging here. See H.R. 2324, 113th Cong. (2013).

A sunset provision has the obvious benefit of making clear to our allies and the pool of would-be terrorist recruits that, more than twelve years after September 11, the United States is not engaged in, or seeking to engage in, a state of perpetual war. More significantly, it also drives home the larger point that at some point, perhaps soon, the conflict Congress authorized in September 2001 will effectively have run its course. And, in fact, the President has himself suggested that he is open to the possibility of repeal. The Executive could, of course, treat the AUMF as lapsed, even without legislation formally so providing.

One issue that arises with the approach, however, is the question of the Guantánamo detainees. With the formal cessation of hostilities comes the end of the authority to detain under the laws of war, which is the basis for the Guantánamo detentions. While this will be a cause for celebration for many, it is likely to be a cause of concern for some members of Congress and the Executive. A 2009 review conducted by the Obama Administration concluded that of the 240 detainees then still at Guantánamo, some four dozen were deemed “too dangerous to release” but ineligible for prosecution given defects in the scope of specific criminal laws at the time of their capture and/or evidentiary concerns.⁹³ While conditions may have changed since that assessment was made, and some reasonable “wind-down” authority will almost certainly be permitted,⁹⁴ at some point the authority to detain will cease, given an end to the underlying armed conflict.

That said, the fear of that day—and the government’s interest in continued detention pursuant to the laws of war—ought not be the *reason* for the continuation of the armed conflict. 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. Moreover, with advance

⁹³ See Final Report, Guantánamo Review Task Force (Jan. 22, 2010), at 22–25, *available at* <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>, [<http://perma.law.harvard.edu/07BozdbfwjT/>]. As of this writing, the Guantánamo detainee population is at 155, but virtually all of the four dozen remain. See Letter from James Hogan, Chief, Freedom of Info. Policy Office, Dep’t of Def., to Jay Ward Brown (June 17, 2013) (providing list of the disposition decisions of the Guantánamo Bay Task Force), *available at* <http://www.lawfareblog.com/wp-content/uploads/2013/06/Detainee-Disposition-List.pdf>, [<http://perma.law.harvard.edu/0ZMgZsV4s2i>].

⁹⁴ Cf. *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding detention of German nationals under Alien Enemy Act of 1798 even after 1945 German surrender).

planning, it would probably be feasible to negotiate deals to keep detainees of particular concern under close surveillance, so long as we could find a nation to take them.

It is worth noting, however, that this issue may soon arise whether or not Congress formally sunsets the AUMF. In *Hamdi v. Rumsfeld*,⁹⁵ the Supreme Court concluded that the authorization to use force includes the authority to detain; a plurality of the court also warned that “[i]f the practical circumstances of a given conflict [meaning boots on the ground] are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”⁹⁶ With the withdrawal of troops from Afghanistan, the relevant practical circumstances will have in fact changed and may yield a turning point with respect to the Guantánamo detainees (especially those whose detention is based upon ties to the Taliban rather than al Qaeda), regardless of whether the AUMF sunsets.

Another possible consequence of repeal is the elimination of a possible short-term period of military detention prior to federal court prosecution, as was employed in the two cases of Ahmed Warsame, captured in the Gulf of Aden in 2011, and Abu Anas al-Libi, captured in Libya on October 5, 2013. Again, however, the arguable advantages of such hybrid law-of-war and law enforcement operations cannot and should not provide the basis for continuing the war. *If* there is a demonstrated need for presentment delay in a limited set of terrorism cases, Congress and the administration should consider a narrow legislative fix—and should not perpetuate an entire armed conflict to achieve such a limited goal.⁹⁷

⁹⁵ 542 U.S. 507 (2004).

⁹⁶ *Id.* at 520 (plurality opinion). Congress has since “affirm[ed]” this detention authority, specifying by statute that the authority to use force includes the authority to detain. *See* FY2012 NDAA § 1021, 125 Stat. at 1562. It is not clear, however, that affirmation by Congress grants authority that the Supreme Court would otherwise reject.

⁹⁷ As one of us argues in a forthcoming paper, such a legislative “fix” may already exist, by virtue of section 412 of the USA PATRIOT Act, 8 U.S.C. § 1226a. *See* Stephen I. Vladcek, *Detention After the AUMF*, 83 FORDHAM L. REV. (forthcoming 2014). In particular, although that provision only authorizes up to seven days of detention without trial for non-citizen terrorism suspects, it appears to contemplate longer periods for those whose release “will threaten the national security of the United States or the safety of the community or any person.” 8 U.S.C. § 1226a(a)(7); *see* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (reserving the limits the Due Process Clause would impose on detention without trial in cases involving “terrorism or other special circumstances where special arguments might be made for forms of preventive detention”).

C. Repeal and Replace

A final, albeit suboptimal, option would be to repeal the AUMF and replace it with an AQAP-specific authorization. So long as the AUMF remains on the books, AQAP's apparent inclusion as an "associated force" provides authority for the United States to use military force against it, and thereby moots the need for an AQAP-specific statute. But if Congress were to pursue an AUMF sunset or if the current AUMF were otherwise determined to have lapsed, it is possible that the Obama Administration would pursue such an authorization, given that AQAP is the one terrorist group currently deemed to have the capacity and intent to launch attacks on the U.S. homeland, according to the recent Intelligence Community Worldwide Threat Assessment.⁹⁸ At least in this unclassified form, however, even this threat is qualified. As the Assessment describes, AQAP leaders will have to "weigh the priority they give to U.S. plotting against other internal and regional objectives," along with limits on the number of their members who are in a position to operationalize U.S. attacks."⁹⁹

In any event, such an authorization should only be adopted after public debate and discussion, based on legislative determinations that AQAP poses the type of sustained, intense threat that justifies the application of law-of-war tools, and that a declaration of armed conflict is in the nation's best security interests. *If* the facts (and the public) support it, an AQAP-specific authorization would be the type of *narrow and specific* authorization that we have argued for throughout, and would be far preferable to the more expansive (if not potentially limitless) proposals also under consideration. Other possible candidates for a narrow authorization might ultimately include al Shabaab or other emergent groups, but much more discussion and debate is needed about the nature of the threat, the gap in authority that would exist without a force authorization, and the sensible scope of an authorization to use force in response.

The comments of Blair and McChrystal, among many others, nevertheless provide an important moment of pause, and a reminder of why Congress should be cautious before embracing this approach. As they all note, targeted killing operations may be creating more enemies than they are

⁹⁸ See Clapper, *supra* note 27.

⁹⁹ *Id.* at 3–4.

eliminating. Replacing the AUMF with an AQAP-specific statute—and thereby condoning the permissive use of force vis-à-vis AQAP as a matter of first resort going forward—might invite the very type of excessive reliance on targeted killings that facilitate AQAP recruitment, induce an increased focus on U.S. operations, and ultimately do us harm.¹⁰⁰

IV. Conclusion

In his majority opinion in *Boumediene v. Bush*, Justice Anthony Kennedy offered a sober reflection on the historical relationship between the courts and the political branches with respect to the war powers. In his words:

Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. *This result is not inevitable, however.* 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.¹⁰¹

It seems beyond dispute that the target of Justice Kennedy’s rhetoric was the AUMF—and the very real possibility that, absent thoughtful legislative intervention, the courts would soon have to confront questions that they have historically sidestepped about the scope of use-of-force authorizations during wartime. And yet, not only have more than twelve years passed since the AUMF was enacted, but the fifth anniversary of the *Boumediene* decision has come and gone, and the AUMF remains in full force. The time has come to take up Justice Kennedy’s invitation—to “engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.” Reasonable minds will certainly disagree about the right answer, but an open-ended and unnecessary expansion of the AUMF is clearly the wrong one.

¹⁰⁰ See Blair, *supra* note 85.

¹⁰¹ 553 U.S. 723, 797–98 (2008) (emphasis added).