A NEW AUMF: DEFINING COMBATANTS IN THE WAR ON TERROR

GRAHAM CRONOGUE*

> Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you 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. . . . [T]he Constitution g[ave] the war making power to Congress . . . and resolved . . . that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood[.][1]
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> - Abraham Lincoln

INTRODUCTION

On September 11, 2001, the United States entered into a new kind of struggle, one that challenges long-observed norms of war and conflict. Throughout history, wars have typically been declared and fought between states and against clearly identifiable combatants, but this new enemy is neither organized by state affiliation nor located in a specific geographic area. Further, this enemy often lives among, dresses like, and even targets civilians. These profound differences make it extremely difficult to apply traditional rules of war. Just one week after the devastating attacks on the Pentagon and World Trade Center, Congress hastily passed the Authorization for Use of Military Force to address this threat and its new challenges. This statute authorized the President 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, in order to prevent any future

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* Duke University School of Law, J.D. expected 2013; University of North Carolina B.A. 2010. I would like to thank Professor Scott Silliman for his invaluable advice, feedback, and instruction. My gratitude also goes to the editors of the *Duke Journal of Comparative &International Law*, especially Catherine Lawson and Kate Hunter, for their excellent advice. As always, I am eternally grateful to my parents, Ron and Tina Cronogue, for their unwavering love and support.

1. Letter from then U.S. Congressman Abraham Lincoln to William H. Herndon opposing the Mexican-American War (Feb. 15, 1848), *relevant text available at* http://www.theatlantic.com/daily-dish/archive/2007/02/lincoln-on-pre-emptive-war-and-the-presidency/230900/.

> acts of international terrorism against the United States by such nations, organizations or persons.[2]

This congressional authorization gave the president the authority to use force against those involved in the 9/11 attacks and their allies, but the war on terror has moved beyond this mandate. In 2001, al-Qaeda, the Taliban, and Osama bin Laden were clearly the "enemy."[3] The AUMF addressed this threat by providing domestic authorization for the use of force against all entities closely tied to 9/11. However, ten years after the attacks, bin Laden is dead and the Taliban is a shadow of its former self.[4] Yet the United States still uses the AUMF to justify the use of force against new terrorist and extremist groups, many of which were not closely involved in 9/11 and may not have even existed in 2001. Given this disconnect, politicians have advocated amending, scrapping, or reaffirming the AUMF to have it reflect the present reality of the conflict.

The Obama administration argues that the AUMF should remain the same and has taken pains to expand the authorization to cover new terrorist threats from organizations unrelated to al-Qaeda.[5] However, this ten-year-old authorization must be revised. The United States is facing a new and still evolving enemy; our law on conflict must evolve with it. We should not expect the President to simply reinterpret or stretch statutory language when considering such fundamentally important issues as national security, deadly force, and indefinite detention. This "stretching" out of the statute will create significant questions of legality and authorization in times when we cannot afford to hesitate or second-guess. The President and the armed forces need an updated, clear, and explicit authorization to execute this war effectively and know the limits of their power. In short, Congress must amend or update the AUMF to reflect the current reality of conflict and guide the President's prosecution of this war.

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

3. *See, e.g.*, RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 1 (2007), *available at* http://www.fas.org/sgp/crs/natsec/RS22357.pdf; Maria Newman, *Bin Laden Takes Responsibility for 9/11 Attacks in New Tape*, N.Y. TIMES (Oct. 29, 2004), http://www.nytimes.com /2004/10/29/international/30osamaCND.html.

4. *See, e.g.*, Jim Michaels, *Taliban Showing Weakness in South Afghanistan*, USA TODAY (Oct. 19, 2011), http://www.usatoday.com/news/world/afghanistan/story/2011-10-17/taliban-weakens-in-south -afghanistan/50807280/1.

5. *See, e.g.*, Harold Koh, Legal Advisor, Dep't of State, Address at the Annual Meeting of the American Society of International Law in Washington, D.C. (Mar. 25, 2010) (claiming that the associated forces of al-Qaeda and the Taliban are also viable targets under the AUMF).

In this paper, I will argue that the AUMF must be revised to include a better definition of what force the President can use, as well as where, when, and against whom it may be used. First, I will look at the authorization we currently have, its goals, how it is used, and some interpretative issues. Next, I will show that the President should have explicit Congressional authorization and should not rely solely on his inherent constitutional authority. Third, I will discuss the new problems we face ten years after 9/11 and see how the AUMF addresses them. Fourth, I will look at some suggestions for amending the AUMF, especially Representative Howard P. "Buck" McKeon's bill which became law on December 31, 2011.[6] Finally, I will provide my own suggestion for the new AUMF.

I. THE AUTHORIZATION FOR USE OF MILITARY FORCE - 2001

The Authorization for Use of Military Force (AUMF) was clearly directed at the perpetrators of 9/11 and their allies. Comments by legislators and those most involved in the drafting confirm that Afghanistan, the Taliban, and bin Laden were the chief targets.[7] Despite this seemingly clear legislative intent, many terms in the statute are extremely ambiguous, making it difficult to say exactly against whom, when, where, and what the AUMF authorizes. In order to understand how the AUMF does and should operate today, this paper first examines the text and original goals of the bill.

A. Who?

> [A]gainst 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 . . . .[8]

The AUMF authorized force against essentially any actor the president determines had sufficient connections to the September 11th attacks. In defining who fits under the AUMF, the statute states that it targets "nations, organizations, or persons." This broad answer to "who" is limited only by the 9/11 nexus requirement, which is seemingly determined by the President alone. This ambiguity and broad grant of discretion makes

6. On December 12, 2011, Congress produced a Conference Report for the NDAA. I will not discuss this new proposal; however, the proposed alterations do not substantially affect or negate any arguments in this paper.

7. *See* GRIMMETT, *supra* note 3.

8. AUMF, *supra* note 2, § 2(a).

present-day use and interpretation of the AUMF extremely difficult and unclear.

1. Nations

The Act first targets "nations." This reference to "nations" quite clearly authorizes interstate conflict, similar to a declaration of war. In the 9/11 context, this authorization approved the use of force against Afghanistan, the nation known to have harbored the perpetrators of 9/11.[9] In addition to Afghanistan, the AUMF could authorize force against any other states that the President determined participated in the attacks or harbored any of the organizations or people responsible for the attacks.

This reference to "nations" seems to be the least problematic of the three groups in many respects.[10] Nations have traditionally been the target of declarations of war, are geographically defined, and are easily identifiable. Furthermore, there are established rules and procedures for conflicts between states, thus the President can look to established precedent and customary international law regarding executive practice during interstate conflict. However, it could be argued that this authorization is unnecessarily unclear, as it does not explicitly name the nations against whom force may be used.

Since Congress passed the AUMF just days after the attacks, it could not be certain if any other nations were sufficiently linked to the terrorist attacks and probably chose the more open term because of this imperfect information. However, the decision to invade a country or authorize missile strikes against a state involves greater risks of escalation, casualties, and repercussions in the international system and domestically than actions against individuals and organizations.[11] As we have seen in Afghanistan and Iraq, attacks against nations obviously involve significantly longer commitments, cost more money, and claim more lives.[12] Accordingly, it could be argued that Congress should have defined which nations fell under this authorization instead of leaving such an important decision solely to the President. After all, authorizing the President to determine which

9. *Bin Laden Claims Responsibility for 9/11*, CAN. BROAD. CORP. (Oct. 29, 2004), http://www.cbc.ca/news/world/story/2004/10/29/binladen_message041029.html.

10. Of course, the use of force against other states is categorically illegal under Article 2(4) of the Charter of the United Nations, absent Chapter VII authorization from the United Nations Security Council or self-defense as recognized under Article 51. However, I will not address the legality of the use of force under the UN Charter in this paper.

11. *See* AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 (2011), *available at* http://www.fas.org/sgp/crs/natsec/RL33110.pdf.

12. *See id.* at 1-5, 8.

nations satisfy the nexus requirement essentially amounts to a Congressional delegation of the power to declare war.[13] Even though Congress intended to target Afghanistan, the AUMF does not clearly limit itself and gives the President more authority to enter into interstate conflict if he discovers that another nation was involved.

2. Organizations

This next category is a little less clear. Congress clearly wanted to target al-Qaeda with the term "organization", so it is safe to assume that other terrorist groups could fit this term. However, organizations have varying levels of coherence, member involvement, outside support, and transparency. These issues make it difficult to draw a line between members, mere supporters, and independent contractors. Nevertheless, the question of what organizations fall under the AUMF profoundly affects the scope of the President's power to act under the statute. Closely linked to this definitional question is whether and to what extent the authorization of force applies against all members of these organizations, even non-combatant or unwitting members.

First, the statute does not clearly say which groups fall under the AUMF's "organization." Al-Qaeda, as an organized group responsible for the 9/11 attacks, clearly fits this definition. However, demarcating exactly where the al-Qaeda organization ends and one of its "affiliates" or "associated forces" begins is extremely difficult. For example, al-Qaeda now has many branches and affiliates in Yemen and Saudi Arabia.[14] Is al-Qaeda in the Arabian Peninsula (AQAP) part of the al-Qaeda organization or is it merely an affiliate? Al-Qaeda and AQAP have similar operative functions, tactics, and goals.[15] On the other hand, they have different leaders, formed at different times, and operate in different regions.[16] The precise level of cooperation and partnership between AQAP and al-Qaeda

13. While the President has significant powers as the Commander-in-Chief to engage in limited conflicts, this power is normally subject to congressional checks. These checks emanate from statutes such as the War Powers Resolution (50 U.S.C. §§ 1541-1548) and from the Constitution itself. However, as discussed in Part I(C), congressional authorization, even acquiescence, significantly bolsters the President's military powers.

14. JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY 17 (2011), *available at* http://www.fas.org/sgp/crs/terror/R41070.pdf.

15. Jonathan Masters, *Al-Qaeda in the Arabian Peninsula (AQAP),* COUNCIL ON FOREIGN RELATIONS (Dec. 7, 2011), http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369; Jayshree Bajoria, *al-Qaeda*, COUNCIL ON FOREIGN RELATIONS (Aug. 29, 2011), http://www.cfr.org/terrorist-organizations/al-qaeda-k-al-qaida-al-qaida/p9126.

16. Masters, *supra* note 15.

is difficult to determine, yet it matters a great deal.[17] AQAP formed after the 9/11 attacks and would clearly lack a sufficient nexus to 9/11 unless it was part and parcel of al-Qaeda.[18] Therefore, an interpretation of organization that ties AQAP and al-Qaeda together as one organization would vastly increase the scope of presidential authorization in Yemen, while a narrowing interpretation would severely restrict the President's ability to act.

Another significant difficulty lies in discerning when a person who interacts with the organization becomes a part of the organization. Terrorist groups often intentionally hide their members' identities, roles, and statuses in the group. This secrecy and deception make it difficult to tell not only who is in the organization but also what level of affiliation each individual really has with the organization. Many members of al-Qaeda were not directly involved in the planning and, given the "cell" structure of al-Qaeda, may not have even known about the attack. Despite this difficulty, both the Bush and Obama administrations have applied the AUMF to prosecute and fight many individuals who were not part of or involved in the attack.

Applying the AUMF to all al-Qaeda members makes sense for several practical and legal reasons. First, these individuals voluntarily joined an organization that planned 9/11 and is subject to the AUMF. Their membership and support could easily have encouraged or facilitated the commission of the attacks in less direct ways. Next, requiring that the individual member of the organization had a sufficient nexus to the attack would make the term "organization" redundant, as any individual with such a nexus would always fall under the "persons" prong as well. The term "organization" generally refers to the collective group of individuals; thus "organization" should be read broadly to include every member. Furthermore, trying to differentiate between the members in secretive organizations who knew about the attack from those who did not would be extremely difficult. Not only would these individuals have an incentive to misrepresent, but also the organizations have a strong incentive to hide their command structure and organization. Requiring the President to look into each member's level of involvement would be overly cumbersome and would make other statutory terms redundant.

Despite this difficulty, the courts in habeas cases have not been able to offer any formal process for discerning whether an individual is part of an organization or not. Rather, the courts advise that this process must be done

17. *Id.*
18. *Id.*

on a case-by-case basis, looking at the specific actions of the individual in relation to the organization.[19] The courts have also criticized the determinations of Combatant Status Review Tribunals (CSRT). In *Boumediene*, the Supreme Court found that "there is considerable risk of error in the tribunal's findings of fact," a risk compounded by the nature of this conflict.[20] Since the determination of whether an individual is a member of the organization is not clearly defined and CSRTs have been criticized by the Court, the President cannot always be sure that he is following the statute.[21] However, the courts have generally deferred to the President's determinations by only requiring a preponderance of the evidence and allowing inferences to be made from things such as travel patterns[22] and where the individual was found.[23]

Even though the term "organization" presents some interpretative issues, it is quite successful in achieving most of Congress's goals as they existed in 2001. Congress wanted to give the President broad authority to target all those responsible for the 9/11 attacks and those that harbored the perpetrators.[24] Organization goes a long way in achieving this goal by clearly including any groups of people that were involved in the 9/11 attacks. Congress could have explicitly authorized force against affiliates as well, but this would have undermined the 9/11 nexus considerably. Also, Congress may have assumed that later sessions would amend or update the authorization to deal with later problems of insufficient scope. In the week following the most devastating act of foreign terrorism on American soil, it seems that Congress was more concerned about conferring broad authority on the President to stop similar attacks. Given these considerations, "organizations" helped achieve Congress's goals at the time.

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19. *See* Sulayman v. Obama, 729 F. Supp. 2d 26, 33 (D.D.C. 2010) (quoting Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010)) (holding that the decision regarding whether an individual is part of a terrorist group "must be made on a case-by-case basis by using a functional rather than a formal approach"); Salahi v. Obama, 625 F.3d 745, 751-52 (D.C. Cir. 2010) (quoting Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010)) ("These decisions make clear that the determination of whether an individual is 'part of' al-Qaida '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.'").

20. Boumediene v. Bush, 553 U.S. 723, 785 (2008).

21. *See id.*

22. Uthman v. Obama, 637 F.3d 400, 404 (D.C. Cir. 2011) (finding it significant that defendant traveled to Afghanistan along a route used by al-Qaeda recruits).

23. *Id.* ("[W]e found it significant that a detainee was captured near Tora Bora in late 2001.") (referencing Al Odah v. United States, 611 F.3d 8, 11, 16 (D.C. Cir. 2010)).

24. *See* AUMF, *supra* note 2 (stating the law's purpose to "authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States").

3. The 9/11 Nexus and the Individual

The AUMF demands that targets have some nexus to the 9/11 attacks. Specifically, they must have either "planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons."[25] As the plurality in *Hamdi* noted, "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF."[26] However, it is less clear whether the AUMF applies to individuals not directly engaged in combat; specifically, the term "aided" poses some interpretative difficulties.

Organizations like al-Qaeda often have front operations and also employ non-combatants such as cooks and drivers. Is an unwitting accomplice or an individual contractor working for al-Qaeda an enemy combatant? For instance, what does the AUMF allow the President to do with bin Laden's driver?[27] Or the civilian who gives money to a charity that turns out to be a front for al-Qaeda? Both persons clearly performed actions that aided and supported al-Qaeda logistically or financially. But they are not military forces, and one of them is not even aware of her transgression. The text of the AUMF makes no useful distinctions on this matter and offers no guidance concerning the level of support or mens rea. However, when deciding enemy combatant status, the Courts have found a distinction in "'whether the individual functions or participates within or under the command structure of the organization.'"[28]

According to the text of the AUMF, the determination of whether an individual is sufficiently connected to be an enemy combatant is left to the President.[29] While this provision gave the President significant leeway in deciding against whom to use force, the President had initially wanted broader authority. Congress rejected the broader language that authorized force to "deter and pre-empt any future acts of terrorism or aggression against the United States"[30] and included the nexus requirement. Yet how limiting this nexus requirement has actually been remains unclear. According to the plain language of the statute and current practice, it seems

25. *Id.* § 2(a).

26. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

27. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

28. Al Odah v. United States, 648 F. Supp. 2d 1, 7 (D.D.C. 2009) (quoting Hamlily v. Obama, 616 F.Supp.2d 63, 75 (D.D.C. 2009)).

29. *See* AUMF, *supra* note 2, § 2(a).

30. The White House draft of the September 12, 2001 resolution can be found at 147 CONG. REC. 18,136 (2001) (statement of Sen. Robert Byrd); *see also* John Lancaster & Helen Dewar, *Congress Clears Use of Force, $40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001, at A4.

that the President initially has the sole authority to determine what actors fit this requirement and is subject to review from the courts only after he has detained the individual.[31] As we have seen in the Prize cases, the President does have the ability to frame national security issues,[32] but allowing the President to decide against whom Congress has authorized force is an extreme delegation of power.[33]

B. When?

The AUMF contains no explicit reference to duration.[34] However, many authorizations for conflict or declarations of war contain only the implicit limitation that they will end once the hostilities cease or the enemy is destroyed. In the AUMF context, the 9/11 nexus is the only temporal limitation. Once the United States has disabled or dismantled all the relevant actors related to the 9/11 attacks, the authorization should end because no one could satisfy the nexus. The plurality in *Hamdi* took a similar approach when evaluating how long the President could detain an enemy combatant to prevent him from returning to the battlefield, by deciding that the detention must end when the conflict is over.[35] In light of this determination, the text, and the standing practice of ending war authorizations against a state when the conflict ends, the AUMF should not last any longer than it takes to destroy, imprison, or force the surrender of all "nations, organizations or persons" who have a sufficient tie to 9/11.

However, the AUMF is different than other authorizations because the war on terror is unlike conventional conflict. This conflict is not against a specific nation or well-defined organization, making it very difficult to say when the conflict will end or even what that end would look like. Even though authorizations for previous wars were technically indefinite, lacking a predetermined end date, the conflicts were against other nations and presumably had an identifiable endpoint. The leaders of opposing states enjoyed diplomatic legitimacy and could recognize and respect the other's

31. *See, e.g.*, Hamdi, 542 U.S. at 516.

32. The Brig Amy Warwick (The Prize Cases), 67 U.S. 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him* . . . .").

33. The issue of the 9/11 nexus and authorizations against states and organizations is similarly complicated and is the chief issue with the AUMF today. I discuss these issues in Part III and IV of the paper.

34. *See, e.g.*, 147 CONG. REC. 17,047 (2001) (statement of Sen. Joseph Biden) ("[The AUMF] does not limit the amount of time that the President may prosecute . . . parties guilty for the September 11 attacks.").

35. Hamdi, 542 U.S. at 521.

surrender. Our current war, however, is arguably against an ideology or at least against a group that is very hard to find and identify. Moreover, unlike a traditional interstate conflict, even a small group of these individuals could cause catastrophic damage, making it even harder to tell when the threat has dissipated. Indeed, the legislature, when debating the AUMF, suggested that the war would last a very long time.[36] This leads to the question of whether the ideologies of the responsible organizations have to be destroyed or just their command structures and offensive capabilities.

Ultimately, the duration of the AUMF depends on complex determinations of how we define the "enemy" and how loose or tight the 9/11 nexus must be. Thus, it is extremely important to decide whether we will limit congressional authorization to those groups and individuals that actually acted on 9/11 or whether we will expand it to groups, branches, and affiliates that share their ideology, tactics, and goals.

C. What?

The AUMF's broad "all necessary and appropriate force" language confers on the President complete Congressional authorization to wage war against the specified groups. First, the AUMF's "all necessary and appropriate force" language mirrors that found in a declaration of war and, far from imposing any constraints, bolsters the President's powers significantly.[37] In *Bas v. Tingy*, the Court found that Congress could make narrow authorizations that are "limited in place, in objects, and in time."[38] Yet, the AUMF authorization is much broader than that typically found in a limited or quasi-war context where the President can only use certain armed forces against a specific type of target in a specified way.[39] In the Quasi-War with France, for example, the President's actions were limited to a specific place and type of enemy force.[40] Indeed, the use of force was restricted to the high seas and armed French vessels.[41] In these examples, the President was not authorized to use force in enemy ports or against many other members of the enemy's military.[42] In contrast, the AUMF

36. *See, e.g.*, 147 CONG. REC. 17,112 (2001) (statement of Rep. Tom Lantos) ("We are embarking on a long and difficult struggle, like none other in our Nation's history.").

37. *See, e.g.*, S.C. Res. 678, ¶ 2, U.N. SCOR, 45th Year, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing all member states "to use all necessary means" to end Iraq's occupation of Kuwait).

38. Bas v. Tingy, 4 U.S. 37, 43 (1800).

39. *See id.*

40. Little v. Barreme, 6 U.S. 170, 178 (1804).

41. *Id.* at 177-78 ("[Congressional authorization] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing *to* a *French* port . . . exclud[ing] a seizure of any vessel not bound *to* a *French* port.").

42. *See id.* at 178-79.

does not explicitly limit where or what kind of force the President may use.[43] Rather, it leaves this determination open to the President and merely names the class of targets.[44]

Second, the AUMF's language illustrates congressional acquiescence or approval of broad presidential authority to use force. "[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'"[45] The language in the AUMF is very similar to declarations of war and authorizations, in which presidents have exercised plenary power in determining the means and type of force.[46] In these "perfect" wars, "all the members act[ed] under a general authority, and all the rights and consequences of war attach to their condition."[47] For instance, the Gulf of Tonkin Resolution allowed the President to "take all necessary measures" and was used as broad authority to wage combat and detain enemies.[48] Similarly, the AUMF allows for the use of "all necessary and appropriate force." Presidents have commonly exercised broad authority under similar grants of power, and Congress's failure to act in limiting these powers here suggests acquiescence to this interpretation.[49] More convincingly than in *Dames & Moore*, where Congress failed to object to executive action, there are numerous comments from the legislature that the President should have broad authority under the AUMF.[50] Given these statements and Congress's ample opportunity to limit the scope or type of force, Congress must have acquiesced to past executive practice and interpretation.

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43. AUMF, *supra* note 2.

44. *See id.* § 2(a).

45. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

46. *See, e.g.*, Gulf of Tonkin Resolution, H.R.J. Res. 1145, 88th Cong., Pub. L. No. 88-408, 78 Stat. 384 (enacted 1964, repealed 1971).

47. Bas, 4 U.S. at 40.

48. *See* Gulf of Tonkin Resolution, H.R.J. Res. 1145.

49. *See* Dames & Moore, 453 U.S. at 678.

50. 147 CONG. REC. 16,867 (2001) (statement of Sen. Harry Reid) ("I stand with President George W. Bush in his commitment to use every means at our disposal to exterminate the perpetrators of yesterday's actors of terror and war."); *id.* at 16,868 (statement of Sen. Charles Schumer) ("I was proud to speak to the President yesterday. I assured him something, and I speak for all of us: partisanship . . . He will be our leader. He will come up with a plan. We will have advice and offer suggestions.").

Furthermore, the plurality in *Hamdi* also treated the AUMF as a broad authorization to use force.[51] In upholding the President's power to detain enemy combatants, the Court leaned heavily on the similarities between the current authorization and that of broad authorizations characteristic of full wars.[52] The Court found that the President had many of the same powers usually granted to the President by war declarations.[53] Then, it looked to past exercises of presidential power to find what actions Congress would have implicitly authorized.[54] Specifically, the Court found that detention was as "fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[55]

Given that the AUMF does not contain any specific limitation on the type of force and that the language describing this force is hashed in the extremely broad terms, the AUMF must grant the President significant authority to act. This authority is certainly still constrained by the laws of war and other independent constitutional checks on the Executive, but it appears that Congress delegated the President extremely broad powers. Finally, based on the plurality's opinion in *Hamdi*, the exact scope of these powers will be interpreted in light of past actions by the Executive but still remains far from clear.[56]

D. Where?

Another significant issue not addressed by the AUMF is where this "force" may be applied. Again, the text of the statute offers little guidance, as it does not mention any geographic limitation. The statute does confirm the existence of a threat to American citizens at home and abroad.[57] Of course, one plausible reading is that there is no limitation whatsoever. Under this reading, if an organization that satisfies the 9/11 requirement is in the United States or in a foreign country, the President is always authorized to use force against that target.

Given the President's duty to protect Americans and the context in which the AUMF was passed, the AUMF seemingly authorizes force at

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51. *See* Hamdi, 542 U.S. at 530-32. This holding was notably limited to the detention of a US citizen on American soil.

52. *See id.*

53. *Id.* at 531-32.

54. *See id.* at 532, 543.

55. *Id.* at 518.

56. *See id.* at 520-21.

57. *See* AUMF, *supra* note 2 ("[The 9/11 attacks] render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.").

home. The AUMF passed after an attack on American soil, and the United States seemed in a very real sense part of the theater of war. Furthermore, force under the AUMF is designed to "prevent any future acts of international terrorism against the United States" and its citizens at home.[58] Since al-Qaeda could have small cells in the United States, a territorial limitation precluding force at home might hamstring this objective. Despite these factors, the plurality in *Hamdi* limited its holding to apply the AUMF to an American citizen captured in the traditional battlefield.[59] However, it seems that the need to detain enemy combatants picked up on the foreign battlefield and prevent them from engaging in conflict is at least as strong as when the enemy is in the United States.[60] Later, the Court in *Padilla* upheld the application of the AUMF to an American citizen captured on American soil, suggesting the AUMF should apply at home.[61]

The true difficulty with the AUMF's geographical limitation comes when the organization or person is in another country. The AUMF does authorize actions against "nations," so it clearly is not limited to domestic threats. However, what happens if the target is in a state that is not an eligible target? This issue implicates fundamental questions of sovereignty that have become especially important in the case of targeted killings in Pakistan and Yemen. Despite the importance of this issue, the AUMF remains silent on this point.

II. THE IMPORTANCE OF CONGRESSIONAL AUTHORIZATION

In order to evaluate the significance of the AUMF, we must first determine whether the President actually needs authorization to defend the United States against these terrorist threats or if he can use his inherent constitutional authority to accomplish the same goal. The President's inherent powers as Commander in Chief are at their height during times of war and emergency. Therefore, I will first examine the question of "were we at war." In light of this answer and the President's inherent authority, I will look at whether the AUMF provides any benefits in the prosecution of this conflict.

A. Were We at War?

The text of the AUMF confers on the President strong authorization to combat a category of enemies for an undefined period of time and in an

58. *See id.* § 2(a).
59. Hamdi, 542 U.S. at 518.
60. *See id.*
61. *See* Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004) (Kennedy, J., concurring).

unspecified location. His powers are much broader than that typically authorized in limited or quasi-wars. Moreover, the President has ordered transnational air strikes, electronic surveillance, detentions, and military invasions pursuant to his powers under the AUMF.[62] Yet, the AUMF is not a formal declaration of war and its targets are not all states or state actors. This absence of a formal declaration might suggest that we are not in a state of war. However, if the United States was not in a state of war with al-Qaeda, the President's inherent authority to act might be severely limited, making the AUMF an essential component to the use of force.

The Court held in the Prize cases that a "state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war."[63] Rather, a state of war can exist de facto.[64] In the Prize cases, the Court considered President Lincoln's order of a blockade against the South "official and conclusive evidence . . . that a state of war existed which demanded and authorized a recourse to such a measure."[65] In addition to the President's declaration, the Court found that the Queen of England's proclamation of neutrality after the firing on Fort Sumter was also adequate evidence of war.[66] The Court acknowledged its deference to the President's characterization of the conflict and classification of the enemy as "belligerents."[67] Thus, the President's characterization of the conflict and the actions of the enemy can create a state of war even absent congressional action.[68]

Here, President Bush proclaimed that al-Qaeda's attacks on American soil were "acts of war."[69] Even prior to September 11, al-Qaeda had attacked American embassies, ships, and military bases on several occasions, leading President Clinton to declare a state of armed conflict against al-Qaeda.[70] But on September 11, 2001, the conflict escalated dramatically. Al-Qaeda inflicted massive casualties against American civilians, caused catastrophic economic damage, and fundamentally altered

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62. *See, e.g.*, Hamdi, 542 U.S. at 510; Hamdan, 548 U.S. at 568; Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644, 681 (6th Cir. 2007).

63. The Brig Amy Warwick, 67 U.S. at 636.

64. *See id.*

65. *Id.* at 670.

66. *Id.* at 669.

67. *Id.* at 670.

68. *See id.*

69. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 71 (5th ed. 2011) (citing Press Release, The White House, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001)).

70. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 108-43 (2004), *available at* http://www.9-11commission.gov/report/911Report_Ch4.htm.

America's security and foreign policy goals. The President has framed the conflict as a war and the subsequent invasions, detentions, and killings confirm this view. These actions as well as the ongoing threat from al-Qaeda elevate the conflict to a de facto state of war.

It is important to note, however, that the Prize cases dealt with a defensive war during a national crisis; the confederate rebels severely threatened the territorial integrity of the United States.[71] In the immediate aftermath of 9/11 and given the ease with which foreign militants can inflict damage across state borders, the United States could probably claim that actions at home and overseas were part of a defensive war. Though the Prize cases should authorize the executive actions immediately following the attack, it is not clear whether they would authorize executive action today.[72] With the death of the 9/11 mastermind and increased security measures, actions against al-Qaeda are looking less defensive and more offensive. Furthermore, the passage of time has made the scenario seem less like the emergency that required rapid executive action. For these reasons, it is unclear whether the United States today is actually in a defensive war with al-Qaeda under the Prize cases framework.[73]

B. Importance of Congressional Authorization

Though the President's inherent authority to act in times of emergency and war can arguably make congressional authorization of force unnecessary, it is extremely important for the conflict against al-Qaeda and its allies. First, as seen above, the existence of a state of war or national emergency is not entirely clear and might not authorize offensive war anyway. Next, assuming that a state of war did exist, specific congressional authorization would further legitimate and guide the executive branch in the prosecution of this conflict by setting out exactly what Congress authorizes and what it does not. Finally, Congress should specifically set out what the President can and cannot do to limit his discretionary authority and prevent adding to the gloss on executive power.

Even during a state of war, a congressional authorization for conflict that clearly sets out the acceptable targets and means would further legitimate the President's actions and help guide his decision making during this new form of warfare. Under Justice Jackson's framework from *Youngstown*, presidential authority is at its height when the Executive is

71. The Brig Amy Warwick, 67 U.S. at 648.

72. *See id.*

73. *See id.*

acting pursuant to an implicit or explicit congressional authorization.[74] In this zone, the President can act quickly and decisively because he knows the full extent of his power.[75] In contrast, the constitutionality of presidential action merely supported by a president's inherent authority exists in the "zone of twilight."[76] Without a congressional grant of power, the President's war actions are often of questionable constitutionality because Congress has not specifically delegated any of its own war powers to the executive.[77]

This problem forces the President to make complex judgments regarding the extent and scope of his inherent authority. The resulting uncertainty creates unwelcome issues of constitutionality that might hinder the President's ability to prosecute this conflict effectively. In time-sensitive and dangerous situations, where the President needs to make split-second decisions that could fundamentally impact American lives and safety, he should not have to guess at the scope of his authority. Instead, Congress should provide a clear, unambiguous grant of power, which would mitigate many questions of authorization. Allowing the President to understand the extent of his authority will enable him to act quickly, decisively but also constitutionally.

Finally, a grant or denial of congressional authorization will allow Congress to control the "gloss" on the executive power. There is considerable tension between the President's constitutional powers as Commander in Chief and Congress's war making powers.[78] This tension is not readily resolved simply by looking at the Constitution.[79] Instead courts look to past presidential actions and congressional responses when evaluating the constitutionality of executive actions.[80] Indeed Justice Frankfurter noted in *Youngstown* that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."[81] Thus, congressional inaction can be deemed as implicit delegation of war making power to the executive.[82]

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74. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

75. *See id.* at 637.

76. *Id.*

77. *See id.* at 635.

78. *Id.* at 641-42.

79. *See id.* at 641 ("These cryptic words [found in the Commander in Chief Clause] have given rise to some of the most persistent controversies in our constitutional history.").

80. *See id.* at 610-11 (Frankfurter, J., concurring).

81. *Id.*

82. *See id.*

Whether the United States is in a state of war or not, an authorization of force provides legitimacy and clarity to the war effort. If the President acts pursuant to such an authorization his authority is at its height; consequently, he can operate with greater certainty that his actions are constitutional.[83] Absent such a declaration, the President's power is much less clear. While the President has the authority to frame the conflict and he might still be able to act pursuant to his inherent powers, he is operating in the zone of twilight.[84] Congressional authorizations remove this uncertainty by stamping specific acts with congressional approval or disapproval. This process also allows Congress to exert control over what the President can do in the future and prevents the "gloss" that comes from congressional acquiescence.[85]

III. PROBLEMS WE FACE TODAY

The AUMF authorized the President to use "all necessary and appropriate force" against all actors that he determined were involved in the 9/11 attacks.[86] The nexus requirement tethered military action to this specific event and those involved in the attacks.[87] In 2001, this hastily passed statute adequately addressed America's principal security concerns, namely al-Qaeda, the Taliban and Osama bin Laden. However, as time passes and the war on terror expands to new groups and regions, the connection to these attacks is becoming more and more tenuous. The United States faces threats not just from al-Qaeda, but also from its allies and cobelligerents, many of whom seemingly have no relation to 9/11. Moreover, the exact scope and appropriate use of this force remains undefined. Though the President has interpreted "force" to include detention and targeted killings and has applied it to American citizens at home and abroad, these actions are immensely controversial.[88] The AUMF does little to help clear up these problems.

America's chief security threats used to come from the Taliban and al-Qaeda. The Taliban harbored the perpetrators of the 9/11 attacks, al-Qaeda, and fell squarely under the AUMF's nexus requirement. Now, al-Qaeda has many allies and cobelligerents; these groups employ similar tactics, share

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83. *See id.* at 635 (Jackson, J., concurring).

84. *See id.* at 637.

85. *See id.* at 610-11 (Frankfurter, J., concurring).

86. AUMF, *supra* note 2, § 2(a).

87. *Id.*

88. *See, e.g.*, Baden Copeland et al., *Killing of Awlaki is Latest in Campaign Against Qaeda Leaders*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/interactive/2011/09/30/world/middleeast/the-killing-of-anwar-al-awlaki.html?ref=anwaralawlaki.

comparable ideologies, and present significant threats to American lives.[89] But does the AUMF authorize force against these groups? Are groups such as al-Shabaab,[90] AQAP,[91] and the Pakistani Taliban[92] sufficiently tied to 9/11 or al-Qaeda? These groups are violent, dangerous, and opposed to the United States. In many ways, they are just as dangerous as al-Qaeda. However, many of these groups did not even exist on September 11, 2001, and the ones that did were not directly involved in the attacks. Thus, they could not possibly have a strong relationship to the attacks themselves, nor did they harbor those who did. Since the AUMF's text only authorizes force against those actors the President deems were involved in the 9/11 attacks, these groups are necessarily outside of Congress's authorization.

Still, the threat from these groups is just as real and the need to use force is just as great. The President has responded to these threats with force, claiming congressional authorization and inherent constitutional authority. In this context, it is unclear if or to what extent either of these authorizations actually exist. This ambiguity is especially apparent in the President's use of extraterritorial force as well as the detention and targeted killings of American citizens.

On September 30, 2011, two United States drones flying in Yemen used Hellfire missiles to kill Anwar al-Awlaki.[93] Al-Awlaki was an American citizen and the chief al-Qaeda recruiter globally and considered a viable target under the AUMF.[94] However, Yemen does not fall under the AUMF's list of targets, nor is the United States at war with Yemen. The ACLU and the Center for Constitutional Rights sued on behalf of al-Awlaki, complaining that the President does not have a "blank check" to kill terrorists all over the world.[95] Since the courts dismissed the suit on the political question doctrine, this issue remains unresolved.[96] However, it

89. Jens David Ohlin, *Targeting Co-Belligerents*, *in* TARGETED KILLINGS: LAW & MORALITY IN AN ASYMETRICAL WORLD (Claire Finkelstein et al. eds.) (forthcoming) (manuscript at 64), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886414&.

90. *Al-Shabaab*, NAT'L COUNTERTERRORISM CENTER, http://www.nctc.gov/site/groups/al_shabaab.html (last visited Dec. 3, 2011).

91. *Al-Qa'ida in the Arabian Peninsula (AQAP)*, NAT'L COUNTERTERRORISM CENTER, http://www.nctc.gov/site/groups/aqap.html (last visited Dec. 3, 2011).

92. *Tehrik-e Taliban Pakistan (TTP)*, NAT'L COUNTERTERRORISM CENTER, http://www.nctc.gov/site/groups/ttp.html (last visited Dec. 3, 2011).

93. *Anwar al-Awlaki*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html (last updated Mar. 5, 2012).

94. *See id.*

95. Dina Temple-Raston, *Father of Internet Imam Plans to Sue CIA*, NAT'L PUBLIC RADIO (Aug. 3, 2010), *available at* http://ccrjustice.org/newsroom/news/father-of-internet-imam-plans-sue-cia.

96. Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 10 (D.D.C. 2010).

highlights an important and continuing issue regarding the practical application of the AUMF.

The AUMF's text does not explicitly authorize force in states when the organizations or individuals are there without the knowledge or consent of that state. Rather, it only authorizes force against nations who were themselves involved in or harbored those responsible for 9/11. International law demands a significant amount of respect for the territorial integrity of sovereign nations, and Congress would not likely delegate the President the power to violate that right in any country he finds combatants.[97] Yet, some individuals and organizations in these states are classified as belligerents and are lawful targets. Moreover, failing to authorize force against targets solely because they are living in certain states might encourage combatants to relocate there. If Congress determines that force cannot be used against AUMF targets in Yemen, then militants have an even stronger incentive to relocate there. Also, their presence in a state not authorized under the AUMF does not necessarily diminish the lethality of their attacks or the threat they pose to the United States and its allies. Attacking individuals in friendly or neutral states might be a military necessity in many scenarios, but it certainly is not explicitly authorized by the AUMF.

IV. RECOMMENDATIONS

More than a decade after the attacks on 9/11 and with American military operations in Iraq winding down, civil liberties groups, along with both Republicans and Democrats in Congress, have expressed a desire to update the AUMF.[98] Obviously, these groups have different goals and, consequently, different views for the new AUMF. Some Congressmen want to expand the President's legal authority to use force against enemy combatants outside of Afghanistan and Iraq and against combatants who are not part of al-Qaeda,[99] while civil liberties groups focus on providing more robust legal protections for detainees and American citizens like al-Awlaki and Padilla.[100] These divergent considerations and goals suggest that a middle road will be very hard to find. However, Congress must look at both the legal and practical considerations embodied in all of these

97. *See, e.g.*, U.N. Charter arts. 2(4), 2(7), 51.

98. Donna Cassata, *National Defense Authorization Act: House and Senate Negotiators Agree on Bill Hoping to Avoid Obama Veto*, HUFFINGTON POST (Dec. 13, 2001), http://www.huffingtonpost.com/2011/12/13/national-defense-authorization-act-ndaa-obama-detainee-policy_n_1145407.html.

99. Josh Gerstein & Charles Hoskinson, *House Wrestles Over War-on-Terror Measure*, POLITICO (May 26, 2011), http://www.politico.com/news/stories/0511/55737.html.

100. *See, e.g., A Call to Courage: Reclaiming Our Liberties Ten Years After 9/11*, ACLU 9-11 (Sept. 2011), *available at* https://www.aclu.org/files/assets/acalltocourage.pdf.

suggestions because the updated AUMF must be both constitutional and practical from a military standpoint.

A. 2012 National Defense Authorization Bill

This year, the Chairman of the House Armed Services Committee, Representative "Buck" McKeon, introduced H.R. 1540, also known as the National Defense Authorization Act for the 2012 Fiscal Year.[101] The House of Representatives passed the bill and referred it to the Senate. Section 1034 of the bill updates the AUMF by more specifically defining the conflict and combatants and explicitly includes the power to detain. This bill was made with the recognition that the AUMF "has not been updated to reflect the evolving nature and origin of the Islamist threat against this country"[102] and was seen by its supporters as a "needed revision and affirmation . . . since the connection between [the 9/11 attacks] and the terrorists the United States is now fighting is becoming less obvious."[103] The text of the relevant section is as follows:

> SEC. 1034. AFFIRMATION OF ARMED CONFLICT WITH AL-QAEDA, THE TALIBAN, AND ASSOCIATED FORCES.
>
> Congress affirms that—
>
> (1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;
>
> (2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (*Public Law 107-40*; *50 U.S.C. 1541 note*)
>
> (3) the current armed conflict includes nations, organization, and persons who—
>
> a. are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
>
> b. have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and

101. The original text of the bill passed by the House of Representatives can be found at http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540rfs/pdf/BILLS-112hr1540rfs.pdf.

102. Letter from Michael B. Mukasey, to the Hon. Howard P. "Buck" McKeon, Chairman, House Armed Services Committee (May 20, 2011), *available at* http://armedservices.house.gov/index.cfm/letters?ContentRecord_id=e61a15eb-fdc0-477a-aec2-e598327e8b8a).

103. Gerstein, *supra* note 99.

> (4) the President's authority pursuant to the Authorization for Use of Military Force . . .includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.[104]

This proposal addresses many of the AUMF's shortcomings and ambiguities, but has its own problems with clarity and overbreadth. First, it more clearly identifies the enemy by listing al-Qaeda and the Taliban and removing the nebulous 9/11 nexus requirement. Before this amendment, the AUMF merely defined the enemy in terms of its relation to 9/11. Though there can be no doubt that al-Qaeda and the Taliban were the AUMF's chief targets, a fact confirmed by the President's practice of targeting members of these organizations, this explicit provision provides welcome clarity. Despite the increased clarity in this part of the statute, the proposal also adds the ambiguous terms "associated forces" and "substantially supporting."

These new terms invite speculation that presents similar problems of interpretation as that created by the original 9/11 nexus requirement. What exactly does it mean to be an "associated force"? Are associated forces more closely tied to al-Qaeda than its "allies" or is this a lower standard? Is there a threshold level of support beyond which we call it "substantial"? Just like the original AUMF's deference to the President, the breadth and scope of these terms seemingly depends on the Executive's determination and framing of the conflict. The potential ambiguity in "associated forces" is exacerbated by the statute's authorization in part 3 (b) of force against groups who have "directly supported hostilities in aid of" al-Qaeda, the Taliban, associated forces, or their supporters. If it is too difficult to prove that a group is an "associated force," it seems that the President can just act under this less stringent standard. As long as a group has engaged in or supported hostilities that have supported or aided al-Qaeda, the Taliban, associated forces and their supporters, 3(b) authorizes force against them. However, part 3(b) has some inherent problems of overbreadth when read in conjunction with 3(a). Arguably any group that strongly identifies with or funds al-Qaeda or the Taliban could be an associated force. Thus, we could end up in a situation where an Indonesian group (say group "I") that funds an associated force (AF) of al-Qaeda but is engaged in conflict against a coalition partner over any sort of dispute becomes a target under part 1. This would make any group (say group "J") that substantially supports group "I" a viable target under part 1's substantial support of an

104. H.R. Res. 1540, 112th Cong. § 1034 (2011), *available at* http://thehill.com/images/stories/blogs/flooraction/Jan2011/hr1540.pdf.

associated force engaged in hostilities with a coalition partner prong. The statutory circle could then be drawn pursuant to 3 (b) to include any group that engages in hostilities in support of group "J". Thus, the new AUMF authorizes force against a group that is several degrees removed for al-Qaeda.

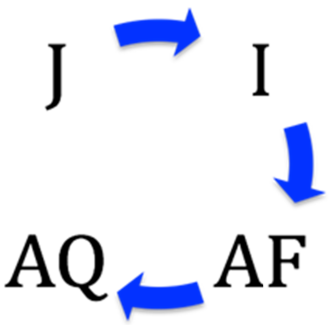

Figure 1[105]

Therefore, this bill would allow the President to act quickly and decisively in ways that the AUMF did not. The "substantially supports", "associated forces" and part 3(b) are much more elastic than the 9/11 requirement and would authorize the President to use force against groups that support and operate alongside al-Qaeda even though they may not have been involved in the 9/11 attacks. Instead of trying to relate the possible targets back to a certain action on a certain day, the President would now be able to make decisions based on the organization's actions as he sees them today. This would remove the need to decide whether or not, for instance, the Pakistani Taliban could be considered part of the Taliban or sufficiently tied to 9/11. Instead the President could make a determination based on real-time intelligence, looking at the group's actions and the threat they pose. If the President determines that this group substantially supports al-Qaeda or that it engages in hostilities in aid of al-Qaeda, he has clear authority to act.

Second, the new amendment clears up much of the debate regarding congressional authorization for detention. Part 4 of section 1034 explicitly authorizes detention as one aspect of force. Though the Court has said that the power to detain is necessarily incident to the prosecution of war, this provision serves an important purpose by affirming Congress's approval of

105. Figure 1 illustrates how far removed group "J" can be from al-Qaeda while still falling in the circle of statutory authorization.

this determination and past practice.[106] Next, it specifies that detention can last for the duration of the hostilities, reaffirming the Court's suggestion in *Hamdi.*[107] Furthermore, it seems to clear up some of the issues surrounding *Padilla* in that it explicitly allows for detention of individuals that are described in part 3 as combatants and makes no mention of citizenship.[108] Given the intense controversy over what special protections should be afforded to American citizens raised most recently by *Padilla* and al-Awlaki's placement on the targeted killing list, Congress undoubtedly considered these issues. Therefore, Congress's omission of this consideration demonstrates their acquiescence to past practice. If Congress had wanted to limit the AUMF's detention or force provisions against American citizens, it could have included a specific provision that mentioned this issue. Even though this new amendment clears up the issue of congressional approval, it is still subject to constitutional limitations and will be open to criticism for failing to provide adequate protections to American citizens.[109]

This expansion undoubtedly gives the President broad authority to act but the terms "substantially supporting", "associated forces", and part 3(b) seem overly broad, declaring a seemingly endless war against terrorism.

B. Criticism from Benjamin Wittes[110]

Prominent scholar Benjamin Wittes agrees that an update to the AUMF is becoming increasingly important. He acknowledges that "[w]e have a legal instrument authorizing [a] war that is growing by the day more attenuated in its description of the conflict. Logically, therefore, if we want to both authorize and cabin the war we are fighting, we should update the instrument."[111]

According to Wittes, the amendment expands the AUMF's authorization outside of the administration's current interpretation of

106. Hamdi, 542 U.S. at 518.

107. *Id.* at 521.

108. *See generally* Padilla, 542 U.S. 426.

109. *But see* S. 1253, 112th Cong. § 1031(d) (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1253rs/pdf/BILLS-112s1253rs.pdf (The Senate version of the bill specifically prevents the detention of American citizens "on the basis of conduct taking place within the United States except to the extent permitted by the Constitution of the United States").

110. Mr. Wittes is a Senior Fellow in Governance Studies at The Brookings Institution.

111. Benjamin Wittes, *Updating the AUMF—A Discussion*, LAWFARE (Nov. 28, 2010, 9:18 AM), http://www.lawfareblog.com/2010/11/updating-the-aumf-a-discussion/.

acceptable force.[112] First, the amendment says that the current conflict includes those who are "part of, or substantially supporting" the enemy. Wittes argues that this language suggests "Congress has authorized the use of 'all necessary and appropriate force' against mere supporters of our enemies."[113] Under this interpretation of the statute, the amendment might authorize force in response to any sort of "non-trivial support [given] to" the defined combatants.[114] This interpretation might actually authorize force against Iran for its continued support of terrorist groups, even though Iran has not directly engaged in hostilities with the United States.[115] Although some form of force may become necessary against Iran, especially in light of the recent assassination attempt in Washington D.C.,[116] it seems unlikely that Congress would want to delegate to the President the authority to attack another nation merely for its support. Moreover, this proves that the amendment will go far beyond direct participants in the conflict and extend to their supporters all over the world. In fact, the text of the statute authorizes force against nation "A" for supporting hostilities in support of nation "B" because nation "B" substantially supports an "associated force." The proposal authorizes force against nation "A" even though nation "A" has no contact with al-Qaeda or even an associated force.

In an attempt to fix these problems of over breadth, Wittes proposes that Congress change the "substantially supporting" language to "harbor."[117] He also proposes that we limit authorizations under the "harbor" prong to nations.[118] Without this alteration, Wittes argues that Section 1034 of H.R. 1540 might extend the use of force to groups that have only a relative or tenuous connection to al-Qaeda and the Taliban.[119] Wittes believes that the term "harbors" would prevent drawing the circle of legitimate targets too broadly.[120] Indeed, "harbors" suggests some level of intent or knowledge as well. For instance, in the criminal law context,

112. Benjamin Wittes, *An Analysis of the National Defense Authorization Bill*, FEDERALIST SOCIETY (June 21, 2001), http://www.fed-soc.org/publications/detail/an-analysis-of-the-national-defense-authorization-bill.

113. *Id.*

114. *Id.*

115. *Id.*

116. *US Officials Vow to Hold Iran Accountable for Alleged Assassination Plot*, MSNBC (Oct. 12, 2001, 12:41 PM), http://www.msnbc.msn.com/id/44870617/ns/us_news-security/.

117. Benjamin Wittes, *An Easy Fix for the AUMF Language*, LAWFARE (May 25, 2011, 11:36 PM), http://www.lawfareblog.com/2011/05/an-easy-fix-for-the-aumf-language/.

118. *Id.*

119. *Id.*

120. *See id.*

harboring a fugitive requires a "know[ing]" *mens rea*.[121] This heightened requirement would similarly narrow the application of force to those nations who are knowingly supporting enemy combatants by providing them intentionally or unintentionally with a safe haven.

Mr. Wittes suggestions do a fairly good job at restricting the imposition of force to those who are actively engaged in the conflict. The House's term "substantially supporting" does not contain an explicit *mens rea* requirement and is probably less demanding than "harboring." Furthermore, the President might be able to use the "substantially supporting" prong to target individuals or groups who have a very loose connection to the enemy. Finally, it lessens the danger that nation "A" will become an authorized target absent some strong reason. Instead of authorizing force against nation "B" when "B" merely supported the associated force, the President must prove that nation "B" was actually harboring the terrorist group. It is more likely that nation "A" would know about harboring than mere "support," making nation "A's" decision to support nation "B" more odious and more worthy of force.

The term "harboring" might not provide clearer domestic legal authorization for the United States' practice of targeted drone killings in places such as Pakistan and Yemen. Both of these countries are considered havens for enemy combatants who are fleeing the United States military.[122] From these states, the enemy is able to regroup and plan future attacks, thus the ability to use force in these nations is extremely important to the war effort. When dealing with nations, it might actually be easier to simply say that Yemen or Pakistan are "harboring" than "substantially supporting." Both countries undoubtedly know that terrorists live within their borders, but it might be very difficult and politically costly to say that they are substantially supporting terrorists.[123] While harboring suggests a greater level of involvement and intent on the individual level, it might actually be possible to construe "harbor" as a lower level of involvement and *mens rea* on the state level.

V. MY SOLUTION

The AUMF must be updated. In 2001, the AUMF authorized force to fight against America's most pressing threat, the architects of 9/11.

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121. *See, e.g.*, 18 U.S.C.A. § 1071 (providing that concealing a person from arrest requires "knowledge of the fact that a warrant or process has been issued").

122. *See, e.g.*, Barbara Starr, *U.S. Fears Yemen a Safe Haven for al Qaeda*, CNN (Dec. 28, 2009), http://articles.cnn.com/2009-12-28/world/yemen.alqaeda.terror_1_qaeda-yemenis-general-david-petraeus?_s=PM:WORLD.

123. *See id.*

However, much has changed since 2001. Bin Laden is dead, the Taliban has been deposed, and it is extremist organizations other than al-Qaeda and the Taliban who are launching many of the attacks against Americans and coalition partners.[124] In many ways, the greatest threat is coming from groups not even around in 2001, groups such as AQAP and al Shabaab.[125] Yet these groups do not fall under the AUMF's authorization of force. These groups are not based in the same country that launched the attacks, have different leaders, and were not involved in planning or coordinating 9/11. Thus, under a strict interpretation of the AUMF, the President is not authorized to use force against these groups.

Congress needs to specifically authorize force against groups outside of al-Qaeda and the Taliban. Our security concerns demand that the President can act quickly and decisively when facing threats. The current authorization does not cover many of these threats, yet it is much more difficult to achieve this decisiveness if the President is forced to rely solely on his inherent powers. A clear congressional authorization would clear up much of this problem. Under Justice Jackson's framework, granting or denying congressional authorization ensures that President does not operate in the "zone of twilight."[126] Therefore, if Congress lays out the exact scope of the President's power, naming or clearly defining the targeted actors, the constitutionality or unconstitutionality of presidential actions will become much clearer.[127]

Removing the 9/11 nexus to reflect the current reality of war without writing a carte blanche is the most important form of congressional guidance regarding target authorization. In order for the President to operate under the current AUMF, he must find a strong nexus between the target and the attacks on September 11. As I have shown in this paper, this nexus is simply non-existent for many groups fighting the United States today. Yet, the President should want to operate pursuant to congressional authorization, Justice Jackson's strongest zone of presidential authority. In order to achieve this goal, the administration has begun to stretch the statutory language to include groups whose connection to the 9/11 attacks, if any, is extraordinarily limited. The current presidential practice only nominally follows the AUMF, a practice Congress has seemingly consented to by failing to amend the statute for over ten years. This

124. *See, e.g.*, EMERGENCY RESPONSE & RESEARCH INST., AQAP AND AL-SHABAAB ALLIANCE; AN EMERGING TERRORIST THREAT (2010), *available at* http://emergencynet-news.com/pdf/Yemen_AQAP_bomb_alliance.pdf.

125. *See id.*

126. *See* Youngstown Sheet & Tube Co., 343 U.S. at 635–37 (Jackson, J., concurring).

127. *See id.*

"stretching" is dangerous as Congress is no longer truly behind the authorization and has simply acquiesced to the President's exercise of broad authority.

The overarching purpose of the new authorization should be to make it clear that the domestic legal foundation for using military force is not limited to al-Qaeda and the Taliban but also extends to the many other organizations fighting the United States. The language in Representative McKeon's bill does a fairly good job of achieving this goal by specifically naming al-Qaeda and the Taliban along with the term "associated force." This provision makes it clear the President is still authorized to use force against those responsible for 9/11 and those that harbored them by specifically mentioning al-Qaeda and the Taliban. However, the additional term "associated force" makes it clear that the authorization is not limited to these two groups and that the President can use force against the allies and separate branches of al-Qaeda and the Taliban. This creates a very flexible authorization.

Despite the significant flexibility of the phrase "associated force engaged in hostilities", I would propose defining the term or substituting a more easily understood and limited term. Associated force could mean many things and apply to groups with varying levels of involvement. Arguably any group that strongly identifies with or funds al-Qaeda or the Taliban could be an associated force. Thus, we could end up in the previously describe situation where group "I" who is in conflict with the United States or a coalition partner in Indonesia over a completely different issue becomes a target for its support of an associated force of al-Qaeda. Beyond that, the United States is authorized to use all necessary force against any groups that directly aid group "I" in its struggle.

My proposal for the new AUMF would appear as follows:

AFFIRMATION OF ARMED CONFLICT WITH AL-QAEDA, THE TALIBAN, AND ASSOCIATED FORCES

Congress affirms that—

(1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;

a. for the purposes of this statute, an associated force is a nation, organization, or person who enjoys close and well-established collaboration with al-Qaeda or the Taliban and as part of this relationship has either engaged in or has intentionally provided direct tactical or logistical support for armed conflict against the United States or coalition partners.

(2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (*Public Law 107-40*; *50 U.S.C. 1541*);

(3) the current armed conflict includes nations, organization, and persons who—

  a. are part of al-Qaeda, the Taliban, or associated forces; or

  b. engaged in hostilities or have directly supported hostilities in aid of a nation, organization or person described in subparagraph (A);

  c. or harbored a nation, organization, or person described in subparagraph (A); and

(4) the President's authority pursuant to the Authorization for Use of Military Force includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

(5) Nothing in this authorization should be construed to limit the President's ability to respond to new and emerging threats or engage in appropriate and calculated actions of self-defense.

The definition of "associated forces" will add much needed clarity and provide congressional guidance in determining what groups actually fall under this provision. Rather than putting faith in the President not to abuse his discretion, Congress should simply clarify what it means and limit his discretion to acceptable amounts. The "close and well-established collaboration" ensures that only groups with very close and observable ties to al-Qaeda and the Taliban are designated as "associated forces." While the requirement that part of their collaboration involve some kind of tactical or logistical support ensures that those classified as enemy combatants are actually engaged, or part of an organization that is engaged, in violence against the United States. Also, requiring that the associated force's violence be directed at the United States or a coalition partner and that this violence is part of its relationship with al-Qaeda or the Taliban is another important limitation.

First, requiring the associated force to engage in violence that is directed at these nations ensures that "associated force" does not include countries such as Iran that might have a relationship with al-Qaeda and give it financial support but are not actually in violent conflict with the United States. Second, requiring that this violence is made in furtherance of its relationship with al-Qaeda and the Taliban ensures that the violence that makes a group an "associated force" is actually related to its collaboration with al-Qaeda and the Taliban. Without this second provision, a group that

supports al-Qaeda would be elevated to an "associated force" if it engaged in violence with, for instance, Australia over a completely unrelated issue.

While some groups that work closely with and support al-Qaeda would not be considered associated forces, it is important to limit the scope of this term. This label effectively elevates the group to the same status as al-Qaeda and the Taliban and attaches authorization for force against any group that supports or harbors it. Furthermore, there is little real harm by narrowly defining associated forces because the groups that do support al-Qaeda will still be subject to the authorization under the "support" or "harbor" prongs. Narrowly defining "associated forces" simply prevents the problem of authorization spreading to supporters of those who are merely supporters of al-Qaeda.

Compared to Representative McKeon's proposal, these new provisions would narrow the scope of authorization. The President would not be able to use this authorization to attack new groups that both spring up outside our current theater and have no relation to al-Qaeda, the Taliban or the newly defined associated forces. However, part (5) of my authorization would ensure that the President is not unnecessarily restricted in responding to new and emergent threats from organizations that do not collaborate and support al-Qaeda. In this way, the proposal incorporates Robert Chesney's suggestion, "[i]t may be that it [is] better to draw the *statutory* circle narrowly, with language making clear that the narrow framing does not signify an intent to try and restrict the President's authority to act when necessary against *other groups* in the exercise of lawful self-defense."[128] The purpose of the new AUMF should not be to give the President a carte blanche to attack any terrorist or extremist group all over the world. The purpose of this authorization is to provide clear authorization for the use of force against al-Qaeda and its allies. Moreover, if a new group is created that has no relation to any of the relevant actors defined in this statute, Congress can pass another authorization that addresses this reality. The purpose of congressional authorization should not be to authorize the President to act against every conceivable threat to American interests. In fact, such an authorization would effectively strip Congress of its constitutional war making powers. Instead, the new proposal should provide clear domestic authorization for the use of force

128. Robert Chesney, *White House Threatens Veto on the Defense Authorization Act, Citing Detention and AUMF Related Provisions*, LAWFARE (May 24, 2011, 5:16 PM), http://www.lawfareblog.com/2011/05/white-house-threatens-veto-on-the-defense-authorization-act-citing-detention-and-aumf-related-provisions/. Robert Chesney is a Professor of National Security Law at the University of Texas.

against those nations that present the greatest threat to the United States today.

CONCLUSION

The original AUMF was hastily passed during a time of crisis to address America's most pressing security threats and concerns. Over time these threats and concerns have changed and grown. Our law on conflict should evolve with these changes. The best way to bring about this change is to update the AUMF. This update should reflect the present reality of the conflict by expanding the authorization to use force beyond simply those involved in 9/11. This authorization should expand to include groups such as AQAP who work closely with and fight alongside al-Qaeda. However, we should not expand the scope of the statute as far as Congress has proposed. Representative McKeon's legislation would effectively give the President a carte blanche to decide who and what to attack and detain. Such a broad grant of authority would effectively allow the President to use force whenever and wherever he wanted. Instead, the new legislation should balance the need for decisive presidential action against the very real concern of adding too much gloss to the Executive power. My proposal attempts to find such a balance by clearly defining the groups of combatants, ensuring that the President has clear and significant authority to act against those organizations. It also limits his discretion in deciding what groups fit this description and prevents him from starting a global and perpetual war on terror, while ensuring that he is not completely barred from responding to new threats as they arise. Undoubtedly, my proposal has flaws and loopholes and cannot be used to authorize force against all future threats, but it does a better job than Representative McKeon's of heeding President Lincoln's warning.