

OBAMA'S AUMF LEGACY

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In the fifteen years since the Authorization for Use of Military Force (AUMF) was enacted on September 18, 2001, the Taliban has been removed from power but not eliminated; Osama Bin Laden has been killed and the senior leaders of Al Qaeda as of 9/11 have been captured, killed, or driven underground, although Al Qaeda remains a threat; numerous Al Qaeda affiliates have sprung up around the globe, most notably in Iraq, Yemen, Syria, and Somalia; and most ominously, the Islamic State has arisen from the ashes of Al Qaeda in Iraq to become what the Director of National Intelligence has described as “the preeminent terrorist threat” against the United States “because of its self-described caliphate in Syria and Iraq, its branches and emerging branches in other countries, and its increasing ability to direct and inspire attacks against a wide range of targets around the world.”¹

Despite massive changes in the geographical scope of the conflict that began on 9/11, the strategy and tactics employed, and the identity of the enemy, the AUMF remains the principal legal foundation under U.S. domestic law for the president to use force against and detain members of terrorist organizations. The AUMF is already the longest operative congressional authorization of military force in U.S. history, and, as of fall 2016, there was no immediate prospect that Congress would move to repeal or update it. With the continued vibrancy of Al Qaeda, its associates, and the Taliban, and with the 2014 presidential extension of the AUMF to cover military operations against the Islamic State, the AUMF is likely to be the primary legal basis for American uses of force for the foreseeable future.

The transformation of the AUMF from an authorization to use force against the 9/11 perpetrators who planned an attack from Afghanistan into a protean foundation for indefinite war against an assortment of terrorist organizations in numerous countries is one of the most remarkable legal developments in American public law in the still-young twenty-first century. As this article demonstrates, this transformation largely occurred during the Obama presidency. Given all that has happened since 9/11, it is easy to forget that almost every issue about the AUMF's meaning and scope remained unresolved at the end of the Bush presidency. It was during Obama's time in office, guided by his administration, that courts construed the AUMF to resolve many of its ambiguities and uncertainties, and that Congress ratified the basic framework of these judicial interpretations. The Obama administration also relied extensively on the

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¹ James R. Clapper, Director of National Intelligence, Statement for the Record Before the U.S. Senate Armed Services Committee: Worldwide Threat Assessment of the U.S. Intelligence Community 4 (Feb. 9, 2016), *available at* https://www.armed-services.senate.gov/imo/media/doc/Clapper_02-09-16.pdf.

judicial construction of the AUMF, supplemented by its own elaborate and publicly expressed interpretations, as a basis for targeting members of various terrorist organizations in numerous countries. Furthermore, the administration significantly extended the scope and duration of the AUMF by interpreting it to apply to the Islamic State.

In a real sense, then, the 2001 AUMF is President Obama's AUMF. Despite his frequent rhetoric about ending the AUMF-authorized conflict, part of Obama's legacy will be cementing the legal foundation for an indefinite conflict against various Islamist terrorist organizations. After making these points in parts I and II, we examine in part III the role that international law has played in informing the content of Obama's AUMF. The Obama administration maintained that the international laws of war—both *jus in bello* and *jus ad bellum*—were important constraints on its actions under the AUMF. There are many disputes and uncertainties, however, about how to apply the laws of war to a global noninternational armed conflict against terrorist organizations. For these unsettled issues of international law, the administration often adopted interpretations that supported presidential discretion and flexibility, and thus that enhanced rather than constrained the administration's authority to take action under the AUMF.

We should emphasize at the outset that our goal here is descriptive, not normative. Our aim is to capture how the meaning and scope of the AUMF developed during President Obama's time in office—primarily due to interpretations and actions by his administration, but also as a result of important decisions by the judiciary and Congress. Identifying the distinctive contributions made to AUMF jurisprudence during the Obama administration is, we think, a necessary prerequisite to any normative assessment of the evolution of this body of law.

I. AUMF LAW BEFORE THE OBAMA ADMINISTRATION

Given how much we currently know about the meaning and scope of the AUMF, it is hard to remember how little was settled about the AUMF in the more than seven years between its enactment and the Obama presidency that began on January 20, 2009.

September 18, 2001

On September 18, 2001, President Bush signed a Joint Resolution of Congress passed four days earlier.² Section 2(a) provides:

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

This force authorization is directed at entities whom the president "determines" were connected to the 9/11 attacks, a group that on September 18, 2001 included at least the nation of Afghanistan when it was governed by the Taliban ("nations"), Al Qaeda ("organizations"), Al Qaeda members, and at least those Taliban members who were part of its armed forces ("persons"). But the AUMF raised scores of unanswered interpretive questions, including the meaning of "force," the geographical scope of authorization, the requisite nexus to 9/11, and the duration of authorization.

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

The legislative history of the 2001 AUMF provides no answers to these questions. The AUMF was voted on by Congress three days after the 9/11 attacks and was not accompanied by a legislative report. The only interpretive point that emerges clearly from its history is that Congress rejected the Bush administration's request for a broader authority to "deter and preempt any future acts of terrorism or aggression against the United States" and gave it instead the more targeted authority to use force against entities connected to 9/11.³ Congressional members spoke on numerous issues related to the AUMF in floor speeches, but these are stray individual comments. Beyond tying the authorization to the 9/11 attacks, no institutional view about the meaning of the AUMF emerges from the congressional record.

September 18, 2001 to January 20, 2009

The Bush administration gave the AUMF a robust interpretation. It invoked the AUMF as a ground of authority for military detention—at Guantánamo and elsewhere—and for trial by military commission.⁴ It also construed the AUMF to authorize warrantless surveillance of "international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations," despite the restrictions of the Foreign Intelligence Surveillance Act.⁵ In addition, it argued that the AUMF authorized military detention of some U.S. citizens and residents, including at least two who were captured inside the United States.⁶ The public and the academy fiercely debated these issues as well as broader issues about the AUMF's meaning and scope, such as: the degree to which the AUMF triggered the president's war powers and was a legally sufficient substitute for a war declaration; whether and to what extent the president's authority under the AUMF was limited by international law; and the proper extent of judicial review of presidential actions taken under the AUMF.⁷

The judiciary, however, addressed remarkably few issues about the AUMF's meaning and scope during the Bush administration. The U.S. Supreme Court's most important decision, *Hamdi v. Rumsfeld*, held that the AUMF authorized the detention of a U.S. citizen Taliban soldier picked up on a battlefield in Afghanistan.⁸ Justice O'Connor's governing plurality opinion observed 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 [the 9/11] attacks, are individuals Congress sought to target in passing the

³ See 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 (2002).

⁴ See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 13, 2001).

⁵ See U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006), available at <https://epic.org/privacy/terrorism/fisa/doj11906wp.pdf>.

⁶ See, e.g., Brief for the Respondent-Appellee at 21, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_47460.pdf.

⁷ See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2066–72, 2107–33 (2005) (describing some of the debates).

⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). This holding emerged from a combination of Justice O'Connor's plurality opinion for four justices, and Justice Thomas's dissent. See *id.* at 579 (Thomas, J., dissenting) (arguing that Hamdi's "detention falls squarely within the Federal Government's war powers"). A different majority of the Court ruled that the Due Process Clause required the government to permit Hamdi to challenge the factual basis for his detention before a neutral decision maker. See *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

AUMF.”⁹ It concluded that Congress’s authorization of “necessary and appropriate” “force” included the authority to detain enemy fighters for the duration of the relevant conflict, a conclusion based on “longstanding law-of-war principles,” executive branch practice, judicial precedent, and the functional need to prevent enemy combatants from returning to the battlefield. Despite *Hamdi*’s undoubted significance for the AUMF, its guidance is limited. The decision lacked a majority opinion, and the plurality opinion confined its analysis to ongoing combat operations against the Taliban and hinted that its analysis might not apply fully in other contexts, or indefinitely.¹⁰

Of the five major “war on terrorism” decisions by the U.S. Supreme Court during the Bush administration, *Hamdi* was the only one to offer an interpretation of the AUMF. The Court in *Hamdan v. Rumsfeld* assumed without deciding that the “AUMF activated the President’s war powers, and that those powers include the authority to convene military commissions in appropriate circumstances,” and then held that this assumed authority did not alter the requirements of the Uniform Code of Military Justice, which it found were violated by President Bush’s military commissions.¹¹ The Court’s decisions in *Rasul*, *Padilla*, and *Boumediene*—all of which involved challenges to military detentions—concerned the proper territorial scope of, and venue for, the writ of habeas corpus (statutory or constitutional) and did not address the substantive meaning of the AUMF.¹²

For most of the Bush administration, lower courts also had little opportunity to construe the AUMF because the vast majority of litigation that potentially touched on the AUMF concerned jurisdictional questions. The main judicial decisions that did address the merits of the AUMF during this period—lower court decisions concerning the legality of military detention of individuals apprehended inside the United States—were effectively mooted when the individuals were transferred to civilian custody.¹³

The U.S. Supreme Court finally resolved the territorial scope of habeas corpus as applied to Guantánamo near the end of the Bush administration. On June 12, 2008, it issued its decision in *Boumediene v. Bush*, holding that detainees at Guantánamo had a constitutional right to seek a writ of habeas corpus in U.S. federal courts.¹⁴ The Court provided no guidance on the meaning of the AUMF but did make clear that the government could have the Guantánamo habeas cases heard before judges in the District Court for the District of Columbia Circuit. Those district court judges thus began to reach the merits of Guantánamo habeas petitions and, finally,

⁹ *Id.* at 518.

¹⁰ See *infra* note 61.

¹¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006) (citation omitted).

¹² See *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the Constitution’s Suspension Clause applies to the detention of noncitizens at Guantánamo Bay); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal habeas statute, 28 U.S.C. §2241, conferred jurisdiction to determine the legality of military detention at Guantánamo); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (dismissing on jurisdictional grounds a habeas petition filed by a U.S. citizen captured and detained on U.S. soil).

¹³ See, e.g., *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006). In addition, one district court held that the AUMF did not authorize the president to conduct warrantless electronic surveillance, *ACLU v. NSA*, 438 F.Supp.2d 754, 780 (E.D. Mich. 2006), but the Sixth Circuit vacated the order on standing grounds, *ACLU v. NSA*, 493 F.3d 644, 656 (6th Cir. 2007).

¹⁴ *Boumediene*, 553 U.S. 723. Habeas cases from Guantánamo had as a practical matter been consolidated in federal courts in the District of Columbia since 2004. See Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1452 (2011).

to interpret the scope of the AUMF. Most notably, they accepted the Bush administration's argument that the AUMF authorized detention of "enemy combatants," a term defined to mean "an individual who was part of or supporting Taliban or al Qaeda forces, 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 hostilities in aid of enemy armed forces."¹⁵ The district court judges applied this standard in a handful of habeas cases during the Bush administration.¹⁶ But they said little else about the meaning of the AUMF.

When Barack Obama became president on January 20, 2009, therefore, the meaning of the AUMF was largely unsettled. To be sure, his administration did not start with a blank slate, since it inherited an armed conflict against Al Qaeda, the Taliban, and associated groups under the AUMF that included military detention of members of those groups at the Guantánamo detention facility and elsewhere. Nevertheless, on a range of issues, the administration faced significant choices about how to interpret the president's authority under the AUMF.

II. THE AUMF IN THE OBAMA ADMINISTRATION

The AUMF in the Courts

One of President Obama's first acts in office was to issue an executive order directing that the Guantánamo detention facility be closed within a year,¹⁷ a directive that, for a variety of reasons, remained unfulfilled as of fall 2016 (although the Obama administration had managed to substantially reduce the number of detainees held at Guantánamo). President Obama always separated the question of closing the Guantánamo facility, however, from the question of the legality of and need for military detention under the AUMF. In a speech early in his first term in office, for example, he noted that even after closure of the Guantánamo facility, long-term detention inside the United States might be necessary for detainees "who cannot be prosecuted yet who pose a clear danger to the American people."¹⁸

The Obama administration outlined its position concerning the scope of its detention authority in a March 2009 memorandum in the Guantánamo habeas litigation. The memorandum cited *Hamdi* for the proposition that "[t]he detention authority conferred by the AUMF is necessarily informed by principles of the laws of war."¹⁹ It then argued on this basis that the AUMF authorized the detention of

¹⁵ *Boumediene v. Bush*, 583 F.Supp.2d 133, 135 (D.D.C. 2008). During the period between *Boumediene* and President Obama's inauguration, district court judges in the District of Columbia relied on and applied this standard as the one "previously adopted by this Court in the *Boumediene* cases." See, e.g., *El Gharani v. Bush*, 593 F.Supp.2d 144, 147 (D.D.C. 2008).

¹⁶ See, e.g., *Sлити v. Bush*, 592 F.Supp.2d 46 (D.D.C. 2008); *El Gharani*, 593 F.Supp.2d 144; *Al Alwi v. Bush*, 593 F.Supp.2d 24 (D.D.C. 2008); *Ahmed v. Bush*, 585 F.Supp.2d 127 (D.D.C. 2008).

¹⁷ See Exec. Order 13,492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Guantánamo Detention Facilities, 74 Fed. Reg. 4897 (Jan. 22, 2009), at https://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities. The president ordered CIA detention sites to be closed immediately. Ensuring Lawful Interrogations, Exec. Order 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009), at https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

¹⁸ White House Press Release, Remarks by the President on National Security (May 21, 2009), at <https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

¹⁹ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay at 1, *In re Guantánamo Bay Detainee Litigation* (D.D.C. Mar. 13, 2009) (Misc. No. 08-442)

persons who were part of, or substantially supported, Taliban or al Qaida forces 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 hostilities, in aid of such enemy armed forces.²⁰

The Obama administration thus went beyond the holding of *Hamdi* in construing the AUMF to authorize the U.S. military to detain four groups of individuals: (1) members of Taliban forces; (2) members of Al Qaeda forces who are engaged in hostilities against the United States or its coalition partners; (3) members of associated forces; and (4) those persons who have given substantial support to one of the other groups.²¹ The administration also argued that “the AUMF is not limited to persons captured on the battlefields of Afghanistan,” and that “individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself.”²²

The U.S. Supreme Court did not review this interpretation of the AUMF during the Obama administration, so as a practical matter, federal courts in the District of Columbia Circuit resolved the issue in the context of addressing various matters related to the Guantánamo detentions. With minor qualifications, these courts accepted the Obama administration’s construction of the AUMF. But accepting this construction raised a host of more specific questions about how to define the boundaries of the four groups in question and how to determine which individuals fall within those boundaries. *Boumediene* provided no guidance on these questions.²³ As a result, courts in the D.C. Circuit developed a rich, common law jurisprudence of detention authority relating to the Guantánamo detainees.²⁴

Some of their decisions concerned procedural matters, such as standards of proof and the admissibility of evidence.²⁵ On the substantive scope of the AUMF, courts agreed with the Obama administration that the authorization extended to “associated forces.”²⁶ And on the question of what constitutes membership in a diffuse armed organization like Al Qaeda and its associated forces, the courts adopted a functional approach, as the Obama administration had urged.²⁷ Under

[hereinafter March 2009 Brief], available at <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf>.

²⁰ *Id.* at 2.

²¹ See also *id.* at 3 (“The United States can lawfully detain persons currently being held at Guantánamo Bay who were ‘part of,’ or who provided ‘substantial support’ to, al-Qaida or Taliban forces and ‘associated forces.’ This authority is derived from the AUMF, which empowers the president to use all necessary and appropriate force to prosecute the war, in light of law-of-war principles that inform the understanding of what is ‘necessary and appropriate.’”).

²² *Id.* at 7.

²³ *Boumediene*, 553 U.S. at 798 (“[O]ur opinion does not address the content of the law that governs petitioners’ detention.”).

²⁴ See Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

²⁵ See, e.g., *Latif v. Obama*, 677 F.3d 1175, 1183 (D.C. Cir. 2012) (ruling that a court could consider hearsay evidence in determining whether an individual qualified for detention and that official government records and reports were subject to a “presumption of regularity”).

²⁶ See, e.g., *Khan v. Obama*, 655 F.3d 20, 23 (D.C. Cir. 2011); *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010).

²⁷ See, e.g., *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); *Hamlily v. Obama*, 616 F.Supp.2d 63, 75 (D.D.C. 2009); see also *Bradley & Goldsmith*, *supra* note 7, at 2111–13 (arguing for functional approach to the issue).

this approach, as the administration noted in the March 2009 brief, “the particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts.”²⁸

The courts also agreed with the Obama administration about the proper limits of judicial review on AUMF-related matters. They agreed, for example, that habeas jurisdiction did not extend to U.S. military detentions in Afghanistan.²⁹ In addition, the D.C. Circuit in 2010 agreed with the Obama administration that “[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive’s opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.”³⁰ Some lower federal courts subsequently questioned whether this view survived *Hamdi* and *Boumediene*, at least with respect to the conflict in Afghanistan, but agreed with the Obama administration that the conflict there had not ended for purposes of detention authority.³¹ Finally, in response to a lawsuit filed by the father of a U.S. citizen who sought to prevent the use of lethal force against his son in Yemen, a federal district court agreed with the administration that the plaintiff lacked standing and that the legality of the attack was a nonjusticiable political question.³²

AUMF Authority Outside the Courts and Outside Guantánamo

The one issue that Congress weighed in on regarding the meaning of the AUMF since 9/11 concerned detention. In the National Defense Authorization Act for 2012 (NDAA), Congress “affirmed” that the AUMF authorizes detention of the entities referenced in the 2001 AUMF, as well as any individual 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.”³³ Congress thus adopted the same construction of the AUMF that the Obama administration had proposed in the March 2009 brief, and that the D.C. Circuit had accepted.³⁴ As a result, “a decade after the conflict began, all three branches

²⁸ March 2009 Brief, *supra* note 19, at 2. For a detailed description of how courts applied this functional approach in practice, see BENJAMIN WITTES, ROBERT M. CHESNEY, LARKIN REYNOLDS & THE HARVARD LAW SCHOOL NATIONAL SECURITY RESEARCH COMMITTEE, *THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING 1* (2012), available at <http://www.brookings.edu//media/research/files/reports/2011/5/guantanamo-wittes/chesney-full-text-update32913.pdf>.

²⁹ See *Al-Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013); *Al-Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

³⁰ *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010); see also *Al-Maqaleh*, 738 F.3d at 330 (“Whether an armed conflict has ended is a question left exclusively to the political branches.”).

³¹ See *Razak v. Obama*, 2016 U.S. Dist. LEXIS 41034 (D.D.C. 2016); *Al Warafi v. Obama*, 2015 U.S. Dist. LEXIS 99781 (D.D.C. 2015); *Al Odah v. United States*, 62 F.Supp.3d 101 (D.D.C. 2014).

³² See *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010); see also *Al-Aulaqi v. Panetta*, 35 F.Supp.3d 56 (D.D.C. 2014) (dismissing wrongful death suit).

³³ See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, sec. 1021(b)(2), 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. §801).

³⁴ See Report of the Committee on Armed Services, National Defense Authorization Act for Fiscal Year 2012, H.R. Rep. No. 112-78, sec. 1034, at 209 (May 17, 2011) (“The committee supports the Executive Branch’s interpretation of the Authorization for Use of Military Force, as it was described in a March 13, 2009, filing before the U.S. District Court for the District of Columbia.”).

of the government weighed in to affirm the ongoing relevance of the 2001 AUMF and its application not only to those groups that perpetrated the 9/11 attacks or provided them safe haven, but also to certain others who were associated with them.”³⁵

The Obama administration’s March 2009 brief stated that its interpretation of the AUMF was “limited to the authority upon which the Government is relying to detain the persons now being held at Guantánamo Bay,” and noted that it “is not, at this point, meant to define the contours of authority for military operations generally, or detention in other contexts.”³⁶ Nevertheless, the administration eventually extended this construction of the AUMF to a number of other contexts. For example, in its internal legal analyses, it relied on this construction for detention outside Guantánamo.³⁷ President Obama also invoked his authority under the AUMF, as well as his constitutional authority, to establish formal periodic review of continued detention for certain Guantánamo detainees.³⁸

In addition to detention issues, the Obama administration relied heavily on the AUMF in its counterterrorism targeting operations—by manned and unmanned aircraft, by special forces and other soldiers on the ground, and in offensive cyberoperations.³⁹ The Bush administration had also relied on the AUMF as a basis for its counterterrorism targeting operations.⁴⁰ But counterterrorism targeting outside of areas of active hostilities became much more prominent (and controversial) during the Obama administration,⁴¹ in large part because of its increased use of drones, and the administration was more public about relying on the AUMF for such targeting. In addition, the administration fleshed out AUMF-related concepts such as “membership” and “associated forces” in a number of widely reported targeting contexts, including air strikes against al-Shabaab in Somalia, Al Qaeda in the Arabian Peninsula in Yemen, and the Khorosan Group in Syria.⁴² Finally,

³⁵ Stephen W. Preston, General Counsel, U.S. Department of Defense, *The Legal Framework for the United States’ Use of Military Force Since 9/11* (Apr. 10, 2015), at <http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911>.

³⁶ March 2009 Brief, *supra* note 19, at 2.

³⁷ See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 120, 295, 487 (2015) (basing this conclusion on interviews and internal government documents).

³⁸ See Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order 13,567, 76 Fed. Reg. 13277 (Mar. 7, 2011), at <https://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba>.

³⁹ See, e.g., Preston, *supra* note 35 (describing “the groups and individuals against which the U.S. military was taking direct action (that is, capture or lethal operations) under the authority of the 2001 AUMF, including associated forces”).

⁴⁰ See George W. Bush, Letter to Congressional Leaders on Reporting on the Deployments of United States Combat-Equipped Armed Forces Around the World, 2 PUB. PAPERS 1469 (Dec. 16, 2008), available at <https://www.gpo.gov/fdsys/pkg/PPP-2008-book2/pdf/PPP-2008-book2-doc-pg1469.pdf>.

⁴¹ As of April 2016, Obama had ordered approximately ten times as many drone strikes as Bush, which had killed seven times as many people. See Micah Zenko, *Obama’s Embrace of Drone Strikes Will Be a Lasting Legacy*, N.Y. TIMES (Jan. 12, 2016), at <http://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy> (noting that ratios are based on average estimates provided by three nongovernmental organizations).

⁴² See SAVAGE, *supra* note 37, at 224–27, 274–79, 686; see also Charlie Savage, *Is the U.S. Now at War with Shabab? Not Exactly*, N.Y. TIMES, Mar. 15, 2016, at A11.

the administration placed a restrictive policy and procedural overlay on these legal conclusions to guide counterterrorism targeting decisions outside areas of active hostilities (defined to be areas other than in Afghanistan, Iraq, and Syria).⁴³

The AUMF and the “Forever War”

During 2012–2013, it appeared that the Obama administration might be preparing to terminate the AUMF-authorized war. In the fall of 2012, the General Counsel of the Defense Department, Jeh Johnson, explained how the administration conceptualized the “end” of the AUMF-authorized conflict.⁴⁴ When Al Qaeda is decimated to the point where it “is no longer able to attempt or launch a strategic attack against the United States,” he said, the United States “should no longer be considered [in] an ‘armed conflict’ against Al Qaeda and its associated forces.”⁴⁵ Six months later, President Obama said that the war against Al Qaeda and in Afghanistan was winding down, expressed a desire “to refine, and ultimately repeal, the AUMF’s mandate,” and pledged not to “sign laws designed to expand this mandate further.”⁴⁶

For a number of reasons, the administration was unable to end the AUMF-authorized war. First, Al Qaeda, though diminished, remains a serious threat against the United States in various countries.⁴⁷ Second, Al Qaeda associates such as the Nusra Front in Syria and Al Qaeda in the Arabian Peninsula in Yemen continue to flourish and pose threats to the United States.⁴⁸ Third, active hostilities continue in Afghanistan against Al Qaeda and the Taliban even though President Obama declared in late December 2014 that “our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion.”⁴⁹ Despite this pronouncement, thousands of U.S. troops are scheduled to remain in Afghanistan through 2016, and U.S. targeting and related combat operations there continue.⁵⁰ Fourth, the

⁴³ See Exec. Order 13,732, United States Policy on Pre- and Post-strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, 81 Fed. Reg. 44485 (July 1, 2016), at <https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>; White House Press Release, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013) [hereinafter U.S. Policy Standards and Procedures], available at https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf; White House Memorandum, Presidential Policy Guidance: Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), at <https://www.aclu.org/other/presidential-policy-guidance>.

⁴⁴ Jeh C. Johnson, General Counsel, Department of Defense, Speech at the Oxford Union: The Conflict Against Al Qaeda and Its Affiliates: How Will It End (Nov. 30, 2012), available at <http://www.state.gov/documents/organization/211954.pdf>.

⁴⁵ *Id.* at 7–8.

⁴⁶ White House Press Release, Remarks of President Barack Obama at the National Defense University (May 23, 2013), at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>.

⁴⁷ See, e.g., Clapper, *supra* note 1; John O. Brennan, Director of the Central Intelligence Agency, Statement Before the U.S. Senate Select Committee on Intelligence (June 16, 2016), available at <http://www.intelligence.senate.gov/sites/default/files/documents/jobrennanstatement.pdf>.

⁴⁸ Clapper, *supra* note 1; Interview by Al Arabiya with CIA Director John O. Brennan, Director of the Central Intelligence Agency (June 12, 2016), at <http://english.alarabiya.net/en/perspective/features/2016/06/12/Full-transcript-of-Al-Arabiya-s-interview-with-CIA-chief-John-Brennan.html>.

⁴⁹ See White House Press Release, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan>.

⁵⁰ See Mark Landler, *Obama Says He Will Keep More Troops in Afghanistan Than Planned*, N.Y. TIMES, July 7, 2016, at A8.

AUMF continues to provide the principal legal basis for detaining the remaining individuals held at Guantánamo, including high-level detainees who are unlikely to be sent to other countries. If the AUMF was terminated or repealed without the enactment of an alternative source of detention authority, such detentions might be rendered unlawful.

The fifth reason the administration has not ended armed conflict under the AUMF is that, in September 2014, President Obama construed the AUMF to authorize extensive and ongoing use of military force against the Islamic State,⁵¹ a terrorist organization that the CIA Director described in June 2016 as having tens of thousands of fighters, far larger than Al Qaeda at its height, and a “terrorism capability” of “global reach.”⁵² The Islamic State descended from Al Qaeda in Iraq, an organization that was once either part of or an “associated force” with Al Qaeda. By 2014, however, the successor Islamic State had disassociated itself from, and became a competitor to, Al Qaeda. In concluding nonetheless that the AUMF authorized force against this group, the administration reasoned that the AUMF applied to its predecessor, which “had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive,” and that the Islamic State “continues to wage the conflict against the United States.”⁵³ This interpretation is significant because many administration officials have said that the conflict against the Islamic State will likely last for a very long time.⁵⁴

Despite this interpretation, in February 2015, the administration asked Congress to explicitly authorize the conflict against the Islamic State in a statute separate from the 2001 AUMF.⁵⁵ This proposal would not have repealed the 2001 AUMF, although the president insisted that his administration “remain[ed] committed to working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF.”⁵⁶ Some members of Congress also proposed standalone AUMFs for the conflict against the Islamic State. At the time of this writing, none of these proposals appeared to have a serious prospect of enactment. In the meantime, Congress has continued to appropriate billions of dollars for the conflict, something that the Obama administration has argued constitutes a “ratification” of the president’s construction of the AUMF.⁵⁷

⁵¹ See SAVAGE, *supra* note 37, at 688–89; see also Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn’t Necessary*, N.Y. TIMES, Sept. 11, 2014, at A10.

⁵² Patricia Zengerle & Jonathan Landay, *CIA Director Says Islamic State Still Serious Threat*, REUTERS, June 16, 2016, at <http://af.reuters.com/article/worldNews/idAFKCN0Z210A>.

⁵³ Preston, *supra* note 35.

⁵⁴ See, e.g., Aaron Mehta, *Odierno: ISIS Fight Will Last 10 to 20 Years*, DEFENSE NEWS, July 17, 2015, at 3; Dan De Luce, *Is the U.S. Ready for an Endless War Against the Islamic State?*, FOREIGN POL’Y (Aug. 27, 2015), at <http://foreignpolicy.com/2015/08/27/is-the-u-s-ready-for-an-endless-war-against-the-islamic-state>.

⁵⁵ See Draft Joint Resolution to Authorize the Limited Use of the United States Armed Forces Against the Islamic State of Iraq and the Levant (2014), available at https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf.

⁵⁶ White House Press Release, Letter from the President—Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), at <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

⁵⁷ See Defendant’s Motion to Dismiss at 2, *Smith v. Obama*, No. 16-843 (D.D.C. 2016) available at <https://www.documentcloud.org/documents/2991414-Smith-v-Obama-Govt-Motion-to-Dismiss.html>. *But cf.* War Powers Resolution, Pub. L. No. 93-148, sec. 8(a), 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541–1548 (2012)) (“Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred—(1) from . . . any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities . . . and stating that it is intended to constitute specific statutory authorization within the meaning of this [joint resolution].”).

It is unlikely that courts will weigh in on President Obama's significant extension of the AUMF-authorized conflict to the Islamic State. Habeas corpus over Guantánamo detainees was the primary vehicle through which courts addressed the scope of the AUMF conflict. But the Obama administration has not brought any new detainees to Guantánamo, let alone any Islamic State detainees, and indeed it has not even detained any captured Islamic State fighters outside the United States for an extended period. One underappreciated consequence of the administration's increased reliance on drone strikes and decision not to bring new detainees to Guantánamo Bay is that courts in the United States have not had the opportunity to address the legality of the extension of the AUMF-authorized conflict to the Islamic State. A recent lawsuit by a deployed army intelligence officer seeks judicial review of this issue.⁵⁸ However, the lawsuit faces many procedural and substantive hurdles, and, if past precedent is a guide, the federal courts are unlikely to reach the merits and thus are unlikely to resolve the issue.⁵⁹

In sum, during the Obama administration, the AUMF received extensive interpretation by courts that largely followed Obama administration arguments, including most notably the standards it proposed in March 2009; Congress ratified the judiciary's interpretation, with the administration's support; the administration conducted extensive targeting in many countries under the authority of the AUMF; and the president construed the AUMF to cover the conflict with the Islamic State, which formed the basis for targeting that organization in a number of countries. The 2001 AUMF, which is likely to be the primary foundation of U.S. military force against organized terror for the indefinite future, is very much the AUMF that President Obama crafted, argued for, and nurtured. It will stand as one of his primary legal legacies.

III. THE ROLE OF INTERNATIONAL LAW

Returning to some of the issues addressed in part II, this part examines how the Obama administration has invoked international law in making claims about the scope of the AUMF, with particular emphasis on claims relating to detention and targeting. The story is complex, as international law is relevant to a host of AUMF-related issues, and the administration's positions have sometimes reflected a mix of legal and policy considerations. In general, however, the picture that emerges is as follows: while the administration often pointed to international law's relevance in contesting the charge that its authority under the AUMF was insufficiently bounded,⁶⁰ in practice it interpreted that law in ways

⁵⁸ See Complaint for Declaratory Relief, *Smith*, Case No. 16-843, available at <https://assets.documentcloud.org/documents/2823282/Smith-Complaint-as-Filed.pdf>.

⁵⁹ In its motion to dismiss, the Obama administration invoked the political question doctrine, limitations on standing, and sovereign immunity. See Defendant's Motion to Dismiss, *Smith v. Obama*, *supra* note 57. For analysis, see Marty Lederman, *DOJ's Motion to Dismiss in Smith v. Obama, The Case Challenging the Legality of the War Against ISIL*, JUST SECURITY (July 14, 2016), at <https://www.justsecurity.org/31984/dojs-motion-dismiss-smith-v-obama-case-challenging-legality-war-isil>.

⁶⁰ See, e.g., Eric H. Holder, Attorney General, U.S. Department of Justice, Speech at the Northwestern University School of Law (Mar. 5, 2012), at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> ("International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally."); Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL'Y REV. 141, 147 (2012) ("International legal principles, including respect for a state's sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.")

that helped support presidential discretion and flexibility. On many of the most controversial issues of presidential power under the AUMF—including the legality of indefinite military detention of persons captured away from a traditional battlefield, the targeting and capturing of alleged terrorists who are not formal members of an identified enemy group, and the use of force in nations with which the United States is not at war—the administration justified its actions by reference to international law.

Detention Authority

The Supreme Court's plurality opinion in *Hamdi* treated the international laws of war as relevant to interpreting what the AUMF authorizes.⁶¹ Consistent with this approach, the Obama administration in its March 2009 brief contended that "[t]he detention authority conferred by the AUMF is necessarily informed by principles of the laws of war."⁶² Those laws, it observed, "evolved primarily in the context of international armed conflicts between the armed forces of nation states," and are "less well-codified" for the "novel" noninternational law armed conflict posed by the groups covered by the AUMF.⁶³ The administration concluded that "[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority" under the AUMF.⁶⁴

The brief never specified what it would mean for the "principles" of the international law of armed conflict to "inform" the meaning of the AUMF. It did insist, however, that courts should defer to the executive branch on this question.⁶⁵ It also invoked principles of the laws of war as a basis for contesting the petitioners' contention that detention under the AUMF was limited to persons who are "directly participating in hostilities."⁶⁶ Instead, the administration argued, the laws of war justified the detention of "the irregular forces of al-Qaida and the Taliban"—as combatants—even if "someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian."⁶⁷ This was a robust claim of authority in a noninternational armed conflict, and one at odds with the position of the International Committee of the Red Cross and many scholars, who maintain that combatant detention authority in a noninternational armed conflict is limited to those who directly participate in

⁶¹ See *Hamdi*, 542 U.S. at 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities.") (citations omitted); *id.* at 521 ("[O]ur understanding [of the government's detention authority under the AUMF] is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

⁶² March 2009 Brief, *supra* note 19, at 1; see also Harold Hongju Koh, Legal Adviser, U.S. Department of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law, Washington, D.C. (Mar. 25, 2010), at <http://www.state.gov/s/l/releases/remarks/139119.htm> ("[W]e are resting our detention authority on a domestic statute—the 2001 Authorization for Use of Military Force (AUMF)—as informed by the principles of the laws of war.").

⁶³ March 2009 Brief, *supra* note 19, at 1.

⁶⁴ *Id.*

⁶⁵ See *id.* at 6 n.2.

⁶⁶ See *id.* at 8.

⁶⁷ *Id.* at 9.

hostilities.⁶⁸ Nevertheless, courts accepted the administration's AUMF-expanding international law claim.⁶⁹

The March 2009 brief also maintained that the AUMF, as informed by the laws of war, extended to "associated forces" of Al Qaeda or the Taliban.⁷⁰ Subsequent administration briefs and speeches argued in more detail that members of "associated forces" could be detained under the AUMF because individuals could be detained "in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, including under principles of co-belligerency."⁷¹ This AUMF-expansive position was legally contested on the ground that principles of co-belligerency rest on concepts of neutrality that have no place in the noninternational armed conflict with Al Qaeda and the Taliban.⁷² Once again, courts accepted the administration's position.⁷³ The administration also continued to argue, again in the face of legal controversy, that the AUMF, informed by the laws of war, permitted detention of those who "substantially support[]" one of the AUMF-covered groups.⁷⁴ One indication of the flexibility and discretion inherent in these categories is that the administration often argued in the alternative for detention authority over an individual based on some combination of a claim of membership in Al Qaeda *or* the Taliban, *or* in an associated force, *or* as a substantial supporter.⁷⁵ Courts blessed these loose, overlapping specifications.⁷⁶

Even for the issue on which *Hamdi* spoke most clearly regarding the relevance of the laws of war—the proper length of detention—the administration interpreted the AUMF "as informed by" the laws of war to confer flexible detention authority. This was apparent in its habeas briefs, where the administration argued that the armed conflict in Afghanistan had not

⁶⁸ See, e.g., Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law*, 90 INT'L REV. RED CROSS 991, 1135 (2008); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2657 (2005); Scott D. MacDonald, *The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law*, 2 J. TERRORISM RES. (2011), available at <http://jtr.st-andrews.ac.uk/article/10.15664/jtr.232>.

⁶⁹ See, e.g., *Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012); *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010).

⁷⁰ See March 2009 Brief, *supra* note 19, at 2.

⁷¹ See Brief for Respondents-Appellees at 28, *Barhoumi*, 609 F.3d 416. In this and other briefs, the United States relied on *Hamlihi*, 616 F.Supp.2d at 74–75, which concluded that "[a] 'co-belligerent' in an international armed conflict context is a state that has become a 'fully fledged belligerent fighting in association with one or more belligerent powers.'" *Id.* at 75 (quoting Bradley & Goldsmith, *supra* note 7, at 2112 (quoting MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 531 (1959))); see also Johnson, *supra* note 60, at 146 (noting that the associated forces category "is based on the well-established concept of co-belligerency in the law of war").

⁷² See Rebecca Ingber, *Co-belligerency and War Powers: The Making of Executive Law*, 42 YALE J. INT'L L. (forthcoming 2017); Jens David Ohlin, *Targeting Co-belligerents*, in *TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD* 60 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2011).

⁷³ See sources cited *supra* note 26.

⁷⁴ See Brief for Appellees at 21, *Al-Bihani*, 590 F.3d 866; Brief for Respondents-Appellants, *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011) (No. 10-5048). As discussed in part II, Congress embraced the administration's position concerning both associated forces and substantial supporters in the 2012 National Defense Authorization Act.

⁷⁵ See, e.g., Brief for Appellees at 12, *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012) (No. 11-5081) (arguing that detainee "was 'part of' Al-Qaida, the Taliban, or an Associated Force"); Brief for Respondents-Appellees at 23, *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011) (No. 09-5125) (arguing that detainee was "part of, or substantially support[ed], Taliban, Al-Qaida, or Associated Forces"); Brief for Respondents-Appellees at 25, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051) (arguing that detainee was "part of Taliban or al-Qaida forces (or associated forces)").

⁷⁶ See, e.g., *Alsabri*, 684 F.3d at 1302 (accepting government's triple alternate formulation); *Al Alwi*, 653 F.3d at 16–17 (accepting two of government's four alternative designations); *Al-Bihani*, 590 F.3d at 872 (accepting government's triple alternatives and, on separate grounds, adding a fourth).

ceased even though the president had stated that the “war ended” there, and in any event was a political question upon which courts lacked authority to rule.⁷⁷ It was also apparent in the administration’s public pronouncements, which, based on a combination of the laws of war and domestic precedent, implied that the release of detainees could be “delayed” even after hostilities ceased.⁷⁸ And it was apparent in the periodic review process adopted for specified Guantánamo detainees, which made clear that the process was being adopted “as a discretionary matter” and “does not affect the scope of detention authority under existing law.”⁷⁹

In one prominent decision, *Al-Bihani v. Obama*, a panel of the D.C. Circuit disagreed with the administration’s suggestion that “the war powers granted by the AUMF and other statutes are limited by the international laws of war.”⁸⁰ In a rehearing petition, the administration argued that the panel’s view “does not properly reflect the state of the law” and reiterated that, “[c]onsistent with *Hamdi*, the United States interprets the detention authority granted by the AUMF, as informed by the laws of war.”⁸¹ In subsequently voting to deny en banc review, seven D.C. Circuit judges stated that “the panel’s discussion of [the relevance of international-law-of-war principles to the AUMF] is not necessary to the disposition of the merits.”⁸² Some commentators concluded that this statement mooted, or converted into dicta, the panel’s earlier international law analysis.⁸³

Since *Al-Bihani*, the D.C. Circuit has not clarified what role, if any, international law plays in interpreting the AUMF in detention cases. The 2012 NDAA contains general references to detention “under the law of war,” thus implying some relevance for international law.⁸⁴ But Congress’s explicit endorsement of detention authority in the NDAA for both associated forces and those who substantially support the relevant forces significantly reduces the need for an independent law-of-war analysis when interpreting the original AUMF. The laws of war could theoretically continue to be relevant to fine-grained questions about who may be included in those categories. But since Guantánamo habeas proceedings are now largely concluded, the issue has little continuing relevance in the detention context unless and until the next president attempts to detain at Guantánamo new types of belligerents whose detention implicates novel issues under the laws of war.

Targeting Authority

Although the international laws of war have decreasing relevance to detention under the AUMF, they have continuing vital relevance to targeting practices under the AUMF. While the “legacy” Guantánamo population is dwindling and the habeas cases there are losing steam,

⁷⁷ Courts have responded to these claims in various ways, all ultimately agreeing with the Obama administration position. See *supra* text accompanying notes 29–32.

⁷⁸ See Johnson, *supra* note 44 (relying on “conventional legal principles” and citing *Ludecke v. Watkins*, 335 U.S. 160 (1948), as “holding that the President’s authority to detain German nationals continued for over six years after the fighting with Germany had ended”).

⁷⁹ Exec. Order 13,567, *supra* note 38, sec. 1(b).

⁸⁰ *Al-Bihani*, 590 F.3d at 871.

⁸¹ U.S. Government Response to Petition for Rehearing and Rehearing En Banc at 8, *Al-Bihani*, 590 F.3d 866, available at <http://www.scotusblog.com/wp-content/uploads/2010/05/US-response-re-rehear-Al-Bihani-5-13-10.pdf>.

⁸² *Al-Bihani*, 590 F.3d 866, *reh’g, en banc, denied*, 619 F.3d 1 (D.C. Cir. 2010).

⁸³ See, e.g., Vladeck, *supra* note 14, at 1462–63.

⁸⁴ See National Defense Authorization Act for Fiscal Year 2012, *supra* note 33, §§1021–1024.

the AUMF-authorized armed conflict on the battlefield continues unabated in many countries, not just against Al Qaeda, the Taliban, and associates, but also against the Islamic State. These threats are not going away anytime soon, and targeting informed by the laws of war will thus continue into the indefinite future. As in the detention context, the Obama administration has invoked international law relating to targeting in a variety of ways that preserve flexibility and discretion.⁸⁵

The administration has maintained a firm commitment to the core *jus in bello* principles, including distinction and proportionality. The principle of distinction “requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack.”⁸⁶ The principle of proportionality “prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁷ These *jus in bello* principles leave open many questions, however, as applied to a global noninternational armed conflict against terrorist organizations.

Most of the questions concern when the United States targets enemy forces outside “areas of active hostilities” or “hot battlefields,” in nations like Pakistan, Yemen, and Somalia. The United States has maintained that the armed conflict against the Taliban, Al Qaeda, their associate forces, and the Islamic State extends to such locales, and thus that the *jus in bello* permits targeting of enemy forces in these areas, at least where the forces have “a significant and organized presence, and from which [they are] conducting terrorist training in an organized manner and ha[ve] executed and [are] planning to execute attacks against the United States.”⁸⁸ The International Committee of the Red Cross, United Nations rapporteurs, and many scholars have questioned or rejected the U.S. position that it is involved in a broad cross-border noninternational armed conflict, and have argued that international human right law rather than *jus in bello* must govern on nonactive battlefields.⁸⁹ In response to criticism of this position, the

⁸⁵ This phenomenon is not new. See Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as a Two-Level Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689 (2016) (describing how international law has historically been invoked by presidents to expand domestic war authority); see also Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49 (2016) (discussing how the executive branch uses international law in a variety of ways to bolster its domestic authority).

⁸⁶ Koh, *supra* note 62.

⁸⁷ *Id.*

⁸⁸ Memorandum from Acting Assistant Attorney General David J. Barron to the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 27 (July 16, 2010) [hereinafter Barron Memorandum] available at https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf; see also White House Press Release, Remarks by President Obama at Strasbourg Town Hall, Strasbourg, France (Apr. 3, 2009), at <https://www.whitehouse.gov/the-press-office/remarks-president-obama-strasbourg-town-hall>; White House Press Release, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), at <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”).

⁸⁹ See, e.g., Melzer, *supra* note 68, at 77; Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, 893 INT’L REV. RED CROSS 1, 16–18, 36–37 (2015); Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, paras. 61–64, UN Doc. A/68/389 (Sept. 18, 2013), available at <https://www.justsecurity.org/wp-content/uploads/2013/10/2013EmmersonSpecialRapporteurReportDrones.pdf>.

administration continued to insist that the *jus in bello* framework governed, but tempered its targeting practices as a matter of policy.⁹⁰

The administration also used *jus in bello* to specify who is covered by the AUMF and thus targetable. As with detention, the administration employed a fact-intensive approach to individual membership in a covered group that includes whether a person performs functions for the group “that are analogous to those traditionally performed by members of State militaries that are liable to attack.”⁹¹ There has been a great deal of controversy about the degree to which this approach permits “signature” strikes based on patterns of terrorist life.⁹² The administration also invoked *jus in bello* in support of targeting “associated forces” of Al Qaeda and the Taliban.⁹³ Unlike in the detention context, neither the judiciary nor Congress has affirmed the validity of the “associated forces” rubric for targeting purposes.

These fact-intensive legal standards for “membership” and “associated forces,” combined with the opaque context in which they are applied and the alternative rationales in which they are often couched, yield substantial discretion and flexibility in targeting determinations.⁹⁴ In one notable instance, the administration deemed Al Qaeda in the Arabian Peninsula (AQAP) to be either part of Al Qaeda or an associated force of Al Qaeda, an alternative designation central to the justification for the targeted killing of Anwar al-Awlaki.⁹⁵ Another prominent context concerned the targeting of the senior leadership of al-Shabaab, a terrorist organization in Somalia. Officials disagreed about whether al-Shabaab was an associated force of Al Qaeda, but the administration ultimately maintained and acted on the option of targeting leaders of al-Shabaab who were deemed members of Al Qaeda.⁹⁶

Although the administration did not similarly invoke *jus ad bellum* to inform the meaning of the AUMF, it did claim that this body of law (especially as it relates to the sovereignty of nations from which terrorist organizations operate) constrained its targeting actions under the AUMF. In this context too, the administration adopted contested interpretations of international law that gave it significant flexibility in intervening in other nations without their consent. One important issue here is when the United States can invoke an anticipatory self-defense rationale under the UN Charter to use force against terrorist organizations inside nonconsenting nations. Under the traditional view from the *Caroline* case, the threat of attack from the nonstate actor must be “imminent,” which means that the need for self-defense must

⁹⁰ See U.S. Policy Standards and Procedures, *supra* note 43.

⁹¹ Brian Egan, Legal Adviser, U.S. Department of State, International Law, Legal Diplomacy, and the Counter-ISIL Campaign 10 (Apr. 4, 2016), available at <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>.

⁹² See SAVAGE, *supra* note 37, at 254–56; Spencer Ackerman, *US to Continue “Signature Strikes” on People Suspected of Terrorist Links*, GUARDIAN (July 1, 2016), at <https://www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths>.

⁹³ See, e.g., Holder, *supra* note 60 (“[I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces.”).

⁹⁴ Cf. David Pozen, *The Rhetorical Presidency Meets the Drone Presidency*, NEW RAMBLER (2015), at <http://newramblerreview.com/book-reviews/law/the-rhetorical-presidency-meets-the-drone-presidency> (“All of the constraint is lodged in abstract descriptors.”); Ashley S. Deeks, *The Obama Administration, International Law, and Executive Minimalism*, 110 AJIL 646 (2016) (noting that “the Obama administration has sometimes taken action in the face of two (or more) possible legal theories without articulating which theory it is using”).

⁹⁵ See Barron Memorandum, *supra* note 88, at 21.

⁹⁶ See SAVAGE, *supra* note 37, at 274–77. Savage cites one instance in which the Pentagon general counsel invoked the outer bounds of “associated forces” to abort a strike on al-Shabaab, although he notes that the general counsel later changed his mind about the issue in light of new intelligence. See *id.* at 276–77.

be “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”⁹⁷ The administration’s position has been that “the traditional conception of what constitutes an ‘imminent’ attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.”⁹⁸ It appeared to use this more flexible conception of “imminence” when it attacked the Islamic State in Syria even though at the time, that organization had not attacked the United States.⁹⁹ A similar theory appeared to be in play in its attacks on the Khorasan Group (an Al Qaeda branch) in Syria, which the administration claimed posed an imminent threat even though many officials acknowledged that an attack from that group might be fairly distant in the future.¹⁰⁰

A related context in which the administration has employed a supple understanding of *jus ad bellum* concerns the use of force in self-defense when a nation is unwilling or unable to suppress a terrorist threat. The Obama administration relied on the theory to conduct attacks on AUMF-authorized targets in Pakistan and Syria, and possibly in other countries as well. The theory was not a new one for the United States, but it lies on the aggressive end of available theories to address threats from terrorist groups in sovereign states, and it remains controversial.¹⁰¹

In pointing out that the administration’s interpretations of international law have been contested, we do not mean to suggest that they were wrong. There are few clear controlling legal authorities to govern a transnational noninternational armed conflict in which terrorist groups organize and act from nations with which the United States is not at war. As a result, every participant in these debates is arguing to some extent from imperfect analogy. Moreover, the application of any legal regime to evolving and secretive terrorist organizations is necessarily fact-bound and involves elements of judgment. Our point is simply that the administration has

⁹⁷ See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 149 (3d ed. 2008).

⁹⁸ Brennan, *supra* note 88; see also Egan, *supra* note 91; U.S. Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force* (Nov. 8, 2011), available at <https://fas.org/irp/eprint/doj-lethal.pdf>. But see Noura S. Erakat, *New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense*, 56 ARIZ. L. REV. 195 (2014) (criticizing the administration’s position); Christophe Paulussen & Kinga Tibori Szabó, *Testing the Validity of US Self-Defence Arguments Against the Khorasan Group in Syria*, INT’L CTR. COUNTERTERRORISM (Nov. 4, 2014), at <http://icct.nl/publication/testing-the-validity-of-us-self-defence-arguments-against-the-khorasan-group-in-syria>.

⁹⁹ See Egan, *supra* note 91, at 4–5 (noting that “in Syria U.S. operations against ISIL are conducted in individual self-defense and the collective self-defense of Iraq”) (emphasis added); see also Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and “First Use” in the Jus ad Bellum*, JUST SECURITY (Apr. 11, 2016), at <https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-ad-bellum> (explaining that the United States argued in the alternative for individual self-defense “even though in recent years [the Islamic State] has not yet engaged in an armed attack specifically against the United States”).

¹⁰⁰ See, e.g., U.S. Department of Defense News Transcript, Department of Defense Press Briefing by Rear Adm. Kirby in the Pentagon Briefing Room (Feb. 3, 2015), at <http://www.defense.gov/News/News-Transcripts/Article/607008> (acknowledging that the Pentagon could not “pin down” whether attack would happen within “a day or month or week or six months,” but concluding that it “doesn’t matter” because of aim to “get to the left of any boom to prevent the planning from going any further”); Scott Pelley, *FBI Director on Threat of ISIS, Cybercrime*, 60 MINUTES (Oct. 5, 2014), at <http://www.cbsnews.com/news/fbi-director-james-comey-on-threat-of-isis-cybercrime> (quoting FBI Director James Comey as saying, “I can’t sit here and tell you whether [Khorasan’s] plan is tomorrow or three weeks or three months from now.”).

¹⁰¹ See, e.g., Olivier Corten, *The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?*, 29 LEIDEN J. INT’L L. 777 (2016); see also Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT’L L.J. 1, 8 (2016) (describing Obama administration’s efforts to forge consensus around “unwilling or unable” test).

adopted *jus in bello* and *jus ad bellum* criteria in AUMF-related operations that have tended to support presidential discretion and flexibility.

IV. CONCLUSION

For many years, President Obama proclaimed that he wanted to repeal the AUMF and end the AUMF-authorized conflict. By the closing year of his presidency, however, his administration had established the AUMF as the legal foundation for an indefinite conflict against Al Qaeda and associated groups and extended that foundation to cover a significant new conflict against the Islamic State. Discretion-preserving claims about international law played an important role in helping to support that foundation.