

REAUTHORIZING THE LONG WAR: A NEW LEGAL FOUNDATION FOR COUNTERTERROR OPERATIONS

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I. INTRODUCTION

For the past seventeen years, the United States has been embroiled in a series of peripheral conflicts against non-state terror organizations.¹ These conflicts have been waged across at least nine countries² and have involved the massive expenditure of U.S. resources.³ Despite the length and cost of the ongoing “War on Terror,” the conflict shows no sign of abatement.⁴ Instead, data indicates that counterterror operations conducted by the United States will increase across the globe for the foreseeable future.⁵ In 2017, bombings massively increased across spheres of conflict in the Middle East,⁶ and actions by state powers ensured the United States’ continued involvement in the region.⁷ Further, persistent conflict in the Middle East promises to create conditions for the proliferation of non-state terror groups.⁸

Yet, U.S. counterterror operations, which span continents and are fought against a proliferating number of non-state actors, are currently authorized by a seventeen-year-old statute that is no more than two pages long.⁹ The

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¹ See Kimberly Amadeo, *War on Terror Facts, Costs, and Timeline*, BALANCE (Dec. 11, 2018), <https://www.thebalance.com/war-on-terror-facts-costs-timeline-3306300>.

² Memorandum from Matthew Weed, Analyst in Foreign Policy, Cong. Research Serv., to Congresswoman Barbara Lee 2 (July 10, 2013).

³ Amadeo, *supra* note 1.

⁴ Jennifer Cafarella, *It’s Time for Trump to Face Reality in Syria*, FOX NEWS (Jan. 29, 2018), <http://www.foxnews.com/opinion/2018/01/29/its-time-for-trump-to-face-reality-in-syria.html>.

⁵ See Rex W. Tillerson, U.S. Sec’y of State, Remarks at the Hoover Institute at Stanford University (Jan. 17, 2018) (transcript available at <https://www.state.gov/secretary/20172018tillerson/remarks/2018/01/277493.htm>).

⁶ Paul McLeary, *U.S. Bombs Falling in Record Numbers in Three Countries*, FOREIGN POL’Y (Sept. 18, 2017, 7:29 PM), <http://foreignpolicy.com/2017/09/18/u-s-bombs-falling-in-record-numbers-in-three-countries/>.

⁷ Cafarella, *supra* note 4.

⁸ See Jennifer Cafarella et al., *Syria’s “War After ISIS” Begins as Turkey Attacks America’s Anti-ISIS Partner*, INST. FOR THE STUDY OF WAR (Jan. 20, 2018), <http://www.understandingwar.org/backgrounder/syria%E2%80%99s-%E2%80%9Cwar-after-isis%E2%80%9D-begins-turkey-attacks-america%E2%80%99s-anti-isis-partner>.

⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 151 Stat. 224 (2001).

2001 Authorization for the Use of Military Force (AUMF) was passed in response to the September 11th attacks and grants the President broad authority to respond militarily to the groups and nations responsible for the attacks.¹⁰ At the time, the AUMF was necessary to allow the President to strike the perpetrators of one of the worst domestic attacks in American history.¹¹ However, seventeen years later, given the evolution of the war against non-state terror groups, the AUMF's obsolescence is apparent.¹² The AUMF no longer accurately reflects the state of counterterror operations undertaken by the United States, nor the myriad of non-state actors currently threatening U.S. interests.¹³ Further, its broad language does little to provide checks on executive overreach in its response to these non-state actors and the threats they pose.¹⁴ By continuing to rely upon an antiquated authorization, the President risks subjecting critical counterterror operations to a continuing aura of illegitimacy and, potentially, illegality.¹⁵

The purpose of this Note is to illustrate the current scope of U.S. counterterror operations around the globe and the need for a new congressional authorization. Part II will provide a brief overview of the Executive's constitutional war powers, the attacks of September 11th, the passage of the AUMF, and the subsequent counterterror operations conducted by both the Bush and Obama Administrations.

Part III will analyze counterterror operations taken during the first year of the Trump presidency and his Administration's marked increase in AUMF reliance. It will include an analysis of recent congressional efforts to replace the AUMF. Further, it will highlight current counterterror operations against the two main terror groups currently threatening the United States and predict the future trajectory of both conflicts.

Finally, Part IV will argue that a currently proposed congressional reauthorization of the AUMF, the Flake-Kaine Resolution of 2017, is Congress's best option to grant the United States the appropriate legal framework from which to base its counterterror strategy around the globe.

¹⁰ *Id.*

¹¹ Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 66 (2012).

¹² *Id.* at 67.

¹³ *Id.* at 82.

¹⁴ See Michael Shank & Matthew Southworth, *America Must Rethink the War on Terror*, U.S. NEWS & WORLD REP. (May 24, 2013, 10:15 AM), <https://www.usnews.com/opinion/articles/2013/05/24/congress-must-sunset-the-authorization-for-use-of-military-force?page=2>.

¹⁵ Barnes, *supra* note 11, at 84–85.

II. HISTORY

A. The Executive's War Power

On its face, the Constitution appears to lay out a simple delineation of war powers to the branches of government. It states Congress shall have the power “to declare war” and to “raise and support Armies,”¹⁶ while the President “shall be Commander in Chief” of the U.S. military.¹⁷ A rudimentary analysis of these two clauses yields a simple formula: Congress declares when the United States goes to war and provides the funding to do so, while the President determines how the United States goes to war. Once Congress has determined a state of war exists, all strategic and operational concerns fall within the authority of the President.¹⁸

Unfortunately, such a clear-cut analysis based upon a plain reading of the Constitution does not accurately reflect the current state of war powers between our governmental branches. As Clausewitz said, “war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight . . . like the effect of a fog.”¹⁹ While Clausewitz was referring to operational campaigns in war, the “fog of war” also extends into our own constitutional debate.²⁰ To better navigate this constitutional fog, one must examine a pivotal case involving executive wartime powers, *Youngstown Sheet & Tube Co. v. Sawyer*,²¹ in which Justice Robert Jackson set forth his tiered framework of executive power.²²

In *Youngstown*, the Court considered whether President Truman overstepped his executive authority by seizing privately owned steel mills during the height of the Korean War.²³ The Court determined that such a seizure was unconstitutional and an exercise of Congress’s law-making authority, not within the authority of the Executive Branch.²⁴ In his concurring opinion, Justice Jackson laid out a framework with which to measure presidential authority and stated that, “Presidential powers are not

¹⁶ U.S. CONST. art. I, § 8, cl. 11.

¹⁷ U.S. CONST. art. II, § 2.

¹⁸ *Id.*

¹⁹ CARL VON CLAUSEWITZ, *On the Theory of War*, in ON WAR 84, 105–06 (1873).

²⁰ Indeed, if an expansive view of executive war powers under the Commander in Chief Clause and the Vesting Clause is adopted, an argument could be made that the President has the inherent power to strike terrorist groups to both respond, and deter, attacks against the United States. See Barnes, *supra* note 11, at 57–111.

²¹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

²² As is evident, this Note rejects other interpretations of executive war powers in favor of the tiered framework expounded by Justice Jackson.

²³ *Steel Seizure*, 343 U.S. at 582.

²⁴ *Id.* at 587–88.

fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”²⁵

Justice Jackson went on to describe three measuring points, identified as “ebbs,”²⁶ in which an expression of presidential authority may be categorized.²⁷ A President’s action is within the highest ebb of his power when the “President acts pursuant to an express or implied authorization of Congress.”²⁸ When the President “acts in absence of either a congressional grant or denial authority,” he can “only rely upon his own independent powers”; his power is at its median ebb and open to judicial interpretations.²⁹ Finally, when the President “takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”³⁰ At low ebb, the President’s actions must be “scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”³¹

Justice Jackson’s framework has “become the most significant guidepost in debates over the constitutionality of executive action in the realm of national security and foreign relations.”³² As such, per the AUMF, all considerations of presidential actions undertaken will be viewed in light of the Jackson framework to measure whether sufficient authority exists.³³

Further, the War Powers Resolution of 1973 (also known as the War Powers Act) is another critical element in determining presidential war powers.³⁴ The twentieth century witnessed a pronounced weakening of Congress’s power to declare war, as both the Korean and Vietnamese wars were fought without an express declaration.³⁵ Although it was passed over President Nixon’s veto, the War Powers Act was Congress’s attempt to regain control over the decision to go to war, while allowing the Executive flexibility to respond to events in an increasingly complex geopolitical sphere.³⁶ The Act requires the President to consult with Congress before

²⁵ *Id.* at 635 (Jackson, J., concurring).

²⁶ Though Justice Jackson does not explicitly describe each tier of presidential power as an “ebb,” I will incorporate this description for the sake of uniformity.

²⁷ *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring).

²⁸ *Id.* at 635.

²⁹ *Id.* at 637.

³⁰ *Id.* at 637–38.

³¹ *Id.* at 638.

³² Barnes, *supra* note 11, at 65.

³³ *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring).

³⁴ See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

³⁵ See NCC Staff, *When Congress Last Used its Powers to Declare War*, NAT’L CONST. CTR. (Dec. 8, 2018), <https://constitutioncenter.org/blog/when-congress-once-used-its-powers-to-declare-war> (noting that the last formal declaration of war in the history of the United States was against Bulgaria, Hungary, and Romania on June 4, 1942, in the midst of the Second World War).

³⁶ See *War Powers Overview*, LIBR. OF CONGRESS (Mar. 2007), <https://www.loc.gov/law/help/war->

introducing U.S. armed forces into hostilities and then regularly once U.S. forces are deployed.³⁷ Further, it requires the President submit a written report regarding the necessity of military action to both houses of Congress when U.S. forces are introduced into hostilities.³⁸ This report to Congress initiates a sixty-day window; after which, if Congress has not specifically authorized the use of U.S. forces or granted a formal extension, the President must withdraw the forces.³⁹

As such, all presidential actions must follow the reporting requirements set forth in the War Powers Act, and Congress must specifically authorize the action within sixty days of the initial report.⁴⁰ Even though Congress may specifically authorize an action under the War Powers Act, executive action taken outside the specific grant of authority may violate the Act itself.⁴¹

B. Al-Qaeda's Strike on the United States

*"At 8:46 on the morning of September 11, 2001, the United States became a nation transformed."*⁴²

On September 11, 2001, under the strategic directive of Usama bin Laden,⁴³ nineteen members of an al-Qaeda taskforce struck the symbols of the United States' economic and military power.⁴⁴ The economic and human cost of the attack was staggering: approximately 2,981 people died in the attacks,⁴⁵ and estimates of the initial economic damage range from \$95–178 billion.⁴⁶

Although the September 11th attacks were a shock to all in the United States, al-Qaeda's intention to strike the United States was known within the

powers.php.

³⁷ 50 U.S.C. § 1542 (2012).

³⁸ *Id.* § 1543.

³⁹ *Id.* § 1544(b).

⁴⁰ *Id.*

⁴¹ See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

⁴² *The 9/11 Commission Report: Executive Summary*, NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S., https://govinfo.library.unt.edu/911/report/911Report_Exec.htm (last visited Mar. 15, 2019).

⁴³ Often anglicized as Osama bin Laden. See *Usama (Osama) Bin Laden*, FBI RECORDS: THE VAULT, <https://vault.fbi.gov/osama-bin-laden> (last visited Feb. 10, 2019).

⁴⁴ *9/11 Attacks*, HIST. (Feb. 17, 2010), <http://www.history.com/topics/9-11-attacks>.

⁴⁵ *The 9/11 Commission Report: Executive Summary*, *supra* note 42.

⁴⁶ Shan Carter & Amanda Cox, *One 9/11 Tally: \$3.3 Trillion*, N.Y. TIMES (Sept. 8, 2011), <http://www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html> (note that this estimate accounts for only the initial toll and physical damage and subsequent economic impact. The modern estimate of financial damage, after sixteen years of rippling effects, exceeds \$3 trillion).

intelligence community.⁴⁷ Throughout the 1990s, Islamic extremists began to target the interests of the United States with increasing regularity.⁴⁸ Through efficient organization, these non-state actors orchestrated six successful attacks on both the interests and citizens of the United States from 1993–2000.⁴⁹ Through the leadership of Usama bin Laden, one such group, al-Qaeda, quickly rose to the forefront of the global jihadi movement.⁵⁰ Bin Laden developed al-Qaeda into a dynamic and lethal organization, while stressing grievances against the United States widely shared in the Muslim world.⁵¹ Prior to its ultimate success in perpetuating the September 11th attacks, al-Qaeda had called for indiscriminate attacks on Americans for the better part of a decade.⁵²

In its official report, the National Commission tasked with the investigation of the September 11th attacks found that none of the measures adopted by the United States government from 1998–2001 disturbed, or even delayed, the progress of the September 11th plot.⁵³ Not only had the United States government failed to adequately assess the danger posed by al-Qaeda, but there were also failures of both policy and capabilities.⁵⁴ Regarding policy, terrorism was not the overriding national security concern during the Clinton Administration or the pre-September 11th Bush Administration.⁵⁵ Regarding capabilities, there were significant issues with the centralization and access of data across the United States' intelligence agencies.⁵⁶ In terms of foreign intelligence agencies, the Central Intelligence Agency had minimal capacity to conduct paramilitary operations, and a lackluster capacity to collect intelligence from human agents.⁵⁷ When the inadequacies of the Federal Bureau of Investigation, Department of Defense, and other American institutions are taken into account, an unfortunate fact becomes clear: before the passage of the AUMF, the United States lacked the capacity to counter the growing threat of terrorism perpetrated by non-state actors.⁵⁸

⁴⁷ See *The 9/11 Commission Report: Executive Summary*, *supra* note 42.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² See *id.* In February 1998, bin Laden issued a self-styled fatwa, publicly declaring that it was a Muslim's duty to kill Americans anywhere in the world as a protest to America's "occupation" of Islam's holy places. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *id.* ("[W]e believe we are safer today. But we are not safe.").

C. The United States' Response: The Authorization for Use of Military Force

On September 14, 2001, the AUMF was introduced in the Senate in response to the September 11th attacks.⁵⁹ By September 19, 2001, the AUMF was public law.⁶⁰ The AUMF is split into three parts: (1) five perambulatory clauses, (2) one section describing the granted authority, and (3) one section placing the authorization within the rubric of the War Powers Resolution.⁶¹ The incorporation of the AUMF into the War Powers Resolution provides the specific congressional authorization needed to stay the sixty-day withdraw requirement for any military deployments taken pursuant to the grant of authority.⁶² In Section 2(a), the AUMF grants authority to the President, authorizing the use of:

[A]ll necessary and appropriate force against those nations, organizations, or persons he determined 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.⁶³

In a cursory read of Section 2(a), it is clear that the authorizing language is broad in scope. The authorization can be broken down into five elements: (1) target, (2) method, (3) time, (4) place, and (5) purpose.⁶⁴ Of these five elements, three—purpose, method, and place—clearly grant the Executive a wide berth of authority to act; meanwhile two elements—time and target—seem to circumscribe the AUMF's broad authority to some extent.⁶⁵

Regarding the method element, the AUMF authorizes the President to “use all necessary and appropriate force,”⁶⁶ which would clearly contemplate the use of military force.⁶⁷ In terms of *jus in bello*, actions such as carpet bombing⁶⁸ or nuclear strikes would exceed the “necessary and appropriate force” requirement, barring an attack on the United States of such

⁵⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 151 Stat. 224 (2001).

⁶⁰ *Id.*; see also Barnes, *supra* note 11, at 68.

⁶¹ Barnes, *supra* note 11, at 68.

⁶² See Authorization for Use of Military Force, Pub. L. No. 107-40, 151 Stat. 224 (2001).

⁶³ See *id.*

⁶⁴ Barnes, *supra* note 11, at 68.

⁶⁵ See *id.* at 69–76.

⁶⁶ Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 151 Stat. 224 (2001).

⁶⁷ Barnes, *supra* note 11, at 70–71.

⁶⁸ *Id.* at 71.

magnitude.⁶⁹ However, dropping the most powerful conventional bomb in the U.S. arsenal—the 20,000-pound GBU-43/B Massive Ordnance Air Blast, fell within the “necessary and appropriate force” requirement.⁷⁰ As such, it appears the outer limits of what can be deemed “necessary and appropriate force” have not yet been reached.

Regarding the purpose element,⁷¹ the AUMF authorizes the President to use force “in order to prevent any future acts of international terrorism against the United States.”⁷² The AUMF does not grant the President responsive strike authority, which most would agree is already granted through Article II; rather, it grants preventative authority.⁷³ Thus, the President may strike not only in response to an attack on the United States, but also preemptively in order to prevent an attack from occurring.⁷⁴

Regarding the place element, the AUMF applies, seemingly, no restriction on the geographic scope of military action taken by the President.⁷⁵ The language of the AUMF “does not limit the use of force to any particular region or country,” but instead encompasses a “worldwide scope.”⁷⁶ Although the AUMF contains no express prohibition of action *within* the United States, the congressional debate generally assumed that the AUMF would not authorize domestic action.⁷⁷ The incorporation of the AUMF into the War Powers Resolution, which deals with introducing U.S. forces abroad, would also seem to prohibit the AUMF’s application to domestic actions.⁷⁸

Turning to the first of the circumscribing factors, there is no clear “time”⁷⁹ limit on the AUMF’s grant of authority.⁸⁰ Instead, the grant of authority is attached to a specific instance and date: “the terrorist attacks that occurred on September 11, 2001.”⁸¹ While there is no fixed date of expiration, the AUMF’s authority cannot last forever.⁸² As we move further away from the September 11th attacks and conflicts against non-state actors

⁶⁹ *Id.*

⁷⁰ Helena Cooper & Mujib Mashal, *U.S. Drops ‘Mother of All Bombs’ on ISIS Caves in Afghanistan*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/world/asia/moab-mother-of-all-bombs-afghanistan.html>.

⁷¹ Barnes, *supra* note 11, at 75.

⁷² *Id.*

⁷³ *Id.* at 75–76.

⁷⁴ *Id.*

⁷⁵ *Id.* at 72.

⁷⁶ *Id.* at 72–73.

⁷⁷ *Id.* at 74.

⁷⁸ *Id.* at 74–75.

⁷⁹ *Id.* at 71.

⁸⁰ *Id.*

⁸¹ See Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 151 Stat. 224 (2001).

⁸² Barnes, *supra* note 11, at 71.

become increasingly unrelated, the AUMF's authority, in terms of Congress's intent, clearly diminishes.⁸³

The last circumscribing factor of the AUMF's grant of authority is target.⁸⁴ The AUMF authorizes force against a seemingly clear and limited target, "those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks *that occurred on September 11, 2001*."⁸⁵ In fact, the White House's proposed language, which would have granted additional authorization "to deter and pre-empt any future acts of terrorism or aggression against the United States," was expressly rejected by key legislators during the drafting process.⁸⁶

However, the Bush Administration's initial interpretations would define an "enemy combatant" under the AUMF as any "individual who was part of or supporting the Taliban or al Qaeda forces, or *associated forces* that are engaged in hostilities against the United States."⁸⁷ Jeh Johnson, former General Counsel to the Defense Department, determined that the "associated forces" must be both (1) an organized, armed group that has entered the fight alongside al-Qaeda, and (2) a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.⁸⁸ However, "not every group that commits terrorist acts is an associated force."⁸⁹ Despite this seemingly stringent labeling process, the associated forces doctrine has been used to extend military action to groups far removed from the September 11th attacks.⁹⁰

It is worth noting that in terms of the Jackson framework, the AUMF represents the express will of Congress; thus, any action taken by the President pursuant to the AUMF is "supported by the strongest of presumptions."⁹¹ As non-state groups splinter and become further distanced from the AUMF's express target, and the associated forces justification

⁸³ *Id.* at 71, 83–84.

⁸⁴ *Id.* at 69.

⁸⁵ See Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 151 Stat. 224 (2001) (emphasis added).

⁸⁶ Barnes, *supra* note 11, at 69.

⁸⁷ *Id.* at 77 (quoting Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy 1 (July 7, 2004) (transcript available <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>)) (emphasis added).

⁸⁸ Stephen W. Preston, Gen. Counsel, U.S. Dep't of Def., *The Legal Framework for the United States' Use of Military Force Since 9/11* (Apr. 10, 2015) (transcript available at <https://dod.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/>).

⁸⁹ *Id.*

⁹⁰ See *id.* (discussing targeting of ISIL in Syria and Iraq).

⁹¹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

becomes more strained, the President's authority per the Jackson framework begins to recede to a lower ebb.⁹²

D. The Bush Administration

It did not take long for the Bush Administration to publicly identify the perpetrators of the September 11th attacks.⁹³ Usama bin Laden was recognized as the primary suspect by then-Secretary of State Colin Powell as early as September 13, 2001.⁹⁴ In his address to a joint session of Congress on September 20, 2001, President Bush named al-Qaeda and the Taliban regime in Afghanistan as the primary groups responsible for the attacks.⁹⁵ On October 7, 2001, the U.S. military initiated Operation Enduring Freedom.⁹⁶ The operation initially consisted of a bombing campaign against al-Qaeda and Taliban forces throughout Afghanistan; it is the first recorded military action authorized by the AUMF.⁹⁷ U.S. ground forces entered Afghanistan twelve days later, and by November 9, 2001, the Taliban regime was in shambles.⁹⁸ Major combat operations would continue into 2003, notably with Operation Anaconda beginning in March of 2002, the purpose of which was to eliminate al-Qaeda members remaining throughout Afghanistan.⁹⁹ On May 1, 2003, U.S. officials declared an end to "major combat,"¹⁰⁰ though combat operations have continued during the "nation building" process that lasted through the Bush Administration and into the present day.¹⁰¹

The operations in Afghanistan against the Taliban and al-Qaeda under the Bush Administration appear to be appropriate uses of force under the authority of the AUMF.¹⁰² However, the scope of operations and theaters of

⁹² See *id.* at 635–38.

⁹³ See Ari Fleischer, White House Press Sec'y, Press Briefing by Ari Fleischer (Sept. 13, 2001) (transcript available at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010913-12.html#powell>).

⁹⁴ *Id.*

⁹⁵ President George W. Bush, Address to the Joint Session of the 107th Congress (Sept. 20, 2001), in *SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH: 2001–2008*, at 66–68.

⁹⁶ *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/us-war-afghanistan> (last visited Feb. 16, 2019).

⁹⁷ See *id.*

⁹⁸ KENNETH KATZMAN & CLAYTON THOMAS, CONG. RESEARCH SERV., RL30588, *AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY* 7 (Dec. 13, 2017).

⁹⁹ Adam Geibel, *Operation Anaconda, Shah-i-Khot Valley, Afghanistan, 2–10 March 2002*, MIL. REV., May–June 2002, at 72–73.

¹⁰⁰ KATZMAN & THOMAS, *supra* note 98, at 7.

¹⁰¹ See Weed, *supra* note 2, at 2.

¹⁰² See Authorization for Use of Military Force, Pub. L. No. 107-40, 151 Stat. 224 (2001).

military action would only expand during the Bush presidency.¹⁰³ Over the course of George W. Bush's two terms in office, his Administration publicly disclosed eighteen instances of reliance upon the AUMF to "take or continue military or related action."¹⁰⁴ These actions spanned across at least twelve countries and broad geographic locations: Afghanistan, the Philippines, Pakistan, Georgia, Somalia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq,¹⁰⁵ the "high seas," and Cuba.¹⁰⁶ Though the groups were listed officially as "the Taliban[,] . . . al Qaeda[,] . . . [and] other terrorist organizations,"¹⁰⁷ the Administration targeted non-state terror groups with, at best, tenuous links to the September 11th attacks, such as Somalia-based al-Shabaab.¹⁰⁸ Such targeting under the AUMF highlights the strained justifications made by both the Bush Administration and subsequent Presidents as the "War on Terror" has evolved far beyond its September 11th commencement and the authority granted by the AUMF.¹⁰⁹

E. The Obama Administration

The Obama Administration represented a turning point in the history of the AUMF. As President Obama entered the White House, he pledged to bring home U.S. troops from the two major wars that President Bush had initiated under the authority of the AUMF.¹¹⁰ As President Obama entered his second term and operations in Iraq and Afghanistan were winding down, the Administration appeared to be preparing to terminate the AUMF.¹¹¹ In

¹⁰³ See Weed, *supra* note 2, at 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2. In addition to operations in Afghanistan, operations taken against Saddam Hussein's regime in Iraq constitute the other major episode of warfare taken during Bush's tenure as President. The military campaign against the government of Iraq, known as Operation Iraqi Freedom, is outside the scope of this Note for two primary reasons. First, it was not authorized by the 2001 AUMF, but instead the 2002 AUMF, which specifically authorized the United States to strike the Iraqi state under Hussein. Second, the base target of the 2002 AUMF was a sovereign state recognized by the United Nations, not a non-state actor or a harboring country. Though the 2002 AUMF was the primary authorization for military action against the Saddam regime, the 2001 AUMF would be (and still is) used to justify strikes against the insurgent groups that quickly proliferated in the Iraqi power vacuum.

¹⁰⁶ *Id.* at 2–4 (note the actions in Cuba relate to military detentions, and not combat operations).

¹⁰⁷ *Id.* at 3.

¹⁰⁸ See *Drone Wars Somalia: Analysis*, INT'L SECURITY, <http://securitydata.newamerica.net/drones/somalia-analysis.html> (last visited Feb. 16, 2019).

¹⁰⁹ See discussion *infra* Section II.E.

¹¹⁰ See Greg Myre, *Pledging to End Two Wars, Obama Finds Himself Entangled in Three*, NPR (Oct. 15, 2015, 1:58 PM), <https://www.npr.org/sections/parallels/2015/10/15/448925947/pledging-to-end-two-wars-obama-finds-himself-entangled-in-three>.

¹¹¹ Curtis A Bradley & Jack L. Goldsmith, *Agora: Reflections on President Obama's War Powers Legacy: Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 636 (2016).

2012, with al-Qaeda's operational capacity degraded to the point of near extinction, Jeh Johnson, then-General Counsel of the Defense Department, stated that the United States "should no longer be considered [to be in] an 'armed conflict' against al Qaeda and its associated forces."¹¹²

Yet, "[i]n a real sense, then, the 2001 AUMF is President Obama's AUMF."¹¹³ Despite his campaign promises and denunciations of the AUMF, part of President Obama's legacy will be "cementing the legal foundation for an indefinite conflict."¹¹⁴ Regardless of President Obama's expressed desire to end legal reliance on the AUMF and the conflicts it supported, events transpired during his Administration that led him to entrench the AUMF as the primary legal foundation for counterterrorism operations around the globe.¹¹⁵

The Bush Administration relied on the AUMF as a basis for counterterrorism targeting operations, but such operations became more prominent under President Obama.¹¹⁶ By May 2016, President Obama had reported nineteen instances of reliance on the AUMF, surpassing the eighteen reported instances made during both terms of the Bush Administration.¹¹⁷ President Obama vastly expanded the "targeted killing program" conducted through the AUMF by ordering approximately 542 drone strikes, which "killed an estimated 3,797 people, including 324 civilians."¹¹⁸

Further, the Obama Administration applied the associated forces doctrine to incorporate new non-state actors into the targeting purview of the AUMF.¹¹⁹ Most notably, the Obama Administration determined the Islamic State of Iraq and the Levant (ISIL) was an "associated force" to al-Qaeda, despite their public break from one another as associated groups, bringing strikes against ISIL within the purview of the AUMF.¹²⁰ This determination allowed U.S. operations to counter ISIL's rapid gain of nearly 40% of Iraqi

¹¹² Jeh C. Johnson, Gen. Counsel, Dep't of Def., *The Conflict Against Al Qaeda and Its Affiliates: How Will It End* (Nov. 30, 2012) (transcript available at <http://www.state.gov/documents/organization/211954.pdf>).

¹¹³ Bradley & Goldsmith, *supra* note 111, at 629.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 635–36.

¹¹⁶ *Id.* at 632–36.

¹¹⁷ Memorandum from Matthew Weed, Analyst in Foreign Policy, Cong. Research Serv., to multiple congressional offices 2 (May 11, 2016).

¹¹⁸ Micah Zenko, *Obama's Final Drone Strike Data*, COUNCIL ON FOREIGN REL. (Jan. 20, 2017), <https://www.cfr.org/blog/obamas-final-drone-strike-data>.

¹¹⁹ Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. 67, 81 (2017).

¹²⁰ Preston, *supra* note 88.

territory, reducing its territorial holdings to just 2.2% as of July 2017 by conducting over 13,200 airstrikes in support of various ground forces.¹²¹

Even toward the end of the Administration, President Obama acted to expand and solidify the AUMF as the foundation for military operations against non-state actors. In June 2016, the Administration broadened the military's authority under the AUMF to carry out airstrikes in Afghanistan targeting "people impeding the work of Afghan government forces."¹²² In August 2016, the Obama Administration conducted a multi-faceted military action in Libya to dislodge Islamic State militants from that city.¹²³ In November 2016, following the election of Donald Trump, President Obama expanded the "target" scope of the AUMF to encompass al-Shabaab, a military group in Somalia, and thus, effectively authorized action across Somalia-proper and into surrounding Kenya.¹²⁴

The Obama Administration determined the "2001 AUMF authority fits within the overall framework of presidential power to use military force against those posing a threat to U.S. national security and U.S. interests."¹²⁵ In his two terms of office, President Obama and his Administration greatly increased American reliance on the AUMF as the legal authority for operations conducted around the globe, a trend that has continued as President Trump has taken office.¹²⁶

III. ANALYSIS

A. The Trump Administration

As Donald Trump ascended to the presidency, he inherited the longest running war in American history and a plethora of peripheral conflicts

¹²¹ See *Global Conflict Tracker: War Against Islamic State in Iraq*, COUNCIL ON FOREIGN REL. (Aug. 14, 2018), <https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/war-against-islamic-state-in-iraq>.

¹²² See Charlie Savage et al., *Obama Expands War With Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html>.

¹²³ See Missy Ryan & Sudarsan Raghavan, *U.S. Special Operations Troops Aiding Libyan Forces in Major Battle Against Islamic State*, WASH. POST (Aug. 9, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/08/09/u-s-special-operations-forces-are-providing-direct-on-the-ground-support-for-the-first-time-in-libya/?utm_term=.6f818f6c2790.

¹²⁴ Savage et al., *supra* note 122.

¹²⁵ Weed, *supra* note 117, at 2.

¹²⁶ Daniel Brown, *Trump Will Keep the US Military in Syria Without New Congressional Authorization – And It Could Set a Dangerous Precedent*, BUS. INSIDER (Feb. 23, 2018, 2:54 PM), <https://www.businessinsider.com/trump-aumf-us-military-syria-without-new-authorization-2018-2>.

authorized by the AUMF.¹²⁷ Despite expressed desires and promises to the contrary, the Obama Administration acted to solidify the AUMF as the foundation of American military operations against non-state actors.¹²⁸ Although more than sixteen years after its initial passage, the AUMF is still the primary statutory authority relied upon by the Trump Administration in conducting counterterror operations.¹²⁹

Despite a recent resurgence of congressional debate regarding the expiration or replacement of the AUMF,¹³⁰ the Trump Administration has signaled that it will continue executive reliance on the authorization for the foreseeable future.¹³¹ On October 30, 2017, both then-Secretary of State Rex Tillerson and then-Secretary of Defense Jim Mattis testified to Congress that the Administration believed the current authorization was “sufficient” and that they opposed revising the authorization.¹³² They further advised that Congress “should not impose any time or geographic constraints on the government’s war powers” if revisions were to occur.¹³³ During his testimony, former Secretary Mattis noted that another militant group, Boko Haram, a Nigerian Salafi-terror group, pledged allegiance to al-Qaeda and could be deemed by President Trump as being “covered by the [AUMF].”¹³⁴

The Trump Administration has not only signaled a continuation of the AUMF, but has acted to further stretch the boundaries of the authorization.¹³⁵ The Trump Administration’s broadening of authority under the AUMF was first seen in April 2017, when the U.S. military dropped the “mother of all bombs,”—a 20,000 lb. GBU 43/B Massive Ordnance Air Blast—on an ISIL cave complex in eastern Afghanistan.¹³⁶ It represented the first combat use of the most powerful non-nuclear bomb in the U.S. arsenal¹³⁷ and a vast expansion of the “necessary and appropriate” force element of the AUMF.¹³⁸ This is part of a significant “loosening of the reins” approach to the military’s authority to conduct airstrikes on non-state terror groups under the AUMF,

¹²⁷ *Id.*

¹²⁸ Gene Healy, *Bringing an End to the Forever War*, WAR ON THE ROCKS (Aug. 29, 2016), <https://warontherocks.com/2016/08/bringing-an-end-to-the-forever-war/>.

¹²⁹ See Brown, *supra* note 126.

¹³⁰ See discussion *infra* Section III.B.

¹³¹ Brown, *supra* note 126. See also Charlie Savage, *No Need to Update 9/11 War Law, Trump Officials Tell Congress*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/politics/9-11-war-law-aumf-trump.html>.

¹³² See Savage, *supra* note 131.

¹³³ *Id.*

¹³⁴ *Id.* (alteration added).

¹³⁵ See *infra* notes 136–50 and accompanying text.

¹³⁶ Cooper & Mashal, *supra* note 70.

¹³⁷ *Id.*

¹³⁸ See Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 151 Stat. 224 (2001).

particularly in Iraq and Syria.¹³⁹ This increase in airstrikes further extends to Africa, where in March of 2016 a U.S. airstrike struck an al-Shabaab training camp, killing more than 150 militants.¹⁴⁰

In terms of Syria, the Administration has expressly relied on the AUMF for operations against ISIL under the associated forces doctrine, continuing the classification first set by President Obama.¹⁴¹ Citing the AUMF, the Trump Administration deemed all airstrikes taken in May and June of 2017 as within the AUMF's purview and that the Administration "was not seeking revisions to the 2001 AUMF or additional authorizations to use force."¹⁴² Further, and more significantly, the Trump Administration deemed not only strikes against ISIL were justified under the AUMF, but also "strikes taken . . . against the Syrian Government," as the "AUMF also provides authority to use force to defend U.S., Coalition, or partner forces engaged in the campaign to defeat ISIS."¹⁴³ This represents the first time the AUMF has been used to justify strikes against a sovereign state and could mark a turning point in the history of U.S. counterterrorism operations.¹⁴⁴

In addition to expansions of both the target and method elements of the AUMF's authorizing clause, the place element has also been expanded during the Trump Administration.¹⁴⁵ On October 4, 2017, a Green Beret Operational Detachment was ambushed in a remote area along Niger's border with Mali, and four U.S. commandos were killed in the ensuing firefight.¹⁴⁶ This marked the first U.S. combat fatalities in the expanding U.S.

¹³⁹ Cooper & Mashal, *supra* note 70. It should be noted that this "loosening of the reins" approach, while firmly adopted by President Trump, was implemented by President Obama during his last month in office. *Id.*

¹⁴⁰ Phil Stewart, *U.S. Strikes al Shabaab Training Camp in Somalia, More Than 150 Killed*, REUTERS (Mar. 7, 2016, 5:07 PM), <https://www.reuters.com/article/us-usa-somalia-dronestrike/u-s-strikes-al-shabaab-training-camp-in-somalia-more-than-150-killed-idUSKCN0W91XW>.

¹⁴¹ Letter from Charles Faulkner, Bureau of Leg. Affairs, U.S. Dep't of State, to Bob Corker, Chairman, Comm. on Foreign Relations (Aug. 2, 2017) (available at <https://www.politico.com/f?id=0000015d-a3bf-d43a-a3dd-b3bf14170000>) (regarding legal basis for use of force in Syria).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Daniella Diaz & David Wright, *Ryan Downplays Need for Congress to Authorize Strikes on Syria*, CNN: POLITICS (Apr. 12, 2018, 6:11 PM), <https://www.cnn.com/2018/04/12/politics/syria-aumf-paul-ryan-congress-white-house/index.html>.

¹⁴⁵ See Barnes, *supra* note 11, at 72–73; Eric Schmitt, *3 Special Forces Troops Killed and 2 Are Wounded in an Ambush in Niger*, N.Y. TIMES (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/world/africa/special-forces-killed-niger.html>.

¹⁴⁶ See Schmitt, *supra* note 145; Eric Schmitt & Thomas Gibbons-Neff, *Fourth U.S. Soldier Is Found Dead After Ambush in Niger*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/world/africa/green-berets-niger-soldiers-killed.html>.

counterterrorism mission in Northwestern Africa.¹⁴⁷ Although U.S. forces were first ordered into Mali under President Obama in 2013,¹⁴⁸ the casualties in Niger served as the first time many Americans had any knowledge of U.S. operations there.¹⁴⁹ This illustrates the utter lack of knowledge the American public has in regard to U.S. counterterror operations under the AUMF.¹⁵⁰ More significantly, it further highlights the expansive nature of U.S. counterterror operations and the need for an updated authorization.¹⁵¹

B. Congressional Will Regarding the AUMF

There has been no shortage of debate relating to the appropriateness, and unforeseen longevity, of the AUMF.¹⁵² Since its initial passage, Congress has considered legislative proposals to alter or repeal the authority granted by the AUMF; however, no effort has yet been successful.¹⁵³ Despite this history of legislative failure, as the Trump Administration moved through its first year, there was a renewed debate among scholars and congressional leaders alike.¹⁵⁴

Renewed focus on the AUMF began in June 2017, when Representative Barbara Lee¹⁵⁵ introduced an amendment to the 2018 Defense Appropriations Bill that would have repealed the AUMF 240 days after the date of enactment.¹⁵⁶ The House Appropriations Committee passed the amendment, but it was quickly stricken by House Republicans as Paul Ryan and other leaders moved to stymie the effort.¹⁵⁷ This was not the first time

¹⁴⁷ Schmitt & Gibbons-Neff, *supra* note 146.

¹⁴⁸ Luis Martinez, *Why US Troops are in Niger*, ABC NEWS (Oct. 19, 2017, 2:38 AM), <http://abcnews.go.com/Politics/us-troops-niger/story?id=50559788>.

¹⁴⁹ Jason C. Ditz, *What Are U.S. Forces Doing in Niger Anyway?*, THE AM. CONSERVATIVE (Oct. 20, 2017), <https://www.theamericanconservative.com/articles/what-are-u-s-forces-doing-in-niger-anyway/>.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² The sources of congressional debate and scholarly articles are too many to reference. *Reauthorizing the War on Terror*, by Beau D. Barnes, one of the best analysis of the AUMF, argued in 2012 that a revision of the AUMF was necessary and inevitable. *See Barnes, supra* note 11. Since then, the diffusion of non-state terror groups has only escalated.

¹⁵³ David Welna, *Authorization for the Use of Military Force Could Be Up for Update in Senate*, NPR (June 20, 2017, 4:40 PM), <https://www.npr.org/2017/06/20/533698497/authorization-for-the-use-of-military-force-could-be-up-for-update-in-senate>.

¹⁵⁴ *Id.*

¹⁵⁵ It should be noted that Representative Barbara Lee was the only congressional representative to vote against the original passage of the AUMF in 2001. Christopher Woody, *Congress May Repeal the Post-9/11 Act the US Military Used to Justify the Fight Against ISIS*, BUS. INSIDER (June 29, 2017, 1:16 AM), <http://www.businessinsider.com/a-bill-to-repeal-the-aumf-just-passed-2017-6>.

¹⁵⁶ *Id.*

¹⁵⁷ Jeremy Herb, *House Republicans Strip Repeal of War Authorization from Defense Bill*, CNN (July

Representative Barbara Lee attempted a repeal of the AUMF, only to be struck down by the House majority.¹⁵⁸ However, her continued efforts have made two factors clear: (1) after seventeen years, the AUMF remains fresh in the minds of American legislators, and (2) outright repeal of the AUMF does not have majority support in the House of Representatives and likely will not for the foreseeable future.¹⁵⁹

Similarly, the Senate saw a renewed interest in the AUMF during the first year of the Trump Administration.¹⁶⁰ Senator Rand Paul was the force behind outright repeal, using the 2017 anniversary of the September 11th attacks to deride the AUMF for “being used to justify American warfare in 7 different countries.”¹⁶¹ He further introduced an amendment to the National Defense Authorization Act that would have effectively repealed the AUMF.¹⁶² Despite a significant personal effort from Senator Paul, the Senate followed a similar trajectory as the House: a 61–36 vote to table Senator Paul’s amendment, effectively kicking the can further down the road.¹⁶³

Not all efforts in the Senate have been toward outright repeal, as a bipartisan effort to revise the AUMF has been pushed by Senators Jeff Flake (Republican) and Tim Kaine (Democrat).¹⁶⁴ Their resolution attempts to “update the [AUMF] in order to provide legal authority for military action against al-Qaeda, the Taliban, and the Islamic State of Iraq and Syria [ISIS].”¹⁶⁵ The amendment seeks to “establish a process of oversight by Congress of military action”¹⁶⁶ related to these three groups and establishes the associated forces doctrine within the text of the statute.¹⁶⁷ Significantly, the al-Nusra Front, Khorasan Group, al-Qaeda in the Arabian Peninsula

19, 2017, 11:43 AM), <http://www.cnn.com/2017/07/19/politics/war-authorization-repeal-stripped-defense-bill/index.html>.

¹⁵⁸ Sarah Wire, *U.S. House Rejects Rep. Barbara Lee’s Push to End War Authorization*, L.A. TIMES (May 18, 2016, 4:01 PM), <http://www.latimes.com/politics/la-pol-sac-essential-poli-us-house-rejects-rep-barbara-lees-push-to-end-1463612506-htmlstory.html>.

¹⁵⁹ *Id.*

¹⁶⁰ See Sen. Rand Paul, *Why We Must Repeal the 16-year-old Authorization for the Use of Military Force*, RARE (Sept. 11, 2017, 10:19 AM), http://rare.us/rare-politics/issues/foreign-policy/rand-paul-why-we-must-repeal-the-16-year-old-authorization-for-the-use-of-military-force/?utm_content=buffer6848a&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

¹⁶¹ *Id.*

¹⁶² See Amdt. 871 to H.R. 2810, 115th Cong. (2017), *enacted as* National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, 131 Stat 1283.

¹⁶³ Connor O’Brien, *Senate Scuttles Rand Paul’s War Powers Repeal*, POLITICO (Sept. 13, 2017, 1:08 PM), <https://www.politico.com/story/2017/09/13/war-powers-aumf-rand-paul-senate-242662>.

¹⁶⁴ See S.J. Res. 43, 115th Cong. (2017).

¹⁶⁵ See *id.* § 2(1) (alterations added).

¹⁶⁶ *Id.* § 2(2).

¹⁶⁷ *Id.* § 3–4.

(AQAP), and al-Shabaab are explicitly listed as associated forces.¹⁶⁸ The amendment further imposes reporting requirements for the targeting of any additional associated forces not listed, authorizes Congress to reject certain groups from falling within the statute's authorization, includes a five-year sunset clause, and effectively repeals the current AUMF.¹⁶⁹ The proposed legislation represents an ambitious bipartisan attempt to revise the AUMF; but, unfortunately, it has not gotten serious traction within the Senate.¹⁷⁰

C. A Glimpse into U.S. Counterterrorism Operations

*"Although this conflict began specifically focused on one relatively hierarchical organization concentrated in Afghanistan, it has since metastasized to include a plethora of groups and locations around the globe."*¹⁷¹

As it has been illustrated, the authorization of the AUMF was exceedingly broad with few circumscribing elements. The three Administrations that have come to power since the passage of the AUMF have acted to incrementally stretch that authority to justify an ever-expanding counterterrorism strategy.¹⁷² This widening of operations under the AUMF has come to encompass groups that do not necessarily fit within the framework of the authorizing clause.¹⁷³ This includes groups such as Boko Haram in Nigeria, Tahrir al-Sham in Syria, al-Shabaab in Somalia, and the Haqqani Network in Pakistan.¹⁷⁴

To analyze the entirety of U.S. counterterror operations against these groups would fill many volumes and would be nearly impossible due to pertinent information being classified. However, an examination of the two primary non-state groups targeted under the AUMF will highlight how the

¹⁶⁸ *Id.* § 4(a)(2).

¹⁶⁹ *Id.* § 4–11.

¹⁷⁰ Leigh A. Caldwell & Vivian Salama, *Congress Wrestles with New War on Terror Authorization*, NBC NEWS (Apr. 16, 2018, 6:58 PM), <https://www.nbcnews.com/politics/congress/congress-wrestles-new-war-terror-authorization-n865656>.

¹⁷¹ Barnes, *supra* note 11, at 112.

¹⁷² Trevor McCrisken, *Ten Years On: Obama's War on Terrorism in Rhetoric and Practice*, 87 INT'L AFF. 781, 781 (2011); Micah Zenko, *Donald Trump is Pushing America's Special Forces Past the Breaking Point*, FOREIGN POL'Y (Aug. 1, 2017, 10:07 AM), <https://foreignpolicy.com/2017/08/01/donald-trump-is-pushing-americas-special-forces-past-the-breaking-point-jsoc-navy-seal/>.

¹⁷³ Tess Bridgeman, *How to Ensure New Congressional War Authorization is Not a Blank Check*, JUST SECURITY (Apr. 20, 2018), <https://www.justsecurity.org/55147/stop-congressional-war-authorization-blank-check/>.

¹⁷⁴ *Foreign Terrorist Organizations*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, <https://www.dni.gov/nctc/ftos.html> (last visited Feb. 17, 2019).

reality of U.S. counterterrorism strategy has evolved beyond the AUMF's original purpose.

1. Al-Qaeda

Al-Qaeda was the first multinational terrorist group of the twenty-first century,¹⁷⁵ but after eleven years of protracted warfare against the United States, the group had been degraded to the point of near annihilation. However, beginning in 2012, events in the Middle East, in particular the security situation in Iraq and the Syrian Civil War, allowed al-Qaeda to resurge.¹⁷⁶ Al-Qaeda now operates four major branches throughout the world: al-Qaeda (AQ) (umbrella organization and global operating arm), al-Qaeda in the Arabian Peninsula (AQAP) (operational arm in Saudi Arabia and Yemen),¹⁷⁷ al-Qaeda in the Indian Subcontinent (AQIS) (operational arm in Afghanistan, Pakistan, India, Burma, Bangladesh, and the Kashmir),¹⁷⁸ and al-Qaeda in the Islamic Maghreb (AQIM) (operational arm in the Sahara and Sahel of North and West Africa).¹⁷⁹

Unfortunately, the resilience of al-Qaeda and continuing events in the Middle East paint a grim picture for continued counterterrorism operations against the group. A report prepared for the United Nations Security Council in February 2018 found that al-Qaeda's global network remains "remarkably resilient"¹⁸⁰ and that its affiliated groups "remain the dominant terror threat in some regions."¹⁸¹ Al-Qaeda has largely stayed out of the limelight since ISIL's major advance through Syria and Iraq; but as ISIL's self-proclaimed caliphate has been decimated to the point of non-existence, al-Qaeda has exploited the opportunity to increase recruitment and forge alliances.¹⁸²

¹⁷⁵ See generally Jodi M. Vittori, *The Business of Terror: Financially, al Qaeda Operates Like a Multinational Corporation*, IP – TRANSATLANTIC EDITION, Summer 2005, at 89, 89–93.

¹⁷⁶ See AZEEM IBRAHIM, *THE RESURGENCE OF AL-QAEDA IN SYRIA AND IRAQ* 18–22 (2014).

¹⁷⁷ See generally *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap> (last visited Feb. 17, 2019).

¹⁷⁸ See generally *Al-Qaeda in the Indian Subcontinent*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/al-qaeda-indian-subcontinent-aqis> (last visited Feb. 17, 2019).

¹⁷⁹ See Zachary Laub & Jonathan Masters, *Al-Qaeda in the Islamic Maghreb*, COUNCIL ON FOREIGN REL. (Mar. 27, 2015), <https://www.cfr.org/backgroundunder/al-qaeda-islamic-maghreb>.

¹⁸⁰ See *Al-Qaeda a Greater Threat than ISIS in Some Places, Experts Warn*, CBS NEWS (Feb. 7, 2018, 2:17 PM), <https://www.cbsnews.com/news/al-qaeda-greater-threat-than-isis-in-some-places-experts-warn/>.

¹⁸¹ Robert Gearty, *Al Qaeda at 30 Shows Signs of Resurgence After ISIS Routed*, FOX NEWS (Aug. 11, 2018), <https://www.foxnews.com/world/al-qaeda-at-30-shows-signs-of-resurgence-after-isis-routed>.

¹⁸² *The Rise and Fall of ISIL Explained*, AL JAZEERA (June 20, 2017), <https://www.aljazeera.com/indepth/features/2017/06/rise-fall-isis-explained-170607085701484.html>.

Further, conflict in the Middle East will continue to perpetuate the conditions necessary for al-Qaeda to flourish. With ISIL pushed out of its territorial holdings in Syria, Turkey has now invaded northern Syria to curb, and eventually destroy, Kurdish influence in the region.¹⁸³ Given Turkish President Recep Erdogan's stated intentions, it can be predicted that northern Syria will be engulfed in armed conflict for the foreseeable future, even as the wider civil war begins to wind down.¹⁸⁴ In Iraq, the conditions look no more promising. With ISIL's territorial gains likewise being reversed by the U.S. coalition, Iraq's Shia politicians, with strong influence from Tehran, are acting to disenfranchise the Sunni population.¹⁸⁵ This marginalization of the Sunni population will likely drive vulnerable tribal communities back into the orbit of al-Qaeda and other extremist forces.¹⁸⁶

All the while, al-Qaeda's core objectives have remained unchanged: initiate a global jihad against the West and topple Western-backed "apostate" regimes in and around the Middle East (i.e., Saudi Arabia, Egypt, Pakistan, and others).¹⁸⁷ The unfortunate reality for the United States is that the fight against al-Qaeda does not have a foreseeable end. Indeed, in order for the United States to protect its strategic interests in the Middle East, a pragmatic and multi-faceted strategic approach to curbing al-Qaeda's influence is imperative. A necessary element of any U.S. strategy includes the "enactment of appropriate legislation."¹⁸⁸ Although clearly authorizing action against al-Qaeda, the AUMF is not the proper legal foundation to base action against the group in the coming years.

In terms of the Jackson framework,¹⁸⁹ the AUMF would appear to grant President Trump with the "highest ebb" of authority to strike and disrupt al-Qaeda cells across the globe. However, it is hard to reconcile the purpose of

¹⁸³ Elizabeth Teoman & Jennifer Cafarella, *Turkey's Next Phase in Afrin Syria*, INST. FOR THE STUDY OF WAR (Jan. 23, 2018), <http://www.understandingwar.org/background/turkey%E2%80%99s-next-phase-afirin-syria>.

¹⁸⁴ See generally Center for Preventive Action & Henri J. Barkley, *What Erdogan's Victory Means for Turkey, the Kurds, and Syria*, COUNCIL ON FOREIGN REGS. (June 29, 2018), <https://www.cfr.org/blog/what-erdogans-victory-means-turkey-kurds-and-syria>.

¹⁸⁵ See generally Omer Kassim, *Iraq's Judiciary Rules Against Sunni Politician Ahead of Iraqi Elections*, INST. FOR THE STUDY OF WAR (Feb. 9, 2018), <http://www.understandingwar.org/background/iraq%E2%80%99s-judiciary-rules-against-sunni-politician-ahead-iraqi-elections>.

¹⁸⁶ Erica Gaston, *Sunni Tribal Forces*, GLOB. PUB. POL'Y INST. (Aug. 30, 2017), <http://www.gppi.net/publications/sunni-tribal-forces/?L=0%2525252527>.

¹⁸⁷ See Rabasa et al., *Beyond al-Qaeda: The Global Jihadist Movement Part I*, RAND PROJECT AIR FORCE xxv (2006), https://www.rand.org/content/dam/rand/pubs/monographs/2006/RAND_MG429.pdf.

¹⁸⁸ *Id.* at xxiii.

¹⁸⁹ See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–38 (1952) (Jackson, J. concurring).

the original AUMF with current counterterrorism operations against al-Qaeda. Continued congressional inaction towards revamping the AUMF should be read not as express authorization, but, instead, as silence and thereby lowering executive action to a “middle ebb” of authority.¹⁹⁰ In this regard, Congress’s inaction is a misguided approach. Al-Qaeda continues to present a critical danger to national security and strategic interests across the Middle East.¹⁹¹ The group has evolved far past the operational capacity it held in the initial phases of the War on Terror,¹⁹² and it is time for the United States’ legal strategy to evolve as well.

2. Islamic State of Syria and the Levant

As 2018 opened, ISIL seemed far more removed from the headlines than in previous years.¹⁹³ Its lightning advance through Syria and Iraq and subsequent formation of the self-described “caliphate” had been largely erased by a three-year air campaign that killed an estimated 65,000 militants and reversed almost all the group’s territorial gains.¹⁹⁴ The organization has limited capacity to engage in traditional military conflict, or to field any sort of sizeable army; as of February 2018, airstrikes under Operation Inherent Resolve continue to degrade the group’s operational capacity.¹⁹⁵

Despite these developments, the group remains a critical security concern for the United States. With its territorial “caliphate” in ruins, on the ground level, the Islamic State will return to “all-out insurgency.”¹⁹⁶ This strategic pivot will require the group to switch from traditional military operations to hit-and-run attacks, assassinations, and high-profile civilian bombings.¹⁹⁷ Additionally, the United States will be forced to contend with ISIL’s

¹⁹⁰ See generally *id.* at 637.

¹⁹¹ Rabasa et al., *supra* note 187, at iii.

¹⁹² See generally *id.*

¹⁹³ See *infra* notes 194–95 and accompanying text.

¹⁹⁴ Estimates vary. See Christopher Woody, *US Special Operations Command Chief Claims ‘60,000 to 70,000’ ISIS Fighters Have Been Killed*, BUS. INSIDER (July 24, 2017, 1:48 PM), <http://www.businessinsider.com/gen-raymond-thomas-socom-60000-to-70000-isis-fighters-killed-2017-7>.

¹⁹⁵ See *February 9: Military Airstrikes Continue Against ISIS Terrorists in Syria and Iraq*, U.S. CTR. COMMAND (Feb. 9, 2018), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1436822/february-9-military-airstrikes-continue-against-isis-terrorists-in-syria-and-ir/>.

¹⁹⁶ Hassan Hassan, *Insurgents Again: The Islamic State’s Calculated Reversion to Attrition in the Syria-Iraq Border Region and Beyond*, 10 COMBATING TERRORISM CTR. AT W. POINT SENTINEL 1, 1 (2017).

¹⁹⁷ *Id.* at 4.

expanding operational capacity in the northern Sinai Peninsula¹⁹⁸ and its continued presence in Libya.¹⁹⁹

Perhaps most significantly, in terms of national security, ISIL's strategic pivot will likely involve greater emphasis on terror attacks against Western targets.²⁰⁰ With its cells in Iraq and Syria under constant siege, ISIL is exporting its external operations cells, using safe havens in Afghanistan, Pakistan, and Libya to plan attacks on the United States.²⁰¹ As it has lost territory in Iraq and Syria, ISIL has increased its recruitment of foreign fighters and indicated the group's intention to "create an external operations node for new waves of global attacks."²⁰² In response, U.S. military personnel, intelligence, and resources will be expended in the effort to disrupt and destroy such cells.²⁰³ Thus, the fight against ISIL can be predicted to extend into the foreseeable future.

Legally, President Obama and, subsequently, President Trump established the AUMF as the primary authority behind military operations against ISIL.²⁰⁴ However, in terms of the Jackson framework,²⁰⁵ it is clear that action against ISIL falls within the "middle ebb" of executive authority at best. Congressional attempts to grant the President express authorization to strike the group have failed, and continued legislative inaction appears inevitable.²⁰⁶ Further, the claim that military operations against ISIL are authorized by the AUMF, namely under the associated forces doctrine, is dubious at best.²⁰⁷ While ISIL began as an al-Qaeda off-shoot, the groups

¹⁹⁸ Callum Paton, *Egypt Launches All-Out Attack on ISIS in Desperate Bid to Drive Militants from Strongholds*, NEWSWEEK (Feb. 9, 2018, 8:24 AM), <http://www.newsweek.com/egypt-launches-all-out-attack-isis-desperate-bid-drive-militants-strongholds-801956>.

¹⁹⁹ See Alexander Smith, *ISIS in Libya: Trump Orders First Airstrike Near Sirte*, NBC NEWS (Sept. 25, 2017, 11:04 AM), <https://www.nbcnews.com/storyline/isis-terror/isis-libya-trump-orders-first-airstrikes-near-sirte-n804461>.

²⁰⁰ Natasha Turak, *Terror Attacks are Likely to Increase in 2018, with ISIS and al-Qaeda Both Still Dangerous*, CNBC (Dec. 28, 2017, 9:32 PM), <https://www.cnbc.com/2017/12/28/terror-isis-and-al-qaeda-likely-to-carry-out-more-attacks-in-2018.html>.

²⁰¹ Jennifer Cafarella et al., *ISIS Plotting Attacks from Afghanistan*, INST. FOR THE STUDY OF WAR (Nov. 17, 2017), <http://www.understandingwar.org/backgrounder/isis-plotting-attacks-afghanistan>.

²⁰² See *id.*

²⁰³ *Id.*

²⁰⁴ Brown, *supra* note 126.

²⁰⁵ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 636–38 (1952) (Jackson, J., concurring).

²⁰⁶ See Jeremy Herb, *What Happened Last Time Congress Tried to Pass a War Authorization*, CNN (Apr. 7, 2017, 1:29 PM), <https://www.cnn.com/2017/04/07/politics/congress-obama-war-authorization/index.html>.

²⁰⁷ Daniel L. Byman & Jennifer R. Williams, *ISIS v. Al Qaeda: Jihadism's Global Civil War*, BROOKINGS INST. (Feb. 24, 2015), <https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war/>.

formally split when ISIL leader Abu Bakr al-Baghdadi expressly rejected the strategic guidelines set by Usama bin Laden and declared the Islamic “caliphate.”²⁰⁸ Since then, the two groups have waged a jihadi “civil war,” vying for influence of the global jihadi movement.²⁰⁹ Thus, the two groups do not form an “association,” but rather are direct rivals.²¹⁰ As a result, the Executive’s decision to place Operation Inherent Resolve under the authorization of the AUMF further stretches the statute’s limits and dilutes the legal foundation of U.S. counterterror operations around the globe.²¹¹

As illustrated, the AUMF does not provide an adequate legal basis for continuing operations against al-Qaeda or ISIL—not to mention the myriad of other terror groups that currently pose a threat to U.S. interests. As such, a new authorization is necessary if the United States is to effectively protect its interests both domestically and abroad.

IV. RESOLUTION

The threat posed by non-state terror groups remains as critical as it was in the immediate aftermath of September 11th.²¹² Yet, as illustrated above, the sphere of terror and counterterror conflict has drastically shifted, with new actors proliferating and new strategies for inflicting terror developing at a rapid pace. Non-state terror groups continually threaten U.S. domestic security and interests abroad, particularly in the Middle East. With the threat of a “Great Powers” conflict rapidly increasing as the United States entered 2018,²¹³ it is critical to contain and disrupt non-state actors who seek to weaken U.S. interests.

As the analysis of current targets of the AUMF illustrates, the statute is out of step with the continuously evolving state of counterterrorism waged by the United States.²¹⁴ The target element has been expanded far past the

²⁰⁸ *Id.*

²⁰⁹ *See generally id.*

²¹⁰ *See id.*

²¹¹ John B. Bellinger III & Jonathan Masters, *New Terror Threats Require New Law*, COUNCIL ON FOREIGN REL. (Sept. 9, 2014), <https://www.cfr.org/interview/new-terror-threats-require-new-law>.

²¹² Katherine Zimmerman, *The Never-Ending War on Terror: Why the U.S. Keeps Fighting the Wrong Battle*, FOREIGN AFF. (May 11, 2018), <https://www.foreignaffairs.com/articles/2018-05-11/never-ending-war-terror>.

²¹³ *See* Idrees Ali, *U.S. Military Puts ‘Great Power Competition’ at Heart of Strategy: Mattis*, REUTERS (Jan. 19, 2018, 10:15 AM), <https://www.reuters.com/article/us-usa-military-china-russia/u-s-military-puts-great-power-competition-at-heart-of-strategy-mattis-idUSKBN1F81TR> (“The U.S. military has put countering China and Russia at the center of a new national defense strategy.”). However, with a “Great Powers” conflict more likely, the need to contain the threat from non-state terror groups remains as critical as ever.

²¹⁴ Byman & Williams, *supra* note 207.

point of feasibility.²¹⁵ Further, the AUMF is invariably tied to the September 11th attacks, and the nature of counterterror operations (indeed, the very nature of conflict around the globe) have evolved far beyond the conflagrations of 2001.²¹⁶ As we move into a new era of global affairs, “September 11 should not continue to be the *raison d’être* of global military counterterrorism operations.”²¹⁷ It is time to pass a new AUMF that allows the Executive Branch to counter the threat from non-state terror groups, while also providing congressional oversight.

A. *The Flake-Kaine Joint Resolution of 2017*

In this regard, the Flake-Kaine Joint Resolution of 2017²¹⁸ is the best congressional attempt at passing a new AUMF that reflects the current counterterrorism situation. Current congressional failure to seriously consider the resolution is based on continuing the status quo and avoiding responsibility for continued U.S. military action.²¹⁹ As Senator Kaine stated, United States Representatives simply “don’t want to cast a war vote.”²²⁰ However, all signals indicate that operations against non-state groups will continue for the foreseeable future, and it is the responsibility of Congress to ensure that such operations are done within an appropriate legal framework.

The Flake-Kaine Resolution comes the closest to addressing the shortcomings of reliance upon the antiquated AUMF.²²¹ In terms of target, the Flake-Kaine Resolution expressly lists al-Qaeda, the Taliban, and ISIL as applicable targets and formally incorporates the associated forces doctrine.²²² It contains a “whereas” clause that formally recognizes ISIL’s departure from the orbit of al-Qaeda and the necessity for express authorization against it.²²³ While it does not address other influential non-state groups (i.e. Boko Haram, Tahrir al-Sham, etc.), such groups could fall within the formally adopted associated forces provision.²²⁴ The resolution requires the President to submit a report to Congress regarding a group’s inclusion as an associated force,

²¹⁵ Zimmerman, *supra* note 212.

²¹⁶ *Id.*

²¹⁷ Barnes, *supra* note 11, at 98.

²¹⁸ See generally S.J. Res. 43, 115th Cong. (2017).

²¹⁹ Jeremy Herb, *Kaine, Flake to Introduce New ISIS Military Force Authorization*, CNN (May 25, 2017, 3:15 PM), <https://www.cnn.com/2017/05/25/politics/isis-war-authorization-tim-kaine-jeff-flake/index.html>.

²²⁰ *Id.*

²²¹ See generally S.J. Res. 43, 115th Cong. (2017).

²²² *Id.* §§ 3(a)(1)–(3).

²²³ See generally S.J. Res. 43, 115th Cong. (2017).

²²⁴ *Id.* § 4.

which would then be subject to congressional approval,²²⁵ adding a check on executive abuse. Further, these groups could be formally added as an official target upon reauthorization under Section 11 of the Flake-Kaine Resolution, following the expiration of the authorization under the sunset clause.²²⁶

Turning to expiration, the time element of the original AUMF would be replaced by a five-year sunset clause.²²⁷ While any expiration of authorization is against the express wishes of former Secretary Mattis and the Trump Administration, Section 11 of the Flake-Kaine Resolution lays out expedited procedures for reauthorizing the statute once the sunset clause has run.²²⁸ In theory, this would allow Congress to quickly reauthorize military force against non-state terror groups, while also allowing a window for debate regarding the evolution of the security situation and applicable changes.²²⁹

In terms of scope, geographical areas of operation would also be defined and limited under the new resolution. Under Section 5, counterterrorism operations in the following countries—Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen—are *de jure* authorized.²³⁰ If action was required in any country not expressly listed in Section 5, the President would be required to submit a report to Congress including: the name of the country, a description of the operational presence of the target group in the country, and a justification for why the use of force in the country is necessary and appropriate.²³¹ This places not only a limit on geographic scope, but also a formal check on executive overreach. As the report requirements indicate, this resolution maintains the “necessary and appropriate” standard for the method element of the original AUMF.²³²

Regarding purpose, the Flake-Kaine Resolution maintains the original language of the AUMF and states that authorization is granted “to prevent any future acts of international terrorism against the United States.”²³³ This is a clear-cut statement of the authorization’s purpose: to protect the interests of the United States both domestically and abroad.²³⁴ Also, it disengages the purpose of the authorization from the attacks of September 11th and thereby

²²⁵ *Id.*

²²⁶ *Id.* § 11.

²²⁷ *Id.* § 8.

²²⁸ Savage, *supra* note 131; *see also* Ali, *supra* note 213; *see generally* S.J. Res. 43 115th Cong. § 11 (2017).

²²⁹ *See generally* S.J. Res. 43, 115th Cong. (2017).

²³⁰ *Id.* § 5.

²³¹ *Id.* § 4(c)(2).

²³² *Id.* §§ 3(a), 5(3).

²³³ *Id.* § 3.

²³⁴ *See id.*

provides a clear legal foundation for counterterrorism operations moving forward.

In terms of the Jackson framework, passage of the Flake-Kaine Resolution would indicate the express will of Congress and thereby place counterterrorism actions taken by the current Administration in the “highest ebb” of executive authority (assuming they fell within the scope of the authorization).²³⁵ Current actions taken by the Trump Administration, as well as many taken under President Obama, were conducted concurrent to congressional silence on the issue, placing such action in the “middle ebb” of executive authority.²³⁶ As the continuing debate over the AUMF shows, counterterrorism operations without the express will of Congress will continuously be plagued by claims of illegitimacy, or worse, illegality.²³⁷ As such, the passage of the Flake-Kaine Resolution remains the best option for Congress to put the United States in an advantageous position in relation to counterterror operations around the globe.

V. CONCLUSION

The 2001 Authorization of the Use of Military Force is an antiquated statute, and reliance upon it weakens the legality of U.S. counterterror operations. It is time for the United States to shed the AUMF for a statutory authorization that accurately reflects, and grants legal legitimacy to, critical U.S. counterterror operations around the globe.

Congress’s failure to address the antiquated AUMF weakens the authority of the Executive Branch to protect U.S. interests, and places counterterrorism operations on a dubious legal foundation. It is time to face the reality that the threat from non-state terror groups—to both domestic security and U.S. interests abroad—will exist for the foreseeable future. Congress must pass reasonable legislation that will allow the United States to counter that threat in an effective and legally legitimate way. The Flake-Kaine Resolution presents Congress’s best chance to achieve this end and should be adopted by our congressional representatives.

²³⁵ See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–58 (1952) (Jackson, J., concurring).

²³⁶ See Herb, *supra* note 219.

²³⁷ See *id.*