

# AFTER THE AUMF

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### **I. INTRODUCTION**

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

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

Although its delegation of power to the President was sweeping, the AUMF in fact reflected a compromise between Congress and the Bush Administration—which had sought an even broader and more open-ended grant of authority. Even as fires continued to burn at Ground Zero, Congress pushed back, only authorizing military force against those who could be tied to the groups directly responsible for the September 11 attacks. Despite widespread misrepresentations to the contrary, Congress pointedly refused to declare a “war on terrorism.” Instead, the use of force Congress authorized was to be directed at those who bore responsibility for the 9/11 attacks—namely al Qaeda and the Taliban. It was also for a specific purpose: preventing those “nations, organizations, or persons” responsible for the September 11 attacks from committing future acts of terrorism against the United States.

A dozen years later, the AUMF—which has never been amended—remains the principal source of the U.S. government’s domestic legal authority to use military force against al Qaeda and its immediate associates, both on the battlefields of Afghanistan and far beyond. But even as the statutory framework has remained unchanged, the facts on the ground have evolved dramatically: The Taliban regime in Afghanistan—behind which al Qaeda had taken refuge—has been removed from power; those individuals most directly responsible for the September 11 attacks have been incapacitated; and, perhaps most importantly, the “core” of al Qaeda has been “decimated,” to quote former Defense Secretary Panetta,<sup>2</sup> such that it no longer poses the threat that it did in the

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1. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

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

weeks and months before and after September 11. With the drawdown of U.S. troops in Afghanistan continuing apace, we are getting closer to the day when the AUMF will have served its purpose and the United States will no longer be engaged in an ongoing armed conflict with the Taliban or al Qaeda.

Of course, recent, tragic events in Boston, Algeria, and elsewhere underscore the extent to which terrorists—both self-radicalized individuals and organized groups—continue to present a threat to the United States, both at home and overseas. But in an area of law and policy in which there is seldom deep consensus, the one point upon which all seem to agree is the increasing extent to which those who threaten us the most are *not* those against whom Congress authorized the use of force in September 2001. This has led some to call for a new AUMF.

Perhaps the most widely discussed proposal is that contained in a Hoover Institution white paper by Robert Chesney, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes. Titled “A Statutory Framework for Next-Generation Terrorist Threats,” the heart of the proposal is a new statute wherein “Congress sets forth general statutory criteria for presidential uses of force against new terrorist threats but requires the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force.”<sup>3</sup> Modeled on the existing process for State Department administrative designation of Foreign Terrorist Organizations (FTOs),<sup>4</sup> the Hoover proposal is for Congress to enact a new blanket framework statute authorizing the use of military force against as-yet-undetermined future terrorist organizations, and to delegate to the Executive Branch the authority to designate those organizations against which such force may be used if and when the time comes.<sup>5</sup> If press reports are accurate, the Hoover paper is but one of a number of competing proposals being circulated for a “new”—or, at least, expanded—AUMF, although the salient details of other efforts in this regard remain to be seen.<sup>6</sup>

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3. ROBERT CHESNEY ET AL., HOOVER INST., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 10 (2013), <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

4. See 8 U.S.C. § 1189 (2006); see also 18 U.S.C. § 2339B (making it a crime to provide material support to a designated FTO).

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

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

In this paper, we offer an alternative vision for the future of U.S. counterterrorism policy. We start from the fundamental premise that, as former DOD General Counsel Jeh Johnson put it in a speech last fall, war should “be regarded as a finite, extraordinary and unnatural state of affairs” that “violates the natural order of things.” In Johnson’s words: “Peace must be regarded as the norm toward which the human race continually strives.”<sup>7</sup>

Thus, as we explain in the pages that follow, the future of U.S. counterterrorism policy should be one in which use-of-force authorizations are a last, rather than first, resort. Given the evolving sophistication of our ordinary law enforcement and intelligence-gathering tools over the past decade, along with the President’s settled powers under both domestic and international law to use military force in self-defense, the burden should—indeed, *must*—be on those seeking *additional* use-of-force authority to demonstrate why these existing capacities are inadequate. And even then, any use-of-force authority should be enacted by Congress only after public debate and extensive deliberation, carefully calibrated to the specific threat posed by an identifiable group, and limited in scope and duration, so as to avoid making the very mistake that Congress so assiduously sidestepped after September 11.

In short, calls for a new framework statute to replace the AUMF are unnecessary, provocative, and counterproductive—perpetuating war at a time when we should be seeking to end it. Congress certainly may choose, as it did in the AUMF, to authorize the use of military force against specific, organized groups so as to address an established and sustained threat that existing authorities are inadequate to quell. But until and unless the political branches identify a group that poses such a threat, the many other counterterrorism tools at the government’s disposal—including law enforcement, intelligence-gathering, capacity-building, and, when necessary, self-defense capabilities provide a much more strategically sound—and legally justifiable—means of addressing the terrorist threat.<sup>8</sup>

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

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

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

## II. BACKGROUND

### A. The AUMF, al Qaeda, and the Taliban

As noted above, Congress in the AUMF rejected alternative language proposed by the Bush Administration that would have authorized the broad-scale use of force to both punish those responsible for September 11 *and* “deter and pre-empt *any* future acts of terrorism or aggression against the United States.”<sup>9</sup> Instead, Congress chose its words carefully, focusing only on those “nations, organizations, or persons” that the President “determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>10</sup> Shortly after he signed the AUMF into law, President Bush confirmed what by then had been widely reported—that convincing evidence identified the responsible parties as al Qaeda and the Taliban.<sup>11</sup>

From its inception, then, the AUMF was not a general counterterrorism statute; it was a specific authorization to use military force only against those entities that attacked the United States on September 11—al Qaeda, the Taliban, and, by interpretation, associated forces fighting against the United States as part of that conflict. Moreover, as the Supreme Court would emphasize in *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*, such force was only authorized to the degree it was consistent with the traditional incidents—and international laws—of war.<sup>12</sup>

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

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

10. AUMF § 2(a), 115 Stat. at 224.

11. President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1140–41 (Sept. 20, 2001).

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

released.<sup>13</sup> Conversely, all three branches of the U.S. government have agreed that anyone who *is* a member of al Qaeda or the Taliban can be detained without charge, and—according to the views of the past two administrations—subject to lethal force in appropriate circumstances as well.<sup>14</sup> The AUMF has thus been the principal source of authority for U.S. military operations in Afghanistan and, so far as can be gleaned from public reports, targeted killing operations in Pakistan, Yemen, and Somalia, as well.<sup>15</sup>

Twelve years later, al Qaeda’s core has been effectively eviscerated—it is a group President Obama describes as “a shadow of its former self,”<sup>16</sup> and which the Director of National Intelligence testified before Congress as being “probably unable to carry out complex, large-scale attacks in the West.”<sup>17</sup> At the same time, the Taliban has been removed from power in Afghanistan, with the impending withdrawal of U.S. ground troops also heralding in a new phase in U.S. policy there. Increasingly, then, legal and policy debates over the AUMF have focused less and less on al Qaeda and the Taliban, and more and more on those groups and other actors that had nothing to do with the September 11 attacks, but pose a threat to U.S. interests *today*. Some of these groups can arguably be understood as covered by the AUMF to the extent that they are appropriately defined as an “associated force” of al Qaeda and the Taliban; others cannot unless the notion of “associated force” is stretched beyond recognition. The debate over the future of the AUMF has thus become one dominated by a discussion of “associated forces”—and the purported need for new use-of-force authorities to neutralize threats that have no connection to the September 11 attacks.

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13. See, e.g., Greg Miller & Karen DeYoung, *Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots*, WASH. POST, Mar. 7, 2013, at A1 (noting that law of war authorities pursuant to AUMF do not extend beyond al Qaeda, the Taliban, and associated forces; key debate, then, is over scope of “associated forces”).

14. See, e.g., John O. Brennan, Assistant to the President for Homeland Sec’y and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (emphasizing that “individuals who are part of al-Qaida or its associated forces are legitimate military targets”); see also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(1), 125 Stat. 1298, 1562; *Al Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010).

15. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, at A1.

16. President Barack H. Obama, State of the Union Address (Feb. 12, 2013), available at <http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html>.

17. See Hon. James R. Clapper, Director of National Intelligence, Statement for the Record: Worldwide Threat Assessment of the U.S. Intelligence Community, at 4 (Mar. 12, 2013), available at <http://www.intelligence.senate.gov/130312/clapper.pdf>.

## B. The Problem of “Associated Forces”

Most modern wars have involved more than two parties. Thus, in World War II, the United States was not just at war with Germany, Italy, and Japan; rather, the United States was also at war with their “co-belligerents,” *e.g.*, Bulgaria, Hungary, and Romania, among others.<sup>18</sup> Both the Bush and Obama Administrations have applied this notion of co-belligerency to the conflict authorized by the AUMF as well. Thus, whereas Congress in the AUMF referred only to “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,”<sup>19</sup> the past two administrations—with subsequent ratification by Congress with respect to detention authority<sup>20</sup>—have understood this language to encompass not just al Qaeda and the Taliban, but also those groups that are “associated forces” thereof. As Jeh Johnson explained in a 2012 speech, the U.S. government defines associated forces to include those (1) organized armed groups that have entered the fight alongside al Qaeda; and (2) are a co-belligerent with al Qaeda in the hostilities against the United States and its coalition partners.<sup>21</sup>

Critically, this definition excludes groups of two or more terrorists with no direct affiliation with al Qaeda, *e.g.*, the Tsarnaev brothers. Similarly, it excludes entities that share ideological affinities with al Qaeda but that do not engage in any hostilities against the United States or its coalition partners. That said, it is decidedly unclear who *is* covered. Whereas there was no question during the relevant period of World War II that the United States was at war with co-belligerents Bulgaria, Hungary, and Romania, the U.S. government has never publicly made clear which groups qualify as “associated forces” subject to the AUMF. Thus, the government first acknowledged that al Qaeda in the Arabian Peninsula (AQAP) qualified as an associated force in litigation, but even there equivocated as to whether AQAP was covered by the AUMF because it was “part of” al Qaeda or because it was an “associated force.”<sup>22</sup> There is even less certainty as to

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

19. AUMF § 2(a), 115 Stat. at 224.

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

21. *See* Johnson, *supra* note 7.

22. *See* Opposition to Plaintiff’s Motion for a Preliminary Injunction and Memorandum of the United States in Support of Defendants’ Motion To Dismiss at 1, *al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), available at <http://www.lawfareblog.com/wp-content/uploads/2010/09/usgbrief.pdf>

which, if any, of the many groups operating in the tribal areas of Northwest Pakistan so qualify, or whether and under what circumstances entities such as al Shabaab, al Qaeda in the Islamic Maghreb (AQIM), or the al-Nusra Front—or parts of such groups—might also be encompassed within the definition of “associated force.”

The absence of transparency as to the government’s application of that concept have led some to speculate that the executive branch will simply subsume “extra-AUMF” threats into the AUMF, shoehorning emerging threats into the increasingly outdated framework of the September 2001 statute simply by labeling them “associated forces.”<sup>23</sup> Were this to happen, the government could—despite the decimation of al Qaeda’s core and the withdrawal of all U.S. ground troops from Afghanistan—seek to rely on the AUMF as authority for offensive military operations in Mali, Somalia, or even Syria, to say nothing of operations in other corners of the globe with even less of a connection to those who attacked us on September 11. More to the point, such force would be targeted against groups that have not coordinated with al Qaeda or the Taliban in hostilities against the United States, and that had no connection to the September 11 attacks (if they even existed twelve years ago), the language of the AUMF notwithstanding.

To be clear, there is no indication that this shift has already taken place. But there is relatively widespread agreement that it would be an unsatisfactory state of affairs, if and when it does.<sup>24</sup> The more that the AUMF is used to justify the use of military force against those with no connection to the September 11 attacks and the ensuing armed conflict, the more it is a fig leaf obfuscating the extent to which the United States is engaged in uses of force unauthorized by and inconsistent with Congress, the Constitution, and international law. As we explain in Part III below, if new groups emerge that pose a threat sufficient to warrant independent use-of-force authority, the government should affirmatively—and publicly—identify them, and obtain from Congress specific authorization to use force against *those* groups. If, in contrast, no special use-of-force authority is needed to respond to these groups, then there is no need for an expanded AUMF.

**The proponents of the Hoover proposal, however, have seized upon a third**

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(“The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda . . .”).

23. See, e.g., CHESNEY ET AL., *supra* note 3, at 4 (“[I]n a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult (and hence subject to debate) in some cases, and downright impossible in others.”).

24. See, e.g., Miller & DeYoung, *supra* note 5 (“U.S. officials said administration lawyers are increasingly concerned that the law is being stretched to its legal breaking point, just as new threats are emerging in countries including Syria, Libya and Mali.”).

possibility: That the lack of transparency surrounding the identity of associated forces, coupled with the belief that the government *will* seek to use force against so-called “extra-AUMF” threats regardless of the underlying statutory authorization, together justify a new regime that would address both issues. Thus, the Hoover proposal holds itself out as a compromise in which Congress delegates to the President the power to identify those groups against which military force is necessary pursuant to specific statutory criteria, but requires such delegations to be public—transparent and accountable, with *ex post* auditing and reporting, as well. As the Hoover proposal concludes,

a listing system modeled on this approach best cabins presidential power while at the same time giving the president the flexibility he needs to address emerging threats. Such a listing scheme will also render more transparent and regularized the now very murky process by which organizations and their members are deemed to fall within the September 2001 AUMF.<sup>25</sup>

Although we agree wholeheartedly that greater transparency and accountability are necessary with regard to the government’s scope of authority to use force against “associated forces” under the AUMF, we utterly fail to see how such increased oversight and transparency would justify Congress delegating its war authorizing powers to the Executive or the types of open-ended or broad force authorizations that both the Hoover paper and proposals reportedly being floated behind the scenes in Congress advocate.<sup>26</sup> To the contrary, as we explain below, such an approach rests on an assumption we—and Congress should—vigorously dispute, *i.e.*, that no alternative means exist for achieving a comparable result. Indeed, not only do such alternatives exist, but these proposals paradoxically threaten to make the nation *less* safe in the long term.

### **III. THE CASE AGAINST OPEN-ENDED AUTHORITY TO USE FORCE**

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

*First*, it is not at all clear that the threat these “extra-AUMF” groups pose has evolved to justify a new declaration of armed conflict; notably, the Executive is not saying it is needed. *Second*, repeated claims to the contrary notwithstanding, law enforcement

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25. CHESNEY ET AL., *supra* note 3, at 10.

26. *See* sources cited *supra* note 6.

tools, coupled with international counterterrorism cooperation and capacity building, as well as strategic initiatives to reduce violent extremism, are and have proven to be a highly effective means of deterring, incapacitating, and gathering intelligence from terrorists; they can—and should—be the tools of first resort against these groups and their members. *Third*, to the extent that law enforcement tools are insufficient to prevent terrorist attacks against U.S. interests in a particular circumstance, the President’s self-defense authorities should provide more than adequate authority to take necessary action. *Fourth*, if an organized armed group emerges that poses the type of sustained, intense threat that justifies a declaration of armed conflict, Congress can pass a new and appropriately circumscribed authorization to use military force—just as it did in the AUMF. *Fifth*, and most importantly, it is not at all clear that the expanded use of military force as a matter of first resort achieves the United States’ ultimate security goal of protecting the nation from terrorist threats; to the contrary, it likely undermines it.

### **A. The Evolving Nature of the Threat**

The push for a new AUMF is premised on the notion that, as the Hoover paper puts it, while the “original objects of the AUMF are dying off, newer terrorist groups that threaten the United States and its interests are emerging around the globe.”<sup>27</sup> With this, we agree. The threat the United States faces from terrorism writ large has not been and cannot be eliminated by the decimation of al Qaeda’s core.

But while the world is hardly threat-free, it is simply not evident that any particular emerging terrorist groups—or self-radicalized individuals—pose the kind of threat to the United States that al Qaeda posed on September 11, *i.e.*, one that cannot be met with existing tools, but instead requires an open-ended authorization of military force and the invocation of the laws of armed conflict. In fact, according to the Director of National Intelligence’s recently released Intelligence Community Worldwide Threat Assessment, only AQAP is described as having the intent and capacity to launch attacks on the U.S. homeland.<sup>28</sup>

Moreover, under well-established rules of international law, a threat alone does not trigger an armed conflict, absent a certain level of hostilities that reach a threshold level of intensity involving an organized, armed group. This is for good reason: If any group of violent criminals triggered an armed conflict, virtually every nation-state would be in a perpetual state of war. A declaration of armed conflict against a long and/or open-ended list of emerging terrorist groups undermines the important distinction between war and peace, as well as the efforts to cabin war that have been the heart of the

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27. CHESNEY ET AL., *supra* note 3, at 1–2.

28. *See* Clapper, *supra* note 17, at 3–4.

international community's collective engagement since the end of the Second World War. It would change the default from peace to war.<sup>29</sup>

### **B. The Expansion of Law Enforcement Capacities and Capabilities Since 2001**

Claims to the contrary notwithstanding, law enforcement tools, coupled with other counterterrorism capabilities, are—and have proven to be—effective in dealing with a wide array of terrorist threats, including those also subject to military force under the AUMF. According to the Department of Justice's own statistics, for example, the United States has successfully prosecuted approximately 500 terrorists over the past decade, including several dozen who were apprehended overseas and/or arguably had connections to al Qaeda or its affiliates.<sup>30</sup>

More than just taking dangerous terrorists off the street, these arrests and prosecutions have also been the source of valuable intelligence about terrorist groups and their operations, due in part to the strong incentives for defendants to provide accurate, reliable information.<sup>31</sup> Recent examples include: Ahmed Warsame, who was captured off the coast of Yemen in 2011, transferred to the United States after a short period of military detention, and reportedly provided the government extensive intelligence and evidence prior to pleading guilty to providing material support to terrorism, among other charges;<sup>32</sup> Ibrahim Suleiman Adnan Adam Harun, an al Qaeda

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

30. Department of Justice data obtained by Human Rights First in response to FOIA request (on file with authors).

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

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

operative captured in Italy last year, extradited to the United States, and is reportedly cooperating with investigators;<sup>33</sup> and David Headley, who provided valuable information about the terrorist organization Lashkar y Tayyiba, and Pakistan-based terrorist leaders, prior to being sentenced to 35 years for his role in the 2008 terrorist attack in Mumbai, India, and another planned, but thwarted attack, in Denmark, and committed to continued cooperation.<sup>34</sup> And just a few months ago, Abu Ghaith, Osama bin Laden’s son-in-law, was taken into custody in Jordan, and is now being prosecuted in federal civilian court in New York for conspiring to kill Americans abroad.

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

- The so-called Foreign Intelligence Surveillance Act (FISA) wall, which was sharply criticized by the 9/11 Commission for inhibiting the sharing of intelligence and law enforcement information and thereby contributing to pre-September 11 law enforcement failures,<sup>35</sup> has come down. Thanks to amendments included in the USA PATRIOT Act of 2001, FISA now explicitly permits the coordination of law enforcement and intelligence officials to protect against acts of international terrorism,<sup>36</sup> and various statutory reforms over the past decade have only further facilitated such interagency cooperation.<sup>37</sup>

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

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

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

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

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

- The FISA Amendments Act of 2008 further authorized the government, albeit not without controversy, to engage in the warrantless interception of communications that take place in the United States if the targets are foreigners overseas. In a recent debate, Sen. Dianne Feinstein, Chairwoman of the Senate Intelligence Committee, described these authorities as having “produced and continu[ing] to produce significant information that is vital to defend the nation against international terrorism and other threats”—including information relied upon in making recent terrorism-related arrests.<sup>38</sup>
- Substantive criminal laws have evolved to respond to the changing nature of the threat. Material support statutes, for example, which have been interpreted broadly,<sup>39</sup> were expanded to cover overseas conduct in October 2001, with further expansions in 2004.<sup>40</sup> Additional substantive expansions to these laws were also added in 2004, including the addition of a new crime of “receiving military-type training from a foreign terrorist organization.”<sup>41</sup>
- In 2009, the High-Value Intelligence Group was put into effect—pulling together the expertise of top intelligence professionals across the government, including from the FBI, CIA, and DOD—to design and conduct intelligence interviews of high-value terrorism detainees.
- Federal courts have recognized an expanded “public safety” exception to *Miranda* to allow for the limited introduction into evidence of unwarned statements.<sup>42</sup>
- An increasing cohort of judges and civilian prosecutors has successfully navigated the handling of classified information. Obvious examples include the recent closed-door arraignment of three European men apprehended on their way to

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38. See Ellen Nakashima, *Senate Approves Measure to Renew Controversial Surveillance Authority*, WASH. POST, Dec. 28, 2012, at A3.

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

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

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

42. See, e.g., *United States v. Khalil*, 214 F.3d 111, 115–21 (2d Cir. 2000) (upholding questioning of terrorism suspect pursuant to public safety exception); *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243 (E.D. Mich., Sept. 16, 2011) (relying on the public safety exception to *Miranda* in rejecting motion to suppress statements obtained under 50 minutes of unwarned questioning).

Yemen and accused of supporting al Shabaab,<sup>43</sup> and the extensive handling of classified information in the prosecution of Ahmed Ghailani, now serving a life sentence for his role in the 1998 embassy bombings.<sup>44</sup> But other examples abound.<sup>45</sup>

- Meanwhile, widely cited fears about the potential harm of bringing high-profile terrorism suspects into federal court have proven baseless. Not a single terrorist trial has been attacked, and not a single terrorism suspect or convict has escaped.

To be sure, intelligence gathering capacities are still imperfect—as the Boston Marathon bombings show all too harshly. But the Boston episode underscores a critical point lost to many critics: the shortcomings in law enforcement tools generally stem from shortcomings in anticipatory knowledge, *i.e.*, the government’s ability to know in advance of any and all potential attacks. This is a problem that affects law enforcement and military uses of force *alike*. Where the government *does* have knowledge of a threat to the nation’s security, law enforcement tools have proven to be effective in both incapacitating threatening actors and gathering intelligence that can help thwart other attacks.

### **C. The President’s Unquestioned Self-Defense Authorities**

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

Indeed, it is well settled that the President has inherent authority under Article II of the U.S. Constitution and Article 51 of the U.N. Charter to take immediate—and, where necessary, lethal—action in defense of the nation. As the Supreme Court explained 150

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

44. See Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 25, 2011, at A18.

45. See, *e.g.*, United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008).

years ago, “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”<sup>46</sup> President Bush would have required no statute to shoot down the planes headed to the World Trade Center on September 11; President Obama would have required no statute to defend U.S. diplomats from attack in Benghazi. The failure to do so in either tragic episode was not the result of insufficient authorities, but insufficient intelligence in advance of the attacks.

Take, moreover, the type of situation with which the Hoover proposal seems most concerned: a terrorist group that does not neatly fall within the AUMF, but is poised to carry out an imminent and lethal attack on the U.S. homeland from a part of the world in which nonmilitary means of thwarting the attack are unavailable. In such a situation, the President could—and should—take action, consistent with the international law requirements of necessity and proportionality, without waiting for a new congressional authorization to use force. We, too, worry about such a hypothetical, but we fail to why, on those facts, self-defense authorities would be inadequate.

#### **D. Congress’s Ability to Pass a Group-Specific AUMF If and When It Is Needed**

Moreover, even if such a group *were* to emerge, nothing would or should stop Congress from providing a new, narrow, and specific authorization to use force, just as it did within three days of the September 11 attacks, based on a case-specific determination that the target of the force authorization is an organized armed group that presents the type of sustained, significant threat justifying the affirmative declaration of an armed conflict.

Proposals to delegate such future—and momentous—decisions to the President lack *any* historical precedent, and for good reason. It is *Congress*, not the Executive, that is given the authority under our Constitution to declare war. An authorization to use military force is a measure that should be undertaken solemnly, and only with public debate and buy-in by representatives of a cross-section of the nation, based upon a careful and deliberate evaluation of the nature of the specific threat. It should not be an *ex ante* delegation to the President to make unreviewable decisions to go to war at some future date. This is something our Founding Fathers understood well. Thus, proposals to delegate such a determination to the President threaten the carefully calibrated balance of powers enmeshed within the Constitution, essentially asking Congress to surrender one of its most important functions to the Executive.

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

The authors of the Hoover proposal nevertheless respond that Congress can't be expected to act with sufficient dispatch: "Congress probably cannot or will not, on a continuing basis, authorize force quickly or robustly enough to meet the threat, which is ever-morphing in terms of group identity and in terms of geographic locale."<sup>47</sup> And yet, no examples exist of cases where Congress either could not or would not provide the necessary authority—or why, in the interim, the President's Article II authorities, criminal laws, and other existing counterterrorism authorities weren't sufficient to meet the threat. Until and unless Congress is besieged with requests to authorize the use of military force against a range of terrorist groups, each of which presents a threat akin to that posed by al Qaeda a decade ago, and fails to act on them, it is difficult to see why case-specific use-of-force authorizations would be inadequate.

### **E. Why a New AUMF Would Also Be Unwise**

Up to this point, our analysis has focused on the many reasons why a new AUMF is not needed. Such a measure would also be counterproductive and unwise. Most importantly, an open-ended declaration of armed conflict actually runs the risk of *undermining* our principal counterterrorism goal—*i.e.*, protecting this and future generations of Americans from the threat of international terrorism.

In recent testimony before a subcommittee of the Senate Judiciary Committee, Farea al-Muslimi, a freelance journalist from Wassab, Yemen, provided a stark reminder of this risk. Mr. al-Muslimi painted a vivid description of the ways in which a recent drone strike in his village invoked terror of the United States. As he put it: "Had the United States built a school or hospital, it would have instantly changed the lives of my fellow villagers for the better and been the most effective counterterrorism tool."<sup>48</sup> Instead, he warns that the strikes are strengthening AQAP's standing and undercutting U.S. security: "AQAP recruits and retains power through its ideology, which relies in large part on the Yemeni people believing that America is at war with them."<sup>49</sup>

Mr. Muslimi is not alone in his views. He is joined by none other than General Stanley McChrystal, former commander of U.S. forces in Afghanistan; General James E. Cartwright, former Vice-Chairman of the Joint Chief of Staff; and Admiral Dennis Blair,

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47. CHESNEY ET AL., *supra* note 3, at 10.

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

49. *Id.*

former Director of National Intelligence—all of whom have warned of the ways in which excessive reliance on uses of force in general, and targeted killings in particular, can increase or otherwise engender resentment toward the United States.<sup>50</sup> These men echo the lessons of the U.S. Army’s Counterinsurgency Manual, which describes the recuperative power of insurgent groups, the impossibility of killing every insurgent, and the potential counterproductive consequences of such attempts.<sup>51</sup>

Other counterproductive consequences include the risks of further destabilizing already unstable regimes, increased international condemnation, and the very real possibility of reduced counterterrorism cooperation as a result. Already, there are indications that some key allies are nervous about providing the United States with intelligence information that might be used as a basis for drone strikes.<sup>52</sup> In fact, Germany reportedly restricted the type of information it can pass on to its American counterparts in response to concerns about its intelligence being used to support what it deemed to be illegitimate drone strikes.<sup>53</sup> Meanwhile, it sets a disturbing precedent for other sovereigns—strengthening the claims of Russia and China, among others, to use

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

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

52. See, e.g., Ravi Somaiya, *Drone Strike Prompts Suits, Raising Fears for U.S. Allies*, N.Y. TIMES, Jan. 30, 2013, at A4.

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

force as a matter of first resort against any member of groups they deem to be “terrorist,” broadly defined.<sup>54</sup>

#### **IV. THE BETTER WAY FORWARD**

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

##### **A. A More Transparent AUMF**

For all the reasons described in Part I, the AUMF, coupled with law enforcement and intelligence tools and backstopped by the President’s inherent Article II authorities, have proven to be a more than adequate basis for addressing the threat posed by organized terrorist groups since September 11. Should an organized armed group emerge that cannot adequately be dealt with through these existing authorities, the President would be able to ask, and Congress would be in a position to grant, authorization to deal with the threat posed by that specific group. Notably, the Obama Administration does not appear to think that such a situation exists at the present, and is not asking for new, expanded authority. Never before has Congress declared war against an enemy when the President has not asked it to do so.

That said, there is a legitimate concern about the lack of transparency in how the AUMF is being interpreted, especially with regard to which groups qualify as associated forces. The United States should not be engaged in a secret war. Such secrecy flies in the face of the most fundamental aspect of the rule of law—fair notice—while also generating suspicion and distrust. The American public should be aware of, and thus able to publicly discuss and debate, the groups that we are fighting. Meanwhile, innocent civilians should be given the benefit of notice, thereby allowing them to take steps to disassociate themselves from those groups (and the members thereof) with which the United States deems itself to be in an armed conflict. Either the President should take it upon himself to make public any determination that a particular group qualifies as an associated force of al Qaeda or the Taliban under the AUMF, or Congress should demand it.

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

## B. An Afghanistan-Based AUMF Sunset

An alternative option would be for Congress to write a sunset provision into the AUMF—one that is tied to the withdrawal of forces from Afghanistan, currently scheduled for the end of 2014. This approach has intuitive appeal, given the range of concerns about an open-ended and ever-expanding armed conflict without an identifiable battleground or core center of operations. The long lag time before the authorities actually sunset would provide the Executive ample opportunity to determine what, if any, additional authorities are needed to deal with the threat, and would leave Congress ample time to respond.

One issue that arises with the approach, however, is the question of the Guantánamo detainees. With the formal cessation of hostilities comes the end of the authority to detain under the laws of war—and, therefore, under the AUMF. While this will be a cause for celebration for many, it is likely to be a cause of concern for some members of Congress and the Executive. A 2009 review conducted by the Obama Administration concluded that of the 166 detainees still at Guantánamo, some four dozen were deemed “too dangerous to release” but ineligible for prosecution. While conditions may have changed since that assessment was made, and some reasonable “wind-down” authority will almost certainly be permitted,<sup>55</sup> at some point that authority *will* cease. That said, the government’s interest in continued detention pursuant to the laws of war ought not be the *reason* for the war—this would be a perverse example of the tail wagging the dog. We note that it would probably be feasible to negotiate deals to keep these detainees under surveillance, particularly with the use of sophisticated intelligence and law enforcement tools, so long as we could find a nation to take them.

It is worth noting, however, that this issue may soon arise whether or not Congress formally sunsets the AUMF. In *Hamdi v. Rumsfeld*,<sup>56</sup> the Supreme Court concluded that the authorization to use force includes the authority to detain, a plurality of the court also warned that “[i]f the practical circumstances of a given conflict [meaning boots on the ground] are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”<sup>57</sup> With the withdrawal

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

56. 542 U.S. 507 (2004).

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

of troops from Afghanistan, the relevant practical circumstances will have in fact changed, and may yield a turning point with respect to the Guantánamo detainees (especially those whose detention is based upon ties to the Taliban rather than al Qaeda), regardless of whether the AUMF sunsets.

A sunset provision has the obvious benefit of making clear to our allies and to the pool of would-be terrorist recruits that, twelve years on, the United States is not engaged in, or seeking to engage in, a state of perpetual war. More significantly, it also drives home the larger point—that at some point, perhaps soon, the conflict Congress authorized in September 2001 will effectively have run its course. The Executive could, of course, treat the AUMF as lapsed, even without such legislation.

### **C. Repeal and Replace**

A final, albeit suboptimal, option would be to repeal the AUMF and replace it with an AQAP-specific authorization. So long as the AUMF remains on the books, AQAP's apparent inclusion as an "associated force" provides authority for the United States to use military force against it, and thereby moots the need for an AQAP-specific statute. But if Congress were to pursue an AUMF sunset or if the current AUMF were otherwise determined to have lapsed, it is possible the Obama Administration would pursue such an authorization, given that AQAP is the one terrorist group currently deemed to have the capacity and intent to launch attacks on the U.S. homeland, according to the recent Intelligence Community Worldwide Threat Assessment. The threat is qualified, however. As the Assessment describes, AQAP leaders will have to "weigh the priority they give to US plotting against other internal and regional objectives," along with limits on the number of their members who are in a position to operationalize U.S. attacks."<sup>58</sup>

In any event, such an authorization should only be adopted after public debate and discussion, based on legislative determinations that AQAP poses the type of sustained, intense threat that justifies the application of law-of-war tools, and that a declaration of armed conflict is in the nation's best security interests. *If* the facts (and the public) support it, an AQAP-specific authorization would be the type of *narrow and specific* authorization that we have argued for throughout, and would be far preferable to the more expansive (if not potentially limitless) proposals also under consideration.

That said, Mr. Muslimi's testimony before the Senate Judiciary Committee, taken together with the comments of Blair, Cartwright, and McChrystal, among others, provide an important moment of pause, and a reminder of why Congress should be cautious before embracing this approach. As they all note, targeted killing operations

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58. Clapper, *supra* note 17, at 3–4.

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

## V. CONCLUSION

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

Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. *This result is not inevitable, however.* The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.<sup>59</sup>

It seems beyond dispute that the target of Justice Kennedy’s rhetoric was the AUMF—and the very real possibility that, absent thoughtful legislative intervention, the courts would soon have to confront questions that they have historically sidestepped about the scope of use-of-force authorizations during wartime. And yet, next month marks the fifth anniversary of the *Boumediene* decision, and the AUMF remains in full force. The time has come to take up Justice Kennedy’s invitation—to “engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.” Reasonable minds will certainly disagree about the right answer, but an open-ended and unnecessary expansion of the AUMF is clearly the wrong one.

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59. *Boumediene v. Bush*, 553 U.S. 723, 797–98 (2008) (emphasis added).