

2014

The Long Arm of the Law: Executive Overreach and the AUMF

Tyler McBrien
Claremont McKenna College

Recommended Citation

McBrien, Tyler, "The Long Arm of the Law: Executive Overreach and the AUMF" (2014). *CMC Senior Theses*. 934.
http://scholarship.claremont.edu/cmc_theses/934

This Open Access Senior Thesis is brought to you by Scholarship@Claremont. It has been accepted for inclusion in this collection by an authorized administrator. For more information, please contact scholarship@cuc.claremont.edu.

CLAREMONT McKENNA COLLEGE

**THE LONG ARM OF THE LAW:
EXECUTIVE OVERREACH AND THE AUMF**

SUBMITTED TO
PROFESSOR JENNIFER TAW
AND
DEAN NICHOLAS WARNER
BY
TYLER McBRIEN

for
SENIOR THESIS
Spring 2014
April 28, 2014

TABLE OF CONTENTS

Acknowledgements	4
Abstract	5
Introduction	6
Part I: Constitutional Interpretations of War Powers and Historical Trends	9
<i>Constitutional War Powers of the Executive & Legislative Branches</i>	9
<i>Pro-Congress Interpretations</i>	10
<i>Pro-Executive Interpretations</i>	11
<i>Consolidation of War Powers in the Executive</i>	
a.) <i>Presidential Action</i>	12
b.) <i>Congressional Complicity</i>	15
c.) <i>Other Explanations</i>	19
Part II: AUMF as a Bridge Too Far	22
a.) <i>Targets</i>	22
b.) <i>Purpose of the Use of Force</i>	26
c.) <i>Geographical Scope</i>	32
d.) <i>Military Resources and Methods of Force</i>	33
e.) <i>Timing and Procedural Restrictions</i>	38
Part III: The Need for Repeal	40
<i>Arguments for Keeping the AUMF</i>	40
<i>Legal and Ethical Arguments Against the AUMF</i>	42
<i>Pitfalls of a Perpetual State of War</i>	43
Part IV: Policy Options for Congress and the President	48
<i>Criteria for Policy Options</i>	49
<i>Policy Options</i>	
a.) <i>Status quo</i>	50
b.) <i>Repealing the AUMF</i>	55
I. <i>Actions for Congress</i>	59
II. <i>Actions for the President</i>	62
Conclusion	64
Bibliography	66

Acknowledgements

First and foremost, I would like to thank Professor Jennifer Taw for giving me guidance in my academic career, tireless support in the completion of my thesis, and even her couch for my dorm room. Her backing has made my thesis process an incredibly enjoyable and stimulating one. I hope to continue to call Professor Taw my mentor for years to come. I would also like to thank my academic advisor, Professor Jonathan Petropoulos, for supporting me through my most formative years at CMC. Finally, I would like to thank my family for their support and my friends for a wonderful four years in Claremont.

Abstract

Since World War II, the executive branch has dominated foreign policy and national security decisions, expanding war powers well beyond the president's constitutional purview. Aided by a complicit Congress, the president has bypassed the legislator and unilaterally prosecuted some of the United States' bloodiest conflicts. Continuing this tradition of executive overreach, Congress passed the Authorization for the Use of Military Force (AUMF) on September 14, 2001, which ostensibly empowered the president to pursue those responsible for the 9/11 attacks, namely al Qaeda and the nations supporting them. However, the broadly-worded force authorization and equally far-reaching legal interpretations by the executive branch turned the AUMF into a nearly limitless authorization. Since its passage, the AUMF has provided the legal backstop for the war in Afghanistan, drone strikes in Yemen, Somalia, Pakistan, and elsewhere, National Security Agency surveillance, and the Guantanamo Bay detention facility. Enabled by the AUMF, the "war on terror" has eroded civil liberties, allowed extrajudicial killings, and transformed the conflict with al Qaeda war without end. In order to end the destructive legacies of the war on terror and begin to reverse the trend of executive overreach, Congress and the president should repeal the AUMF and update the force authorization regime.

Introduction:

On September 14, 2001, just days after the terrorist attacks on the World Trade Center, both houses of the United States Congress passed the Authorization for Use of Military Force Against Terrorists, now known in shorthand as the AUMF, with only a single vote against.¹ The lone dissenter, Representative Barbara Lee from California's 13th district, who was still a relatively junior representative at the time, voiced her deep concern and trepidation over the proposed bill.² Arguing for restraint, Lee urged, "There must be some of us who say, let's step back for a moment and think through the implications of our actions today—let us more fully understand their consequences." She continued, "We cannot respond in a conventional manner. I do not want to see this spiral out of control . . . If we rush to launch a counterattack, we run too great a risk that women, children, and other non-combatants will be caught in the crossfire."³ Lee then closed her speech with an aphorism she had heard earlier in the day from priest Nathan Baxter during a memorial service for the victims of the attack: "As we act, let us not become the evil that we deplore."⁴

The AUMF in its original form has remained intact and relatively uncontested for over 12 years. John Bellinger III, close advisor to Condoleezza Rice and the Bush Administration and critic of the legislation, said, "[The AUMF] is like a Christmas tree.

¹ This paper will use the abbreviation "AUMF" to refer to the "Authorization for the Use of Military Force," Public Law 107-40, September 18, 2001, <<http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>>.

² Gregory D. Johnsen, "60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History," *Buzzfeed*, January 16, 2014, <<http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most>>.

³ Barbara Lee, "Rep. Barbara Lee's Speech Opposing the Post 9-11 Use of Force Act," *Waging Peace*, September 14, 2011, <http://www.wagingpeace.org/articles/2001/09/14_lee-speech.htm>.

⁴ *Ibid.*

All sorts of things have been hung off of those 60 words.”⁵ Since its passage in 2001, the AUMF has provided the legal underpinnings for the prosecution of the war in Afghanistan, the detention of suspected enemy combatants at Guantanamo Bay, the drone strike program in Pakistan, Yemen, and elsewhere, and the NSA surveillance program.⁶ In a May 2013 speech to the National Defense University, President Obama cautioned against “[continuing] to grant Presidents unbound powers more suited for traditional armed conflicts between nation states,” and voiced his desire to “[engage] Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate.”⁷ But President Obama failed to specify what an amended or entirely new AUMF would look like, and debates in legal, political, and moral realms still persist as to whether the U.S. government should repeal, replace, amend, or keep the current authorization.

This paper aims to frame the AUMF debate within the historical trend of the consolidation of war powers in the executive branch. In the development of this gradual power shift, the AUMF represents a bridge too far by establishing new heights of executive overreach. In order to repel the steady march of the imperial presidency, Congress should repeal the AUMF and establish a system of force authorizations that engage Congress through statutory measures. Part I of this paper will analyze pro-Executive and pro-Congress interpretations of war powers and the historical trend toward the consolidation of warmaking authority in the executive branch. Part II will explain the AUMF in the context of this historical trend and explain how this legislation has set new

⁵ Johnsen, “60 Words and a War Without End.”

⁶ All of these topics will be discussed at length throughout the paper.

⁷ Barack Obama, “Remarks by the President at the National Defense University,” National Defense University, Washington, D.C., May 23, 2013, <<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>.

precedents of executive war powers. Part III will explore arguments against the AUMF to address the need for repeal. The final part of the paper will explore current proposals for reform and offer a policy recommendation.

Part I: Constitutional Interpretations of War Powers and Historical Trends

Constitutional War Powers of the Legislative & Executive Branches

While the AUMF represents a new level of executive overreach, the imbalance of power in the branches of the U.S. government on matters of foreign policy and national security has steadily increased throughout U.S. history, in spite of the original intent of the Framers. The Founding Fathers sought to establish a balance of power and a system of checks and balances in all realms of American politics, both domestic and international. In foreign policy and national security issues, the Constitution authorizes Congress to “declare War . . . and make Rules concerning Captures on Land and Water,” “to raise and support Armies,” appropriate money, and to “provide and maintain a Navy.”⁸ The Constitution also requires the President to act in certain capacities with the “Advice and Consent” of two-thirds of the Senate.⁹ The President in turn serves as “Commander in Chief of the Army and Navy of the United States.” At the Philadelphia Constitutional Convention, James Wilson praised the overlapping war powers and said, “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.”¹⁰ Given these provisions and delegations of power, the Constitution, in principle, safeguards against an executive acting unilaterally, risking the country’s soldiers, wealth, and interests abroad.

⁸ Constitution of the United States,
<http://www.archives.gov/exhibits/charters/constitution_transcript.html>.

⁹ *Ibid.*

¹⁰ Bruce A. Ackerman *et al.*, “Ronald V. Dellums v. George Bush (D.D.C. 1990): Memorandum Amicus Curiae of Law Professors” (1991). *Faculty Publications*. Paper 751.
<<http://scholarship.law.wm.edu/facpubs/751>>.

Pro-Congress Interpretations

Though few disagree with the constitutional establishment of checks and balances in some aspects of U.S. policymaking and government, many war powers scholars still disagree on the Framers' intention for the delegation of war powers between the executive and legislative branches. Even the courts have remained generally silent in this debate, "especially during wartime, when the consequences of a constitutional error are potentially enormous."¹¹ "Pro-Congress" interpretations of war powers posit that the president is obligated by law to obtain some type of formal authorization from Congress before engaging in any significant military action.¹² Looking at the original intent of the Constitution, pro-Congress advocates contend that the Framers separated war powers for fear that the president, "whose powers balloon unnaturally in wartime, has a dangerous incentive to contrive and publicize bogus pretexts for war."¹³ Therefore, pro-Congress interpreters of the Constitution hope to check presidential war powers both before and during hostilities.

Proponents of this interpretation do not always connect the congressional authorization requirement to formal declarations of war; however, they do see an authorization to use force as a necessary "mechanism for Congress to 'constitutionally manifest its understanding and approval for a presidential determination to make war.'"¹⁴ The President acts as Commander in Chief, but as former Virginia Senator Jim Webb

¹¹ Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review*, Vol. 118, No. 7, (May 2005), 2051.

¹²*Ibid.*, 2057.

¹³ Stephen Holmes, "John Yoo's Tortured Logic," *The Nation*, April 13, 2006, <<http://www.thenation.com/article/john-yoos-tortured-logic>>.

¹⁴ Bradley and Goldsmith, "Congressional Authorization," 2057.

points out, “only in the sense that he would be executing policies shepherded within the boundaries of legislative powers.”¹⁵ This pro-Congress interpretation vests the power to initiate war solely in Congress, leaving the President only two distinct powers: conducting a congressionally authorized war and responding to sudden or surprise attacks. These arguments maintain congressional supremacy in war powers and bring the legislative branch into the foreign policy fold by requiring the branches to work in tandem on national security issues.

Pro-Executive Interpretations

In the “pro-Executive” understanding of constitutional war powers, the president, as “Commander in Chief of the Army and Navy of the United States” has broad authority and latitude to employ military force in response to threats, whether responsively or preventively, to the national security and foreign interests of the United States.¹⁶ These arguments place little emphasis on the necessity of congressional authorizations of force, especially in times of emergency, which call for rapid military responses. Many pro-Executive advocates point to the Federal Constitutional Convention in 1787 as proof of original pro-Executive intent, when the Framers of the Constitution substituted Congress’ power to “make war” for an ability to “declare war.”¹⁷ Debates during the convention concluded that legislative processes may prove too slow to respond to sudden attacks, yet

¹⁵ Jim Webb, “Congressional Abdication,” *The National Interest*, (March/April 2013), 8.

¹⁶ Robert J. Delahunty and John C. Yoo, “The President’s Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them,” *Harvard Journal of Law & Public Policy*, Vol. 487, (2001), 490.

¹⁷ Office of the Legal Adviser, Department of State, “The Legality of the United States Participation in the Defense of Vietnam,” *The Yale Law Review*, Vol. 75, No. 7, (Jun. 1966), 1101.

many dissenters still warned against unilateral executive military action.¹⁸ Preeminent pro-Executive scholar and co-author of the AUMF John Yoo has advocated for the president's "'inherent executive power' to decide on his own whether to 'deploy military force preemptively'" and has vigorously defended the "president's 'right' to 'start wars.'"¹⁹ Yoo supports his pro-Executive claim with notable historical precedents and the argument of national self-defense through retaliation or preemptive measures to repel imminent attacks.

Consolidation of War Powers in the Executive:

a.) *Presidential Action*

While constitutional law scholars debated pro-Congress and pro-Executive interpretations, presidents since World War II have charged ahead, consolidating power by setting precedents and acting autonomously in the arenas of foreign policy and national security. In a famous example of pro-Executive activism, a 1966 memorandum from President Johnson's State Department claimed:

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization . . . The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.²⁰

Indeed, history corroborates Johnson's memorandum, and the trend of executive deployment of troops with or without congressional authorization has continued well into

¹⁸ *Ibid.*, 1101.

¹⁹ Stuart Streichler, "Mad About Yoo, or, Why Worry about the Next Unconstitutional War?" *Journal of Law & Politics*, Vol. 24, (Winter 2008), 93-94.

²⁰ Office of the Legal Adviser, 1101.

the 21st-century. In the early 1950s, President Truman prosecuted a war in Korea involving 250,000 American troops and, later that same decade, President Eisenhower sent 14,000 troops to Lebanon—all without congressional authorization.²¹ Not wanting to weaken the presidency through legislative approval, President Truman both refused to seek congressional authorization for his exploits in Korea and brushed aside congressional overtures when an authorization was offered.²² In 1999, President Clinton, also lacking congressional authorization, ordered military action in the Republic of Yugoslavia and claimed that he took such actions “pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”²³ The resulting hostilities implicated over 30,000 American troops and roughly 800 U.S. aircraft, deploying over 23,000 bombs and missiles.²⁴

Another notable example occurred in 2002, when the White House Counsel’s Office under the Bush administration claimed that the president retained congressional authorization to prosecute an invasion in Iraq from the joint resolution that authorized the first Persian Gulf War back in 1991.²⁵ At the time, a senior administration official explained, “We don’t want to be in the legal position of asking Congress to authorize the use of force when the president already has that full authority. We don’t want, in getting a resolution, to have conceded that one was constitutionally necessary.”²⁶ As a secondary line of defense, the Bush administration issued a legal brief citing the president’s Article

²¹ *Ibid.*, 1101.

²² Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate*, (Ann Arbor: University of Michigan Press, 2005), 50.

²³ Delahunty and Yoo, “The President’s Constitutional Authority,” 504.

²⁴ *Ibid.*, 504.

²⁵ Mike Allen and Juliet Eilperin, “Bush Aides Say Iraq War Needs No Hill Vote,” *Washington Post*, August 26, 2002.

²⁶ *Ibid.*

II authority as legal justification to deploy armed forces to Iraq: “Irrespective of any Congressional assent, the President has broad powers as Commander in Chief of the Armed Forces under the Constitution that would justify the use of force in Iraq.”²⁷ Offering two lines of legal justification, the Bush administration was resolute in its claim to bypass Congress. Though Congress ultimately passed an authorization for the use of force in Iraq in 2002, the fact that the Bush administration considered the approval of Congress for an entirely different war from the one authorized 11 years prior as a “concession” rather than a constitutional obligation showed a stunning circumvention of congressional war powers.

This trend has continued well into the Obama administration. In 2011, President Obama sidestepped Congress and ordered a military air campaign in Libya, causing many journalists and critics to speculate that President Obama had violated the War Powers Resolution.²⁸ In a 38-page memorandum distributed to lawmakers, the White House defended its “constrained and supporting role in a multinational coalition” and claimed that the President’s actions did not violate the War Powers Resolution “because U.S. military operations [in Libya] are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60 day termination provision.”²⁹ However, this “constrained and supporting role” cost the U.S. military nearly \$1 billion, raising questions about the true

²⁷ Rudalevige, *The New Imperial Presidency*, 2.

²⁸ See for example Conor Friedersdorf, “Obama Fails to Justify the Legality of War in Libya,” *The Atlantic*, June 16, 2011, and Charlie Savage, “War Powers Act Doesn’t Apply for Libya, Obama Says,” *The New York Times*, June 15, 2011.

²⁹ “White House Report on U.S. Actions in Libya,” June 15, 2011, <http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERES_DOC.html?ref=politics>.

extent of the Obama administration's intervention.³⁰ Irrespective of whether or not the Obama Administration violated the War Powers Resolution, the White House sent the explanatory document after the fact and failed to engage Congress in meaningful dialogue before commencing the intervention. Additionally, the Obama Administration carried out the military intervention even though the United States did not face an imminent attack or threat.

b.) *Congressional Complicity*

Bold presidential action did not occur in a vacuum. The consolidation of war powers resulted from an energetic executive as well as a complicit Congress. At a 2013 conference at the Wilson Center on reasserting the role of Congress in war powers, Senator Bob Corker lamented the fact that “what’s happened over time with Congress in general is that we have no ownership whatsoever over the conflicts that exist.”³¹ Polarization in the legislative branch has adversely affected its control over the power to initiate military action. In a general trend, legislators have pursued unachievable and overly idealistic policy goals, capitalized on foreign policy issues for political gains, and evaded political consequences in decision-making.³² Apart from declaring lofty grand strategies for appearances for presidential hopefuls, Congress has shied away from the important decisions, tending to place the responsibility and blame with the president.³³ In their book *Our Own Worst Enemy: The Unmaking of American Foreign Policy*, authors

³⁰ John Barry, “America’s Secret Libya War,” *The Daily Beast*, August 30, 2011, <<http://www.thedailybeast.com/articles/2011/08/30/america-s-secret-libya-war-u-s-spent-1-billion-on-covert-ops-helping-nato.html>>.

³¹ “AUMF: Reasserting the Role of Congress,” Woodrow Wilson Center, July 11, 2013, 4.

³² I.M. Destler, Leslie H. Gelb, and Anthony Lake, *Our Own Worst Enemy: The Unmaking of American Foreign Policy*, (New York: Simon and Schuster, 1984), 130.

³³ *Ibid.*, 130.

I.M. Destler *et al* chronicle this “irresponsibility” of Congress in the foreign policy arena especially in the two decades following World War II, which marked the “golden years for the foreign-policy Establishment and for the Executive Branch” and “years of deference if not abstinence” for the legislative branch.³⁴ Most notably, when President Truman unilaterally sent troops to Korea, Congress sat on the sidelines. Satisfied to receive briefings from deputy assistant secretaries of State, Congress simply acquiesced, as they let President Truman carry out the fourth-bloodiest war in American history.³⁵

Though the President has employed military force without the consent of Congress, the majority of conflicts since the Korean War have occurred with formal congressional authorization. Paradoxically, these congressional authorizations have consolidated executive power even further, because, as Stephen Holmes points out in his critical article of John Yoo called “John Yoo’s Tortured Logic,” “legislative complicity has generally proved more useful to the President than to Congress.”³⁶ In 1964, Congress passed the Gulf of Tonkin Resolution, which authorized the President to “take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” and provided the legal foundation for the prosecution of the Vietnam War.³⁷ Compared to previous congressional authorizations of force in both declared and undeclared wars, the Gulf of Tonkin Resolution, until its repeal in 1971, was “arguably broader or at least more open-ended with respect to targets and purpose.”³⁸

With the exception of two dissenting senators, including Senator Wayne Morse who

³⁴ *Ibid.*, 130.

³⁵ *Ibid.*, 130.

³⁶ Holmes, “John Yoo’s Tortured Logic.”

³⁷ “The Wars for Vietnam: The Senate Debates the Tonkin Gulf Resolution, August 6-7, 1964,” Vassar College, accessed April 27, 2014, <<http://vietnam.vassar.edu/overview/doc9.html>>.

³⁸ Bradley and Goldsmith, “Congressional Authorization,” 2076.

warned against the “great mistake in subverting and circumventing the Constitution of the United States,” the resolution passed easily.³⁹ With its far-reaching implications, the Gulf of Tonkin Resolution perfectly illustrated Congress’ deference to the President in issues of war and national security, whether the President consulted the legislative body or not.

These harsh criticisms of congressional deference in the Gulf of Tonkin Resolution are usually tempered with the apologetic claim that the force authorization led to the War Powers Resolution, which ultimately curbed presidential discretion in initiating war. In 1973, Congress passed the resolution and overrode a veto from President Nixon. The legislation limited Presidential deployment of troops without congressional authorization to sixty days. After its passage, members of Congress trumpeted a great victory for the reclamation of war powers in the legislative branch.⁴⁰ The first part of the War Powers Resolution claims that the law guarantees “that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”⁴¹ The landmark legislation did mark a distinct line in the sand, at least rhetorically, for the expanding executive war powers. However, a 2012 Congressional Research Service report on presidential compliance with the War Powers Resolution concluded that the celebrated legislation did not have nearly the intended effect. From 1975 through mid-September 2012, only one out of 136 submitted presidential reports actually triggered the time limit in section 4(a)(1) of the

³⁹ “The Wars for Vietnam: The Senate Debates the Tonkin Gulf Resolution, August 6-7, 1964.”

⁴⁰ Destler, Gelb, and Lake, *Our Own Worst Enemy*, 134.

⁴¹ “War Powers,” United States Library of Congress, last updated February 28, 2014, <<http://www.loc.gov/law/help/war-powers.php>>.

War Powers Resolution.⁴² Though many hail the legislation as a great check on the executive, presidential compliance has proved difficult to enforce.

Congressional deference, or “abdication” as former Senator Jim Webb calls it, and executive overreach intensified once again after the September 11 attacks with the “war on terror” and the passage of the AUMF. A part of the military establishment himself as Secretary of the Navy, Senator Webb described the political landscape immediately after September 11, 2001:

Powers quickly shifted to the presidency as the call went up for centralized decision making in a traumatized nation where quick, decisive action was considered necessary. It was considered politically dangerous and even unpatriotic to question this shift . . . Members of Congress fell all over themselves to prove they were behind the troops and behind the wars.⁴³

This crisis-stricken environment gave birth to the new post-September 11 governance, which bolstered the pro-Executive interpretation of war powers and exacerbated the imbalance of power. The beginning of the new AUMF governance occurred in part because of congressional abdication in the critical days after the September 11 attacks. Despite initial pushback from a much broader White House AUMF proposal in the hours following the attack, Congress passed the little deliberated force authorization with only one dissenting vote from either house.

After the passage of the broadly worded 2001 AUMF, members of Congress remained silent during the passage of the 2002 authorization for the use of force in Iraq. Even though Congress had voted for the use of force, many claimed that the president

⁴² Richard F. Grimmett, “The War Powers Resolution: After Thirty-Eight Years,” Congressional Research Service, September 24, 2012, < <http://www.fas.org/sgp/crs/natsec/R42699.pdf>>.

⁴³ Webb, “Congressional Abdication,” 9.

still held the power to decide whether or not to act on the authorization. After the vote, Senate Majority Leader Tom Daschle commented, “Regardless of how one may have voted on the resolution last night, I think there is an overwhelming consensus . . . that while [war] may be necessary, we’re not there yet.”⁴⁴ Despite Senator Daschle’s insistence that the time had not yet come for war, once the President Bush deployed troops, Congress played a marginal to absent role in the proceeding events. During some of the most critical times of the war, the *Congressional Record* reveals almost no debate of the military engagement. In *The New Imperial Presidency*, author Andrew Rudalevige recounts his close reading of the *Congressional Record* during this important time:

The Senate spent most of mid-March debating the emotionally polarizing but substantively limited question of partial-birth abortion procedures. The House of Representatives had its official photograph taken, named a room after former majority leader Richard Armey, and expressed its unanimous sense that fires in nonresidential buildings and executions conducted by stoning were bad things.⁴⁵

Congressional abdication came at a time when the United States could have benefitted the most from thoughtful dialogue and engagement.

c.) *Other Explanations*

Several phenomena may explain the consolidation of executive war power and congressional abdication. In the realms of waging war and maintaining national security, the president enjoys a potent “first-mover advantage.” With this significant advantage, the president may act without approval from Congress, after which “the burden lies on

⁴⁴ Gene Healy, “Reclaiming the War Power,” in *Cato Handbook For Congress: Policy Recommendations for the 108th Congress*, Cato Institute, 112.

⁴⁵ Rudalevige, *The New Imperial Presidency*, 1.

other institutions to force him to alter his policies.”⁴⁶ This makes presidential military actions difficult to challenge because Congress must prove that the president acted well beyond any reasonable interpretation of congressional force authorizations. Challenging the executive on this front becomes all the more difficult given the commonly held conception that the president operates under much more informed circumstances in matters of national security. Such an advantage is bolstered by the “rally ‘round the flag’” effect, in which the president gains momentum sometimes from a rise, albeit short-term, in approval ratings after military exploits.⁴⁷

With the advent of political parties, members of Congress grew even more likely to toe the party line and follow the president’s lead.⁴⁸ Partisanship continued to intensify, and, as a result, members of Congress developed a much higher likelihood of voting along party lines. In a *National Journal* study completed in 2011, every Senate Democrat amassed a voting record more liberal than every State Republican and vice versa.⁴⁹ These phenomena can allow exaggerated or even false claims of threats facing the United States, as the members of Congress aligned with the president in power may question war claims less. Many have speculated that the Johnson Administration intentionally misrepresented the events of the Gulf of Tonkin in order to catalyze action.⁵⁰ Similar debates raged over “discredited intelligence” which had served as the basis for the war in

⁴⁶ Mark Tushnet, “Controlling Executive Power in the War on Terrorism,” *Harvard Law Review*, Vol. 118, No. 8, (Jun., 2005), 2677.

⁴⁷ *Ibid.*, 2678.

⁴⁸ In Senator Webb’s article, he remarks that “party loyalties over a range of contentious policy decisions became so strong that it often seemed we were mimicking the British parliamentary system, with members of Congress lining up behind the president as if he were a prime minister.” See Webb, “Congressional Authorization,” 9.

⁴⁹ Ronald Brownstein, “Pulling Apart,” *The National Journal*, February 24, 2011, <<http://www.nationaljournal.com/magazine/congress-hits-new-peak-in-polarization-20110224>>.

⁵⁰ Bradley and Goldsmith, *Congressional Authorization*, 2075.

Iraq.⁵¹ These possible explanations either enabled or aided the energetic administrations and deferential congressional classes since WWII. This backdrop set the stage for the kneejerk authorization penned after the terrorist attacks on September 11. Continuing the progression of executive overreach, the AUMF has pushed the executive war powers boundaries even further.

⁵¹ Elisabeth Bumiller, "Records Show Doubts on '64 Vietnam Crisis," *The New York Times*, July 14, 2010, <http://www.nytimes.com/2010/07/15/world/asia/15vietnam.html?_r=2&>.

Part II: AUMF as a Bridge Too Far

Although the AUMF continues the trend toward the consolidation of warmaking authority in the executive branch, the law also represents a new level of executive overreach. In their survey of congressional authorizations of the use of force throughout American history, “Congressional Authorization and the War on Terrorism,” Curtis Bradley and Jack Goldsmith distinguish between limited and broad authorizations of force and use five components in their analysis: “(1) the authorized military resources; (2) the authorized methods of force; (3) the authorized targets; (4) the purpose of the use of force; and (5) the timing and procedural restrictions on the use of force.”⁵² Adding in the geographical scope of the authorization, all of these analytical components, in part or in whole, show the AUMF as atypically broad both in how Congress wrote the law and how the president has subsequently interpreted it.

A.) Targets

One of the most contentious issues surrounding the war on terror and the AUMF is the methodology, or lack thereof, used for classifying and targeting enemy combatants. Although many disagree as to whether those who passed the AUMF intentionally gave the president broad discretion, many critics and observers agree that the AUMF has been used to legally justify the lethal targeting of a widening array of enemies. According to Bradley and Goldsmith’s survey of authorizations, historically speaking “all of the authorizations restrict targets, either expressly (as in the Quasi-War statutes’ restrictions relating to the seizure of certain naval vessels), implicitly (based on the identified enemy

⁵² Bradley and Goldsmith, “Congressional Authorization,” 2072.

and stated purposes of the authorization), or both.”⁵³ With the AUMF, however, the restriction of targets exists in a grey area. The staunchest critics of the AUMF see the issue of targeting as the most nefarious outcome of the legislation. In “After the AUMF,” Jennifer Daskal and Stephen Vladeck summarize this fear and warn, “The more that the AUMF is used to justify the use of military force against those with no connection to the September 11 . . . the more it becomes an essentially limitless authorization, allowing the President to use force as a matter of first resort.”⁵⁴

These debates over terrorist targets began at the inception of the AUMF. On September 20, 2001, President Bush addressed a mourning nation:

Our enemy is a radical network of terrorists, and every government that supports them . . . Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.⁵⁵

Statements such as this one reflect the Bush Administration’s broad interpretation from the outset of the scope of targets authorized by the AUMF. However, this was not the intention of Congress. Despite the Bush Administration’s initial efforts for broad discretion in terrorist targeting during the drafting of the bill, many members of Congress saw the AUMF as distinct from the Gulf of Tonkin Resolution because the new legislation had authorized force only against a specific enemy.⁵⁶ In a House debate over the proposed AUMF, Representative Jackson of Illinois claimed, “I am not voting ‘Yes’

⁵³ *Ibid.*, 2077.

⁵⁴ Jennifer Daskal and Stephen I. Vladeck, “After the AUMF,” *Harvard National Security Journal*, Vol. 5, (2014), 125.

⁵⁵ George W. Bush, “Address to the Joint Session of the 107th Congress,” from “Selected Speeches of George W. Bush: 2001-2008,” The White House Archives, 68-69, <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf>.

⁵⁶ Bradley and Goldsmith, “Congressional Authorization,” 2079.

on September 14, 2001 for an open-ended Tonkin Gulf-type Resolution . . . I'm not willing to give President Bush carte blanche authority to fight terrorism." He then cautioned, "Recently President Bush said that the United States 'will make no distinction between the terrorists who committed these acts and those who harbored them.' But we must make distinctions."⁵⁷

In the view of Representative Jackson and numerous other members of Congress, the AUMF did not constitute a blank check force authorization, but rather a restricted authorization to exercise military action against only "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."⁵⁸ In his article "The Wrong War," Grenville Byford makes an important distinction by separating wars fought against "proper nouns (Germany, say)," from the generally less successful "wars against common nouns (poverty, crime, drugs)."⁵⁹ Based on this distinction, a discrepancy seems to exist between the common noun enemy of the "war on terror" and the proper noun targets of the AUMF from the view of Congress. In July 2013, the Congressional Research Service drafted a background brief on the AUMF and concluded that the legislation is considered groundbreaking because it "(1) empowered the President to target non-state actors, even to the individual level, as well as states, and (2) did not specify which states and non-state actors were included under the authorization."⁶⁰

⁵⁷ "Proceedings and Debates of the 107th Congress, First Session," *Congressional Record*, Vol. 147, No. 120, September 14, 2001, H5675, <<http://www.gpo.gov/fdsys/pkg/CREC-2001-09-14/pdf/CREC-2001-09-14-house.pdf>>.

⁵⁸ Daskal and Vladeck, "After the AUMF," 115.; "Authorization for the Use of Military Force."

⁵⁹ Grenville Byford. "The Wrong War," *Foreign Affairs*, (July/August 2002), 34.

⁶⁰ Matthew Weed, "The 2001 Authorization for Use of Military Force: Background in Brief," Congressional Research Service, 7-5700, July 10, 2013, 1.

While recognizing these new precedents, Bradley and Goldsmith make an important observation of the AUMF, which differs from past authorizations and war declarations. The authors suggest that the AUMF allows for broader interpretation of targets because of two provisions. By allowing the President to use military action against “those nations, organizations, or persons he determines have the requisite nexus with the September 11 attacks,” the AUMF “*describes* rather than *names* the enemies that are the objects of the use of force.”⁶¹ Secondly, Bradley and Goldsmith present the possibility that the “he determines” provision intentionally grants the President autonomy. Because of these significant provisions, the authors categorize the AUMF as one of the broadest authorizations in American history with regard to enemy targets, whether intended or not.

Although some members of Congress viewed the requirement of targets to have some connection to those responsible for the September 11 attacks as a viable legal limitation, others viewed this nexus requirement as a feeble, inadequate safeguard. Eleanor Holmes Norton, a non-voting delegate to the House of Representatives from the District of Columbia, warned during AUMF deliberations that the September 11 reference was only a “slim anchor,” and in reality the text of the legislation “allows war against any and all prospective persons and entities.”⁶² The Bush and Obama Administrations’ interpretations of the AUMF to include “associated forces” of al Qaeda further reduced Norton’s precarious “slim anchor.” In May 2013 at the National Defense University, President Obama declared the United States to be at war with “al Qaeda, the Taliban, and their associated forces.”⁶³ When asked whether groups or individuals who

⁶¹ Bradley and Goldsmith, “Congressional Authorization,” 2082.

⁶² Johnsen, “60 Words and a War Without End.”

⁶³ Barack Obama, “Remarks by the President at the National Defense University.”

may have emerged after September 11 or with no connection with the attacks on September 11 could be legally covered under the current AUMF, Acting General Counsel of the Department of Defense Robert Taylor unequivocally replied, “If they become an associated force with al Qaeda, then they have joined with the organization that was responsible for those September 11 attacks and we believe they are fully covered by the AUMF.”⁶⁴ By declaring war against both a common noun and associated forces, the nexus requirement faded, and the potential targets covered under the AUMF expanded.

B.) Purpose of the Use of Force

The broadening of targets in a military conflict to associated forces and beyond inherently changes the purpose of the use of force. Using the AUMF to justify the pursuit of targets with no connection to al Qaeda or the 9/11 attacks turns the authorization into something else entirely. The notion of associated forces and co-belligerents is not historically unprecedented. In World War II, the United States was at war with Germany, Italy, Japan, and their co-belligerents; however, in that conflict, Congress subsequently declared war against the co-belligerents. By contrast, the executive branch has added co-belligerents and associated forces into the AUMF without additional congressional authorization.⁶⁵ The AUMF authorized force against al Qaeda in order to prevent future acts of terrorism “by such nations, organizations or persons.” The broader interpretation possibly changes the purpose to prevent *any* future acts of terrorism by any organization.

In a speech at the Oxford Union in late 2012, U.S. Department of Defense General Counsel Jeh Johnson defined associated forces as “having two characteristics:

⁶⁴ “Hearing to Receive Testimony on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force,” U.S. Senate, Committee on Armed Services, Washington, D.C., May 16, 2013, 21.

⁶⁵ Daskal and Vladeck, “After the AUMF,” 123.

(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.”⁶⁶ This idea of associated forces represents a significant legal argument to justify killing combatants not explicitly associated with al Qaeda. As Daskal and Vladeck point out:

All three branches of the U.S. government have agreed that anyone who *is* a member of al Qaeda or the Taliban can be detained without charge, and also, according to the views of the past two administrations, subject to lethal force in appropriate circumstances.⁶⁷

Once an enemy combatant or organization acquires the label of “associated force,” the U.S. government may essentially employ limitless force against them, similarly to al Qaeda itself. Because the past two administrations have read associated forces into the AUMF, determining the scope of these al Qaeda offshoots has become a heated debate in executive overreach.

These debates resulted in the May 2013 Senate Committee on Armed Services hearing on the AUMF. During Senator Angus King’s opening remarks at the hearing, the Senator called the proceedings “astoundingly disturbing” and accused the representatives from the Pentagon of having “essentially rewritten the Constitution.”⁶⁸ His main concern surrounded the concept of associated forces, and he remarked:

This authorization, the AUMF, is very limited, and you keep using the term ‘associated forces.’ You used it 13 times in your statement. That is not in the AUMF. And you said at one point it suits us very well. I assume it does suit you very well because you are reading it to cover everything and anything.⁶⁹

⁶⁶ Jeh Charles Johnson, “The Conflict Against Al Qaeda and its Affiliates: How Will It End?” Oxford Union, Oxford University, November 30, 2012, <<http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>>.

⁶⁷ Daskal and Vladeck, “After the AUMF,” 121.

⁶⁸ “Hearing to Receive Testimony,” 23.

⁶⁹ *Ibid.*, 23.

Senator King's fear, and the fear of others, holds that the executive branch might shoehorn any new or emerging threats into this associated forces category. Because of the mutable, amorphous nature of al Qaeda and related organizations, the president and the Pentagon enjoy a certain leeway in the categorization of these groups. In the May 2013 Senate Committee on Armed Services hearing on the AUMF, Assistant Secretary Sheehan testified that "these groups . . . have very murky membership and they also have murky alliances and shifting alliances," and "they change their name and they lie and obfuscate their activities."⁷⁰ Pentagon and White House officials constantly leave the definition of associated forces open-ended and paint the network as a complex web of groups, which makes determining the nexus requirement for a lawful military strike incredibly difficult. Given the stated difficulty of designating groups as associated forces and the purported care in determining these designations, such assessments might seem like high-level, high-sensitivity deliberations. Yet, Assistant Secretary Sheehan reported that lower level officials in the Pentagon make these designations prior to presidential approval for the use of lethal force.⁷¹

This concern of shoehorning new, disjointed threats is compounded by the fact that the U.S. Department of Defense keeps the list of associated forces secret.⁷² Warning that such a public revelation would cause "serious damage to national security," a

⁷⁰ *Ibid.*, 9.

⁷¹ In the May 2013 Senate Hearing, Senator Reed asked Assistant Secretary Sheehan if the designation of a group or individual as an associated force is made prior to Presidential approval of military action, and Assistant Secretary Sheehan responded, "The issue of affiliated force has not gone to the presidential level, Senator. That issue is managed at a much lower level." Assistant Secretary Sheehan went on to affirm the executive branch's authority: "I would think that that is a decision better for the executive branch." Senate Hearing, May 2013, 13.

⁷² Cora Currier, "Who Are We at War With? That's Classified," *ProPublica*, July 26, 2013, <<http://www.propublica.org/article/who-are-we-at-war-with-thats-classified>>.

spokesman for the Department of Defense explained the Pentagon's rationale in keeping the list classified: "Because elements that might be considered 'associated forces' can build credibility by being listed as such by the United States, we have classified the list." He went on, "We cannot afford to inflate these organizations that rely on violent extremist ideology to strengthen their ranks."⁷³ This justification stands on shaky ground, because the Pentagon has failed to give concrete evidence to back up this claim. In his "Lawfare Blog," Harvard Law Professor Jack Goldsmith brands the "soft criterion" of the inflation rationale as "weak," because the acknowledgement of the U.S. government would likely have little bearing on already well-known groups.⁷⁴ Additionally, the Department of Defense's official acknowledgement of al Qaeda, al Qaeda in the Arabian Peninsula (AQAP), and elements of al Shabaab seems to run counter to this argument, as the Pentagon does not sufficiently explain why some groups would be inflated by acknowledgement rather than others.⁷⁵ Such lack of transparency seems self-serving for the president, who would want to escape scrutiny from controversial drone strikes and other actions.⁷⁶

These varied legal interpretations of associated forces have led many to caution that the AUMF has not significantly legally limited executive discretion of enemy targets and the purpose of the authorization. In an article called "60 Words and a War Without

⁷³ *Ibid.*

⁷⁴ Benjamin Wittes, "DOD's Weak Rationale for Keeping Enemy Identities Secret," *Lawfare Blog*, July 26, 2013, <<http://www.lawfareblog.com/2013/07/dods-weak-rationale-for-keeping-enemy-identities-secret/>>.

⁷⁵ In the opening remarks of the Senate hearing, Chairman Senator Carl Levin explicitly names groups other than al Qaeda: "This fight occasionally takes the form of targeted strikes against operational leaders of al Qaeda and associated forces, groups like al Qaeda in the Arabian Peninsula and al Shabaab in Somalia." "Hearing to Receive Testimony," U.S. Senate, 2.

⁷⁶ Wittes, "DOD's Weak Rationale."

End: The Untold Story of the Most Dangerous Sentence in U.S. History,” Gregory D.

Johnsen reported on the history of the AUMF and the expansion of enemy targets:

Several of the lawyers I talked to, officials from both the Bush and Obama Administrations spoke eloquently and at great length about the limits of the AUMF and being constrained by the law. And maybe that is true. But none of them were able to point to a case in which the U.S. knew of a terrorist but couldn't target him because it lacked the legal authority. Each time the president wanted to kill someone, his lawyers found the authority embedded somewhere in those 60 words.⁷⁷

Similarly, in a 2013 Senate hearing on the future of the AUMF, Senator Jim Inhofe remarked that in 10 years of briefings with members of the U.S. military on operations against al Qaeda and their affiliates, he had never once heard “that they lacked the legal authority to conduct their missions.”⁷⁸ Senator Inhofe then asked Assistant Secretary for Special Operations Michael Sheehan if he had ever encountered a situation in which the special operations community “did not have sufficient legal authorization to prosecute the war,” to which Assistant Secretary Sheehan responded, “I have not yet once found that we did not have enough legal authority within the Department of Defense to prosecute [the war].”⁷⁹ While this may show a successful vetting process in the Department of Defense, the lack of legal limitations may also display the absence of significant constraints on enemy targets.

Enemy targeting began a new chapter when the Obama administration carried out a targeted killing operation against an American citizen, Anwar al-Awlaki, in Yemen in

⁷⁷ Johnsen, “60 Words and a War Without End.”

⁷⁸ “Hearing to Receive Testimony,” 11.

⁷⁹ *Ibid.*, 11.

2011.⁸⁰ In addition to eliminating enemy combatants with tenuous ties to al Qaeda, the Obama administration invoked the AUMF to kill its own citizen, establishing a new legal precedent. However, the White House did not acknowledge these killings until May 2013, when Attorney General Eric Holder admitted to the Senate Judiciary Committee that the U.S. military had killed four American citizens since 2009.⁸¹

In response to criticisms and fears of extrajudicial killings, the executive branch rolled out a number of interpretations and clarifications on the AUMF and drone strikes. Though these white papers, fact sheets, and speeches dealt in a number of hypotheticals, the interpretations within showed new heights of executive power. In November 2011, the Department of Justice issued a white paper plainly stating that “were the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual’s citizenship would not immunize him from a lethal operation.” A 2013 White House fact sheet corroborated this statement, noting that the Department of Justice would conduct “additional legal analysis” to ensure constitutional compliance. At face value, this policy may seem consistent with the domestic judicial process. However, as Attorney General Eric Holder clarified in a speech, the Obama administration has interpreted “due process” and “judicial process” quite differently.⁸² According to Holder, civilian and military officials in the executive branch may carry out

⁸⁰ Mark Mazzetti, Eric Schmitt, and Robert F. Worth, “Two-year Manhunt Led to Killing of Awlaki in Yemen,” *The New York Times*, September 30, 2011, <<http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>>.

⁸¹ Pete Yost, “Four American Citizens Killed in Drone Strikes Since 2009: Eric Holder,” *The Huffington Post*, May 22, 2013, <http://www.huffingtonpost.com/2013/05/22/american-citizens-drone-strikes_n_3321950.html>.

⁸² Eric H. Holder, Jr., “Attorney General Eric Holder Speaks at Northwestern University School of Law,” March 5, 2012, <<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>>.

due process solely within the executive branch and use lethal force against a U.S. citizen without judicial approval.⁸³

C.) Geographical Scope

With the new level of discretion in enemy targeting comes an unprecedented, widening geographical region where the U.S. military carries out its operations. In his opening remarks at the May 2013 Senate hearing on the AUMF, Senator John McCain demonstrated his disbelief at the evolution of the legislation: “None of us, not one who voted for the AUMF, could have envisioned we were about to give future Presidents the authority to fight terrorism as far flung as Yemen and Somalia.”⁸⁴ According to the two Pentagon officials, under the AUMF, the President would have the domestic authority to put boots on the ground in both Yemen and the Congo, because the battlefield exists “from Boston to the FATA.”⁸⁵ This was not the first time the White House made this claim. A few years prior to the hearing in 2011, Assistant to the President for Homeland Security and Counterterrorism John O. Brennan proclaimed in a speech, “The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”⁸⁶ These statements marked a serious departure from the United States’ previous armed conflicts. Some representatives cautioned against the undefined battlefield parameters as early as the initial Congressional debates surrounding the AUMF on September 14, 2001. Representative Jesse Jackson, Jr. of Illinois warned, “As written, the resolution could be interpreted, if

⁸³ *Ibid.*

⁸⁴ “Hearing to Receive Testimony,” 15.

⁸⁵ *Ibid.*, 19.

⁸⁶ John O. Brennan, “Strengthening our Security by Adhering to our Values and Laws,” Harvard Law School, September 16, 2011, <<http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>>.

read literally, to give the President the authority to deploy or use our armed forces domestically.”⁸⁷ Indeed, in a letter to Senator Rand Paul, Attorney General Eric Holder confirmed that hypothetically, in an “extraordinary circumstance,” the President would be authorized to carry out a drone strike against a U.S. citizen on U.S. soil.⁸⁸

Though Representative Jackson’s fears have not been realized, an October 2013 raid on a coastal Somali city showcased the long reach of U.S. military operations. In an official statement days later, the Pentagon Press Secretary claimed that the operation had taken place “under legal authorities granted to the Department of Defense by the Authorization to Use Military Force (2001) against al-Qa’ida and its associated forces.”⁸⁹ In a similar statement the day before, Defense Secretary Chuck Hagel declared that the United States military would pursue terrorists “no matter where they hide.”⁹⁰ Delivering on this threat, the Bush and Obama administrations have invoked the AUMF to engage in military actions in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia since the passage of the AUMF.⁹¹ In both practice and posturing, the Pentagon and the President have given no geographic limitation to the war on terror.

D.) Military Resources and Methods of Force

⁸⁷ “Proceedings and Debates of the 107th Congress, First Session,” H5675.

⁸⁸ Eric H. Holder Jr. to Rand Paul, March 4, 2013, *The Huffington Post*, <<http://big.assets.huffingtonpost.com/BrennanHolderResponse.pdf>>.

⁸⁹ George Little, “Statement by Pentagon Press Secretary George Little on U.S. Operations in Somalia,” U.S. Department of Defense, Release No. 703-13, October 7, 2013, <<http://www.defense.gov/releases/release.aspx?releaseid=16297>>.

⁹⁰ Chuck Hagel, “Statement by Secretary Hagel on Operations in Libya and Somalia,” U.S. Department of Defense, Release No. 701-13, October 6, 2013, <<http://www.defense.gov/releases/release.aspx?releaseid=16295>>.

⁹¹ These locations include any instance where the President has invoked the AUMF to deploy, direct, or report on the ongoing use of military forces. Weed, “The 2001 Authorization,” 2.

Indeterminate battlefields have coincided with unprecedented tactics and methods of waging war since the passing of the AUMF in 2001. Bolstered by the AUMF's provision for the president to "use all necessary and appropriate force," the in addition to an explosion of military resources and technology has allowed the president to further consolidate war powers in the executive branch. In terms of military expenditures, the wars in Afghanistan and Iraq, taken together, cost between \$4 and \$6 trillion and counting, making the post-9/11 military conflicts the most expensive in United States history.⁹²

In his article "The True Forever War," Council on Foreign Relations Fellow Micah Zenko catalogued the military technology evolution and how this development has afforded the president significant autonomy as well as freedom from scrutiny. On September 11, 2001, the United States laid claim to an arsenal of 167 drones, with only a "handful" carrying weapons; 12 years later, in December 2013, the Pentagon and CIA laid claim to an estimated 11,000 drones, hundreds of which are considered "armed-capable."⁹³ Initially developed to find one man, Osama bin Laden, the drone program "has now been used an estimated 462 times to kill an estimated 3,600 suspected terrorists, militants, and civilians in countries with which the United States is not formally at war."⁹⁴ Similarly, the U.S. Special Operations Command (SOCOM) has more than doubled its size and budget since 9/11.⁹⁵ The growth of rapidly expanding cyber

⁹² Linda J. Bilmes, "The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets," Harvard Kennedy School Faculty Research Working Paper Series, RWP13-006, March 2013,

<<https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=8956&type=WPN>>.

⁹³ Micah Zenko, "The True Forever War," *Foreign Policy*, February 18, 2014,

<http://www.foreignpolicy.com/articles/2014/01/24/the_true_forever_war_technology_aumf>.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

capabilities is even more difficult to estimate, given the fact that “the strategic guidance and supporting doctrine . . . remains secret—or more likely unresolved.”⁹⁶ And, as Zenko points out, size as well as the relative ease to deploy these methods have risen dramatically. These low-cost, low-risk, and, most notably, low-visibility methods have permitted the White House and the Pentagon unparalleled war powers.

These new wartime methods are not limited to uses of lethal force. By invoking the AUMF provisions to “use all necessary and appropriate force” and to “prevent any future acts of international terrorism against the United States,” as well as reaffirming the inherent power of commander in chief, the Bush and Obama administrations have acted with significant latitude in non-lethal activities, such as surveillance and detention even in the face of contradictory legislation. In 2006, the *New York Times* reported that the National Security Agency (NSA) had been carrying out a robust surveillance program on American citizens, all in complete disregard of the Foreign Intelligence Surveillance Act (FISA) warrant requirements.⁹⁷ In a Senate Judiciary Committee hearing on the subject of the constitutionality of the NSA surveillance program, Attorney General Alberto Gonzales vehemently defended the program, arguing that the president acted “with authority provided both by the Constitution and by statute.”⁹⁸ In addition to invoking the oft-cited commander in chief and chief executive authorities of the president, Attorney General Gonzales called attention to a provision in the FISA accords, which prohibit government electronic surveillance “except as authorized by statute.” Congress passed

⁹⁶ *Ibid.*

⁹⁷ See e.g. David E. Sanger and John O’Neil, “White House Begins New Effort to Defense Surveillance Program,” *The New York Times*, January 23, 2006, and Elisa Massimino and Avidan Cover, “While Congress Slept,” *Human Rights*, Vol. 33, No. 1 (Winter 2006), 6.

⁹⁸ “U.S. Senate Judiciary Committee Holds a Hearing on Wartime Power and the NSA’s Surveillance Authority,” *The Washington Post*, February 6, 2006, <<http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html>>.

such a statute, Gonzales argued, in 2001 with the AUMF, which authorizes the president to “use all necessary and appropriate force against al Qaeda.”⁹⁹ His reasoning, and indeed the reasoning of the Bush administration, followed that if lethal force could be authorized, then certainly electronic surveillance would fall well within that extreme.

Attorney General Gonzales’ statements on NSA surveillance were subjected to serious debate. In a statement before the Senate Judiciary Committee, Yale Law scholar Harold Koh chastised the Bush Administration for implementing the NSA surveillance program and acting beyond its constitutional bounds. Citing the Fourth Amendment, which requires government surveillance to be “reasonable, supported except in emergency situations by *warrants* issued by courts, and *based upon specific probable cause*,” Koh accused the NSA surveillance program of violating the constitution on all three fronts.¹⁰⁰ By relying on the AUMF as justification for warrantless surveillance, Koh argued that the executive had grabbed even more power and rendered Congress a “pointless rubberstamp.”¹⁰¹ In perhaps a testament to the AUMF as a new level of executive power, Koh pointed out the fact that, since the passing of FISA in 1978, no other administration had violated the surveillance legislation.¹⁰² Only with the AUMF did the Bush Administration feel it had the legal authority, along with the motivation, to violate FISA and conduct warrantless surveillance. In what looked ostensibly as a drawdown of executive power, Attorney General Gonzales informed Congress via letter that the Terrorist Surveillance Program would not be renewed, and any future

⁹⁹ *Ibid.*

¹⁰⁰ Harold Hongju Koh, “Statement Before the Senate Committee on the Judiciary Regarding Wartime Executive Power and the National Security Agency’s Surveillance Authority,” February 28, 2006, 2, <<http://www.law.yale.edu/documents/pdf/HHKNSAtestfinal.pdf>>.

¹⁰¹ *Ibid.*, 3.

¹⁰² *Ibid.*, 14-15.

surveillance would “now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.”¹⁰³ However, as *The Guardian* and the *The Washington Post* revealed in June 2013, the program had simply been replaced by a new, even more robust surveillance program called PRISM.¹⁰⁴

The detention of suspected terrorists at Guantanamo Bay, Cuba represents another area where the AUMF enabled a burgeoning executive power. Roughly eight hundred prisoners have been detained at Guantanamo Bay Detention Camp since its opening in 2002.¹⁰⁵ From its inception, the Guantanamo detention facility aimed to detain terrorism suspects outside of the reach of U.S. laws and courts, and potentially beyond the scrutiny of other federal branches.¹⁰⁶ Like most of its actions in the “war on terror,” the executive branch has cited the AUMF and the international laws of war to legally justify the detentions at Guantanamo Bay.¹⁰⁷ To be sure, the Guantanamo detention facility has been subjected to significant political scrutiny and legal challenges during its life span.¹⁰⁸ And, like other controversial actions by the executive branch, the Obama administration has promised efforts to scale back and even end the detention program. However, despite President Obama’s May 2013 speech where he voiced his “commitment to closing

¹⁰³ Alberto R. Gonzales to Patrick Leahy and Arlen Specter, January 17, 2007, <http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf>.

¹⁰⁴ Because documents are still coming to light on the full extent and legality of the NSA surveillance program launched in 2007 after the Terrorist Surveillance Program, I will not go into full analysis of the program in this paper. However, the existence of the program even after the illegality of its predecessor displays further Executive consolidation of power by continuing to bypass the FISA courts.

¹⁰⁵ Jonathan Masters, “Closing Guantanamo?” *Council on Foreign Relations*, last updated November 9, 2011, <<http://www.cfr.org/terrorism/closing-guantanamo/p18525#p1>>.

¹⁰⁶ *Ibid.*

¹⁰⁷ Michael F. Hertz *et al.*, “Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay,” March 13, 2009, <<http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>>.

¹⁰⁸ For an excellent summary of legal challenges to and perspectives on Guantanamo, see “Judging Guantanamo: The Court, Congress, and the White House,” *Council on Foreign Relations*, last updated January 21, 2009, <<http://www.cfr.org/terrorism-and-the-law/judging-guantanamo-court-congress-white-house/p11025#p2>>.

Guantanamo,” the controversial detention facility remained open through the end of the year and on into the next.¹⁰⁹

E.) Timing and Procedural Restrictions

In terms of timing and procedural restrictions, the AUMF is more typical of other authorizations for the simple reason that congressional force authorizations usually do not restrict timing. Force authorizations implicitly continue to hold until the United States defeats the stated enemy.¹¹⁰ In his majority opinion in the 2008 case *Boumediene v. Bush*, Justice Kennedy explained that “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.”¹¹¹ Understandably, like past authorizations, Congress failed to provide a “sunset clause” or time limitation in the 2001 AUMF. The AUMF’s mandate, like others, implicitly ends with the end of the conflict or “cessation of active hostilities” in the words of the “Geneva Convention Relative to the Treatment of Prisoners of War” with al Qaeda and its associated forces.¹¹² Both supporters of presidential latitude and those seeking to curb executive power accept the legal justification that the war powers remain in place until “the enemy is declared, by an action of the political branches, to have been defeated.”¹¹³ However, because of the expanding scope of targets subsumed under al Qaeda and its associated forces and the amorphous nature of the al Qaeda threat, the implicit time limit defined by defeat of the enemy becomes harder to determine. As

¹⁰⁹ John Knefel, “Despite Recent Pledges, Guantanamo Lumbers On,” *Rolling Stone*, October 7, 2013, <<http://www.rollingstone.com/politics/news/despite-recent-pledges-guantanamo-lumbers-on-20131007>>.

¹¹⁰ Bradley and Goldsmith, “Congressional Authorization,” 2074.

¹¹¹ “*Boumediene et al. v. Bush*, President of the United States,” U.S. Supreme Court, October Term, 2007, 69, <<http://www.scotusblog.com/wp-content/uploads/2008/06/06-1195.pdf>>.

¹¹² Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

¹¹³ For a discussion on this see Adam Klein, “The End of al Qaeda? Rethinking the Legal End of the War on Terror,” *Columbia Law Review*, Vol. 110, No. 7 (November 2010), 1867.

evidence of these difficulties, the war in Afghanistan is already the United States' longest major military conflict.¹¹⁴ Although the AUMF's lack of time restrictions may seem in line with past authorizations, the open-endedness of the enemies does not lend itself to a clearly defined "cessation of active hostilities." In all aspects of force authorizations, the AUMF has allowed the president to push the boundaries of executive war powers further than ever historically possible.

¹¹⁴ Thomas Nagorski, "Editor's Notebook: Afghan War Now Country's Longest," *ABC News*, June 7, 2010, <<http://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303>>.

Part III: The Need for Repeal

Arguments for Keeping the AUMF

The AUMF has enabled an unprecedented level of power in the executive branch, but that fact alone does not sufficiently provide a basis for a repeal or replacement of the current legislation. Some proponents of the AUMF not only defend the constitutionality of the legislation but also praise the trend toward consolidation of power in order to appropriately address the atypical threat presented by terrorism. In a “Statement of Administration Policy” released in November 2011, the Obama administration claimed that “the authorities granted by the AUMF . . . are essential to our ability to protect the American people from the threat posed by al-Qa’ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals.”¹¹⁵ The statement from the White House reflects the common refrain of AUMF supporters that the U.S. military can only properly face the threat posed by al Qaeda and its associated forces with an intentionally broad mandate. Recognition of the abnormality of the conflict occurred at the AUMF’s inception. During the House debates on September 14, 2001, even Representative Barbara Lee, the sole dissenting vote against the AUMF, said, “We are not dealing with a conventional war. We cannot respond in a conventional manner.”¹¹⁶

Along this line of argument, only an ambiguous AUMF allowing for broad interpretation could allow the U.S. military to address the “full range” of threats posed by

¹¹⁵ “Statement of Administration Policy: S. 1867 National Defense Authorization Act for FY 2012,” November 17, 2011, <http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf>.

¹¹⁶ “Proceedings and Debates of the 107th Congress, First Session,” H5672.

al Qaeda and its associated forces. At the Senate Judiciary Committee hearing in 2013 Mr. Taylor reminded Congress that “the enemy in this conflict has not confined itself to the geographic boundaries of any one country” in this “unconventional war.”¹¹⁷ And, in dealing with this shifting threat, Assistant Secretary Sheehan assured Congress that the current AUMF worked and continues to work adequately:

I think the AUMF as currently structured works very well for us. So I guess we would be concerned that any change might restrict our combatant commanders from conducting their operations they have in the past. So right now, we are comfortable. And I think, Senator Inhofe said if it ain't broke, don't fix it. I would subscribe to that policy.¹¹⁸

After the assassination of Osama bin Laden, many supporters of the broadly interpreted AUMF felt affirmed in their methods. A few days after the raid, John Yoo wrote in the *National Review* that, while the “majority of the credit for the operation that killed Osama bin Laden goes to the Obama administration,” “it is also a vindication of the Bush administration’s terrorism policies and shows that success comes from continuing those policies.”¹¹⁹ The “if it ain't broke don't fix it” mentality has provided a solid foundation for proponents of the AUMF.

Other arguments against changing the current AUMF revolve around the idea of presidential and military flexibility in addressing the rapidly changing threat of terrorism

¹¹⁷ “Hearing to Receive Testimony,” 7.

¹¹⁸ *Ibid.*, 17.

¹¹⁹ Yoo went on to reference and commend the enhanced interrogation techniques that led to the identification of bin Laden’s courier, who then led U.S. intelligence analysts to bin Laden. These enhanced interrogation techniques have been legally propped up by the post-9/11 governance of the AUMF. John Yoo, “Bin Laden, No More,” *The National Review*, May 2, 2011, <<http://www.nationalreview.com/articles/266271/bin-laden-no-more-nro-symposium/page/0/5>>.

Others, however, have minimized the importance of the role of enhanced interrogation techniques, which some allege to be torture, in the killing of Osama bin Laden. For a discussion on the value of enhanced interrogation or torture, see Scott Shane and Charlie Savage, “Bin Laden Raid Revives Debate on Value of Torture,” *The New York Times*, May 3, 2011, <http://www.nytimes.com/2011/05/04/us/politics/04torture.html?_r=0>.

in general, not just al Qaeda and its associated forces. These proponents caution against the gridlock that may occur in Congress over wartime decisions that require rapid resolution, such as an emerging terrorist organization with no connection to al Qaeda. Even the Framers considered this potential snare of allowing Congress full wartime authority. In their view, the House of Representatives could prove dilatory in times of war because of its unwieldy size and infrequent meetings.¹²⁰ Warnings of increased polarization and factionalism culminated in the 112th Congress earning the dubious distinction of the least productive Congress of all time.¹²¹ The recent failures of the appropriately dubbed “do nothing” Congress have casted doubts over Congress’ capability to make real-time decisions in high-pressure war situations.

Legal and Ethical Arguments for Changing the AUMF

After 13 years of an untouched AUMF and a drastically changed threat landscape, this “if it ain’t broke don’t fix it” mentality is becoming harder to legally and ideologically justify. Arguments for keeping the AUMF often come from a purely national security perspective. Critics of the AUMF frame the debate in much broader terms, citing the need to restore the rule of law and America’s reputation abroad in addition to national security concerns of securing new force authorizations to cover threats with no connection to al Qaeda. At its core, much of the debate over the AUMF and the delegation of constitutional war powers boils down to defining Justice Jackson’s

¹²⁰ “Reclaiming the War Power,” 110.

¹²¹ Chris Cillizza, “The Least Productive Congress Ever,” *The Washington Post*, July 17, 2013, <<http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/17/the-least-productive-congress-ever/>>.

“equilibrium established by our constitutional system.”¹²² In a statement before the Senate Judiciary Committee in 2008, Harold Koh raised the stakes even higher when he argued, “The Bush Administration’s ‘War on Terror’ has done serious and extensive damage to civil liberties and the rule of law in the name of national security.”¹²³ In this argument against the AUMF, the legal and ethical are intertwined. Generally speaking, this argument holds that the new heights of executive overreach enabled by the AUMF and its subsequent legal interpretations have eroded civil liberties and the rule of law.¹²⁴ Only by maintaining the separation of powers and the system of checks and balances, even in the arena of war powers, can the U.S. government uphold these American ideals.

Pitfalls of a Perpetual State of War

Another argument against the AUMF involves an understanding of the law during times of war and peace. According to the Congressional Research Service, declarations of war automatically “trigger many standby statutory authorities conferring special powers on the President,” as opposed to authorizations, which trigger no such standby statutory authorities.¹²⁵ Despite the lack of precedent, the executive branch has continuously

¹²² “*Youngstown Sheet & Tube Co. v. Sawyer*,” U.S. Supreme Court, 343, <<http://supreme.justia.com/cases/federal/us/343/579/case.html#634>>.

¹²³ He went on to claim that the Bush Administration’s “War on Terror” had also “clouded our human rights reputation, given cover to abuses committed by our allies in that ‘war,’ blunted our ability to criticize and deter gross violators elsewhere in the world, and made us less safe and less free.” Harold Hongju Koh, “Statement of Harold Hongju Koh Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law Yale Law School Before the Senate Judiciary Committee, Subcommittee on the Constitution on Restoring the Rule of Law,” September 16, 2008, 5.

¹²⁴ This new level of executive overreach includes the expansion of the scope of war powers outlined in Chapter II.

¹²⁵ Jennifer K. Elsea and Matthew C. Weed, “Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications,” Congressional Research Service, January 11, 2013, summary.

argued that the AUMF sufficiently provides a “statutory exception.”¹²⁶ Likening the force authorization to a war declaration and the accompanying wartime atmosphere, the Bush and Obama administrations perpetuated a crisis paradigm in which energetic Executive action is both justified and necessary. As long as the war with al Qaeda and its associated forces rages on, the reach of the executive branch, backed by the intact authorization, will and should continue expanding.

AUMF advocates, such as Jeh Johnson, do acknowledge the existence of a “tipping point” at which many of the al Qaeda leadership have been killed or captured, and the group no longer poses a real threat against the United States.¹²⁷ However, determining this “tipping point” has been the subject of significant debate. In his February 2013 State of the Union Address, President Obama called core al Qaeda a “shadow of its former self,” yet mentioned the emergence and evolution of al Qaeda’s affiliates.¹²⁸ Despite reducing al Qaeda to a mere “shadow,” Assistant Secretary Sheehan lamented that al Qaeda’s tipping point “unfortunately is a long way off” based on the group’s “organizational resiliency.”¹²⁹ These discrepancies fuel fears of a perpetual state of war allowing for the open-ended AUMF to ascribe unchecked presidential war powers indefinitely.

The difficulty in ascertaining and declaring the end of the conflict with al Qaeda, and therefore the end of the AUMF’s mandate, has both political and technical dimensions. For all three branches of the federal government, “pinpointing the ‘end’ of

¹²⁶ *Ibid.*

¹²⁷ Johnson, “The Conflict Against al Qaeda and its Affiliates.”

¹²⁸ Barack Obama, “Remarks by the President in the State of the Union Address,” February 12, 2013, <<http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>>.

¹²⁹ “Hearing to Receive Testimony,” 10.

such a nebulous conflict” is “fraught with political risk.”¹³⁰ Declaring an end to the conflict inevitably raises hard-to-answer questions of victory, defeat, cost, and intent. Additionally, declaring an end to the conflict may imply that the United States no longer faces terrorist threats to its national security. Such a statement would fly in the face of intelligence on new and emerging terrorist threats and would open a politician up to harsh criticisms from more hawkish members of Congress.

But even beyond the political difficulties, the nature of the threat posed by al Qaeda does not lend itself to easy analysis. In his article, “The End of al Qaeda? Rethinking the Legal End of the War on Terror,” Adam Klein discusses the complexities of determining an end to the AUMF’s conflict, arguing that “a binary, on/off model of when and how a war on terrorism ends under law does not adequately reflect the multifaceted nature of the overall al Qaeda threat to the United States.”¹³¹ With its many offshoots, affiliates, and associations, the United States cannot wage a war against one unified enemy but rather multiple, sometimes loosely connected enemies. Some groups may use the al Qaeda label for convenience, and other groups may have a similar Salafist and “anti-Western” agenda but no official ties to al Qaeda. In the war with al Qaeda, “there is no physical territory to conquer, no clear leadership structure to topple, no Reichstag over which to fly a foreign flag.”¹³² The defeat of one branch of al Qaeda, or even the assassination of Osama bin Laden, does not always mean definitive victory.

¹³⁰ Klein, “The End of al Qaeda?” 1868.

¹³¹ *Ibid.*, 1867.

¹³² Stephen I. Vladeck, “*Ludecke’s* Lengthening Shadow: The Disturbing Prospect of War Without End,” *Journal of National Security Law & Policy*, Vol. 2:53, 53.

Because of this political and technical difficulty to determine or declare an end to the conflict, the AUMF's mandate continues.

The difficulty in determining a cessation of hostilities has led some to declare the current conflict as the “forever war” or the “war without end.”¹³³¹³⁴ The pitfalls and dangers of a forever war are manifold. In his testimony in May 2013 to the Senate Armed Services Committee, Human Rights Watch Executive Director Kenneth Roth explained the importance of the war and peace distinction:

When it comes to our most basic rights, there is probably no more important distinction than the line between peace and war. In peacetime, the government can use lethal force only if necessary to stop an imminent threat to life, and it can detain only after according full due process. But in wartime, the government can kill combatants on the battlefield, and it has greatly enhanced power to detain people without charge or trial. So, safeguarding the right to life and liberty depends in important part on ensuring that the government is not operating by wartime rules when it should be abiding by peacetime rules.¹³⁵

Given the fact that the “battlefield” in the war with al Qaeda and its associated forces could be anywhere, the “forever war” becomes all the more troubling. In terms of detention without charge or trial, the Supreme Court upheld that the AUMF had “implicitly authorized” the President’s right to detain “enemy combatants” during war in its 2004 decision in *Hamdi v. Rumsfeld*.¹³⁶ And in 2012, President Obama signed the National Defense Authorization Act, which included section 1021 which called for

¹³³ Harold Hongju Koh, “How to End the Forever War?” Oxford Union, Oxford, UK, May 7, 2013, <<http://www.law.yale.edu/documents/pdf/Faculty/KohOxfordSpeech.pdf>>.

¹³⁴ Vladeck, “*Ludecke’s* Lengthening Shadow,” 53.

¹³⁵ Kenneth Roth, “Testimony of Kenneth Roth to United States Senate, Armed Services Committee, Hearing on ‘The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force,’” May 16, 2013, 2.

¹³⁶ Bradley and Goldsmith, “Congressional Authorization” 2053.

“affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force.”¹³⁷

Through the Supreme Court’s decision in *Hamdi* and the Executive branch’s interpretations of the authorization, the AUMF and the war on terror have become locked in a vicious cycle. As U.S. military operations diminish core al Qaeda, new threats, often deemed affiliates or associated forces, emerge. The President then invokes the AUMF to pursue the new threats, thereby justifying the need for the AUMF in the first place. In this forever war the executive branch has put forth a new “crisis paradigm” without a time limit.¹³⁸ Despite the perpetuation of the conflict, statements from White House officials reflect at least some recognition of the need to end the conflict. While still arguing for the need to continue the conflict at present, Jeh Johnson echoed Kenneth Roth’s sentiments on war and said, “‘War’ must be regarded as a finite, extraordinary and unnatural state of affairs . . . War violates the natural order of things . . . In its 12th year, we must not accept the current conflict, and all that it entails, as the ‘new normal.’”¹³⁹ And, during his remarks at the National Defense University in May 2013, President Obama pithily stated, “This war, like all wars, must end. That’s what history advises. That’s what our democracy demands.”¹⁴⁰ Actions, however, have not followed these remarks, and the conflict, coupled with ever-expanding executive war powers, continues.

¹³⁷ “National Defense Authorization Act for Fiscal Year 2012,” Public Law 112-81, December 31, 2011, <<http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>>.

¹³⁸ Harold Hongju Koh, “Statement Before the Senate Committee on the Judiciary Regarding *Hamdan v. Rumsfeld*: Establishing a Constitutional Process,” July 11, 2006, 3.

¹³⁹ Johnson, “The Conflict Against al Qaeda and its Affiliates.”

¹⁴⁰ Barack Obama, “Remarks by the President at the National Defense University.”

Part IV: Policy Options for the AUMF

With no end to the conflict against al Qaeda and its associated forces in sight, a significant first step in curbing the slow creep of executive power must involve repealing the AUMF and updating the authorization regime. This is not a novel suggestion. The AUMF has drawn the ire of politicians from the left and the right, as well as across the political spectrum in the media. With each new controversial news piece on the “war on terror,” the media releases a salvo of op-ed pieces demanding the repeal of the broad congressional authorization. *The New York Times* published a notable editorial in March 2013 calling for the immediate repeal of the AUMF.¹⁴¹ Numerous other op-eds have echoed the call from *The New York Times*, and think tanks such as the Hoover Institute and Wilson Center have provided frameworks for a repealing the AUMF or drafting a new one. In Congress, legislators have proposed bills to diminish or repeal the force authorization.¹⁴² Even President Obama himself expressed his desire to “refine, and ultimately repeal, the AUMF’s mandate.”¹⁴³

In spite of all of the calls for reform, the AUMF remains firmly in place. In order to begin to reverse the destructive trend of executive overreach, Congress must repeal the AUMF and, in partnership with the executive branch, pursue a series of comprehensive

¹⁴¹ “Repeal the Military Force Law,” Editorial, *The New York Times*, March 9, 2013, <http://www.nytimes.com/2013/03/10/opinion/sunday/repeal-the-authorization-for-use-of-military-force-law.html?_r=1&>.

¹⁴² In the House of Representatives, Congresswoman Barbara Lee of California’s 13th District introduced a bill to end the AUMF’s mandate. See <https://lee.house.gov/press-release/congresswoman-barbara-lee-calls-sunset-aumf-report-lethal-use-drones-introduces>.

In July of the same year, Congressman Adam Schiff from California’s 28th District also introduced a bill to “sunset” the AUMF. See <http://schiff.house.gov/press-releases/rep-schiff-offers-amendment-sunset-authorization-for-use-of-military-force-aumf-never-intended-to-authorize-a-war-without-end/>.

¹⁴³ Barack Obama, “Remarks by the President at the National Defense University.”

reforms to “update” the AUMF. The two branches should work together to tie these reforms to the areas where the AUMF has unduly expanded executive power: enemy targets, purpose of the conflict, geographical scope, military resources and methods, and timing and procedural restrictions.

Criteria for Policy Options

In considering the merits and drawbacks of a number of policy options relating to AUMF reform, or maintenance of the *status quo*, policymakers should consider three criteria: political feasibility, addressing threats to national security, and maintaining national interest, each with equally weighted importance. Whether the reform originates in the executive, judicial, or legislative branch, policymakers should carefully assess the political possibility of such a proposal succeeding. No matter how valuable the proposal may appear on other fronts, if the proposal has little political feasibility, then the law simply will not pass, especially in the current polarized climate of the “do nothing” Congress. Given the diverse range of vested interests of the various actors in the AUMF including the military-industrial complex, Congress, the President, human rights advocacy groups, and others, touching the current AUMF will cause a great deal of political friction. Therefore, policymakers must include these sometimes disparate interests in their reform calculus.

Equally important in deciding whether to keep, repeal, or replace the current AUMF is an analysis of how the authorization will allow the United States to protect itself from current threats. Policymakers should either address how the current or new AUMF will address emerging or perennial threats to U.S. national security or how other

defense mechanisms could take over in place of the AUMF. Coverage of new and emerging threats should factor into the national security calculus to avoid an authorization from growing obsolete too quickly, as the current AUMF has.

In addition to political feasibility and a consideration of the threat to U.S. national security, policymakers should consider how closely the new or reformed legislation aligns with U.S. national interests and core values. At Northwestern University's School of Law in March 2012, Attorney General Eric Holder articulated this priority: "Just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution—and must always be consistent with statutes, court precedent, the rule of law, and our founding ideals."¹⁴⁴ In crafting new legislation, policymakers should avoid double standards or contradictions that could undermine U.S. influence or prestige abroad. Keeping in mind the distinction between war and peace, the new policy should not perpetuate the forever war. Policymakers should also remain cognizant of how such an authorization could change future American values or ideas by setting new precedents and practices.

Policy Options:

a.) Status quo

In exploring options for the future of the AUMF, threats to U.S. national security, and executive war powers, decision makers must analyze the merits of maintaining the *status quo*, which would involve preserving the AUMF in its current form, as a viable

¹⁴⁴ Holder, "Attorney General Eric Holder Speaks."

policy option. In terms of political feasibility, preserving the AUMF is popular among vested interests. For elected officials, the “war on terror” still scores favorable ratings in public opinion polls, although they are slowly diminishing. According to a February 2014 poll administered by Gallup, 77% of participants ranked international terrorism as a “critical” threat to vital U.S. interests in the next 10 years.¹⁴⁵ In the same poll, just under half of the participants saw the U.S. military action in Afghanistan as a mistake.¹⁴⁶ Though the second figure may seem high, any number less than a majority certainly does not constitute a large enough constituency to mobilize an effective movement to repeal the AUMF. Given the general sentiment of the importance of the war on terror, elected officials may view challenging the *status quo* as politically risky, and may therefore lack incentives to try to change the well-entrenched legislation.

Military leaders similarly lack incentives to challenge the AUMF *status quo*.

Major General Michael Nagata stated that he had “not yet encountered a situation where there was insufficient legal authority for the combatant commander to execute the mission or the direction he has been given.”¹⁴⁷ Under the AUMF, military commanders have been granted significant latitude to pursue their targets and execute their mission objectives. Repealing or replacing the AUMF could mean forfeiting that legal freedom to operate in the field. Given the vested interests of both political and military actors to maintain the *status quo*, the few bills introduced in Congress have gained little traction.

¹⁴⁵ “War on Terrorism” Gallup, accessed April 27, 2014, <<http://www.gallup.com/poll/5257/war-terrorism.aspx#1>>.

¹⁴⁶ *Ibid.*

¹⁴⁷ “Hearing to Receive Testimony,” 12.

Preservation of the *status quo* as a viable policy option is also buoyed somewhat by the second criterion: addressing U.S. national security. Some may argue that the AUMF finally grants the president the self-defense powers that the Framers had envisioned when they provisioned the war powers. Alexander Hamilton explained the need for an open-ended self-defense mechanism during his advocacy for the Constitution:

The circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy.¹⁴⁸

The indeterminate limits of the AUMF have certainly granted, one could argue, the president the authority to “provide for the defense and protection of the community.” This line of argument could extend across all realms of the war on terror, including detention. Both the Bush and Obama administrations have relied on the AUMF to legally justify the indefinite detention of “enemy combatants.” Therefore, upon the repeal or replacement of the AUMF, Congress and the president would have to figure out “how to deal with prisoners of war in the absence of a specific war.”¹⁴⁹ With a change in the *status quo*, the premature release of potentially dangerous detainees could threaten U.S. national security.

Intelligence also plays into considerations of U.S. national security. Drone strikes offer a good example of how classified intelligence could back up the claim that the AUMF best serves the United States’ national security concerns. Much of the scrutiny brought down upon the controversial drone strike program, along with the AUMF, comes

¹⁴⁸ Delahunty and Yoo, “The President’s Constitutional Authority,” 488.

¹⁴⁹ Michael McAuliff, “AUMF Repeal Bill Would End Extraordinary War Powers Granted After 9/11,” *The Huffington Post*, June 10, 2013, <http://www.huffingtonpost.com/2013/06/10/aumf-repeal-bill-war-powers_n_3416689.html>.

from a fundamental trust gap between the American people and intelligence agencies or appointed officials, as opposed to elected officials. Even though no published data exists on drone strikes, some counterterrorism experts have suggested that CIA tradecraft lends itself to accurate and reliable drone strikes with the most minimal collateral damage.¹⁵⁰ During the Bush Administration's "war on terror," Harold Koh, sitting as dean of Yale Law School, counted among the president's staunchest critics, even penning an article entitled "Can the President Be Torturer in Chief?"¹⁵¹ However, Koh seemed to change his tune after assuming his post as Legal Adviser of the Department of State in 2009. Koh shifted from the war on terror's chief critic to its "defender-in-chief."¹⁵² In a 2010 statement, Koh assured the American public, "Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise."¹⁵³ Setting political explanations for Koh's change of heart aside, one explanation could be that, after seeing the intelligence on the targets covered under the AUMF, Koh felt that the law justified the killings.

But these national security arguments may have held more weight in the few years following the passage of the AUMF. Since 2001, the AUMF has allowed for the dismantlement of al Qaeda, the group responsible for the attacks on September 11. However, in today's shifting threat landscape, the *status quo* option of keeping the

¹⁵⁰ For a discussion on the CIA's expertise in drone strikes and the opinions of leading experts, see Michael Hirsh, "Is the CIA Better Than the Military at Drone Killings?" *The National Journal*, February 24, 2014, <<http://www.nationaljournal.com/magazine/is-the-cia-better-than-the-military-at-drone-killings-20140225>>.

¹⁵¹ Harold Hongju Koh, "Can the President Be Torturer in Chief?" Yale Law School, *Faculty Scholarship Series*, Paper 1790, <http://digitalcommons.law.yale.edu/fss_papers/1790/>.

¹⁵² Raoul Kleven, "Harold Koh: President Obama's Drones Defender-in-Chief," *PolicyMic*, April 13, 2012, <<http://www.policymic.com/articles/6954/harold-koh-president-obama-s-drones-defender-in-chief>>.

¹⁵³ Harold Hongju Koh, "The Obama Administration and International Law," March 25, 2010, <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

AUMF fully intact is becoming harder to justify by the national security criterion. In 2012, then Secretary of Defense Leon Panetta famously declared that the United States had “decimated” and “demoralized” core al Qaeda due to the kill and capture of top al Qaeda leadership including Osama bin Laden, Shaikh Saeed al-Masri, Atiyah Abd al-Rahman, Abu Yahya al-Libi, and Khalid Sheikh Mohammed.¹⁵⁴

Despite these decisive victories over al Qaeda, military operations have continued to expand to meet the evolving threat. In a hearing on the AUMF, Senator John McCain voiced his concerns over using the AUMF to address these new threats to national security:

We are now killing people in the Haqqani Network . . . The reason why I bring that up, we did not even designate the Haqqani Network as a terrorist organization until 2012. And there are published reports, which are not as a result of classified briefings that I have had, that we have killed people that their direct association with al Qaeda is tenuous. In fact, there is one story that we killed somebody in return for the Pakistanis to kill somebody.¹⁵⁵

Though threats to national security, specifically from terrorist organizations, continue to plague the United States, these threats have grown increasingly less connected to al Qaeda. Because the AUMF does not legally extend to all groups who now threaten the United States, the national security argument for maintaining the *status quo* is becoming obsolete.

The *status quo* option also falls short when considering the policy criterion of maintaining U.S. core values and national interests. Because the AUMF has enabled

¹⁵⁴ Leon Panetta, “The Fight Against Al Qaeda: Today and Tomorrow,” at the Center for a New American Security, November 30, 2012, <<http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547>>.

¹⁵⁵ “Hearing to Receive Testimony,” 15-16.

significant executive overreach even in pro-executive interpretations of constitutional war powers, the retention of the AUMF disrupts the balance of power and renders ineffective the system of checks and balances in U.S. government. Justice Jackson's noteworthy concurrence in his 1952 *Youngstown* decision perfectly describes the stakes involved in the type of unilateral presidential action enabled by the AUMF:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.¹⁵⁶

As the AUMF continues to expand presidential war powers, Justice Jackson's heralded "equilibrium" slowly disintegrates. Such brash actions taken since the passage of the AUMF by the executive branch risk to undermine presidential legitimacy at home and U.S. prestige abroad.

b.) Repealing the AUMF:

Because of the unsustainability and detrimental effects of the AUMF, the president and Congress should embark on an overhaul of the AUMF and authorization regime, starting with repealing the law from 2001. Only by first repealing the AUMF can Congress begin to meaningfully curb executive overreach in the use of military force and end the state of perpetual war. Although difficult, the political feasibility of repeal is not impossible; bills to this effect have already been proposed by members of Congress. In June 2013, Representative Adam Schiff (D-CA), a senior member of the Intelligence Committee, proposed a bill to repeal the AUMF, citing as reasons that al Qaeda had

¹⁵⁶ "*Youngstown Sheet*," <<http://supreme.justia.com/cases/federal/us/343/579/case.html#634>>.

largely been degraded and that “Congress never intended and did not authorize a perpetual war.”¹⁵⁷ While recognizing the need for the United States to remain vigilant against “specific networks of violent extremists,” Rep. Schiff’s proposed bill “urges the President to work with the legislative branch to secure whatever new authorities may be required to meet the threat and comply with the Constitution, the War Powers Resolution, and the law of war.”¹⁵⁸ The bill, which called for the repeal of the AUMF effective on December 31, 2014, won 185 votes in favor.¹⁵⁹ Though the bill did not garner enough votes to pass the House, the affirmative votes signalled at least the beginning of political support for ending the AUMF’s mandate.

Another boon to the political feasibility of repealing and updating the AUMF is the existence of many high-profile endorsements for reform. In 2010, John B. Bellinger III, who served as the Legal Adviser for the U.S. Department of State and the National Security Council during the Bush administration, penned an op-ed for the *Washington Post*, in which he called for Congress to “update and clarify” the “sparsely worded statute that Congress passed hastily on Sept. 18, 2001, while the wreckage of the World Trade Center was still smoldering.”¹⁶⁰ His main criticism comes from the lack of specificity in the broadly worded authorization; Bellinger argues that the AUMF does not explicitly authorize detentions, targeting U.S. citizens, and other activities that the Bush and Obama

¹⁵⁷ Adam Schiff, “A Bill to Repeal the Authorization for Use of Military Force,” 113th Congress, 1st Session, <<http://www.scribd.com/doc/146870084/Schiff-AUMF-Sunset-Legislation>>.

¹⁵⁸ *Ibid.*

¹⁵⁹ “Final Vote Results for Roll Call 410,” H.R. 2397, July 24, 2013, <<http://clerk.house.gov/evs/2013/roll410.xml>>.

¹⁶⁰ John B. Bellinger III, “A Counterterrorism Law in Need of Updating,” *The Washington Post*, November 26, 2010, <<http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>>.

administrations have felt entitled to carry out backed by the authorization. This criticism and call for repeal carries more weight coming from an insider such as Bellinger.

Transcending political and security considerations, repealing the AUMF is imperative if Congress and the president hope to uphold U.S. core values. For all of the problematic aspects of the AUMF, the solution begins with repeal. In terms of restoring the separation of power and reasserting Congress' role in war and foreign policy, the debates leading up to the ultimate repeal of the legislation will force members of Congress to confront the war on terror both politically and intellectually. This will mark an important first step for Congress to reclaim its war powers. In terms of the tradeoff between civil liberties and security, repealing the AUMF will undercut the legal justifications for extrajudicial detentions and infringements on the privacy of U.S. citizens. In the absence of the AUMF, the executive branch can no longer claim to carry out due process for U.S. citizen targets of lethal force.

Rather than only repealing the law, Congress and the president must update the authorization regime in order to address the current threat landscape. The feasibility of repealing the AUMF is inextricably linked with highly politicized concerns over maintaining U.S. national security in the absence of a statutory force authorization. While perhaps in the minority, some argue that a combination of the president's Article II constitutional authority and law enforcement tools offers sufficient authority and capabilities for the United States to maintain robust national security.¹⁶¹ In their view, such authority holds even in the absence of the AUMF. This Article II, Section 2

¹⁶¹ For a thorough discussion on this constitutional authority *see* Delahunty and Yoo, "The President's Constitutional Authority."

argument, however, tends on the extreme side of pro-Executive interpretations and perpetuates the trend of Executive overreach. Robert Chesney *et al* point out a few shortcomings of a heavy reliance on Article II, Section 2 authority in their article “A Statutory Framework for Next-Generation Terrorist Threats.”¹⁶² Due to the demonstrated protracted nature of the conflict, policymakers should keep in mind changing strategies as new administrations come to power. Certain administrations might feel more secure exercising Article II authority than others. Therefore, from a pragmatic perspective, it would be risky to rely on a potentially inconsistent policy in such a high-value item as national security. Also keeping national security in mind, the president would run into murky legal water in attempting to detain potentially dangerous criminals without statutory coverage.¹⁶³

Should Congress repeal the AUMF, another question arises of whether or not law enforcement capabilities can sufficiently deal with new and emerging terrorist threats. In the 2013 Senate hearing on the AUMF, Assistant Secretary Sheehan explained, “Even prior to the AUMF, we were able to arrest people and try them and bring them back to the United States with great efficacy prior to September 11.”¹⁶⁴ These capabilities, as Attorney General Holder pointed out in his speech at Northwestern, have only strengthened through greater cooperation between domestic law enforcement and foreign intelligence agencies in the post-9/11 United States.¹⁶⁵ Additionally, not all situations require military responses. However, situations have arisen in the past in which the

¹⁶² Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes, “A Statutory Framework for Next-Generation Terrorist Threats,” Jean Perkins Task Force on National Security and Law, Hoover Institution, Stanford University, 2013, 6.

¹⁶³ *Ibid.*, 6.

¹⁶⁴ “Hearing to Receive Testimony,” 10.

¹⁶⁵ Holder, “Eric Holder Speaks.”

president needed statutory authority to prosecute an effective military response. For example, in 1998, President Clinton struck terrorist-related facilities in Afghanistan and Sudan because “law enforcement and diplomatic tools” had proved ineffective in meeting this national security challenge.¹⁶⁶

Given the national security considerations in the absence of a force authorization, Congress and the executive branch should pursue a comprehensive, pragmatic update of the authorization regime to address new threats, while still aligning with U.S. core values and avoiding the troubling legacies of the AUMF. This tact would prove much more politically feasible than only repealing the AUMF. Future authorizations must take care to limit the targets, purpose, geographical scope, military resources and methods, and duration of the conflict.

I. Actions for Congress

In order to come back into the fold in foreign policy and national security, Congress must structure a new authorization system to ensure constant consultation with the president. From the report by Robert Chesney *et al* at the Hoover Institution, Congress should adopt aspects of the “general criteria plus listing” recommendation, in which legislators formalize general statutory criteria by which the president may list groups or individuals matching the criteria and carry out lethal force against them. Such criteria could allow an expedited authorization process on organizations “with sufficient capability and planning that it presents an imminent threat to the United States” or “any group or person that has committed a belligerent act against the U.S. or imminently

¹⁶⁶ William J. Clinton, “Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan,” August 20, 1998, <<http://www.presidency.ucsb.edu/ws/?pid=54799>>.

threatens to do so.”¹⁶⁷ While this approach does well to engage Congress and encourage transparency through the listing process, fully subscribing to this recommendation still grants the executive too much discretion by allowing the president to choose the organizations and individuals against whom lethal force is authorized.

One way to sufficiently curb presidential power in the “general criteria plus listing” approach is to accommodate parts of a bipartisan bill proposed by Senators John McCain and Tim Kaine called the *War Powers Consultation Act of 2014*.¹⁶⁸ Disheartened by the often ignored War Powers Resolution, the two senators called for a repeal and replacement of the 30 year old law. While fully repealing the law may prove unnecessary or politically difficult, many of the aspects of the bill, developed by the 14-month long National War Powers Commission, can be incorporated into the updated AUMF.¹⁶⁹ While still developing general criteria for terrorist organizations, Congress should follow the senators’ lead in forming a permanent Joint Congressional Consultation Committee (JCCC) consisting of majority and ranking members of the committees relating to national security.¹⁷⁰

Instead of immediately employing lethal force after deeming a certain terrorist organization in accordance with statutory criteria, the president should first meet with the JCCC after deeming an organization or individual as meeting the criteria (except in cases of an imminent threat, in which case the president’s Article II emergency powers would

¹⁶⁷ Chesney, “A Statutory Framework,” 11.

¹⁶⁸ “Kaine, McCain Introduce Bill to Reform War Powers Resolution,” January 16, 2014, <<http://www.kaine.senate.gov/press-releases/kaine-mccain-introduce-bill-to-reform-war-powers-resolution>>.

¹⁶⁹ “National War Powers Commission Report,” Miller Center of Public Affairs, University of Virginia, <<http://web1.millercenter.org/reports/warpowers/report.pdf>>.

¹⁷⁰ “Kaine, McCain Introduce Bill.”

still hold). After meeting with the JCCC, the president may commence with hostilities, but members of JCCC must take a vote in support or opposition of an expedited authorization within 30 days. Similarly to the War Powers Resolution, if the president fails to secure a majority vote, the military action must end after the grace period. Such an arrangement strikes a balance between the exigencies of war and the need for congressional consultation.

Even with this approach, perpetuating the “crisis paradigm” and the forever war should still concern members of Congress. In drafting the new law, legislators must include a “sunset” provision of a set duration of time after which the entire expedited authorization system is subjected to review and renewal.¹⁷¹ If Congress fails to renew the legislation, then the sunset provision would immediately repeal the authorizations. To assure strict presidential compliance of the new system, something that has eluded the War Powers Resolution, Congress should include statutory punitive measures, which would trigger in the event of presidential violation of the updated AUMF. As per the Cato Institute’s policy recommendation called “Reclaiming the War Power,” Congress should defund “any such deployment that lacks the prior approval of Congress.”¹⁷² As Benjamin Wittes writes in his blog “Lawfare,” “There are many possible ways for Congress to authorize and guide the conflict—temporally, geographically, and in terms of the definition of the enemy.”¹⁷³ This new authorization system aims to let Congress dictate each of these conflict areas on a case-by-case basis.

¹⁷¹ Chesney, “A Statutory Framework,” 14.

¹⁷² “Reclaiming the War Powers,” 109.

¹⁷³ Benjamin Wittes, “Updating the AUMF—A Discussion,” *Lawfare Blog*, November 28, 2010, <<http://www.lawfareblog.com/2010/11/updating-the-aumf-a-discussion/>>.

II. Actions for the President

Although Congress will drive the lion's share of AUMF reform, the president should also take actions to curb executive power in the interests of U.S. national security and core values. This is not an implausible request. To start reversing the trend of executive overreach, the Obama administration can make good on some of its promises. In his landmark speech at the National Defense University in May 2013, President Obama cautioned against "continu[ing] to grant Presidents unbound powers" while promising to refuse to sign any "laws designed to expand [the mandate of the AUMF] further."¹⁷⁴ While containing executive power is a good start, the Obama administration should also implement measures to roll back those powers.

After leaving his post as Legal Adviser to the U.S. Department of State, Harold Koh delivered his speech "How to End the Forever War?" at the Oxford Union in May 2013, in which he outlined his three part plan to accomplish what his speech title suggested: "(1) Disengage from Afghanistan, (2) Close Guantanamo, and (3) Discipline Drones."¹⁷⁵ In these three legacies of the AUMF, President Obama has either made progress or at least intimated at his desire to comply with Koh's tenets to end the forever war. In Afghanistan, the Obama administration has prepared the Pentagon to carry out full troop withdrawal from Afghanistan by the end of 2014.¹⁷⁶ Other reports have suggested that the troop count will drop as low as 10,000 post-2014, the minimum troop

¹⁷⁴ Barack Obama, "Remarks by the President at the National Defense University."

¹⁷⁵ Koh, "How to End the Forever War?"

¹⁷⁶ Spencer Ackerman and Dan Roberts, "Obama Orders Pentagon to Prepare for Full Troop Withdrawal from Afghanistan," *The Guardian*, February 25, 2014, <<http://www.theguardian.com/world/2014/feb/25/obama-pentagon-us-troops-withdrawal-afghanistan>>.

count recommended by the U.S. Department of Defense.¹⁷⁷ These reports, should they come to fruition, demonstrate a real desire on the Obama administration to begin scaling back the perpetual war. Guantanamo Bay, on the other hand, represents an area where Congress has stalled reform. In his 2014 State of the Union Address, President Obama urged Congress to lift restrictions on detainee transfers in order to close the Guantanamo Bay detention facility, in order to remain “true to our Constitutional ideals” and set an example for the rest of the world.¹⁷⁸ His recent emphasis shows a renewed effort, as President Obama has not mentioned the facility in his past four State of the Union addresses.¹⁷⁹ Progress in the disciplining of drone strikes is much more difficult to discern because of public disclosure issues. However, in his National Defense University speech, President Obama announced his signing of the “Presidential Policy Guidance,” which cryptically mentioned a guiding framework for the use of force against terrorists.¹⁸⁰ Because he no longer faces the pressures of reelection, President Obama should utilize his final years in office to deliver on his campaign promises and end the limitless mandate of the AUMF.

¹⁷⁷ Ankit Panda, “U.S. Considering Leaving Fewer than 10,000 Troops in Afghanistan Post-2014,” *The Diplomat*, April 23, 2014, <<http://thediplomat.com/2014/04/u-s-considering-leaving-fewer-than-10000-troops-in-afghanistan-post-2014/>>.

¹⁷⁸ Barack Obama, “President Barack Obama’s State of the Union Address,” January 28, 2014, <<http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>>.

¹⁷⁹ Josh Gerstein, “Obama Renews Push to Close Guantanamo Bay Prison,” *Politico*, January 28, 2014, <<http://www.politico.com/story/2014/01/state-of-the-union-guantanamo-bay-prison-102765.html>>.

¹⁸⁰ James Traub, “Repeal and Restore: How President Obama Can End the War on Terror, Once and For All,” *Foreign Policy*, February 28, 2014, <http://www.foreignpolicy.com/articles/2014/02/28/repeal_and_restore_obama_end_war_on_terror>.

Conclusion:

The terrorist attacks on the World Trade Center on September 11th, 2001 fundamentally changed how Americans viewed the world and lived their everyday life. Congress and the president reacted to this change by passing the AUMF and forging a new crisis paradigm for the post-9/11 United States. Since the hazy, frenetic few days after the passage of the AUMF, the crisis paradigm has allowed the U.S. Armed Forces and intelligence agencies to dismantle al Qaeda, the group responsible for the attacks, and splinter its terrorist networks. But the war on terror came with heavy costs. Leaving a trail of unintended consequences, the force authorization eroded civil liberties, allowed the U.S. government to carry out extrajudicial killings, and transformed the conflict with al Qaeda into a war without end.

The purpose of this paper is not to analyze whether the ends justified the means. Some have even argued that the ends are not what they seem, taking into consideration blowback from drone strikes and the inspiration of emerging radical terrorist groups. Rather, this paper aims to provide a framework for Congress and the president to establish a new paradigm, one in which the separation of powers set out by the Constitution is restored, while still allowing for the United States to remain safe and secure. The AUMF did not spontaneously materialize; only the decades-long, nefarious trend of executive overreach could pave the way for such an expansive piece of legislation. In a meeting with Henry Kissinger in 1961, Harry Truman told the academic, “If the President knows what he wants, no bureaucrat can stop him. A President has to

know when to stop taking advice.”¹⁸¹ Future presidents should discard such radical pro-Executive ways of thinking, and Congress should hold them accountable. Threats to U.S. national security are constantly evolving. In responding to those threats, Congress and the President must take care not to resort to self-cannibalization and do more harm than good.

¹⁸¹ Vernon Bogdanor, “Harry Truman, President, 1945-1953,” Gresham College, January 29, 2008, <<http://www.gresham.ac.uk/lectures-and-events/harry-truman-president-1945-1953>>.

Bibliography:

- Ackerman, Bruce A., Chayes, Abram, Damrosch, Lori Fisler, Ely, John Hart, Griswold, Erwin N., Gunther, Gerald, Henkin, Louis, Koh, Harold Hongju, Kurland, Philip B., Tribe, Laurence H., and Van Alstyne, William W. "Ronald V. Dellums v. George Bush (D.D.C. 1990): Memorandum Amicus Curiae of Law Professors." (1991). *Faculty Publications*. Paper 751. [.http://scholarship.law.wm.edu/facpubs/751](http://scholarship.law.wm.edu/facpubs/751).
- Ackerman, Spencer and Roberts, Dan. "Obama Orders Pentagon to Prepare for Full Troop Withdrawal from Afghanistan," *The Guardian*, February 25, 2014.
- Allen, Mike and Eilperin, Juliet. "Bush Aides Say Iraq War Needs No Hill Vote." *Washington Post*, August 26, 2002.
- Barry, John. "America's Secret Libya War." *The Daily Beast*, August 30, 2011. <http://www.thedailybeast.com/articles/2011/08/30/america-s-secret-libya-war-u-s-spent-1-billion-on-covert-ops-helping-nato.htm>.
- Bellinger III, John B. "A Counterterrorism Law in Need of Updating." *The Washington Post*, November 26, 2010.
- Bilmes, Linda J. "The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets." Harvard Kennedy School Faculty Research Working Paper Series. RWP13-006. March 2013. <https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=8956&type=WPN>.
- Bogdanor, Vernon. "Harry Truman, President, 1945-1953." Gresham College, January 29, 2008. <http://www.gresham.ac.uk/lectures-and-events/harry-truman-president-1945-1953>.
- "*Boumediene et al. v. Bush*, President of the United States." U.S. Supreme Court, October Term, 2007. <http://www.scotusblog.com/wp-content/uploads/2008/06/06-1195.pdf>.
- Bradley, Curtis A. and Goldsmith, Jack L. "Congressional Authorization and the War on Terrorism." *Harvard Law Review*. Vol. 118. No. 7 (May 2005): 2047-2133.
- Brennan, John O. "Strengthening our Security by Adhering to our Values and Laws." Harvard Law School, September 16, 2011. <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.
- Brownstein, Ronald. "Pulling Apart." *The National Journal*, February 24, 2011. Accessed April 27, 2014. <http://www.nationaljournal.com/magazine/congress-hits-new-peak-in-polarization-20110224>.

- Bumiller, Elisabeth. "Records Show Doubts on '64 Vietnam Crisis." *The New York Times*, July 14, 2010.
http://www.nytimes.com/2010/07/15/world/asia/15vietnam.html?_r=2&.
- Bush, George W. "Address to the Joint Session of the 107th Congress." From "Selected Speeches of George W. Bush: 2001-2008." The White House Archives, 68-69.
http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf.
- Byford, Grenville. "The Wrong War." *Foreign Affairs*, July/August 2002.
- Cillizza, Chris. "The Least Productive Congress Ever," *The Washington Post*, July 17, 2013.
- Chesney, Robert, Goldsmith, Jack, Waxman, Matthew C., and Wittes, Benjamin. "A Statutory Framework for Next-Generation Terrorist Threats." Jean Perkins Task Force on National Security and Law, Hoover Institution, Stanford University. 2013.
- Clinton, William J. "Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan." August 20, 1998.
<http://www.presidency.ucsb.edu/ws/?pid=54799>.
- "Constitution of the United States."
http://www.archives.gov/exhibits/charters/constitution_transcript.html.
- Currier, Cora. "Who Are We at War With? That's Classified." *ProPublica*, July 26, 2013. <http://www.propublica.org/article/who-are-we-at-war-with-thats-classified>.
- Daskal, Jennifer and Vladeck, Stephen I. "After the AUMF," *Harvard National Security Journal*, Vol. 5. (2014): 115-146.
- Delahunty, Robert J. and Yoo, John C. "The President's Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them." *Harvard Journal of Law & Public Policy*. Vol. 487. (2001): 487-517.
- Destler, I.M., Gelb, Leslie H., and Lake, Anthony. *Our Own Worst Enemy: The Unmaking of American Foreign Policy*. New York: Simon and Schuster. 1984.
- Elsa, Jennifer K. and Weed, Matthew C. "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications." Congressional Research Service, January 11, 2013.
- Friedersdorf, Conor. "Obama Fails to Justify the Legality of War in Libya." *The Atlantic*, June 16, 2011.

- Gallup Organization. "War on Terrorism." Accessed April 27, 2014.
<http://www.gallup.com/poll/5257/war-terrorism.aspx#1>
- Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135
- Gerstein, Josh. "Obama Renews Push to Close Guantanamo Bay Prison." *Politico*, January 28, 2014.
- Gonzales, Alberto R. to Leahy, Patrick. January 17, 2007.
http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf.
- Grimmett, Richard F. "The War Powers Resolution: After Thirty-Eight Years." Congressional Research Service, September 24, 2012.
<http://www.fas.org/sgp/crs/natsec/R42699.pdf>.
- Hagel, Chuck. "Statement by Secretary Hagel on Operations in Libya and Somalia." U.S. Department of Defense. Release No. 701-13. October 6, 2013.
<http://www.defense.gov/releases/release.aspx?releaseid=16295>.
- Healy, Gene. "Reclaiming the War Power." In *Cato Handbook For Congress: Policy Recommendations for the 108th Congress*. Cato Institute.
- "Hearing to Receive Testimony on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force." U.S. Senate, Committee on Armed Services, Washington, D.C. May 16, 2013.
- Hertz, Michael F. "Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay." March 13, 2009.
<http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.
- Hirsh, Michael. "Is the CIA Better Than the Military at Drone Killings?" *The National Journal*, February 24, 2014.
- Holder, Jr. Eric H., "Attorney General Eric Holder Speaks at Northwestern University School of Law." March 5, 2012.
<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.
- Holder, Jr. Eric H., to Paul, Rand. March 4, 2013. *The Huffington Post*.
<http://big.assets.huffingtonpost.com/BrennanHolderResponse.pdf>.
- Holmes, Stephen. "John Yoo's Tortured Logic." *The Nation*, April 13, 2006. Accessed April 27, 2014. <http://www.thenation.com/article/john-yoos-tortured-logic>
- Johnsen, Gregory D. "60 Words and a War Without End." *Buzzfeed*, January 16, 2014.
<http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most>

- Johnson, Jeh Charles. "The Conflict Against Al Qaeda and its Affiliates: How Will It End?" Oxford Union, Oxford University. November 30, 2012.
<http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union>.
- "Kaine, McCain Introduce Bill to Reform War Powers Resolution." January 16, 2014.
<http://www.kaine.senate.gov/press-releases/kaine-mccain-introduce-bill-to-reform-war-powers-resolution>.
- Klein, Adam. "The End of al Qaeda? Rethinking the Legal End of the War on Terror." *Columbia Law Review*, Vol. 110. No. 7. November 2010.
- Kleven, Raoul. "Harold Koh: President Obama's Drones Defender-in-Chief." *PolicyMic*. April 13, 2012.
- Knefel, John. "Despite Recent Pledges, Guantanamo Lingers On." *Rolling Stone*, October 7, 2013. <http://www.rollingstone.com/politics/news/despite-recent-pledges-guantanamo-lingers-on-20131007>.
- Koh, Harold Hongju. "Can the President Be Torturer in Chief?" Yale Law School, *Faculty Scholarship Series*. Paper 1790.
http://digitalcommons.law.yale.edu/fss_papers/1790/.
- Koh, Harold Hongju. "How to End the Forever War?" Oxford Union, Oxford, UK. May 7, 2013. <http://www.law.yale.edu/documents/pdf/Faculty/KohOxfordSpeech.pdf>.
- Koh, Harold Hongju. "The Obama Administration and International Law." March 25, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm>.
- Koh, Harold Hongju. "Statement Before the Senate Committee on the Judiciary Regarding *Hamdan v. Rumsfeld*: Establishing a Constitutional Process." July 11, 2006.
- Koh, Harold Hongju. "Statement Before the Senate Committee on the Judiciary Regarding Wartime Executive Power and the National Security Agency's Surveillance Authority." February 28, 2006.
<http://www.law.yale.edu/documents/pdf/HHKNSAtestfinal.pdf>.
- Koh, Harold Hongju. "Statement of Harold Hongju Koh Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law Yale Law School Before the Senate Judiciary Committee, Subcommittee on the Constitution on Restoring the Rule of Law." September 16, 2008.
- Lee, Barbara. "Rep. Barbara Lee's Speech Opposing the Post 9-11 Use of Force Act." *Waging Peace*, September 14, 2011.
http://www.wagingpeace.org/articles/2001/09/14_lee-speech.htm.

- Little, George, "Statement by Pentagon Press Secretary George Little on U.S. Operations in Somalia." U.S. Department of Defense. Release No. 703-13. October 7, 2013. <http://www.defense.gov/releases/release.aspx?releaseid=16297>.
- Massimino, Elisa and Cover, Avidan. "While Congress Slept." *Human Rights*, Vol. 33. No. 1. Winter 2006.
- Masters, Jonathan. "Closing Guantanamo?" *Council on Foreign Relations*. Last updated November 9, 2011. <http://www.cfr.org/terrorism/closing-guantanamo/p18525#p1>.
- Mazzetti, Mark, Schmitt, Eric, and Worth, Robert F. "Two-year Manhunt Led to killing of Awlake in Yemen." *The New York Times*, September 30, 2011.
- McAuliff, Michael. "AUMF Repeal Bill Would End Extraordinary War Powers Granted After 9/11." *The Huffington Post*, June 10, 2013.
- Nagorski, Thomas. "Editor's Notebook: Afghan War Now Country's Longest," *ABC News*, June 7, 2010, <<http://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303>>.
- National War Powers Commission. "National War Powers Commission Report," Miller Center of Public Affairs, University of Virginia. 2008. <http://web1.millercenter.org/reports/warpowers/report.pdf>.
- Obama, Barack. "Remarks by the President at the National Defense University," National Defense University, Washington, D.C., May 23, 2013. <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.
- Obama, Barack, "Remarks by the President in the State of the Union Address." February 12, 2013, <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.
- Obama, Barack, "Remarks by the President in the State of the Union Address." January 28, 2014. <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.
- Office of the Legal Adviser, U.S. Department of State. "The Legality of the United States Participation in the Defense of Vietnam," *The Yale Law Review*, Vol. 75, No. 7, (Jun. 1966): 1101.
- Panda, Ankit. "U.S. Considering Leaving Fewer than 10,000 Troops in Afghanistan Post-2014." *The Diplomat*, April 23, 2014.
- Panetta, Leon. "The Fight Against Al Qaeda: Today and Tomorrow." At the Center for a New American Security. November 30, 2012. <http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547>.

“Proceedings and Debates of the 107th Congress, First Session.” *Congressional Record*, Vol. 147. No. 120. September 14, 2001, H5675.
<http://www.gpo.gov/fdsys/pkg/CREC-2001-09-14/pdf/CREC-2001-09-14-house.pdf> .

“Repeal the Military Force Law.” Editorial. *The New York Times*, March 9, 2013.

Roth, Kenneth. “Testimony of Kenneth Roth to United States Senate, Armed Services Committee, Hearing on ‘The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force.’” May 16, 2013.

Rudalevige, Andrew. *The New Imperial Presidency: Renewing Presidential Power After Watergate*. Ann Arbor: University of Michigan Press, 2005.

Savage, Charlie. “War Powers Act Doesn’t Apply for Libya, Obama Says.” *The New York Times*, June 15, 2011.

Savage, Charlie and Shane, Scott. “Bin Laden Raid Revives Debate on Value of Torture,” *The New York Times*. May 3, 2011.

Sanger, David E. and O’Neil, John. “White House Begins New Effort to Defense Surveillance Program.” *The New York Times*, January 23, 2006.

Schiff, Adam. “A Bill to Repeal the Authorization for Use of Military Force.” 113th Congress, 1st Session, <http://www.scribd.com/doc/146870084/Schiff-AUMF-Sunset-Legislation>.

Streichler, Stuart. “Mad About Yoo, or, Why Worry about the Next Unconstitutional War?” *Journal of Law & Politics*, Vol. 24. (Winter 2008): 93-128.

Traub, James. “Repeal and Restore: How President Obama Can End the War on Terror, Once and For All.” *Foreign Policy*, February 28, 2014.

Tushnet, Mark. “Controlling Executive Power in the War on Terrorism.” *Harvard Law Review*, Vol. 118. No. 8. (June 2005): 2673-2682.

United States Library of Congress. “War Powers.” Last updated February 28, 2014.
<http://www.loc.gov/law/help/war-powers.php>

“U.S. Senate Judiciary Committee Holds a Hearing on Wartime Power and the NSA’s Surveillance Authority.” *The Washington Post*, February 6, 2006.
<http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html>.

- Vladeck, Stephen I. "Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End," *Journal of National Security Law & Policy*, Vol. 2:53.
- "The Wars for Vietnam: The Senate Debates the Tonkin Gulf Resolution, August 6-7, 1964." Vassar College. Accessed April 27, 2014.
<http://vietnam.vassar.edu/overview/doc9.html>
- Webb, Jim. "Congressional Abdication," *The National Interest*, March/April 2013.
- Weed, Matthew. "The 2001 Authorization for Use of Military Force: Background in Brief." Congressional Research Service, 7-5700. July 10, 2013.
- The White House. "Statement of Administration Policy: S. 1867 National Defense Authorization Act for FY 2012" November 17, 2011.
http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.
- The White House. "White House Report on U.S. Actions in Libya," June 15, 2011.
http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERSDOC.html?ref=politics.
- Wittes, Benjamin. "DOD's Weak Rationale for Keeping Enemy Identities Secret." *Lawfare Blog*, July 26, 2013. <http://www.lawfareblog.com/2013/07/dods-weak-rationale-for-keeping-enemy-identities-secret>.
- Wittes, Benjamin. "Updating the AUMF—A Discussion." *Lawfare Blog*, November 28, 2010. <http://www.lawfareblog.com/2010/11/updating-the-aumf-a-discussion/>.
- Woodrow Wilson Center. "AUMF: Reasserting the Role of Congress." July 11, 2013. Accessed April 27, 2014. <http://www.wilsoncenter.org/event/aumf-reasserting-the-role-congress>.
- Yoo, John. "Bin Laden, No More," *The National Review*, May 2, 2011.
- Yost, Pete. "Four American Citizens Killed in Drone Strikes Since 2009: Eric Holder." *The Huffington Post*, May 22, 2013.
http://www.huffingtonpost.com/2013/05/22/american-citizens-drone-strikes_n_3321950.html.
- Zenko, Micah. "The True Forever War," *Foreign Policy*, February 18, 2014.
http://www.foreignpolicy.com/articles/2014/01/24/the_true_forever_war_technology_aumf.