

NOTE

Battlefield Earth: The Danger of Executive Overreach in the Global Fight Against Terrorism and Why Congress Must Act

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ABSTRACT

In the aftermath of 9/11, Congress adopted the Authorization for Use of Military Force (“AUMF”) on September 14, 2001, permitting the President to use force against both al Qaeda for committing the attack and the Taliban for harboring them. Beyond those two organizations, however, significant debate has arisen concerning the scope of the AUMF—and whether it includes terrorist organizations such as al Qaeda in the Arabian Peninsula, whom the United States is fighting in Yemen, not Afghanistan. The 2012 National Defense Authorization Act failed to clarify the scope of authority provided by the AUMF and merely codified existing uncertainties in the law. Nonetheless, global terrorism will continue to demand military action as new threats emerge in far-flung regions of the world—threats that cannot be traced to those directly responsible for 9/11. Congress must therefore pass a new statutory authorization that clearly identifies the appropriate target(s) in the ongoing armed conflict against terrorist organizations. Congressional action will prevent executive overreach and ensure that the detention of terrorist combatants in the future remains legal.

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INTRODUCTION

This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written.¹

On August 1, 2013, the Obama Administration ordered the closure of nineteen U.S. diplomatic facilities across the Middle East and North Africa in response to fears over an imminent terrorist attack.² Despite the widespread embassy evacuations and the issuance of a worldwide travel alert, the Middle Eastern country of Yemen, and its resident al Qaeda affiliate, al Qaeda in the Arabian Peninsula (“AQAP”), formed the epicenter of the Administration’s concern.³ Fears had arisen that AQAP intended to attack Yemeni ports and pipelines⁴ and drive vehicle bombs into the U.S. Embassy in Sana’a.⁵ The United States responded by launching a series of drone strikes in Yemen that killed more than two dozen AQAP fighters.⁶

Air strikes in Yemen, however, are not new. In December 2009, a U.S. Navy ship stationed off the coast of Yemen released a series of cruise missiles in the direction of a small camp just a few miles inland.⁷ The Pentagon officials who authorized the strike believed that the target was an AQAP training camp, but the missiles in fact struck a Bedouin camp.⁸ Although fourteen AQAP operatives visiting the camp died in the operation, so too did forty-one Bedouin.⁹ In fact, since 2002, the United States has carried out a total of eighty-seven air strikes in Yemen,¹⁰ forty-one of which occurred in 2012.¹¹ In 2013, the

1 Al-Bihani v. Obama, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring).

2 See *Taking No Chances: Barack Obama and the War on Terror*, ECONOMIST, Aug. 10, 2013, at 23 [hereinafter *Taking No Chances*]. In addition to temporarily closing the U.S. embassy in Yemen’s capital, Sana’a, the United States and Great Britain removed all diplomatic personnel from Sana’a and encouraged other nationals to leave Yemen. *Id.*

3 See *id.*

4 *Id.*

5 *Al-Qaeda Messages Sparked US Embassy Closures*, AL JAZEERA, Aug. 6, 2013, <http://www.aljazeera.com/news/americas/2013/08/20138523565882739.html>.

6 See Bill Roggio, *US Launches 1st Drone Strike in Yemen in 7 Weeks*, LONG WAR J. (July 28, 2013), http://www.longwarjournal.org/archives/2013/07/us_launches_first_dr_1.php; Bill Roggio, *US Strikes Twice in Yemen, Kills 11 AQAP Operatives in Drone Attacks*, LONG WAR J. (Aug. 7, 2013), http://www.longwarjournal.org/archives/2013/08/us_strikes_again_in.php.

7 GREGORY D. JOHNSEN, *THE LAST REFUGE: YEMEN, AL-QAEDA, AND AMERICA’S WAR IN ARABIA* 251–52 (2013).

8 *Id.* at 252–53.

9 *Id.* at 253.

10 Bill Roggio & Bob Barry, *Charting the Data for U.S. Air Strikes in Yemen, 2002–2014*,

United States deployed the second-largest number of strikes in a single year to date, with a total of twenty-six strikes.¹² Moreover, the Pentagon has admitted to deploying U.S. ground troops to provide support to Yemeni forces in their fight against AQAP.¹³ The United States is clearly engaged in armed conflict against AQAP in Yemen.¹⁴

As an organization, AQAP played no part in the September 11, 2001 (“9/11”) attacks on U.S. soil.¹⁵ The United States, however, conducts military action in Yemen under the Authorization for Use of Military Force (“AUMF”),¹⁶ passed in September 2001 by Congress in response to 9/11.¹⁷ Although President Obama relies on the AUMF as the legal justification for pursuing suspected AQAP terrorists in Yemen,¹⁸ lawyers within his Administration now speculate that “the law is being stretched to its legal breaking point.”¹⁹ Since 9/11, groups

LONG WAR J., <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php> (last updated Jan. 24, 2014, 7:08 AM).

¹¹ *Id.* Other reports place this figure at fifty-four. See *Taking No Chances*, *supra* note 2, at 23.

¹² See Roggio & Barry, *supra* note 10 (showing that in 2013, the United States conducted twenty-six air strikes in Yemen, killing ninety-nine AQAP combatants and seventeen civilians).

¹³ Anna Mulrine, *US Sends Troops to Yemen as Al Qaeda Gains Ground*, CHRISTIAN SCI. MONITOR, May 11, 2012, <http://www.csmonitor.com/USA/Military/2012/0511/US-sends-troops-to-Yemen-as-Al-Qaeda-gains-ground>; see also Gregory D. Johnsen, *A Profile of AQAP's Upper Echelon*, CTC SENTINEL, July 2012, at 6 (noting that U.S. armed forces backed “a sustained military offensive by Yemeni troops”).

¹⁴ See generally JOHNSEN, *supra* note 7 (discussing the conflict in Yemen).

¹⁵ See Graham Cronogue, Note, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 377, 382 (2012) (noting that AQAP formed after the September 11, 2001 terrorist attacks and “lack[s] a sufficient nexus to 9/11 unless it was part and parcel of al-Qaeda”). To be sure, AQAP represents a viable threat. AQAP recruited and trained Umar Farouk Abdu Mutallab, the infamous “underwear bomber,” who attempted to set off a bomb on a U.S. airliner bound for Detroit in December 2009. See JOHNSEN, *supra* note 7, at 257–62. AQAP tried again in 2012 using a more sophisticated device until an informant working for a British intelligence agency disrupted their plot. *Id.* at 287.

¹⁶ See Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁷ See *id.*

¹⁸ See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks Before the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (April 30, 2012), available at <http://www.lawfareblog.com/2012/04/brennanspeech/>; see also Beau D. Barnes, *Reauthorizing the “War on Terror”: The Legal and Policy Implications of the AUMF’s Coming Obsolescence*, 211 MIL. L. REV. 57, 63–64 (2012); Dawn Johnsen, “The Essence of a Free Society”: The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference, 106 NW. U. L. REV. 467, 522–23 (2012).

¹⁹ Greg Miller & Karen DeYoung, *Officials Debate Stretching 9/11 Law*, WASH. POST, Mar. 7, 2013, at A1; see also Cronogue, *supra* note 15, at 402 (stating that “the administration has begun to stretch the statutory language to include groups whose connection to the 9/11 attacks, if any, is extraordinarily limited”).

affiliated with al Qaeda have sprouted across the globe, now hailing from Mali, Algeria, Somalia, Yemen, Iraq, Pakistan, Afghanistan, Indonesia, and the Philippines.²⁰ In addition to AQAP, the Obama Administration has relied on the AUMF to pursue members of al-Shabaab, a Somali terrorist organization with ties to AQAP that also played no role in the 9/11 attacks.²¹ Soon, the President's interpretation of the AUMF may extend to the al-Nusra Front, a terrorist group operating in Syria that is increasingly linked to al Qaeda.²² Such an expansive interpretation of the AUMF risks turning the AUMF into a "blank check," permitting the current or a future administration to deploy armed forces wherever a member of some version of al Qaeda is found.²³

The end result is that any day the world can wake up to a new locus for the use of American military might: Afghanistan and Yemen today, Mali and Somalia tomorrow?²⁴ Although Congress firmly rejected such an open-ended authorization in 2001,²⁵ its recent conduct

²⁰ See Greg Miller & Joby Warrick, *Al-Qaeda Divided but Still a Danger*, WASH. POST, Feb. 3, 2013, at A1 (graphically detailing locations of al Qaeda and its affiliated groups).

²¹ See Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 43 n.70 (2012), http://columbiawlawreview.org/wp-content/uploads/2012/03/31_Hafetzpdf (discussing the military detention of Somali al-Shabaab member Ahmed Warsame before the Obama Administration transferred him to civilian custody in the United States); see also News Release, George Little, Pentagon Press Sec'y, U.S. Dep't. of Defense, U.S. Operations in Somalia (Oct. 7, 2013), available at <http://www.defense.gov/releases/release.aspx?releaseid=16297> (discussing the October 4, 2013 raid in which Somalia intended, but ultimately failed, to capture al-Shabaab commander Abdikadir Mohamed Abdikadir for his role in the 1998 U.S. embassy bombing in Nairobi, Kenya and the 2002 hotel and airline attacks in Mombassa, Kenya). Al-Shabaab formed in 2006, five years after 9/11. See Nelly Lahoud, *The Merger of Al-Shabab and Qa'idat al-Jihad*, CTC SENTINEL, Feb. 2012, at 1, 3.

²² Jack Goldsmith, *The AUMF Will Soon Extend to Syria (If It Doesn't Already)*, LAWFARE (Mar. 23, 2013, 10:15 AM), <http://www.lawfareblog.com/2013/03/the-aumf-will-soon-extend-to-syria-if-it-doesnt-already/>. Goldsmith has called upon the federal government to update its statutory framework governing the ongoing conflict against terrorist groups. See Jack Goldsmith, *Stealth Wars Require Rules, Too*, WASH. POST, Feb. 6, 2013, at A17 (observing that the AUMF provides a "tenuous [legal] foundation" for fighting terrorist groups with no involvement in 9/11).

²³ See Cronogue, *supra* note 15, at 394; cf. Barnes, *supra* note 18, at 78–79 (referring to the Bush Administration's "blank check" approach to its interpretation of the AUMF).

²⁴ The United States also maintains a drone base in Niger. Eric Schmitt, *Drones in Niger Reflect New U.S. Tack on Terrorism*, N.Y. TIMES, July 11, 2013, at A3. Although the drone base is ostensibly there to collect intelligence, the regional presence of "high-value" members of al Qaeda affiliates, most likely al Qaeda in the Islamic Maghreb, may result in the use of force under the Obama Administration's interpretation of the AUMF. See Miller & DeYoung, *supra* note 19.

²⁵ RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2–3 (2007).

appears more equivocal.²⁶ Additionally, as recent events in Yemen have raised doubts over President Obama's prior statement that al Qaeda is largely defeated,²⁷ Congress must return to the AUMF to clearly identify the appropriate target(s) in the ongoing armed conflict against terrorist organizations.²⁸ Congressional action will prevent executive overreach and ensure that the detention of terrorist combatants remains legal.

Part I of this Note introduces the AUMF and deconstructs key provisions contained therein. Part I also introduces the National Defense Authorization Act for Fiscal Year 2012,²⁹ which included the Obama Administration's interpretation of AUMF detention authority. Part II explores unresolved legal issues surrounding the terms of the AUMF and relies on Justice Jackson's tripartite framework for executive power set forth in *Youngstown Sheet & Tube Co. v. Sawyer*³⁰ to highlight the limitations of the AUMF in the context of the current conflict. Part III sets forth a new statutory framework, under which the Obama Administration can continue to pursue the remnants of al Qaeda and the Taliban, while also responding to new terrorist threats—especially AQAP—as they emerge. Finally, Part IV responds to the argument that the Executive branch deserves almost unlimited deference in its interpretation of the AUMF and explains

²⁶ Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT'L SECURITY L. & POL'Y 167, 198–99 (2012) (discussing the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, and its lack of clarity about whether Congress effected any change to the scope of authority provided by the AUMF).

²⁷ See *Taking No Chances*, *supra* note 2, at 23 (“[T]he alarms strongly contradict the administration’s previous claims that al-Qaeda has been weakened, by its efforts, to the brink of defeat.”); *Fox News Sunday* (Fox News television broadcast Aug. 11, 2013), available at <http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2013/08/11/sen-mccain-govt-surveillance-al-qaeda-threat-russia-political-strategists-talk-2014-and> (statement of Carly Fiorina) (“[President] Obama has looked . . . naive about [discussing the end of the war on terror].”).

²⁸ Congress appears to be heeding calls to review the AUMF, with the Senate holding its first hearing on the matter on May 16, 2013. See generally *Hearing to Receive Testimony on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the S. Comm. on Armed Services*, 113th Cong. (2013) [hereinafter *AUMF Hearing*]. Some members of the House of Representatives instead want to repeal the AUMF in its entirety. See H.R. 198, 113th Cong. (2013). The current uptick in U.S. drone strikes in Yemen and the reemergence of AQAP as a viable threat, see *supra* notes 6–14 and accompanying text, present Congress with a timely opportunity to finally act.

²⁹ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298.

³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

why al Qaeda-affiliated groups such as AQAP should be treated separately from “core” al Qaeda.³¹

I. A BRIEF HISTORY OF THE AUMF: CONGRESSIONAL ACTION, JUDICIAL INTERPRETATION, AND EXECUTIVE EXPANSION

In the aftermath of 9/11 the Bush Administration immediately assumed a “war footing,”³² characterizing the 9/11 attacks as an act of “armed conflict” against the United States.³³ Congress responded by passing the AUMF on September 14, 2001.³⁴

Section 2(a) of the AUMF states:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.³⁵

There is little doubt that the AUMF applies to al Qaeda and the Taliban because al Qaeda “planned, authorized, [and] committed” the 9/11 attacks and the Taliban “harbored” them.³⁶ Pursuant to the AUMF, in October 2001, the United States invaded Afghanistan and, with the Northern Alliance, removed the Taliban from power.³⁷ The war in Afghanistan continues to this day.³⁸

³¹ Throughout this Note, “al Qaeda” will be used solely for the purpose of identifying the organization formerly led by Osama bin Laden and operated out of Afghanistan. Other groups affiliated with the al Qaeda brand, such as al Qaeda in the Arabian Peninsula, will be referred to by their specific names. Occasionally, quoted material may refer to al Qaeda by an alternate form, such as “al-Qaida.”

³² Webber, *supra* note 26, at 174.

³³ Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 789 (2008). Both the United Nations Security Council and the North Atlantic Treaty Organization (“NATO”) agreed with this characterization. *Id.*

³⁴ Barnes, *supra* note 18, at 66. President Bush signed the AUMF on September 18, 2001. *Id.*

³⁵ AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

³⁶ Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 789 (2011) [hereinafter Chesney, *Who May Be Held?*].

³⁷ See *Afghanistan Profile: A Chronology of Key Events*, BBC NEWS, <http://www.bbc.co.uk/news/world-south-asia-12024253> (last updated Nov. 24, 2013, 7:33 AM).

³⁸ As of January 15, 2014, approximately 57,000 coalition forces remain in Afghanistan, 38,000 of which are American. INT’L SEC. ASSISTANCE FORCE, KEY FACTS AND FIGURES 2 (2014), available at <http://www.isaf.nato.int/images/stories/File/2014-01-15%20isaf%20placemat-final.pdf>.

Compared to earlier authorizations of force, the AUMF is relatively broad because it lacks explicit targets.³⁹ Moreover, the AUMF reserves to the executive branch the authority to determine those targets.⁴⁰ Yet despite this flexibility, Congress passed a narrower AUMF than the Bush Administration had requested.⁴¹ President Bush sought the authority “to deter and preempt any future acts of terrorism or aggression against the United States.”⁴² Congress rejected this language, which would have authorized the use of military force against terrorists who were not involved in 9/11.⁴³ Thus, although Congress gave President Bush the flexibility to determine targets for the use of military force, that flexibility was limited to those responsible in some way for 9/11.⁴⁴ To date, the U.S. Supreme Court’s 2004 decision in *Hamdi v. Rumsfeld*⁴⁵ contains its only major pronouncement on the scope of executive power granted by the AUMF.⁴⁶

A. *The AUMF in the U.S. Supreme Court: Hamdi v. Rumsfeld*

Yaser Esam Hamdi was an American citizen captured while allegedly fighting alongside the Taliban in Afghanistan.⁴⁷ Upon discovering Hamdi’s American citizenship, U.S. forces relocated Hamdi from Guantánamo Bay to a naval brig in Charleston, South Carolina.⁴⁸ Hamdi’s father filed suit contesting his son’s detention,⁴⁹ and the case ultimately reached the U.S. Supreme Court. Relying on long-standing laws of war, Justice O’Connor’s plurality opinion concluded

³⁹ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2077–80 (2005).

⁴⁰ AUMF § 2(a) (stating that the President is authorized to use force against those entities “he determines” are responsible for the 9/11 attacks).

⁴¹ See GRIMMETT, *supra* note 25, at 2.

⁴² 147 Cong. Rec. 18,138 (2001).

⁴³ GRIMMETT, *supra* note 25, at 3 (“[T]his portion of the language in the proposed White House draft resolution was strongly opposed by key legislators . . .”).

⁴⁴ See *id.*

⁴⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴⁶ Other U.S. Supreme Court decisions concerning the war on terror include *Boumediene v. Bush*, 553 U.S. 723, 732, 771 (2008) (holding that the U.S. Constitution applies to Guantánamo Bay detainees for the purpose of filing a writ of habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (holding that the executive branch exceeded its authority in constituting the military commissions); *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004) (holding that detainees had a statutory right to the writ of habeas corpus); and *Rumsfeld v. Padilla*, 542 U.S. 426, 442, 451 (2004) (holding that the United States District Court for the Southern District of New York lacked jurisdiction to hear Jose Padilla’s writ of habeas corpus and remanding the case for further proceedings).

⁴⁷ *Hamdi*, 542 U.S. at 510–13 (plurality opinion).

⁴⁸ *Id.* at 510.

⁴⁹ *Id.* at 511.

that the AUMF authorized the detention of enemy combatants, such as Hamdi, as “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force.’”⁵⁰ Regardless of Hamdi’s U.S. citizenship, detention authority extends to a “limited category” of “individuals who fought against the United States in Afghanistan as part of the Taliban.”⁵¹ The United States may detain combatants for “the duration of the particular conflict *in which they were captured*,”⁵² which in Hamdi’s case meant “[a]ctive combat operations against Taliban fighters” in Afghanistan.⁵³ It thus remains an open question whether the United States can detain combatants captured in Afghanistan once active combat operations in Afghanistan cease.⁵⁴

The Supreme Court further warned in *Hamdi* that if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war,” detention authorization “may unravel.”⁵⁵ Conflicts that informed the law of war typically involved identifiable targets—nations and their armies—on an identifiable battlefield.⁵⁶ Al Qaeda and the Taliban represent the identifiable, if implied, targets of the AUMF.⁵⁷ The primary identifi-

⁵⁰ *Id.* at 518 (quoting AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)). Although Justice O’Connor’s opinion only garnered four votes, Justice Thomas agreed with the plurality that the AUMF authorizes the President to detain enemy combatants. *See id.* at 587–88 (Thomas, J., dissenting). Because the plurality opinion provides the narrowest grounds for the Court’s judgment, it is effectively the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (internal quotation marks omitted)).

⁵¹ *Hamdi*, 542 U.S. at 518–19 (plurality opinion).

⁵² *Id.* (emphasis added).

⁵³ *Id.* at 521; *see also* *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010) (stating that detention is justified until the executive branch determines that “hostilities in Afghanistan have ceased”).

⁵⁴ *See* Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 210 (2013) [hereinafter Chesney, *Beyond the Battlefield*] (“When U.S. involvement in overt armed conflict in Afghanistan comes to an end, so too will the other key stabilizing factor . . . the existence of at least one location as to which [the law of armed conflict] indisputably applies and as to which many cases could be linked.”).

⁵⁵ *Hamdi*, 542 U.S. at 521 (plurality opinion).

⁵⁶ *See generally* Erin Creegan, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Treatment of Terrorist Combatants (Protocol IV)—A Proposal*, 41 CAL. W. INT’L L.J. 345, 346–60 (2011) (discussing the laws of war under the Geneva Conventions).

⁵⁷ *See* Chesney, *Beyond the Battlefield*, *supra* note 54, at 198 (noting that the AUMF implicitly established “a two-party conception of the enemy”).

able battlefield is Afghanistan. Detention authority cannot be presumed when suspected terrorists are not part of al Qaeda or the Taliban, or where detention is based on activities unconnected to the conflict in Afghanistan.⁵⁸

AQAP thus exemplifies the potential tension between *Hamdi* and the Obama Administration's interpretation of the AUMF. AQAP is not an identifiable target of the AUMF because it played no organizational role in 9/11, and the fight against AQAP is taking place in Yemen, not Afghanistan.⁵⁹ Despite this tension, the Obama Administration continues to rely on the AUMF as the basis for its use of force in Yemen⁶⁰ by grafting the concept of "associated force" onto the explicit statutory authorization.⁶¹ Although this term appears nowhere in the language of the AUMF,⁶² the Obama Administration has decided that AQAP is sufficiently affiliated with al Qaeda for AQAP to be targeted under the AUMF.⁶³ In response, commentators have expressed concern about "cement[ing] the transformation of post-9/11 military detention powers—created based on the premise of wartime exigency—into a permanent, default detention system for an elastic category of terrorism cases"⁶⁴ and rightly ask: "Just who is it that the United States purports to be at war with?"⁶⁵ The following section highlights the manner in which federal courts in the District of Columbia⁶⁶ have grappled with the Obama Administration's framework, shedding light on its limitations.

⁵⁸ See Deborah N. Pearlstein, *Detention Debates*, 110 MICH. L. REV. 1045, 1056 (2012) (reviewing BENJAMIN WITTES, *DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO* (2011)) (observing that courts have not resolved the issue of detention authority for suspects captured in, for example, Yemen).

⁵⁹ See *supra* notes 15–17 and accompanying text.

⁶⁰ See Brennan, *supra* note 18.

⁶¹ See *infra* Part I.B.

⁶² See *supra* note 35 and accompanying text.

⁶³ See Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., Lecture at the Oxford Union, Oxford University: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

⁶⁴ Hafetz, *supra* note 21, at 46.

⁶⁵ Chesney, *Who May Be Held?*, *supra* note 36, at 856.

⁶⁶ Since passage of the Detainee Treatment Act of 2005, Congress has restricted jurisdiction over Guantánamo Bay litigation to the U.S. Court of Appeals for the District of Columbia Circuit. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741–44.

B. *Deconstructing the Obama Administration's Framework in the D.C. Circuit*

Entities fall within the scope of the AUMF in two ways: (1) through direct involvement in 9/11, or (2) by harboring an entity that was directly involved in 9/11.⁶⁷ The AUMF thus implicitly established “a two-party conception of the enemy”: al Qaeda for committing the attacks and the Taliban for harboring them.⁶⁸ Nonetheless, other entities may be targeted under the AUMF, provided they fulfill the “9/11 nexus” that Congress established.⁶⁹

The Obama Administration provided its interpretation of the AUMF in a 2009 memorandum prepared during the course of Guantánamo Bay detainee litigation,⁷⁰ and then again in more recent litigation challenging the National Defense Authorization Act for Fiscal Year 2012.⁷¹ In contrast to the express terms of the AUMF, the Obama Administration's framework for interpreting the AUMF dilutes the 9/11 nexus requirement by asserting that “[t]he President *also* has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”⁷² This framework introduces three new concepts: “part of,” “substantial support,” and “associated forces,” which broaden considerably the statute's explicit scope. Under this framework, the Obama Administration has used the AUMF to authorize drone strikes against AQAP in Yemen and elsewhere.⁷³

The Obama Administration supports its framework by reference to the laws of war contained in the Geneva Conventions or customary international law.⁷⁴ The Administration further states that conduct

⁶⁷ AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

⁶⁸ Chesney, *Beyond the Battlefield*, *supra* note 54, at 198.

⁶⁹ Cronogue, *supra* note 15, at 379; *see also* Bradley & Goldsmith, *supra* note 39, at 2079–80.

⁷⁰ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1–2, *In re* Guantanamo Bay Detainee Litig., Nos. 08-442 (TFH), 05-0763 (JDB), 05-1646 (JDB), 05-2378 (JDB) (D.D.C. Mar. 13, 2009) [hereinafter Guantanamo Bay Detainee Litigation Memorandum].

⁷¹ Brief for the Appellants at 27–29, *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013) (No. 12-3176) [hereinafter Hedges Appellants Brief].

⁷² Guantanamo Bay Detainee Litigation Memorandum, *supra* note 71, at 2 (emphasis added).

⁷³ *See* Chesney, *Beyond the Battlefield*, *supra* note 54, at 179 (noting that the United States used force against AQAP in Yemen “at least forty times between 2010 and August 4, 2012”); Brennan, *supra* note 18.

⁷⁴ Hedges Appellants Brief, *supra* note 71, at 27–28; Guantanamo Bay Detainee Litigation Memorandum, *supra* note 71, at 1.

fulfilling the requirements of these terms will be determined by analogy to “traditional international armed conflict” on a case-by-case basis.⁷⁵ Although courts recognize the concepts of “part of” (membership) and “associated forces” (of al Qaeda and the Taliban in Afghanistan), no court has relied solely on “substantial support” to uphold a detention.⁷⁶ This is partly because the courts have struggled to define precisely what “substantial support” actually means when neither the Administration nor Congress has offered clear guidance.⁷⁷

1. Discerning the Not-So-Bright Line Between Membership and Substantial Support

Authorizing the use of force against organizations necessarily “authorize[s] the use of force (including detention) against their members.”⁷⁸ That authority extends to members of al Qaeda or the Taliban who were not involved in 9/11 and those who joined either group after 9/11.⁷⁹ Members need not be captured in Afghanistan, nor have been involved in the conflict in Afghanistan.⁸⁰ The sole criteria governing detention is membership in an organization tied to 9/11.

The Obama Administration concedes that the membership provision of its framework provides the basis for detention in the majority of cases without relying on “substantial support.”⁸¹ Indeed, the D.C. Circuit’s broad interpretation of membership has permitted it to “shoehorn even the close cases” into this “less-controversial prong of the government’s approach.”⁸² One possible reason for the D.C. Circuit’s approach is the extraordinary difficulty in locating the boundary between membership and substantial support, as evidenced by the executive branch’s description of “substantial supporters” as persons

⁷⁵ Guantánamo Bay Detainee Litigation Memorandum, *supra* note 71, at 1–2.

⁷⁶ Hafetz, *supra* note 21, at 40 n.53; *see also* Steve Vladeck, *What Hedges Could Have Said . . .*, LAWFARE (Sept. 18, 2012, 1:38 PM), <http://www.lawfareblog.com/2012/09/what-hedges-could-have-said/>.

⁷⁷ *See generally* Kate Hammond, Note, *The National Defense Authorization Act and the Unbound Authority to Detain: A Call to Congress*, 22 S. CAL. INTERDISC. L.J. 193 (2012) (discussing the lack of an adequate definition of “substantial support” and calling for Congress to provide one).

⁷⁸ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 71 (D.D.C. 2009).

⁷⁹ *Id.* at 72 (citing Bradley & Goldsmith, *supra* note 39, at 2109).

⁸⁰ *See Salahi v. Obama (Salahi II)*, 625 F.3d 745, 748 (D.C. Cir. 2010) (rejecting the sufficiency of the evidence proving that a Mauritanian detainee was an al Qaeda member, but declining to object to Salahi’s absence from any battlefield); *see also* Cronogue, *supra* note 15, at 388–89 (noting that if the 9/11 nexus is satisfied, there is no apparent limitation on locus of capture).

⁸¹ *Hamlily*, 616 F. Supp. 2d at 70 (referring to a statement made during a hearing).

⁸² Vladeck, *supra* note 76.

“more or less part of the armed force.”⁸³ The Administration’s attempt at a definition provides courts with little guidance for distinguishing between the two concepts.

Another possible reason is the difficulty of distinguishing between less-than-substantial support and substantial support. Substantial support does not include “unwitting or insignificant support” but involves a case-specific determination that may be vulnerable to subjective differences between cases.⁸⁴ According to the Obama Administration, substantial support applies to persons who “bear sufficiently close ties to those forces and provide them support that warrants their detention in prosecution of the conflict.”⁸⁵ This is a patently circular argument: detention on the basis of substantial support is warranted when the support provided warrants their detention.

As justification, the Obama Administration points to Article 4 of the Third Geneva Convention, which permits the detention of “[p]ersons who accompany the armed forces without actually being members thereof.”⁸⁶ Even if this provision has some analogous usefulness, it permits the detention of a narrow category of individuals. Use of the word “accompany” implies that the supporters maintain close proximity to the conflict.⁸⁷ It is not clear that the Obama Administration has hewn closely to that line. In *Salahi v. Obama*,⁸⁸ the government argued in the district court that hosting al Qaeda leaders and “referring aspiring jihadists to a known al-Qaida operative” amounted to substantial support.⁸⁹ The District Court for the District of Columbia rejected this evidence as showing support more “sporadic” than substantial.⁹⁰

⁸³ Reply Brief at 12, *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013) (No. 12-3176) [hereinafter *Hedges Reply Brief*].

⁸⁴ Guantánamo Bay Detainee Litigation Memorandum, *supra* note 70, at 2.

⁸⁵ *Hedges Appellants Brief*, *supra* note 71, at 27–28.

⁸⁶ *Id.* at 28; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316, 3320 [hereinafter *Third Geneva Convention*] (permitting the detention of “civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces”).

⁸⁷ Black’s Law Dictionary defines “accompany” as “[t]o go along with (another); to attend.” BLACK’S LAW DICTIONARY 18 (9th ed. 2009). It uses the example of a licensed driver accompanying an unlicensed driver when the former is “close enough to supervise and help the [latter].” *Id.*

⁸⁸ *Salahi v. Obama*, 710 F. Supp. 2d 1 (D.D.C. 2010), *vacated*, 625 F.3d 745 (D.C. Cir. 2010).

⁸⁹ See *Salahi v. Obama*, 625 F.3d 745, 746 (D.C. Cir. 2010) (describing the government’s position in the district court).

⁹⁰ *Salahi*, 710 F. Supp. 2d at 4.

Although some federal district court opinions have signaled dissatisfaction with the Obama Administration's attempt to detain individuals on the basis of substantial support,⁹¹ in *Al-Bihani v. Obama*,⁹² the D.C. Circuit acknowledged that the AUMF provides the government with "the power to craft a workable legal standard" governing detention authority, one which may include substantial support.⁹³ There, the court found that a detainee's conduct satisfied both the membership and the substantial support prongs.⁹⁴ The court noted, however, that "the picture may be less clear" in situations where "facts may indicate only support, only membership, or neither."⁹⁵ In fact, the executive branch appears internally divided over whether substantial support constitutes defensible independent grounds for detention,⁹⁶ and frequently abandons "substantial support" on appeal to present its case solely under the membership prong.⁹⁷ Thus, although the D.C. Circuit cautiously approves of detention on the basis of "substantial support," its precise contours and legal basis remain unclear.⁹⁸ The lack of clarity becomes increasingly problematic when "substantial support" is used to detain a member of an "associated force," further diluting the connection between the detainee and 9/11.⁹⁹

⁹¹ See *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009) (following *Hamlily* in rejecting substantial support); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009) (claiming that "[d]etention based on substantial or direct support . . . without more, is simply not warranted by domestic law or the law of war"); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 71 (D.D.C. 2009) (limiting "substantial support" to "members of the enemy organization's armed forces," thus nullifying its usefulness as an independent basis for detention).

⁹² *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

⁹³ *Id.* at 872. Numerous cases before the D.C. Circuit since its decision in *Al-Bihani* cite variously to a "purposeful and material support" standard in addition to a "substantial support" standard. See *Hedges v. Obama*, 724 F.3d 170, 181 & n.64 (2d Cir. 2013) (internal quotation marks omitted) (collecting cases).

⁹⁴ *Al-Bihani*, 590 F.3d at 873–74. Ghaleb Nasser al-Bihani carried a weapon and cooked for the 55th Arab Brigade that fought with the Taliban in Afghanistan until surrendering to the Northern Alliance. *Id.* at 869.

⁹⁵ *Id.* at 873–74.

⁹⁶ Chesney, *Who May Be Held?*, *supra* note 36, at 772.

⁹⁷ See *Salahi v. Obama*, 625 F.3d 745, 746–47 (D.C. Cir. 2010); *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010).

⁹⁸ See *Hedges*, 724 F.3d at 181 (noting that *Al-Bihani*, while accepting the notion of membership and substantial support-based detention, declined to "explor[e] the bounds of these concepts").

⁹⁹ See Cronogue, *supra* note 15, at 397–98 (discussing a hypothetical scenario involving groups that are several degrees removed from 9/11).

2. Identifying “Associated Forces”

According to the Obama Administration, an associated force is “(1) an organized, armed group that has entered the fight alongside al-Qaeda, [and that] (2) is a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.”¹⁰⁰ The District Court for the District of Columbia has defined an associated force as a “co-belligerent . . . fighting in association with one or more belligerent powers.”¹⁰¹ Holding a shared philosophy or purpose is insufficient; instead the group must exhibit “an actual association in the current conflict with al-Qaeda or the Taliban.”¹⁰² There is no clear statutory or common law delineation concerning the strength of affiliation between the “associated force” and al Qaeda or the Taliban necessary to bring other groups within the scope of the AUMF.¹⁰³

Two D.C. Circuit cases shed some light on this issue. In *Khan v. Obama*¹⁰⁴ the court upheld the detention of Shawali Khan, a member of Hezb-e-Islami Gulbuddin (“HIG”) operating alongside al Qaeda and the Taliban in Afghanistan.¹⁰⁵ HIG worked with the Taliban to raise funds for attacks against coalition forces and helped perpetrate the attacks.¹⁰⁶ *Barhoumi v. Obama*¹⁰⁷ upheld detention based on training with “a reputed terrorist leader” who coordinated militia training with Osama bin Laden in Afghanistan.¹⁰⁸ The common thread in each case is the locus of association: Afghanistan.

In contrast to the above cases, AQAP does not actually fight alongside al Qaeda in Afghanistan. Nonetheless, the Obama Administration targets AQAP as an “associated force” of al Qaeda.¹⁰⁹ It is possible that some AQAP members are covered by the AUMF because of prior al Qaeda membership.¹¹⁰ Given AQAP’s more recent

¹⁰⁰ Hedges Appellants Brief, *supra* note 71, at 29–30. This definition of associated force raises the issue of what it means to “fight alongside” al Qaeda and whether the phrase was intended to have geographic, operational, or ideological scope. So far, courts have only applied the concept of associated force to the Afghan battlefield. *See infra* notes 104–08 and accompanying text.

¹⁰¹ *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 74–75 (D.D.C. 2009) (quoting Bradley & Goldsmith, *supra* note 39, at 2112) (internal quotation marks omitted) (interpreting “associated forces” to mean “co-belligerents” under the law of war).

¹⁰² *Id.* at 75 n.17.

¹⁰³ Chesney, *Who May Be Held?*, *supra* note 36, at 789–90 n.111.

¹⁰⁴ *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011).

¹⁰⁵ *Id.* at 21.

¹⁰⁶ *Id.* at 32–33.

¹⁰⁷ *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010).

¹⁰⁸ *Id.* at 418.

¹⁰⁹ Chesney, *Beyond the Battlefield*, *supra* note 54, at 199.

¹¹⁰ *Id.*

Yemeni and Saudi recruitment, however, parsing which members of AQAP bid allegiance to Osama bin Laden (or Ayman al-Zawahiri, al Qaeda's current leader) for the purpose of detention is unworkable.¹¹¹ Moreover, the level of collaboration between AQAP and al Qaeda is unclear. They generally identify with "different leaders, formed at different times, and operate in different regions."¹¹² It is, at the very least, questionable whether a court would uphold detention based on membership in a group (such as AQAP) that merely holds the same philosophy or purpose as al Qaeda.¹¹³

In sum, the Obama Administration's framework for interpreting the AUMF appears to stretch the authority granted by Congress.¹¹⁴ Although federal courts have upheld the detention of members of "associated forces" fighting on the battlefield in Afghanistan, detention based on "substantial support" is highly questionable. Moreover, it remains unclear how far courts will allow the concept of "associated force" to stretch before holding that the Obama Administration has crossed the line of its use-of-force authority. Because recent congressional defense authorizations failed to provide clear guidance, Congress needs to take a fresh look.

C. The National Defense Authorization Act for Fiscal Year 2012: What Difference, if Any, Did It Make?

On December 31, 2011, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012 ("NDAA 2012" or "the Act").¹¹⁵ In the Act, Congress "affirm[ed]" the executive branch's detention authority under the AUMF by incorporating the Obama Administration's framework discussed above.¹¹⁶ In section 1021(b), the Act states that the executive branch may detain any individual:

¹¹¹ See JOHNSON, *supra* note 7, at 208–09.

¹¹² Cronogue, *supra* note 15, at 381. For additional discussion on the degree of association between al Qaeda and AQAP, see *infra* Part IV.B.

¹¹³ See *supra* note 102 and accompanying text.

¹¹⁴ Cronogue, *supra* note 15, at 402–03.

¹¹⁵ National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, 125 Stat. 1298 (2011). The NDAA 2012 sparked significant criticism, mostly out of concern that it authorizes the indefinite detention of U.S. citizens. In brief, the NDAA 2012 does not require indefinite military detention for anyone. It requires, however, military custody for foreign combatants pending disposition, which may include detention without trial until the end of hostilities or trial in an Article III court. *Id.* § 1022. The various issues concerning military detention of U.S. citizens are beyond the scope of this Note, which focuses instead on the "covered persons" provisions introduced in the statute.

¹¹⁶ *Id.* § 1021(a).

- (1) . . . who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
- (2) . . . who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.¹¹⁷

Section 1021(b)(1) tracks the AUMF and retains the 9/11 nexus. Section 1021(b)(2) names al Qaeda and the Taliban as target organizations and includes the Obama Administration's detention framework.¹¹⁸ Problematically, however, section 1021(d) states that the NDAA 2012 does not "limit or expand" the scope of executive power provided by the AUMF.¹¹⁹ The Act thus introduces a contradiction: new statutory language in section 1021(b)(2) permits the executive to detain persons not directly involved in 9/11, while section 1021(d) purports *not* to expand the power granted by the AUMF, despite the AUMF's requirement of a 9/11 nexus.

The Second Circuit's opinion in *Hedges v. Obama*¹²⁰ attempted to resolve this contradiction by stating that section 1021(b)(2) should be read to "affirm that the general AUMF authority to use force against these organizations includes the more specific authority to detain those who were part of, or those who substantially supported, these organizations or associated forces."¹²¹ To be sure, use-of-force authority against organizations includes detention authority vis-à-vis its members.¹²² It is not obvious, however, that in 2001 Congress imbued the AUMF with an implicit authority to detain individuals who provide substantial support or are part of an associated force operating far afield from Afghanistan. Although *Hedges* interprets section 1021(d) to mean that the President enjoyed this broader authority all along,¹²³ the legislative history behind the AUMF suggests that Con-

¹¹⁷ *Id.* § 1021(b)(1)–(2).

¹¹⁸ Benjamin Wittes, *Is the NDAA Vague or Overbroad?*, *LAWFARE* (Sept. 19, 2012, 4:51 PM), <http://www.lawfareblog.com/2012/09/is-the-ndaa-vague-or-overbroad/>.

¹¹⁹ NDAA 2012 § 1021(d) (emphasis added).

¹²⁰ *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013). *Hedges* dismissed for lack of standing claims by journalists and activists that section 1021(b)(2) had infringed upon speech and association activities protected by the First Amendment and violated due process under the Fifth Amendment. *Id.* at 193–98.

¹²¹ *Id.* at 190.

¹²² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

¹²³ *Hedges*, 724 F.3d at 191.

gress intended for the President to act solely against those “directly involved” in 9/11.¹²⁴ And although *Hedges* states that sections 1021(b)(2) and (d) do not represent a combined “ex post facto fix” to the AUMF,¹²⁵ they certainly have the appearance of one.¹²⁶ In any case, the continued uncertainty, even amongst members of Congress, over the AUMF’s applicability to groups such as AQAP¹²⁷ would best be resolved by more specific congressional action.¹²⁸

II. THE GLOBAL FIGHT AGAINST TERRORISM REQUIRES STATUTORY REAUTHORIZATION

It is no secret that the global fight against terrorism presents new issues regarding the scope and duration of conflict.¹²⁹ Precisely because the threat from terrorism is unlikely to dissipate in the near future, Congress must stay actively involved to ensure that the “state of war” does not become “a blank check for the President,”¹³⁰ and that any use of force stays within constitutionally permissible bounds. By inserting the executive’s framework into the NDAA 2012 while simultaneously stating that it was not limiting or expanding the AUMF, Congress essentially ducked the issue and missed an opportunity for a fuller debate about the scope and extent of the conflict.

¹²⁴ GRIMMETT, *supra* note 25, at 3.

¹²⁵ *Hedges*, 724 F.3d at 191 (internal quotation marks omitted).

¹²⁶ One cannot help but wonder if the 112th Congress did, in fact, try to use the NDAA 2012 to reshape the AUMF passed by the 107th Congress in response to the diffusion of the terrorist threat. See Cronogue, *supra* note 15, at 396 (observing that the NDAA 2012 essentially recognized “that the AUMF has not been updated to reflect the evolving nature and origin of the Islamist threat against this country and was seen by its supporters as a needed revision and affirmation . . . since the connection between [the 9/11 attacks] and the terrorists the United States is now fighting is becoming less obvious” (footnote omitted) (internal quotation marks omitted)). Moreover, in 2005, then-Senate Majority Leader Tom Daschle (D-SD) reported that he had refused a last minute Bush Administration request to add language to the AUMF granting the President the authority to use force “in the United States.” Tom Daschle, Op-Ed., *Power We Didn’t Grant*, WASH. POST, Dec. 23, 2005, at A21. In contrast, in 2011 Senator Lindsey Graham (R-SC), during floor debates over amendments to the NDAA 2012, stated that in his view, “America is part of the battlefield.” 157 Cong. Rec. S8662 (daily ed. Dec. 15, 2011) (statement of Sen. Lindsey Graham); see also Webber, *supra* note 26, at 195 n.230.

¹²⁷ See *AUMF Hearing*, *supra* note 28, at 2–3 (questioning whether “the AUMF extend[s] to organizations which played no active role in the September 11 attacks and may not even have existed in 2001” as well as the “legal basis for military action in countries like Yemen and Somalia”).

¹²⁸ Cronogue, *supra* note 15, at 391 (noting that renewed congressional action would “legitimize the President’s actions” and provide guidance in “this new form of warfare”).

¹²⁹ See, e.g., Hafetz, *supra* note 21, at 45–46.

¹³⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

A. *Global Terrorism Necessitates a Military Response*

Despite drawdowns in Iraq and Afghanistan, the need for some military involvement in mitigating the threat of global terrorism reflects the “prevailing winds of U.S. national security policy.”¹³¹ Under the Geneva Conventions framework, “[t]he fight against terrorism is not, technically, an international armed conflict” because it is not a conflict between states.¹³² Counterterrorism occupies a legal “twilight zone” not directly addressed by the Geneva Conventions law-of-war framework.¹³³ Instead, the fight against nonstate actors falls under the rubric of noninternational armed conflict to which, at the very least, Common Article 3 of the Geneva Conventions applies.¹³⁴ The U.S. Supreme Court agreed with this view, thus affirming that the United States is engaged in armed conflict, regardless of the legal status of the opposing party.¹³⁵

The problem, however, lies in defining the scope and duration of the conflict. On May 1, 2012, Presidents Obama and Karzai signed the U.S.-Afghanistan Strategic Partnership Agreement governing the relationship between the countries following the end of the United States’ combat role in 2014.¹³⁶ Implementing the strategic agreement is contingent upon a now-reluctant President Karzai signing a bilateral security agreement governing the presence of U.S. troops after 2014.¹³⁷ If signed, the Obama Administration should not use the presence of a small contingent of U.S. forces as a cover for continued authority under the AUMF.¹³⁸ Regardless of whether the United States

¹³¹ Barnes, *supra* note 18, at 113; *see also* John T. Bennett, *White House Quietly Shifts Armed Drone Program from CIA to DoD*, DEFENSENEWS (May 24, 2013, 6:00 AM), <http://www.defensenews.com/article/20130524/DEFREG02/305240010/White-House-Quietly-Shifts-Armed-Drone-Program-from-CIA-DoD>.

¹³² Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 379 (2008).

¹³³ Corn & Jensen, *supra* note 33, at 798.

¹³⁴ Third Geneva Convention, *supra* note 86, 6 U.S.T. at 3318. Common Article 3 applies to any “armed conflict not of an international character.” *Id.*

¹³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

¹³⁶ Press Release, White House Office of the Press Sec’y, Fact Sheet: The U.S.-Afghanistan Strategic Partnership Agreement (May 1, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/05/01/fact-sheet-us-afghanistan-strategic-partnership-agreement>. Under the agreement, some U.S. forces may remain in Afghanistan to target “the remnants of al-Qaeda.” *Id.*

¹³⁷ Steve Holland, *U.S. Wants Afghanistan to Sign Security Deal in “Weeks Not Months,”* REUTERS, Jan. 6, 2014, *available at* <http://www.reuters.com/article/2014/01/06/us-afghanistan-usa-idUSBREA050Z520140106>.

¹³⁸ The United States proposes to retain approximately 8000 troops in Afghanistan for training and counterterrorism purposes. *Id.*

retains troops in Afghanistan after 2014, *Hamdi* strongly suggests that the Obama Administration must address the disposition of detainees still held at Guantánamo Bay once the war in Afghanistan ends in 2014,¹³⁹ as President Obama has repeatedly claimed that it will.¹⁴⁰

Instead, to mitigate the specter of “indefinite detention”¹⁴¹ and a “war without end,”¹⁴² the use of force (including detention) should be linked to specific threats emanating from specific groups, rather than to terrorism threats in general. Congress’s constitutional legislative power¹⁴³ makes it the branch of government best suited to providing this degree of detail. At the very least, the threat from AQAP has risen to a level that warrants greater statutory specificity. By acting now, Congress would reinforce the President’s constitutional authority to conduct the armed conflict; failing to act, however, risks undermining the President’s ability to respond to new threats.¹⁴⁴

B. *Applying Justice Jackson’s Framework to the Ongoing Conflict*

To this day, the “accepted framework for evaluating executive action”¹⁴⁵ remains the test articulated by Justice Jackson’s concurring opinion in *Youngstown*.¹⁴⁶ Justice Jackson’s well-known test describes three different levels of executive power.

¹³⁹ *Hamdi* coupled the duration of detention authority with “[a]ctive combat operations against Taliban fighters.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004) (plurality opinion); see also Chesney, *Beyond the Battlefield*, *supra* note 54, at 210 (stating that if the war is over, a “key stabilizing factor” underlying the AUMF will disappear).

¹⁴⁰ Most recently, President Obama stated in his 2014 State of the Union Address that “we will complete our mission [in Afghanistan] by the end of this year, and America’s longest war will finally be over.” Barack Obama, President of the United States, State of the Union Address (Jan. 28, 2014), available at http://www.washingtonpost.com/politics/full-text-of-obamas-2014-state-of-the-union-address/2014/01/28/e0c93358-887f-11e3-a5bd-844629433ba3_story.html.

¹⁴¹ See, e.g., Webber, *supra* note 26, at 183 (observing that the conflict with al Qaeda, and thus detention duration, “could last for decades”).

¹⁴² Jerome A. Barron, *Citizenship Matters: The Enemy Combatant Cases*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 33, 37 (2005).

¹⁴³ See U.S. CONST. art. I.

¹⁴⁴ See Cronogue, *supra* note 15, at 391–93 (discussing the need for congressional authorization).

¹⁴⁵ *Medellin v. Texas*, 552 U.S. 491, 524 (2008); see also Barnes, *supra* note 18, at 65–66 (“Jackson’s concurrence has become the most significant guidepost in debates over the constitutionality of executive action in the realm of national security and foreign relations.”); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1919 (2012) (“[T]he [U.S. Supreme] Court has invoked Justice Jackson’s seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* as the critical framework for scaling deference to the Executive’s preferred security policies.” (footnote omitted)).

¹⁴⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

1. *Maximum Executive Authority*

First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”¹⁴⁷ The use of force in Afghanistan against al Qaeda and the Taliban falls under this prong of Jackson’s test because the language of the AUMF impliedly authorized targeting groups responsible for 9/11.¹⁴⁸ Given the AUMF’s explicit 9/11 nexus, it is highly debatable whether using force against terrorist groups with no connection to 9/11 such as AQAP is similarly supported.

Furthermore, while the NDAA 2012 expressly provides for the detention of substantial supporters and members of associated forces,¹⁴⁹ it does not define the requisite level of support or association to an individual within its purview. Congressional assent to the Administration’s *theoretical* definition of an “associated force” as a “co-belligerent” that “fight[s] alongside al-Qaeda [or the Taliban]”¹⁵⁰ should not be construed as congressional assent to the Administration’s *practice* of using force against belligerents that “fight alongside” al Qaeda only in an ideological sense. If ideology becomes the benchmark of association, it is difficult to discern any real boundary to the armed conflict. Finally, because Congress firmly anchored the NDAA 2012 to the AUMF,¹⁵¹ any use-of-force authority must be assessed in light of what the AUMF itself provides.¹⁵² As previously discussed, the Second Circuit’s opinion in *Hedges* failed to fully resolve the textual differences between the AUMF and the NDAA 2012.¹⁵³ Therefore, because the NDAA 2012 did not substantively alter the power

¹⁴⁷ *Id.* at 635.

¹⁴⁸ *See supra* note 68 and accompanying text.

¹⁴⁹ NDAA 2012, Pub. L. No. 112-81, § 1021(a)–(b), 125 Stat. 1298, 1562 (“Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons,” where covered persons include “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”).

¹⁵⁰ *Hedges* Appellants Brief, *supra* note 71, at 29–30.

¹⁵¹ *See* NDAA 2012 § 1021(d) (construed so as not to “limit or expand” the scope of presidential authority under the AUMF).

¹⁵² *See* Carroll Andrew Morse, *The Issue Is Not the NDAA, It’s the AUMF*, ANCHOR RISING (Mar. 22, 2012, 1:00 PM), <http://www.anchorrising.com/barnacles/014076html> (“The issue is the AUMF itself. The NDAA’s reaffirmation of the AUMF doesn’t impact much of anything, and a legislative victory that changed the NDAA but ignored the AUMF wouldn’t diminish the increased war-powers that have been granted to the President by Congress.”).

¹⁵³ *See supra* Part I.C.

granted by the AUMF, it failed to place the use of force against groups unconnected to 9/11, such as AQAP, on the firmest footing under Justice Jackson's framework.

2. Congressional Acquiescence

Under Justice Jackson's second category, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers."¹⁵⁴ There is, however, a "zone of twilight" where Congress may, through acquiescence, implicitly approve presidential action in the area of foreign affairs.¹⁵⁵ By failing to amend the AUMF, Congress is in danger of acquiescing (or has acquiesced) to an expansive manifestation of executive war powers.¹⁵⁶ It is unclear whether a court might consider congressional funding as a type of acquiescence, whereby "Congress has implicitly approved the practice" of pursuing terrorists unconnected to 9/11 by funding it through various defense appropriations.¹⁵⁷ That the Obama Administration has exhibited unwillingness to test this principle in court suggests that a finding of congressional acquiescence is not assured.¹⁵⁸ And even if the NDAA 2012 suggests congressional acquiescence to the Administration's interpretation of the AUMF, war

¹⁵⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). It is beyond the scope of this Note to assess whether the use of force in Yemen meets the criteria for acting in the national self-defense. *Cf.* *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (recognizing the President's inherent authority to defend the nation). Certainly, however, it is doubtful that actions taken in Yemen can be considered a response to 9/11. *See* Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur*, *GUARDIAN* (June 21, 2012, 12:54 PM), <http://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un> (referring to a statement by United Nations Special Rapporteur Christopher Heyns: "It's difficult to see how any killings carried out in 2012 can be justified as in response to [events] in 2001 Some states seem to want to invent new laws to justify new practices."); *see also* Chesney, *Beyond the Battlefield*, *supra* note 54, at 201 (quoting Bowcott, *supra*).

¹⁵⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁵⁶ *See* Cronogue, *supra* note 15, at 402–03; *see also* Johnsen, *supra* note 18, at 505 (discussing the expanded notion of inherent executive authority that President Bush sought and Congress previously rejected, and which President Obama purports not to seek).

¹⁵⁷ *See* *Dames & Moore v. Regan*, 453 U.S. 654, 680–82 (1981) (finding congressional acquiescence to President Carter's decision—subsequently ratified by President Reagan—to suspend claims against Iran in Congress's acceptance of the practice of executive settlements); *see also* *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d. Cir. 1971) (*per curiam*) (finding congressional authorization for the war in Vietnam after Congress had repealed the Gulf of Tonkin Resolution because it had extended the Selective Service Act and appropriated funding for the war effort).

¹⁵⁸ *See* Chesney, *Beyond the Battlefield*, *supra* note 54, at 166–67 (referring to the Obama Administration's decision to transfer Somali al-Shabaab member Ahmed Warsame from military detention on board the *U.S.S. Boxer* to civilian custody in the United States, "render[ing] the question of detention authority academic in his case").

should not be fought in the “zone of twilight” because Congress might unwittingly authorize more than it intended.¹⁵⁹

3. *Executive Power at Its Lowest Ebb*

Under Justice Jackson’s third category, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”¹⁶⁰ The legislative history of the AUMF reveals that Congress declined to provide the executive branch with the power to wage war against all terrorists in general, instead granting it solely with respect to those that were directly involved in 9/11.¹⁶¹ However, by relying on the AUMF to target groups unconnected to 9/11, the Obama Administration treats the AUMF like the blank check that Congress expressly rejected.¹⁶² As the fight against terrorism expands beyond al Qaeda and targets terrorist groups originating in other parts of the world, the use of force threatens to fall more squarely within this lowest and indefensible ebb.

Instead, Congress must clearly identify the current target.¹⁶³ If the United States is no longer primarily at war with groups responsible for 9/11, Congress needs to be straightforward with the American public and update the AUMF by specifically naming the appropriate targets. Otherwise, “Congress is no longer truly behind the authorization,”¹⁶⁴ allowing for potentially unlimited wars to be initiated by the executive branch and fought by American servicemembers. This is why the United States needs a new AUMF.

III. TOWARDS A NEW STATUTORY FRAMEWORK: THE AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST GLOBAL TERRORIST ORGANIZATIONS OF 2014¹⁶⁵

The current AUMF straddles the line between a broad and restricted authorization. It requires the President to report to Congress

¹⁵⁹ See generally EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 150–60 (1st paperback prtg. 1991) (discussing the extension of the Vietnam War into Cambodia and Laos and the efforts of Congresswoman Elizabeth Holtzman to challenge combat operations in federal court).

¹⁶⁰ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁶¹ GRIMMETT, *supra* note 25, at 2–3; see also Bradley & Goldsmith, *supra* note 39, at 2079 (“Many members of Congress stated or implied in floor debates that [the 9/11] nexus limitation was the sole textual limitation on the President’s authorization to use force.”).

¹⁶² Cf. *supra* notes 41–44 and accompanying text.

¹⁶³ See Chesney, *Who May Be Held?*, *supra* note 36, at 856 (observing the need for clarification regarding which terrorist organizations “the United States purports to be at war with”).

¹⁶⁴ Cronogue, *supra* note 15, at 403.

¹⁶⁵ See Appendix, *infra*, for suggested statutory language.

on the status of hostilities, but permits the President to determine the targets provided that they fulfill the 9/11 nexus requirement.¹⁶⁶ There is precedent for setting more limited authorizations. For example, Congress passed the 1955 authorization to use force in Taiwan for the “specific purpose” of “securing and protecting Formosa and the Pescadores against armed attack,” and included a “time limitation and a reporting requirement.”¹⁶⁷ The open-ended nature of the fight against terrorism militates in favor of Congress passing a narrower authorization so that it does not become a “war without end.”¹⁶⁸ In a limited authorization, Congress may properly restrict the resources, methods, targets, purposes, and durations of executive military action.¹⁶⁹ This Note proposes a new Authorization for Use of Military Force Against Global Terrorist Organizations of 2014 (“AUMF 2014”) that places explicit restrictions on targets and sets a timeframe for future congressional attention.¹⁷⁰

A. *Identifying the Target*

The AUMF 2014 integrates greater specificity concerning the targeted terrorist organizations and incorporates some of the lessons learned from the past few years of D.C. Circuit case law.

1. *Removing “Nations”*

Generally speaking, the President should not be able to go to war with a nation without explicit congressional approval.¹⁷¹ The war in Afghanistan was prompted in part by the decision to overthrow the Taliban, then the de facto government of Afghanistan.¹⁷² If the gov-

¹⁶⁶ Bradley & Goldsmith, *supra* note 39, at 2082.

¹⁶⁷ *Id.* at 2076–77 (quoting Joint Resolution of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7). Bradley and Goldsmith discuss additional narrowly drawn authorizations. The 1991 authorization to use force to repel the Iraqi invasion of Kuwait had the narrow purpose of implementing pertinent UN Security Council resolutions. *Id.* at 2077. The 1983 authorization to use force in Lebanon was targeted towards specific functions and had an eighteen-month sunset clause. *Id.* The 1993 authorization to use force in Somalia was for the sole purpose of protecting U.S. personnel and bases, and had a short five-month time limitation. *Id.*

¹⁶⁸ Barron, *supra* note 142, at 37.

¹⁶⁹ Bradley & Goldsmith, *supra* note 39, at 2078.

¹⁷⁰ See Barnes, *supra* note 18, at 110 (suggesting inclusion of a time limit on any reauthorization); Chesney, *Who May Be Held?*, *supra* note 36, at 856 (calling for a sunset provision).

¹⁷¹ Barnes, *supra* note 18, at 107.

¹⁷² See Barack Obama, Pres. of the United States, Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan> (describing the impetus and result of the deployment of U.S. forces into Afghanistan).

ernment decides that military force against a specific nation is warranted, Congress should pass a separate authorization or declaration of war under its Article I, section 8 powers,¹⁷³ similar to the Authorization for Use of Military Force Against Iraq Resolution of 2002.¹⁷⁴ Alternatively, the President could rely on inherent constitutional power to defend the nation from attack should such circumstances arise.¹⁷⁵ Removing “nations” is thus consistent with passing a narrower authorization while acknowledging the President’s ability to command the U.S. armed forces in national self-defense.

2. Targeting Specific Organizations

The AUMF 2014 contains a tripartite framework for targeting specific terrorist organizations. The first prong addresses the continued effort to subdue those responsible for 9/11: al Qaeda and the Taliban. The second prong addresses the use of force against AQAP, an organization specifically named in the new statute because of the extent of U.S. armed forces involvement in Yemen.¹⁷⁶ Third, given the fluid manner in which terrorist groups can form and re-form,¹⁷⁷ the statute also contains a third prong—an emergency provision. This provision permits military action against a terrorist organization that has directly threatened U.S. persons or interests but whose actions do not rise to the level necessary to trigger the President’s inherent constitutional powers. This may include, for example, the organization responsible for the September 11, 2012 attack on the U.S. Consulate

¹⁷³ U.S. CONST. art I, § 8.

¹⁷⁴ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a)(1), 116 Stat. 1498, 1501 (authorizing the President to use military force to “defend the national security of the United States against the continuing threat posed by Iraq”).

¹⁷⁵ See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (upholding President Lincoln’s commander-in-chief authority to command the armed forces and institute a blockade prior to congressional declaration of war).

¹⁷⁶ See generally JOHNSON, *supra* note 7 (discussing the history and current state of U.S. armed forces involvement in Yemen). One argument against specifying terrorist groups states that Congress might not be able to act “quickly or robustly enough to meet the threat, which is ever-morphing in terms of group identity and in terms of geographic locale.” See ROBERT CHESNEY ET AL., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 9–10 (2013), available at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>. This concern should be assuaged, however, by the emergency provision discussed above, which permits the executive branch to respond to new threats. The sixty days provided to Congress mirrors that of the War Powers Resolution. *Cf.* 50 U.S.C. § 1543 (2006). Congressional inability to determine that a particular terrorist group represents a threat within that timeframe suggests that any use of force should be seriously questioned.

¹⁷⁷ See generally Chesney, *Beyond the Battlefield*, *supra* note 54, at 185–98 (discussing the challenge of differentiating between and identifying various terrorist organizations).

in Benghazi, Libya.¹⁷⁸ Under this provision, the President may respond to an action or threat of action endangering U.S. persons or interests, but must comply with the existing reporting requirements set forth in the War Powers Resolution.¹⁷⁹ Congress would then have sixty days to authorize the use of force¹⁸⁰ by amending the AUMF 2014 to include the target organization. Should Congress decline to authorize the use of force, the executive branch would be required to withdraw U.S. forces at that time. Although numerous presidents have sidestepped the congressional approval requirement of the War Powers Resolution, fewer have contested the sixty-day rule, and in a 1980 advisory opinion, the Department of Justice found the deadline constitutional.¹⁸¹ The Obama Administration generally acts consistently with the provisions of the War Powers Resolution¹⁸² and will likely do so in the future to avoid a separation-of-powers showdown before the U.S. Supreme Court.¹⁸³

The AUMF 2014 also recognizes that the President needs the ability to target associated forces that participate in hostilities with specifically identified organizations. In Afghanistan, many private armed groups fought alongside al Qaeda and the Taliban,¹⁸⁴ and the D.C. Circuit has upheld detention of members of associated forces in such cases.¹⁸⁵ The definition of associated force as a co-belligerent

¹⁷⁸ The Libyan Ansar al-Sharia, generally thought to be behind the attack, would fall under this provision.

¹⁷⁹ 50 U.S.C. § 1543 (2006).

¹⁸⁰ *Id.* § 1544.

¹⁸¹ Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 196 (1980).

¹⁸² See generally RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2012) (summarizing presidential reporting consistent with the War Powers Resolution). But see Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16 (discussing the Obama Administration's decision not to comply with the War Powers Resolution and its argument that "the limited American role" of the United States in Libya did not constitute engaging in "hostilities" for the purpose of the Resolution).

¹⁸³ Although the Supreme Court has never struck down "any statutory limitations on substantive executive war powers," the Court "has invalidated many presidential wartime acts precisely because they lacked congressional authorization." Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 31–32 (2012) (internal quotation marks omitted).

¹⁸⁴ Guantánamo Bay Detainee Litigation Memorandum, *supra* note 71, at 7; see also Chesney, *Beyond the Battlefield*, *supra* note 54, at 187 (quoting an anonymous American military officer who, when referencing groups fighting in Afghanistan and Pakistan, stated, "This is actually a syndicate of related and associated militant groups and networks . . . Trying to parse them, as if they have firewalls in between them, is really kind of silly. They cooperate with each other. They franchise work with each other.").

¹⁸⁵ See *Khan v. Obama*, 655 F.3d 20, 33 (D.C. Cir. 2011).

suggested by the Obama Administration is a good start,¹⁸⁶ but it must be clear that an associated force exhibits “an actual association in the current conflict”¹⁸⁷—a close, geographic association.

Narrowly drawing the definition of associated force resolves the issue of whether the concept extends to groups acting in entirely different parts of the world, under their own agendas, but with similar purposes to al Qaeda. If an organization independently threatens the United States, it must be specifically named. For example, the Somali group al-Shabaab may be targeted as an associated force of AQAP while its members are participating in hostilities in Yemen¹⁸⁸ once the AQAP is specifically named in the new AUMF. But if al-Shabaab were to pose a sufficiently serious and largely independent threat, Congress would need to amend the new AUMF to expressly authorize force against al-Shabaab.

3. *Deploying Force Against Members of Covered Organizations*

In contrast to the current AUMF that permits the use of force against “persons” involved in 9/11, the AUMF 2014 focuses on members of targeted terrorist organizations. It is not, however, specific as to the test of membership. The D.C. Circuit has developed an appropriate functional test,¹⁸⁹ and Congress is correct to leave this factually challenging matter to the courts. One author has suggested permitting the President to implement a “policy of selective individual designation,” should “the President wish[] to separate a dangerous individual from a more benign organization.”¹⁹⁰ Granted, dangerous individuals exist, but individuals alone rarely warrant American military might.¹⁹¹ Congress should not permit the President to use military force—to essentially “go to war”—against an individual lacking cognizable ties to a terrorist group.¹⁹² Instead, the President should work with the

¹⁸⁶ Hedges Appellants Brief, *supra* note 71, at 29–30.

¹⁸⁷ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 n.17 (D.D.C. 2009).

¹⁸⁸ Al-Shabaab operates out of Somalia but has recently strengthened its ties to AQAP in Yemen. See Chesney, *Beyond the Battlefield*, *supra* note 54, at 165–66, 193–95.

¹⁸⁹ See, e.g., *Almerfed v. Obama*, 654 F.3d 1, 6 (D.C. Cir. 2011) (staying at a guesthouse run by a terrorist support entity is probative but not sufficient to establish membership); *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (residing at an al Qaeda guest house constitutes “powerful evidence” of membership); *Salahi v. Obama*, 625 F.3d 745, 751 (D.C. Cir. 2010) (swearing an oath to al Qaeda is relevant to showing membership but insufficient on its own); *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (operating within an enemy’s “formal command structure” is sufficient to prove membership but is not necessary).

¹⁹⁰ Barnes, *supra* note 18, at 107.

¹⁹¹ See *id.* at 106.

¹⁹² Here, this Note is referring to the so-called “lone wolf” terrorist, and not individuals

relevant nation in which the dangerous individual resides to bring charges and seek extradition to the United States for criminal trial.¹⁹³

4. *Eliminating Substantial Support*

Federal district courts have largely rejected the concept of substantial support, and it is unclear whether detention based solely on substantial support for terrorism is permitted under the laws of war.¹⁹⁴ Activities that support terrorism, such as terrorism financing, should be pursued under existing criminal laws that prohibit providing or conspiring to provide “material support or resources to a foreign terrorist organization.”¹⁹⁵ In fact, the Obama Administration successfully used this approach in 2009 when they convicted a Malian man for conspiring to transport cocaine across Northern Africa in support of al Qaeda, al Qaeda in the Islamic Maghreb, and the Fuerzas Armadas Revolucionarias de Colombia.¹⁹⁶ Removing substantial support further clarifies the boundaries of conduct warranting detention, which would otherwise become muddled with the near-impossible feat of defining the precise meaning of “substantial.”

B. *Detention Location, Duration, and Disposition*

The voluminous litigation vis-à-vis terrorism detention suggests that Congress must pay particular attention to this aspect of the use of force.¹⁹⁷ Detention issues center primarily on three areas: who can be

such as Anwar Al-Aulaqi, whom U.S. forces targeted as a member of AQAP. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010). For further information on the threat of lone wolf terrorists, see Beau D. Barnes, Note, *Confronting the One-Man Wolf Pack: Adapting Law Enforcement and Prosecution Responses to the Threat of Lone Wolf Terrorism*, 92 B.U. L. REV. 1613, 1647–48 (2012) (describing and citing examples of “lone wolf” terrorists).

¹⁹³ See 18 U.S.C. § 3184 (2012) (governing the extradition of fugitives from a foreign country to the United States). The Obama Administration used this approach in the case of Abu Hamza al-Masri, who was extradited to the United States from England in 2012 and is scheduled to face trial in April 2014. Philip Sherwell, *Abu Hamza Lawyers Want to Bar Mention of Osama bin Laden and 9/11 from US Terror Trial*, TELEGRAPH (London) (Jan. 31, 2014, 1:40 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10608915/Abu-Hamza-lawyers-want-to-bar-mention-of-Osama-bin-Laden-and-911-from-US-terror-trial.html>. One drawback is that extradition takes time. The United States indicted al-Masri in 2004, eight years prior to his extradition. See Sealed Indictment at 1, *United States v. Mustafa*, No. 04 Cr. 356 (S.D.N.Y. April 19, 2004).

¹⁹⁴ See *supra* Part I.B.1.

¹⁹⁵ See 18 U.S.C. § 2339B (2012).

¹⁹⁶ See generally Press Release, U.S. Attorney’s Office, S. Dist. of N.Y., *Malian Man Sentenced in Manhattan Federal Court to 57 Months in Prison for Conspiring to Provide Material Support to Terrorists* (Mar. 12, 2012), available at <http://www.justicegov/usaonys/pressreleases/March12/issaoumarsentencingprpdf>.

¹⁹⁷ See generally *Category Archives: Guantanamo: Litigation: D.C. Circuit*, LAWFARE, <http://www.lawfare.com/category/archives/guantanamo-litigation-d-c-circuit>.

detained, where the detention will take place, and how the detention will end.

1. *U.S. Citizens and Lawful Permanent Residents*

Under *Hamdi*, U.S. citizens (and by implication, U.S. permanent residents) are detainable as members of target organizations for participating in battlefield hostilities.¹⁹⁸ For conduct or arrests taking place in the United States, however, the government should utilize civilian courts to prosecute those individuals under domestic criminal laws.¹⁹⁹ Article III courts have certainly proved adequate in this respect.²⁰⁰ This policy also reflects the prevailing winds of current executive policy towards detention of U.S. citizens and permanent residents. In his signing statement attached to the NDAA 2012, President Obama stated that he “[would] not authorize the indefinite military detention without trial of American citizens.”²⁰¹ Signing statements are not binding, however, and thus legislation is required to constrain future executive action in this area.

2. *Non-U.S. Persons*

Given the damage that Guantánamo Bay has inflicted on the United States’ reputation,²⁰² foreign detainees should be held in a prison in the vicinity of the battlefield before being transferred to a U.S. military prison located in the United States.²⁰³ To achieve this goal, Congress must cease its meddling in the transfer of Guantánamo

www.lawfareblog.com/category/guantanamo/litigation/dccircuit/ (last visited Feb. 1, 2014) (discussing cases); Larkin Reynolds, *Updated GTMO Habeas Numbers*, LAWFARE (Mar. 29, 2011, 5:26 PM), <http://www.lawfareblog.com/2011/03/updated-gtmo-habeas-numbers/> (summarizing cases).

¹⁹⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–16 (2004) (plurality opinion).

¹⁹⁹ See generally David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SECURITY L. & POL’Y 1 (2011) (arguing for an approach that includes all the available tools: military force, intelligence, and, crucially, domestic law enforcement).

²⁰⁰ See *id.* at 27 (noting that terrorism cases tried in Article III courts have a conviction rate of ninety percent).

²⁰¹ Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011).

²⁰² See, e.g., Hakimi, *supra* note 132, at 626–27 (noting the “intensely negative” international reaction to U.S. detention practices, including holding suspected terrorists for indefinite periods of time at Guantánamo Bay).

²⁰³ In 2009 President Obama responded to critics of his plan to bring Guantánamo Bay detainees to U.S. prisons by pointing to the fact that no inmate has ever escaped from a federal supermax facility. See *No Inmate Has Escaped from Federal Supermax Prison*, POLITIFACT.COM (May 21, 2009), <http://www.politifact.com/truth-o-meter/statements/2009/may/21/barack-obama/obama-correct-no-inmate-has-ever-escaped-supermax-/>.

Bay detainees to U.S. soil.²⁰⁴ Regarding duration, linking detention to a particular regional conflict through the new AUMF 2014 implements the implied message of *Hamdi*, which coupled detention authority with active combat against the Taliban.²⁰⁵ The D.C. Circuit echoed this approach by stating that detention is justified until the political branches determine that “hostilities in Afghanistan have ceased.”²⁰⁶ This change will help to assuage concerns that a new terrorism-related conflict will be used as a cover to extend the detention of terrorism suspects captured elsewhere. Finally, disposition of detainees should largely follow the methods outlined in section 1021(c) of the NDAA 2012²⁰⁷ except to the extent that additional language is necessary to implement the above-mentioned requirement that individuals will be detained only until the end of the specific hostilities in which they engaged, and not until the end of some indeterminate conflict.²⁰⁸

C. Congressional Review

Ten years is too long for Congress to leave the AUMF languishing “like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”²⁰⁹ By integrating the specificity described above, and forcing the Executive to obtain congressional authorization to target new groups, Congress will remain informed and in control of the fight against terrorism. Including a five-year sunset provision on the AUMF 2014, however, also ensures that the entire statute is reviewed and debated on a more frequent

²⁰⁴ Congress, for example, has made it impossible to close Guantánamo Bay by prohibiting the use of funds for the construction or modification of facilities in the United States to house Guantánamo Bay detainees. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 1022, 1027, 126 Stat. 1632, 1911, 1914; NDAA 2012, Pub. L. No. 112-81, § 1026, 125 Stat. 1298, 1566.

²⁰⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (plurality opinion).

²⁰⁶ *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010). It is beyond the scope of this Note to define what precisely the terms “hostilities” or “active combat” mean. Such terms are inherently vague and difficult to define in the abstract. See Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT’L L. & POL’Y 281, 288 (2010) (noting that “no official definition of ‘hostilities’ can be found in the [law of armed conflict]”). By expressly linking detention duration to armed combat in a particular region, however, the proposal suggested by this Note at least narrows the scope of the inquiry for a future court when confronted with the need to determine detention authority.

²⁰⁷ NDAA 2012 § 1021(c)(1)–(4).

²⁰⁸ See *id.* § 1021(c)(1) (authorizing “[d]etention under the law of war without trial until the end of the hostilities”).

²⁰⁹ *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

basis.²¹⁰ This further ensures that the public will be kept abreast of, and enjoy greater opportunity to comment on, the war being waged in its name. Implementing the changes outlined provides much-needed clarity in the ongoing conflict against global terrorism and bolsters executive power to conduct the fight. The Obama Administration can then cease trying to convince the public (and itself) that its actions are authorized and can act confidently knowing that its detention authority will not “unravel.”²¹¹

IV. RESPONDING TO CALLS FOR EXECUTIVE DEFERENCE

The Obama Administration claims that a new AUMF is not warranted and prefers to pursue new terrorist groups under the current statute draped with its own interpretive gloss.²¹² The arguments for executive deference range from the general—that the Obama Administration’s overall interpretative approach should be afforded deference—to the specific—that AQAP, and other groups adopting the al Qaeda name, really are part of core al Qaeda and are thus targetable under the current AUMF. Both claims ultimately fail. The U.S. Supreme Court has underscored the importance of congressional involvement in resolving issues of national security and conflating al Qaeda affiliates with al Qaeda would effectively nullify any future need for congressional involvement because so many terrorist groups claim some connection to al Qaeda.²¹³

A. Deference to the Obama Administration’s AUMF Interpretation

Some commentators argue that the Obama Administration’s framework should be afforded the type of “super-strong” deference associated with *Chevron* deference.²¹⁴ *Chevron* deference encompasses a two-part test: (1) “whether Congress has directly spoken to the precise question at issue,” and (2) if Congress has not directly spoken, “whether the agency’s [interpretation] is based on a permissible construction of the statute.”²¹⁵ *Chevron* deference is essentially a test of reasonableness. Few commentators, however, advocate for the

²¹⁰ See Barnes, *supra* note 18, at 110 (suggesting a time limit on any reauthorization); Chesney, *Who May Be Held?*, *supra* note 36, at 856 (calling for a sunset provision).

²¹¹ Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

²¹² Cronogue, *supra* note 15, at 378.

²¹³ For example, the al-Nusra Front in Syria, once believed to be aligned with al Qaeda in Iraq, might soon be considered an associated force of al Qaeda. See Goldsmith, *The AUMF Will Soon Extend to Syria (If It Doesn’t Already)*, *supra* note 22.

²¹⁴ See Landau, *supra* note 145, at 1919.

²¹⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

kind of absolute deference claimed by the Bush Administration.²¹⁶ The “dominant” school of scholarly thought on the issue of deference “takes a balanced, nonabsolutist approach . . . that supports some measure of deference in circumstances that reflect executive expertise.”²¹⁷

The U.S. Supreme Court’s post-9/11 opinions, however, rejected strong deference²¹⁸ and repeatedly ruled against the government.²¹⁹ Akin to deciding a case under *Chevron* step one, in the absence of clear congressional direction, the Court has eschewed deference in favor of remanding the issue to Congress “for a second pass at the question.”²²⁰ The Court uses this approach to resolving the particulars of the AUMF, deciding “subsidiary elements” of the issues raised by the statute but calling on Congress to clarify the precise scope of executive power.²²¹ Thus far, Congress has largely failed.²²² Absent a “clear delegation” to the Executive, *Chevron* deference will remain inapplicable.²²³

Amidst the various positions, one point is clear: positions adopted during the course of litigation may not warrant the same level of deference as an executive interpretation of a treaty.²²⁴ This is because litigation may serve “broader governmental interests such as a desire to maximize the government’s own authority.”²²⁵ The Obama administration initially outlined its framework for interpreting the AUMF as applied to detention policy during the Guantánamo Bay detainee litigation.²²⁶ Consequently, it may not deserve strong deference.

Ultimately, a consistent standard for affording deference to an executive interpretation of its authority to use force is hard to discern. Nonetheless, the Supreme Court’s reliance on Justice Jackson’s tripartite framework to assess executive power highlights the importance of

²¹⁶ Johnsen, *supra* note 18, at 495.

²¹⁷ *Id.* at 497–98.

²¹⁸ *Id.* at 491.

²¹⁹ *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (affording Guantánamo Bay detainees the constitutionally protected right to contest their detention in federal court).

²²⁰ Landau, *supra* note 145, at 1921–22, 1948.

²²¹ *Id.* at 1964–65.

²²² *Id.* at 1965 (noting that the NDAA 2012 “leaves the lion’s share” of ambiguities raised during the course of detainee litigation “unanswered”).

²²³ *Id.* at 1966.

²²⁴ Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1773 (2007).

²²⁵ Johnsen, *supra* note 18, at 498.

²²⁶ *See* Guantánamo Bay Detainee Litigation Memorandum, *supra* note 71, at 3–7.

“dual-branch solutions” to national security issues.²²⁷ Arguably, “the constitutional delegation of the war-declaring power to the Congress” means that its “mutual participation” is required to uphold the legality of any use of military force.²²⁸ Congressional engagement is thus positive because it legitimizes executive power and provides a comprehensive legal framework governing the use of force.²²⁹

B. Precisely Who Is Part of “Core” Al Qaeda?

Another prominent counterargument to rewriting the AUMF in the manner this Note suggests is “that AQAP remains part-and-parcel of al Qaeda, and [is] hence directly subject to the AUMF.”²³⁰ Indeed, Osama bin Laden’s former secretary, Nasser al-Wuhayshi, helped to establish AQAP in Yemen.²³¹ Yet, as previously noted, AQAP and al Qaeda now operate in different countries under a different organizational hierarchy.²³² Reports that Wuhayshi communicates with Zawahiri²³³ are insufficient to conflate the two groups for the purpose of deploying force; Zawahiri conceivably communicates with an array of terrorist organizations.²³⁴ Moreover, various reports differ over the degree of Zawahiri’s involvement in the events leading up to the August 2013 embassy evacuations.²³⁵

Furthermore, the two organizations are readily distinguishable. Although the Obama Administration has publicly stated that al

²²⁷ Landau, *supra* note 145, at 1977.

²²⁸ Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).

²²⁹ See Recent Legislation, *National Defense Authorization Act for Fiscal Year 2012*, Pub. L. No. 112-81, 125 Stat. 1298 (2011), 125 HARV. L. REV. 1876, 1883 (2012).

²³⁰ *Ten Years After the 2001 Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror: Hearing Before the H. Armed Servs. Comm.*, 112th Cong. 89 (2011) (statement of Robert Chesney) [hereinafter Chesney Statement].

²³¹ JOHNSON, *THE LAST REFUGE*, *supra* note 7, at 208.

²³² Chesney Statement, *supra* note 230, at 4.

²³³ See, e.g., *Taking No Chances*, *supra* note 2, at 23.

²³⁴ For example, Zawahiri reportedly played a significant role in the evolution of the Algerian Salafist Group for Preaching and Combat into al Qaeda in the Islamic Maghreb. See, e.g., WILLIAM THORNBERRY & JACLYN LEVY, *CTR. FOR STRATEGIC & INT’L STUDIES, AL QAEDA IN THE ISLAMIC MAGHREB 3* (2011), available at http://csis.org/files/publication/110901_Thornberry_AQIM_WEBpdf.

²³⁵ Compare *Taking No Chances*, *supra* note 2, at 23 (reporting that Zawahiri had ordered attacks to coincide with Laylat al-Qadr, falling on the twenty-seventh night of Ramadan), with *Al-Qaeda Messages Sparked US Embassy Closures*, *supra* note 5 (noting that “US sources and analysts cautioned that communication between al-Qaeda and its affiliate did not necessarily mean that AQAP was taking orders from Zawahiri”).

Qaeda is on the verge of collapse,²³⁶ AQAP now holds the dubious distinction of being considered the terrorist group “most likely to carry out a terrorist attack in America.”²³⁷ The U.S. State Department lists the two groups separately on its list of Foreign Terrorist Organizations.²³⁸ Crucially, however, if AQAP were considered part of al Qaeda, then additional groups further removed from 9/11 become targetable under the Administration’s current AUMF interpretation.²³⁹ To avoid executive overreach, Congress must delineate clear targets and boundaries in the ongoing global fight against terrorist organizations.

CONCLUSION

The al Qaeda responsible for 9/11 is in flux, largely defeated. At the same time, new groups, such as AQAP, continue to emerge as threats in their own right. The current AUMF targets groups with a specific 9/11 nexus and does not account for the changing face of terrorism. The NDAA 2012 failed to make congressional intent clear by incorporating contradictory and ill-defined language. If Congress wishes to continue the global fight against terrorist groups that actively threaten the United States, it must be clear regarding the scope and object of its authorization so that the public fully understands whom the United States is fighting. Accordingly, a new AUMF is required.

²³⁶ See Johnson, *supra* note 63, at 2; see also Jennifer Epstein, *Report: Al Qaeda near Collapse*, POLITICO (July 27, 2011, 6:22 AM), <http://www.politico.com/news/stories/0711/60004html>.

²³⁷ Chesney, *Beyond the Battlefield*, *supra* note 54, at 165.

²³⁸ The State Department officially listed al Qaeda on October 8, 1999, and AQAP on January 19, 2010, more than a decade later. See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085htm>. The National Counterterrorism Center has stated that “AQAP emerged in January 2009” and that its predecessor, al Qaeda in Yemen, itself only “came into existence . . . in February 2006.” *Al-Qa’ida in the Arabian Peninsula (AQAP)*, NAT’L COUNTERTERRORISM CTR., <http://www.nctc.gov/site/groups/aqaphtml> (last visited Feb. 1, 2014).

²³⁹ See *supra* notes 21–22 and accompanying text.

APPENDIX

The following is the proposed language of a joint resolution that Congress should pass. A discussion of its primary aspects appears in Part III above.

JOINT RESOLUTION

To authorize the use of United States Armed Forces against those responsible for the attacks launched against the United States on September 11, 2001 and for the continuing threat to the United States from global terrorist organizations.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force Against Global Terrorist Organizations of 2014.”

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against:

- (1) Al Qaeda, and members thereof, as the armed terrorist organization that planned, authorized, and committed the terrorist attacks against the United States on September 11, 2001.
- (2) The Afghan Taliban, also known as Quetta Shura, and members thereof, as the armed terrorist organization that harbored al Qaeda.
- (3) Al Qaeda in the Arabian Peninsula, and members thereof, as the armed terrorist organization responsible for planning, authorizing, and committing terrorist attacks against the United States, including by attempting to bomb U.S.-bound airliners and diplomatic facilities.
- (4) Co-belligerents, and members thereof, of any armed terrorist organization specifically identified in subsection (a) or targeted under subsection (b) below.

(b) EMERGENCY PROVISION.—In keeping with the powers granted to the President under Section 2(c) of the War Powers Resolution, 50 U.S.C. §§ 1541–48, the President is authorized to use all necessary and appropriate force against an armed terrorist organization committing or imminently threatening a terrorist attack against U.S. persons or interests.

When invoking the powers granted under subsection (b), the President must comply with the reporting requirements contained in sections 4 and 5 of the War Powers Resolution.

Congress shall then decide within sixty days whether to authorize the use of the United States armed forces against such an armed terrorist organization. Congressional authorization shall take the form of an amendment to this Authorization for Use of Military Force Against Global Terrorist Organizations of 2014 by specifically identifying the armed terrorist organization in subsection (a).

(c) **DETENTION.**—Individuals detained pursuant to the authority granted in subsections (a) and (b) above shall be promptly transferred to a U.S. military facility in the United States pending disposition under the laws of war.

(d) **DISPOSITION UNDER THE LAWS OF WAR.**—The disposition of an individual detained pursuant to the authority granted in subsections (a) and (b) above may include the following:

- (1) Detention under the laws of war without trial until the end of the relevant hostilities authorized by the Authorization for Use of Military Force Against Global Terrorist Organizations of 2014;
- (2) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction;
- (3) Transfer to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity; or
- (4) Trial under chapter 47A of title 10, United States Code.

(e) **APPLICABILITY TO U.S. CITIZENS AND LAWFUL RESIDENT ALIENS.**—For conduct occurring in a foreign battlefield or territory, the disposition of U.S. citizens and lawful resident aliens shall comply with subsection (d) above.

For conduct occurring in U.S. territory, the disposition of U.S. citizens and lawful resident aliens shall comply with subsection (d)(2) above.

(f) **CONGRESSIONAL REVIEW.**—This Authorization for Use of Military Force Against Global Terrorist Organizations of 2014 shall expire in five years from its date of enactment unless Congress chooses to renew the Authorization for Use of Military Force Against Global Terrorist Organizations of 2014 for a period of not more than five additional years.

(g) DEFINITIONS.—Throughout this Act:

(1) The term “co-belligerent” is defined as: (i) an armed terrorist organization fighting in conjunction with and in close physical proximity to an armed terrorist organization specifically identified in subsection (a) or targeted in subsection (b) above, and which has engaged in hostilities against the U.S. or a coalition partner; or (ii) any organization that harbors an armed terrorist organization specifically identified in subsection (a) or targeted under subsection (b) above.

(2) The term “close physical proximity” requires that the co-belligerent be engaged in hostilities in the same country as the identified armed terrorist organization or in an immediately adjacent country.

(3) The term “relevant hostilities” is defined as active combat in the country of capture, or in the country the hostilities in which gave rise to the conduct mandating detention.