



Ending the Endless War

An Incremental Approach to Repealing the 2001 AUMF

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By Bill French with John Bradshaw.

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COVER PHOTO a U.S. Air Force CV-22 Osprey flies a night mission in Afghanistan on April 28, 2010. (Credit: U.S. Army photo)

Foreword to the Updated Edition

This policy report was originally published in August 2014 in the wake of Mosul falling to the Islamic State and just as the United States was beginning its bombing campaign in Iraq. Since then, much of the focus on reforming the 2001 authorization for use of military force (AUMF), the law crafted in response to the 9/11 attacks, has shifted to debating war authority to confront the Islamic State, a subject the National Security Network has written on elsewhere. Despite this change of focus within political discourse in Washington, the arguments and recommendations this paper makes regarding the 2001 law are more relevant today than when they were originally published.

First, the war against the Islamic State has reinforced the need for closing loopholes in the 2001 law so that it is not abused to target additional organizations unrelated to its initial scope of responding to the 9/11 attacks. The White House's assertion that the 2001 law applies to the Islamic State, which did not exist on 9/11 and is not affiliated with al-Qaeda, underscores the need to refine the 2001 law so that it *names* the organizations to which it applies. Otherwise, we should anticipate further abuse that bypasses Congress' constitutional authority to declare war and that skirts full public debate over new armed conflicts.

Second, America's experience with the 2001 authorization should give pause to the conservative advocates who insist there should be few, if any, limits on the president's war authority regarding the Islamic State or otherwise. Replicating that unconstrained law invites a repeat of the same unforeseen expansion of conflict beyond its initially contemplated scope, as we discuss in this paper. Some conservative advocates have gone so far as to claim limitations on the president's war authority are historically unprecedented. To them, we commend this report's appendix: a comprehensive survey of war authorizations throughout American history, which details a rich record of limits in terms of geography, time, operations, and named enemies. To better inform the debate over the history of the limitations in war authorities, we have updated *Appendix 1* of this paper to include greater detail about the methods used in our historical assessments, as well as some minor changes to our scoring of past authorizations for the sake of total accuracy. The remainder of the paper remains unchanged.

Third, our recommended changes to the 2001 AUMF to include limits in time, geography, and named enemy organizations are even more relevant today. President Obama has renewed his call to “refine and ultimately repeal” the 2001 law without specifying what the refined version would look like. Our paper continues to fill that void. There is also a growing movement to sunset the 2001 authorization in the near future – perhaps on a timeframe that overlaps with the potential expiration of a possible Islamic State AUMF. Here it is worth pointing out, as we do in the paper, that merely sunseting the 2001 law risks perpetual reauthorization without addressing the expansive scope of the authorization itself. Furthermore, the potential near-simultaneous repeal of the 2001 AUMF and an Islamic State AUMF could set the stage for replacing *both* authorizations with a single, general-purpose counterterrorism law – something some conservatives have flirted with for a number of years now. The result could be codifying global perpetual war and deepening America’s transformation into a militarized national security state.

This is not to argue that repealing the 2001 AUMF is a bad option – indeed, repeal is a critical component of moving away from the United States’ unremitting war posture, as we argue in this work. It *is* to insist, however, that debate over near-term repeal considers adding additional limits to the law to mitigate the risks of a possible string of reauthorizations. Discussion about near-term repeal could also benefit from a vision of what might come next. While it might be preferable for no new authorization to replace the 2001 AUMF if it expires in the near-term, there remains a considerable question about the continued need for armed conflict against al-Qaeda as a national security matter and serious doubts that politics in Washington would let the war authority lapse entirely without a replacement. While the recommendations made in this paper dealt with amending the 2001 law, we believe they are equally valuable for crafting a replacement for the 2001 authorization if policymakers select that route.

All of the above entails the need to think about when the conflict against al-Qaeda can be brought to a responsible end. This, too, was an original task of our work. Before concluding, we outline a theory of conflict termination against al-Qaeda and non-state terrorist actors derived from Jeh Johnson’s comments on the tipping point at which an organization is no longer capable of strategic attack against the United States.

These are historic debates and we commend all participants for having the discussion.

Bill French and John Bradshaw

Washington, DC
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Executive Summary

In the immediate aftermath of the attacks of September 11, 2001, in an atmosphere of fear and uncertainty, the U.S. Congress passed an Authorization for the Use of Military Force (AUMF) that was unmoored from American traditions. The 2001 AUMF is unique among other such authorizations in American history in that it includes no limitations in time, geography, operations, or a named enemy, as this report documents in detail (see **appendix 1**). Among other benefits, these traditional limitations would have facilitated continual assessment of the armed conflict to determine if the objectives of the authorization had been reached. Instead, the lack of limits in the 2001 law has set America adrift on an unreflective course toward perpetual war, increasing the risks of blowback against American national security objectives. The lack of limits in the AUMF has also facilitated an expansion of combat operations far beyond the scope envisioned by the lawmakers that approved the authorization over a decade ago. Today, the question is whether policymakers will accept perpetual war or change course and return to traditional legislated limits on use of force.

A realistic window of opportunity is emerging to refine the law by bringing it in line with historical practice and putting it on the course toward repeal. The war in Afghanistan is coming to a close. The campaign to degrade and destroy core al-Qaeda has largely succeeded, rendering the organization “probably unable to carry out complex, large-scale attacks in the West.”¹ Moreover, the expansion of operations under the AUMF has already stressed its

authority to the limits and leaves open the possibility of expansive interpretations of the law by future administrations, further calling for refinement.

This paper assesses the national security risks of perpetual warfare entailed by the 2001 law and recommends a way forward to realize President Obama's commitment to "refine, and ultimately repeal"² the AUMF. To accomplish these objectives, an *incremental approach* is recommended that would *cap* the scope of the authorization now and *roll back* its scope over time, ending in its eventual expiration. In order to cap and roll back the law in this fashion, the authorization must first be brought more in line with traditional limits on use of force used in past authorizations by amending it to include:

- Limits in time by inserting a sunset clause to put the law on a natural course toward expiration, but keeping open the option for temporary reauthorization if necessary;
- Limits on targeting authority through establishing a list of named enemy organizations to which the authorization applies; and
- Geographic limits by listing regions or countries where force may be employed.

These changes can achieve a *capping effect* on the war authority by limiting named enemies to those organizations already targeted pursuant to the 2001 law – the Taliban, al-Qaeda, and their specific associated forces (which have not yet been publicly named) – and by limiting authorized geographic areas to those in which operations are already occurring. Applying these limits would help prevent the expansion of conflict under a revised AUMF and keep the law as close as possible to its original purpose of pursuing those responsible for the September 11 attacks.

These same changes can also enable the *rollback* of the authorization over time: after authorized use of force is limited to named enemy organizations and geographic areas, policymakers can dial down war authority over time by removing named enemy organizations and geographic areas from the authorization as circumstances permit. Such rollback could ensure that future authority corresponds to progress made in counterterrorism operations once specific enemy organizations are degraded to the point that countering them no longer requires armed conflict. This rollback approach also allows policymakers to draw down war authority in a piecemeal fashion rather than having to consider only the broader choice of keeping all war authority or losing all war authority.

Regardless of how policymakers exercise the options of gradual rollback of authority, the addition of a sunset clause to the law puts the authorization on a natural course toward expiration. Because a sunset clause results in delayed expiration – and can be reauthorized –

the incremental approach to repeal both guards against perpetual war and avoids precipitously concluding sustained combat operations against al-Qaeda.

Importantly, the rolling back of war authority over time requires having a concept of how conflict termination should work against non-state actors. To help address this question, we build on the concept of a “tipping point,” enunciated by Jeh Johnson when he was General Counsel at the Department of Defense. This concept holds that the conflict against al-Qaeda should end when the organization has been degraded to the point of no longer being capable of strategic attack against the United States. However, depending upon the specific organization in question – whether core al-Qaeda or specific associated forces – we believe that other tipping points could be defined and applied. In the case of a group that has never been capable of strategic attack, a tipping point could occur when that organization can no longer conduct regional attacks against American assets beyond the ability of intelligence, law enforcement and regional partners to address. For groups targeted because they are associated forces of core al-Qaeda or the Taliban, the tipping point could occur when the group they are associated with has been removed from the conflict.

Finally, caution is required for modifying and repealing the 2001 AUMF. Refining and ultimately repealing the AUMF will require engaging in a presumably contentious political process in which potentially multiple proposals are offered. For the process of refining the law to be successful – even if not in the exact terms we propose – there are a number of pitfalls to avoid. In particular, proposals to expand the 2001 AUMF to serve as – or replace the law with – a general counterterrorism authorization against threats beyond al-Qaeda and the Taliban should be carefully avoided. Such an approach would not only have an entirely different purpose than the 2001 law, but also lack clear national security justification. While it is important to manage the risks posed by terrorist organizations that do not fit under the original AUMF or our proposal, that task can be sufficiently addressed with currently existing authorities and methods that do not involve the 2001 law, such as Article II powers, the War Powers Resolution, intelligence capabilities, law enforcement, or additional separate authorizations against other specific threats if necessary.

Fulfilling President Obama’s commitment to roll back and ultimately repeal the 2001 AUMF remains within reach. In fulfilling that objective, policymakers have the opportunity to reinforce American national security by correcting a legislative anomaly in the history of authorized use of force and changing course away from perpetual war.

The Need to Refine and Repeal the AUMF

The 2001 AUMF is characterized by a unique lack of limitations compared to other authorizations passed by Congress throughout American history. This comparative lack of limitations has significant consequences for U.S. national security and has created a pathway toward perpetual war. Legislated limitations on war authority serve an important function by helping set specific national security objectives for the use of force and regulating the risks incurred in pursuing such objectives. Limits on war authority also protect the philosophical and legal doctrine that war must come to an end and help prevent an expansion of military operations that would foster an overreliance on military power at the expense of longer-term interests. Finally, perpetual war proceeding from the lack of limits in the 2001 law also places American soft power at risk when it is most needed as competition is increasing in the international system.

Historically Unique Lack of Limits in the AUMF

The 2001 AUMF is unique in that it does not include any of the limitations characteristic of past authorizations for the employment of the “necessary and appropriate force” that it authorizes.³ Previously, Congress has limited the scope of authorized use of force to specific durations of time, a defined geography, or a named enemy, and has frequently set limits on the kinds of operations or forces that can be employed. Of the 35 instances that Congress has authorized the use of military force, 56 percent contained geographic limitations, 40 percent named the enemy, 37 percent limited the kinds of military operations or forces authorized to be employed, and 29 percent contained an expiration date. While 54 percent of such authorizations included just one of the previous four types of limitations, the 2001 AUMF is the sole case in American history that includes *none* (see **Appendix 1**).

While such limits by no means guarantee that force will be used ethically and in line with American national security interests, they can help restrict the scope for potential misuse of American military power, especially if multiple kinds of limits are used in combination. At a minimum, combination of limits can help ensure that no potential misuse of military power can continue perpetually or spread unhindered by legislative requirements.

Of the types of limits on authorized use of force historically used by Congress, the 2001 AUMF comes closest in the category of a named enemy. But here, too, the law falls short. Rather than naming an enemy, the 2001 AUMF establishes what legal scholars call “nexus requirements”

that determine against whom force can be employed.⁴ The 2001 law defines these requirements in terms of “those nations, organizations, or persons he [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁵ Empowered by such authorization, the Executive Branch determines what actors fulfill these conditions and are legitimate targets in war.

In practice, al-Qaeda and the Taliban have been regarded as directly fulfilling the nexus requirements of the AUMF. However, this practice has not substituted for a legislatively named enemy. Al-Qaeda has been taken to mean not just core al-Qaeda that was responsible for the September 11 attacks, but also its “associated forces” – those connected to core al-Qaeda from the point of view of the legal principle of co-belligerency in international law. The principle of co-belligerency holds that, when belligerents are at war, a third party who is substantially supporting one side can be lawfully targeted once it has been given but refused the chance to declare neutrality.⁶ Applied to al-Qaeda, co-belligerency requires an organization to have “entered the fight alongside al Qaeda” and to work with “al Qaeda in hostilities against the United States or its coalition partners.”⁷ While not providing the same clarity as a named enemy, the concept of co-belligerency does serve a limiting function, requiring operational linkage between third-party actors and al-Qaeda rather than merely shared ideology.

Expansion of Operations under the AUMF

Enabled by a lack of traditional limits, U.S. counterterrorism operations pursuant to the 2001 AUMF have expanded considerably. The exact extent of U.S.-led counterterrorism operations pursuant to the 2001 law is not publicly known. Since 2001, Presidential Notifications to Congress have evoked AUMF authority in the direct targeting of four organizations in four separate countries. However, it is very unlikely this is the full scope of targeting pursuant to the 2001 law. In reality, probably another four organizations or more – eight organizations total – have been targeted. This conclusion is specific to drone strikes, for which there is considerably more data available than other kinds of operations such as those conducted by Special Operators that, if quantified, could reveal a greater number of organizations targeted in a larger number of countries (see **Appendix 2**).

Congress has registered concern in the face of such expansion of military operations under the 2001 law. Last year, for example, Senator Richard Durbin (D-IL) argued that the expansion of military operations have gone beyond targeting those directly responsible for the September 11 attacks, as Congress originally intended, which did not include giving “future presidents the authority to fight terrorism as far flung as Yemen and Somalia. I don’t think any of us envisioned that possibility.”⁸ As of September 2013, lawmakers on the Senate Armed Services

Committee were unaware of the full list of terrorist groups the United States has targeted under the AUMF, prompting the Department of Defense to offer to provide such a list, presumably in classified form.⁹ As of May 2014, the Senate Foreign Relations Committee was similarly unaware of the full scope of targeting.¹⁰

Military operations pursuant to the 2001 AUMF have also pushed the limits of the law by targeting individuals within organizations that as a whole are not among al-Qaeda's associated forces. Since 2011, the United States has targeted al-Shabaab with direct military action using drone strikes, manned airstrikes, and Special Operations forces. But the Administration has yet to publicly declare the organization to be an associated force of al-Qaeda. Instead, the government asserts there are "al-Qa'ida-associated elements of al-Shabaab" and has limited military operations to only those against elements "engaged in efforts to carry out terrorist attacks against the United States and our interests."¹¹

Finally, the potential remains for further expansion of military operations under the 2001 law as written. The targeting of associated elements within non-associated organizations creates a lower threshold for use of force in new geographic areas, as with al-Shabaab in Somalia. An even lower threshold was contemplated in 2013, when government officials considered expanding the associated forces doctrine beyond the co-belligerents of al-Qaeda to include "associates of associates."¹² While this doctrine does not appear to have taken hold, it and potentially other expansive interpretations remain available for future administrations.

The Moral and National Security Risks of Perpetual War

The lack of traditional limits in the 2001 AUMF risks what Harold Koh, former Legal Advisor to the Department of State, has called a "forever war" – something he and other senior legal officers have called to avoid.¹³ The risk of permanent warfare threatens to undermine the basic legal and philosophical conception of war in Western civilization as an exceptional state of affairs that must come to an end. In the case of the United States, that conception was codified in the 1863 Lieber Code that declared, "The ultimate object of all modern war is a renewed state of peace."¹⁴ If that conception were jettisoned, the damage to American values and even the nature of American society might be severe. At a minimum, Harold Koh has warned that "Condoning a state of perpetual war would mark a gross deviation from our constitutional norms."¹⁵

Furthermore, these moral and legal risks have national security consequences. American soft power and the appeal of American values abroad – a persistent U.S. advantage in an increasingly competitive international system – could be irreparably undermined should the United States become widely perceived as a militarized state conducting global permanent

warfare. General Stanley McChrystal, former commander of Joint Special Operations Command and U.S. forces in Afghanistan, expressed the severity of such risks in the particular context of drone strikes when he said, “what scares me about drones strikes is how they are perceived around the world...the resentment created by unmanned strikes...is much greater than the average American appreciates.”¹⁶

Perception of an America engaged in permanent war would likely increase the risk of blowback against legitimate U.S. national security objectives. While the risks of unintended consequences can never be reduced to zero, it is difficult to imagine a political culture that accepts perpetual war can also responsibly undertake cost-benefit analysis of the use of force while giving full consideration to possible negative consequences over the long term. On an institutional level, keeping in place the lack of limits on authorized use of force that supports in principle a perpetual and expanding war is one of many factors fostering an overreliance on military power in American national security policy. Such a situation risks heightening overinvestment in the Department of Defense budget, which is already nearly 12 times larger than that of the Department of State.¹⁷ On a strategic level, continued overreliance on military power in counterterrorism risks self-defeating outcomes. Robert Grenier, former director of the CIA Counter-Terrorism Center, has warned that operations in Yemen against AQAP “risks turning the country into the Arabian equivalent of Waziristan.”¹⁸ The risk of such self-defeating outcomes is further underscored by reports that the estimated number of AQAP fighters in Yemen has increased from 300 in 2009 to over 1,000 last year.¹⁹ While refining the 2001 law and its ultimate expiration would not eliminate these risks, it can mitigate them and hedge against their exacerbation in the future.

How to Refine and Repeal the 2001 AUMF

Refining and ultimately repealing the 2001 AUMF effectively and responsibly should be guided by two objectives. First, as discussed above, refining the law should be aimed at mitigating the risk of perpetual warfare and its attendant national security risks. Second, and somewhat in tension with the first, any effort to refine and repeal the law should also avoid precipitously concluding armed conflict against the Taliban, core al-Qaeda, and their associated forces. As a consequence, simply repealing the law today would not appear desirable – but neither is the status quo.

An *incremental approach* to repealing the 2001 law can effectively achieve both aims by *capping* the authorization and setting up the opportunity to gradually *roll back* its scope. As we detail, this cap and rollback method would set more responsible, specific limits to war authority today while enabling the incremental repeal of portions of war authority as they are no longer needed, ultimately resulting in full repeal or expiration. This approach would immediately mitigate the risk of perpetual war while keeping in place more limited war authority for the time being to allow continued operations against the Taliban, al-Qaeda, and associated forces.

An Incremental Approach to Repealing the 2001 AUMF

1. Limiting the duration of authorized use of force

Mitigating the risk of perpetual war most immediately requires setting limits in time for the duration of war authority. Setting temporal limits can be accomplished by amending the 2001 law to include a sunset provision that would expire war authority in the near future. In terms of specific timing, a reasonable option would be to sunset AUMF authority at the end of 2016 given the Administration's announcement that a residual U.S. force will remain in Afghanistan through that time with a limited counterterrorism mission, but depart afterwards. If any reauthorization of the refined law were to occur beyond 2016, a sunset mechanism should remain in place that would expire the law on faster cycles of no more than 12 months.

Amending the 2001 law to include such a sunset provision would hardwire the AUMF on the course toward repeal, reflect the doctrine that war must end, and underscore that war is a state of exception requiring special circumstances that must be publicly justified by the state. To that end, a sunset provision would add built-in opportunities

to assess the continued necessity of armed conflict against named terrorist organizations. While outright and immediate repeal of the AUMF would more directly prevent perpetual warfare, a sunset mechanism carries the advantage of not prematurely terminating ongoing combat operations against the Taliban and al-Qaeda.

To be sure, any repeal whether immediate or delayed by a sunset clause is sure to face political complications, especially given the climate in Congress. This is unavoidable. However, repealing the law by sunset would likely face less political difficulty than an immediate repeal because of the buffer in time it provides. But regardless of any political difficulties, definitively removing the 2001 AUMF from law in the future is important insurance against perpetual war. Recent events have reminded of this fact with respect to the 2002 AUMF for Iraq, which some have argued could authorize the use of armed force against the Islamic State in Iraq and Syria (ISIS) despite the Iraq War having concluded in 2011.²⁰ While as of this writing President Obama has authorized limited strikes against ISIS under Article II authority under the Constitution, appeals to use 2002 Iraq AUMF authority against ISIS, which authorizes sustained armed conflict beyond limited strikes, demonstrate that as long as the Iraq AUMF remains on the books there is a risk it will be misappropriated for a larger-scale military action. This kind of risk for misuse is inherent in any AUMF so long as it remains on the books longer than necessary.

Nonetheless, repealing the 2001 AUMF by using a sunset mechanism is not without its own problems. Because an AUMF with a sunset clause could in principle be reauthorized beyond what is necessary, more insurance is needed to mitigate the risks of perpetual war. Therefore, additional limiting measures are necessary so that any potential string of reauthorizations would maintain a war authority that is more limited than the 2001 law as it stands today.

2. Limiting authorized use of force according to named enemy organizations

In order to clarify the enemy and set stricter limits on targeting, the 2001 law should be amended to include a list of named enemy organizations against which force is exclusively authorized until expiration in 2016 or following short-term reauthorizations thereafter. In order to cap the scope of the conflict, any list of named organizations amended into the law should not exceed those already targeted under AUMF authority. In public notifications to Congress, Presidents Bush and Obama have declared that attacks against four organizations have been conducted pursuant to AUMF authority, including attacks against core al-Qaeda, al-Qaeda in the Arabian Peninsula (AQAP), elements of al-Shabaab, and the Taliban.

2.1 Considerations for naming organizations

In order to amend the 2001 AUMF to include a legislated list of named organizations against which targeting is authorized, Congress should work with the Administration to clarify which organizations have been targeted under AUMF authority. In support of this process, the Administration should share with Congress relevant intelligence to justify its targeting of specific organizations pursuant to the 2001 law. In meeting this burden, at least partial use of a classified forum is probably unavoidable in order to protect operational intelligence and sources and methods.

It is possible that the list of named organizations amended into the AUMF may not be exactly the same as those publicly cited in notifications to Congress to-date. First, if the Administration has used AUMF authority in strikes against other organizations such as the Haqqani Network – which appears likely – then it has not formally and publicly notified Congress to that effect, further underscoring the need for close consultation with Congress prior to amending the law. Second, amending the AUMF to authorize force only against specific organizations would require the Administration to clarify its targeting of elements of al-Shabaab. If al-Shabaab cannot be demonstrated to be a co-belligerent of al-Qaeda – something that, again, the Administration has not claimed in its congressional notifications – then it should not be listed on any named organization list in a refined AUMF. If al-Shabaab were not to be listed, but the Administration nevertheless considered al-Shabaab a high-level threat against the United States despite being an organization focused on local objectives, then the Administration would of course be free to pursue a separate authorization.

2.2 Distinguishing belligerents from co-belligerents

In amending the 2001 law to include a list of enemy organizations, the refined law should specifically distinguish between belligerent organizations – those responsible for September 11 and those who harbored them – and co-belligerent enemy organizations.²¹ This distinction could prove vital to limiting expansion of combat operations by preventing abuse of the concept of co-belligerency in international law to potentially target “associates of associates.” If a named list of organizations were given without specification of “belligerent” and “co-belligerent” enemies, then co-belligerency might be applied to organizations named on the list like AQAP, who have been targeted so far because they are co-belligerents or associated forces of core al-Qaeda. In other words, failing to specify co-belligerent status in naming enemies might widen the door for the double application of co-belligerency: applied first to named organizations that have been targeted so far because they are co-belligerents of al-Qaeda (associated forces) and

second to the co-belligerents of those organizations (associates of associates). This kind of “daisy-chaining” allows targeting to drift even further from those responsible for the September 11 attacks.

To more decisively shut the door on this kind of expansive targeting in the future, a refined AUMF could go even further. Instead of just distinguishing belligerents and co-belligerents, a clause could be included to explicitly forbid the use of the law’s authority to target the co-belligerents of any organization other than those listed as primary belligerents involved in the September 11 attacks.

To go even further, a refined law could prohibit the targeting of *any* organization not named in the law and require separate authorizations for any new organization to be targeted at all, including organizations that would fulfill the requirement of co-belligerence but are not named in a refined AUMF. There is relevant precedent for this. During World War II, the United States issued multiple declarations, one each for Germany’s co-belligerents. In this way, the use of the co-belligerency principle was not restricted per se but authorized with a separate law for each enemy that fulfilled the criteria.²²

2.3 Conflict termination and naming organizations

Beyond explicitly limiting the scope of war authority, amending the 2001 law to include named enemy organizations facilitates incrementally dialing down combat operations as circumstances warrant. Rather than forcing policymakers to consider when the tipping point has been reached against al-Qaeda and its associated forces in a general sense, making war authority specific to named organizations more readily permits considering when tipping points have been reached against specific organizations. Once a given organization is determined to have reached the tipping point at which armed conflict is no longer necessary, that group may then be removed from the AUMF by way of amending the law.

The notion of dialing down war authority by removing enemy organizations from the law requires a concept of conflict termination vis-à-vis non-state actors. Jeh Johnson has developed the beginning of such a conception. During his tenure as General Counsel of the Department of Defense, he argued that there is a theoretical “tipping point” at which “so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured” that they no longer pose the risk of “strategic attack” against the United States, i.e. attack against the American homeland. At that point, “our efforts should no longer be considered an ‘armed conflict’” by virtue of the fact that the

organization would be “effectively destroyed” and reduced to individuals that law enforcement and other national security tools would be able to address.²³

However, Johnson’s tipping point concept of conflict termination requires additional details. The main problem with his assessment is that it does not make distinctions between the Taliban, al-Qaeda, their affiliates, and the specific grounds upon which the United States targets specific organizations. Taking these factors into account, three kinds of tipping points are apparent that could be applied as part of the incremental approach to guide rolling back the scope of a refined law:

Strategic attack tipping point: First, there is the kind of tipping point that Johnson identified, in which an enemy belligerent has been targeted because of its ability to launch strategic attacks against the United States, as core al-Qaeda did on September 11, 2001. Intelligence Community assessments also list AQAP as interested in and capable of attacking the American homeland. Once such an organization has been sufficiently degraded so that it can no longer threaten strategic attack beyond the capacity of law enforcement to manage, then it would appear armed conflict against that organization is no longer necessary.

Regional attack tipping point: Second, not all belligerents likely targeted under the AUMF are capable of strategic attack against the United States, nor have they all been targeted on that basis. Therefore, the measurement of strategic attack would not seem to be appropriate, and other measures determining when armed conflict is still necessary are needed. For example, the Taliban has been subject to attack on the basis of its harboring the perpetrators of the September 11 attacks, not committing them. A similar situation applies to organizations probably targeted as co-belligerents – but not named in presidential notifications to Congress – such as the Haqqani Network, which have joined the fight alongside al-Qaeda and the Taliban but not launched attacks against the American homeland. In other words, these are organizations with regional reach. The relevant tipping point for organizations with regional reach would seem to be when they have been degraded to the point of not being able to participate effectively in hostilities against U.S. assets in a given region or area. And, to whatever limited extent an organization could attack the United States once past the “regional attack tipping point,” the extent of that capability would be more consistent with a scattered group of individuals that law enforcement, partner nations, and intelligence capabilities would be able to manage.

No-longer-a-co-belligerent tipping point: This tipping point applies exclusively to associated forces that have been targeted by virtue of being co-belligerents with core al-Qaeda or the Taliban. It is possible that a given organization is at some point no longer co-belligerent with al-Qaeda or the Taliban because it has left the fight or, more likely, the organization that it was co-belligerent with has been defeated. This idea has been expressed in terms of “you can’t have an ‘associated force’ with no core.”²⁴ Part of the value of a refined AUMF distinguishing between belligerents and co-belligerents is that once a belligerent is defeated in one of the above ways, its co-belligerent organizations would presumably no longer be subject to lawful attack as they would no longer be related to the armed conflict. At that point, if such co-belligerents were considered to pose a high-level threat against the United States, then the administration would of course remain free to pursue a separate authorization.

3. Limiting authorized use of force to geographic areas

Further limiting the scope of the AUMF would be accomplished by amending the law to include geographic limits on authorized use of force in terms of national territories or somewhat broader geographic areas. Geographic limits in conjunction with a list of named enemy organizations would provide another means to incrementally ending armed conflict under the AUMF. As military counterterrorism operations to engage named enemy organizations become no longer necessary in a geographic area, then policymakers could remove that area by amending the law.

As with naming enemy organizations, amending geographic limits into the law should also be preceded by consultations between the Administration and Congress. So far, Presidential Notifications to Congress have declared the use of AUMF authority for direct military action in Afghanistan, Pakistan, Yemen, and Somalia. Maritime interdictions have also invoked AUMF authority. To effectively cap the scope of operations under a refined law, authorized areas for direct military action should be restricted to areas in which such action has already been undertaken. However, as with a list of named organizations, the geographic areas amended into the AUMF would not necessarily be the same as those in which operations occur today. The main area in question is Somalia, where al-Shabaab operates. Whether Somalia would be an appropriate area for continued use of force under a refined AUMF would depend upon the Administration’s clarification of its targeting of al-Shabaab and its status as a potentially associated force of al-Qaeda, discussed previously.

What about Detention Authority?

This paper deals with the scope of armed conflict defined in the 2001 law. While detention authority has important consequences for U.S. national security and AUMF reform, a full treatment of that complex subject requires more attention than can be provided in this work. Regarding the connection between detention and the AUMF, the main question is what detention authority will remain, if any, to hold members of the Taliban, al-Qaeda, and associated forces following the conclusion of hostilities and/or the expiration of the AUMF. The answer isn't entirely clear. Detention has been the subject of significant debate between and within Congress, government, civil society, and a series of high-profile court cases. Invariably, these ongoing debates will shape the outcome of future detention policy. It has been the practice in armed conflict since the creation of the Geneva Conventions to release prisoners of war at the conclusion of armed conflict with the exception of individuals who are being immediately charged with crimes. But political and legal arguments about the extension of that practice to detainees continue. Nonetheless, regardless of one's position on what detention authority will remain after hostilities and/or the repeal of the AUMF, the tail should not wag the dog by keeping the AUMF in place for the purpose of perpetuating detention authority rather than achieving war aims. In other words, it is not sensible to continue armed conflict beyond what is needed for national security as part of an effort to continue to hold detainees.

The idea of amending geographic limits into the AUMF has not gone without criticism. Some critics²⁵ of geographic constraints point to the fact that transnational terrorist organizations operate across territorial boundaries of states. But this means only that geographic limits amended into the law could benefit from being defined in terms of more general geographic areas rather than national boundaries. While the same critics have further objected that defined geographic limits on the AUMF would incentivize enemy organizations to change locations, there are two responses. First, because terrorist organizations require certain conditions to operate effectively in an area, like political permissibility, it is not as if given organizations could relocate without restriction or without perhaps sizable cost imposed on the effectiveness of their operations. Also, in the case of organizations like AQAP, which is mostly focused on political objectives in Yemen, the area of their operation is largely tied to the geographic location of their objectives, which are not subject to relocation. Second, in extremis, policymakers would retain the option of further amending the AUMF to include new geographic areas where named enemy organizations have expanded operations or relocated.

4. A note on enacting reasonable operational limits

Earlier, it was noted that the four historical methods of limiting authorized use of force included limits in time, geography, named enemies, and the kinds of operations that could be conducted or forces that could be employed. While the incremental approach to repeal recommends pursuing limits of the first three kinds in a refined AUMF, the fourth kind of limitation – operational limitations – is not recommended as part of AUMF reform. This is not because operational limits, such as greater regulation and oversight of targeted killings conducted with drone strikes or transferring the CIA’s drone strike mission to the Department of Defense, are not important. Such limits, which have been the subject of voluminous debate, are appropriate. However, a reformed AUMF does not appear to be the appropriate place to enact such limits on operations like targeted killings because those operations are likely to continue in the future under legal authorities other than the AUMF. Therefore, more effective regulation of counterterrorism activities should not be tied narrowly to a refined 2001 law. Instead, such limits and regulations should be enacted in a way that achieves a more general scope of application beyond AUMF-authorized operations. That way, those limits would apply to counterterrorism operations more broadly and remain in place after the AUMF has expired.

What AUMF Reform Should Not Do

Any effort to refine the 2001 AUMF will be subject to considerable debate, scrutiny, and counterproposals in the political process. As a result, going forward with changing the 2001 law requires not only a clear idea of what to do, but a clear sense of the pitfalls that are to be avoided. The chief error to be avoided is transforming the 2001 law into – or replacing the law with – a more expansive, general-purpose counterterrorism authorization that would try to serve as a catch-all authority for targeting threatening organizations regardless of their affiliations. Most prominently, Senator Bob Corker (R-TN) has proposed “updating” the law²⁶ by expanding its scope to include more or less any alleged imminent threat to the United States regardless of whether that threat is a co-belligerent with core al-Qaeda.²⁷ This is similar to a prominent proposal from the Hoover Institution that outlines the option of creating a listing system to designate imminent terrorist threats to the United States and authorize their attack once placed on the list.²⁸ Others, like Senator McCain (R-AZ), have made similar arguments, lamenting that the AUMF does not apply to organizations like al-Qaeda in the Islamic Maghreb (AQIM) that are unrelated to September 11 and do not fulfill the legal criteria of co-belligerency with al-Qaeda.²⁹ But any approach to turn the 2001 law into a general-purpose, catch-all counterterrorism authorization faces a number of serious problems:

Lack of national security justification: The most immediate problem with creating a general-purpose authorization is that there is no corresponding national security need. In its annual public assessments, the Intelligence Community lists only core al-Qaeda and al-Qaeda in the Arabian Peninsula (AQAP) as constituting credible threats to the American homeland.³⁰ In other words, the known direct terrorist threats to the United States are *already* covered by the 2001 law and could be named as enemy organizations under the kind of refined AUMF outlined above. While it is true that organizations such as AQIM threaten American interests, it is unclear that the extent to which they threaten American interests requires direct U.S. military action.

Even the more challenging case of ISIS indicates the lack of a national security justification for a general-purpose or expanded counterterrorism authorization. As of this writing, President Obama has authorized limited use of force against ISIS in Iraq to protect American personnel and execute humanitarian operations. But two things are notable. First, the administration appears to have cited Article II authority for the strikes rather than request authorization from Congress because of the limited nature and intensity of the operation.³¹ Second, even if sustained armed conflict against ISIS (or any other group) becomes necessary – which would trigger the need for Congressional authorization – then the administration would be free to request a separate, specific authorization for that purpose. At present, the need for such an authorization for ISIS is not clear. While the Department of Defense is concerned about the threat ISIS poses to U.S. interests in the region as well as their anti-American rhetoric, they “don’t assess right now that they [ISIS] are doing distinct homeland plotting.”³²

Moreover, any general-purpose authorization would likely fail to make important distinctions about threats. Lumping organizations as disparate as AQIM – an al-Qaeda affiliate – and ISIS – a competitor to al-Qaeda – under the same general-purpose authorization makes generalizations about threats rather than recognizing the important distinctions between terrorist organizations, what they mean for American interests, and what the war aims should be in any hostilities against them.

Unrelated to the 2001 law: Amending or replacing the 2001 law with measures that would authorize targeting imminent threats regardless of their connection to core al-Qaeda would be at odds with the purpose of the original law, which was to deal with those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” The same is true of expanding the authorization to include groups like AQIM that are neither connected to the 2001 attacks nor co-belligerents with al-Qaeda. Proposals like those mentioned above would therefore constitute a new law intended to serve a very different function and should be considered as not properly

related to AUMF reform at all, but entirely different enterprises calling for a separate debate.

A step backward: Any expansive, general-purpose counterterrorism authorization – particularly one based on an “imminent threat” standard – would represent a serious step backwards. In 2001, the original AUMF that the Bush Administration submitted to Congress requested authority to make war against any imminent threat.³³ But this blank check was rejected even then – in the days after the September 11 attacks – as too open-ended.³⁴ Unlike that request, current proposals that outline this option do call for naming groups that constitute an imminent threat in the form of a list maintained by the President in consultation with Congress (rather than naming the organizations in the law).³⁵ But that standard is so broad that the organizations listed could be continually expanded and would be wide open to abuse. Such abuse could effectively codify perpetual war *and* lower its threshold by merely requiring the addition of new enemies to a list by a consultative process, rather than new legislation.³⁶

Managing Risk: How to Deal with Extra-AUMF Threats

While a more expansive AUMF is unnecessary, it is certainly true that there are threats to American interests posed by extremist groups that fall outside the scope of the 2001 law or a refined version of that law as outlined above. But there are other authorities and methods that can effectively deal with extra-AUMF threats that do not require an expanded authorization or, probably in most cases, the use of a direct military action. Moreover, these capabilities and authorities would remain at the President’s disposal following the AUMF’s eventual full repeal:

Presidential power and Article II: The legal powers of the presidency hedge against any immediate threat to national security. Should any imminent terrorist threat appear that a refined AUMF is unable to address, the president retains his constitutional powers under Article II as Commander-in-Chief to respond with limited direct military action. This appears to be precisely what is happening with Article II being used to launch limited strikes against ISIS to protect American personnel in Iraq as of this writing. Under the War Powers Resolution, the president may employ armed force for up to 60 days even in the absence of congressional authorization. Relatedly, the president always remains free to request a new AUMF to deal with new threats not covered under a refined AUMF or after its ultimate repeal or expiration. Requesting such an authorization – to deal with ISIS by way of sustained armed conflict, for example – would not be a difficult hoop to jump through. Congress would almost certainly hear the administration’s request immediately – as it did with the recent case

of the requested authorization to attack Syria – and likely be predisposed to give the matter an expeditious vote.

Civilian counterterrorism tools: The past decade has produced effective non-military counterterrorism tools. From 2001 to 2011, about 300 cases related to jihadist terrorism have been prosecuted, with those resolved resulting in an 87 percent conviction rate.³⁷ During 2001-2013, 60 terrorist attacks may have been prevented domestically.³⁸ Meanwhile, intelligence counterterrorism capabilities have dramatically expanded. One-quarter of the 107,000 employees in the Intelligence Community and one-third (\$17.2 billion) of overall intelligence spending support counterterrorism.³⁹ Economic disruption of terrorist organizations has also proven effective. Since 2008, the Office of Foreign Asset Control of the Treasury Department has seized over \$2 billion in terrorist finances.⁴⁰

Foreign partners: Under what is sometimes called the “light footprint model,” the United States can train, equip, and assist foreign militaries to improve their indigenous counterterrorism capabilities as well as employ non-military intelligence forces.⁴¹ The light footprint model is especially appealing to counter terrorist organizations that do not pose the threat of strategic attack to the United States because it does not require the United States to enter into armed conflict or conduct direct military action. A number of programs to improve the counterterrorism capacity of foreign partners are already underway, and the Obama Administration has proposed bolstering these initiatives with an additional \$5 billion “Counter-Terrorism Partnership Fund” (CTPF). The CTPF shows promise if fleshed out with sufficient detail and consistent funding through regular, sustainable base spending rather than unsustainable Overseas Contingency Operations accounts.⁴²

Conclusion

Today, the conclusion of the War in Afghanistan and degradation of core al-Qaeda are creating a window of opportunity to actualize the President’s commitment to refine and repeal the 2001 AUMF. By taking an incremental approach to that end, policymakers can both mitigate the possibility of perpetual war and avoid precipitously concluding combat operations. The first step of the incremental approach is to amend the law so that it incorporates traditional limitations in terms of time, geography, and limits according to named enemy organizations. This course enables capping of the scope of conflict under the AUMF to those organizations already targeted and to those geographies in which operations are already occurring. It also enables rolling back the scope of armed conflict by giving policymakers the freedom to remove

named enemy organizations and geographic areas from the law in the future. Therefore, the cap and rollback approach allows the AUMF to keep pace with progress in counterterrorism, keeping only the degree of authorization that is needed and creates a strong hedge against perpetual warfare. A harder firewall against perpetual war and the attendant risks for U.S. national security can be provided by the addition of a sunset clause, setting the authority on a natural course toward repeal. By seizing the current opportunity for responsibly reforming the AUMF, policymakers can take the overdue step of correcting a legislative anomaly in the history of authorized use of force. Failure to do so would be to invite unnecessary risks for American national security.

Appendix 1: Historical authorizations for use of military force, declarations of war, and legislative limiting mechanisms

Updated February 2015

Appendix 2 presents a table of all authorizations for use of military force, including declarations of war. Authorizations were discovered by cross-referencing a Congressional Research Service Report on notable instances of U.S. use of force abroad with acts of Congress.⁴³ Previous efforts by others to compile all authorizations were helpful but incomplete. The discovered body of authorizations was then analyzed to discern the mechanisms used to limit the scope of authorized use of force. Four mechanisms were discovered, presented below alongside the methods used to determine when each was present in a given law:

- **Named enemy** limitations name specific enemies against which force is authorized. Naming an enemy requires the law to specify political actors or groups subject to force by proper noun, not merely giving categories of actors or nexus conditions for determining qualifying actors in the future. For example, the 1798 Act to Regulate Trade and Intercourse with the Indian Tribes, which authorizes the use of military force against any “person, who...attempt[s] to make a settlement” on Native American territory, does *not* count as naming an enemy.
- **Geographic** limitations specify areas where force is authorized. In the legislative record, laws vary in how precise or well-defined the spatial areas are within their scope. Sometimes geography is specified in the form of exact boundaries, as with the 1799 Act to Regulate Trade and Intercourse with the Indian Tribes that outlines the land features that define various Native American territories. Other times, national areas are specified for authorized use of force, such as “in Lebanon” in the 1983 Multinational Force in Lebanon Resolution. In other instances, geography is definitively specified but the geographic space is defined broadly, such as the area of “Southeast Asia” in the 1964 Joint Resolution to Promote the Maintenance of the International Peace and Security in Southeast Asia. In all cases, geography is a condition included in the wording of the authorization for use of military force.
- **Expirations** limit authorized force in time. For a law to count as including an expiration, it must give actual units of time. Other cases were not counted such as, for example, the 1964 Joint Resolution granting the President the right to terminate war authority once he is satisfied certain conditions have been met. Instances in which the law set time limits on funding while approving of operations were also considered to count as containing a time limit, as with the 1993 provision regarding Operation Restore Hope.
- **Operational** limitations specify the kind of operations that are authorized or the specific types of forces that may be employed. Instances of this limiting mechanism must be carefully distinguished from the legislation of specific objectives, which can sometimes appear to be operational limits but are rather different. Operational limitations ultimately specify *how* an

Ending the Endless War

objective can be prosecuted, whereas objectives simply state *what* is to be attained. For example, the 1798 Act to Regulate Trade and Intercourse with the Indian Tribes authorizes use of force “to remove” settlers from Native American territory. But we considered this to be a very specific objective and *not* an operational limit per se because the act does not give further details about removal, how it should be effected, or what forces can be used. When these more detailed factors are present, we judged an operational limit to have been made. For example, the 1807 Act to Prohibit the Importation of Slaves authorized naval forces “to seize, take, and bring into any port” vessels importing slaves into the United States.

In total, 41 authorizations were found. However, some of these authorizations referred to the same conflict. During World War I, two separate declaration of war were issued – one against Germany, the other against Austria-Hungry. During World War II, six separate declarations of war were issued. However, for our purposes, the separate declarations associated with each conflict are counted as a single authorization (two total, one for WWI and one for WWII) to prevent skewing the data (this was possible because the language was virtually identical within each set of declarations except the naming of new enemies the United States was expanding its war effort to include). As result, the data presented below was calculated using 35 rather than 41 as the total number of authorizations in American history.

In assessing the text of each authorization, focus was given to the operative body of text in determining any limits that were present. No independent value was assigned to preamble language for the purpose of determining when limits were contained in authorizations. This results in a *conservative estimate* of limitations because preambles more frequently and often more exactly specify the purpose of authorizations than the operative language in the body of the law. For example, in the case of the 1798 Protection of the Commerce and Coasts Acts, we did *not* consider the law to include a named enemy because the operative language did not mention any specific nation *despite the fact* that the preamble to the law directs itself against the activity of vessels belonging to the “Republic of France.”

After analyzing each authorization, it was concluded that:

- 56 percent contained geographic limitations (19 total);¹
- 40 percent named the enemy (14 total);
- 37 percent limited the kinds of military operations or forces authorized to be employed (13 total); and
- 29 percent contained an expiration date (10 total).
- While 54 percent of the authorizations included just one of the previous four types of limitations (19 total), the rest contained more than one *except* the 2001 AUMF which is the sole case in American history that includes *none*.

For a summary of the changes in the updated version of this appendix, see after the table.

¹ The portion of authorizations that included geographic limits was calculated using 34 rather than 35 for the total number of authorizations discovered in the congressional record. This is because in one case a law amended a previous war authority that already included geographic limits without altering these limits. Rather than counting this positively or negatively, we omitted the case from the total number of authorizations for the purposes of calculating the percent containing geographic limits. See footnote 49 for more detail.

Ending the Endless War

| Authorization | Details of Authorization | Limiting Mechanisms | | | |
|---|--|---------------------|-------------------|------------|------------|
| | | Named Enemy | Geography | Expiration | Operations |
| Crimes Act , April 30, 1790 ⁴⁴ | Authorizes the president to employ state militias to protect “the inhabitants of the frontiers of the United States.” | | X | | |
| First Militia Act , May 2, 1792 ⁴⁵ | When the U.S. is “invaded, or is in imminent danger of invasion from a foreign nation or Indian tribe, the President is authorized to use the militia of the state or states most convenient to the place of danger of scene of action.” Authority to use state militias to quell insurrection under certain conditions was also granted. Authority was to expire after two years. | | | X | |
| Act to Regulate Trade and Intercourse with the Indian Tribes , May 19, 1796 ⁴⁶ | Authorizes the use of military force at the president’s discretion to remove any person who settles on land belonging to Indian tribes as established by treaty with the United States. The authorization gave detailed boundaries of these territories. Authority was to expire after two years. | | X | X | |
| Protection of the Commerce and Coasts of the United States , May 28, 1798 ⁴⁷ | Authorizes U.S. armed vessels to “seize, take and bring, into any port of the United States ... any armed vessels that are hovering on the Coasts” of the U.S. that threaten American ships. | | X | | X |
| An Act in Addition to the Act to More Effectually Protect the Commerce and Coasts of the United States , June 28, 1798 ⁴⁸ | Authorizes the confining of the crew, officers, and hostile persons on any armed vessels who have been captured. | | N/A ⁴⁹ | | X |
| Act to Further Protect the Commerce of the United States , July 9, 1798 ⁵⁰ | Authorizes U.S. armed vessels to “subdue, seize, and take any armed French vessel,” found in the jurisdictional limits of the U.S. or elsewhere in the seas. | X | | | X |
| Act to Regulate Trade and Intercourse with the India Tribes , March 3, 1799 ⁵¹ | Authorizes use of force to remove any person who settles on land belonging to Indian tribes due to their treaties with the United States. The authorization gave detailed boundaries of these territories. Authority to expire after three years. | | X | X | |
| Act to Protect Commerce and Seaman of the United States Against the Tripoli Cruisers , February 6, 1802 ⁵² | Authorizes American “armed vessels to, subdue, seize and make prize of all vessels, goods, and effects, belonging to the Dey of Tripoli, or to his subjects, and to bring or send the same into port” and to “cause any other acts of precaution or hostility” consistent with a state of war and deemed justified by the president for “protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas.” Authority to expire after two years. | X | X | X | X |
| Act to Preserve Peace in the Ports and Harbors of the United States , March 3, 1805 ⁵³ | Authorizes the president to use American land and sea military forces to compel foreign armed vessels to leave if they have previously refused to leave U.S. waters. Authority to expire after two years. | | X | X | X |
| Act Prohibiting Importation of Slaves , March 2, 1807 ⁵⁴ | Authorizes the president to employ vessels to cruise and monitor any parts of the coast where individuals may try to violate this act by importing slaves and bring violating ships to port. | | X | | X |
| Non-Intercourse Act , March 1, 1809 ⁵⁵ | Authorizes the use of land and sea forces to force public ships from France or Great Britain to depart if they enter U.S. waters. Imposes embargo on Britain and France. Authority to expire after the end of next Congress. | X | X | X | X |
| Act to Take Possession of Land East of the River Perdido and South of Georgia and the Mississippi Territory , January 15, 1811 ⁵⁶ | Authorizes the president of the United States to take possession of the country lying east of the river Perdido, the land south of the state of Georgia, as well as the Mississippi territory, if an arrangement has been made with the local authorities. If the territory is threatened by occupation by a foreign nation, the president may use the Army and Navy to take possession of the territory. | | X | | |

Ending the Endless War

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| War of 1812 , June 18, 1812 ⁵⁷ | Authorizes the president to use “the whole land and naval force to wage war against the “vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland.” | X | | | |
| Embargo Act of 1813 , December 17, 1813 ⁵⁸ | Authorizes enforcing an embargo on all ships and vessels in “ports and places within the limits or jurisdiction of the United States” through 1815 unless there is an end to the hostilities between the U.S. and Great Britain, Ireland, and their dependencies. | | X | X | X |
| Act to Protect the Commerce and Seaman of the United States Against the Algerian Cruisers , March 3, 1815 ⁵⁹ | Authorizes the use of armed vessels to protect American seamen in the Atlantic, Mediterranean, and adjoining seas. Ships may “subdue, seize and make prize of all vessels, goods, and effects of or belonging to the Dey of Algiers, or to his subjects, and to bring or send the same into port” and “cause to be done all such other acts of precaution or hostility” that the state of war and the president deem justified. | | X | | X |
| Act to Protect the Commerce of the United States, and to Punish Piracy , March 3, 1819 ⁶⁰ | Authorizes the use of armed vessels to protect U.S. merchant vessels and their crews from “piratical aggressions and depredations.” Ships may “subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat with an armed crew that has attempted or committed any piracy against the U.S. citizens or vessels.” Authority expires at end of next Congress. | | | X | X |
| Anti-Slave Trade Act of 1819 , March 3, 1819 ⁶¹ | Authorizes the use of armed vessels wherever the president judges attempts are being made to continue the slave trade by citizens of the United States. Armed vessels may bring into U.S. ports any ships that may be found violating this act by engaging in the trafficking of potential slaves. | | | | X |
| Act to Take Possession of East and West Florida , March 3, 1819 ⁶² | Authorizes the president to “take possession of, and occupy, the territories of East and West Florida, and the appendages and appurtenances thereof; and to remove and transport the officers and soldiers of the king of Spain, being there, to the Havana, agreeably to the stipulations of a treaty between the United States and Spain, executed at Washington.” | X | X | | |
| Indian Intercourse Act , June 30, 1834 ⁶³ | Authorizes use of military force to remove any person who settles or surveys on land belonging to Indian tribes – a geographically defined area called “Indian country” – due to their treaties with the United States. | | X | | |
| Mexican American War of 1846 , May 13, 1846 ⁶⁴ | Authorizes the president to use “the militia, naval, and military forces of the United States” to wage war against the Republic of Mexico. | X | | | |
| Joint Resolution to Adjust Difficulties with Paraguay , June 2, 1858 ⁶⁵ | Authorizes force “in the event of a refusal of just satisfaction by the government of Paraguay” with respect to the attack on the United States steamer <i>Water Witch</i> . | X | | | |
| Act to Suppress Rebellion Against and Resistance to the Laws of the United States , July 29, 1861 ⁶⁶ | Authorizes the president to use all state militias, as well as the Army and Navy, “to employ such parts of the land and naval forces of the United States as lie may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion in whatever State or Territory thereof the laws of the United States may be forcibly opposed.” | | X | | |
| Joint Resolution for the Relief of the Venezuela Steam Transportation Company , June 19, 1890 ⁶⁷ | Authorizes the use of “such means or exercise such powers as may be necessary” to “obtain indemnity” from the Venezuelan Government for the “wrongful seizure, detention and employment in war” of assets belonging to the Venezuelan Steam Transportation Company of New York in 1871. | X | | | |
| Spanish American War of 1898 , April 25, 1898 ⁶⁸ | Authorizes the president to use “the entire land and naval forces of the United States, and to call into the actual service of the United State the militia” to wage war against the Kingdom of Spain “to such extent as may be necessary.” | X | | | |
| Veracruz Occupation, Joint | The “President is justified in the employment of the armed forces of | X | | | |

Ending the Endless War

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| Resolution 251 , April 22, 1914 ⁶⁹ | the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States” in regards to the arrest and release of American sailors in Tampico, Mexico by Mexican authorities. | | | | |
| WWI Declarations of War Against Austro-Hungary, and Germany , 1917 ^{70, 71} | Authorizes the president to use “all the resources of the country” and “the entire naval and military forces of the United States and the resources of the Government to carry on war against” Austro-Hungary and Germany. | X | | | |
| WW2 Declarations of War Against Japan, Germany, Italy, Hungary, Bulgaria and Romania , 1941 and 1942 ^{72, 73, 74, 75, 76, 77} | Authorizes the president “to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against” Japan, Germany, Italy, Bulgaria, Hungary, and Romania. | X | | | |
| Authorization To Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions January 29, 1955 ⁷⁸ | Authorizes the president to use the U.S. armed forces for “the specific purpose of securing and protecting Formosa, and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores “ | | X | | |
| Joint Resolution to Promote Peace and Stability in the Middle East , March 9, 1957 ⁷⁹ | Authorizes the provision of military assistance and use of armed force in the “area of the Middle East” to countries resisting “armed aggression from any country controlled by international communism” in a way that is consistent with U.S. treaty obligations. | | X | | |
| Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia , August 10, 1964 ⁸⁰ | To promote the maintenance of international peace and security in southeast Asia, the president is authorized to “take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom,” to expire when the president determines “peace and security of the area is reasonably assured” | | X | | |
| Multinational Force in Lebanon Resolution , October 12, 1983 ⁸¹ | Authorizes the president to maintain U.S. armed forces’ participation in the Multinational Force in Lebanon for 18 months, unless Congress extends the deadline. Forces “shall be subject to the limited performance of the functions” agreed upon between the United States and Lebanon in 1982. | | X | X | X |
| Authorization of the Use of Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq , January 14, 1991 ⁸² | Authorizes the use of force to enforce UN resolutions regarding the Iraqi invasion of Kuwait, especially the UN call for Iraqi forces to leave Kuwait. | X | | | |
| Operation Restore Hope , 1993 ⁸³ | Congress approved of the use of “United States Armed Forces in Somalia” for the purposes of “protection of United States personnel and bases” and humanitarian relief while terminating funding for operations in 1994. | | X | X | X |
| Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States , September 18, 2001 ⁸⁴ | Authorizes the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” | | | | |
| Authorization for the Use of Military Force Against Iraq Resolution of 2002 , October 16, 2002 ⁸⁵ | Authorizes the use of force to “defend the national security of the United States against the continuing threat posed by Iraq” and to “enforce all relevant United Nations Security Council resolutions regarding Iraq.” | X | | | |

Ending the Endless War

To aid readers and ongoing national debate, the February 2015 edition of this paper adds additional detail regarding the methods used to judge when limits were present in given authorizations. Some minor changes were also made regarding our evaluation of authorizations in American history and the limitations that they contained. We also removed the Pancho Villa resolution because it was a non-binding measure and added the Operation Restore Hope Resolution, which was accidentally omitted in the previous edition. This resulted in slight changes in the final percentages of authorizations containing each of the limiting mechanisms we evaluated. Our initial assessment was that: "Of the 35 instances that Congress has authorized the use of military force, 60 percent contained geographic limitations, 43 percent named the enemy, 37 percent limited the kinds of military operations or forces authorized to be employed, and 23 percent contained an expiration date... 51 percent of such authorizations included just one of the previous four types of limitations..." The original draft of the report will be maintained on our website.

Appendix 2: Organizations targeted and potentially targeted by drone strikes under the 2001 AUMF

Appendix 1 attempts to summarize the organizations that have been targeted with military force under the 2001 AUMF. No full list of targeted organizations has been release by the U.S. government to the public, creating a sizable knowledge gap in public discourse. Lack of clarity on the list of targeted organizations also extends to senior members of Congress.⁸⁶ The primary documentary record on targeted organizations is found in 24 Presidential Notifications to Congress regarding actions taken pursuant to the 2001 law by the Bush and Obama Administrations. However, these publicly available notifications likely do not list all organizations actually targeted under the AUMF. This likelihood is suggested by the well-documented counterterrorism operations occurring in nearby (or within) areas where operations have taken place pursuant to the 2001 law and directed against organizations *not* listed Presidential Notifications with links to al-Qaeda, the Taliban, or both.

To help address this gap, the below table presents organizations known to have been targeted under AUMF authority and those potentially targeted under AUMF authority. Organizations *known* to have been targeted under the 2001 law are those which have been named in Presidential Notifications. Organizations *potentially* targeted under the 2001 AUMF are those that (1) were targeted by drone strikes and therefore in a way consistent with U.S. counterterrorism practices against organizations named in Presidential Notifications and (2) operate in or near the battlespaces where the U.S. has targeted organizations named in Presidential Notifications.

This appendix selects drone strikes as a method to help identify organizations potentially targeted under 2001 AUMF authority because of the high amount of data and reporting on them compared to other kinds of force, e.g. the use of Special Operators. Drone strike data is taken primarily from the New America Foundation database. In the case of Somalia, which is not covered by the New America data, the research of the Bureau of Investigative Journalism is used. This research found:

- four organizations are *known* to have been targeted under the 2001 AUMF;
- four organizations have *potentially* been targeted under the 2001 AUMF;
- these eight organizations have been targeted within the territory of four states other than Afghanistan: Pakistan, Iraq, Yemen and Somalia.

Drone strikes and organizations targeted in Afghanistan have been omitted. The reason is that the problems with the scope of the 2001 AUMF relate primarily to operations outside of Afghanistan and to targeting organizations besides al-Qaeda central and the Taliban – both of which lie uncontroversially within the scope of the 2001 law. However, strikes against the Taliban and al-Qaeda have been included if they took place elsewhere to give fuller representation of the expansion of operations pursuant to the 2001 AUMF.

Ending the Endless War

| Organization | Specified in Presidential Notifications | Drone Strikes | Countries |
|---|---|----------------------|---|
| IMU (Islamic Movement of Uzbekistan) | No | 2 ⁸⁷ | Pakistan (2010; 2012) |
| Tehrik-i-Taliban | No | 17 ⁸⁸ | Pakistan (2008-present) |
| Maulvi Nazir | No | 2 ⁸⁹ | Pakistan (2012-2013) |
| Haqqani Network | No | 37 ⁹⁰ | Pakistan (2008-present) |
| the Taliban | Yes ⁹¹ | 135 ⁹² | Pakistan (2004-present) |
| Al-Qaeda | Yes ⁹³ | 47 ⁹⁴ | Pakistan (2005-present) Yemen (2002) |
| AQAP | Yes ⁹⁵ | 93 ⁹⁶ | Yemen (2002; 2009-present) |
| Al-Shabaab | Yes (specified as “al-Qaeda-associated elements of al-Shabaab”) ⁹⁷ | 7-11 ⁹⁸ | Somalia (2011-present) |

Notes

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- ² Barack Obama, "Remarks by the President at the National Defense University." National Defense University, Washington, DC. May 23, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>
- ³ "Authorization for Use of Military Force" (Pub.L. 107-40, September 14, 2001). 107th Congress, 2001-2002. Available at: <https://www.govtrack.us/congress/bills/107/sjres23/text>
- ⁴ See for example: Graham Cronogue, "A New AUMF: Defining Combatants in the War on Terror," *Duke Journal of Comparative and International Law* volume 22 (2012): pp. 377-406.
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- ⁹ See the exchange between Michael A. Sheehan, Assistant Secretary of Defense for Special Operations/Low-Intensity Conflict, Department of Defense and Senator Levin: Transcript from the Senate, Committee on Armed Services. "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, May 16, 2016: p. 9. Available at: <http://www.armed-services.senate.gov/hearings/oversight-the-law-of-armed-conflict-the-use-of-military-force-and-the-2001-authorization-for-use-of-military-force>
- ¹⁰ Senate Committee on Foreign Relations. "Authorization For Use Of Military Force After Iraq And Afghanistan," Hearing, May 21, 2014. Available at: <http://www.foreign.senate.gov/hearings/authorization-for-use-of-military-force-after-iraq-and-afghanistan-05-21-14>
- ¹¹ See: Jennifer Daskal & Stephen I. Vladeck, "Westgate, al Shabaab and the AUMF." *Just Security*, September 23, 2013. Available at: <http://justsecurity.org/2013/09/23/westgate-al-shabaab-aumf/> For the characterization of elements of al Shabaab being associated forces of al Qaeda, see: B.H. Obama, "Letter to Congressional Leaders on the Deployment of United States Combat-Equipped Armed Forces," *Daily Compilation of Presidential Documents*, 2012 DCPD No. 482 (June 15, 2012): 1-4 <http://www.gpo.gov/fdsys/pkg/DCPD-201200482/html/DCPD-201200482.htm>
- ¹² Greg Miller & Karen DeYoung, "Administration debates stretching 9/11 law to go after new al-Qaeda offshoots," *The Washington Post*, March 6, 2013. Available at: http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394_story.html
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- ¹⁵ Harold Hongju Koh, Sterling Professor of International Law, Yale Law School. Statement before the Senate, Senate Foreign Relations Committee. "Authorization for the Use of Military Force After Iraq and Afghanistan," Hearing, May 21, 2014. Available at: http://www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf
- ¹⁶ Stanely McChrystal quotes in David Alexander, "Retired general cautions against overuse of 'hated' drones." Reuters, January 7, 2013. Available at: <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608O20130107>
- ¹⁷ The continuing resolution that funds the Department of State into FY14 authorized about \$50 billion including OCO funds while the BCA spending caps for DoD's base budget are around \$500 billion. DoD is also likely to be appropriated around \$80 billion dollars in OCO funds. In For details on the declining Department of State budget, see: Liz Shroyer, "8 Takaways from

the Administration's Budget Proposal." U.S. Global Leadership Coalition, April 23, 2013. Available at: <http://www.usglc.org/2013/04/23/8-takeaways-from-the-administrations-budget-proposal/>

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¹⁹ Gregory D Johnsen, "How We Lost Yemen." *Foreign Policy*, August 6, 2013. Available at: http://www.foreignpolicy.com/articles/2013/08/06/how_we_lost_yemen_al_qaeda#sthash.FTA1L7M4.dpbs

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²¹ Naming enemy organizations and distinguishing between belligerents and co-belligerents would build on previous Congressional efforts. The 2006 Military Commissions Act w codified a definition of "co-belligerent" for purposes of detention "any state or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy." See "Military Commissions Act of 2006," Sec 948a, Act of Congress, January 3, 2006. Available at: <http://www.gpo.gov/fdsys/pkg/BILLS-109s3930enr/pdf/BILLS-109s3930enr.pdf>

A similar theme was taken up in the 2012 National Defense Authorization Act which specified detention authority could apply to "a person who was part of or substantially supporting al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States." However, both laws concerned detention authority exclusively and did not name enemy organizations beyond al-Qaeda and the Taliban. Moreover, while co-belligerency was defined, no list was given of organizations co-belligerent with the Taliban and al Qaeda. See "National Defense Authorization Act for Fiscal Year 2012," Sec. 1021, Act of Congress, December 31, 2011. Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>

²² Jennifer Daskal & Stephen I. Vladeck, "After the AUMF"; p. 6-10. Available at: <http://www.lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf>

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²⁵ Lt. Col. Geoffrey S. Corn (ret.), Professor of Law, South Texas College of Law. Statement to the Senate Committee on Armed Services. "Hearing addressing the Law of Armed Conflict, The Use of Military Force, And the 2001 Authorization for Use of Military Force," Hearing, May 15, 2013. Available at: http://www.lawfareblog.com/wp-content/uploads/2013/05/Corn_05-16-13.pdf

²⁶ Bob Corker, Ranking Member, Senate Foreign Relations Committee. "Corker: Updating 2001 AUMF Necessary to Address New and Emerging Terrorist Threats," Hearing, March 20, 2013. Available at: <http://www.corker.senate.gov/public/index.cfm/2013/3/corker-updating-2001-aumf-necessary-to-address-new-and-emerging-terrorist-threats>

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- ³⁰ James R. Clapper, Director of National Intelligence. Statement for the Record to the Senate, Senate Select Committee on Intelligence. "Worldwide Threat Assessment of the US Intelligence Community," Hearing, January 29, 2014. Available at: http://www.dni.gov/files/documents/Intelligence%20Reports/2014%20WWTA%20%20SFR_SSCI_29_Jan.pdf
- ³¹ Karen DeYoung and Loveday Morris, "U.S. Airstrikes Target Islamic Militants in Northern Iraq." *Washington Post*, 8/8/14. Available At: http://www.washingtonpost.com/world/middle_east/us-airstrikes-target-islamic-state-militants-in-northern-iraq/2014/08/08/a7a659d8-1efd-11e4-ae54-0cfe1f974f8a_story.html?hpid=z1
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- ³⁶ The Hoover proposal includes a number of measures designed to "mitigate" to risk of codifying perpetual war, including a defining "imminence" in the law and requiring strict reporting and notification procedures. However, even if these measures are sufficient in principle, in practice they depend upon political will in Congress and in the Executive Branch to be effectively implemented and followed. That political will would be subject to political pressure, expediency, political interests and require political action to discipline serious implementation that could easily be perceived or cast in the political arena as going out on a limb to protect terrorists. These practical considerations create circumstances ripe to stretch, bend or break the law. Minimizing the risk of perpetual war requires avoiding the likelihood of such abuse entirely.
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