

AFTER AL-QAIDA: A PROSPECTIVE COUNTERTERRORISM AUMF

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In the wake of the September 11th attacks, Congress passed the Authorization for Use of Military Force (2001 AUMF), which authorized the President to use military force against the responsible parties, namely al-Qaida and the Taliban. However, with al-Qaida now diminished, the 2001 AUMF, due to its explicit 9/11 focus, cannot continue to credibly provide the legal foundation for U.S. counterterrorism strategy against threats posed by new terror organizations. As other legal options fail either to restrain unilateral executive branch action or to legitimize the use of force, enacting a new counterterrorism-focused authorization for use of military force (AUMF) is the best method for enabling, while still controlling, the necessary use of military force against terrorist groups. Part I of this Note will examine the ways in which the 2001 AUMF, the President's Article II powers, and non-military options are alone each insufficient to effectively address new terror threats. Part II will demonstrate why a new statutory AUMF is the best path forward by analyzing the strengths of the 2001 AUMF in both enabling and constraining the use of force. Part III will outline a prospective counterterrorism-specific AUMF, designed to offer the executive branch sufficient flexibility to meet new terrorist threats early, but, through statutory restrictions and increased congressional oversight, also provide clear and improved limitations on the unilateral presidential use of force.

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INTRODUCTION

In the wake of the September 11th attacks, Congress passed the Authorization for Use of Military Force (2001 AUMF), which authorized the President to use military force against those groups responsible for the assault,¹ namely al-Qaida and its protector, the Taliban. Under this legal authorization, the United States invaded Afghanistan and then conducted strikes against al-Qaida and its progeny around the world. However, with al-Qaida diminished, the 2001 AUMF, due to its explicit 9/11 focus, cannot credibly continue to provide the legal foundation for U.S. counterterrorism strategy against threats posed by new terror groups. As other legal options fail either to restrain unilateral executive branch action or to legitimize the use of force, enacting a new counterterrorism-focused authorization for use of military force (AUMF) offers the best method for enabling, while still controlling, the necessary use of military force against terrorists. Such a new counterterrorism AUMF would ensure the United States has ready the full set of policy tools needed to respond to the emergence of a new al-Qaida without sacrificing checks on presidential action.

This Note will proceed in three Parts. Part I will review the threat posed by terrorism and examine the ways in which the 2001 AUMF, the President’s Article II powers, and non-military options are each insufficient to address new terror threats within the confines of our democratic system. Part II will demonstrate why a new statutory AUMF is the best path forward by analyzing the strengths of the 2001 AUMF in both enabling and constraining the use of force. Part III will review and build on other proposals to outline a prospective counterterrorism-specific AUMF, designed to offer the executive branch sufficient flexibility to meet new terrorist threats early, while employing new statutory restrictions and increased congressional oversight to provide clear and improved limitations on the unilateral presidential use of force. Relying on a listing system concept, this novel framework would include an adapted certification procedure for designating eligible terror groups, a system of congressional review and veto power, tailored restrictions on force, and regular reporting as well as delisting opportunities.

¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

I

LEGAL AUTHORITIES TO COMBAT TERRORISM

The inadequacy of the 2001 AUMF, the President's Article II powers, and non-military options either to enable or constrain the use of military force against emerging terror groups demonstrates the need for a new counterterrorism AUMF. This Part will first provide a brief history of al-Qaida prior to 9/11 as an illustration of the potential threat posed by emerging terrorist organizations as well as of the insufficiency of the aforementioned policy options to meet that danger before it truly manifests.

A. Brief History of al-Qaida

In 1988, Osama bin Laden founded al-Qaida from a core of fighters who had just defeated the Soviet Army in Afghanistan.² Aiming to establish a new caliphate and blaming the United States for a litany of grievances,³ al-Qaida dedicated itself to killing Americans in order to drive the United States from the Middle East.⁴ After years of building a network of operatives and training camps,⁵ bin Laden issued two fatwas,⁶ publicly declaring war against the United States.⁷ With its Afghan base under Taliban protection, al-Qaida then launched a series of attacks against U.S. interests around the world, most significantly including the 1998 embassy bombings,⁸ the millennium plot,⁹ and the USS Cole bombing.¹⁰ Despite a growing recogni-

² NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 56 (2004) [hereinafter 9/11 COMMISSION REPORT], <https://www.9-11commission.gov/report>.

³ See *id.* at 50–52 (stating the proffered grievances which included the worldwide oppression of Muslims).

⁴ See *id.* at 47–48 (noting that al-Qaida committed itself to killing U.S. soldiers and civilians).

⁵ See *id.* at 55–67 (covering al-Qaida's early years).

⁶ See *id.* at 47 (“A fatwa is normally an interpretation of Islamic law by a respected Islamic authority, but neither Bin Ladin, Zawahiri, nor the three others who signed [the 1998 fatwa] were scholars of Islamic law.”).

⁷ See Osama bin Laden, *Declaration of War Against the Americans Occupying the Land of the Two Holy Places*, TERRORISMFILES.ORG (Aug. 23, 1996), http://www.terrorismfiles.org/individuals/declaration_of_jihad1.html (declaring war on the United States); Shaykh Usamah Bin-Muhammad Bin-Ladin et al., *Jihad Against Jews and Crusaders*, FED'N AM. SCIENTISTS (Feb. 23, 1998), <https://fas.org/irp/world/para/docs/980223-fatwa.htm> (urging attacks on U.S. soldiers and civilians).

⁸ See 9/11 COMMISSION REPORT, *supra* note 2, at 68–70 (describing the 1998 bombings of the U.S. embassies in Kenya and Tanzania which killed 224 people).

⁹ See *id.* at 176–79 (describing the foiling of the 1999 millennium plot, in which an al-Qaida operative who intended to bomb Los Angeles International Airport was arrested crossing the Canadian border with explosives in his car).

tion of the threat,¹¹ on September 11, 2001, nineteen al-Qaida operatives hijacked four airliners, crashing them into the World Trade Center, the Pentagon, and, due to the passengers' heroic efforts, a field in Pennsylvania.¹² All told, 2973 people were murdered by al-Qaida on that day.¹³

al-Qaida's history illustrates the dangers inherent in failing to adequately address the threat from an emerging terrorist organization early. As will be shown below, the legal options available to the United States today are each uniquely insufficient in their capacity to meet the menace of a new terror group, like that of al-Qaida prior to 9/11.

B. *The 2001 AUMF*

In the aftermath of 9/11, the United States quickly identified al-Qaida as the perpetrator.¹⁴ Within days, Congress enacted an authorization for use of military force, the 2001 AUMF, which reads in relevant part:

[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.¹⁵

On the authority of this brief provision, the United States has waged an ongoing, global, and controversial war against al-Qaida and its progeny.

While the 2001 AUMF's grant of power is broad, the statute possesses a primary internal limitation that prevents it from credibly and legitimately serving as the legal basis for the use of force against terror groups beyond al-Qaida and its progeny. Specifically, though the 2001 AUMF authorizes the President "to use all necessary and appropriate

¹⁰ See *id.* at 190–91 (describing the 2000 attack on the USS Cole, in which al-Qaida operatives drove a small boat packed with explosives into a Navy destroyer anchored in Aden, Yemen, killing seventeen U.S. sailors).

¹¹ See *id.* at 254–77 (detailing U.S. efforts to counter al-Qaida, which included a dedicated CIA bin Laden unit, multiple FBI investigations, and attention at the highest levels of government).

¹² See *id.* at 1–14, 285–315 (describing the events of the 9/11 attacks).

¹³ *Id.* at 311 & n.188.

¹⁴ See, e.g., R.W. Apple Jr., *No Middle Ground*, N.Y. TIMES (Sept. 14, 2001), <https://nyti.ms/2GyjeY4> (recognizing bin Laden's responsibility for the 9/11 attacks).

¹⁵ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

force” to “prevent any future acts of international terrorism against the United States,” it contains a crucial limitation: It restricts legally permissible targets to “those nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” This constraint, referred to as the 9/11 nexus,¹⁶ provides the executive branch sufficient flexibility to target all individuals and groups connected to the 9/11 plot, but denies the authority to conduct an indiscriminate war against every terrorist or disfavored nation.¹⁷ Executive interpretations of the statute, most controversial of which is the associated forces concept,¹⁸ have provided some flexibility to target emerging terrorist organizations, such as ISIS, but the invocation of the 2001 AUMF’s statutory authority still requires a demonstrable connection between a target terror organization and al-Qaida.¹⁹

The 9/11 nexus’s restriction of legitimate statutory targets to al-Qaida and its progeny means that, as al-Qaida continues to decline,

¹⁶ See, e.g., Graham Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT’L L. 377, 384 (2012) (referring to the “9/11 Nexus” as a requirement that “targets have some nexus to the 9/11 attacks”); Gabrielle LoGaglio, *Crisis with ISIS: Using ISIS’s Development to Analyze “Associated Forces” Under the AUMF*, 5 AM. U. NAT’L SECURITY L. BRIEF 127, 133 (2014) (stating that, although “President Bush’s initial draft of the AUMF did not contain a 9/11 nexus, [which would] requir[e] those targeted under the AUMF to be responsible for the 9/11 attacks,” the version ultimately passed by Congress limited the President’s mandate by requiring that targets have some “nexus to the 9/11 attacks”).

¹⁷ See Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SECURITY J. 115, 116 (2014) (“Thus, despite widespread misrepresentations to the contrary, Congress pointedly refused to declare a ‘war on terrorism.’ The use of force Congress authorized was instead directed at those who bore responsibility for the 9/11 attacks—namely, al Qaeda and the Taliban.”).

¹⁸ See Jeh Charles Johnson, Gen. Counsel, Dep’t of Def., National Security Law, Lawyers, and Lawyering in the Obama Administration, Dean’s Lecture at Yale Law School (Feb. 22, 2012), in 31 YALE L. & POL’Y REV. 141, 146 (2012) (defining an associated force as an organization that is both “(1) . . . an organized, armed group that has entered the fight alongside al-Qaeda, and (2) . . . a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners”). Critics have argued that executive branch interpretations of this doctrine have allowed the use of force beyond the 2001 AUMF’s intended scope. See Jennifer Daskal, Opinion, *Obama’s Last Chance to End the “Forever War,”* N.Y. TIMES (Apr. 27, 2016), <https://nyti.ms/1T3Uh4e> (“[T]he United States is relying on an authorization to fight those responsible for Sept. 11 to wage war against groups that had nothing to do with those attacks and, in some cases, didn’t even exist at the time. This expansive legal interpretation empowers future presidents in dangerous ways.”).

¹⁹ See Stephen Preston, Gen. Counsel, Dep’t of Def., The Legal Framework for the U.S. Use of Military Force Since 9/11, Address at the Annual Meeting of the American Society of International Law (Apr. 10, 2015), in 109 AM. SOC’Y INT’L L. PROC. 331, 334 (2015) (“[T]he concept of associated forces under the 2001 AUMF does not provide the President with unlimited flexibility to define the scope of his statutory authority.”).

the 2001 AUMF is an increasingly poor fit for the future threat environment faced by the United States.²⁰ Limited by the 9/11 nexus to targeting al-Qaida, the Taliban, and associated forces, the statute cannot provide the legal foundation for military action against new terrorist groups lacking connections to al-Qaida. A victim of its own success, the 2001 AUMF is poised to occupy an increasingly marginal position in U.S. counterterrorism policy as the United States continues to degrade al-Qaida and its progeny, shrinking the pool of permissible targets. Fundamentally, the 2001 AUMF is retrospective, aimed at a past era's biggest threat, while counterterrorism's preventative goals demand a prospective outlook, attempting to identify and defeat the next terrorist threat before it reaches the level of al-Qaida on September 10, 2001. Furthermore, any attempt to fit groups unconnected to al-Qaida within the 2001 AUMF's remit in order to unlock statutory approval for the use of force warps the statute in a manner that the text cannot bear, delegitimizes statutory authorizations, and damages our democratic institutions. These considerations demonstrate the need for a replacement AUMF, covering terrorist groups beyond al-Qaida.

C. *The President's Article II Powers*

In the absence of statutory authorization, the President's Article II powers represent the primary legal basis for the use of force against al-Qaida and other terrorist organizations. Unlike the 2001 AUMF, Article II powers could arguably provide a legitimate legal foundation for military strikes against emerging terrorist groups unconnected to al-Qaida. However, a review of the President's power under Article II to use force demonstrates that basing the United States' ability to strike terrorists solely on Article II removes any meaningful constraint on the unilateral use of force against terrorist organizations and weakens the legal foundations of U.S. counterterrorism policy.

The constitutional allocation of the ability to authorize the use of force is a contentious question.²¹ While Article II of the U.S.

²⁰ See, e.g., ROBERT CHESNEY ET AL., HOOVER INST., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 3–5 (2013) (arguing that the 2001 AUMF “is increasingly mismatched to the threat environment facing the United States”); Daskal & Vladeck, *supra* note 17, at 117 (“[T]he one point upon which all seem to agree is the increasing extent to which those who threaten us the most are not those against whom Congress authorized the use of force in September 2001.”).

²¹ See, e.g., Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,”* 44 ST. MARY'S L.J. 1, 6 (2012) (quoting Justice Rehnquist as “call[ing] the Commander in Chief power ‘the most difficult area of all of the Constitution’” (quoting *Executive Impoundment of Appropriated Funds: Hearings Before*

Constitution declares the President to be the “Commander in Chief of the Army and Navy of the United States,”²² Article I reserves for Congress the powers to declare war as well as to create, support, and regulate the Armed Forces.²³ As a result of this overlapping grant of power, debate has raged over the extent to which the President possesses the inherent authority to use force without a congressional declaration of war or equivalent statutory approval.²⁴ Unsurprisingly, Presidents have consistently asserted considerable independent authority to deploy troops and use force abroad, relying on the Commander in Chief power as well as the President’s recognized role as the primary actor in foreign affairs generally.²⁵ This independent constitutional authority has been asserted to permit the unilateral presidential use of force abroad “‘for the purpose of protecting important national interests,’ even without specific prior authorization from Congress.”²⁶

Past practice, or “historical gloss,” demonstrates longstanding acceptance of the President’s authority to unilaterally use force abroad.²⁷ U.S. history abounds with instances of the President using

the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 251 (1971)); *id.* (noting the “varying interpretations of the balance of war powers between the President and Congress”); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057–58 & 2058 n.31 (2005) (noting the debate on the need for congressional approval for the use of force).

²² U.S. CONST. art. II, § 2.

²³ *Id.* art. I, § 8.

²⁴ *See, e.g.*, Bradley & Goldsmith, *supra* note 21, at 2057 (“Many war powers scholars argue that the President is constitutionally required to obtain some form of congressional authorization before initiating significant offensive military operations.”).

²⁵ *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (noting that the President shoulders the “vast share of responsibility for the conduct of our foreign relations”); *id.* at 645 (Jackson, J., concurring) (“I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) (recognizing executive authority to withhold passports as “deriv[ing] from the generally accepted view that foreign policy was the province and responsibility of the Executive”); Bejesky, *supra* note 21, at 12–13 (“[T]he President is the country’s exclusive agent in international relations.”).

²⁶ Authority to Use Military Force in Libya, 35 Op. O.L.C. ___, at *6 (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (quoting Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992)).

²⁷ *Id.* at *7; *see also Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents . . . making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President”); *id.* at 635 n.2 (Jackson, J., concurring) (noting that “the President might act in external affairs without congressional authority”).

force without prior congressional permission.²⁸ The preeminent example of such a unilateral executive use of force is the Korean War, a three-year-long conflict in which over 300,000 U.S. troops were deployed and nearly 36,600 U.S. soldiers were killed.²⁹ Despite the duration, scale, and intensity of this conventional war, President Truman conducted this conflict entirely under his inherent Article II authority, having not received any congressional authorization to enter the conflict nor any explicit ratification for the fighting.³⁰

In addition to the reality of past practice, the courts have acknowledged the President's power to unilaterally use force in the national interest.³¹ The most influential of such judicial opinions, Justice Jackson's concurrence in *Youngstown*, lays out a widely accepted framework which countenances and approves some unilateral executive foreign policy and military actions.³² This construct conceptualizes three categories of presidential action: acts undertaken in concert with congressional will, in the face of congressional silence, or in opposition to a congressional statement. Analyzing the constitutional validity of the presidential action within in each category, Justice Jackson stated that the President's power is at its "maximum" in the first category and at its "lowest ebb" in the third.³³ The second situation, in which "the President acts in absence of either a congressional grant or denial of authority," creates a "zone of twilight" that "enable[s], if not invite[s], measures on independent presidential responsibility."³⁴ The zone of twilight effectively permits a range of unilateral actions as long as the President possesses relevant inherent constitutional power, which Justice Jackson believed included foreign affairs.³⁵ While such executive actions remain more vulnerable to challenge than when Congress and the President act together, they are

²⁸ See generally RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41677, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2010 (2011) (documenting examples of such uses of force).

²⁹ *Id.* at 11.

³⁰ See Bradley & Goldsmith, *supra* note 21, at 2060 n.43 ("The Korean War was neither declared nor expressly authorized by Congress.")

³¹ See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (upholding Lincoln's ability to unilaterally impose a blockade on Southern ports).

³² *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). Though only a concurrence, Justice Jackson's view was later endorsed by the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654, 668–69, 673–74 (1981) (noting that "we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful" and then using Justice Jackson's system to analyze and uphold presidential action taken in accordance with a statutory authorization).

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

³⁴ *Id.* at 637.

³⁵ *Id.* at 635 n.2 (noting that "the President might act in external affairs without congressional authority").

unlikely to be held constitutionally invalid, especially on issues of national security and foreign affairs where the judiciary treads lightly.³⁶ Justice Jackson's framework, which offers a great amount of discretion to the President in most cases, occupies a dominant position in the evaluation of the President's powers in foreign affairs.³⁷

This combination of constitutional powers, historical practice, and judicial acquiescence grants the President a broad functional authority to use force unilaterally. As demonstrated by the Korean War, among numerous other military actions,³⁸ when Congress stays silent, the President's Article II powers permit the almost completely unchecked ability to undertake military operations if the President determines that course of action to be in the national interest.³⁹

Following the Vietnam War, Congress recognized the functional extent of the President's war powers and decided to stay silent no longer, passing the War Powers Resolution. Aiming to reassert congressional authority over use of force decisions, the statute averred to restrict the "constitutional powers of the President as Commander-in-Chief" to employ force "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States."⁴⁰ The Resolution further required consultation with and reporting to Congress and created a mandatory deadline for the withdrawal of forces deployed into hostilities without congressional approval.⁴¹

³⁶ See Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466, 492 (2005) ("Only if the political branches were clearly and resolutely in opposition could the courts take and decide the case." (citing *Doe v. Bush*, 240 F. Supp. 2d 95 (D. Mass. 2002))).

³⁷ See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083–84 (2015) (relying on Justice Jackson's framework).

³⁸ See GRIMMETT, *supra* note 28, at 1 (documenting "hundreds of instances in which the United States has utilized military forces abroad," but noting that only in eleven instances did "the United States formally declare[] war against foreign nations").

³⁹ An additional potential constraint on the use of force is international law, which governs both the initiation and conduct of conflicts. However, while international law has and may continue to shape U.S. policy decisions, much international law, including the rules governing the initiation of military action, does not carry the force of law within the United States and, as such, may be disregarded by the President at will. See Bradley & Goldsmith, *supra* note 21, at 2090–91 ("Nor has Congress sought affirmatively to incorporate *jus ad bellum* rules into U.S. domestic law, even though it has incorporated a number of *jus in bello* rules through, for example, the War Crimes Act of 1996."). Therefore, though international law may exert normative restraints on action, as this Note focuses on the constraints imposed by domestic law, it will not further examine international law limitations on the use of force.

⁴⁰ War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. § 1541(c) (2012)).

⁴¹ *Id.* §§ 3–5 (codified at 50 U.S.C. §§ 1542–1544); see also *id.* § 8 (codified at 50 U.S.C. § 1547) (clarifying that appropriations for operations unilaterally undertaken by the

Fundamentally, the Resolution aimed to constrain the President's ability to use force by unilaterally placing restrictions on exercising Article II powers.

Beyond its enumerated constraints, the War Powers Resolution also acted as an explicit congressional statement on use of force issues, moving any subsequent presidential military action, undertaken without specific congressional authorization or not in immediate self-defense, from *Youngstown* category two, under which the action was likely constitutionally valid, to *Youngstown* category three, under which the action would likely be declared unconstitutional if challenged.⁴² By speaking, Congress set a new default for war powers issues, eliminating the zone of twilight and requiring the President to play by Congress's rules in order to use force.

Despite the high hopes of its proponents, the War Powers Resolution has mostly failed in its goal of reining in unilateral presidential uses of force.⁴³ As every subsequent President has viewed the Resolution as unconstitutional,⁴⁴ unilateral presidential use of force has not abated,⁴⁵ a practice facilitated by a combination of clever executive statutory interpretation and congressional inaction. Two major arguments concerning the interpretation of the War Powers Resolution have enabled the President to continue using force without congressional authorization. First, the Resolution itself permits the unilateral insertion of U.S. soldiers into hostilities. Despite the initial

President shall not be construed as an authorization of force and therefore do not waive the reporting or termination provisions of the Resolution).

⁴² See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 610, 637–38 (1952) (Jackson, J., concurring). Though the judiciary is hesitant to rule on foreign affairs, the courts will strike down presidential action that is contrary to an explicit congressional statement. See *id.* at 588–89 (majority opinion) (upholding the injunction of President Truman's seizure of steel plants during the Korean War); see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 132–42 (1866) (Chase, C.J., concurring) (striking down the use of military tribunals as beyond the President's congressional authorization in this area); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 44 (2004) ("Where the executive has acted in the face of legislation policies or without legislative approval, the courts have invalidated executive action, even during wartime, or scrutinized it more closely.").

⁴³ See James A. Baker III & Warren Christopher, Opinion, *Put War Powers Back Where They Belong*, N.Y. TIMES (July 8, 2008), <https://nyti.ms/2jPMD6M> (describing the War Powers Resolution as "ineffective at best"); see also Brian J. Litwak, *Putting Constitutional Teeth into a Paper Tiger: How to Fix the War Powers Resolution*, 2 NAT'L SECURITY L. BRIEF 1 (2012) (arguing that the War Powers Resolution has failed to check presidential unilateralism).

⁴⁴ See Baker III & Christopher, *supra* note 43 (stating that "[n]o president has recognized its constitutionality").

⁴⁵ See GRIMMETT, *supra* note 28, at 12–31 (detailing uses of force from 1973 to 2010).

policy statement forbidding such executive action,⁴⁶ the reporting and withdrawal deadline requirements clearly imply that the initial step of unilaterally employing force remains within the President's powers.⁴⁷

Second, the executive branch has interpreted the Resolution to neutralize the statute's applicability to the most common uses of force. For instance, the statute prohibits introducing U.S. troops into "hostilities" without prior congressional approval.⁴⁸ However, multiple administrations have viewed the referenced "hostilities" as a "full military engagement," therefore permitting "intermittent military engagements" without approval.⁴⁹ Controversially,⁵⁰ the Obama Administration held that the Resolution was inapplicable to its Libyan military intervention, arguing that this use of force, which included airstrikes and drones and cost over \$700 million,⁵¹ did not qualify as "hostilities" because "U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor . . . U.S. casualties or a serious threat thereof, or any significant chance of escalation into [such] a conflict."⁵² This aggressive interpretation set a precedent,⁵³ effectively neutralizing the War Powers Resolution as a check on presidential uses of force, especially when applied to the counterterrorism context, in which frequent, low-intensity operations

⁴⁶ War Powers Resolution, Pub. L. No. 93-148, § 2(a), (c), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. 1541(a), (c) (2012)).

⁴⁷ See *id.* §§ 4–5 (codified at 50 U.S.C. §§ 1543–1544) (requiring reporting and withdrawal of troops introduced into hostilities without congressional approval); see also Authority to Use Military Force in Libya, 35 Op. O.L.C. ___, at *8 (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf.

⁴⁸ War Powers Resolution § 2(c) (codified at 50 U.S.C. § 1541(c)).

⁴⁹ Robert Chesney, *White House Clarifies Position on Libya and the WPR: US Forces Not Engaged in "Hostilities,"* LAWFARE (June 15, 2011, 3:46 PM), <https://www.lawfareblog.com/white-house-clarifies-position-libya-and-wpr-us-forces-not-engaged-hostilities>; see also Authority to Use Military Force in Libya, 35 Op. O.L.C. ___, at *8 (arguing that "determining whether a particular planned engagement constitutes a 'war' for constitutional purposes instead requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations" (quoting Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (1994))).

⁵⁰ See, e.g., Bruce Ackerman, Opinion, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <https://nyti.ms/2p7sRDm> ("The legal machinations Mr. Obama has used to justify war without Congressional consent set a troubling precedent that could allow future administrations to wage war at their convenience—free of legislative checks and balances.").

⁵¹ WHITE HOUSE, UNITED STATES ACTIVITIES IN LIBYA 8–9, 14 (2011) [hereinafter U.S. ACTIVITIES IN LIBYA], <https://fas.org/man/eprint/wh-libya.pdf>.

⁵² *Id.* at 25.

⁵³ See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. ___, at *7 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> (relying on OLC's 2011 Libya opinion to justify airstrikes against Syria).

with few U.S. casualties are the norm.⁵⁴ This interpretation basically allows the President to undertake any military operation that is unlikely to cause a conventional war. In short, while the Resolution has worked to increase transparency and has established a new normative framework,⁵⁵ executive interpretations of the Resolution have removed any substantive constraint imposed by the statute, allowing the President to deploy and justify almost any force desired.

Compounding this obliteration of statutory checks, Congress has remained silent despite aggressive presidential interpretations and occasional outright disregard of the statute. As the courts hesitate to intrude on such inchoate interbranch disputes,⁵⁶ this inaction functionally results in an unchecked executive ability to act. For instance, Congress failed to issue an institutional repudiation of the Libyan intervention,⁵⁷ which, as a contrary congressional statement, would have been more likely to produce judicial review.⁵⁸ This institutional weakness in the face of executive overreach results in the Resolution's failure to provide a meaningful check on presidential uses of force.⁵⁹

⁵⁴ See Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, LAWFARE (June 16, 2011, 8:38 AM), <https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory> (“Note that this argument implies that the President can wage aggressive war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution's time limits. So the implications here, in a world of increasingly remote weapons, are large.”).

⁵⁵ The Resolution has succeeded in increasing reporting and thereby transparency as to military actions. See, e.g., MATTHEW WEED, CONG. RESEARCH SERV., PRESIDENTIAL REFERENCES TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS (2016), <https://fas.org/sgp/crs/natsec/pres-aumf.pdf> (compiling examples of presidential reporting for uses of force under the 2001 AUMF). Furthermore, the mere existence of the Resolution may encourage presidents to seek statutory authorizations when they might not have otherwise. See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 12–13 (2014) (describing President George H.W. Bush's deliberations over requesting an AUMF for the 1991 Gulf War).

⁵⁶ See, e.g., Fisher, *supra* note 36, at 484 (“[F]ederal courts [used] the political question doctrine on a regular basis to avoid fundamental constitutional issues about the war power.”).

⁵⁷ See, e.g., Charlie Savage, *Libya Effort Is Called Violation of War Act*, N.Y. TIMES (May 25, 2011), <https://nyti.ms/2oxFo6v> (reporting that, despite much criticism, Congress lacked a “clear consensus on how to react”).

⁵⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); Fisher, *supra* note 36, at 492 (noting that judicial review is more probable if there is explicit interbranch disagreement).

⁵⁹ A number of structural factors, including access to information, expertise, and ease of decisionmaking, place Congress in a weak position as compared to the President in the area of foreign affairs. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (noting the President is accorded greater discretion in foreign affairs in part due to better access to information about foreign countries); Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L. REV. 1777, 1818 (2013) (noting that

As the War Powers Resolution fails as a check, the President's Article II powers remain as significantly unbounded as they were prior to the statute's enactment.⁶⁰ Therefore, the President could rely on Article II as the legal basis to combat al-Qaida or any new terror group. However, such uses of force would be almost entirely unchecked and unaccountable to any other branch of government. In conclusion, absent another legal foundation, the President's Article II powers provide a feasible, but unilateral and nearly unrestricted option to fight terrorism.

D. Non-Military Options

Repealing the 2001 AUMF to focus instead on law enforcement and intelligence operations represents another method of combatting al-Qaida as well as future terrorist threats. Proponents of such a pivot argue that alternative approaches, as opposed to continuing to rely on the 2001 AUMF or passing a new statutory AUMF, would improve the United States' security outcomes and end unconstitutional practices.⁶¹ While law enforcement and intelligence should be and are crit-

the President is more powerful in foreign affairs due to several advantages in acting as a "first mover," including "the ability to act quickly and secretly; the President's role as the 'sole organ' of U.S. foreign affairs; the executive's information monopoly; substantive expertise in military and security matters; and a norm of executive primacy that fosters expectations that the President will take the lead in national security"). Other scholars have argued that Congress has further abdicated its constitutionally-granted role in this area for the personal political gain of individual members. See, e.g., Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1006 (1999).

⁶⁰ A counterargument holds that less aggressive interpretations by future presidents would strengthen the restraints of the War Powers Resolution and rein in Article II power. However, presidents of all political stripes have pushed the Article II envelope. See Authority to Use Military Force in Libya, 35 Op. O.L.C. __, at *6-9 (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (relying on prior aggressive executive branch interpretations). Furthermore, the most aggressive narrowing of the Resolution, and thereby the expansion of unchecked Article II power, was undertaken by a President who was a constitutional law professor and professed opponent of unilateral executive power. See Charlie Savage, *Attack Renews Debate over Congressional Consent*, N.Y. TIMES (Mar. 21, 2011), <https://nyti.ms/2p7tbSX>. Future (or current) presidents with more hawkish views or less respect for constitutional checks and balances may make more aggressive use of this Libyan precedent, thereby drastically expanding the scope of unchecked presidential uses of force. See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. __, at *7 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download>.

⁶¹ See Daskal & Vladeck, *supra* note 17, at 146 (arguing that expanding the scope of the 2001 AUMF will neither best preserve constitutional values nor advance national security interests). Even proponents of the primacy of law enforcement and intelligence options recognize a limited need for military action, which would only be covered by uses of force based on Article II powers used in self-defense against imminent threats. *Id.* at 136-37. However, there are no effective checks, in the absence of a specific statutory AUMF, to restrict unilateral use of force to only imminent threats. See *supra* Section I.C

ical components of U.S. counterterrorism policy, removing a statutory basis for force would harm U.S. security by reducing the availability of necessary military options.

Current U.S. counterterrorism policy places a fundamental emphasis on intelligence and law enforcement operations, both at home and abroad, as means of disrupting terrorist organizations. The scale of the non-military apparatus aimed at terrorism,⁶² as well as the limited feasible locations for military action,⁶³ demonstrate the centrality of non-military options in U.S. counterterrorism policy. However, law enforcement and intelligence cannot adequately address all types of terror threats. One such threat arises from regions beyond the reach of U.S. law enforcement and intelligence capabilities, such as pre-9/11 Afghanistan, which can become safe havens for terrorist groups.⁶⁴ In such situations, law enforcement or intelligence may disrupt some plots, but are fundamentally unable to address the underlying problem, namely a hostile organization operating with the intent to attack the United States. When the local government is unable or unwilling to act, U.S. military force may be the only option available to truly destroy the organization and reduce the overall threat. For instance, while U.S. law enforcement and intelligence might have been able to disrupt the 9/11 attacks, these organs had little practical ability to address the full threat posed by al-Qaida from its Afghan base.⁶⁵ Further evidence of the critical role of military force is offered by the post-9/11 campaign against al-Qaida, which, through the persistent use of military force against the group and its leaders, has so degraded the organization's capabilities that it is viewed as a diminished and fading threat.⁶⁶

Repealing the 2001 AUMF to increase reliance on law enforcement and intelligence operations would either imprudently restrict the

(describing the President's largely unfettered authority to use force in the absence of statutory constraints).

⁶² See Daskal & Vladeck, *supra* note 17, at 132–35 (discussing new non-military initiatives since 9/11).

⁶³ See Preston, *supra* note 19, at 333–34 (noting that the 2001 AUMF has authorized force in only six countries).

⁶⁴ See CHESNEY ET AL., *supra* note 20, at 5 (describing the inadequacy of law enforcement and intelligence tools as a mechanism for disrupting or permanently incapacitating terrorist activity in late-1990's Afghanistan).

⁶⁵ See, e.g., 9/11 COMMISSION REPORT, *supra* note 2, at 116–17, 119–37 (describing the Clinton Administration's focus on military options against al-Qaida in Afghanistan due to a lack of viable alternatives).

⁶⁶ See, e.g., CHESNEY ET AL., *supra* note 20, at 3 (“[T]he original al Qaeda network has been substantially degraded by the success of the United States and its allies in killing or capturing the network's leaders and key personnel.”); Daskal & Vladeck, *supra* note 17, at 121–22 (stating that the core of al-Qaida “has been effectively eviscerated”).

tools available to U.S. policymakers by restricting the availability of military options, thereby endangering U.S. security by effectively creating terrorist sanctuaries against which the United States is powerless to respond, or would encourage the unilateral use of military force under the President's Article II powers.

II

ADVANTAGES OF A STATUTORY AUMF

None of the available options for combatting emerging terrorist organizations are fit to meet such threats, as the 2001 AUMF cannot credibly target new groups, reliance on the President's Article II powers permits the unchecked unilateral use of force, and non-military options alone are insufficient to address these dangers. The best way to handle the emergence of new terror organizations is to replace the 2001 AUMF with a new counterterrorism-specific AUMF, which, as demonstrated by the strengths of the 2001 AUMF, would enable the use of necessary military force against new groups but also constrain presidential action such that this grant of authority does not become a blank check.

A. Enables the Use of Military Force

Enacting a new statutory counterterrorism AUMF would enable the President to use military force as needed to disrupt emerging terrorist organizations, remedying the failure of the 2001 AUMF to permissibly target such groups and the inability of non-military options to respond to all terror threats. Specifically, the advantages of using a new AUMF as the legal foundation for combatting terrorist organizations—as demonstrated by the 2001 AUMF's utility, flexibility, and legitimacy—suggest that a new counterterrorism statute is the best path forward.

The first strength of an AUMF is its utility, providing clear legal authority for the critical use of force against the terrorist organizations within its remit. Unlike the sole use of law enforcement and intelligence, an AUMF would explicitly permit the employment of a valuable counterterrorism tactic, military force, against terrorists.⁶⁷ The effectiveness of military action under the auspices of an AUMF is shown by the success of the 2001 AUMF, under which the United States, reaching where law enforcement and intelligence alone often

⁶⁷ An AUMF would provide legal authority for several related counterterrorism tactics beyond military strikes, such as military detention. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004) (recognizing that the 2001 AUMF provided authorization for military detentions of Taliban members).

could not, “effectively eviscerated” al-Qaida,⁶⁸ systematically destroying its network, killing its leaders, and leaving the core organization “a shadow of its former self.”⁶⁹ Furthermore, the motivation to disavow military options, in order to end a “forever war” and return to an idyllic pre-9/11 state of peace, ignores that, since even a diminished al-Qaida poses an ongoing threat to the United States,⁷⁰ reducing available policy options without any countervailing benefit will harm U.S. security.⁷¹ This basic military achievement against al-Qaida demonstrates the fundamental utility of a force authorization to legally enable the use of force, which is a crucial tool in the counterterrorism policy toolkit.

The second advantage of a statutory authorization to combat terrorism is its flexibility, providing the President a full range of policy options to respond to an inherently amorphous threat. An AUMF unlocks the ability to use force legitimately, providing flexibility to respond to differing situations with the appropriate tool, be that intelligence gathering, arrests, or direct strikes. Importantly, an AUMF does not privilege the use of force over other counterterrorism strategies but simply ensures that military options remain in the policy toolkit. An AUMF would permit the use of force; it would not mandate the use of force. Rather than restrict policy options, Congress can address concerns that an AUMF would result in overreliance on military action by focusing on careful statutory design and procedures.⁷² Furthermore, a well-designed statute would provide the President with necessary operational flexibility to meet the threat posed by malleable terrorist networks. For instance, as the 2001 AUMF was constructed to combat al-Qaida,⁷³ a dispersed network with a global and secret membership, the statute declined to place onerous restrictions on military action and instead provided the President with discretion

⁶⁸ Daskal & Vladeck, *supra* note 17, at 121.

⁶⁹ *Id.* (internal quotation marks omitted) (quoting Barack Obama, State of the Union Address (Feb. 12, 2013), <http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html>).

⁷⁰ Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 636 (2016) (“Al Qaeda, though diminished, remains a serious threat against the United States in various countries.”).

⁷¹ See, e.g., Stephen M. Griffin, *Analyzing War Powers After 9/11*, 64 DRAKE L. REV. 961, 975 (2016) (stating that repealing the 2001 AUMF without a replacement enacted “is no way to run the nation’s diplomacy or, for that matter, a military operation” and simply “is irresponsible”).

⁷² See CHESNEY ET AL., *supra* note 20, at 7 (noting that a new AUMF could create a “hammer-nail problem” or a force-first default resulting in overreliance on military action).

⁷³ See, e.g., 147 CONG. REC. H5634 (daily ed. Sept. 14, 2001) (statement of Rep. Ros-Lehtinen) (“Our defenses must be based on recognition and awareness of the methods, weapons, tactics and behavior of this new enemy.”).

to fight the approved conflict without restriction on form, place, or duration.⁷⁴ By avoiding artificial limitations on executive branch action, the 2001 AUMF's broad discretionary grant of authority allows the President to use the best tool in each scenario.⁷⁵ Additionally, the elasticity contained within the 2001 AUMF targeting parameter, which, rather than simply naming al-Qaida, describes the intended targets in functional terms and grants the President the final targeting determination,⁷⁶ entrenches U.S. control over the enemy designation, thereby preventing al-Qaida from undertaking internal changes in name, associations, or leadership to escape statutory coverage.⁷⁷ A close functional cousin of such targeting elasticity, the associated forces concept is a statutory interpretation,⁷⁸ endorsed by Congress and the courts,⁷⁹ that ensures the proper functioning of the 2001 AUMF by maintaining sufficient flexibility to meet intertwined and evolving terrorist threats⁸⁰ as well as U.S. control over the designation of the enemy.⁸¹ An AUMF designed on similar principles to face

⁷⁴ See, e.g., 147 CONG. REC. S9422 (daily ed. Sept. 14, 2001) (statement of Sen. Biden) (“[The 2001 AUMF] does not limit the amount of time that the President may prosecute this action against the parties guilty for the September 11 attacks. We must all understand that the use of force will not be easy or quick.”).

⁷⁵ This flexibility permits policy choices to be based on the situational calculus, as illustrated by the different approaches taken by the U.S. government to eliminate top al-Qaida leadership. For example, the government used drone strikes to kill al-Qaida's then second in command, see Mark Mazzetti, *C.I.A. Drone Is Said to Kill Al Qaeda's No. 2*, N.Y. TIMES (Aug. 27, 2011), <https://nyti.ms/2tXCETV>, but employed special ops soldiers to kill Osama bin Laden, see Peter Baker et al., *Bin Laden Is Dead, Obama Says*, N.Y. TIMES (May 1, 2011), <https://nyti.ms/2k3webH>.

⁷⁶ See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (defining targeted entities as “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”).

⁷⁷ See Preston, *supra* note 19, at 335 (arguing that the AUMF cannot be interpreted to “allow the enemy—rather than the President and Congress—to control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States”).

⁷⁸ See *supra* note 18 and accompanying text.

⁷⁹ See National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011) (affirming the authority to detain members of “al-Qaeda, the Taliban, or associated forces” under the 2001 AUMF); Khan v. Obama, 655 F.3d 20, 33 (D.C. Cir. 2011) (affirming the detention of a member of Hezb-i-Islami Gulbuddin, a force associated with al-Qaida and the Taliban).

⁸⁰ See *Current Terrorist Threat to the United States: Hearing Before the S. Comm. on Intelligence*, 114th Cong. 31 (2015) (testimony of Nicholas Rasmussen, Director, National Counterterrorism Center) (“[W]hen I looked at the words ‘associated forces’ I was thinking ahead to maybe the development of new alliances, new alignments, that we can’t necessarily foresee today.”).

⁸¹ See Griffin, *supra* note 71, at 971 (noting that the Obama Administration determined that in addition to al-Qaida, the 9/11 AUMF covered associated forces engaged in hostilities against the U.S.); see also *supra* note 77 and accompanying text.

emerging terror threats, unlike the 2001 AUMF and non-military options, would provide the necessary flexibility to face such unknown future threats.

Third, utilizing a statutory AUMF legally and democratically legitimizes the military actions taken under its auspices to a far greater degree than is possible for force justified under Article II power alone. The enactment of a statutory AUMF requires the initial agreement of Congress, making later judicial approval all but certain,⁸² and represents a strong showing of interbranch unity that grants any such AUMF a unique degree of legal and democratic legitimacy.⁸³ The continued institutional endorsement of its applications as well as a lack of any serious political momentum to repeal it would further strengthen an AUMF's underlying democratic validity. In contrast, unilateral Article II uses of force lack equivalent interbranch affirmation and therefore are supported by a far narrower political base. The 2001 AUMF's history demonstrates each of these legitimating features of a statutory authorization at work. Passed and later reaffirmed by a specific appropriation bill, the statute and its interpretations have enjoyed continual informed congressional support⁸⁴ as well as a line of approving judicial decisions.⁸⁵ Furthermore, the statute appears to enjoy continuing democratic approval, evidenced by the lack of popular support for its repeal and the absence of electoral controversy

⁸² See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum”); Issacharoff & Pildes, *supra* note 42, at 35 (describing “a democratic-process based view that emphasizes that the judicial role in reviewing assertions of power during exigent circumstances should focus on ensuring whether there has been [presidential and congressional] institutional endorsement for the exercise of such powers” as “characteristic [of] . . . American courts”).

⁸³ Legal legitimacy is obtained by moving the object of congressional and presidential agreement into *Youngstown* category one, giving this action “the widest latitude of judicial interpretation.” 343 U.S. at 637. Democratic legitimacy of a statutory AUMF stems from the fact that both political branches, as the unique and sole national representatives of the people in our Republic, considered and agreed to embark on a particular course of action. The unilateral actions of a single branch lack this weighty democratic endorsement. See generally Issacharoff & Pildes, *supra* note 42 (arguing that courts tend to affirm joint actions of the executive and the legislature, but are more likely to reject the unilateral actions of the executive).

⁸⁴ NDAA for Fiscal Year 2012 § 1021(b)(2); see also Bradley & Goldsmith, *supra* note 70, at 634 (“Congress thus adopted the same construction of the AUMF that the Obama Administration had proposed in the March 2009 brief.”).

⁸⁵ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004) (affirming the detention, under the AUMF, of a U.S. citizen captured while fighting for the Taliban); *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010) (affirming that a member of an associated force was “properly detained pursuant to the AUMF”); Bradley & Goldsmith, *supra* note 70, at 633–34 (explaining that courts have upheld the Obama Administration’s interpretation of the AUMF).

surrounding the statute.⁸⁶ The interbranch consensus inherent in a statutory AUMF, demonstrated in the 2001 AUMF,⁸⁷ represents a powerful legal and democratic endorsement of the legitimacy of the statute and the subsequent military actions it authorizes, which is not obtainable for solely executive branch actions taken under Article II powers.

In conclusion, a new counterterrorism AUMF would provide the legal foundation and flexible framework to successfully enable the use of military force against terror organizations. As demonstrated by the 2001 AUMF's utility, flexibility, and legitimacy, a new AUMF represents an option superior to law enforcement and intelligence alone, which are unable to respond to some potential situations, or reliance on Article II powers, which lacks comparable structural legitimacy.

B. *Constrains the Use of Military Force*

In addition to enabling the use of military force, a counterterrorism AUMF would place clear restrictions on the use of force against terror threats. Unlike Article II powers, which have become a nearly blank check for the unilateral executive branch use of force, an AUMF allows Congress to set some explicit limits on military operations and better oversee executive action within the AUMF's area. Succinctly, the 2001 AUMF constrains the unilateral presidential use of force and increases the accountability for military actions.

When Congress remains silent as to an aspect of foreign affairs, the President's inherent powers will usually be sufficient to support her unilateral action in this zone of twilight.⁸⁸ Especially in light of the aggressive interpretations elevating Article II powers and obliterating the checks of the War Powers Resolution, the absence of a congressional statement on responses to terrorism means that the President would possess nearly unconstrained and unaccountable power to strike terror targets where, when, how, and for whatever reasons she deemed fit. However, the enactment of a counterterrorism AUMF, an explicit congressional statement on the subject, would erase the zone of twilight, forcing the President to comply with the established con-

⁸⁶ See Griffin, *supra* note 71, at 970 (arguing that the "four intervening presidential elections" and the failure of "the public [to] register any concern with the basic concept of a long war" represent "strong evidence of not only the ongoing political relevance of the [2001] AUMF, but also its continuing *legal* and *constitutional* significance").

⁸⁷ See, e.g., Preston, *supra* note 19, at 333 (noting that since the NDAA for Fiscal Year 2012, "all three branches of the government weighed in to affirm the ongoing relevance of the 2001 AUMF and its application not only to those groups that perpetrated the 9/11 attacks or provided them safe haven, but also to certain others who were associated with them").

⁸⁸ *Youngstown*, 343 U.S. at 637.

gressional framework for using force against terror groups or to risk having transgressive and excessive actions reversed by the judiciary.⁸⁹ Furthermore, the mere existence of a public framework for conducting operations against terrorists creates normative pressure to remain within its bounds. Enacting a new AUMF would allow Congress to place and enforce limits on the scope, type, duration, and location of force used to combat terrorism—a clear improvement over reliance on Article II powers, which cedes all aspects of the counterterrorism campaign to the President’s unfettered discretion.

Examining the 2001 AUMF reveals the effective boundaries a statutory AUMF can place on executive branch uses of force. Days after 9/11, the White House proposed an AUMF, which sanctioned action “to deter and pre-empt any future acts of terrorism or aggression against the United States.”⁹⁰ Congress, fearing that such an unlimited authorization was “another Tonkin Gulf Resolution,”⁹¹ passed the 2001 AUMF as a clear repudiation of the White House’s proposed alternative.⁹² Instead, Congress enacted a more restrained statute, inserting the 9/11 nexus and requiring War Powers Resolution compliance. By this construction, Congress intended that the 2001 AUMF provide the executive branch sufficient flexibility to target al-Qaida and its associates, but deny the authority to conduct an indiscriminate war against all hostile militants. Additionally, Congress sought to impose other implicit restraints on force, which would only be employed where covered groups operate.⁹³

The executive branch, though occasionally pushing on the authorization’s boundaries, has striven to stay within the confines of the 2001 AUMF, eschewing reliance on Article II powers alone to combat ter-

⁸⁹ See *id.* at 639–41 (striking down the President’s seizure of steel mills as directly contrary to congressional action); Fisher, *supra* note 36, at 489 (noting that the courts would decide war powers cases if the dispute between the President and Congress was “clear and resolute” and had “reached a constitutional impasse or deadlock”).

⁹⁰ 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 6 (2007).

⁹¹ Jim Abrams, *Senate Passes \$40 Billion Aid Bill*, ASSOCIATED PRESS, Sept. 14, 2011 (quoting Senator John McCain); see, e.g., Bradley & Goldsmith, *supra* note 21, at 2079 & n.134 (collecting similar statements from members of Congress).

⁹² See David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73–76 (2002) (reporting that the congressional response to the White House was “immediately negative”).

⁹³ See GRIMMETT, *supra* note 90, at 3 (noting that the 2001 AUMF “was not framed in terms of use of military action against terrorists generally”); Cronogue, *supra* note 16, at 385 (“Once the United States has disabled or dismantled all the relevant actors related to the 9/11 attacks, the authorization should end because no one could satisfy the nexus.”).

rorism.⁹⁴ The statute's effectiveness in restricting military action is shown by the limited scope of force justified under the 2001 AUMF in comparison to the significant military operations justified by other means. First, force sanctioned by the 2001 AUMF, rather than by raw Article II powers, has only ever been directed against groups falling within the statute's explicit and repeatedly reaffirmed remit, namely the Taliban, al-Qaida, and their associated forces. As such, though the United States has faced varied security threats since its enactment, the 2001 AUMF has been used to authorize force against just six organizations in seven countries.⁹⁵ Specifically, in addition to the Taliban and al-Qaida in Afghanistan,⁹⁶ the statute has authorized attacks on al-Qaida core operatives in Pakistan, Libya, Yemen, and Somalia.⁹⁷ The United States has also struck four other terror organizations—al-Qaida in the Arabian Peninsula (AQAP),⁹⁸ ISIS, Jabhat al-Nusra, and the Khorasan Group⁹⁹—all of which come under the 2001 AUMF

⁹⁴ See WEED, *supra* note 55, at 4–39 (surveying presidential reporting that occurred since the 2001 AUMF).

⁹⁵ See Preston, *supra* note 19, at 333–34 (listing organizations targeted under the 2001 AUMF and their locations). Operations, including drone strikes and at least one special operations raid, in the seventh country, Pakistan, have never been officially acknowledged by the U.S. government, but are presumably based on the 2001 AUMF as well. See MATTHEW C. WEED, CONG. RESEARCH SERV., R43983, 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION 5 (2015).

⁹⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”).

⁹⁷ WEED, *supra* note 95, at 5. In particular, the strikes in Libya and Somalia have caused confusion in the press, see Charlie Savage et al., *Obama Expands War with Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), <https://nyti.ms/2k9Mw3a>, as the targeted individuals often possessed joint membership in al-Qaida and a local Islamist militia, such as al Shabaab. The U.S. government has consistently maintained that strikes in these countries were taken against individuals due to their concurrent membership in al-Qaida, not because local groups were deemed associated forces. See *The Framework Under U.S. Law for Current Military Operations: Hearing Before S. Comm. on Foreign Relations*, 107th Cong. 3 (2014) [hereinafter *Framework Under U.S. Law*] (statement of Stephen W. Preston, Gen. Counsel, Dep't of Def.).

⁹⁸ See Preston, *supra* note 19, at 333–34 (acknowledging and justifying strikes against AQAP); see also WEED, *supra* note 95, at 5 (stating that “2001 AUMF-authorized military actions had included strikes in Yemen against Al Qaeda in the Arabian Peninsula (AQAP), considered either part of or associated with Al Qaeda”). AQAP was founded by al-Qaida operatives at the direction of leadership, swore fealty to the core, and fought alongside al-Qaida against the United States, showing that it is either part of al-Qaida or an associated force. See Robert Chesney, *AQAP Is Not Beyond the AUMF: A Response to Ackerman*, LAWFARE (Apr. 24, 2014, 10:12 AM), <https://www.lawfareblog.com/aqap-not-beyond-aumf-response-ackerman>.

⁹⁹ See Preston, *supra* note 19, at 333–34 (justifying strikes against the Khorasan Group and Jabhat al-Nusra); see also WEED, *supra* note 55, at 30–34 (justifying strikes against the Khorasan Group). As al-Qaida's direct franchises in Syria, these organizations receive

as either part of al-Qaida or an associated force. Though fundamentally necessary to any force authorization,¹⁰⁰ rooted in historically accepted concepts of the laws of war,¹⁰¹ and affirmed by all three branches of government,¹⁰² categorizing these organizations, particularly ISIS, as associated forces, and thereby within the remit of the 2001 AUMF, has proven controversial.¹⁰³ However, even as the most borderline case, ISIS (formerly known as al-Qaida in Iraq) can legitimately be classified and targeted as an associated force of al-Qaida because of ISIS's deep historic ties with al-Qaida's core and the basic principle, articulated by the Obama Administration, that internal power struggles cannot immunize al-Qaida's descendants from the 2001 AUMF's reach.¹⁰⁴ In targeting such associated forces, the executive branch has consistently used the 2001 AUMF's language and structure as its legal basis, recognizing the benefits of staying within this framework as well as the costs of exiting it.¹⁰⁵ Though the sheer

direct orders and support from the core leadership, making them part of al-Qaida and therefore legitimate targets under the 2001 AUMF.

¹⁰⁰ See *supra* notes 78–81 and accompanying text.

¹⁰¹ See *Framework Under U.S. Law*, *supra* note 97, at 1 (“The concept of an ‘associated force’ is based on the well-established concept of co-belligerency in the laws of war.”); Johnson, *supra* note 18, at 146 (stating that the associated forces doctrine “is based on the well-established concept of cobelligerency in the law of war”).

¹⁰² Preston, *supra* note 19, at 333; see, e.g., NDAA for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011); Khan v. Obama, 655 F.3d 20, 33 (D.C. Cir. 2011) (finding sufficient evidence to conclude that appellant was a member of an “associated force” of al-Qaida and the Taliban).

¹⁰³ See, e.g., Charlie Savage, *An Army Captain Takes Obama to Court over ISIS Fight*, N.Y. TIMES (May 4, 2016), <https://nyti.ms/2m8TJBH> (reporting on a lawsuit claiming the United States lacked statutory authority for strikes against ISIS); see also LoGaglio, *supra* note 16, at 159–71 (arguing that ISIS no longer qualifies as an associated force on the standard announced by the Obama Administration).

¹⁰⁴ See WEED, *supra* note 95, at 8 (stating that ISIS can be targeted under the 2001 AUMF because it “communicated and coordinated with Al Qaeda; the Islamic State currently has ties with Al Qaeda fighters and operatives; . . . employs tactics similar to Al Qaeda; and . . . is the ‘true inheritor of Osama bin Laden’s legacy’” (quoting Press Release, White House, Press Briefing by Press Secretary Josh Earnest (Sept. 11, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>)). Stephen Preston, the General Counsel for the Department of Defense under President Obama, further explained that “ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined bin Laden’s al-Qa’ida organization in its conflict against the United States. . . . ISIL now claims that it, not al-Qa’ida[] . . . is the true executor of bin Laden’s legacy.” Preston, *supra* note 19, at 334. Preston concluded that “the President is not divested of the previously available authority under the 2001 AUMF . . . simply because of disagreements between the group and al-Qa’ida’s current leadership,” in part because “[a] contrary interpretation of the statute would allow the enemy—rather than the President and Congress—to control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.” *Id.* at 335.

¹⁰⁵ See, e.g., *Framework Under U.S. Law*, *supra* note 97, at 4 (arguing that the United States is “strongest when Congress and the Executive branch are acting together”); Letter

number of strikes and close overlap between al-Qaida and other militants can create a public impression of unfettered presidential authority to conduct strikes, the extent of military action under the 2001 AUMF's scope is better viewed as a symptom of the expansive scale and following al-Qaida achieved due to its post-9/11 notoriety.

Secondly, the 2001 AUMF has not evolved into an all-purpose tool for justifying force against any perceived threat. In responding to terrorists lacking a sufficient connection to al-Qaida to come within the 2001 AUMF's associated forces concept, the executive branch has either avoided the direct use of force entirely¹⁰⁶ or sparingly deployed force based on alternative legal justifications.¹⁰⁷ Furthermore, other prominent examples of U.S. military action since 9/11, including the Iraq War,¹⁰⁸ the Libyan intervention,¹⁰⁹ and the Trump

from Charles Faulkner, Bureau of Legislative Affairs, to Sen. Bob Corker (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> (justifying strikes against ISIS under the 2001 AUMF); WEED, *supra* note 55 (surveying presidential reporting that occurred since the 2001 AUMF); Preston, *supra* note 19 (detailing the legal bases for executive military action).

¹⁰⁶ For instance, the United States has refrained from striking Boko Haram, which is a brutal terror organization but has not targeted the United States. Instead, the United States has supported regional partners' efforts against the group. See Siobhán O'Grady, *U.S. Sends Troops and Drones to Cameroon as Boko Haram Fight Intensifies*, FOREIGN POL'Y (Oct. 14, 2015, 6:37 PM), <http://foreignpolicy.com/2015/10/14/u-s-sends-troops-and-drones-to-cameroon-as-boko-haram-fight-intensifies/>. U.S. forces are deployed in several countries on training and support missions, which, as non-combat operations, do not rely on the 2001 AUMF or fall within the War Powers Resolution's strictures on deployments into hostilities, and are authorized by separate congressional action. See, e.g., 10 U.S.C. § 333 (2012 & Supp. V 2018) (authorizing the use of troops for non-combat training and capacity-building missions). A recent tragic mission in Niger appears to have been based on such support authorizations. See ALEXIS ARIEFF ET AL., CONG. RESEARCH SERV., R44995, NIGER: FREQUENTLY ASKED QUESTIONS ABOUT THE OCTOBER 2017 ATTACK ON U.S. SOLDIERS 6, 8–9, 14 (2017) (reporting that U.S. soldiers were deployed on a “train, advise, and assist” mission, not a combat mission, and the notifications to Congress did “not specifically refer[] to 2001 AUMF authority as the legislative basis for [the] deployment”).

¹⁰⁷ While the United States has frequently targeted members of al-Shabaab due to overlapping memberships in al-Qaida, see *supra* note 97, the few direct U.S. strikes against the organization have relied on legal justifications distinct from the 2001 AUMF. See Erica Gaston, *Do the Strikes on al Shabaab Stretch the AUMF or the Unit Self-Defense Doctrine?*, LAWFARE (Mar. 18, 2016, 10:00 AM), <https://www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine> (describing the unit self-defense doctrine as the legal basis for a strike against al-Shabaab).

¹⁰⁸ See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

¹⁰⁹ See Authority to Use Military Force in Libya, 35 Op. O.L.C. __, at *6–7 (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (legitimizing this military action under the President's inherent Article II powers).

Administration's strikes on the Assad regime,¹¹⁰ relied on other legal authorizations, demonstrating the recognized limitations on the applicability of the 2001 AUMF.

In short, the history of the 2001 AUMF demonstrates that, while the United States has conducted a significant number of military operations since 9/11, these actions have targeted a small number of organizations with a proven connection to al-Qaida and thereby remained within the statute's authorized confines, relied on separate specific legal authorizations, or relied on the zone of twilight as to force not aimed at terror organizations. As such, this record indicates that enacting a new counterterrorism AUMF will likely, for both legal and normative reasons, result in executive branch compliance with the statutory requirements in order to authorize military operations against terrorist groups. By placing clear conditions on the use of force, Congress asserts its own constitutional authority over use of force decisions, enables more critical judicial review of presidential actions, and fundamentally curbs the President's ability to unilaterally use force abroad by channeling presidential action into its statutory framework.

Beyond the effectiveness of these targeting constraints, a statutory AUMF also imposes procedural and reporting conditions on the executive branch that can drastically improve accountability, transparency, and oversight of military action.¹¹¹ Especially as compared to the alternative means of enabling force, reliance on Article II powers, a new counterterrorism AUMF represents a superior option.

Uses of force justified by the President's Article II powers entail few, if any, requirements for disclosure, consultation, or reporting to Congress. The one main relevant statute, the War Powers Resolution, has been interpreted to irrelevance or simply ignored when not reinforced by a more specific congressional statement. In contrast, a new AUMF would have far greater scope for imposing a variety of disclosure and reporting conditions upon uses of military force. Congress's implementation of an AUMF, thereby involving itself in critical decisions of war and peace, gives the body more leverage in obtaining

¹¹⁰ See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. __, at *11–18 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> (claiming the President's inherent Article II powers as the legal foundation for strikes in response to Syrian chemical attacks); see also John Bellinger, *President Trump's War Powers Report on the Syria Attacks*, LAWFARE (Apr. 8, 2017, 3:08 PM), <https://www.lawfareblog.com/president-trumps-war-powers-report-syria-attacks> (reprinting a letter from President Trump to Congress asserting Article II powers as the legal foundation for these attacks).

¹¹¹ See *infra* Section III.B.2–3 (outlining the benefits of procedural and reporting conditions).

transparency and accountability over the critical initial decision to use force against a group. Furthermore, through the statutory design of a new AUMF, Congress can require periodic reporting and other measures to ensure a flow of information, which will enable it to stay abreast of executive branch actions, monitor for abuse, be knowledgeable about needed changes, and generally be a more equal partner in the initiation of military action. Again, the 2001 AUMF demonstrates the feasibility and effectiveness of transparency and accountability measures included as conditions on the use of force. First, the 2001 AUMF demanded compliance with section 4 of the War Powers Resolution, which requires periodic reporting of the details of and justification for force deployments.¹¹² Despite dodging War Powers Resolution requirements in other situations, the executive branch has consistently complied with this disclosure requirement, delivering regular reports since the very first post-9/11 deployment.¹¹³ Additionally, while the constraints embodied in the 2001 AUMF would not stop a determined President from striking a terrorist group that fell beyond the 2001 AUMF's remit under her inherent Article II authority, the statute, as a clear congressional statement, would move any such action to Justice Jackson's category three, thereby allowing Congress to more easily obtain judicial review and even reversal of this unilateral presidential decision. As a statutory AUMF can increase congressional accountability over and participation in use of force decisions as well as enhance transparency and disclosure over the duration of a conflict, it represents a better choice than Article II for the legal foundation for U.S. counterterrorism policy.

III A NEW AUMF

A new statutory counterterrorism AUMF, replacing the 2001 AUMF, represents the best method for enabling force while constraining its unilateral use in the fight against terrorism. The design of this new AUMF is critical to ensuring that the resulting statute provides sufficient authority to permit the President enough discretion and flexibility in the use of military force to make the new law useful, while still placing real checks on unilateral presidential action so that

¹¹² Authorization for Use of Military Force Against Iraq Resolution § 3(b); War Powers Resolution, Pub. L. No. 93-148, § 4(c), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1543(c) (2012)).

¹¹³ See WEED, *supra* note 55, at 3–32 (surveying presidential reporting that occurred since the 2001 AUMF); Bradley & Goldsmith, *supra* note 21, at 2078 n.130 (noting that “the President has regularly reported to Congress on the state of the war against terrorism”).

the law does not become a blank check for military action. This Part will first examine existing proposed AUMFs under this capability-constraint balance and find that these proposals either lack the ability to effectively meet the threat posed by emerging terrorist organizations or fail to properly restrain executive power. The Part will then conclude by sketching a framework for a prospective counterterrorism AUMF and demonstrating why each proposed component would help strike an ideal balance between enabling military action and controlling its use.

The AUMF proposed in this Note would create a statutory listing system, under which the executive branch would certify that specific groups met congressionally-established targeting criteria, to designate covered terrorist organizations.¹¹⁴ The new statute would then mandate a form of congressional review, permitting Congress to reject a group's designation. Additionally, the proposal would include force restrictions, which would limit statutorily authorized force to operations with a low risk of U.S. casualties. Though rejecting geographic force restrictions and a sunset clause, this framework would impose detailed periodic reporting requirements, which would trigger an annual congressional review of organizational designations under the statute. With this structure, the AUMF would optimally balance enabling military force against future terror threats with constraining unilateral executive branch action.

A. Other AUMF Proposals

Scholars and politicians have put forth numerous proposals, which aim to modify or replace the current AUMF statute. Though

¹¹⁴ The work most influential on this Note's proposed Authorization for Use of Military Force (AUMF) was put forth by Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes and proposes the listing system approach built upon by this Note. CHESNEY ET AL., *supra* note 20, at 10. Beyond this specific framework, a substantial literature has developed around AUMF proposals and frameworks in recent years, including in congressional draft bills and academic articles of varying perspectives. *See, e.g.*, S.J. Res. 43, 115th Cong. (2017) (proposing to include ISIS within a new AUMF); H.R.J. Res. 100, 115th Cong. (2017) (same); H.R.J. Res. 84, 114th Cong. (2016) (proposing a new AUMF requiring the specific statutory listing of each targeted organization); Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 104–05 (2012) (same); Cronogue, *supra* note 16, at 403–05 (proposing a new AUMF that would include a statutory definition limiting the meaning of "associated force"); Daskal & Vladeck, *supra* note 17, at 126, 142, 145 (advocating for either refining the 2001 AUMF or utilizing group-specific AUMFs). While these ideas provided insight into the tradeoffs in drafting a new AUMF, this Note's proposal goes beyond these ideas to offer a listing system with novel congressional review, force restrictions, and reporting requirements.

none have gained momentum, these floated frameworks offer insight into the ideal prospective structure of a new AUMF.

Many replacement AUMF proposals, which aim to explicitly include ISIS within the new statute's language,¹¹⁵ share the same structural shortcoming, despite varying internal mechanics. Just like the 2001 AUMF, these ISIS-specific AUMFs would inherently be retrospective, only enabling the use of force against ISIS, the major threat from years past, rather than against newly threatening terrorist groups. Moreover, as ISIS is arguably covered under the existing 2001 AUMF and is in decline due to military operations authorized by the statute, such plans do little to improve U.S. security against current or future terror threats. The shortcomings of ISIS-specific AUMFs are also representative of those proposals that aim to limit the scope of statutorily permissible targets to a set of specifically-named groups.¹¹⁶ Another related solution aims to clearly legitimize the use of force against groups beyond al-Qaida by statutorily defining "associated forces" to expressly bring additional groups within the proposed AUMF's language while also limiting executive branch interpretative expansion of the term's coverage.¹¹⁷ However, this proposal still retains the retrospective 9/11-focused limitation of the ISIS-specific proposals and the 2001 AUMF, covering only the associated forces of al-Qaida and preventing the statute from reaching new terror threats.

Another set of proposals argue that Congress ought to simply pass individual group-specific AUMFs for each terror organization that reaches a sufficient threat threshold to necessitate a military response.¹¹⁸ While this framework would ensure the democratic legitimacy of military action against each terror group, as Congress would have explicitly approved its use, this approach lacks sufficient flexibility to respond to new terror threats and would likely encourage the use of unconstrained Article II powers instead to circumvent a cumbersome legislative process. Requiring a group-specific AUMF to strike an emerging terror organization would effectively stymie military action as the time, effort, and political capital necessary to pass a

¹¹⁵ See, e.g., S.J. Res. 26, 114th Cong. (2015); MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 15–16 (2017) (compiling ISIS-specific AUMF proposals); White House, Draft AUMF Against ISIL (Feb. 11, 2015) [hereinafter Draft AUMF Against ISIL], https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf.

¹¹⁶ See, e.g., S.J. Res. 43; H.R.J. Res. 100.

¹¹⁷ See Cronogue, *supra* note 16, at 401–06 (proposing an AUMF which includes a statutory definition of associated forces).

¹¹⁸ See, e.g., Daskal & Vladeck, *supra* note 17, at 138 (defending the efficacy of individual group-specific AUMFs).

statute makes such an outcome nearly impossible in the timeframe required to respond to an incipient threat.¹¹⁹ Passing such an authorization would likely only be feasible after suffering an attack, such as occurred with the 2001 AUMF. As the United States should act prospectively in counterterrorism operations, aiming to smother dangerous terror groups long before they achieve such notoriety, this framework would harm U.S. security by locking up military options until it is too late. Alternatively, faced with the prospect of an emerging terror threat but lacking statutory authority or the realistic prospect of obtaining it, the President would likely still use force if deemed necessary, relying upon Article II powers. Such an invocation of Article II powers would operate in a zone of twilight due to the congressional silence as to this terrorist group and thereby be nearly unbounded, allowing the unilateral use of force. Therefore, relying on individual group-specific AUMFs to counter emerging terror threats would result in practical elimination of military options or, without a channeling statutory framework, unchecked unilateral executive uses of force. Furthermore, group-specific AUMFs would presumably be written and passed as the need arose, meaning likely immediately following a high-profile attack. While such crisis legislation is not uniformly bad, a statute written with cool heads in advance promises a better balance between security needs and democratic checks. Finally, such statutes would again be inherently retrospective, aimed at the current threat only after disaster has struck. Relying on group-specific AUMFs would effectively prevent addressing terror threats prospectively and, as such, does not offer a compelling option for combatting future terror threats.

The best proposal for a newly structured AUMF balances the ability to use military force with constraints on executive action by having Congress establish general criteria to define the threshold that, once crossed, would designate a terrorist organization as posing a sufficient threat to U.S. security as to justify the use of military force against that group. Drawing on the 2001 AUMF, this new statute would set out a general description of the targeted enemy, but would not specify particular groups. Instead, this new AUMF would defer the designation of specific qualifying, and thereby permissibly targeted, terrorist groups to the executive branch. Called a listing system,¹²⁰ this basic framework, if properly designed, would enable

¹¹⁹ See CHESNEY ET AL., *supra* note 20, at 10 (“Congress probably cannot or will not, on a continuing basis, authorize force quickly or robustly enough to meet the threat, which is ever-morphing in terms of group identity and in terms of geographic locale.”).

¹²⁰ See *id.* (defining and endorsing a listing system approach for a new AUMF); see also Barnes, *supra* note 114, at 105 (“Congress should adopt a hybrid approach in this

the use of force, constrain unilateral presidential action, legitimize military action, and ensure a considered response to terrorism. First, a proposed statute utilizing a listing system would give Congress the initial role in defining the enemy, allowing it to set the threat threshold as high or low as it deemed appropriate and, by this congressional involvement, granting a greater degree of democratic legitimacy as compared to the unilateral targeting of Article II authority. Second, written before the manifestation of any specific threat, such an AUMF would be a considered appraisal of the danger sufficient to warrant military force, rather than a hasty overreaction to a crisis. Third, this framework enables a prospective approach to counterterrorism, allowing a timely response to any emerging threat by permitting the President to add quickly any qualifying organization to his statutory list, a far more responsive procedure than passing a group-specific AUMF. Lastly, such a counterterrorism AUMF would constrain the President by removing the zone of twilight, thereby restricting any attempt to rely solely on Article II powers and channeling executive action into the statutory framework.

B. A Proposed Framework for a Counterterrorism AUMF

Having illustrated the advantages of a statutory counterterrorism AUMF with a listing system design, this Section will outline the structural elements of a new AUMF, which would ideally balance the military flexibility necessary to effectively combat terrorism with the maintenance of the checks and oversight crucial to a democratic government. By sketching the goal, targeting criteria, review procedures, internal force restrictions, and reporting requirements contained within the proposed law, this Section will lay out a basic framework, if not the precise words, of a proposal for a prospective statutory counterterrorism AUMF to replace the 2001 AUMF. Specifically, this proposed AUMF modifies existing listing system concepts¹²¹ by adapting and incorporating a tested certification procedure and then adds a novel congressional review procedure, tailored restrictions on the level of force permitted, and consequential periodic reporting requirements. In addition to offering a permanent prospective framework, this proposal provides clear advantages to the executive branch as well as Congress as compared to other options, namely increased flexibility and legitimacy for the President in actions against terror

circumstance, establishing a specific list of organizations that would fall under a new AUMF. Subsequently, if the President felt another organization should be added to the list, he could propose this to Congress through an expedited procedure.”).

¹²¹ See CHESNEY ET AL., *supra* note 20, at 10 (laying out existing listing system concepts).

groups and enhanced involvement and oversight for Congress on use of force issues, potentially providing greater incentives to enact this proposed statutory structure.

1. *Goal & Listing Structure*

The simple goal of this proposed AUMF is to improve U.S. national security. Unlike the 2001 AUMF, this proposed AUMF is not aimed specifically at a contemporary clear and present danger. Rather, the proposed statute aims to create a legal structure under which the full range of policy options, including military force, is available to U.S. decisionmakers when confronting threats emanating from new terrorist organizations.¹²² While this proposal intends to enable military options, it also aims to place restraints on force's use in order to strengthen democratic checks and provide a framework distinct from Article II powers. Fundamentally, the goal of this new AUMF is to create a prospective, rather than retrospective, framework that enables the United States to proactively address all new terror threats, not simply past years' most dangerous groups, with its full range of policy options available without becoming a blank check for military adventurism.

The design of the statutory targeting criteria represents the most crucial aspect of realizing the proposed law's aim of creating usable, but constrained, military authority to pursue new terror threats. Like the 2001 AUMF's 9/11 nexus, these criteria function as Congress's statutory definition of the enemy and, under the law's listing system, serve as the basis on which the executive branch evaluates and designates specifically targetable terrorist organizations.¹²³ As such, these parameters must be carefully calibrated so as not to set the threat threshold too high, thereby preventing almost any group from qualifying and making the statute a practical nullity, or too low, thereby turning the law into a congressionally endorsed blank check for the use of force. Specifically, the proposed AUMF would limit

¹²² See Barnes, *supra* note 114, at 112 ("A reauthorized AUMF should not include a specific reference to the September 11 attacks, but rather should be oriented toward preventing future attacks on the United States by all terrorist organizations, especially by those organizations that are likely to attempt attacks on the United States.").

¹²³ Other statutory schemes grant the President near-complete discretion in defining foreign threats. See, e.g., International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1707 (2012). However, including a statutory definition of targetable terror groups serves a similar purpose to the 2001 AUMF's 9/11 nexus, namely narrowing the statutory authorization of force to prevent the statute from becoming a blank check. Moreover, the imposition of a clear framework for the use of executive discretion further reduces any lingering non-delegation doctrine concerns with this structure. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that the inclusion of an intelligible principle will mitigate non-delegation doctrine concerns).

targets to persons, organizations, and their associated forces¹²⁴ that currently or will in the near future pose an imminent terrorist threat to the U.S. homeland or to systemic U.S. interests abroad. For this targeting parameter, the two key limiting factors are the imminence and direction of the threat. First, “imminent” is meant to describe the extent of the threat faced. It does not mean immediate,¹²⁵ a position the United States has consistently asserted,¹²⁶ thus making imminence a flexible concept covering a broad and potentially temporally distant range of threats.¹²⁷ This concept permits this proposed AUMF to achieve an aim by including within its remit groups like al-Qaida in 1997, which are building organizational infrastructure but do not yet pose an immediate threat. Furthermore, while this imminence standard provides some flexibility in application, utilizing a standard with an established interpretation limits the potential for overreach inherent in defining new terms. Second, limiting qualifying threats to only the most dangerous, those against either the U.S. homeland or systemic U.S. interests, narrows the range of permissible targets, excluding most armed groups. Together, these parameters limit the list of permissibly targeted terrorist organizations to those that do or will pose a major threat to the United States, preventing the statute from becoming an authorization to strike every local militiaman with a gun. Finally, explicitly including associated forces within the statute pre-

¹²⁴ This proposed statute explicitly excludes “nations” from its list of eligible entities, even though the 2001 AUMF included them, meaning that military action against nations would require a separate legal foundation. For instance, the invasion of and subsequent conflict in Afghanistan, which was authorized under the 2001 AUMF, would not be supported by the proposed statute.

¹²⁵ See Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and “First Use” in the Jus Ad Bellum*, JUST SECURITY (Apr. 11, 2016), <https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-ad-bellum/> (stating that “in most contexts ‘imminent’ does not necessarily, or even primarily, mean ‘immediate’ . . . Black’s Law Dictionary defined ‘imminent’ as ‘[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous’”).

¹²⁶ See, e.g., Brian Egan, Legal Advisor, U.S. Dep’t of State, International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations, Address to the 110th Annual Meeting of the American Society of International Law (Apr. 1, 2016), in 92 INT’L L. STUD. 235, 239 (2016) (“The absence of specific evidence of . . . the precise nature of an attack does not preclude a conclusion that an armed attack is imminent.”).

¹²⁷ See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws, Remarks at the Program on Law and Security, Harvard Law School (Sept. 16, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (arguing for “a more flexible understanding of imminence”); see also Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. INT’L L. 563, 565 (2013) (arguing that if “a threat is sufficiently probable and severe, the mere fact that it is still temporally remote should provide no independent injunction against action”).

vents the interpretative expansion of the proposed AUMF's scope and forces compliance with public listing requirements for such targeted associated forces as well.

The proposed AUMF would then mandate that the President, relying on the statutorily defined targeting criteria, establish a list of specific terror organizations to be targeted for the use of military force. This list would only be employed for use-of-force authorizations, as cross-designations with existing terror lists would muddy the purpose of this list, encouraging the inclusion of groups for reasons beyond the narrow intended statutory purpose.¹²⁸ Furthermore, this new AUMF would require formal certifications in order to designate a new group, drawing on a procedure used by the Obama Administration for targeted killings.¹²⁹ To add a group to the AUMF list, first the Homeland Security Advisor—who, as the President's chief counterterrorism expert, would be well-positioned to identify newly formed or threatening terror groups—must recommend such an addition. This recommendation would then be reviewed by the Principals Committee of the National Security Council, which would then decide to certify, based on detailed factual findings, to the President that the nominated group posed an imminent threat under the AUMF.¹³⁰ The President would then review the certification and make the final decision on whether to add this specific terrorist organization to the AUMF list. This process not only allows the full airing of views, but imposes enough of a formal procedural burden as to prevent groups from being added to the list lightly.¹³¹ Following the President's designation, the nominated terrorist group would be provisionally included on the AUMF list, and thereby subject to the use of

¹²⁸ See Barnes, *supra* note 114, at 105 (noting problems with using existing terror lists to define an AUMF's coverage).

¹²⁹ See Presidential Policy Guidance, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf> (directing departmental counsel to, with review, determine legality of direct action).

¹³⁰ The Principals Committee is the preferred body for this review as it includes the top-level national security officials as well as structured input from the entirety of the intelligence and security communities.

¹³¹ An example of formal procedure acting to constrain the expansion of use of force occurred when Obama Administration national security lawyers rejected the application of the associated forces label to al-Shabaab. See CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* 274–79 (rev. ed. 2017); see also Jack Goldsmith, *Law Wars: Review of Power Wars: Inside Obama's Post-9/11 Presidency by Charlie Savage*, NEW RAMBLER (Nov. 10, 2015), <http://newramblerreview.com/book-reviews/law/law-wars> (describing how legal process can force policymakers, “when they propose a controversial operation, to justify why they need to use the proposed means, and not some less controversial and more obviously lawful approach”).

statutory force. Only groups explicitly listed would be subject to the use of force, meaning associated forces would have to be designated as well, which would help eliminate worries over the silent expansion of coverage by loose interpretations of this doctrine. Still, due to the comparative speed of the process relative to legislation, this would sacrifice little military utility in the ability to target such groups.

The outlined structure for congressionally established targeting criteria and executive listing of specific groups creates a responsive and prospective process for enabling the use of force against new terrorist organizations. Additionally, this framework, through the targeting criteria and formal designation process, restrains force by narrowing the range of qualifying groups and mandating a formal process for such a momentous decision. However, because this proposed AUMF amounts to a standing congressional authorization to use force against groups subsequently designated by the President,¹³² the conceived statute also includes several checks on executive branch action, which ensure that Congress plays a continuing role in use of force decisions.

2. *Congressional Review*

To check executive branch overreach, the proposed AUMF would retain for Congress the ability to review and reject the inclusion of any group on the statute's list of permissible targets. This designation review is a critical method of both correcting instances of presidential overreach and deterring such abuse in the first place. Though complex, time-consuming, and occasionally relying on aggressive constitutional interpretations, this review procedure would best ensure that the new counterterrorism AUMF's broad powers are used responsibly and legitimately.

First, the new AUMF would impose notification and review requirements. Upon the provisional designation of a new terror group to the AUMF list, the President would be required to notify Congress, and then, within a short period of time, provide the House and Senate Intelligence Committees¹³³ with detailed factual findings justifying the

¹³² Though this delegation of power is functionally large, it is not unprecedented in its delegation of the identification of the enemy, *see* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (granting the President authority to designate enemies), or the threat, *see* International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(C) (2012) (granting the President authority to designate threats), and is on firm constitutional footing, *see* CHESNEY ET AL., *supra* note 20, at 10–11 (dismissing non-delegation doctrine objection to listing system).

¹³³ This Note prefers use of the Intelligence Committees because these bodies can move with speed and relative cohesion, are interested in and knowledgeable on counterterrorism, can receive classified briefings, have the structure for hearings and other

addition.¹³⁴ The committees would subsequently have time to review the submissions, hold hearings, and demand more information from the executive branch.¹³⁵ Upon the review period's expiration, the provisional addition of the group would become official. Notification and review keep Congress informed of the new statute's use and encourage a rigorous executive process to withstand congressional scrutiny.

Second, the new statute would empower the Intelligence Committees to jointly veto the inclusion of a new organization within the new AUMF's remit. Functionally, the committees would be given the opportunity, during the review period, to reject the President's designation of this specific terror group. If the committees veto the designation, the group would be removed from the AUMF list, eliminating the legal authority for any military operations against that organization. Giving Congress a direct veto changes the dynamic from an executive determination of a threat to an ongoing conversation between two equal branches as to the best policy for U.S. security needs. This structure directly addresses a persistent concern with the 2001 AUMF, namely that Congress was nearly powerless to stop the President from stretching the targeting definition to cover more and more groups. Here, Congress can directly intervene to prohibit expanded AUMF coverage from reaching inappropriate or unintended groups,¹³⁶ thereby preventing the statute from evolving into a blank check.¹³⁷ If the President were then to use force against a

public information-gathering, and possess a dedicated staff. However, other congressional committees or bodies could fill this role, including the Armed Services Committees, the Foreign Relations Committees, or new committees purpose-built for this review function. Another option is to create a review body from the chairs and ranking members of each of the aforementioned committees as well as the top members of each party. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, *THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS* 47 (2010) (discussing several potential revisions to AUMF that would create "consultation groups").

¹³⁴ See H.R.J. Res. 84, 114th Cong. § 2(b)(2)(A) (2016) (requiring documentary support for the addition of groups to an AUMF's coverage).

¹³⁵ This structure resembles the Intelligence Committee review procedure in the recent FISA Amendments Reauthorization Act. See FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, § 103(b), 132 Stat. 3, 10 (2018) (requiring notice to Judiciary and Intelligence Committees of new surveillance, establishing a thirty-day review period, authorizing hearings and information acquisition); *id.* § 107(a), 132 Stat. at 14 (requiring submission of annual reports to Congress).

¹³⁶ *Cf.* Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 586 (2015) ("The veto could require the participation of both Houses of Congress The effect would be to allow one branch of government, or even one House of Congress, to repeal authorization for the use of force.").

¹³⁷ An obvious criticism of this structure is that, even with this committee veto provision, Congress will abdicate its role and refuse to act as a counterweight to the President. See generally Fisher, *supra* note 59 (lamenting congressional abdication of

vetoed group, this use of Article II powers would reside in *Youngstown* category three and therefore risk being overturned by the courts.¹³⁸ This powerful form of ex post review checks and deters abusive statutory interpretations.

The main objection to a committee veto provision is that such legislative vetoes are unconstitutional under *INS v. Chadha*.¹³⁹ Though the committee veto provision advanced here is undoubtedly a form of legislative veto, *Chadha* is distinguishable. Specifically, *Chadha* concerned a delegation of *domestic* power to the executive branch as well as a congressional act changing the status quo. First, in contrast, the proposed committee veto provision falls under the rubric of war powers, which the *Chadha* majority did not mention, but which both the concurrence and dissent explicitly noted in criticizing the breadth of the majority's holding.¹⁴⁰ Moreover, the war powers, which

constitutionally granted powers over war and spending). The proposed statutory structure hopes to mitigate any tendency for congressional abdication through the committee veto provision, which works to incentivize engagement with the designation process. First, by placing a veto within the committees, this design aims to increase the payoffs for engagement by taking advantage of committee members' desire for self-advancement through opportunities for ownership of meaningful and attention-grabbing work, such as hearings or significant votes. Second, the greater capacity of individual committee members to directly affect policy, rather than having their vote and voice drowned out in full congressional proceedings, may incentivize greater engagement with the designation review process. Finally, by consistently and directly mandating committee involvement, this structure directly apportions responsibility to a handful of specific members of Congress for the designation process and any subsequent military action. Unable to deflect responsibility for these decisions to a diffuse and amorphous body, Congress, these members are more likely to engage with the designation review process or, alternatively, more easily be held to account by voters in subsequent elections for failing to do so. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2342 (2006) (noting that members of Congress are likely to cede powers to the Executive in part because of the difficulty voters have in "apportioning responsibility for major national decisions among the hundreds of [members of Congress]").

¹³⁸ Though the courts may hesitate to interfere with the presidential exercise of war powers, on at least two occasions, the courts have struck down executive action that exceeded congressionally-authorized limits despite national emergencies. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952) (holding President Truman's seizure of steel mills amid Korean War labor unrest exceeded presidential authority); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 132–42 (1866) (Chase, C.J., concurring) (striking down the use of military tribunals as beyond the President's congressional authorization in this area); Issacharoff & Pildes, *supra* note 42, at 44 ("Where the executive has acted in the face of legislative policies or without legislative approval, the courts have invalidated executive action, even during wartime, or scrutinized it more closely."). As the proposed AUMF would place the designation process before the occurrence of a crisis, the courts may be even more likely to weigh in on such a non-emergency interbranch dispute.

¹³⁹ 462 U.S. 919, 923–28 (1983) (striking down a procedure permitting a resolution from a single house of Congress to override the Attorney General's decision to halt a deportation).

¹⁴⁰ See Charles Tiefer, *Can the President and Congress Establish a Legislative Veto Mechanism for Jointly Drawing Down a Long and Controversial War?*, 6 J. NAT'L

are constitutionally concurrent powers shared between the President and Congress, implicated by the provision are distinct from *Chadha*'s delegation of domestic power, which reapportioned Congress's exclusive legislative powers.¹⁴¹ Therefore, as *Chadha* does not necessarily extend to war powers, and war powers are constitutionally distinct from the legislation considered in that case, *Chadha* does not bar this veto provision. The veto provision, which gives Congress authority over force decisions analogous to its Declare War power, represents interbranch compromise as to the best allotment of their shared powers, agreements which the courts hesitate to upend.¹⁴² Second, *Chadha* stated that Congress cannot alter the legal status quo without complying with the Bicameralism and Presentment Clauses.¹⁴³ A court looking for a technical ground on which to distinguish *Chadha* may note that here, as with the War Powers Resolution, if the congressional action is not a change of the legal status quo—as is the case here since the committees possess only the power to prevent a provisional change to the status quo—*Chadha*'s prohibition is inapplicable.¹⁴⁴

Third, the historical record demonstrates that, regardless of the applicability of *Chadha*'s holding, the provision's legislative veto would be respected. Since *Chadha*, Congress has enacted hundreds of statutes containing legislative vetoes, in a variety of forms, including

SECURITY L. & POL'Y 131, 152–54 (2012) (reviewing *Chadha*); see also *Chadha*, 462 U.S. at 960 n.1 (Powell, J., concurring); *id.* at 967 (White, J., dissenting).

¹⁴¹ See Tiefer, *supra* note 140, at 161 (“*Chadha* dealt with strict domestic delegations of administrative authority and not something as flexible as the concurrent war powers of the Congress and the President.”); see also G. Sidney Buchanan, *In Defense of the War Powers Resolution: Chadha Does Not Apply*, 22 HOUS. L. REV. 1155, 1178 (1985) (“If, however, no authority has been delegated to the Executive, the *Chadha* holding does not apply.”).

¹⁴² See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309–12 (2d Cir. 1973) (dismissing a war powers claim to a compromise between Congress and the President on the bombing of Cambodia on political question grounds), *cert. denied*, 94 S. Ct. 1935 (1974); see also Issacharoff & Pildes, *supra* note 42, at 35 (characterizing the courts’ approach to assertions of power during wartime as one that focuses “on ensuring whether there has been bilateral institutional endorsement for the exercise of such powers”).

¹⁴³ See *Chadha*, 462 U.S. at 952 (rejecting the legislative veto because it “alter[ed] the legal rights, duties, and relations of persons” without complying with the requirements of bicameralism and presentment); see also *id.* at 994 (White, J., dissenting) (“The central concern of the presentment and bicameralism requirements . . . is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress.”).

¹⁴⁴ See, e.g., Buchanan, *supra* note 141, at 1178–79 (“*Chadha*, therefore, is inapposite to the type of congressional statute that does not delegate authority to the Executive but seeks rather to define the division of constitutional power that exists between Congress and the President in a given area of operation.”).

committee vetoes.¹⁴⁵ The political compromise embodied in the statute, in which Congress grants increased military flexibility and legitimacy to presidential action in exchange for a greater say over the targeting of force, and the repeat nature of congressional-executive interaction on use of force issues make a successful challenge to the statutory structure unlikely.¹⁴⁶ Lastly, as a practical matter, any challenge to the committee veto procedure would have to overcome the political question doctrine, which requires courts to respect interbranch compromises on national security.¹⁴⁷

In conclusion, the committee veto provision offers a new approach to ensuring congressional involvement in fights against new terror groups, while simultaneously checking the President's ability to unilaterally deploy force. Though this provision would face some constitutional questions, there is scope within the *Chadha* decision itself to allow for the provision's operation.

Finally, as an added safeguard, the proposed AUMF would include a severability provision, so that if the committee veto provision were struck down, the remainder of the statutory structure could continue functioning. In such an event, the proposed AUMF would also contain an alternative review procedure that involves the full Congress in order to maintain the interbranch review of targeting designation that is crucial to the proposed AUMF's purpose. Rather than directly vetoing a designation, the Intelligence Committees could recommend rejection to the full Congress, which would trigger an expedited procedure by which both houses of Congress could vote on a joint resolution to disapprove of the addition of this new terrorist organization to the AUMF list.¹⁴⁸ As joint resolutions clearly satisfy

¹⁴⁵ See LOUIS FISHER, CONG. RESEARCH SERV., RS22132, LEGISLATIVE VETOES AFTER *CHADHA* 5 (2005) ("From the date of the court's decision in *Chadha* to 2005, Congress has enacted more than 400 of these legislative vetoes, most of them requiring the executive branch to obtain the approval of specified committees.").

¹⁴⁶ See *id.* at 6 ("Executive agencies and congressional committees have developed a variety of voluntary accommodation procedures over the years that result in a standard quid pro quo; Congress agrees to delegate substantial discretion to executive agencies if they accept a system of review and control by the committees of jurisdiction.").

¹⁴⁷ See Fisher, *supra* note 36, at 492 ("Only if the political branches were clearly and resolutely in opposition could the courts take and decide the case."); see, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309–12 (2d Cir. 1973) (dismissing a challenge to U.S. bombing of Cambodia on political question grounds); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44–52 (D.D.C. 2010) (dismissing a challenge to U.S. targeted killing policy on political question doctrine grounds); see also JARED P. COLE, CONG. RESEARCH SERV., R43834, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 9–12, 15–19 (2014) (discussing the application of the political question doctrine to foreign affairs and collecting foreign affairs cases dismissed on political question grounds).

¹⁴⁸ Other proposed AUMFs have included similar joint resolution procedures to give Congress input over the groups covered by the AUMF. See, e.g., H.R.J. Res. 84, 114th

the Bicameralism and Presentment Clauses, there is no *Chadha* issue.¹⁴⁹ This expedited joint resolution procedure, buttressed by prior committee review, would ensure that Congress has a say over each targeted group, deter Executive branch abuse, and allow all members of Congress to participate in the exercise of congressional war powers.

In short, these review procedures aim to involve Congress in all stages of the new AUMF's life, adding ex post checks on executive application to the ex ante restraints of the targeting criteria. With the opportunity to review and reject each presidential addition to the target list, the proposed AUMF would guarantee that Congress has space to exercise its constitutionally-granted concurrent powers over decisions of war and peace.

3. Force Restrictions & Reporting Requirements

The next major feature of the proposed AUMF's design—a restriction on the authorized amount of force—strikes a compromise between military necessity and limits on unilateral presidential adventurism. Though the proposed AUMF declines to limit permissible types of force, allowing both air and ground operations, the statute would explicitly place authorization for enduring offensive U.S. ground operations¹⁵⁰ and military operations likely to result in major U.S. casualties¹⁵¹ beyond the statute's scope. This force limitation empowers the President to conduct military affairs as the situation on the ground requires, providing the flexibility to conduct drone strikes, special operations raids, and even some sustained deployments of U.S. ground troops.¹⁵² Such a grant of discretion offers the ability to use

Cong. § 2(b)(2) (2016) (requiring Congress to approve additions to the AUMF's coverage by joint resolution).

¹⁴⁹ See FISHER, *supra* note 145, at 2.

¹⁵⁰ See Draft AUMF Against ISIL, *supra* note 115, at 2 (declining to authorize “enduring offensive ground combat operations”); see also Message to the Congress on Submitting Proposed Legislation to Authorize the Use of Military Force Against the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization, 2015 DAILY COMP. PRES. DOC. 1 (Feb. 11, 2015) (stating that this draft AUMF “would not authorize long-term, large-scale ground combat operations like those . . . in Iraq and Afghanistan”).

¹⁵¹ See U.S. ACTIVITIES IN LIBYA, *supra* note 51, at 25 (arguing that the Libyan intervention did not constitute “hostilities” because “U.S. operations [did] not involve sustained fighting or . . . U.S. casualties or a serious threat thereof, or any significant chance of escalation”); see also Authority to Use Military Force in Libya, 35 Op. O.L.C. ___, at *6 (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (stating that the operation was permitted as “the risk of substantial casualties for U.S. forces would be low”).

¹⁵² For instance, in addition to drone strikes and special forces raids, the successful U.S. strategy in rolling back ISIS has included the deployment of U.S. soldiers to train, support, and even assist local forces in combat. See John Ismay, *U.S. Says 2,000 Troops Are in Syria, a Fourfold Increase*, N.Y. TIMES (Dec. 6, 2017), <https://nyti.ms/2AXs6B>.

the military tactics that are essential to combating terror networks but withholds the power to unilaterally commit the United States to something far costlier, like a conventional war or messy occupation. Recognizing that military necessity may occasionally call for actions that the proposed AUMF would not authorize, such as the 2001 Afghanistan invasion, the statute would also contain a provision allowing the President to trigger an expedited joint resolution proceeding, in which he could ask Congress for specific authorization to use greater force against a terror organization. Limiting the proposed AUMF's authorization in this way provides sufficient flexibility to handle the vast majority of counterterrorism needs without allowing the President to initiate far costlier engagements without additional congressional affirmation.

Many other replacement AUMFs contain additional internal restrictions, such as geographic limits on the use of force and sunset clauses on the authorization itself.¹⁵³ This proposed AUMF contains neither specific geographic limitations nor a sunset clause because these features fail to advance the statute's goal, namely to balance military flexibility with constraints on unilateral executive action. Explicit geographic limitations, authorizing the use of force only in certain countries or regions, would unnecessarily constrain the President's ability to combat new terrorist groups, creating safe havens beyond the legal reach of the U.S. military without placing a unique restraint on unilateral executive action. Additionally, a list of permissible operational theaters is inherently retrospective, prohibiting prospective responses to new threats. Furthermore, though the proposed AUMF lacks explicit geographic limitations, the designation decision itself functionally acts as an implicit geographic restriction, permitting the use of force only where listed groups' members could be shown to operate. The targeting criteria and designation, containing implicit geographic constraints, provide the same benefit as explicit geographic restraints, limiting the potential for widespread military engagements, without the drawback of placing retrospective limits on the President's ability to meet new threats.

A sunset clause would also arbitrarily restrain the proposed AUMF, which ought to be designed as a permanent resource to address prospective terror threats. While sunsets provide a periodic check on executive action, this effect can be achieved through annual reporting and organizational delisting provisions, which do not also

¹⁵³ See, e.g., S.J. Res. 43, 115th Cong. § 5 (2017) (requiring additional reporting if operations occur beyond specific regions); H.R.J. Res. 100, 115th Cong. § 2(b) (2017) (including a three-year sunset clause).

repeal a carefully crafted statutory framework due to the mere passage of time. Furthermore, Congress always possesses the ability to end this statutory authorization through a simple repeal bill. Congress should not be allowed to dodge its responsibility to affirmatively and publicly restrict conflict by relying on an artificial time limit, which bears no relation to the actual threats faced by the United States.

The final components of this proposed AUMF are two regular reporting requirements along with the opportunity to delist individual groups, intended to keep Congress informed and to enhance public oversight of executive uses of force. The first provision would mandate that the President provide detailed semi-annual reports, describing the uses, locations, and targets of AUMF-authorized military action during the covered period.¹⁵⁴ Specifically, this information would allow Congress to closely monitor compliance with the statute's terms and gauge the overall effectiveness of military force as a counterterrorism tactic. A second reporting provision would require detailed justifications on an annual basis as to why listed terror groups should remain designated. In addition to keeping Congress informed as to the overall threat posed by all relevant organizations, this provision would also mandate a short window during which the Intelligence Committees could trigger another expedited joint resolution process to remove any designated organization that Congress no longer deems to fulfill the targeting criteria. This organizational delisting provision permits Congress to monitor executive branch listing activity continuously and prevents the President from having the sole authority over the length of a conflict.

CONCLUSION

The proposed AUMF in this Note aims to cover emerging terrorist threats by establishing a statutory listing system to authorize the use of force against specific organizations and balance enabling military force with constraining unilateral executive branch action. Using congressionally established criteria and following a rigorous procedure, the executive branch would designate specific terrorist organizations as within the remit of the proposed AUMF. Following a period

¹⁵⁴ This provision would align with existing reporting requirements surrounding the use of force. See War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555, 555-56 (1973) (codified at 50 U.S.C. § 1543 (2012)) (establishing periodic reporting requirements for the use of force); see, e.g., Letter to Congressional Leaders on the Global Deployment of United States Combat-Equipped Armed Forces, 2016 DAILY COMP. PRES. DOC. 1 (June 13, 2016) (reporting to Congress in compliance with the War Powers Resolution on military actions taken under the 2001 AUMF); see also WEED, *supra* note 55, at 2 (surveying presidential reporting that occurred since the 2001 AUMF).

of notification and review by both congressional Intelligence Committees, the committees could jointly opt to reject the designation of the nominated terror group or trigger an expedited joint resolution procedure by which the full Congress could do the same. In addition to these targeting and initial review procedures, the proposal would restrict authorized force to low-risk, low-U.S. casualty operations and require additional congressional approval for riskier operations. This framework further rejects geographic restrictions and sunset clauses, which create overly broad and artificial limitations on counterterrorism operations. Finally, the statute looks to encourage continual congressional engagement with and oversight of authorized military operations through detailed reporting requirements and an organizational delisting provision, by which Congress could remove designated organizations for failing to meet the established targeting criteria.

Thus designed, the proposed AUMF would provide an optimal balance between counterterrorism needs for military options and democratic checks on presidential power. The statute would allow the President to identify and neutralize emerging terror threats quickly and primarily on her own initiative rather than being wedded to the statutory enshrinement of a past threat. Furthermore, this framework would keep such operations within a pre-approved field of policy options, which prohibit the most abusive and dangerous forms of executive branch adventurism. The proposed AUMF would move Congress to the center of the counterterrorism fight, providing clear and easy opportunities to detect and check presidential overreach.

Despite nearly two decades of effort, terrorism will remain a major threat to the United States for years, if not decades, to come. Though the overall danger lingers, the threatening parties will vary. Moreover, the United States cannot continue to rely on its currently available legal foundations, namely the 2001 AUMF, non-military options, and the President's Article II powers, which fail either to enable military options against new terror groups or to provide any meaningful limitation on the President's unilateral ability to pursue such organizations. Therefore, a new statutory AUMF is needed to address the future threat from terrorism before it becomes too great. The proposed AUMF in this Note enhances the primary advantage of relying on a statute—the ability to balance military necessity and democratic checks—through a design that is conscious of the compromises required to make such a framework successful. As the threat of terrorism will not abate soon, the United States should take action now to ensure it has the ability to meet future threats prospectively and not wait until a successful terror attack forces a change in legal strategy.