VOLUME 118 MAY 2005 NUMBER 7

HARVARD LAW REVIEW

ARTICLE

CONGRESSIONAL AUTHORIZATION AND THE WAR ON TERRORISM

Curtis A. Bradley and Jack L. Goldsmith

TABLE OF CONTENTS

CONGRESSIONAL AUTHORIZATION AND THE WAR ON TERRORISM

Curtis A. Bradley[*] *and Jack L. Goldsmith*[**]

This Article presents a framework for interpreting Congress's September 18, 2001 Authorization for Use of Military Force (AUMF), the central statutory enactment related to the war on terrorism. Although both constitutional theory and constitutional practice suggest that the validity of presidential wartime actions depends to a significant degree on their relationship to congressional authorization, the meaning and implications of the AUMF have received little attention in the academic debates over the war on terrorism. The framework presented in this Article builds on the analysis in the Supreme Court's plurality opinion in Hamdi v. Rumsfeld, *which devoted significant attention to the AUMF. Under that framework, the meaning of the AUMF is determined in the first instance by its text, as informed by a comparison with authorizations of force in prior wars, including declared wars. In ascertaining the scope of the "necessary and appropriate force" that Congress authorized in the AUMF, courts should look to two additional interpretive factors: Executive Branch practice during prior wars, and the international laws of war. Although nondelegation concerns should not play a significant role in interpreting the AUMF, a clear statement requirement is appropriate when the President takes actions under the AUMF that restrict the liberty of non-combatants in the United States. The authors apply this framework to three specific issues in the war on terrorism: the identification of the enemy, the detention of persons captured in the United States, and the validity of using military commissions to try alleged terrorists.*

I. INTRODUCTION

The "war on terrorism" following the September 11, 2001, attacks lacks many of the usual features that define, justify, and limit the conduct of war. The enemy intermingles with civilians and attacks ci-

---

* Professor, University of Virginia School of Law.

** Professor, Harvard Law School.

We both recently worked in the Executive Branch. Professor Bradley served as Counselor on International Law in the Legal Adviser's Office of the Department of State from January through December 2004. Professor Goldsmith served as Special Counsel to the General Counsel of the Department of Defense from September 2002 through June 2003, and as Assistant Attorney General, Office of Legal Counsel, from October 2003 through July 2004. Nothing in this Article is intended to reflect the views of these agencies or the U.S. government more generally.

For their helpful comments and suggestions, we thank David Barron, Kathy Bradley, Martin Flaherty, Ryan Goodman, Derek Jinks, Larry Lessig, John Manning, Martha Minow, Caleb Nelson, Patrick Philbin, Jeff Powell, Michael Ramsey, Nick Rosenkranz, George Rutherglen, Peter Spiro, Bill Stuntz, Cass Sunstein, Ed Swaine, Bob Turner, Adrian Vermeule, Andrew Vollmer, Sam Witten, Ben Wittes, participants in faculty workshops at the University of Chicago, Harvard, and University of Virginia law schools, and participants in the Third Annual Workshop of the American Society of International Law's Interest Group on International Law in Domestic Courts. For their excellent research assistance, we thank Bryan Dayton, Brian Fletcher, Bryan Killian, and Daniel Staroselsky. Finally, we would like to thank our wives, Kathy and Leslie, for their extraordinary patience and support during the drafting of this Article.

vilian and military targets alike. The traditional concept of "enemy alien" is inapplicable in this conflict; instead of being affiliated with particular states that are at war with the United States, terrorist enemies are predominantly citizens and residents of friendly states or even the United States. The battlefield lacks a precise geographic location and arguably includes the United States. It is unclear how to conceptualize the defeat of terrorist organizations, and thus unclear how to conceptualize the end of the conflict. Uncertainty about whether and when the conflict will end, in turn, raises questions about the applicability of traditional powers to detain and try the enemy.

These uncertainties are magnified by the Bush Administration's sweeping description of the post–September 11 conflict. President Bush's statement on September 20, 2001, is typical:

> Our enemy is a radical network of terrorists, and every government that supports them.
>
> Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.[1]

This conception of a general and potentially unbounded war against terrorists, combined with the legal novelties implicated by such a war, has led to an outpouring of academic literature raising concerns about Executive Branch unilateralism and, in particular, about the absence of principled limits on Executive power to identify, target, detain, and try terrorists.[2]

In our view, this literature devotes insufficient attention to the *legislative* underpinnings of the post–September 11 war on terrorism.[3]

---

[1] President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html; *see also, e.g.*, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002) ("The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism — premeditated, politically motivated violence perpetrated against innocents."), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[2] *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Laura A. Dickinson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1413–21 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004).

[3] The neglect of Congress's September 18, 2001 Authorization for Use of Military Force (AUMF) is exemplified by a set of articles published last year in the *Yale Law Journal*. Neither Bruce Ackerman's imaginative analysis of the need for an enhanced congressional role in deciding detention and related issues following terrorist attacks, *see* Ackerman, *supra* note 2, nor the two responses to his essay, *see* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004), mention, much less analyze, the AUMF. In

On September 18, 2001, after negotiation with the President and significant discussion, Congress authorized the President to:

> [U]se 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.[4]

There are several reasons why this Authorization for Use of Military Force (AUMF) deserves to be a more central part of the analysis of the war on terrorism.

First, even in more traditional military conflicts, presidential actions have often lacked such a congressional authorization. Indeed, most uses of military force in U.S. history, including significant military engagements such as the Korean War and the Kosovo bombing campaign, have been initiated without express congressional authorization. Here, by contrast, Congress specifically authorized the use of force against the nations, organizations, and individuals responsible for the September 11 attacks. This important exercise of congressional authority warrants close examination because it may provide guidance on the validity of presidential action and, more broadly, help define and limit the war on terrorism.

Second, under Justice Jackson's widely accepted categorization of presidential power,[5] "the strongest of presumptions and the widest latitude of judicial interpretation" attach "[w]hen the President acts pursuant to an express or implied authorization of Congress."[6] This

---

his reply to the responses, Professor Ackerman briefly mentions the AUMF in two footnotes, but he mischaracterizes it as authorizing a "classical war[] against . . . Afghanistan," Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1876 n.17 (2004), and he never analyzes its relevance to the conflict with al Qaeda and related terrorist organizations, the central theme of his essays, *see id.* at 1876 n.17, 1901 n.80.

[4] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF was approved by both houses of Congress on September 14, 2001, and signed by the President on September 18, 2001.

[5] In what he acknowledged to be an oversimplified grouping, Justice Jackson outlined three categories of presidential power in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Presidential actions supported by a congressional grant of authority fall into the highest category of presidential power, where Executive Branch authority "is at its maximum." *Id.* at 635. Presidential actions neither supported by a congressional grant of authority nor contrary to a congressional denial of authority fall into an intermediate category, where "there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. In the third category, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

[6] *Id.* at 635, 637; *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375 (2000) (quoting this language); Dames & Moore v. Regan, 453 U.S. 654, 668, 674 (1981) (same); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 123 (2d ed. 1996)

proposition applies fully to presidential acts in wartime that are authorized by Congress.[7] By contrast, presidential wartime acts not authorized by Congress lack the same presumption of validity, and the Supreme Court has invalidated a number of these acts precisely because they lacked congressional authorization.[8] The constitutional importance of congressional approval is one reason why so many commentators call for increased congressional involvement in filling in the legal details of the war on terrorism. Before assessing what additional actions Congress should take, however, it is important to assess what Congress has already done.

Third, basic principles of constitutional avoidance counsel in favor of focusing on congressional authorization when considering war powers issues.[9] While the President's constitutional authority as Commander-in-Chief is enormously important, determining the scope of that authority beyond what Congress has authorized implicates some of the most difficult, unresolved, and contested issues in constitutional law.[10] Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous.[11] In-

---

("When the President acts by Congressional authority he has the sum of the powers of the two branches, and can be said 'to personify the federal sovereignty,' and in foreign affairs, surely, the President then commands all the political authority of the United States." (footnotes omitted) (quoting *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring))); Katyal & Tribe, *supra* note 2, at 1274 (referring to Justice Jackson's "three now-canonical categories that guide modern analysis of separation of powers").

[7] *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 29 (1942); *see also* 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) (canvassing Supreme Court decisions and concluding that, in the war context, "[w]here both legislature and executive endorse a particular tradeoff between liberty and security, the courts have accepted that judgment").

[8] *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (invalidating military convictions of civilians in Hawaii during World War II); *Ex parte* Endo, 323 U.S. 283, 304 (1944) (invalidating presidential detention of loyal Japanese Americans during World War II); *see also* Issacharoff & Pildes, *supra* note 7, at 44 (noting that, "[where] the executive has acted . . . without legislative approval, the courts have invalidated executive action, even during wartime").

[9] *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). For invocations of this principle in the foreign affairs context, see, for example, *Christopher v. Harbury*, 536 U.S. 403, 417 (2002); and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000).

[10] *See, e.g.*, *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) ("These cryptic words [of the Commander in Chief Clause] have given rise to some of the most persistent controversies in our constitutional history.").

[11] A notable exception is the *Youngstown* decision. The Court in *Youngstown*, however, did not have the opportunity to consider the meaning of a congressional authorization of force because Congress did not expressly authorize or declare war in the Korean War. The absence of an express authorization or declaration of war was relevant to the analysis in both the majority opinion and Justice Jackson's concurrence. *See Youngstown*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.

stead, courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized.[12] This strategy makes particular sense with respect to the novel issues posed by the war on terrorism.

Finally, much of the literature concerning the war on terrorism has been pitched at a high level of generality, speaking in sweeping and often abstract terms about the tension between national security and civil liberties.[13] Focusing on the AUMF, by contrast, grounds the discussion on a terrain where lawyers have particular competence. The resulting discussion, in our view, is more likely to be helpful to courts in deciding concrete cases and to the Executive Branch in ascertaining the sources and limits of its authority to act.

To say that the AUMF should play a central role in an analysis of the war on terrorism is not to say that interpreting its meaning is an easy task. The President's authority is at its highest "[w]hen the President acts pursuant to an express *or implied* authorization of Congress."[14] The difficult issue is determining what Congress has implicitly authorized. The vast literature on constitutional war powers has largely ignored this issue, focusing instead on the antecedent questions of whether and when the President must receive congressional authorization before engaging in armed conflict.[15]

By contrast, interpretation of the AUMF was a central focus of the Supreme Court's decision last Term in *Hamdi v. Rumsfeld*.[16] Five Justices in *Hamdi* (four Justices in a plurality opinion authored by Justice O'Connor and Justice Thomas in his dissent) concluded that the

---

There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied."); *id.* at 642 (Jackson, J., concurring) (criticizing the argument "that the President having, *on his own responsibility*, sent American troops abroad derives from that act 'affirmative power' to seize the means of producing a supply of steel for them" (emphasis added)).

[12] *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion); *Ex parte* Quirin, 317 U.S. 1, 29 (1942); *see also* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 6 (expanded ed. 1976) ("The judges . . . will do everything in their power to avoid considering an unusual action in terms of the President's power alone, and will seize with manifest relief on any evidence of congressional approval.").

[13] *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); David Luban, *The War on Terrorism and the End of Human Rights*, PHIL. & PUB. POL'Y Q., Summer 2002, at 9; Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

[14] *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (emphasis added); *see also supra* note 5.

[15] For surveys of this literature, see Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548–69 (2002); and William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695, 696–98 (1997).

[16] 124 S. Ct. 2633 (2004). The majority opinions in the other two combatant decisions from last Term — *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), and *Rasul v. Bush*, 124 S. Ct. 2686 (2004) — did not purport to interpret the AUMF.

AUMF had implicitly authorized the President to detain "enemy combatants"[17] until the end of hostilities, even if they were U.S. citizens.[18] The plurality reasoned that the AUMF's authorization to the President to use "all necessary and appropriate force" included the power to detain enemy combatants until the end of hostilities.[19] In support of this conclusion, the plurality looked to Executive Branch practice, judicial precedent, the international laws of war, and the functional need of preventing enemy combatants from returning to the field of battle.[20] Based on similar factors, the plurality also concluded that the AUMF authorized the President to detain enemy combatants, like Hamdi, who were U.S. citizens.[21] For purposes of its decision, however, the plurality expressly limited its construction of the AUMF to individuals engaged in armed conflict against the United States in Afghanistan.[22] It thus did not address whether or to what extent the AUMF authorizes detention of terrorist suspects in other settings.[23] Nor did it address issues of presidential power other than detention,

---

[17] The government has used the term "enemy combatant" in the post-September 11 war on terrorism to refer generally to individuals engaged in hostilities against the United States. *See, e.g.*, Brief for the Respondents at 3, *Hamdi* (No. 03-6696) [hereinafter *Hamdi* Respondents Brief] ("When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual 'was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.'" (quoting U.S. DEP'T OF DEF., FACT SHEET: GUANTANAMO DETAINEES 5 (2004), http://www.defenselink.mil/news/Feb2004/d20040220det.pdf)), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/216/Brief_Respondents.pdf. The plurality noted in *Hamdi* that "[t]here is some debate as to the proper scope of [the term 'enemy combatants'], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such." *Hamdi*, 124 S. Ct. at 2639 (plurality opinion). The plurality nevertheless accepted the term as a legal category, while noting that the category "has not been elaborated upon in great detail" and that its bounds "will be defined by the lower courts as subsequent cases are presented to them." *Id.* at 2642 n.1. The Supreme Court had earlier used the term "enemy combatant" in decisions upholding the use of military commissions to try individuals for offenses under the international laws of war during and immediately after World War II. *See In re* Yamashita, 327 U.S. 1, 7 (1946); *Quirin*, 317 U.S. at 31. Then, as now, the term included members of the enemy armed forces who were not viewed as entitled to prisoner-of-war status. *See id.* We consider the meaning of the term "enemy combatant" in relation to the AUMF below in Part V.

[18] *See Hamdi*, 124 S. Ct. at 2640–41 (plurality opinion); *id.* at 2679 (Thomas, J., dissenting).

[19] *See Hamdi*, 124 S. Ct. at 2640–41 (plurality opinion).

[20] *Id.*

[21] *Id.* at 2640. A different majority of the Court (the four-Justice plurality and Justices Souter and Ginsburg) concluded that Hamdi was entitled as a matter of due process to "notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648; *see id.* at 2653 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[22] *Hamdi*, 124 S. Ct. at 2639 (plurality opinion).

[23] The plurality did agree with the petitioner that Congress had not authorized "indefinite detention for the purpose of interrogation," *id.* at 2641, but its statement left open the possibility that Congress had authorized indefinite detention for a reason that the plurality had previously credited, namely, to prevent the detainee from returning to the battlefield, *see id.*

such as the targeted killing of terrorists or trial of terrorists by military commission.[24]

Building on the *Hamdi* plurality's analysis, this Article presents a framework for interpreting the AUMF in the context of the war on terrorism. Part II clears away two misconceptions relevant to interpreting the authority that Congress has granted in the AUMF. First, we show that Congress need not declare war in order to provide its full authorization to the President to prosecute a war. An authorization of military force can be sufficient and, in fact, might even be necessary. Second, we address the claim that the authorization conveyed by the AUMF is somehow limited or truncated because an armed conflict with terrorists is not a "real war." The authority conferred by the AUMF does not depend on whether the conflict meets some metaphysical test for war, but rather on how the political branches view the conflict and how they characterize the belligerents in it. As we show, the political branches have clearly indicated that the conflict with the nations, organizations, and persons responsible for the September 11 attacks is a war requiring a full military response by the President.

Parts III and IV set forth our framework for interpreting the AUMF. Part III examines the text of the AUMF and places it in comparative historical perspective. Based on this examination, we conclude that, notwithstanding the absence of a declaration of war and the AUMF's focus, in part, on non-state actors, the AUMF confers authority comparable to that conferred by congressional authorizations in declared wars.

Part IV discusses interpretive factors relevant to answering detailed questions about the AUMF's meaning. Following the *Hamdi* plurality, we explain why courts should give content to the AUMF by looking to prior Executive Branch wartime practice and the international laws of war. We also explain why the AUMF, like other congressional authori-

---

[24] The plurality offered several hints about how its analysis might apply to the broader war on terrorism. First, in acknowledging that the petitioner's concern about indefinite detention was not "far-fetched," the plurality observed that "the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable," and noted the government's concession that "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." *Id.* (quoting *Hamdi* Respondents Brief, *supra* note 17, at 16). Second, the plurality noted that its understanding that the AUMF authorizes detention until the end of hostilities might "unravel" "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war." *Id.* Third, by finding authorization for the detention of individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there," *id.* at 2639 (quoting *Hamdi* Respondents Brief, *supra* note 17, at 3 (quoting U.S. DEP'T OF DEF., *supra* note 17, at 5)) (internal quotation marks omitted), the plurality suggested that al Qaeda members captured in Afghanistan would be evaluated under the same standards as those applied to the petitioner. Other than these passing hints, however, the *Hamdi* decision provides little guidance about the war on terrorism.

zations that implicate the concurrent constitutional powers of the President, need not specify all approved presidential wartime actions. As an exception to this latter point, we conclude that it is appropriate for courts interpreting the AUMF to apply a clear statement requirement when the President acts pursuant to the AUMF to restrict the liberty of non-combatants in the United States.

Part V applies the interpretive framework from Parts III and IV to three issues in the war on terrorism. Section V.A explains how to conceptualize the enemy against which Congress authorized force. The main challenge here comes from Congress's authorization of force against "organizations" that have a nexus to the September 11 attacks. We argue that, while the nexus requirement is an important limitation on the scope of the AUMF, the AUMF nonetheless encompasses terrorist organizations other than those responsible for the September 11 attacks if they have a sufficiently close connection with the responsible organizations. We also explain the principles that should govern the assessment of whether an individual has a sufficient connection with a terrorist organization covered by the AUMF. Section V.B focuses on the application of the AUMF in the United States. It concludes that Congress authorized the President to use force in the United States against the covered enemies. As we explain, this authorization includes the power to detain persons covered by the AUMF who are found in the United States, but it does not definitively address the institutions or procedures appropriate for determining whether a person captured on U.S. soil is in fact an enemy combatant, and in particular does not affect the traditional availability of habeas corpus review. We also argue that the AUMF's implied authorization to detain enemy combatants, when applied to terrorists outside the conflict in Afghanistan, should be viewed as lasting with respect to each combatant as long as that combatant continues to pose a threat to the United States. Section V.C argues that Congress has authorized the use of military commissions to try individuals covered by the AUMF for violations of the laws of war, but that such commissions cannot be used to try individuals who fall outside the scope of the AUMF unless the President has independent constitutional authority to wage war against such individuals.

Two caveats are appropriate before we proceed: First, we do not attempt here to analyze comprehensively the actions that the President may take in armed conflict with terrorists. Such an analysis would require us to catalog not only the powers granted by Congress in the AUMF, but also the President's independent powers under Article II of

the Constitution.[25] Instead, we will focus on the President's independent constitutional authority only collaterally, when such a focus is necessary to an interpretation of the AUMF. As will become clear from our analysis, however, some presidential actions in the war on terrorism cannot plausibly be justified by reference to the AUMF and thus will depend for their validity on the scope of the President's independent constitutional authority.

Second, our focus on the legal doctrines relevant to interpreting the AUMF is not meant to suggest that those doctrines will always yield determinate answers, or that such doctrines are the only considerations in determining the validity of presidential actions in the war on terrorism. There are inherent uncertainties associated with applying legal rules developed in other contexts to the war on terrorism — uncertainties that we attempt to grapple with throughout this Article. In addition, the decisions of judges and Executive Branch officials in this context will inevitably be influenced by factors other than legal doctrine, including their perceptions about terrorist threat levels and potential risks to civil liberties. To take an obvious example, judicial assessments of the legality of Executive Branch action under the AUMF are likely to be affected by whether, when, and on what scale there are further terrorist attacks inside the United States. Without denying the significance of these factors, we nonetheless believe that the framework established by the AUMF should play a central role in any legal analysis of government action against suspected terrorists and terrorist threats, and that the AUMF warrants more extended analysis than it has received to date.

II. TWO MISCONCEPTIONS ABOUT THE AUMF

In this Part, we attempt to clear away two misconceptions relevant to interpreting the authority that Congress has granted in the AUMF. The first is that the powers being granted to the President are limited or truncated in some fashion because Congress has not declared war.[26]

---

[25] It would also require us to analyze the applicability, content, and scope of other potential legal restrictions on Executive Branch action during war against terrorist organizations, such as the War Crimes Act, 18 U.S.C.A. § 2441 (West Supp. 2004), the federal criminal torture statute, 18 U.S.C.A. §§ 2340–2340A (West 2000 & Supp. 2004), the Uniform Code of Military Justice, 10 U.S.C.A. §§ 801–946 (West 1998 & Supp. 2004), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113, and the Geneva Conventions, *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. We discuss some of these potential restrictions in passing throughout the Article, but in general the effect of these restrictions is beyond the Article's scope.

[26] *See, e.g.*, Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 30–31 (2002).

As we explain, a declaration of war is not required in order for Congress to provide its full authorization for the President to prosecute a war. An authorization of military force can be sufficient and, in fact, may even be necessary.

The second misconception is that the powers granted to the President in the AUMF are limited or truncated in some fashion because an armed conflict with terrorists is not a "real war."[27] Presidents have exercised their full Commander-in-Chief powers in a number of military conflicts throughout U.S. history that involved many of the purportedly non-traditional elements present in the current conflict with terrorists. More importantly, the scope of authority conferred on the President by a congressional authorization of force has never turned on the metaphysical question of whether a particular conflict qualifies as a "war." Rather, it has always turned on how the political branches view the conflict and how they characterize the belligerents in the conflict. The political branches have clearly indicated, in the AUMF and elsewhere, that the conflict with the terrorists responsible for the September 11 attacks is a war requiring a full military response by the President.

A. War Declarations and Force Authorizations

Many war powers scholars argue that the President is constitutionally required to obtain some form of congressional authorization before initiating significant offensive military operations.[28] These scholars frequently tie this requirement to Congress's constitutional power to "declare War."[29] Nevertheless, they do not typically argue that Congress's authorization must take the form of a formal declaration of war. Instead, they accept that an authorization to use force is an adequate mechanism for Congress to "constitutionally manifest its understanding and approval for a presidential determination to make war."[30]

---

[27] *See, e.g.*, Ackerman, *supra* note 2, at 1032–33; Cole, *supra* note 13, at 958. *But see* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 677, 681 (2004) (arguing that the erosion of boundaries between "war" and "non-war" is an "inescapable social fact").

[28] *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–10 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER 1–16 (2d ed. 2004); HENKIN, *supra* note 6, at 76, 97–101. *But see* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 80–96 (1991) (arguing that the President has the authority to initiate armed conflict in the absence of congressional authorization); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972) (similar argument); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 170–75 (1996) (similar argument).

[29] U.S. CONST. art. I, § 8, cl. 11.

[30] Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 126 (1991).

The extent to which this "pro-Congress" understanding of war powers is in accord with the understandings of the constitutional Founders is the subject of significant debate.[31] Several statements by the Founders suggest that they understood that, under the Constitution, the United States would not be able to initiate war without congressional authorization.[32] The first three presidents of the United States expressed similar views.[33] The Declare War Clause, however, is an uncertain textual basis for this proposition. The clause refers to a particular congressional action — declaring war — and does not state that Congress has the more general authority to "authorize" or "initiate" war.[34] Moreover, there were numerous undeclared wars in the years leading up to the Constitution,[35] and the *Federalist Papers* spe-

---

[31] *Compare, e.g.*, John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002), *with* Ramsey, *supra* note 15, *and* Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002).

[32] For example, James Wilson stated in the Pennsylvania ratifying convention that "[i]t will not be in the power of a single man, or a single body of men, to involve us in such distress [of war], for the important power of declaring war is vested in the legislature at large." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 583 (Merrill Jensen ed., 1976); *see also* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) ("We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body . . . .").

[33] President Washington explained his refusal to undertake significant offensive operations against Indian tribes as follows: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure." Letter from George Washington to Governor William Multrie (Aug. 28, 1793), *in* 33 THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940). President Adams evinced a similar attitude about presidential war power in connection with the Quasi-War with France at the end of the 1700s, noting that it was Congress's duty "to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations." 7 ANNALS OF CONG. 57 (1797). President Jefferson expressed a comparable view — at least in public — with respect to responding to attacks by the Barbary Pirates in the early 1800s. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 88 & n.264 (1997). *But cf.* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 127–29 (2001) (describing how Jefferson took more aggressive offensive actions than his prior public pronouncements suggested were appropriate).

[34] *See* Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 25–33 (1970); Yoo, *supra* note 28, at 242–50; Phillip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1375–1400 (1994) (reviewing ELY, *supra* note 28). A draft of the Constitution would have given Congress the power to "make" war. The word "make" was changed during the Federal Convention to "declare." *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS]. For discussion of the significance of this change, compare, for example, Bobbitt, *supra*, at 1376–81, with Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675–78 (1972).

[35] *See* J.F. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR: AN HISTORICAL ABSTRACT OF THE CASES IN WHICH HOSTILITIES HAVE OCCURRED BETWEEN CIVILIZED POWERS PRIOR TO DECLARATION OR WARNING: FROM 1700 TO 1870 (London,

cifically noted that "the ceremony of a formal denunciation of war has of late fallen into disuse."[36] It therefore seems unlikely that the Founders believed that a congressional declaration of war was a constitutional prerequisite for U.S. warmaking.

This conclusion is bolstered by the fact that, at the time the Constitution was drafted and ratified, declarations of war served particular legal functions separate from domestic authorization. In 1789, war was a "fundamental concept in public international law"[37] — sharply distinguishable from "peace" — to which particular legal consequences attached. During war, elaborate rules of belligerency governed relations between warring states, and equally elaborate rules of neutrality governed relations between belligerents and neutral states. "War," so understood, was different from other uses of military force, which did not by themselves necessarily trigger all of the rules of belligerency and neutrality. Sometimes this distinction was framed in terms of the differences between "perfect" and "imperfect" war,[38] or between "general" and "limited" war.[39] A declaration of war was a method by which states could trigger the full array of international law rules governing neutral and belligerent states on issues such as rights to seizure of vessels, shipment of contraband, and institution of blockades, as well as domestic laws related to war and emergency powers.[40]

Whatever the implications of the Founding history for the issue of whether Congress must authorize war, almost no one argues today that Congress's authorization must take the form of a declaration of war.[41] One reason is historical practice. Starting with early conflicts against Indian tribes and the Quasi-War with France at the end of the 1700s, the United States has been involved in hundreds of military conflicts

---

Her Majesty's Stationery Office 1883); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 54–55 (1981); Yoo, *supra* note 28, at 204–17.

36 THE FEDERALIST NO. 25, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37 HENKIN, *supra* note 6, at 98.

38 *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.); Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 19, 21 (1781).

39 *See, e.g.*, *Bas*, 4 U.S. (4 Dall.) at 43 (opinion of Chase, J.); *cf. id.* at 45 (opinion of Paterson, J.) (stating that "[t]he United States and the French republic are in a qualified state of hostility" (emphasis omitted)).

40 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *250; 3 E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 255 (photo. reprint 1995) (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Institute of Washington 1916) (1758); *cf.* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) ("[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.").

41 *But cf.* BRIEN HALLETT, THE LOST ART OF DECLARING WAR 25–26, 145–68 (1998) (advocating the use of war declarations in modern times); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 120–21 (1991) (same).

that have not involved declarations of war.[42] This practice has been especially evident since World War II: the United States has not declared war in *any* of its many post–World War II conflicts, even though some of them have been significant and prolonged. In three of the most significant of these conflicts — Vietnam and the two Iraq Wars — Congress enacted authorizations of military force rather than declarations of war,[43] and both Congress and the President treated those authorizations as fully empowering the President to prosecute the wars.[44] In addition, in 1973, Congress enacted the War Powers Resolution[45] in an effort to regulate congressional-executive relations concerning war, and the Resolution expressly envisions that authorizations to use force can serve as the vehicle for the initiation of war by the United States.[46] Finally, courts — including the plurality in *Hamdi* — have also treated authorizations to use force as fully empowering the President to conduct war within the terms of the authorizations.[47]

---

[42] *See, e.g.*, RICHARD F. GRIMMETT, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2001 (Cong. Research Serv., CRS Report for Congress Order Code RL30172, Feb. 5, 2002), *available at* http://www.fas.org/man/crs/RL30172.pdf; U.S. Dep't of State, Office of the Legal Adviser, The Legality of U.S. Participation in the Defense of Vietnam, 112 CONG. REC. 5504, 5508 (1966), *reprinted in* 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583, 597 (Richard A. Falk ed., 1968).

[43] The Korean War was neither declared nor expressly authorized by Congress. Congress did, however, appropriate funds for the war and also renewed selective service laws to allow for the military draft. *See* HENKIN, *supra* note 6, at 382 n.37. Whether President Truman had the legal authority to involve the United States in the Korean War has been the subject of debate. *Compare, e.g.*, Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 37 (1995) (arguing that he lacked authority), *with* Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J.L. & PUB. POL'Y 533, 583 (1996) (arguing that he had authority). President Truman claimed that he had the authority to commit troops because, among other things, the United Nations Security Council had authorized the use of force. Whether a Security Council authorization can substitute for congressional authorization of the President's use of force has also been the subject of debate. *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1568–69 & n.53 (2003) (describing this debate and citing advocates for both positions).

[44] For a discussion of the controversy surrounding the Gulf of Tonkin Resolution, which the Johnson Administration relied upon as authorization for the Vietnam War, see *infra* notes 119, 128.

[45] Pub. L. No. 93-148, 87 Stat. 555 (1973).

[46] *See id.* § 2(c), 87 Stat. at 555 (codified at 50 U.S.C. § 1541 (2000)) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."). Although the Resolution was enacted over President Nixon's veto, and has been objected to on constitutional grounds by presidents ever since, neither President Nixon nor subsequent presidents have taken issue with the proposition that Congress's authorization of war need not take the form of a declaration of war.

[47] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion). In the Quasi-War with France in the late 1700s, the Supreme Court recognized that the United States could be at

Another reason why almost no one argues that Congress's authorization of war must take the form of a declaration of war is that the international law role for declarations of war has largely disappeared. The United Nations Charter, which now regulates the portion of the international laws of war known as *jus ad bellum*,[48] refers not to "war," but rather to "armed attack," "use of force," and "threat[s] to the peace."[49] A similar shift away from "war" as the determinative concept has taken place in the law of armed conflict (*jus in bello*).[50] The applicability of the law of armed conflict was once triggered by the existence of a state of "war," which in turn could be triggered by, among other things, a declaration of war.[51] The Geneva Conventions of 1949 changed this regime by making clear that their *jus in bello* rules applied not only to "cases of declared war" but also more broadly to "any other armed conflict" between states, regardless of whether a "state of war" was recognized by one of the parties.[52] Today, "armed conflict" — not "war" — is the relevant jurisdictional concept for *jus in bello*.[53] As a result, it now appears that declarations of war serve little purpose under international law.[54] This is a principal reason why, despite hun-

---

war despite the absence of a declaration of war. *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43–46 (1800) (opinions of Chase and Paterson, JJ.). In the Vietnam War, several courts held that a declaration of war was not constitutionally required in order for Congress to authorize war. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971).

[48] *Jus ad bellum* translates as "law to war" and refers to the body of international law governing the circumstances under which states may resort to the use of force.

[49] *See* U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); *id.* art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . . ."); *id.* art. 42 (authorizing the U.N. Security Council to take military action "as may be necessary to maintain or restore international peace and security"); *id.* art. 51 (stating that nothing in the U.N. Charter "shall impair the inherent right of individual or collective self-defence" in response to an "armed attack").

[50] *Jus in bello* is the body of international law that governs the conduct of warfare, including the use of particular weapons, targeting, and treatment of combatants and civilians.

[51] *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19–20 (Jean S. Pictet ed., 1960); *see also, e.g.*, Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 2, 32 Stat. 1803, 1808–09, 1 Bevans 247, 251 (stating that the annexed regulations concerning the laws and customs of war on land were applicable only "in case of war").

[52] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 42, 6 U.S.T. 3517, 3544, 75 U.N.T.S. 287, 314 [hereinafter Fourth Geneva Convention].

[53] *See, e.g.*, HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 24 (1990); Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 304 (1987).

[54] *See, e.g.*, Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 16–17 (2000). There continue to be reasons unrelated to international law for issuing a declaration of war. A declaration might serve a political signaling function: it could, for example, be a "solemn

dreds of armed conflicts around the world during this period, some of them quite intense and prolonged, it appears that no nation has declared war since the late 1940s.[55]

In sum, in light of the longstanding political branch practice of initiating war without a formal declaration of war, consistent judicial approval of this practice, changes in international law that render war declarations less relevant, and general scholarly consensus, it seems clear that Congress need not issue a formal declaration of war in order to provide its full authorization for the President to prosecute a war.

Not only is a force authorization *sufficient* to provide full congressional authorization to the President to prosecute a war, one could argue, based on political branch practice since the Founding, that a force authorization is *necessary* to so authorize the President. Examination of declared wars throughout U.S. history reveals that Congress's war declarations have never by themselves constituted Congress's authorization for the President's use of military force. Rather, even when Congress has declared war, it has always taken the additional step of authorizing the President to use force to prosecute the war.

The World War II joint resolution concerning war with Germany illustrates this point. The title of the joint resolution made clear that the resolution did two things: it both "[d]eclar[ed] that a state of war exists between the Government of Germany and the Government and the people of the United States" *and* "ma[de] provision to prosecute the same."[56] The body of the resolution did precisely these two things:

> Therefore, be it
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That *the state of war between*

---

act of state which serves as a means of arousing popular support at home and abroad and which is usually reserved for extreme cases." Note, *Congress, the President, and the Power To Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1772 (1968); *see also* Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 34 (1938) (describing a variety of possible functions for declarations of war); Ramsey, *supra* note 15, at 1586 (arguing that, at the time of the Founding, declarations of war were primarily a communicative and rhetorical device). In addition, the operation of some domestic statutes turns on whether there is a declaration of war. *See, e.g.*, 2 U.S.C. § 198(b) (2000) (concerning adjournment by Congress); 50 U.S.C. § 21 (2000) (concerning removal of enemy aliens).

[55] *See, e.g.*, ELY, *supra* note 28, at 140 n.5; *cf.* Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's* War and Responsibility, 34 VA. J. INT'L L. 903, 915 n.54 (1994) ("There is some debate over whether statements made by Egyptian officials during the 1956 Suez Crisis and a Panamanian legislative act in December 1990 constituted such a declaration [of war]. Neither is likely such a declaration. However, even if a few exceptions could be found, the basic state practice has been to avoid such instruments."). *But see* HALLETT, *supra* note 41, at 35 (noting a possible exception in 1967, when "Algeria, Iraq, Kuwait, Sudan, and Syria appear to have made formal declarations of war against Israel"). As noted below, al Qaeda (which is not a nation) declared war on the United States in the 1990s. *See infra* p. 2068.

[56] Joint Resolution of Dec. 11, 1941, ch. 564, 55 Stat. 796.

> *the United States and the Government of Germany* which has thus been thrust upon the United States *is hereby formally declared*; *and the President is hereby authorized and directed* to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.[57]

The identical pattern of expressly distinguishing between Congress's war declaration and its authorization for the President to use force is evident in every other statute declaring war in U.S. history — the other World War II joint resolutions,[58] the World War I joint resolutions,[59] and the statutes declaring war in the Spanish-American War,[60] the Mexican-American War,[61] and the War of 1812.[62]

To the best of our knowledge, no one has ever analyzed the significance of this consistent historical practice of Congress providing express authorizations for the President to use force in declared wars separate from its actual declarations of war.[63] This congressional prac-

---

[57] *Id.* (some emphasis omitted, other emphasis added).

[58] Joint Resolution of June 5, 1942, ch. 325, 56 Stat. 307 (World War II: Rumania); Joint Resolution of June 5, 1942, ch. 324, 56 Stat. 307 (World War II: Hungary); Joint Resolution of June 5, 1942, ch. 323, 56 Stat. 307 (World War II: Bulgaria); Joint Resolution of Dec. 11, 1941, ch. 565, 55 Stat. 797 (World War II: Italy); Joint Resolution of Dec. 8, 1941, ch. 561, 55 Stat. 795 (World War II: Japan). Except for differences in the identity of the enemy, these resolutions are all worded identically to the German resolution.

[59] Joint Resolution of Dec. 7, 1917, ch. 1, 40 Stat. 429 (World War I: Austro-Hungary); Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1 (World War I: Germany).

[60] Act of Apr. 25, 1898, ch. 189, 30 Stat. 364. In contrast to the World War I and World War II resolutions, the title of this statute did not separate the war-declaring and force-authorizing functions, but the body of the statute clearly did so:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *First.* That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, [1898], including said day, between the United States of America and the Kingdom of Spain.
>
> *Second.* That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this Act into effect.

Id. (some emphasis omitted, other emphasis added).

[61] Act of May 13, 1846, ch. 16, 9 Stat. 9. The Mexican-American War is typically included among the United States's five "declared" wars, even though Congress did not state that it was declaring war, but rather recognized that "a state of war exists" between the United States and Mexico. *Id.* In any event, the Act, like the above-discussed declarations of war, proceeded specifically to authorize the President to use military force. *See id.*

[62] Act of June 18, 1812, ch. 102, 2 Stat. 755. Like the title of the Act authorizing the Spanish-American War, the title of the Act authorizing the War of 1812 did not distinguish between the war-declaring and force-authorizing functions, but the body of the statute did so.

[63] *But cf.* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 55 (2d ed. 1989) (noting that every resolution declaring war "authorized the President to use the army, the navy, and the militia for the prosecution of war"); Patrick O. Gudridge, *Ely, Black, Grotius & Vattel*, 50 U. MIAMI L. REV.

tice suggests that while declarations of war may have served the international law functions alluded to above, they have not by themselves served the function of providing congressional authorization for the President to use military force.[64]

This practice might further support the view that if Congress has the power to control the initiation of war, that power comes not (as is typically thought) from the Declare War Clause alone, but more broadly from all of Congress's Article I war-related powers and from the assumptions of the Founders about how these powers would operate in practice.[65] The Declare War Clause is one of six clauses in Article I, Section 8 related to war. The clause itself includes not only the power to declare war, but also the power to grant letters of marque and reprisal and the power to make rules concerning land and sea captures — all powers related to international law issues implicated by war. The Declare War Clause is followed by clauses empowering Congress to provide for, maintain, and regulate the army and navy, and to organize, arm, discipline, and call forth the militia. Congress's power to appropriate money for the military, which, in the case of the

---

81, 85–89 (1995) (discussing separately the declaration of war and authorization of force in the War of 1812).

[64] For judicial reliance on consistent historical practice as informing constitutional meaning, especially in the foreign affairs context, see, for example, *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386–87 (2003); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936). *See generally* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 147 (1984) (proposing "a method of inquiry for determining when the inaction of one branch, in the face of an established practice of another branch, may properly be deemed to authorize the actions of the latter"); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001) (proposing a theory of "constitutional increments," in which the constant historical interplay among the branches informs constitutional interpretation).

[65] *Cf.* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 75 (1990) (noting that the Framers granted "*Congress*, not the president, . . . the dominant role" in foreign affairs, including "all manner of powers regarding raising, supporting, maintaining, and regulating the army, navy, and militia, which could be exercised both domestically and abroad"); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-6, at 662–67 (3d ed. 2000) (arguing that "the Constitution mandates a major role for Congress in supervising executive military operations" on the grounds that the Framers "tied the military power to Congress' control of the public purse" and that the Constitution "gives Congress a host of other military-related powers"). Some commentators have argued that by virtue of the Vesting Clause in Article II (which states that "[t]he executive Power shall be vested in a President of the United States of America," U.S. CONST. art. II, § 1, cl. 1), the President has been granted all foreign affairs powers not expressly granted to Congress. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–54 (2001). Under that theory, one might argue that if the Declare War Clause is not a war initiation power, then such a power has not been expressly assigned to Congress and thus must rest with the President. *See, e.g.*, Yoo, *supra* note 31, at 1677–78. For a critique of the Vesting Clause theory of presidential power, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

army, the Constitution limits to two years,[66] would have been particularly crucial at the Founding, when there was essentially no standing army and no navy.[67] That appropriations authority, along with Congress's authority to regulate the use of the militia, would have required early presidents to seek and secure statutory authority to use military force for any extended period, regardless of whether war had been declared.[68]

We do not want to overstate the significance of this pattern.[69] A full analysis of its implications for the President's power to initiate armed conflict in the absence of congressional authorization would need to consider not only the War Powers Resolution, in which, as noted above, Congress appears to have viewed war authorizations and war declarations as substitutes,[70] but also the judicial decisions that have referred to declarations of war as authorizing military action by the President.[71] Such an analysis would also need to answer the questions of whether Congress could declare war and not authorize force and, if so, what the consequences of such a declaration would be. Our interest is in the different issue of whether authorizations, as opposed to declarations, are capable of conferring full congressional authorization on the Commander-in-Chief. With respect to this issue, we believe that the pattern of congressional action in declared wars provides additional support for the modern consensus that force authorizations

---

66 *See* U.S. CONST. art. I, § 8, cl. 12.

67 *See* Bobbitt, *supra* note 34, at 1385.

68 *See id.* at 1385, 1392, 1396.

69 The pattern does, however, complicate many scholarly war powers theories. For example, it is in tension with the common assumption in the literature that war declarations *themselves* amount to an authorization to use force. *See, e.g.*, ELY, *supra* note 28, at 25 (stating that a declaration of war is a "paradigmatic combat authorization"). If that were so, it is not clear why Congress has always separately authorized the President to use force when declaring war. The pattern also suggests that, contrary to the standard pro-Congress view of war powers, Congress has not viewed war declarations and authorizations to use force to be pure substitutes. Congress appears to have believed that a declaration served a different function than an authorization *and* that it did not serve the function of providing Congress's authorization for the President to use military force; otherwise, Congress would not have added a separate authorization to use military force to every declaration. The pattern also raises questions concerning Professor Yoo's view that the President has plenary legal authority to initiate war even in the absence of authorization from Congress. *See* Yoo, *supra* note 28, at 304. As suggested above, the pattern might support his claim that Congress's power to declare war is not the constitutional basis (or at least the sole constitutional basis) for *authorizing* the use of force. But it also can be understood to suggest that Congress's authority is not limited to a declaratory act with international law consequences, since Congress has always taken the additional step in declared wars of authorizing the President's use of military force. The pattern is also a problem for Greg Sidak's view that the Constitution requires (or should require) Congress to use declarations rather than authorizations to approve of presidential use of force, *see generally* Sidak, *supra* note 41, since it suggests that Congress believes that declarations themselves cannot, or do not, constitute approval of the use of force.

70 *See supra* p. 2060.

71 *See, e.g.*, Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

can confer full congressional authorization for the President to prosecute a war. This pattern shows that it is misleading, and probably wrong, to compare the authority conferred by war declarations in declared wars with the authority conferred by authorizations to use force in authorized but undeclared wars, much less to view a war declaration as a more extensive form of congressional approval than a force authorization. Instead, to determine the extent to which Congress has authorized the use of force, one must compare force authorizations in all armed conflicts, declared or not.[72]

B. Is This a "Real" War?

Without specifically considering the AUMF, some commentators have suggested that the conflict with al Qaeda does not qualify as a "real" war, but rather is war in a metaphorical sense, akin to the war on drugs, war on poverty, or war on crime.[73] A conflict with a terrorist organization is not a genuine war, they argue, because it is not between states, making it difficult to identify the enemy and unclear when, if ever, the conflict will end. Some commentators also contend that non-state actors, like terrorist organizations or their members, cannot be viewed as "combatants" or "belligerents" under the laws of war.[74] Because of the novel features of the current conflict, these commentators suggest, the President does not possess the same array of wartime powers that he possesses in traditional wars between states.

As we noted in the Introduction, there are indeed differences between this conflict and more traditional interstate conflicts. Although these differences may have implications for how the powers conferred by the AUMF can be applied in practice — an issue explored below in Part V — we do not believe that they affect the conclusion that Congress has authorized the President to fully prosecute a war against the entities covered by the AUMF.

To begin with, Congress was aware that it was authorizing the President to use military force against non-traditional actors. Indeed, the AUMF specifically refers to those actors even while mirroring in other respects authorizations to use force in more traditional conflicts. Furthermore, a number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes.[75] In addition, during the Mexican-American War, the Civil

---

[72] We make such a comparison below in Part III.

[73] *See* sources cited *supra* note 27.

[74] *See, e.g.*, Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 348 (2002); Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 513 n.30 (2003).

[75] *See infra* pp. 2073–74. Although U.S. law recognized Indian tribes as sovereign for some purposes, the federal government treated Indian tribes as essentially non-state actors in interac-

War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy.[76] Presidents also have used force against non-state actors outside of authorized conflicts. President McKinley's use of military force to put down the Chinese Boxer Rebellion was primarily directed at non-state actors.[77] President Wilson sent more than seven thousand U.S. troops into Mexico to pursue Pancho Villa, the leader of a band of rebels opposed to the recognized Mexican government.[78] And President Clinton authorized cruise missile strikes against al Qaeda targets in Sudan and Afghanistan.[79] In all of these instances, presidents as commanders-in-chief exercised full military powers against non-state actors — sometimes with congressional authorization, and sometimes without.[80]

---

tions with them. They were "subject to the legislative power of the United States" and lacked "the external powers of sovereignty." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1988). As the Supreme Court explained, Indian tribes were understood as "domestic dependent nations" rather than foreign states. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* Montoya v. United States, 180 U.S. 261, 265 (1901) ("The North American Indians do not and never have constituted 'nations' as that word is used by writers upon international law . . . ."). In addition, the United States used military force against less-organized "bands" of Indians that were undoubtedly non-state actors. *See* Conners v. United States, 180 U.S. 271, 275 (1901).

[76] *See* WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 123–24, 354–55 (rev. 3d ed. 1914); 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 783–84 (Boston, Little, Brown & Co. rev. 2d ed. 1896); 2 *id.* at 832–34.

[77] The Boxer Rebellion was an uprising by a Chinese anti-foreign, anti-Christian secret society. *See generally* DIANA PRESTON, BESIEGED IN PEKING: THE STORY OF THE 1900 BOXER RISING 25–30 (1999); CHESTER C. TAN, THE BOXER CATASTROPHE 35–36 (1955). In 1900, President McKinley sent five thousand U.S. troops to participate in an international relief force that rescued U.S. and European citizens who were besieged by the Boxers in Peking's legation district. *See* FISHER, *supra* note 28, at 58. Although the Rebellion was initially targeted at both foreigners and the ruling Manchu dynasty, by the time the relief force arrived, the Chinese Empress had endorsed the Boxer movement and some government forces had joined in the attack on the foreign legations. *See* RICHARD O'CONNOR, THE BOXER REBELLION 115 (1973); TAN, *supra*, at 93. The Chinese government even declared war on the United States. *See* ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 13 (1982). However, most of the forces that the relief force encountered on its way to Peking were operating beyond the control of the government, which was itself divided and weak. *See* TAN, *supra*, at 94.

[78] *See* JOHN S.D. EISENHOWER, INTERVENTION! THE UNITED STATES AND THE MEXICAN REVOLUTION 1913–1917, at 231–60 (1993).

[79] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 117 (2004) [hereinafter 9/11 COMMISSION REPORT], *available at* http://www.9-11commission.gov/report/911Report.pdf. Similarly, Vice President Cheney authorized the shooting down of the fourth hijacked airplane on September 11. *See id.* at 41.

[80] The post-September 11 war on terrorism has sometimes been compared to the Barbary Wars of the early nineteenth century. *See, e.g.*, Richard Leiby, *Terrorists by Another Name: The Barbary Pirates*, WASH. POST, Oct. 15, 2001, at C1; *see also* Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L L. 121 (2003). Although these wars were in response to acts of piracy against U.S. ships, the Barbary pirates were under the control of North African monarchs and thus were arguably state actors. Moreover, the United States attacked not only pirate ships, but also the cities of

Furthermore, despite its novel features, the post–September 11 war on terrorism possesses more characteristics of a traditional war than some commentators have acknowledged.[81] Al Qaeda declared war against the United States and attacked U.S. military and diplomatic facilities numerous times prior to September 11.[82] On the basis of these attacks and related threats, the Clinton Administration concluded in the 1990s — as a prerequisite to participation in efforts to kill Osama bin Laden — that the United States was in an armed conflict with al Qaeda.[83] The scale and organized nature of the September 11 attacks and the scope of their destruction in terms of lives, economic loss, and psychological trauma also transcend what is typical of mere criminal action. So too does the ongoing nature of the al Qaeda threat; the al Qaeda network has long sought weapons of mass destruction, and has long stated its intention to use them against the United States.[84] Its goals, moreover, are political in nature, unlike typical criminal enterprises.[85] The United States's continuing combat operations and related use of significant military resources against al Qaeda in Afghanistan and other countries also make a war characterization at least plausible.

In addition, the AUMF was enacted against an international law backdrop that focuses not on "war," but rather on "armed attacks" and "armed conflicts" — concepts that are not limited to state actors. The United Nations Charter recognizes the right of states to use force in self-defense in response to an "armed attack."[86] The Charter does not specify that the attack must come from another state, and the Security Council appears to have recognized that the September 11 attacks were armed attacks triggering the right of self-defense under the Charter.[87] Similarly, both the North Atlantic Treaty Organization and the

---

Tripoli and Derna. And, during the Barbary War of 1801 to 1805, both Tripoli and Morocco formally declared war on the United States. *See generally* MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER 3–29 (2002); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 208–24 (1976); JOSEPH WHEELAN, JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR 1801–1805 (2003).

[81] We are addressing here only the legal plausibility of using a war framework, not the policy wisdom of doing so. For an argument that it is undesirable as a matter of policy to treat the conflict with international terrorism as a war (because of, among other things, its effect on resource commitments), see PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 19–33 (2003).

[82] *See* 9/11 COMMISSION REPORT, *supra* note 79, at 47, 59–70, 190–97.

[83] *See id.* at 132, 485 n.123.

[84] *See id.* at 60–61, 380–81.

[85] *See id.* at 361–63.

[86] *See supra* note 49 and accompanying text.

[87] *See* S.C. Res. 1373, U.N. SCOR, Jan. 2001–July 2002, at 291, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1368, U.N. SCOR, Jan. 2001–July 2002, at 290, U.N. Doc. S/RES/1368 (2001).

Organization of American States treated the attacks as "armed attacks" for purposes of their collective self-defense provisions.[88]

Modern *jus in bello* rules, which, as discussed above, are triggered by "armed conflicts" rather than "war,"[89] also extend to conflicts with non-state actors. Common Article 3 of the Geneva Conventions, for example, expressly applies to armed conflicts "not of an international character."[90] While this provision was designed to address internal conflicts between a state and insurgents,[91] it demonstrates that as early as 1949, the law of armed conflict recognized conflicts between states and non-state actors. Since that time, the law of armed conflict has been preoccupied with regulating conflicts with non-state actors. The two 1977 Protocols to the Geneva Conventions, for example, seek to extend international humanitarian protections to a variety of such conflicts.[92] The International Criminal Tribunal for the Former Yugoslavia has also recognized that the concept of "armed conflict" under international law extends beyond the categories of traditional interstate and internal conflicts, and has concluded, without reference to these

---

[88] *See* Press Release, North Atlantic Council, Statement by the North Atlantic Council (Sept. 12, 2001), http://www.nato.int/docu/pr/2001/p01-124e.htm; Lord Robertson, Statement by NATO Secretary General, Lord Robertson (Oct. 2, 2001), http://www.nato.int/docu/speech/2001/s011002a.htm; Organization of American States, Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas (Sept. 21, 2001), http://www.oas.org/OASpage/crisis/RC.24e.htm.

[89] *See supra* p. 2061.

[90] Third Geneva Convention, *supra* note 25, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38. Common Article 3 requires that persons who are not taking an active part in hostilities be treated "humanely," and it prohibits certain actions, such as torture and murder, directed at such persons. *See id.*

[91] *See* INT'L COMM. OF THE RED CROSS, *supra* note 51, at 28–34; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 39–40 (2003). *But cf.* INT'L COMM. OF THE RED CROSS, *supra* note 51, at 36 ("We think . . . that the scope of application of the Article must be as wide as possible.").

[92] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, art. 1(4), 1125 U.N.T.S. 3, 7 [hereinafter Additional Protocol I] (covering "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, art. 1(1), 1125 U.N.T.S. 609, 611 (covering all armed conflicts not covered by the First Protocol "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"); *see also* Jinks, *supra* note 91, at 27 ("As a result of the two Protocols, the Geneva Conventions now recognize and regulate four distinct categories of armed conflict: inter-state armed conflict under Common Article 2; internal 'wars of national liberation' as defined in Protocol I; 'civil wars' proper as defined in Protocol II; and 'armed conflicts not of an international character' under Common Article 3."). The United States has not ratified these Protocols and thus is not bound as a matter of treaty law by their terms. Nevertheless, these Protocols show that the AUMF was enacted against a backdrop of international law that has increasingly moved in the direction of regulating conflicts between states and non-state actors.

distinctions, that "an armed conflict exists whenever there is . . . protracted armed violence *between governmental authorities and organized armed groups*."[93] As other commentators have noted, an extended conflict between a state and a terrorist organization appears to satisfy this standard.[94]

Finally, and most importantly, both Congress and the President have treated this conflict as a war, and have treated the entities identified in the AUMF as enemy combatants under the laws of war. The President characterized the conflict as a war on September 11, and has continued to do so ever since.[95] Congress in the AUMF authorized the President to use "all necessary and appropriate force" against those responsible for the September 11 attacks. The AUMF states, moreover, that it is "intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[96] The President has since filed a number of reports with Congress — described as "consistent with" the War Powers Resolution — that relate to the war on terrorism.[97] Congress has also appropriated billions of dollars for military activities relating to the war on terrorism (including the conflict in Afghanistan), the detention of terrorist enemy combatants, and the use of military commissions.

When, as here, both political branches have treated a conflict as a "war," and that characterization is plausible, there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war. Determinations of what consti-

---

[93] Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995) (emphasis added), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

[94] *See, e.g.*, Jinks, *supra* note 91, at 27–28, 38; Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 4–5 (2002).

[95] On the night of September 11, President Bush addressed the nation and referred to a "war against terrorism." *See* President George W. Bush, Statement by the President in His Address to the Nation (Sept. 11, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html. The next day, after meeting with his National Security Team, he stated, "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war." President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html. In subsequently authorizing the detention and military trial of terrorist enemy combatants, President Bush observed that the September 11 attacks were "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(a), 3 C.F.R. 918, 918 (2001), *reprinted in* 10 U.S.C.A. § 801 (West Supp. 2004) [hereinafter Military Order].

[96] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (2001).

[97] *See* RICHARD F. GRIMMETT, THE WAR POWERS RESOLUTION: AFTER THIRTY YEARS (Cong. Research Serv., CRS Report for Congress Order Code RL 32267, Mar. 11, 2004), *available at* http://www.fas.org/man/crs/RL32267.html.

tutes a war for purposes of the President's Commander-in-Chief authority have always been contextual and have always depended on political branch determinations about how the United States should respond to particular threats, not on whether the conflict satisfied certain definitional criteria.

The *Prize Cases* provide an instructive analogy.[98] In 1861, after Southern forces had attacked Fort Sumter and while Congress was in recess, President Lincoln proclaimed a blockade of Southern ports. The *Prize Cases* involved the capture of four neutral vessels that had allegedly violated the blockade.[99] The owners of the vessels argued that the President did not have the authority to institute the blockade because the Civil War was a mere "insurrection," rather than a "war."[100] Anticipating modern critics of the war on terrorism, they argued that the conflict did not satisfy the traditional criteria for war — it was not between nations, Southern forces were mere "insurgents" or "traitors" rather than "belligerents" or "enemies," and the usual consequences of war did not apply to this form of conflict.[101] In rejecting this argument, the Supreme Court deferred to the President's characterization of the conflict as a civil war, noting that whether the threat by the insurrectionists warranted their characterization as "belligerents" was a "question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."[102] The Court added: "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."[103]

In the *Prize Cases*, deference to the political branch determination of belligerency was relatively easy because the President had used force in response to an attack and because Congress had ratified the President's actions after the fact.[104] The issue is more complex when the President takes action beyond repelling attacks without the authorization of Congress. This complication is not implicated in the conflict covered by the AUMF, however, since Congress has in fact au-

---

98 67 U.S. (2 Black) 635 (1863).

99 *Id.* at 636–38 (reporter's summary).

100 *Id.* at 642 (argument of ship owners' counsel).

101 *See id.* at 644; *id.* at 657 (argument of United States counsel); *Prize Cases*, 67 U.S. (2 Black) at 669–70, 672; *id.* at 687 (Nelson, J., dissenting).

102 *Prize Cases*, 67 U.S. (2 Black) at 670.

103 *Id.*

104 *See id.* at 668 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."); *id.* at 670 (noting that Congress had ratified the President's action).

thorized the President to use all necessary and appropriate force in that conflict.

III. THE AUMF IN HISTORICAL PERSPECTIVE

In this Part, we compare the AUMF with other authorizations of force throughout U.S. history. Section III.A introduces an analytical framework for comparing force authorizations. This framework distinguishes between *limited* authorizations to use force, which restrict the resources and methods of force that the President can employ, often restrict the targets of the authorization, tend to have narrowly defined purposes, and often have procedural or timing restrictions; and *broad* authorizations to use force, which do not restrict resources or methods, do not restrict targets other than to identify an enemy, invoke relatively broad purposes, and impose few if any timing or procedural restrictions. Employing these criteria, section III.B shows that the AUMF confers authority that is comparable in scope to that conferred by congressional authorizations in declared wars.

A. Historical Comparison of Authorizations To Use Force

Congress has expressly authorized the President to use military force dozens of times in U.S. history.[105] As a prelude to analyzing the September 18, 2001 AUMF, we compare, contrast, and categorize these authorizations and consider their potential implications. We limit our analysis of authorizations to use force to those that empower *the President* to use force.[106] For purposes of comparison, these authorizations can be broken down into five analytical components:

(1) the authorized military resources;
(2) the authorized methods of force;
(3) the authorized targets;
(4) the purpose of the use of force; and
(5) the timing and procedural restrictions on the use of force.

We begin with the authorizations to use force against French naval vessels in the Quasi-War of the late 1790s. This war grew out of

---

[105] *See, e.g.*, WORMUTH & FIRMAGE, *supra* note 63, at 309–15; David M. Ackerman & Richard F. Grimmett, *Declarations of War and Authorizations for the Use of Military Force: Background and Legal Implications*, *in* DECLARATIONS OF WAR 1, 8–22 (Ernest V. Klun ed., 2002).

[106] Congress sometimes authorizes entities within the Executive Branch to take actions involving military force, but those authorizations are typically much more limited in scope than presidential authorizations. For example, 10 U.S.C. § 124 authorizes the Department of Defense to use Department personnel and equipment to intercept certain maritime and aerial drug carriers for purposes of communicating with the carrier and directing it to a location ordered by civilian officials. Similarly narrow is 10 U.S.C. § 374, which authorizes the Secretary of Defense to employ Department personnel and equipment, on the request of a federal law enforcement agency, for various specifically designated law enforcement tasks.

French seizures of U.S. merchant vessels during France's war with the European powers.[107] The first congressional authorization empowered the President (1) to instruct U.S. armed vessels, (2) to seize, bring into U.S. ports, and proceed against legally, (3) French armed vessels that had illegally committed certain depredations against U.S. commercial vessels, (4) to protect the commercial shipping of the United States, (5) without restriction as to procedure or timing.[108] Soon thereafter, Congress authorized the President (1) to instruct U.S. armed vessels, (2) to seize, bring to port, and proceed against, (3) any French armed vessel, (4) to protect the commercial shipping of the United States, (5) without procedural or timing limitation.[109]

These two authorizations were typical of the Quasi-War in empowering the President to use particular armed forces in a specified way for limited ends. They did not authorize him to use all of the armed forces of the United States or to conduct military incursions beyond specified military targets, and they limited the geographical scope of the authorized conflict to the high seas. In short, Congress "authori[z]ed hostilities on the high seas by certain persons in certain cases," but it gave "no authority . . . to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port."[110] The Supreme Court described this war as a "limited," "imperfect," or "partial" one — that is, a war "confined in its nature and extent; being limited as to places, persons, and things."[111]

Most authorizations to use force in U.S. history have been of this limited or partial nature. For example, beginning early in U.S. history, Congress authorized the President to use various specified military resources and methods related to the repulsion, suppression, or protection of Indians.[112] Congress twice authorized the President to use lim-

---

[107] *See generally* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797–1801 (1966); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 643–62 (1993); SOFAER, *supra* note 80, at 131–66.

[108] Act of May 28, 1798, ch. 48, 1 Stat. 561; *see also* Act of June 28, 1798, ch. 62, 1 Stat. 574 (supplementing Act of May 28, 1798).

[109] Act of July 9, 1798, ch. 68, 1 Stat. 578.

[110] Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) (emphasis omitted).

[111] *Id.* at 40 (opinion of Washington, J.); *see also id.* at 43 (opinion of Chase, J.) (Congress may authorize war "limited in place, in objects, and in time"). *But cf.* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 33 (1801) ("There must then be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise.").

[112] *See, e.g.*, Act of June 30, 1834, ch. 161, §§ 10–11, 4 Stat. 729, 730; Act of May 28, 1830, ch. 148, 4 Stat. 411; Act of Mar. 3, 1799, ch. 46, § 5, 1 Stat. 743, 745; Act of May 19, 1796, ch. 30, § 5, 1 Stat. 469, 470; Act of Feb. 28, 1795, ch. 36, 1 Stat. 424; Act of May 2, 1792, ch. 28, 1 Stat. 264; Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121; Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96.

ited force to occupy and control Florida.[113] It also authorized the President to use limited force against slave traders and pirates and against the Barbary states that had been preying on U.S. shipping.[114] Other limited authorizations have concerned relatively trivial matters, such as ensuring payments of indemnity[115] and protecting certain fisheries.[116]

The limited authorizations described above stand in sharp contrast to authorizations in declared wars. These latter authorizations all have had the same basic form. The authorization against Germany in World War I is typical. It "authorized and directed" the President (1) "to employ the entire naval and military forces of the United States and the resources of the Government," (2) without restriction on the method of force, (3) without express restriction on targets, but implicitly directed at Germany, (4) "to carry on war against the Imperial German Government," (5) without procedural or timing restriction.[117]

There are four crucial differences between authorizations in declared wars and authorizations in more limited conflicts. First, authorizations in declared wars do not purport to restrict the resources available to the President. He can employ all the military forces of the government. Second, authorizations in declared wars do not limit the methods of force that the President can use. A number of authorizations outside of declared wars, by contrast, have been limited to particular methods of force, such as subduing or seizing certain entities, or compelling certain actions.[118] Third, unlike in the Quasi-War authorization, for example, which empowered the President only to seize ships, authorizations in declared wars place no express limit on authorized targets. Of course, the targets authorized in declared wars are implicitly limited by the named enemy and by the purpose of carrying on and bringing to a successful termination the war against that en-

---

[113] *See* Act of Mar. 3, 1819, ch. 93, 3 Stat. 523; Act of Jan. 15, 1811, 3 Stat. 471.

[114] *See* Act of Mar. 3, 1819, ch. 101, 3 Stat. 532 (slave traders); Act of Mar. 3, 1819, ch. 77, 3 Stat. 510 (pirates); Act of Mar. 3, 1815, ch. 90, 3 Stat. 230; Act of Feb. 6, 1802, ch. 4, 2 Stat. 129.

[115] *See* Joint Resolution of June 19, 1890, No. 28, 26 Stat. 674; Resolution of June 2, 1858, No. 15, 11 Stat. 370.

[116] *See* Act of Mar. 2, 1889, ch. 415, § 3, 25 Stat. 1009, 1009–10.

[117] Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1.

[118] *See, e.g.*, Act of June 30, 1834, ch. 161, §§ 10–11, 23, 4 Stat. 729, 730, 733 (authorizing the President to remove certain traders and settlers from Indian lands); Act of Mar. 3, 1815, ch. 90, 3 Stat. 230 (authorizing the President to subdue, seize, and take public vessels of the Dey of Algiers); Act of Mar. 1, 1809, ch. 24, § 1, 2 Stat. 528, 528 (authorizing the President to compel certain British and French ships to depart U.S. waters); Act of Mar. 2, 1807, ch. 22, § 7, 2 Stat. 426, 428 (authorizing the President to seize, take, and bring into U.S. ports certain U.S. ships violating the slave trade ban); Act of Mar. 3, 1805, ch. 40, §§ 4–5, 2 Stat. 339, 341–42 (authorizing the President to repel and move certain ships from U.S. harbors and waters); Act of July 9, 1798, ch. 68, §§ 1–2, 1 Stat. 578, 578–79 (authorizing the President to subdue, seize, take, and condemn certain armed French vessels).

emy. The authorization to use force in the war with Germany could not be viewed as an authorization to attack Mexico (at least not without some nexus between the attack on Mexico and the authorization of force against Germany). With the exception of this implicit nexus requirement, which is present in *every* authorization to use force, authorizations in declared wars impose no additional limitation on the President's targets. Finally, the purpose of the authorization in declared wars — to defeat the enemy and bring the war to a successful conclusion — is significantly broader than in limited conflicts.

Now consider the significant post–World War II congressional authorizations of force (other than the AUMF, which we analyze below). The most famous concerns the Vietnam War. The Gulf of Tonkin Resolution, following its passage in August 1964 and until its repeal in January 1971, was the primary congressional authorization for the Vietnam War.[119] It provided that "Congress approves and supports the determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."[120] This is an extraordinarily broad authorization to use force. Broken down into our five components, it authorized the President (1) to use all necessary measures, without specification of particular resources, (2) without restriction on the method of force, (3) without restriction on authorized targets, except that the targets must have attacked the United States or, perhaps, threatened further aggression, (4) with the purpose of repelling attacks and preventing aggression, and (5) without procedural or timing limitation. It is possible to read into the Resolution an implicit nexus requirement related to combat action in Southeast Asia.[121] Even with this limitation, the authorization

> was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future "to prevent further aggression."[122]

---

[119] Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384. The Gulf of Tonkin Resolution was passed after alleged attacks by the North Vietnamese on U.S. ships in the Gulf of Tonkin. The Resolution was controversial in part because of its breadth, but also because there was evidence that the Johnson Administration may have misrepresented what happened in the Gulf of Tonkin in order to prompt Congress to act. *See* ELY, *supra* note 28, at 19–20.

[120] Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, § 1, 78 Stat. 384, 384. It also stated that the United States was "prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member . . . of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." *Id.* § 2, 78 Stat. at 384.

[121] *See* ELY, *supra* note 28, at 26 (reading in a nexus requirement based on one of the "whereas" clauses in the resolution, which referred to a "campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors").

[122] Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).

The Gulf of Tonkin Resolution is as broad as force authorizations in declared wars along the crucial dimensions of resources, methods, targets, and purpose, and is arguably broader (or at least more open-ended) with respect to targets and purpose.

The authorization to use force against Iraq in 2002 is slightly narrower than the authorization in the Gulf of Tonkin Resolution, but it is closer in scope to that authorization, and to the authorizations in declared wars, than to typical authorizations in undeclared wars. The Iraq authorization empowers the President to use (1) "the Armed Forces of the United States," (2) "as he determines to be necessary and appropriate," (3) without express restriction on targets, but implicitly directed at Iraq, (4) for the purpose of "defend[ing] the national security of the United States against the continuing threat posed by Iraq; and . . . enforc[ing] all relevant United Nations Security Council Resolutions regarding Iraq," and (5) with two procedural conditions: (a) the President must determine that diplomatic or peaceful means will not achieve these purposes, and that action against Iraq is consistent with the war against those responsible for the September 11 attacks; and (b) the President must report to Congress concerning the authorization every sixty days.[123]

Although not necessarily as broad as the authorization in the Vietnam War, which placed no express limit on available resources, or the authorizations in some declared wars, which pledged the resources of the government beyond the armed forces, the 2002 Iraq authorization is significantly broader than typical authorizations in undeclared wars. The President is authorized to use the "United States Armed Forces," rather than only a subset of U.S. forces as in many limited conflicts. The Iraq authorization places no apparent restriction on methods of force; certainly the President did not view the term "necessary and appropriate" as placing restrictions on the invasion of Iraq. The implicit target of the authorization — Iraq — is similar to targets in declared wars. The purposes of the authorization — which include defending U.S. national security — are comparable in scope to the purposes of authorizations in declared wars and the Vietnam War. Although the procedural conditions in the 2002 authorization have no analogue in authorizations in declared wars and in the Vietnam War, they do not impose significant limitations on presidential action.

The Vietnam authorization and the 2002 Iraq authorization contrast with other, narrower post–World War II authorizations. The 1955 authorization to use force in Taiwan gave the President the ability to use broad resources ("the Armed Forces of the United States"),

---

[123] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501.

but it had a relatively narrow "specific purpose" ("securing and protecting Formosa and the Pescadores against armed attack"), as well as a time limitation and a reporting requirement.[124] The 1991 authorization to use force against Iraq similarly allowed the President to use broad resources ("the United States Armed Forces"), but it had a relatively narrow purpose (implementing various United Nations Security Council resolutions related to Iraq's invasion of Kuwait) and various procedural restrictions.[125]

The authorizations to use force in Lebanon in 1983 and Somalia in 1993 were even narrower. In the Lebanon authorization, Congress limited the President's use of the armed forces to the performance of certain functions (as specified in an agreement with Lebanon), established an eighteen-month limitation on the authorization, and imposed detailed reporting requirements.[126] Similarly, the Somalia authorization had a very limited purpose (most notably, the protection of U.S. personnel and bases), a time limitation of approximately five months, and (in a later statute) a reporting requirement.[127]

This survey of authorizations to use force shows that Congress has authorized the President to use force in many different situations, with varying resources, an array of goals, and a number of different restrictions. All of the authorizations restrict targets, either expressly (as in the Quasi-War statutes' restrictions relating to the seizure of certain naval vessels), implicitly (based on the identified enemy and stated purposes of the authorization), or both. Such restrictions may be constitutionally compelled. Congress's power to authorize the President to use force, whatever its scope, arguably could not be exercised without specifying (at least implicitly) an enemy or a purpose.[128]

---

[124] The authorization stated that it would "expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, and shall report to Congress." Joint Resolution of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7.

[125] *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

[126] *See* Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §§ 3-4, 6, 97 Stat. 805, 806-07 (1983).

[127] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151, 107 Stat. 1418, 1475-77 (1993); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1512, 107 Stat. 1547, 1840-41 (1993).

[128] *See* 1 TRIBE, *supra* note 65, § 4-6, at 661. Some scholars argued that the Gulf of Tonkin Resolution was unconstitutional on precisely this ground. *See, e.g.*, Alexander M. Bickel, *Congress, the President, and the Power To Wage War*, 48 CHI.-KENT L. REV. 131, 137-40 (1971); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 692-700 (1972). *But see* William H. Rehnquist, *The Constitutional Issues — Administration Position*, 45 N.Y.U. L. REV. 628, 636-37 (1970) ("It has been suggested that there may be a question of unlawful delegation of powers here [with respect to the Gulf of Tonkin Resolution], and that Congress is not free to give a blank check to the President. Whatever may be the answer to that abstract question in the domestic field, I think it is plain from *United States v. Curtiss-Wright Ex-*

The primary differences between limited and broad authorizations are as follows: In limited authorizations, Congress restricts the resources and methods of force that the President can employ, sometimes expressly restricts targets, identifies relatively narrow purposes for the use of force, and sometimes imposes time limits or procedural restrictions. In broad authorizations, Congress imposes few if any limits on resources or methods, does not restrict targets other than to identify an enemy, invokes relatively broad purposes, and generally imposes few if any timing or procedural restrictions. With these distinctions in mind, we turn to the September 18, 2001 AUMF.

B. The September 18, 2001 AUMF

The AUMF can be evaluated using the five analytical components we have previously identified. Its authorization "to use *all* necessary and appropriate force" appears to straddle components (1) and (2) by specifying in a single phrase both the resources that the President can use and the methods that he can employ.[129] As for the other components, the President is authorized to use such force (3) "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," (4) with the purpose of "prevent[ing] any future acts of international terrorism against the United States by such nations, organizations or persons," and (5) with an arguable requirement to report to Congress every six months on the status of the authorized hostilities.[130]

A number of factors suggest that the AUMF confers as much authority on the President to prosecute the war against covered entities as did authorizations in declared wars.[131] We begin with the AUMF's

---

port Corp. . . . that the principle of unlawful delegation of powers does not apply to the field of external affairs." (footnotes omitted)); *but cf.* ELY, *supra* note 28, at 25–26 (arguing that to satisfy the nondelegation doctrine, a congressional authorization to use force must specify an enemy and that the Gulf of Tonkin Resolution did so implicitly in its preamble).

[129] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added).

[130] The AUMF states that "[n]othing in this resolution supercedes any requirement of the War Powers Resolution." *Id.* § 2(b)(2), 115 Stat. at 225. The War Powers Resolution, in turn, imposes reporting requirements for situations in which U.S. armed forces are introduced into hostilities in "the absence of a declaration of war." *See* 50 U.S.C. § 1543 (2000). Because the war on terrorism is authorized but not declared, the reporting requirements probably apply. Since September 11, the President has regularly reported to Congress on the state of the war against terrorism, but he has done so "consistent with" the War Powers Resolution, the typical presidential phrase designed to indicate that the President does not concede that he is bound by the Resolution. *See supra* p. 2070.

[131] *Cf.* Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215, 252 (2002) (stating that the AUMF is "arguably the broadest congressional delegation of war power in our nation's history"). It is worth noting that some members of Congress proposed that the United States declare war against terrorist organizations in response to the September 11 attacks.

nexus requirement. The AUMF extends to "nations, organizations, or persons" whom the President determines have certain specified connections to the September 11 attacks. The President initially requested the broader authority to "deter and pre-empt any future acts of terrorism or aggression against the United States," without regard to the entities involved.[132] After negotiations with the White House, however, Congress declined to authorize the use of military force to prevent terrorist attacks by those unconnected to September 11.[133] According to several members of Congress, the AUMF limited its targets to avoid the perceived overbreadth of the Gulf of Tonkin Resolution, which, as noted above, had authorized the President to use force, arguably without specifying any particular enemy.[134] Many members of Congress stated or implied in floor debates that this nexus limitation was the sole textual limitation on the President's authorization to use force.[135]

See, e.g., H.R.J. Res. 62, 107th Cong. (2001); 147 CONG. REC. H5653 (daily ed. Sept. 14, 2001) (statement of Rep. Barr).

[132] According to the Democratic Chief Counsel to the House Committee on International Relations, the President originally asked Congress to approve the following authorization:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, harbored [sic], committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States.

David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002) (alteration in original) (quoting Draft Joint Resolution Authorizing the Use of Force).

[133] *See, e.g.*, John Lancaster & Helen Dewar, *Congress Clears Use of Force, $40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001, at A4; David G. Savage, *Vietnam Ghost Haunts Senate*, L.A. TIMES, Sept. 16, 2001, at A14.

[134] *See, e.g.*, 147 CONG. REC. H5633 (daily ed. Sept. 14, 2001) (statement of Rep. DeFazio) ("The earlier drafts ceded too much authority to the executive branch. In fact, one of the earlier drafts had provisions nearly identical to the Gulf of Tonkin Resolution, which had led to the unaccountable use of U.S. military forces in Vietnam."); *id.* at H5648 (statement of Rep. Mink) ("I have read [the AUMF] a dozen times over, because I want to make sure that the War Powers Act that we enacted right after the conflagration in Vietnam is not in any way jeopardized. I think we have to call attention to those sections which say 'Nothing in this resolution supersedes the war powers resolution.' On that basis, I support the passage of this resolution tonight."); *id.* at H5675 (statement of Rep. Jackson) ("I am not voting 'Yes' on September 14, 2001, for an open-ended Tonkin Gulf-type Resolution. . . . I'm not willing to give President Bush carte blanche authority to fight terrorism. We need to agree to fight it together within traditional constitutional boundaries."). *But cf. id.* at H5672 (statement of Rep. Lee) (arguing against the AUMF by describing the Gulf of Tonkin Resolution and stating, "I fear we make the same mistake today").

[135] *See, e.g.*, *id.* at H5666 (statement of Rep. Cardin) ("[This is] a resolution . . . against those responsible for the recent attacks launched against the United States and its citizens. . . . This resolution limits [its authorization of military force] to respond to the September 11 attacks on our Nation."); *id.* at S9417 (statement of Sen. Feingold) ("[I]t does not contain a broad grant of powers, but is appropriately limited to those entities involved in the attacks that occurred on September 11."); *id.* at S9416 (statement of Sen. Levin) ("[T]his authorization for the use of force is limited to the nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks."); *id.* at H5642 (statement of Rep. Nor-

This September 11 nexus limitation, like nexus limitations in authorizations in declared wars, implicitly restricts authorized targets by virtue of the named enemy and the purposes of the authorization. Also, like authorizations in declared wars but unlike authorizations in many undeclared wars (such as the Quasi-War with France), the AUMF contains no additional limitation on targets. Similarly, the AUMF's purpose of "prevent[ing] any future acts of international terrorism against the United States by such nations, organizations or persons" is as broad as the purposes in authorizations in the Vietnam War ("to prevent further aggression") and in declared wars (such as "carry[ing] on war against the Government of Germany" and "bring[ing] the conflict to a successful termination"), and contrasts with the narrower purposes in limited authorizations of, for example, protecting U.S. commerce,[136] enforcing neutrality restrictions,[137] or implementing U.N. Security Council resolutions.[138] Moreover, as with authorizations in declared wars, in the Vietnam War, and in the recent Iraq war, the AUMF does not appear to impose any limitation on either the resources or the methods that the President can employ.[139] Instead, the AUMF broadly authorizes the President to use "all necessary and appropriate force" to prosecute the war.

---

ton) ("[T]he language before us is limited only by the slim anchor of its September 11 reference, but allows war against any and all prospective persons and entities."); *cf. id.* at S9419 (statement of Sen. Snowe) ("I rise in support of the joint resolution authorizing the use of U.S. Armed Forces against those responsible for the recent act of war against this Nation, to deter future attacks, and to disable the machinery of terror."). Some commentators argue that the AUMF's final "whereas" clause, which recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," amounts to a congressional recognition of inherent presidential authority to engage in preemptive action against terrorists. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority To Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 515 (2002); Paulsen, *supra* note 131, at 252–53. This is possible, but another possibility is that Congress merely was recognizing that its authorization did not exhaust all bases for presidential use of force.

136 *See, e.g.*, Act of Feb. 6, 1802, ch. 4, 2 Stat. 129.

137 *See, e.g.*, Act of June 15, 1917, ch. 30, tit. 5, 40 Stat. 217, 221–23.

138 *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

139 *See, e.g.*, 147 CONG. REC. H5662 (daily ed. Sept. 14, 2001) (statement of Rep. Davis) ("Although [the AUMF] is not a formal declaration of war, the resolution gives the President full authority to use force against these terrorists and is similar to the use of force resolution authorizing military operations during the Persian Gulf conflict in 1991."); *id.* at H5639 (statement of Rep. Hyde) ("We must grant the President the fullest authority to employ all of the resources of the United States, to make war on our enemy, to destroy their ability to harm us and to defend our beloved country."); *id.* (statement of Rep. Lantos) ("The resolution before us empowers the President to bring to bear the full force of American power abroad in our struggle against the scourge of international terrorism.").

One could argue that the phrase "necessary and appropriate," which does not appear in force authorizations in declared wars,[140] was meant to restrict presidential action. We do not believe, however, that it should be read in this manner. The legislative debates on the AUMF overwhelmingly suggest that Congress did not view the "necessary and appropriate" phrase as a limitation on presidential action.[141] Moreover, analogous phrases in the Constitution have not been construed restrictively. The Necessary and Proper Clause, for example, which is similar to the wording in the AUMF, has been interpreted as enlarging rather than diminishing Congress's powers.[142] It seems unlikely that Congress, which views the Necessary and Proper Clause expansively, and has the most to gain from a broad interpretation of the clause, would have used the phrase "necessary and appropriate" as a way to constrain presidential authority. We do not mean to suggest that the AUMF confers unrestricted authority on the President. As we explain in Part IV, Executive Branch practice in prior wars and the international laws of war inform the boundaries of a broad authorization of force such as the AUMF, and the phrase "necessary and appropri-

---

[140] The Gulf of Tonkin Resolution, by contrast, authorized the President to take "all *necessary* measures," but did not use the term "appropriate." Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (emphasis added).

[141] *See, e.g.*, 147 CONG. REC. S9422 (daily ed. Sept. 14, 2001) (statement of Sen. Biden) ("The authority [in the AUMF] permits the President wide latitude to use force against the broad range of actors who were responsible for the September 11 attacks."); *id.* at H5646 (statement of Rep. Schiff) (describing the authorization to use necessary and appropriate force against an identified enemy as a "broad delegation of authority to make war on those who have attacked us"); *id.* at H5649 (statement of Rep. Spratt) ("On occasions in the past, we have been aware of invoking the War Powers Act and becoming implicated in military actions we were not sure about. But the world should note that in this instance we set such concerns aside and give the President broadly the power to use all necessary and appropriate force."); *see also supra* note 139. *But cf.* 147 CONG. REC. H5673 (daily ed. Sept. 14, 2001) (statement of Rep. Clayton) ("The authorization we give the President today is not unlimited. Congress will monitor progress of our military actions and work with the President to ensure that our actions under this resolution are necessary and appropriate, consistent with our values, in conjunction with our friends and allies, and in accordance with international laws.").

[142] *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–14, 420–21 (1819); *see also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 214 (2003) ("[I]t is the latitudinarian gloss on the meaning of 'necessary' [in *McCulloch*] that survives to this day largely unchallenged."); Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1378 (1983) ("Since the time of *McCulloch v. Maryland*, it has been clear that the Clause presents no formidable barriers to legislative activity."). Similarly, the reference to "appropriate legislation" in Section 5 of the Fourteenth Amendment has been interpreted as conveying "the same broad powers expressed in the Necessary and Proper Clause." Katzenbach v. Morgan, 384 U.S. 641, 650 (1966). While recent Supreme Court decisions require "congruence and proportionality" between the means and ends of legislation enacted under Section 5, *see* City of Boerne v. Flores, 521 U.S. 507, 520 (1997), the Court continues to state that Congress's power under Section 5 is "a broad power indeed," Tennessee v. Lane, 124 S. Ct. 1978, 1985 (2004) (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982)) (internal quotation mark omitted).

ate" can be viewed as encompassing these boundaries. Our claim is simply that there is no reason to think that "necessary and appropriate" was meant as an independent and additional restriction.[143]

The AUMF is arguably more restrictive in one respect, and arguably broader in another respect, than authorizations in declared wars. It is arguably more restrictive to the extent that it requires the President to report to Congress on the status of hostilities. This difference from authorizations in declared wars, however, does not purport to affect the military authority that Congress has conferred on the President. The AUMF is arguably broader than authorizations in declared wars in its description of the enemy against which force can be used. The AUMF authorizes the President to use force against those "nations, organizations, or persons he determines" have the requisite nexus with the September 11 attacks. This provision contrasts with authorizations in declared wars in two related ways. First, it *describes* rather than *names* the enemies that are the objects of the use of force.[144] Second, it expressly authorizes *the President* to determine which "nations, organizations, or persons" satisfy the statutory criteria for enemy status.[145] One could argue that the effect of the "he determines" provision is to give the President broad, and possibly unreviewable, discretion to apply the nexus requirement to identify the covered enemy — at least to the extent that his determination does not implicate constitutional rights.[146] Even if this argument is correct, this provision

---

[143] This construction of the AUMF is further supported by the general interpretive principle, analyzed in Part IV, that congressional authorizations in areas of concurrent presidential authority should be construed broadly. *See infra* section IV.C, pp. 2100–02.

[144] There are other examples of authorizations in U.S. history that have described rather than named the enemy, implicitly leaving the determination of the particular entities satisfying the description to the President. *See, e.g.*, Act of June 15, 1917, ch. 30, tit. 5, § 9, 40 Stat. 217, 223 (authorizing the President to employ necessary force against persons and vessels violating the neutrality statute); Act of Aug. 5, 1861, ch. 48, 12 Stat. 314 (authorizing the President to seize ships built for piracy); Act of Mar. 3, 1799, ch. 46, § 5, 1 Stat. 743, 745 (authorizing the President to use military force and measures as he judges necessary to remove illegal settlers from certain Indian lands); Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264 (authorizing the President to employ the militia against "combinations too powerful to be suppressed by the ordinary course of judicial proceedings").

[145] The "he determines" provision has no analogue in authorizations in declared wars or the Vietnam War, but it is similar to provisions in other war authorizations. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (authorizing the President to use U.S. armed forces against Iraq "as *he determines* to be necessary and appropriate" (emphasis added)); Joint Resolution of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7 (authorizing the President to employ armed forces "as *he deems* necessary" to protect Formosa and the Pescadores against armed attack (emphasis added)); Act of Sept. 8, 1916, ch. 463, § 806, 39 Stat. 756, 799–800 (authorizing the President to use force against belligerent powers based on his determination that various neutrality laws are violated).

[146] *See, e.g.*, Dalton v. Specter, 511 U.S. 462, 474 (1994) ("[L]ongstanding authority holds that [judicial review] is not available when the statute in question commits the decision to the discretion of the president."); Webster v. Doe, 486 U.S. 592, 600–01 (1988) (holding that the decision

probably adds little to the President's already-broad authority to determine the existence of facts related to the exercise of his authority under the AUMF.[147]

In sum, a comparison with prior authorizations shows that the AUMF is as broad as authorizations in declared wars with respect to the resources and methods it authorizes the President to employ, and with respect to the purposes for which these resources can be used. The AUMF should therefore be interpreted as conferring full congressional authorization for the President to prosecute a war against the nations, organizations, and persons that he determines have the requisite connection to the September 11 attacks.

IV. ADDITIONAL INTERPRETIVE FACTORS RELEVANT TO CONSTRUING THE AUMF

In Part III, we analyzed the AUMF's text and its relationship to prior congressional authorizations of force, and concluded that the AUMF is as broad as the authorizations that Congress has enacted in declared wars. To go beyond this general conclusion and answer more detailed questions about the AUMF's scope, we must consider additional interpretive factors.

The plurality's analysis of the AUMF in *Hamdi* provides a useful starting point. The plurality interpreted Congress's authorization to the President to use "all necessary and appropriate force" as including the power to take actions involving the "fundamental incident[s] of waging war," and it suggested that the fundamental incidents of waging war are informed by Executive Branch practice during prior armed conflicts and the international laws of war that define permissible conduct during wartime.[148] In addition, the plurality did not require either a tight fit between the language in the AUMF (authorizing force) and the particular incident of war (detaining enemy combatants)

---

whether to terminate employees of the Central Intelligence Agency was committed to the discretion of the Director of Central Intelligence and thus was not subject to judicial review under the Administrative Procedure Act). It is worth emphasizing that the discretion conferred by the phrase "he determines" in the AUMF concerns the determination of which nations, organizations, or persons were involved in the September 11 attacks, and not (as was at issue, for example, in *Hamdi*) the determination of which persons are members of organizations involved in such attacks. As we explain, this distinction may be relevant to the scope of the President's authority to designate someone an enemy combatant. *See infra* pp. 2121–23.

147 *Cf.* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31–32 (1827) (noting, in the context of interpreting a congressional authorization for the President to call forth the militia to suppress insurrections and repel invasions, that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts").

148 Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640–41 (2004) (plurality opinion).

or, relatedly, a clear statement that the particular presidential action relating to this incident of war was in fact authorized.[149]

The plurality in *Hamdi* did not explain or analyze these interpretive factors. In this Part, we attempt to provide a more systematic account of how and why these factors are relevant to interpreting the AUMF.[150] In section IV.A, we explain why Executive Branch practice during prior armed conflicts is relevant to interpreting the AUMF. In

---

[149] *See id.* at 2641 ("[I]t is of no moment that the AUMF does not use specific language of detention.").

[150] Although beyond the scope of our Article, judicial construction of the AUMF could also be affected by deference to the Executive Branch. For example, Executive Branch interpretations of the AUMF might be entitled to deference under, or by analogy to, the *Chevron* doctrine in administrative law. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (concluding that courts should defer to an administrative agency's construction of the statute that it administers when the statute is silent or ambiguous and the agency's interpretation is reasonable); *see also* Acree v. Republic of Iraq, 370 F.3d 41, 63 n.2 (D.C. Cir. 2004) (Roberts, J., concurring) (noting that, although the "applicability of *Chevron* to presidential interpretations is apparently unsettled," *Chevron* would clearly apply if the statute had been directed at the Secretary of State, and "[i]t is puzzling why the case should be so much harder when the authority is given to the Secretary's boss"); *cf.* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (holding that *Chevron* deference is appropriate only when it is "apparent . . . that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law"). Such interpretive deference may be particularly appropriate in the context of the AUMF because it is a statute regulating foreign affairs. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988))). *See generally* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000). Moreover, even if the Executive Branch were not entitled to deference with respect to the meaning of the AUMF per se, it might be entitled to deference concerning the content of the international laws of war, a body of treaty-based and customary law that, as discussed below, can inform the meaning of the AUMF. The Supreme Court gives "great weight" to the Executive Branch's interpretation of treaties. *E.g.*, United States v. Stuart, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). The justifications for such deference — including the Executive Branch's role as principal spokesperson for the United States in foreign affairs and the desirability of having the United States speak with one voice concerning its international law obligations — are probably even stronger with respect to customary international law, an amorphous and evolving body of law, the content of which has always been informed by political discretion and national self-interest. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432–33 (1964) ("When articulating principles of [customary] international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."). Finally, courts often defer to the President's determinations concerning the status of military conflicts, *see, e.g.*, Ludecke v. Watkins, 335 U.S. 160, 167–70 (1948) (deferring to the President's determination that a state of war continued to exist with respect to Germany in World War II after Germany's surrender); The Protector, 79 U.S. (12 Wall.) 700, 701–02 (1871) (deferring to presidential proclamations concerning when hostilities began and ended in the Civil War), and it is easy to imagine that such deference could affect judicial application of the AUMF. The relevance of these and other deference doctrines to the interpretation of the AUMF would depend on the specific issue in question and the position taken on that issue by the Executive Branch.

section IV.B, we analyze the complex role that the international laws of war should play in the interpretation of the AUMF. In section IV.C, we examine the relevance of the President's independent constitutional authority during wartime to the degree of fit required between the language of the AUMF and presidential actions taken under it. In section IV.D, we consider the proper role of clear statement requirements in interpreting the AUMF.

A. Executive Branch Practice

In concluding that the AUMF authorized the President to detain enemy combatants until the end of the relevant conflict, the plurality in *Hamdi* looked to prior Executive Branch practice during wartime to inform its interpretation. In particular, it cited the "universal . . . practice" during wartime of capturing, detaining, and trying enemy combatants.[151] The plurality also relied on prior Executive Branch practice for its conclusion that the detention authority under the AUMF extends to U.S. citizen enemy combatants.[152]

Courts often rely on past Executive Branch practice to inform the meaning of a federal statute related to that practice. In general, Congress is presumed to be aware of relevant Executive Branch practice when it legislates.[153] Especially when this practice is longstanding, courts will often conclude that Congress has approved the practice when it enacts a related statute. In *United States v. Midwest Oil Co.*,[154] for example, the President suspended a statutory land grant program in a way that did not appear to be authorized by the statute. The Supreme Court nevertheless upheld the suspension, reasoning that the President had for many years prior to the enactment of the statute exercised the power to suspend similar land grant programs. The Court explained that, "in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation," and added that the past Executive Branch practice created a "presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice."[155]

---

[151] *Hamdi*, 124 S. Ct. at 2640 (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

[152] The plurality relied in particular on the Lieber Code adopted by the Union during the Civil War, which contemplated that "captured rebels" would be treated as "prisoners of war," and on the military trial during World War II of a U.S. citizen for violation of the laws of war. *See id.*

[153] *See, e.g.*, Nat'l Lead Co. v. United States, 252 U.S. 140, 147 (1920); United States v. Wilson, 290 F.3d 347, 357 (D.C. Cir. 2002).

[154] 236 U.S. 459 (1915).

[155] *Id.* at 472–73; *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (applying this aspect of *Midwest Oil*).

Although courts do not always infer congressional intent to ratify prior Executive Branch practice in this way,[156] the inference is normally "stronger in the foreign affairs arena" than in other contexts.[157] Courts rely more heavily on Executive Branch practice in the foreign affairs area because Congress faces "practical limitations on [its] capacity to forge ex ante standards for executive national security action,"[158] and because the Executive Branch has special fact-gathering and interpretive expertise in this context.[159] In addition, as discussed in more detail below, the President has significant concurrent constitutional authority in the foreign affairs (and especially the war powers) field.[160] Concurrent constitutional authority is one reason why judicial interpretation of *constitutional* foreign affairs powers has always been heavily informed by historical practice and interbranch understandings.[161] It also explains why presidential practice is given so much weight in the interpretation of foreign affairs statutes. As the Supreme Court noted in *Dames & Moore v. Regan*,[162] "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'"[163]

A trilogy of Supreme Court decisions interpreting the Secretary of State's authority over passports illustrates the importance of Executive Branch practice in the foreign affairs context. The decisions concerned a 1926 statute, still in effect, which provides that "[t]he Secre-

---

156 *See, e.g.*, SEC v. Sloan, 436 U.S. 103, 121 (1978) (declining to presume congressional acquiescence in a thirty-four-year-old practice of the Securities and Exchange Commission, despite the fact that the Senate committee having jurisdiction over the Commission's activities had long expressed approval of the practice). *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988) (explaining the pitfalls of inferring congressional intent from legislative silence in the face of Executive Branch practice).

157 Eskridge, *supra* note 156, at 74.

158 *See* Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 848 (1994).

159 *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321–22 (1936).

160 *See* U.S. CONST. art. II, § 2, cl. 1; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (describing "a zone of twilight in which [the President] and Congress may have concurrent authority"); HENKIN, *supra* note 6, at 92, 94 (noting that it is "now accepted" that there is "some undefined zone of concurrent authority in which [the President and Congress] might act, at least when the other has not acted").

161 *See supra* note 64 and accompanying text.

162 453 U.S. 654 (1981).

163 *Id.* at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). The Court added this caveat: "At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President." *Id.* at 678–79; *cf.* WORMUTH & FIRMAGE, *supra* note 63, at 140 (noting that in the war powers context "Executive usage finds its proper role not in the interpretation of the Constitution but in the interpretation of statutes").

tary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."[164] In *Kent v. Dulles*,[165] the Court invalidated State Department regulations under the 1926 statute that had, among other things, required denial of passports to members of the Communist Party.[166] It reasoned that because the Executive Branch prior to 1926 had generally denied passports only for reasons relating to the applicant's citizenship or allegiance, or for fraud or violations of U.S. laws, only those grounds for denial "could fairly be argued were adopted by Congress in light of prior administrative practice."[167]

In the second passport decision, *Zemel v. Rusk*,[168] the Court held that the 1926 statute had implicitly authorized the Secretary of State to impose area restrictions on the use of passports and thus to decline to validate passports for travel to Cuba.[169] In reaching this conclusion, the Court relied on Executive Branch imposition of "both peacetime and wartime area restrictions" during the decade preceding the Act, as well as "the State Department's continued imposition of area restrictions during both times of war and periods of peace since 1926."[170] In the final passport decision, *Haig v. Agee*,[171] the Court held that the 1926 statute authorized the Secretary of State to revoke a passport based on a determination that the passport holder's activities abroad were likely to cause serious damage to U.S. national security or foreign policy.[172] The Court relied on the Executive Branch's long history, both before and after enactment of the 1926 statute, of asserting authority to withhold passports "on the basis of substantial reasons of na-

---

[164] 22 U.S.C. § 211a (2000). Prior to 1952, a passport was not typically required for entry into or exit from the United States, except during wartime. In 1952, however, Congress provided that if the President proclaimed a national emergency and found that it was in the interest of the United States to impose restrictions on entry and exit, it would be "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." Immigration and Nationality Act, Pub. L. No. 414, § 215, 66 Stat. 163, 190 (1952) (codified at 8 U.S.C. § 1185(b) (2000)).

[165] 357 U.S. 116 (1958).

[166] *Id.* at 129–30.

[167] *Id.* at 128.

[168] 381 U.S. 1 (1965).

[169] *See id.* at 7–8.

[170] *Id.* at 8–9. The Court in *Zemel* distinguished *Kent* on the ground that in *Kent* there was no "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." *Id.* at 12. The Court also noted that the 1926 Act "must take its content from history," and that it "authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" *Id.* at 17–18 (quoting *Kent*, 357 U.S. at 128).

[171] 453 U.S. 280 (1981).

[172] *Id.* at 309–10.

tional security and foreign policy."[173] The Court also emphasized that "in the areas of foreign policy and national security," congressional silence in the face of consistent Executive Branch practice "is not to be equated with congressional disapproval."[174]

A more dramatic example of how Executive Branch practice can inform statutory authorization in the foreign affairs context is *Dames & Moore v. Regan*.[175] There, the Supreme Court concluded that, as part of resolving the Iran hostage crisis, the President "was authorized" to suspend private claims against Iran pending in U.S. courts, despite the fact that the Court could not point to any particular federal statute that conferred this authority.[176] The Court's conclusion rested on many factors, some of which are discussed below, but central to its conclusion was a long history of Executive claims settlement known to and not disapproved of by Congress.[177] As Professor Eskridge has observed, *Dames & Moore* stands for the proposition that in the foreign affairs context, more than in others, "the Court will routinely infer legislative approval of executive practices, where 'Congress has consistently failed to object to [such practices] . . . even when it has had an opportunity to do so.'"[178]

In sum, the *Hamdi* plurality's reliance on Executive Branch practice in prior wars to give content to the AUMF is consistent with a long line of decisions that rely on Executive Branch practice when interpreting congressional authorizations of presidential foreign affairs activity.

B. The AUMF and the International Laws of War

The plurality in *Hamdi* relied extensively on the international laws of war in interpreting the AUMF, but it did not explain how or why these laws were relevant. In this section, we first explain how the laws

---

[173] *Id.* at 293; *see also id.* at 293–303 (reviewing this history). The Court in *Haig* distinguished *Kent* as involving a situation in which "it was shown that the claimed governmental policy had not been enforced consistently." *Id.* at 303.

[174] *Id.* at 291.

[175] 453 U.S. 654 (1981).

[176] *Id.* at 686; *see also id.* at 675–84. The Court's use of the passive voice in the phrase "was authorized" is revealing since the Court never made entirely clear whether it was Congress, Article II, or both, that authorized the President to suspend the claims in question, or whether Congress had "authorized" or merely "accepted" or "consented" to the President's action. *Cf. id.* at 678 (suggesting that the President was acting "with the acceptance of Congress"); *id.* at 686 (concluding that "Congress may be considered to have consented to the President's action in suspending claims"). It is thus unclear whether the Court decided that Congress authorized the suspension of claims or rather merely supported the suspension in a way that was less than authorization but more than silence.

[177] *Id.* at 686.

[178] Eskridge, *supra* note 156, at 74 (quoting *Dames & Moore*, 453 U.S. at 682 n.10). For criticism of this method of statutory interpretation, see KOH, *supra* note 65, at 139–42.

of war can both give content to the powers that the AUMF confers on the President and provide boundaries on the scope of Congress's authorization. We then explain why the AUMF should not be read as prohibiting the President from violating the laws of war (although other legal sources might prohibit such violations).

In examining the role that the laws of war should play in the interpretation of the AUMF, our focus is on the laws of war relating to proper conduct during warfare (*jus in bello*), and not on the laws of war governing the circumstances under which nations are permitted to use force (*jus ad bellum*).[179] By expressly authorizing the use of force in the AUMF, Congress has probably overridden whatever *jus ad bellum* constraints there might have been on that use of force.[180] More generally, as we show below, there is a long tradition, dating back to the Founding, of courts and the political branches referring to *jus in bello* to give content to both congressional authorizations to use force and the President's constitutional wartime powers.[181] There is no similar tradition with respect to *jus ad bellum*, in part because *jus ad bellum* had little limiting content at the Founding and for much of our nation's history.[182]

Furthermore, although modern *jus ad bellum* rules, as reflected in the United Nations Charter, sharply restrict the allowable use of force to situations involving self-defense or Security Council authorization,[183] Congress has not insisted on compliance with such restrictions. Indeed, a number of congressional authorizations to use force during the period since adoption of the Charter — including the Vietnam War authorization and the 2002 Iraq authorization — have been highly

---

179 Recent treatments of *jus ad bellum* include YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (3d ed. 2001); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002); and CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000). Recent treatments of *jus in bello* (which is often referred to today as "the law of armed conflict" or "international humanitarian law") include YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004) [hereinafter DINSTEIN, THE CONDUCT OF HOSTILITIES]; LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2d ed. 2000); and THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., 1995). *See also* Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905 (2002).

180 It is well settled that, for purposes of the U.S. legal system, Congress has the authority to override international law. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 600–01 (1889); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) [hereinafter RESTATEMENT].

181 *See infra* section IV.B.1, pp. 2091–94.

182 Prior to the post–World War I formation of the League of Nations and the adoption of the Kellogg-Briand Pact of 1928, war was understood to be a generally available instrument of foreign policy. *See, e.g.*, 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 189 (1922).

183 *See supra* note 49 and accompanying text.

controversial with respect to their international legality.[184] In addition, in the War Powers Resolution — Congress's most significant effort to regulate the use of U.S. military force — Congress made no attempt to require consistency with the U.N. Charter or any other aspect of *jus ad bellum*.[185] And, on numerous occasions since the enactment of the War Powers Resolution, Presidents have ordered the use of military force without congressional authorization and arguably in violation of the U.N. Charter.[186] The limited attention Congress has given to these actions has focused primarily on their constitutionality and not their consistency with *jus ad bellum* rules.[187] Nor has Congress sought affirmatively to incorporate *jus ad bellum* rules into U.S. domestic law,

---

[184] Some have argued that U.S. involvement in the Vietnam War violated *jus ad bellum* rules of international law. *See, e.g.*, Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122 (1966). *But see* John Norton Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051 (1967). For arguments that the U.S. invasion of Iraq in 2003 violated *jus ad bellum* rules, see, for example, Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003); and Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004). *But see* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003). Even with respect to the less controversial conflict in Afghanistan, there was no formal approval of the use of force by the Security Council, and some scholars have questioned whether the United States's right of self-defense can be invoked against non-state actors, and whether whatever right of self-defense there was with respect to al Qaeda gave the United States the right under international law to attack the Taliban regime. *See, e.g.*, Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401 (2002); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 540–44 (2002).

[185] *See* War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973).

[186] A prominent example is the Kosovo conflict, which involved a high-intensity United States-NATO aerial bombing campaign in the former Yugoslavia without either congressional or U.N. Security Council authorization, and without a plausible claim of self-defense. For arguments that this campaign violated the U.N. Charter, see, for example, MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 13–35 (2001); and Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19 (2000).

[187] For example, congressional criticisms and recommendations in response to the Reagan Administration's unauthorized covert operations in support of the Nicaraguan Contras do not appear to have addressed the ostensible *jus ad bellum* international law violations implicated by the affair — even though the International Court of Justice had prominently ruled, just the year before, that these actions did violate international law. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146–50 (June 27); REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987). Similarly, when members of Congress have sought judicial assistance to stop presidents from using force abroad without congressional authorization, they typically complain of violations of the Constitution or the War Powers Resolution, not international law. *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (Kosovo); Conyers v. Reagan, 765 F.2d 1124, 1126 (D.C. Cir. 1985) (Grenada); Crockett v. Reagan, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (El Salvador); Lowry v. Reagan, 676 F. Supp. 333, 334 (D.D.C. 1987) (military actions in the Middle East).

even though it has incorporated a number of *jus in bello* rules through, for example, the War Crimes Act of 1996.[188]

1. The Laws of War as a Source of Authorized Powers. — The AUMF authorizes the President to use "all necessary and appropriate force" against the nations, organizations, and persons responsible for the September 11 attacks, without restriction as to resources and methods. Because the authorization contemplates warfare, it is reasonable to assume that, absent other indicia of statutory meaning, Congress intended to authorize the President to take at least those actions permitted by the laws of war. Otherwise, the Commander-in-Chief would be placed at a unilateral disadvantage vis-à-vis the enemy and might be unable to prosecute the war effectively. In limited circumstances, there may be exceptions to this general conclusion. Because the laws of war are but one source of interpretation, another possible source (such as prior Executive Branch practice) might suggest that Congress did not convey the full authority available under the laws of war. Or there might be constitutional reasons to presume that Congress has not implicitly delegated a certain type of authority. Absent such a special circumstance, however, the AUMF should be read as authorizing the President to do what the laws of war permit.

Judicial precedent and political branch practice support this conclusion. Throughout U.S. history, both courts and presidents have interpreted broad authorizations to use force as authorizing what is permissible under the international laws of war. As early as 1800, Justice Washington noted that in a "perfect" and "declared" war, "all the members [of the nation] act under a general authority, and all the rights and consequences of war attach to their condition."[189] During the Mexican-American War — a declared war with an unqualified authorization to use force[190] — the Executive Branch argued, and the Supreme Court agreed, that the President's exercise of various belligerent rights in occupied California was valid, even in the absence of specific congressional authorization, because the rights were "the belligerent rights of a conqueror" that accorded with "the law of arms and the right of conquest" under the laws of war.[191] Similarly, during the

---

188 *See* 18 U.S.C. § 2441 (2000) (criminalizing various violations of *jus in bello* rules, including grave breaches of the Geneva Conventions).

189 Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800); *see also* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 213 (Phila., Carey, Lea & Blanchard, 1836) ("A *perfect* war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war.").

190 Act of May 13, 1846, ch. 16, 9 Stat. 9.

191 Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1854); *see also id.* at 193 (noting that the occupation government "had its origin in the lawful exercise of a belligerent right over a conquered territory"); *id.* at 180–81 (excerpt from brief of the Attorney General).

Civil War — a war retroactively authorized by Congress months after it began[192] — both President Lincoln and the Supreme Court viewed the President as possessing all the authority permitted by the laws of war.[193] More broadly, in various nineteenth- and twentieth-century decisions upholding the validity of presidential actions during war, various members of the Supreme Court suggested, usually in dicta or dissents, that in the absence of express congressional restriction, the only limitations on presidential power during wartime were the laws of war.[194] Whatever the significance of these decisions for a presidential obligation to comply with international law,[195] they imply that during wartime the President can, in the absence of effective congressional restriction, do what the laws of war permit.

In light of this background, it is not surprising that the plurality in *Hamdi* relied on the laws of war to inform its interpretation of the AUMF. In authorizing the President to "use all necessary and appropriate force," the plurality reasoned, Congress had authorized the "fundamental incident[s] of waging war," one of which is the ability to detain enemy combatants for the duration of active hostilities.[196] To support this proposition, the plurality relied in part on "longstanding law-of-war principles."[197] The clear inference is that the AUMF authorizes what the laws of war permit.[198]

---

192 *See* Act of July 29, 1861, ch. 25, 12 Stat. 281.

193 The Executive Branch defended Lincoln's blockade of the South on the ground that it was permitted by the laws of war. *See* Prize Cases, 67 U.S. (2 Black) 635, 660–61 (1863) (quoting argument from Richard Dana, lawyer for the government, that "[t]he function to use the army and navy being in the President, the mode of using them, within the rules of civilized warfare, and subject to established laws of Congress, must be subject to his discretion"). All nine Justices in the *Prize Cases*, including the dissenters, accepted this proposition. *See id.* at 672–73; *id.* at 684–85 (Nelson, J., dissenting). *See generally* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 386–87 (2003). Lincoln also justified the emancipation of Southern slaves on the ground that it was a wartime action permitted by the laws of war. *See* Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), *in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 406, 408 (Roy P. Basler ed., 1953). *See generally* DANIEL FARBER, LINCOLN'S CONSTITUTION 154–55 (2003) (explaining Lincoln's reliance on the laws of war in emancipating the slaves).

194 *See, e.g.*, New Orleans v. The S.S. Co., 87 U.S. (20 Wall.) 387, 394 (1874); Brown v. United States, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting); *Bas*, 4 U.S. (4 Dall.) at 43 (opinion of Chase, J.).

195 *See infra* note 220.

196 *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 (2004) (plurality opinion).

197 *Id.*

198 The plurality did not specifically identify the source of the law-of-war rule it was invoking. Presumably, it was relying on customary international law, which "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT, *supra* note 180, § 102(2). Although the plurality subsequently referred to Article 118 of the Third Geneva Convention, which provides that prisoners of war must be repatriated at the end of hostilities, *see Hamdi*, 124 S. Ct. at 2641 (plurality opinion), the President had determined that Taliban fighters such as Hamdi were not entitled to the prisoner-of-war protections of that Convention, *see* Memorandum from President George W. Bush, to Vice President Richard Cheney et al.

This generally accepted view — that a broad and unqualified authorization to use force empowers the President to do to the enemy what the laws of war permit — is in tension with an early nineteenth-century Supreme Court decision, *Brown v. United States*.[199] *Brown* arose from the War of 1812, in which Congress both declared war and authorized the President in general terms to use force. The issue was whether Congress had thereby authorized the President to confiscate enemy property located within the United States — an action permitted by the laws of war.[200] The declaration did not authorize the confiscation, concluded the Court, because it had "only the effect" of creating a state of war.[201] The Court further held that the authorization to use force did not support the confiscation, reasoning that the President could not seize enemy property in the United States without *specific* authorization from Congress.[202]

Brown has little significance for the interpretation of the AUMF. Its holding rests on, and is probably limited by, the Constitution's assignment to Congress of the power to make rules concerning captures on land and on the particular array of statutes associated with the War of 1812. More broadly, *Brown* was decided in an era in which the presidential war power was "still in its infancy,"[203] and when Congress micromanaged wars. The Court's requirement in *Brown* of specific congressional authorization for seizure of enemy property probably did not survive the Civil War, in which President Lincoln and the Supreme Court together greatly expanded presidential war powers, including the power to seize both enemy property and neutral vessels operating in violation of a blockade, even in the absence of specific

---

(Feb. 7, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf, and the plurality did not take issue with the President's determination. Thus, the plurality was probably relying on Article 118 as evidence of a customary rule of international law. Indeed, it cited Article 118 and provisions in treaties predating the Third Geneva Convention as support for "a clearly established *principle* of the law of war." *Hamdi*, 124 S. Ct. at 2641 (plurality opinion) (emphasis added).

199 12 U.S. (8 Cranch) 110 (1814).

200 *Id.* at 122–23.

201 *Id.* at 125–26.

202 *Id.* at 126–27. Beyond declaring war, Congress had specifically authorized the President to keep prisoners of war, to issue letters of marque and reprisal, and to treat alien enemies in certain ways, but had said nothing about captures on land. *Id.* The Court inferred from these statutes, combined with Congress's Article I power to make rules concerning captures on land, that the Constitution required Congress to authorize specifically the President to capture enemy property. *Id.* The Court failed to explain, however, why this authority was not entailed by the authorization to use U.S. military forces "to carry the war into effect." *Id.* at 127. In dissent, Justice Story argued that the President, in prosecuting a war, has "a right to employ all the usual and customary means acknowledged in war, to carry it into effect," and that, therefore, "by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved." *Id.* at 145 (Story, J., dissenting).

203 HENKIN, *supra* note 6, at 104.

congressional authorization.[204] That expanded presidential wartime authority continued through World War II and was reflected in legislation, Executive Branch practice, and judicial precedent.[205] During the period following the War of 1812 and particularly during and after the Civil War, wartime presidents occupied territory, captured and detained prisoners of war, held military trials, and negotiated armistice agreements — all in the absence of specific congressional authorization.[206] This broader conception of presidential authority is reflected in many modern Supreme Court decisions, including *Hamdi*, that require much less specific congressional authorization of particular wartime actions than was required in *Brown*.[207]

2. The Laws of War as a Limitation on Authorized Powers. — Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers. For example, the international laws of war permit the detention of enemy combatants without trial until the end of hostilities.[208] The terms of this international law rule suggest that, in order for the detention to be authorized under the AUMF, the detained individuals must be enemy combatants and hostilities must be ongoing. The plurality in *Hamdi* appeared to rely on international law in this limiting manner when it stated that "indefinite detention for the purpose of interrogation is not authorized."[209]

The fact that the international laws of war can inform the boundaries of the powers that Congress has implicitly granted to the President does not mean that such powers are conditioned on perfect compliance

---

[204] *See id.* at 104 ("[L]ater, during the Civil War, the Supreme Court in effect rejected much of what Marshall had written [in *Brown*] when it upheld seizure of vessels pursuant to Lincoln's blockade."). One could also argue that the Emancipation Proclamation, in which Lincoln freed Southern slaves without congressional authorization, and which he justified by reference to the laws of war, is inconsistent with *Brown*. *See, e.g.*, Golove, *supra* note 193, at 385.

[205] *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 262–97 (Randall W. Bland et al. eds., 5th ed. 1984); HENKIN, *supra* note 6, at 45–50; LOUIS WILLIAM KOENIG, THE PRESIDENCY AND THE CRISIS: POWERS OF THE OFFICE FROM THE INVASION OF POLAND TO PEARL HARBOR 55–57, 67–68, 97, 120 (1944); REVELEY, *supra* note 35, at 135–69.

[206] *See, e.g.*, Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1854) (upholding presidential actions taken pursuant to the "right of conquest"); BIRKHIMER, *supra* note 76, at 351–55 (providing examples of presidential use of military commissions); CORWIN, *supra* note 205, at 294–95 (noting examples of presidents concluding armistice agreements); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1221 (2004) (surveying U.S. history and concluding that in the Mexican-American War, the Civil War, the Spanish-American War, World Wars I and II, the Vietnam War, the invasion of Panama, and the 1991 Gulf War, Congress "never sought to regulate the disposition of [prisoners of war] or asserted that it has any authority over them").

[207] *See infra* section IV.C, pp. 2100–02.

[208] *See supra* p. 2092.

[209] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 (2004) (plurality opinion).

with all requirements of the international laws of war. A violation of international law would negate a claim of implied authority under the AUMF only if the international law requirement in question was a condition of the exercise of the particular authority. For example, it is a condition of the power to detain an enemy combatant under the international laws of war that the detainee actually be an enemy combatant, lawful or unlawful.[210] In contrast, even though prisoners of war covered by the Third Geneva Convention are entitled to receive monthly pay, access a canteen, and receive musical instruments,[211] a violation of those requirements (assuming they apply to the particular detainee) would not undermine the authority to detain because none of these requirements is a condition of the authority to detain a prisoner of war. Similarly, if the President ordered photographs to be taken of a prisoner of war in a way that violated the duty in the Third Geneva Convention to protect prisoners from "insults and public curiosity,"[212] this would not mean that he lacked authority to detain the prisoner. Instead, it would mean that he lacked authority to treat the prisoner in this manner.[213]

Justice Souter's concurrence in *Hamdi* appears to confuse this distinction between international law rules that are conditions precedent for the exercise of authorized powers, and those that are not. Justice Souter argued that the government could not rely on the international laws of war to detain Hamdi because it had not acted consistently with the international laws of war in its military campaign against the Taliban. In particular, Justice Souter argued that Taliban combatants appeared to qualify under the Third Geneva Convention for prisoner-of-war status, but that the government had declined to accord them this status and had also declined to conduct status hearings before a "competent tribunal" that, Justice Souter maintained, are required by the Third Geneva Convention and military regulations.[214] As a result, said Justice Souter, the government could not claim the authority to

---

[210] In situations governed by the Fourth Geneva Convention, non-combatants may be interned "only if the security of the Detaining Power makes it absolutely necessary." Fourth Geneva Convention, *supra* note 52, art. 42, 6 U.S.T. at 3544, 75 U.N.T.S. at 314. Such interned persons, like enemy combatants, are to be released "as soon as possible after the close of hostilities." *Id.* art. 133, 6 U.S.T. at 3608, 75 U.N.T.S. at 378. Even before the close of hostilities, however, an interned person must be released "as soon as the reasons which necessitated his internment no longer exist." *Id.* art. 132, 6 U.S.T. at 3606–08, 75 U.N.T.S. at 376–78.

[211] *See* Third Geneva Convention, *supra* note 25, arts. 28, 60, 72, 6 U.S.T. at 3340, 3362, 3372, 75 U.N.T.S. at 158, 180, 190.

[212] *Id.* art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

[213] *Cf.* Khalid v. Bush, Nos. CIV.1:04-1142, CIV.1:04-1166, 2005 WL 100924, at *9 (D.D.C. Jan. 19, 2005) (reasoning that even if conditions of detention violated U.S. law, that would not render the detention itself unlawful).

[214] *See Hamdi*, 124 S. Ct. at 2657–59 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

detain Hamdi pursuant to the laws of war because it had "not made out its claim that in detaining Hamdi in the manner described, it [was] acting in accord with the laws of war."[215]

Justice Souter did not contend that the government had violated international law in determining that Hamdi was a combatant rather than a non-combatant. His argument, rather, was simply that the government may have been violating international law by not treating Hamdi as a prisoner of war. However, both lawful combatants who qualify for prisoner-of-war status and unlawful combatants who do not can, under the laws of war, be detained until the end of hostilities.[216] As a result, Congress should be understood as authorizing Hamdi's detention as long as he fell into *either one* of those categories. If the President incorrectly classified Hamdi as an unlawful combatant rather than as a prisoner of war, that would simply mean that Hamdi's *treatment* was not statutorily authorized, not that Hamdi's detention was unauthorized.[217]

3. The Laws of War as a Prohibition on Presidential Action. — We have thus far explained how the international laws of war can inform the types of authority that the AUMF confers on the President and the boundaries of that conferred authority. We now consider whether the AUMF should be read as affirmatively prohibiting presidential actions that violate the laws of war as embodied in treaties or customary international law.[218] If the AUMF did have this prohibitory effect, it would mean that presidential actions that violated the international laws of war would fall within Justice Jackson's lowest category of presidential power, since the President would be acting contrary to the expressed will of Congress in the AUMF. By contrast, if the AUMF simply failed to authorize presidential violations of international law, then such violations would, at least with respect to the AUMF, fall

---

[215] *Id.* at 2659. For a similar argument, see Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. (forthcoming 2005) (manuscript at 39–77, on file with the Harvard Law School Library).

[216] *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 31 (1942); DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 179, at 30–32.

[217] Justice Souter appears to have based his argument on the failure of the government to give prisoner-of-war protections to Hamdi. One could make the different argument that the government was also violating international law by failing to follow the correct procedures for determining whether Hamdi was an innocent civilian and thus not subject to detention at all. If international law regulates that procedural issue (and it is not clear that it does from the text of the relevant article in the Third Geneva Convention, Article 5), and the government was violating it, then this type of departure from international law might well affect the government's power to detain under a law-of-war rationale, since it would be a condition of the power to detain.

[218] *Cf.* Jules Lobel, *International Law Constraints*, *in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 107, 109 (Gary M. Stern & Morton H. Halperin eds., 1994) (arguing that "Congress intends to maintain the rules of international law . . . absent express, intentional derogation").

within Justice Jackson's intermediate category, in which the President enjoys substantial authority.[219]

We do not think that the AUMF plausibly can be read as a prohibition on presidential actions that violate international law.[220] The AUMF is a broadly worded authorizing statute; it does not purport to prohibit the President from doing anything, much less from violating the laws of war. There may be international law-related restrictions on presidential action during wartime that come from the Constitution, statutes, treaties, or customary international law,[221] but the AUMF does not itself incorporate these restrictions. Although the laws of war inform the boundaries of what the AUMF authorizes, that simply means that as a general matter the AUMF authorizes no more than what the laws of war permit, not that it incorporates law-of-war prohibitions.

Nor does the *Charming Betsy*[222] canon suggest that the AUMF should be read as having such a prohibitory effect.[223] Under this canon, courts will attempt to construe statutes, when reasonably possible, so that the statutes do not violate international law.[224] The *Charming Betsy* canon is most often invoked as a justification for limiting the extraterritorial application of U.S. laws in ways that would

---

[219] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[220] Some commentators have argued that the President's Article II Commander-in-Chief authority is limited by the evolving international laws of war. *See, e.g.*, Golove, *supra* note 193, at 364, 374–78; Lobel, *supra* note 218, at 108–12. Although this is not the place for a comprehensive response to this claim, we are skeptical of it. The Supreme Court has never invalidated presidential action on the ground that the action violated the laws of war. Many of the precedents cited in support of the claim that the laws of war limit the President's Article II Commander-in-Chief power are not framed in terms of limitation, but rather simply state that the President may do everything permitted by the laws of war. Some decisions do talk (in dissents or dicta) about international law as a limitation, but these statements appear to refer to international law as a limitation on the *United States*, not the President, even though it is settled that the United States has the domestic authority to violate international law. *See* The Chinese Exclusion Case, 130 U.S. 581, 600, 602–03 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888). Moreover, the laws of war are along most dimensions much more restrictive now than they were in the late 1700s when the Constitution was drafted and ratified. If the Commander in Chief Clause itself incorporates evolving law-of-war restrictions, the scope of the Commander-in-Chief power would have shrunk significantly during the past two centuries, which is contrary to constitutional history.

[221] *See, e.g.*, 18 U.S.C.A. § 2441 (West Supp. 2004) (criminalizing certain war crimes derived from international law); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866) (holding that the Constitution prohibits the President from trying non-combatants by military commission when civilian courts are open and available).

[222] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

[223] *But see* Lobel, *supra* note 218, at 109 (arguing that presidential violations of international law are contrary to the implied will of Congress and thus within Justice Jackson's lowest category of presidential power).

[224] *See Charming Betsy*, 6 U.S. (2 Cranch) at 118; RESTATEMENT, *supra* note 180, § 114.

arguably violate international law norms of prescriptive jurisdiction.[225] There is a significant question whether the canon applies in the very different context of a grant of discretionary enforcement authority to the President,[226] especially when the grant of discretionary enforcement authority, like the AUMF, overlaps with the President's independent constitutional powers.[227]

Assuming that the canon does apply in this context, it would not follow that the AUMF should be read to prohibit violations of international law. The canon simply requires that ambiguous statutes be con-

---

[225] *See, e.g.*, F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2366 (2004); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–16 (1993) (Scalia, J., dissenting); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1963).

[226] A central purpose of the canon is to avoid having judges, who are politically unaccountable and inexpert in foreign affairs, erroneously place the United States in violation of international law through their construction of a statute. *See generally* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 524–29 (1998). Even if courts construe an authorizing statute like the AUMF to permit the President to violate international law, however, they would not be placing the United States in violation of international law. Rather, such a violation would occur, if at all, only after the Executive Branch, which is both politically accountable and expert in foreign relations, made an independent judgment to exercise the authority conferred by Congress in a way that violated international law. *Cf.* United States v. Corey, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000) ("These concerns [underlying the *Charming Betsy* canon] are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch of our government. When construing a statute with potential foreign policy implications, we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States."); Auth. of the Fed. Bureau of Investigation To Override Int'l Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163, 172 (1989) (concluding that the *Charming Betsy* canon was not applicable to "broad authorizing statutes 'carrying into Execution' core Executive powers" (quoting U.S. CONST. art. I, § 8, cl. 18)).

[227] Consider, for example, the *Paquete Habana* decision, which concerned the seizure by the U.S. Navy of coastal fishing vessels during the Spanish-American War. *See* The Paquete Habana, 175 U.S. 677 (1900). The Supreme Court held that the seizure of the vessels violated customary international law (referred to at that time as part of the "law of nations"), and it ordered that the proceeds from the sales of the vessels and their cargo be restored to the owners. *See id.* at 714. The Court also stated, however, that it would apply customary international law only in the absence of a "controlling *executive* or legislative act." *Id.* at 700 (emphasis added); *see also id.* at 708 ("This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty *or other public act* of their own government in relation to the matter." (emphasis added)). The Court nowhere suggested that the declaration of war or authorization of force in the Spanish-American War should be construed to disallow the President from deciding whether to violate customary international law. Professor Golove maintains that the Court's statement that it would apply customary international law in the absence of a "controlling executive act" simply meant that it would apply customary international law even if there was no Executive act incorporating that law. *See* Golove, *supra* note 193, at 391–92. This interpretation ignores the fact that, as the Court itself emphasized, the President had issued orders requiring compliance with the customary laws of war, *see The Paquete Habana*, 175 U.S. at 712, and hence there *was* a controlling Executive act that would have supported application of the customary principle applied by the Court. The Court therefore must have been saying that there was no controlling Executive act *barring* the application of the customary international law rule.

strued not to violate international law. At most, then, application of the canon to the AUMF would yield the interpretation that the AUMF does not authorize the President to violate international law. It would not yield the quite different interpretation that the AUMF affirmatively prohibits the President from violating international law. To put the point differently, nothing in international law, or in the *Charming Betsy* canon, requires that Congress affirmatively prohibit the President from violating international law when authorizing the use of force. The allocation between the domestic legislature and the Executive of domestic authority to comply with or violate international law is not an issue addressed by international law.[228] Again, Congress or the treaty-makers (the President and the Senate together) might well impose independent prohibitions on presidential action in wartime that are related to international law.[229] The AUMF, however, is not such an enactment.

The primary significance of the distinction between interpreting the AUMF not to authorize violations of international law, and interpreting it affirmatively to prohibit violations of international law, concerns customary international law. Under domestic constitutional law, the President probably has a duty to comply with at least self-executing treaties, on the ground that they are part of the "laws" that he must faithfully execute under Article II.[230] As a result, law-of-war treaties can bind the President independent of the AUMF. By contrast, there is a strong argument that the President has the domestic constitutional authority to violate customary international law.[231] If so, then the issue of whether the AUMF incorporates the prohibitions of the customary international laws of war becomes important. If the AUMF does not incorporate these prohibitions, presidential actions in violation of them would fall within the second of Justice Jackson's three categories, in which the President would retain his preexisting authority to violate customary international law. But if the AUMF affirmatively prohibits the President from violating the customary international laws of war,

---

228 *Cf.* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW 159 (4th ed. 2001) ("The obligation to respect and give effect to international law is upon the state, not upon any particular branch, institution, or member of its government . . . ."); Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001) ("Because international law is silent on the grant of federal court jurisdiction at issue, we interpret the [Foreign Sovereign Immunities Act] without reference to the *Charming Betsy* canon.").

229 *See* HENKIN, *supra* note 6, at 67–70.

230 *See* U.S. CONST. art. II, § 3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 123–24 (2004).

231 *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1446, 1453–55 (11th Cir. 1986) (relying on, among other sources, *The Paquete Habana*, 175 U.S. at 700); RESTATEMENT, *supra* note 180, § 115 reporters' note 3. *But see, e.g.*, Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1116–20 (1985).

the President's actions in violation of such law would fall within the lowest of the three categories and would be valid only if they involved an area of exclusive presidential authority.

C. *The President's Independent Constitutional Authority*

The AUMF is a congressional authorization for the President to act in a context — a military response to an attack on the United States — in which he possesses independent constitutional authority under Article II.[232] In such a context, nondelegation concerns are less significant, so the authorization need not be as precise as would be required in the absence of concurrent presidential authority.[233]

A good illustration of this point is the Supreme Court's decision in *Loving v. United States*.[234] The issue in *Loving* was whether the general authority conferred on the President by the Uniform Code of Military Justice (UCMJ) to prescribe court martial punishments entailed authority to prescribe aggravating factors in the death penalty sentencing phase of court martial proceedings.[235] Loving argued that reading the UCMJ to provide such authority would violate the nondelegation doctrine because the UCMJ did not provide "an intelligible principle to guide the President's discretion."[236] In rejecting this argument, the Court noted that the delegation of authority "was to the President in his role as Commander in Chief."[237] While it is arguable, said the Court, that "more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in the area," in this case "[t]he delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the dele-

---

[232] *See supra* note 160 and accompanying text; *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States . . . .").

[233] *Cf.* Lichter v. United States, 334 U.S. 742, 778–79 (1948) ("*A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.* — This power is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war power by Congress.").

[234] 517 U.S. 748 (1996).

[235] The statutes in question were 10 U.S.C. § 856, which provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense," and 10 U.S.C. § 818, which provides that a court martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by [the UCMJ]." *See Loving*, 517 U.S. at 769.

[236] *Loving*, 517 U.S. at 759.

[237] *Id.* at 772.

gated authority itself possesses independent authority over the subject matter.'"[238]

The analysis in *Loving* echoes the principle — dating back at least to *Curtiss-Wright* — that the nondelegation doctrine has less force in areas touching on the foreign relations powers of the President, especially his war powers.[239] The passport decisions, discussed above, also support this conclusion. In *Kent v. Dulles*, the Court addressed the petitioner's delegation concerns by citing a nondelegation decision and noting that, "if . . . power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."[240] Consistent with the principles outlined above, however, the Court in *Kent* made clear that it was "not compelled to equate this present problem of statutory construction *with problems that may arise under the war power*."[241]

The Court's decisions in *Zemel* and *Haig* confirmed what was suggested in *Kent*: nondelegation constraints do not play a significant role when the President acts pursuant to a foreign relations statute in an area in which he possesses independent constitutional authority. In *Zemel*, the Court relied on *Curtiss-Wright* to reject a nondelegation argument, noting that:

> [B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas.[242]

---

[238] *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975)); *see also Ex parte* Quirin, 317 U.S. 1, 28–30 (1942) (construing ambiguous references in the Articles of War to military commissions as congressional authorization for presidential use of such commissions); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 3 GREEN BAG 2D 249, 252–53 (2002) (analyzing this aspect of *Quirin*).

[239] In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936), the Supreme Court, in a famously expansive opinion, upheld Congress's delegation of authority to the President to impose an arms embargo with respect to certain warring countries. Many aspects of the Court's reasoning, including its description and use of constitutional history and its conception of presidential power, have been heavily criticized. *See, e.g.*, Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1 (1973). The holding in *Curtiss-Wright* concerning the limited applicability of the nondelegation doctrine in the foreign affairs context, however, is less controversial. *See, e.g.*, HENKIN, *supra* note 6, at 124 ("If . . . some parts of [Justice] Sutherland's essay [in *Curtiss-Wright*] are not compelling, one might nonetheless find sufficient reasons for the Court's conclusion about delegation in the realities of the foreign affairs process." (footnote omitted)).

[240] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[241] *Id.* at 128 (emphasis added). The Court also distinguished *Korematsu v. United States*, 323 U.S. 214 (1944), in part on the ground that it was a wartime decision. *See Kent*, 357 U.S. at 128.

[242] Zemel v. Rusk, 381 U.S. 1, 17 (1965). The Court made clear that Congress could not, even in the area of foreign affairs, "grant the Executive totally unrestricted freedom of choice," and it emphasized that historical context could inform the meaning of general congressional authorizations. *Id.* at 17–18. Despite this caveat, *Zemel* clearly stands for the proposition that delegation

Haig relied on this passage in *Zemel*, and on *Curtiss-Wright*, in concluding that the President had statutory authority to revoke the passport in question.[243]

A number of Supreme Court decisions since the passport trilogy have broadly construed congressional authorizations to the President on the basis of similar delegation considerations. *Dames & Moore v. Regan*, discussed above, demonstrates how these delegation principles intersect with Executive Branch practice to inform the authorized basis for presidential action. In relying on Executive Branch practice in its determination that Congress had implicitly accepted a presidential authority to suspend claims, the Court in *Dames & Moore* noted that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act."[244] Similarly, in *Regan v. Wald*[245] the Court relied on *Curtiss-Wright*, *Zemel*, and *Haig* to construe broadly, in the face of a due process challenge, the President's authority to restrict travel to Cuba.[246]

The plurality in *Hamdi* did not rely explicitly on these delegation principles. These principles nevertheless help explain the plurality's broad construction of the AUMF and, relatedly, why it did not require a tight fit between the language of the AUMF (authorizing force) and the particular incident of war (detaining enemy combatants) exercised by the President.

D. Clear Statement Requirements

Thus far we have outlined three factors — Executive Branch practice, the international laws of war, and concurrent authority of the President — that, along with the usual tools of statutory interpretation, inform the meaning of the AUMF. We now consider whether and when courts should impose a clear statement requirement in construing the AUMF. If such a requirement were imposed, it would mean that courts would not interpret the AUMF to authorize a particular

---

concerns are less serious when Congress authorizes the President to act in foreign relations contexts than when it authorizes him to act in purely domestic contexts. *See* ELY, *supra* note 28, at 24.

243 Haig v. Agee, 453 U.S. 290, 291–92 (1981).

244 Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

245 468 U.S. 222 (1984).

246 *Id.* at 243. The Supreme Court's later-in-time and quite different delegation analysis in *Zemel* and *Haig* of the passport statute at issue in *Kent*, combined with the Court's subsequent reaffirmation of the *Zemel-Haig* analysis in *Dames & Moore* and *Wald*, suggest that the delegation analysis in *Kent* is no longer valid. In addition, the Supreme Court's post-*Kent* conclusion that *Chevron* deference can apply when an agency has changed its position, *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156–57 (2000), calls into question *Kent*'s analysis of the significance of changing Executive Branch practice.

presidential action absent a clear statutory indication that Congress intended to authorize the action.[247] Several commentators have argued that courts should impose such a requirement in various contexts related to the AUMF — for example, by interpreting the AUMF not to permit the detention of U.S. citizens in the absence of a clear statement.[248]

The Supreme Court's decision in *Kent v. Dulles* is, once again, a useful starting point for analysis. The 1926 passport statute at issue there authorized the President to withhold passports for any reason.[249] Because of the absence of a clearer and more specific statement from Congress, however, the Court in *Kent* declined to read this authorization to include the power to withhold passports on grounds of political affiliation.[250] In addition to the Court's reliance on historical practice to draw conclusions about legislative intent,[251] the Court cited two constitutional values that would be served by a clear statement requirement. First, the Court sought to avoid construing the statute in question as "restricting the citizens' right of free movement" unless Congress provided for the restriction "in explicit terms."[252] Second, the Court, citing one of the two Supreme Court decisions that invalidated a federal statute on nondelegation grounds,[253] noted that it "hesitate[d] to find in this broad generalized power [over passports] an authority to trench so heavily on the rights of the citizen," and thus would "construe narrowly all delegated powers that curtail or dilute" fundamental rights.[254]

Notwithstanding *Kent*, it is difficult to justify the application of a clear statement requirement that is premised on delegation concerns in the context of the AUMF. As discussed above, in its decisions after *Kent*, the Supreme Court construed the general passport statute as conveying broad discretionary authority to the Secretary of State and, relying on *Curtiss-Wright*, made clear that delegation concerns are less significant when statutes concern foreign affairs than when they con-

---

[247] *See generally* WILLIAM ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION 851 (3d ed. 2001).

[248] *See, e.g.*, Cass R. Sunstein, *Minimalism at War*, 2005 SUP. CT. REV. (forthcoming) (manuscript at 48–49), *available at* http://ssrn.com/abstract_id=629285; *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2655 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[249] *See supra* pp. 2086–87.

[250] *See* Kent v. Dulles, 357 U.S. 116, 130 (1958).

[251] *See supra* p. 2087.

[252] *Kent*, 357 U.S. at 130; *see also id.* at 129 (noting that because the right of American citizens to travel was a fundamental right, the Court would "not readily infer that Congress" gave the Secretary of State "unbridled discretion to grant or withhold [it]").

[253] Pan. Ref. Co. v. Ryan, 293 U.S. 388, 420–30 (1935).

[254] *Kent*, 357 U.S. at 129.

cern domestic affairs.[255] A clear statement requirement premised on delegation concerns makes even less sense in the context of the AUMF in light of the Court's insistence in numerous decisions that delegation concerns are attenuated, not heightened, with respect to authorization statutes that implicate concurrent presidential power related to wartime.[256] Moreover, the functional arguments for allowing broad delegations, such as the need for flexibility in responding to changing conditions, are particularly strong in the context of war.

A clear statement requirement to protect individual liberties is potentially more relevant to the AUMF.[257] Here there are two major issues. The first arises in identifying the relevant liberty interest to be protected. Not every potential liberty intrusion during war warrants protection through a clear statement requirement. For example, Congress need not state clearly, beyond the general authorization to use force, that the President is authorized to drop bombs on members of the enemy armed forces on the battlefield abroad, even if they happen to be U.S. citizens. This is so because individuals who serve in enemy armed forces have no pertinent constitutional right in that situation, and thus there is no constitutional value for a clear statement requirement to protect.[258] The second issue is how to reconcile the idea of a liberty-protecting clear statement requirement with the constitutionally inspired canon that congressional delegations in areas of concurrent presidential authority are to be construed broadly.[259]

Three World War II-era decisions provide guidance on these issues. In *Ex parte Endo*,[260] the Court concluded that Congress had not authorized the President to detain concededly loyal U.S. citizens of Japanese heritage during World War II.[261] Invoking the canon of constitu-

---

[255] *See supra* pp. 2101–02.

[256] *See supra* p. 2102.

[257] For arguments to this effect in the context of the war on terrorism, see Sunstein, *supra* note 248.

[258] Similarly, it is inappropriate to demand a clear statement before the President can occupy, and institute an occupation government in, a foreign territory that satisfies the nexus requirement of the relevant authorization of force. Presidents occupied Germany and Japan in World War II, and Iraq in 2003, pursuant to general congressional authorizations of force. *See also* Cross v. Harrison, 57 U.S. (16 How.) 164, 190, 193 (1853) (upholding the validity of the occupation of California in the Mexican-American War despite the absence of specific congressional authorization beyond the general authorization for the war itself). This is reasonable because occupation is a traditional component of the Commander-in-Chief power that is permitted by the laws of war, and persons adversely affected by occupation generally lack a constitutionally protected liberty interest.

[259] *See supra* pp. 2100–02 (discussing *Loving*, *Curtiss-Wright*, *Kent*, *Zemel*, *Haig*, and *Dames & Moore*); *cf.* Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[260] 323 U.S. 283 (1944).

[261] *Id.* at 302–03.

tional avoidance, the Court noted that, "[i]n interpreting a wartime measure," the Court "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[262] In *Duncan v. Kahanamoku*,[263] the Court arguably imposed a clear statement requirement in declining to interpret the Hawaii Organic Act's ambiguous provisions as authorizing the trial of civilians by military commission.[264] By contrast, in *Ex parte Quirin*, the Court did not demand a clear statement before concluding that the U.S. citizen enemy combatant in that case could be subject to a military commission trial in the United States even though neither the authorization to use force nor the authorization for military commissions specifically mentioned U.S. citizens.[265]

These decisions suggest which liberty interests should be protected through a clear statement requirement, and how the requirement in this context should be harmonized with the principle that congressional authorization related to war should be construed broadly. The Court in *Duncan* and *Endo* emphasized that the presidential actions in question were unsupported by historical practice in other wars and implicated the constitutional rights of U.S. citizen *non-combatants*.[266] In this context, where the liberty interest to be protected is at its height, and the President's Commander-in-Chief prerogative is diminished because he is acting against a non-combatant, the canon protecting constitutional liberties prevails. This logic for the application of a clear statement requirement would not apply, however, when — as in the bombing example above — the presidential action involves a traditional wartime function exercised by the President against an acknowledged enemy combatant or enemy nation. In this context, a broad construction of Congress's delegation is appropriate because the President's Article II powers are at their height, and the relevant liberty interests (and thus the need for a liberty-protecting clear statement requirement) are reduced (or nonexistent). These considerations explain why the Court in *Quirin* did not demand a clear statement and why the Court in *Duncan* emphasized that, although it read the Hawaii martial law statute narrowly as applied to civilian non-combatants, it

---

262 *Id.* at 300.

263 327 U.S. 304 (1946).

264 *See id.* at 324. For a discussion of these two cases as examples of clear statement requirements, see Sunstein, *supra* note 248 (manuscript at 36–37).

265 *Ex parte* Quirin, 317 U.S. 1, 44 (1942).

266 *See Duncan*, 327 U.S. at 310; *Endo*, 323 U.S. at 302.

was not addressing "the well-established power of the military to exercise jurisdiction over . . . *enemy belligerents*."[267]

This analysis suggests that, in construing the AUMF, a clear statement requirement is appropriate when the President acts against *non-combatants* in the United States, but not when he engages in traditional military functions against *combatants*.[268] The plurality's rejection in *Hamdi* of the petitioner's argument based on 18 U.S.C. § 4001(a) is consistent with this conclusion. The petitioner argued, and Justice Souter agreed, that the prohibition in § 4001(a) of detention of U.S. citizens "except pursuant to an Act of Congress" required a clear congressional statement that was not satisfied by the AUMF.[269] The plurality, by contrast, relied on the historical practice of detaining enemy combatants (including U.S. citizens) and the international laws of war analysis outlined above in its determination that the AUMF, an "explicit congressional authorization" to detain individuals in Hamdi's position, satisfied § 4001(a).[270] One could read the plurality either as rejecting a clear statement requirement in this context, or as accepting only a weak version of such a requirement that could be satisfied by background interpretive factors rather than specific text. Either way, the analysis in *Hamdi* is consistent with the general point made above that when the President takes military action against enemy combatants pursuant to a general and unqualified congressional authorization to use force, courts should not require more specific evidence of congressional approval.[271]

---

[267] *Duncan*, 327 U.S. at 313 (emphasis added). This same distinction — between traditional presidential powers exercised against enemy combatants, and non-traditional ones exercised against non-combatants — also explains the different outcomes in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the Court invalidated the use of a military commission with respect to a non-combatant U.S. citizen, and *Quirin*, in which the Court upheld the use of a military commission with respect to a U.S. citizen who was an enemy combatant. *See Quirin*, 317 U.S. at 46, 48; *Milligan*, 71 U.S. (4 Wall.) at 130–31. The Court in *Quirin* distinguished *Milligan* precisely on the ground that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent." *Quirin*, 317 U.S. at 45.

[268] This conclusion assumes away the difficulties associated with determining someone's status as a combatant or non-combatant. We address those difficulties below in section V.A.2, pp. 2113–16.

[269] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2655 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); Brief for Petitioners at 44–47, *Hamdi* (No. 03-6696), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/156/Brief_Petitioners.pdf.

[270] *See Hamdi*, 124 S. Ct. at 2639–40 (plurality opinion).

[271] Although the plurality did not reach the issue, we doubt that § 4001(a) was intended to address the military detention of enemy combatants. The legislative history of § 4001(a) contains statements expressing disapproval of the internment of Japanese Americans during World War II, *see, e.g.*, H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435–36, but that internment was controversial precisely because the individuals in question were *not* enemy combatants. In his concurrence in *Hamdi*, Justice Souter relied on the Japanese American internment decision, *Ex parte Endo*, in support of his argument that a clear statement requirement

V. APPLICATIONS TO THE WAR ON TERRORISM

Under our framework for interpreting the AUMF, courts should look to its text (including its September 11 nexus requirement), prior Executive Branch practice during wartime, the types of actions that are permitted under the international laws of war, and any conditions that international law places on such actions. In addition, a clear statement requirement is appropriate when the President acts to restrict the liberties of non-combatants in the United States, but not when he engages in traditional military functions that restrict the liberty of combatants.

In this Part, we apply this framework to three important and difficult issues in the war on terrorism: the identification of the terrorist enemy, the detention of such enemies when found in the United States, and the validity of military commissions. Interpreting the AUMF does not resolve all aspects of these issues. The analysis that follows therefore leaves room for, among other things, Executive Branch discretion, congressional fine-tuning, and judicial determination of questions of process, constitutional interpretation, and the precise level of deference to be accorded the Executive.

A. Who Is the Enemy Under the AUMF?

The AUMF authorizes the President to use 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."[272] Which nations, organizations, and persons are encompassed by this authorization? The reference to "nations" is similar to authorizations in inter-

---

was appropriate with respect to the detention of U.S. citizens in wartime. *See Hamdi*, 124 S. Ct. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). As noted above, however, *Endo* involved a loyal U.S. citizen detained by civilian authorities, and the Court expressly distinguished the *Quirin* decision (which involved the trial of enemy combatants by military commission) on this ground. *See Endo*, 323 U.S. at 297–98. By contrast, U.S. military authorities uncontroversially detained hundreds of thousands of enemy combatants in the United States during World War II, some of whom were American. *See* ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA 3 (1979); U.S. Army Prisoner of War Info. Bureau, American Nationals Detained in the Custody of the United States Armed Forces During World War II (1956) (contained in Box 56, Prisoner of War Rosters, 1954–1957, Prisoner of War Division, Records of the Provost Marshal General, 1941–, Record Group 389, National Archives and Records Administration; on file with the Harvard Law School Library) (listing more than twenty American nationals detained as prisoners of war by U.S. armed forces in the United States during World War II); *see also In re* Territo, 156 F.2d 142, 144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America.").

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

state conflicts and raises few conceptual questions.[273] Similarly, the reference to "persons," although somewhat unusual,[274] is relatively straightforward. If an individual was involved in the September 11 attacks, or harbored someone who was, he is covered as a "person" under the AUMF. If an individual had no connection to the September 11 attacks, then he is not covered as a "person" under the AUMF even if he subsequently decides to commit terrorist acts against the United States.

The authorization to use force against "organizations," by contrast, raises complex conceptual questions because the contours of an "organization" are much less settled than the contours of a "nation" or a "person." In what follows, we address two questions related to the term "organization." First, which organizations are covered by the AUMF? Second, what kind of affiliation with a covered organization must an individual have in order to fall within the scope of the AUMF? Answers to these and related questions can affect the legal basis for many of the President's actions in the war against terrorism. Consider the Department of Defense's order establishing Combatant Status Review Tribunals for the detainees at Guantánamo Bay, which defines an enemy combatant as "an individual who was part of *or supporting* Taliban or al Qaeda forces, *or associated forces* that are engaged in hostilities against the United States or its coalition partners."[275] Which parts of this definition are supported by the AUMF? More specifically, which forces "associated" with al Qaeda, if any, are included within the scope of the AUMF, and what kind of "support" must an individual give to al Qaeda in order to be included within the AUMF?[276]

---

[273] This aspect of the authorization may implicate factual questions, however, about which nations had the requisite September 11 nexus. The President uncontroversially determined that the Taliban government in Afghanistan had this nexus. But what about other nations, such as Sudan and Iraq? Sudan harbored and supported Osama bin Laden in the 1990s, and President Clinton authorized missile strikes against Sudan for that reason. *See* 9/11 COMMISSION REPORT, *supra* note 79, at 116–18. As for Iraq, the 9/11 Commission Report documented contacts between al Qaeda and the government of Iraq before September 11, *see id.* at 66, but it concluded that these contacts never "developed into a collaborative operational relationship," *id.*, and it is unclear why Congress would have enacted, and the President would have sought, the 2002 authorization for the use of force in Iraq if they believed that the September 18, 2001 AUMF already included Iraq within its scope.

[274] *But cf. supra* pp. 2066–67 (discussing authorizations to use force against private entities).

[275] Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy 1 (July 7, 2004) (emphasis added), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[276] Similar questions arise with respect to the President's November 13, 2001 Military Order, which authorizes the detention and trial not only of al Qaeda members, but also much more broadly of persons whom the President determines "engaged in, aided or abetted, or conspired to commit, acts of international terrorism" against the United States and its interests. Military Order, *supra* note 95, § 2(a)(1)(ii), 3 C.F.R. at 919.

1. Which Terrorist Organizations Are Covered by the AUMF? — The AUMF obviously applies to the terrorist organization known as al Qaeda, since this organization was directly responsible for the September 11 attacks. This means that Congress has authorized the President to use force against all members of al Qaeda, including members who had nothing to do with the September 11 attacks and even new members who joined al Qaeda after September 11. Such members are not, as we explained above, covered by the AUMF in their individual capacities as "persons" because they had no nexus to the September 11 attacks. Nevertheless, they come within the terms of the AUMF because they are part of an "organization" that is covered by it.[277]

By its terms, the AUMF also applies to organizations that aided al Qaeda in relation to the September 11 attacks or harbored its members. To what extent does it apply to terrorist organizations that are affiliated with al Qaeda in its conflict with the United States, but that did not aid al Qaeda in the September 11 attacks or harbor its members? This class of organizations forms a key component of the war on terrorism, in part because of changes in al Qaeda since September 11. Before September 11, al Qaeda was a relatively hierarchical and centralized, though geographically dispersed, organization that operated through cells — "small, autonomous clusters of al Qaeda operatives that may be either dormant or active"[278] — around the globe. Since September 11, al Qaeda has become the leader of a more loosely connected, global movement of Islamic terrorism against the United States and other nations.[279] Today al Qaeda acts less through its own cells than through a confederacy of affiliated terrorist organizations around the world that it inspires, leads, and supports.[280] Often, the line be-

---

[277] We analyze below the connection that a person must have to al Qaeda to be considered part of that organization for purposes of the AUMF. *See infra* section V.A.2, pp. 2113–16.

[278] JONATHAN SCHANZER, AL-QAEDA'S ARMIES: MIDDLE EAST AFFILIATE GROUPS AND THE NEXT GENERATION OF TERROR 22–23 (2004).

[279] *See Current and Projected National Security Threats to the United States: Hearing Before the Senate Select Comm. on Intelligence*, 108th Cong. 1 (2004) (statement of George Tenet, Director of Central Intelligence, Cent. Intelligence Agency), *available at* http://intelligence.senate.gov/0402hrg/040224/tenet.pdf; SCHANZER, *supra* note 278, at 21–30; Douglas Frantz et al., *Al Qaeda Seen as Wider Threat*, L.A. TIMES, Sept. 26, 2004, at A1. To be sure, prior to September 11, al Qaeda trained thousands of jihadist fighters, and bin Laden viewed himself as the "head of an international jihad confederation" whose connections dated back to the mujahideen resistance to the Soviet Union in Afghanistan. *See* 9/11 COMMISSION REPORT, *supra* note 79, at 55–56, 58, 67. The point is that, prior to September 11, al Qaeda more sharply distinguished itself and its terror activities from other organizations and their terror activities, while today it is an al Qaeda-inspired and supported confederation, rather than al Qaeda alone, that threatens the United States.

[280] In addition to the sources in the previous footnote, see PETER L. BERGEN, HOLY WAR, INC. 195–220 (2001); ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 95 (2003); Rohan Gunaratna, *The Post-Madrid Face of Al Qaeda*, WASH. Q., Summer

tween al Qaeda and these affiliated terrorist organizations is unclear. For example, Jemaah Islamiya, a Southeast Asian terrorist network that has attacked or threatened to attack U.S. interests, was until recently led by Riduan bin Isomoddin, the now-captured al Qaeda Southeast Asia operations chief.[281]

At first glance, it might appear that the AUMF does not extend to al Qaeda affiliate organizations that did not have a role in the September 11 attacks or in harboring those that committed the attacks. Just as an individual can become part of a covered "organization" by joining it after the September 11 attacks, however, so too can a group of individuals. While a terrorist organization that did not harbor al Qaeda or aid it in the September 11 attacks is not, merely by virtue of its status as a terrorist organization, covered by the AUMF, a terrorist organization that joins al Qaeda in its conflict with the United States, even after September 11, can be viewed as part of the "organization" against which Congress authorized force. This conclusion is consistent with dictionary definitions of the term "organization," most of which emphasize that the term means two or more persons or elements acting with a common purpose.[282] It is also consistent with Congress's definitions of "terrorist organization" in other statutes, all of which conceptualize terrorist organizations in broad, functional terms.[283]

There is no contrary textual basis to justify limiting the organizations covered by the AUMF to their lowest level of organizational abstraction based on formal criteria such as the name or structure of a particular group as of September 11. Indeed, the fact that Congress

---

2004, at 91, 93; and James Risen, *Evolving Nature of Al Qaeda Is Misunderstood, Critic Says*, N.Y. TIMES, Nov. 8, 2004, at A18.

281 *See* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 app. B at 123–24, *available at* http://www.state.gov/s/ct/rls/pgtrpt/2003/c12153.htm.

282 *See* BLACK'S LAW DICTIONARY 1133 (8th ed. 2004) (defining "organization" as "[a] body of persons . . . formed for a common purpose"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1239 (4th ed. 2000) (defining "organization" as "[s]omething made up of elements with varied functions that contribute to the whole and to collective functions," or a "structure through which individuals cooperate systematically to conduct business"); *cf.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1590 (2002) (defining "organization" to mean "a group of people that has a more or less constant membership, a body of officers, a purpose, and usu. a set of regulations" and "a state or manner of being organized : organic structure : purposive systematic arrangement").

283 *See* 8 U.S.C.A. § 1182(a)(3)(B)(vi)(III) (West Supp. 2004) (defining "terrorist organization" to mean, among other things, "a group of two or more individuals, whether organized or not, which engages in" various described terrorist activities); 18 U.S.C. § 2339B(g)(6) (2000) (defining "terrorist organization" to mean, by reference to 8 U.S.C. § 1189(a), a foreign organization that engages in terrorist activity (as defined in 8 U.S.C. § 1182(a)(3)(B)) or terrorism (as defined in 22 U.S.C. § 2656f(d)(2)), "or retains the capability and intent to engage in terrorist activity or terrorism," in ways that threaten "the security of United States nationals or the national security of the United States"); 22 U.S.C. § 2656f(d)(3) (2000) (defining the term "terrorist group" to mean "any group practicing, or which has significant subgroups which practice, international terrorism").

authorized the use of force against "organizations" rather than "al Qaeda" suggests the contrary. So too does the "purpose" clause of the AUMF, in which Congress stated that the AUMF's purpose was to "prevent any *future acts* of international terrorism against the United States by such nations, organizations or persons."[284] This clause suggests that the AUMF should not be read narrowly to exclude groups that, in organizational conjunction with the entities responsible for the September 11 attacks, threaten future attacks on the United States.

Standard delegation principles further support this conclusion. As we have discussed, at least in those situations where constitutionally protected liberty interests do not mandate a clear statement requirement, delegations in the war context should be construed broadly to give the President flexibility to achieve the purposes for which the delegation was made.[285] Interpreting the term "organization" to include only groups that at the lowest possible level of abstraction were responsible for the September 11 attacks would be contrary to this principle and would permit the perpetrators of the September 11 attacks to take themselves outside the ambit of the AUMF through the simple mechanisms of changing organizational names or rearranging organizational structure.

Consistent with the standard view that wartime delegations to the President should be broadly construed, presidents in prior armed conflicts have exercised significant discretion in using force against entities other than those specifically named in the congressional authorization of force when those entities had a nexus to the named enemy.[286] A good example is the U.S. military operation in World War II against Vichy France. In World War II, Congress declared war and authorized force against Germany, Italy, Japan, Hungary, Bulgaria, and Romania.[287] As the war progressed, the Allies determined that Vichy France-controlled North Africa was a key strategic target in their plans to retake Europe and defeat Germany.[288] The Vichy France government had a loose alliance with Germany, was in various ways

---

[284] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added). Similarly, the AUMF's "whereas" clauses refer to the "threat to the national security and foreign policy of the United States posed by these grave acts of violence," and to the fact that "such acts *continue to pose* an unusual and extraordinary threat to the national security and foreign policy of the United States." Authorization for Use of Military Force (emphasis added).

[285] *See supra* section IV.D, pp. 2102–06.

[286] *See* CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 121–22 (photo. reprint 1970) (1921).

[287] *See supra* notes 56–58 and accompanying text.

[288] *See* KENNETH S. DAVIS, FDR: THE WAR PRESIDENT 1940–1943, at 592–93 (2000); GEORGE F. HOWE, UNITED STATES ARMY IN WORLD WAR II, THE MEDITERRANEAN THEATER OF OPERATIONS, NORTHWEST AFRICA: SEIZING THE INITIATIVE IN THE WEST 10–14 (1957).

under German influence, and engaged in several battles with the United States's ally, Great Britain.[289] Although France was not specifically included in the congressional war declaration or authorization, the United States and its allies attacked and defeated the military forces of Vichy France in French North Africa, without legal controversy.[290]

Nothing in the analysis thus far has indicated how close the affiliation between a terrorist group and al Qaeda must be in order to make the group part of the same "organization" as al Qaeda. Dictionary definitions of "organization" are not helpful in this regard. The international law concepts of neutrality and co-belligerency provide better guidance, and confirm that the "enemy" in an armed conflict can include the enemy's affiliates. A co-belligerent state is a "fully fledged belligerent fighting in association with one or more belligerent powers."[291] One way that a state can become a co-belligerent is through systematic or significant violations of its duties under the law of neutrality.[292] A neutral state's fundamental duties are nonparticipation in the conflict and impartiality toward belligerents.[293] Among other things, this means that the neutral state must not participate in acts of war by the belligerent, must not supply war materials to a belligerent, and must not permit belligerents to use its territory to move troops or munitions, or to establish wartime communication channels.[294] Under these law-of-war principles, a state is deemed to be in an armed con-

---

289 The Franco-German Armistice of June 22, 1940, divided France into two zones, one under German military occupation, and the other under a nominally sovereign France known as the Vichy regime. *See generally* ROBERT O. PAXTON, VICHY FRANCE: OLD GUARD AND NEW ORDER 1940–1944 (1982). On battles between the Vichy French and Great Britain, see *id.* at 56–57.

290 *See* GERALD ASTOR, THE GREATEST WAR: AMERICANS IN COMBAT 1941–1945, at 254–63 (1999); GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II 328, 431–47 (1994). Prior to the attack on Vichy French forces, President Roosevelt had controversially maintained diplomatic relations with Vichy France in the hopes of favorably influencing the regime. *See* DAVIS, *supra* note 288, at 52–53, 262.

291 MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 531 (1959).

292 *See* Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 179, at 485, 492–94. If a state violates its neutral duties in a nonsystematic way, the adversely affected belligerent state is permitted to take reprisals against the ostensibly neutral party, subject to the general rules of reprisals (including proportionality) and the limits of the U.N. Charter. *See id.*; *cf.* U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE para. 520 (1956) ("Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory."), *available at* http://www.osc.army.mil/others/gca/files/FM27-10.pdf.

293 Bothe, *supra* note 292, at 485.

294 Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654; *see also* GREENSPAN, *supra* note 291, at 536–39; GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 177–91 (6th ed. 1976); Bothe, *supra* note 292, at 496–97.

flict with a "neutral" state that systematically violates its neutral duties.

These principles provide a guide for determining which terrorist organizations are included within the AUMF. Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by al Qaeda in the war against the United States, are analogous to co-belligerents in a traditional war. Because the laws of war at a minimum would deem "neutrals" that systematically violate the laws of neutrality by supporting or assisting other terrorist organizations to be lawful military targets, the AUMF should — consistent with its text, with presidential practice in prior wars, and with standard delegation principles — extend to terrorist organizations that are functional co-belligerents of al Qaeda.

2. Requisite Association with Terrorist Organizations. — Members of terrorist organizations do not wear uniforms or other indicia of affiliation, and the organizations purposefully obscure their structure and members' roles, identity, and status. As a result, even after the terrorist organizations encompassed by the AUMF are identified, a second question arises concerning which individuals are included within such organizations. Osama bin Laden clearly is a member of al Qaeda. So too are persons who commit a terrorist act under the al Qaeda command structure. But what about an al Qaeda cell member who has instructions from the organization but has been living quietly in the United States for a decade? What about bin Laden's driver, who is currently contesting the legality of his trial before a military commission?[295] Or, as one judge queried at an oral argument in a case involving the legality of the enemy combatant detentions in Guantánamo Bay, what about "a little old lady in Switzerland" who contributed money to an organization that was "a front for al-Qaeda," even though she thought she was giving money to help Afghan orphans?[296]

The text of the AUMF provides little guidance on these issues. It does not define "organization," let alone describe what is required in order for an individual to be considered part of an organization. The distinction in the international laws of war between *combatants* and *non-combatants* is potentially more useful. The laws of war permit combatants to target other combatants, but prohibit them from target-

---

[295] *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004).

[296] Transcript of Motion to Dismiss Before the Honorable Joyce Hens Green at 25, Rasul v. Bush, No. 02-0299 (D.D.C. Dec. 1, 2004).

ing non-combatants unless the non-combatants take part in hostilities.[297] Technically, al Qaeda members — who violate the laws of war by blurring the combatant/non-combatant distinction — cannot be "combatants" in the sense of having a right under the laws of war to target and capture other combatants.[298] Nonetheless, law-of-war criteria for combatancy are designed to determine when a person's association with or activity related to a party to an armed conflict justifies subjecting that person to the consequences of combatant status under the laws of war. These criteria thus can provide guidance on what type of association with al Qaeda suffices for inclusion within the "organization" for purposes of the AUMF.[299]

First, the laws of war deem most members of the armed forces of an enemy to be combatants.[300] Two important criteria for membership in armed forces are self-identification through the wearing of a uniform or some other distinguishing characteristic, and participation within the command structure of a party to the conflict.[301] Although terrorists do not self-identify by wearing uniforms, they do sometimes self-identify verbally.[302] In addition, terrorist organizations do have leadership and command structures, however diffuse,[303] and persons who receive and execute orders within this command structure are

---

[297] *See* DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 179, at 27; Knut Ipsen, *Combatants and Non-Combatants*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 179, at 65, 65–68.

[298] *See* Ipsen, *supra* note 297, at 66 ("[O]nly a party to a conflict *which is a subject of international law* can have armed forces whose members are combatants." (emphasis added)).

[299] We are addressing here only the substantive question of who is covered by the AUMF, not the process for determining whether someone is covered, and we are not making any claim about the sufficiency of the existing procedures used by the Executive Branch. *See infra* pp. 2121–23.

[300] *See* Third Geneva Convention, *supra* note 25, art. 4(A)(1), 6 U.S.T. at 3320, 75 U.N.T.S. at 138; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex arts. 1, 3, 36 Stat. 2277, 2295–96, 1 Bevans 631, 643–44 [hereinafter 1907 Hague Convention IV]; *see also* Additional Protocol I, *supra* note 92, art. 43(2), 1125 U.N.T.S. at 23; GREENSPAN, *supra* note 291, at 58; MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 122 (1999); Ipsen, *supra* note 297, at 66. Chaplains and medical personnel who are in the armed forces of a state party to a conflict are not deemed to be combatants. *See* DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 179, at 35, 148; GREENSPAN, *supra* note 291, at 56–57; Ipsen, *supra* note 297, at 66; *see also* Additional Protocol I, *supra* note 92, art. 43(2), 1125 U.N.T.S. at 23.

[301] *See* Third Geneva Convention, *supra* note 25, art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138; 1907 Hague Convention IV, *supra* note 300, Annex art. 1, 36 Stat. at 2295–96, 1 Bevans at 643–44; *cf.* Additional Protocol I, *supra* note 92, art. 43, 1125 U.N.T.S. at 23 (emphasizing participation in a command structure but not the wearing of uniforms).

[302] For example, Richard Reid, the "shoe bomber," admitted that he was a member of al Qaeda. Douglas Frantz, *"They're Coming After Us." But Who Are They Now?*, N.Y. TIMES, Oct. 20, 2002, § 4, at 12; *"I Am an Enemy of Your Country"*, WASH. POST, Oct. 5, 2002, at A1. Matters of self-identification are complicated because al Qaeda conceptualizes membership in two ways: either by swearing *bayat* (fealty) to bin Laden, or by being an operative who has not sworn fealty but who takes assignments from the organization. *See* 9/11 COMMISSION REPORT, *supra* note 79, at 67.

[303] *See* 9/11 COMMISSION REPORT, *supra* note 79, at 67.

analogous to combatants and can naturally be deemed "members" of the organization.

Second, the laws of war extend combatant status beyond the categories above to persons who take a "direct" part in hostilities.[304] The "direct participation" standard includes more people than those who participate in combat, and fewer people than every civilian who supports the war effort, which in some modern wars would include everyone.[305] Although there is uncertainty about where the line should be drawn between these two extremes,[306] the key point is that, under the

---

[304] *See* Ipsen, *supra* note 297, at 65–104; *cf. Ex parte* Quirin, 317 U.S. 1, 45 (1942) (reasoning, in the course of distinguishing *Ex parte Milligan*, that Milligan was not "a part of *or associated with* the armed forces of the enemy" (emphasis added)). This proposition is reflected in a variety of sources, including Article 51(3) of the First Additional Protocol to the Geneva Conventions, which provides that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a *direct* part in hostilities." Additional Protocol I, *supra* note 92, art. 51(3), 1125 U.N.T.S. at 26 (emphasis added); *see also* Third Geneva Convention, *supra* note 25, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (applying to "persons taking no *active* part in the hostilities" (emphasis added)); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, para. 629 (Int'l Crim. Trib. for Rwanda Trial Chamber I Sept. 2, 1998) (concluding that there is no difference in practice between "direct" and "active" involvement in hostilities), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akayoo1.htm; The Hostages Trial (Trial of Wilhelm List and Others) (U.S. Military Trib., Nuremberg July 8, 1947–Feb. 19, 1948), *reprinted in* 8 THE UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 58 (1949) ("We think the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war."). Technically, neither Additional Protocol I nor Common Article 3 applies directly in the war against terrorism — the Protocol does not apply because the United States has not ratified it, and Common Article 3 does not apply because the conflict with al Qaeda is not the type of "internal" or "civil" war that Common Article 3 contemplates. Nonetheless, U.S. military manuals and guides embrace the "direct" participation standard, although they interpret the standard in a particular way.

[305] *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at para. 1679 (Yves Sandoz et al. eds., 1987) ("[T]o restrict this concept [of direct participation] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly." (footnote omitted)); U.S. DEP'T OF THE ARMY, PAMPHLET 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE para. 1-22 (1995) (noting that "[t]aking part in hostilities has not been clearly defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting"), *available at* http://www.ima.army.mil/files/p690_47.pdf.

[306] *See generally* Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 117–20 (2001); Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, *in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ — CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 505 (Horst Fischer et al. eds., 2004), *available at* http://www.michaelschmitt.org/images/Directparticipationpageproofs.pdf. The International Committee of the Red Cross commentary on Additional Protocol I defines the term "direct participation" to mean "acts [of war] which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the [enemy] armed forces," and concludes that "direct participation" does not include "gathering and transmission of military information, transportation of arms and munitions, provisions of supplies, etc." INT'L COMM. OF THE RED CROSS, *supra* note 305, at para. 1942. The U.S. military and some commentators take

laws of war, enemy organizations will include some individuals who assist the organization in carrying out attacks, even if they are not formal members of the organization.

These criteria do not provide complete guidance on the question of the requisite association with a terrorist organization for purposes of the AUMF. They do, however, provide some guidance. For example, they exclude from the AUMF the "little old lady from Switzerland" and others who give small-scale financial support (especially unknowing support) to a terrorist organization.[307] By contrast, they include both individuals who take up arms for purposes of attacking the United States on a covered terrorist organization's behalf, and also those who are in the process of "prepar[ing] for combat and return[ing] from combat."[308] They would probably include, therefore, bin Laden's driver, who is accused of picking up and delivering weapons and ammunition to al Qaeda fighters, and of driving bin Laden and other high-ranking al Qaeda members in protective convoys at the time of the al Qaeda attacks on U.S. embassies in Tanzania and Kenya in August 1998, and at the time of the September 11 attacks on the United States.[309] There will of course be difficult cases between these extremes. Our claim is simply that the law-of-war concepts outlined above provide at least some principled guidance for determining who should be included within a covered AUMF organization.[310]

---

a broader view of "direct participation," deeming it to include intelligence agents who gather and transmit military information, guards and lookouts for an armed force, weapons crew members, and the like. Guillory, *supra*, at 117–18 nn.39–40 (collecting sources).

307 We are considering here only the requisite association with an organization for purposes of the AUMF, not the circumstances under which financial support to a terrorist organization might, consistent with the First Amendment, be criminalized. For recent decisions addressing that issue, see, for example, *United States v. Afshari*, 392 F.3d 1031 (9th Cir. 2004); and *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004). *Cf.* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev., 291 F.3d 1000 (7th Cir. 2002) (addressing a First Amendment challenge in the context of civil liability).

308 INT'L COMM. OF THE RED CROSS, *supra* note 305, at para. 1943; *cf. Quirin*, 317 U.S. at 38 ("Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.").

309 *See* Charge Sheet, United States v. Hamdan (U.S. Military Comm'n), *available at* http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf. The driver also would likely fall within the AUMF because he is in the al Qaeda command structure.

310 We have attempted here to provide only an overview of how the issue might be addressed. Modern international criminal tribunals have developed an array of theories for collective liability in the commission of war crimes — including but not limited to joint criminal enterprise, complicity, and command responsibility — that might be relevant in the effort to define the contours of a terrorist "organization." *See generally* HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004), *available at* http://hrw.org/reports/2004/ij/digest.pdf; Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prose-*

B. Location of the Battlefield and Length of Detention

The Court in *Hamdi* held that the AUMF authorized the President to detain an enemy combatant captured on the battlefield in Afghanistan for the duration of hostilities.[311] As noted above, the Court said very little about how the President's power to detain applies to members of terrorist organizations.[312] Two controversial issues about the detention power as it applies to terrorists concern the geographic scope of the authorized conflict and the allowable length of detention for captured enemy combatants. Does the President's authority to use "all necessary and appropriate force" under the AUMF apply to enemy combatants present within the United States? And does the President's implicit authority under the AUMF to detain enemy combatants, when applied in the context of a potentially very long war on terrorism, allow him to detain individuals indefinitely without trial?

1. Location of the Battlefield. — The AUMF's text, considered in light of the factors discussed in Part IV, suggests that the AUMF authorizes the President to use force anywhere he encounters the enemy covered by the AUMF, including the United States. The text of the AUMF imposes no geographic limitation on the use of force. This distinguishes the AUMF from many prior authorizations to use force that contained geographic restrictions.[313] The case for reading the AUMF to apply in the United States is enhanced by the facts that the AUMF was passed in response to the September 11 attacks in the United States, and that at the time of its enactment there was a strong suspicion that enemy terrorist cells still lurked within the country.[314] It is

---

cutorial Ingenuity and Judicial Creativity?, 2 J. INT'L CRIM. JUST. 606 (2004); Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445 (2003). Additional sources that might be relevant include the Lieber Code, *see* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD § 4 (N.Y., D. Van Nostrand 1863), *reprinted in* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45, 60–61 (1983) (describing circumstances in which the military can capture and deny prisoner-of-war status to "[a]rmed enemies not belonging to the hostile army"), and the Third Geneva Convention, *see* Third Geneva Convention, *supra* note 25, art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (deeming members of militias or other volunteer corps "belonging to a [p]arty to the conflict" to be combatants).

311 *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion).

312 *See supra* notes 22–24 and accompanying text.

313 *See, e.g.*, Joint Resolution of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7 (authorizing the President to use armed forces against Chinese communists and others to secure and protect Formosa and the Pescadores against armed attack); Act of June 30, 1834, ch. 161, §§ 10–11, 23, 4 Stat. 729, 730, 733 (authorizing the President to remove persons from Indian lands); Act of Mar. 3, 1819, ch. 93, § 1, 3 Stat. 523, 523–24 (authorizing the President to take possession of and occupy East and West Florida); Act of May 28, 1798, ch. 48, 1 Stat. 561 (authorizing the President to seize French vessels hovering on the U.S. coast).

314 *See, e.g.*, R.W. Apple Jr., *A Clear Message: "I Will Not Relent"*, N.Y. TIMES, Sept. 21, 2001, at A1 ("The nation and its leaders are confronted with the probability of an enemy within — cells of bombers or hijackers, lurking unsuspected in dark or not-so-dark corners of American society.

also enhanced by one of the "whereas" clauses in the AUMF, which states that the September 11 attacks "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad."[315] Moreover, during congressional consideration of the AUMF, there was express consideration (albeit apparently only at the staff level) of whether to add the term "abroad" after "force" in the AUMF, and that term was not added.[316]

The conclusion that the AUMF applies in the United States if the covered enemy is found here is further supported by standard delegation principles and historical practice. As discussed earlier, delegations of foreign affairs authority are construed more broadly in areas in which the President has independent constitutional authority. Whatever the precise scope of the President's Commander-in-Chief powers, these powers are enhanced, and probably at their height, when he engages an enemy that has attacked and infiltrated the United States.[317] As for historical practice, presidents have always exercised wide discretion in determining where to send U.S. troops pursuant to general and unqualified authorizations to use force against an identified en-

---

Nothing quite like it has ever faced the United States before, and there is no easy way to root out the potential terrorists.").

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

316 *See* Abramowitz, *supra* note 132, at 75 (noting the absence of the word "abroad" in the original draft of the AUMF and that "inserting this word after 'force' was suggested during staff discussions"). Mr. Abramowitz suggests that the word "abroad" was unnecessary because the AUMF refers to the War Powers Resolution, which he says "generally deals with introducing U.S. forces abroad." *Id.* This is incorrect. The War Powers Resolution addresses every situation in which the President introduces U.S. armed forces "into hostilities," Pub. L. No. 93-148, §§ 2(a), 4(a)(1), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §§ 1541(a), 1543(a)(1) (2000)), and it expressly contemplates a situation in which Congress is unable to meet because of "an armed attack upon the United States." *Id.* § 5(b), 87 Stat. at 556 (codified at 50 U.S.C. § 1544(b) (2000)). In the House deliberations on the AUMF, at least one member of Congress specifically noted that the AUMF, by its terms, seemed to authorize the use of force even in the United States. *See* 147 CONG. REC. H5675 (daily ed. Sept. 14, 2001) (statement of Rep. Jackson) ("As written, the resolution could be interpreted, if read literally, to give the President the authority to deploy or use our armed forces domestically."). After the Senate had voted to approve the AUMF, Senator Biden stated that "it should go without saying, however, that the resolution is directed only at using force abroad to combat acts of international terrorism." *Id.* at S9423. Senator Biden did not explain this statement, and we do not believe it overcomes evidence to the contrary.

317 At the Constitutional Convention, one of the stated reasons for altering Congress's power to "make" war to a power to "declare" war was to preserve the President's authority to "repel sudden attacks." 2 CONVENTION RECORDS, *supra* note 34, at 318 (explanation by James Madison and Elbridge Gerry). As the Supreme Court made clear in the *Prize Cases*: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

emy.[318] Most notably, in the War of 1812, the Civil War, and World War II — wars supported by broad and geographically unqualified authorizations of force, like the AUMF[319] — presidents and their subordinates exercised traditional military powers against enemies when they were found in the United States.[320] Finally, although *jus in bello* rules of international law regulate the types of targets against which force can be used, they place no restriction on the geographic location of the use of force.

For these reasons, the AUMF is best read as authorizing the President to use all necessary and appropriate force against covered enemies found in the United States.[321] The plurality in *Hamdi* — relying

---

318 *See* BERDAHL, *supra* note 286, at 121–22 ("[T]here has never been any serious doubt as to the President's constitutional power to order the regular forces wherever he may think best in the conduct of a war, whether within or without the limits of the United States, nor has any President hesitated to make use of that power in any foreign war in which the United States has been engaged."); *cf.* Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."). In World War I, for example, Congress declared war and authorized the President to use force against Germany and Austro-Hungary, but the President sent troops into France, Italy, and Russia to fight German and related military forces. *See* BERDAHL, *supra* note 286, at 122.

319 In the Civil War, congressional authorization came four months after Lincoln had already committed U.S. troops to hostilities. *See* Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326.

320 *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 36–38, 48 (1942) (upholding the use of military commissions for Nazi saboteurs captured in the United States during World War II); *Prize Cases*, 67 U.S. (2 Black) at 669–71 (upholding the President's blockade of the Confederacy during the Civil War); J. MACKAY HITSMAN, THE INCREDIBLE WAR OF 1812, at 237–48 (Donald E. Graves ed., Robin Brass Studio 1999) (1965) (describing military battles inside the United States). These wars contrast with the Korean War, in which, as the opinions in *Youngstown* implied, the battlefield was located outside the United States. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."); *id.* at 645 (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence."). The presidential action at issue in *Youngstown* is also distinguishable from the presidential actions in *Ex parte Quirin* and the *Prize Cases* because it was not directed against an enemy found in the United States.

321 Some have maintained that the detention procedures in the USA PATRIOT Act, most notably those set forth in 8 U.S.C. § 1226a, imply that Congress did not intend the AUMF to authorize the President to detain suspected terrorists indefinitely in the United States. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2659 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); Brief of Respondent at 25–26, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/218/Padilla_BriefOfRespondent.pdf; Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373, 386–99, 426–29 (2002). Section 1226a permits the Attorney General to detain aliens (pending removal proceedings or criminal prosecution) who, among other things, are suspected of activities that endanger the national security of the United

on past Executive Branch practice and the international laws of war — properly held that the AUMF's authorization to the President to use "force" against enemies amounted to a "clear[] and unmistakabl[e]" authorization to detain an enemy combatant for the duration of hostilities without trial, and satisfied the "Act of Congress" requirement for detention of a U.S. citizen under 18 U.S.C. § 4001(a).[322] The plurality limited this holding to a U.S. citizen captured on a traditional foreign battlefield.[323] The logic of its interpretation of the AUMF, however, applies to enemy combatants captured in the United States as well.[324] The functional need to prevent the enemy from returning to the battlefield applies at least as strongly (if not more so) when the enemy is found in the United States. It is no less a "fundamental incident of waging war" to detain enemy combatants captured in the United States than it is to detain those captured on a battlefield abroad. The laws of war do not limit the detention power to persons captured outside the home country, and presidents in the War of 1812, the Civil War, and World War II detained combatants when they were found in the United States. Moreover, the *Hamdi* plurality relied heavily on *Quirin*, a case involving the exercise of traditional presidential military functions — the detention and trial of unlawful enemy combatants — applied to persons captured in the United States.[325]

States. *See* 8 U.S.C.A. § 1226a(a)(1), (3) (West Supp. 2004). This is a much broader category of persons than the enemy combatants covered by the AUMF, and indeed includes dangerous aliens with no connection to the war on terrorism. As a result, it is difficult to see how this later-enacted provision implies that Congress did not intend in the AUMF to authorize the President to exercise his traditional power to detain enemy combatants, including those found in the United States.

322 *See Hamdi*, 124 S. Ct. at 2640–42 (plurality opinion).

323 *Id.* at 2639 (defining an enemy combatant for purposes of its analysis as "an individual who . . . was '"part of or supporting forces hostile to the United States or coalition partners"' in Afghanistan and who '"engaged in an armed conflict against the United States"' there" (quoting *Hamdi* Respondents Brief, *supra* note 17, at 3 (quoting U.S. DEP'T OF DEF., *supra* note 17, at 5))).

324 In *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), the Court considered the validity of detaining a U.S. citizen, captured in the United States, who was alleged to be an enemy combatant. Although the Court dismissed the case on jurisdictional grounds, Justice Stevens's dissent, which was joined by three other Justices, expressed the view that "the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits — and the Authorization for Use of Military Force . . . does not authorize — the protracted, incommunicado detention of American citizens arrested in the United States." *Id.* at 2735 n.8 (Stevens, J., dissenting). Justice Breyer, who joined the dissent, including the quoted footnote, was also one of the four Justices in the *Hamdi* plurality. This might suggest that a majority of the Supreme Court would not find sufficient authorization for Padilla's detention, since he was "arrested in the United States." On the other hand, if Padilla were given the hearing mandated in *Hamdi*, his detention would not be "incommunicado" and the footnote might not apply.

325 *See Hamdi*, 124 S. Ct. at 2640, 2642–43 (plurality opinion). A potential consequence of the AUMF's applicability in the United States is that in some circumstances it might authorize the President to target and kill persons covered by the AUMF found in the United States. Several factors may qualify this conclusion with respect to covered persons in the United States who can be arrested through normal means and do not otherwise present an immediate threat. As we have discussed, the AUMF generally authorizes only actions permitted by the laws of war. The laws of

In understanding the significance of this presidential authority to detain enemy combatants found within the United States, it is crucial to distinguish between the *power* to detain someone with enemy combatant status and the *processes* for determining whether someone is an enemy combatant. The Supreme Court in *Hamdi* relied on this distinction in holding that the President could detain a traditional enemy combatant until hostilities ended, but also requiring independent procedural protections — at least for U.S. citizens — to minimize the risk of erroneous classification of someone as an enemy combatant.[326] Some critics of the detention power have confounded these two issues, arguing that the power to detain is illegitimate because of the possibility, especially in a war against a non-uniformed force, of significant mistakes. This criticism elides the important reasons for detaining enemy combatants during wartime. As the plurality emphasized in *Hamdi*, the United States can accommodate the competing concerns of incapacitating the enemy and avoiding erroneous deprivation by considering the power to detain independently from the processes appropriate for detention.[327]

As a result, the conclusion that the AUMF empowers the President to detain enemy combatants found on U.S. soil does not, by itself, resolve the issue of what institutions or procedures are appropriate for determining whether a person captured and detained on U.S. soil is in fact an enemy combatant. The AUMF's text is silent on this point. It states that the President can determine which nations, organizations, and persons contributed to the September 11 attacks, but it does not address his authority to determine which persons are in or adequately associated with organizations that contributed to the attacks. The

---

war may require a belligerent, even when targeting a legitimate military target, to avoid unnecessary violence and suffering. *See, e.g.*, NAVAL WAR COLL., ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.2 (A.R. Thomas & James C. Duncan eds., 1999); U.S. DEP'T OF THE ARMY, *supra* note 292, at para. 3. *See generally* MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 72–73, 521–30 (1961) (explaining the necessity principle). This principle might preclude killing a nonthreatening enemy combatant who can easily be arrested without the use of force. Furthermore, the laws of war prohibit the targeting of persons who are "out of combat." *See* Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 117 (1988); *cf.* Third Geneva Convention, *supra* note 25, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (prohibiting "violence to life and person" for those "*hors de combat*" (out of combat)). Finally, the Fourth Amendment might be relevant to attacks on legitimate military targets in the United States if the targets did not present any immediate threat and could be apprehended by normal law enforcement means. *Cf.* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that a police officer may not seize an unarmed, nondangerous suspect by using deadly force).

326 *See Hamdi*, 124 S. Ct. at 2643 (plurality opinion) ("Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.").

327 *See id.* at 2646–48.

Third Geneva Convention sets forth procedures for determining when a combatant qualifies as a prisoner of war if there is doubt about his or her status.[328] The applicability of these procedures to alleged non-state terrorist enemy combatants is uncertain at best. In any event, the AUMF does not appear to alter the traditional habeas corpus jurisdiction over the military detention in the United States of persons not in the U.S. military.[329] Because courts have exercised habeas corpus review for this purpose in prior authorized conflicts, Congress's similar authorization to use force in this conflict should not be viewed as changing the availability of this judicial remedy. Not surprisingly, therefore, the plurality in *Hamdi* concluded that the AUMF did not affect the availability of habeas corpus review for determining whether a U.S. citizen captured abroad but detained in the United States is in fact an enemy combatant.[330] This distinction between power and

---

[328] *See* Third Geneva Convention, *supra* note 25, art. 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."); *cf.* U.S. Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(2) (1997) ("All persons taken into custody by U.S. forces will be provided with the protections of the [Third Geneva Convention] until some other legal status is determined by competent authority."), *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf; *id.* § 1-6 (describing the requisite competent tribunal).

[329] *See, e.g.*, *In re* Territo, 156 F.2d 142 (9th Cir. 1946) (World War II); *In re* Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813) (War of 1812). In the Civil War, President Lincoln, with the later approval of Congress, suspended the writ of habeas corpus on a number of occasions, acts that were premised on the assumption that the writ was otherwise available to those placed in military custody. *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755; FARBER, *supra* note 193, at 17, 157–63; *see also Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (holding that President Lincoln lacked authority to suspend the writ and ordering the release of a person in military detention). *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963) ("[T]he classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or the military without any court process at all . . . ."); George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2D 397, 398 (2002) ("[T]he writ provides the single most important legal protection against executive tyranny and military government."). Professor Gerald Neuman refers to "a long tradition limiting the scope of habeas corpus inquiry in the military context." Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1039 (1998). The cases he analyzes for this proposition, however, concern habeas corpus review of courts martial and related military trials, and detentions of members of the U.S. military, not military detentions without trial or military detentions of persons not in the U.S. armed forces.

[330] *See Hamdi*, 124 S. Ct. at 2644 (plurality opinion). The plurality appeared to view the government's position in *Hamdi* to be that the Commander-in-Chief has essentially unreviewable authority to determine whether a particular U.S. citizen is in fact an enemy combatant. *See id.* at 2645. This view had a plausible basis in the government's briefs. *See Hamdi* Respondents Brief, *supra* note 17, at 26–27.

process applies just as forcefully, and probably more so, to the detention of enemy combatants captured in the United States.[331]

2. Length of Detention. — Unlike some authorizations to use force, the AUMF does not purport to limit the time period in which the President can act.[332] Moreover, many members of Congress noted in the debates over the AUMF that the war against the perpetrators of the September 11 attacks might take a very long time,[333] and none suggested an implicit time limitation on the authorization. The lack of a time limitation is further indicated by Congress's inclusion of sunset clauses in other prominent statutes passed in response to the September 11 attacks, but not in the AUMF.[334]

The potentially indefinite length of the authorized conflict raises difficult questions about how long the United States may detain a captured terrorist enemy combatant. The traditional law-of-war rule is that a prisoner of war can be detained until the "cessation of active hostilities."[335] The purpose of this rule is to prevent enemy combatants from returning to fight.[336] In a traditional armed conflict, a temporally unqualified authorization to use force like the AUMF would, as the plurality noted in *Hamdi*, be interpreted to authorize detention un-

---

331 In *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the Court held that foreign citizens held as enemy combatants at the U.S. naval base in Guantánamo Bay, Cuba, could seek habeas corpus review of the legality of their detention. Although the Court suggested that the detainees at Guantánamo Bay might be able to demonstrate that they were held in "custody in violation of the Constitution or laws or treaties of the United States" within the meaning of the habeas statute, *see id.* at 2698 & n.15, the Court did not establish the extent (if any) to which the Constitution applies there, or how the procedural rights of the detainees at Guantánamo compare with the procedural rights of those held in the United States as enemy combatants.

332 The Lebanon, Somalia, and Taiwan authorizations, as discussed above, had such timing requirements. *See supra* pp. 2076–77; *see also* Act of Dec. 17, 1813, ch. 1, § 20, 3 Stat. 88, 93 (stating that embargo provisions during the War of 1812 would expire a year and a month after passage); Act of Feb. 6, 1802, ch. 4, § 5, 2 Stat. 129, 130 (providing a two-year period for which seamen could be engaged to serve in conflict against Tripoli pirates).

333 *See, e.g.*, 147 CONG. REC. H5639 (daily ed. Sept. 14, 2001) (statement of Rep. Hastert) ("This will be the great challenge for our generation. It may take years."); *id.* (statement of Rep. Lantos) ("We are embarking on a long and difficult struggle, like none other in our Nation's history."); *id.* at H5648 (statement of Rep. DeLay) ("Every American should anticipate and prepare for a prolonged and sustained campaign. They should understand that this war will be measured in years, not months."); *see also id.* at S9422–23 (statement of Sen. Biden) (stating that the AUMF "does not limit the amount of time that the President may prosecute this action against the parties guilty for the September 11 attacks").

334 *See, e.g.*, Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 108(a), 116 Stat. 2322, 2336 ("The Program shall terminate on December 31, 2005."); USA PATRIOT Act, Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295 (2001) ("[T]his title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.").

335 Third Geneva Convention, *supra* note 25, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

336 Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion); *see also* CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES 112 (1977); INT'L COMM. OF THE RED CROSS, *supra* note 51, at 547; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 179, at 326.

til the end of hostilities.[337] Translated into the terrorism context, this rule might mean that a captured terrorist enemy combatant could be detained for a long time and perhaps indefinitely. Indefinite detention without trial or charge strikes many as an excessive remedy for membership in an enemy terrorist organization, especially given the possibility of erroneous designation, as well as the possibility that an enemy combatant may, after some period, no longer pose a threat to the United States. In light of these concerns, it is not surprising that the plurality in *Hamdi* intimated uncertainty about whether the "cessation of hostilities" concept should be applied to the war on terrorism.[338]

The proper approach here, we believe, is to apply the traditional law-of-war rule in a way that takes account of both its underlying purpose and the novel features of the war on terrorism. The traditional rule is premised on the possibility of an identifiable end of the conflict, either by formal peace treaty, armistice agreement, or even by attrition or exhaustion. This is the premise that the war on terrorism — the end of which is difficult to imagine right now — calls into question. Calling into question this premise, however, does not call into question the functional justification under the laws of war for detention itself, which is to prevent the combatant from returning to the conflict. The new circumstances simply call into question how the laws of war should conceptualize the end of the conflict.

The laws of war traditionally permitted detaining authorities to address categorically the danger that a prisoner would return to hostilities by detaining all enemy combatants until the conclusion of the overall hostilities with the nation on whose behalf the combatants had fought. This approach makes sense in the interstate war context, in which mistaken detentions are less likely, the costs of a mistaken detention are lower because of the foreseeably finite duration of war, and the detainee's state has the power to eliminate the reason for returning to the fight, and thus the reason for the detention, by surrendering or entering into a peace treaty or armistice agreement. This categorical, group-based approach makes less sense in the context of the war with al Qaeda and related terrorist organizations. Because the enemy does not wear uniforms and is not affiliated with an enemy state, and because of the potentially indefinite duration of the conflict, designation errors are both more likely and more serious. In addition, no state has

---

337 *See Hamdi*, 124 S. Ct. at 2641–42 (plurality opinion).

338 *See id.* at 2641 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [of the Authorization granting authority to detain for the duration of the conflict] may unravel."). The plurality also warned that it would not construe the AUMF to permit indefinite detention for at least one purpose — interrogation. *See id.*

the power to end hostilities and thereby end the basis for returning to the fight, and thus the basis for the detention.

These differences suggest that, with respect to the power to detain terrorist combatants outside the conflict in Afghanistan, the end of the conflict should be viewed in individual rather than group-based terms. Under this approach, the question is not whether hostilities have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities. A determination of the existence of such a danger could be based on, among other things, the detainee's past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile.[339] In some cases, the individualized determination will be easy, in that the detainee might openly profess to have a continuing intent to engage in hostilities against the United States. But in most cases it is likely to be difficult, and will depend on various contested factors, as well as the burden of proof. This difficulty is illustrated by the fact that a number of detainees released from Guantánamo Bay, presumably following a determination of non-dangerousness, have reappeared on the battlefield against the United States.[340]

This interpretation of how the laws of war should apply to the length of detention of terrorist enemy combatants is supported by the fact that many of the traditional rules contemplate release of an enemy combatant based on an individualized determination that the combatant does not present a future threat. The Third Geneva Convention, for example, requires the repatriation of seriously wounded and sick prisoners prior to the end of hostilities.[341] In addition, the Convention

---

339 Individualized assessments of future dangerousness are common in other U.S. detention settings, such as in criminal sentencing proceedings, pretrial detention, and civil commitment proceedings. *See generally* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003). These mechanisms potentially provide models for the type of individualized assessments we contemplate in the text. Of course, the basis for detention in the war on terrorism context — that the individual is a member of a group waging war against the United States who potentially threatens to continue to participate in the war if released — is different from the basis for detention in other contexts.

340 *See* John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A1.

341 Third Geneva Convention, *supra* note 25, art. 109, 6 U.S.T. at 3400, 75 U.N.T.S. at 218. To reduce the danger that sick and wounded prisoners will return to hostilities after recovering, states may seek to make arrangements to accommodate them in neutral countries "[t]hroughout the duration of hostilities." *Id.* As the International Committee of the Red Cross commentary explains, such accommodation "ensures that such prisoners of war will not after recovery make any active contribution in their own country to the war effort." INT'L COMM. OF THE RED CROSS, *supra* note 51, at 511. Prisoners with incurable wounds or sickness and certain other prisoners whose mental or physical fitness seems to have been "gravely diminished," however, must be returned to their own countries rather than to a neutral country, Third Geneva Convention, *supra* note 25, art. 110, 6 U.S.T. at 3400–02, 75 U.N.T.S. at 218–20, because there is little

permits agreements providing for the repatriation, to neutral states, of able-bodied prisoners who have undergone long periods of confinement.[342] The Convention further provides for the voluntary repatriation of a prisoner based on parole or promise to the extent that it is allowed by the laws of the prisoner's own state, something that is typically done on the condition that the prisoner not take up arms against his captor.[343] Such state-based mechanisms for ensuring that repatriated prisoners do not return to the fight are of course not as readily available with respect to terrorists. There may be conditions that can be imposed on the release of particular terrorist detainees, however, that will reduce the likelihood that they will pose a continuing threat to the United States. Travel restrictions, for example, were imposed in connection with the release of Yaser Hamdi.[344]

We do not claim that our proposed individualized approach to determining the end of hostilities in this context is a settled requirement of the customary laws of war. It is noteworthy, however, that the Executive Branch, under various political and judicial pressures, has been moving for several years toward the individualized approach described above. Prior to the Supreme Court's decision in *Hamdi*, the Executive Branch released dozens of alleged enemy combatants from detention based on an informal process that included interagency consideration of each detainee's intelligence value and threat level.[345] In the spring of 2004, while *Hamdi* and *Rasul v. Bush*[346] were under consideration, the Executive Branch established an Administrative Review Board that uses formal procedures to review whether enemy combatants should continue to be detained or should be released, with or without conditions.[347] In making its recommendations, the Board

---

danger that they will return to hostilities. INT'L COMM. OF THE RED CROSS, *supra* note 51, at 515; *see also* DELESSERT, *supra* note 336, at 112 ("The detention of a soldier whose mental and physical fitness has been gravely and perhaps permanently impaired is clearly no longer a military necessity.").

342 Third Geneva Convention, *supra* note 25, arts. 109–10, 6 U.S.T. at 3400–02, 75 U.N.T.S. at 218–20. It also provides, however, that states are forbidden from employing such repatriated prisoners in active military service. *Id.* art. 117, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

343 *See id.* art. 21, 6 U.S.T. at 3334–36, 75 U.N.T.S. at 152–54; DELESSERT, *supra* note 336, at 179. Although parole is rarely used today, it is a well-established part of the law of war. During World War II, for example, the United States paroled Italian prisoners of war in Sicily and the United States after the new Italian government changed sides in 1943. *See* HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 398–400 (1978).

344 *See* Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

345 *See* Alberto R. Gonzales, Remarks Before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), *available at* http://www.abanet.org/natsecurity/judge_gonzales.pdf.

346 124 S. Ct. 2686 (2004).

347 *See* U.S. DEP'T OF DEF., ORDER, ADMINISTRATIVE REVIEW PROCEDURES FOR ENEMY COMBATANTS IN THE CONTROL OF THE DEPARTMENT OF DEFENSE AT

considers whether each detainee

> *remains a threat to the United States and its allies* in the ongoing armed conflict against al Qaida and its affiliates and supporters or if there is any other reason that it is in the interest of the United States and its allies for the enemy combatant to remain in the control of [the Department of Defense].[348]

Although the reference to "any other reason" for continued detention goes beyond the law-of-war model described above, the general approach is consistent with our analysis.

C. Military Commissions

Another area of controversy in the war on terrorism concerns the President's establishment of military commissions to try certain terrorists. On November 13, 2001, President Bush issued an order authorizing these commissions.[349] The order covers present and former members of al Qaeda; individuals who "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy"; and those who knowingly harbored any of these individuals.[350] Under the order, the military commissions are authorized to try these individuals for "any and all offenses triable by military commission that such individuals are alleged to have committed."[351]

GUANTANAMO BAY NAVAL BASE, CUBA (May 11, 2004), *available at* http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf.

348 *Id.* § 2.A (emphasis added); *see also id.* § 3.E.

349 *See* Military Order, *supra* note 95, § 4, 3 C.F.R. at 919–20.

350 *Id.* § 2(a).

351 *Id.* § 4(a). President Bush subsequently determined that fifteen individuals being detained at the U.S. naval base in Guantánamo Bay were eligible to be tried before military commissions. *See* News Release, U.S. Dep't of Def., President Determines Enemy Combatants Subject to His Military Order, http://www.defenselink.mil/releases/2003/nr20030703-0173.html (July 3, 2003); News Release, U.S. Dep't of Def., Presidential Military Order Applied to Nine More Combatants, http://www.defenselink.mil/releases/2004/nr20040707-0987.html (July 7, 2004). In 2004, the Pentagon announced that four of these individuals had been charged with conspiracy to commit war crimes and other crimes triable by military commission. *See* News Release, U.S. Dep't of Def., Additional Military Commission Charges Referred, http://www.defenselink.mil/releases/2004/nr20040714-1030.html (July 14, 2004); News Release, U.S. Dep't of Def., Guantanamo Detainee Charged, http://www.defenselink.mil/releases/2004/nr20040610-0893.html (June 10, 2004); News Release, U.S. Dep't of Def., Two Guantanamo Detainees Charged, http://www.defenselink.mil/releases/2004/nr20040224-0363.html (Feb. 24, 2004). These commission proceedings began in August 2004, almost three years after issuance of the November 13 order. *See* News Release, U.S. Dep't of Def., First Military Commission Convened at Guantanamo Bay, Cuba, http://www.defenselink.mil/releases/2004/nr20040824-1164.html (Aug. 24, 2004).

Some commentators have asserted that the President lacks the authority to establish military commissions because Congress has neither declared war nor expressly authorized the establishment of military commissions in the war on terrorism.[352] As we explain, the interpretive principles outlined above suggest that the President does have authority to use military commissions in the war on terrorism, subject to certain limitations. Once again, we put aside the issue of the President's independent constitutional authority and focus only on his statutory authority.[353] We also put aside the question whether the particular procedures established by the Department of Defense for the commissions are legally sufficient.[354]

As discussed in Part II, a declaration of war is not required in order for Congress to authorize the President to fully prosecute a war; a broadly worded authorization of force is sufficient. Moreover, as discussed in Part III, the AUMF is as broad in this respect as authorizations of force in declared wars. Therefore, arguments that the President lacked authority to establish military commissions because Congress did not formally declare war, or because the AUMF is narrower in scope than authorizations in other wars in which military commissions have been used, can readily be dismissed.[355]

Although the November 13 order states that individuals tried by military commissions have no right to seek review in any U.S. court, *see* Military Order, *supra* note 95, § 7(b), 3 C.F.R. at 921, Alberto Gonzales, then counsel to the President, stated shortly after issuance of the order that it "preserves judicial review in civilian courts," and that "anyone arrested, detained or tried *in the United States* by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court." Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (emphasis added). He also noted that the language of the order was "similar to" that of President Franklin Roosevelt's commission order in World War II, which was construed by the Supreme Court (in *Quirin*) as permitting habeas review. *Id.*; *see also Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."); Proclamation No. 2561, 3 C.F.R. 309 (1938–1943).

352 *See, e.g.*, Katyal & Tribe, *supra* note 2, at 1266.

353 *Cf. Quirin*, 317 U.S. at 29 ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.").

354 The November 13 order outlined some minimal procedural requirements for the commissions, such as the requirement of at least a two-thirds vote by members of the commission present, with a majority being present, for a conviction, but otherwise it delegated the determination of the procedures to the Department of Defense. *See* Military Order, *supra* note 95, § 4(c), 3 C.F.R. at 920. The Department of Defense issued a detailed order in March 2002 establishing procedures for the commissions and giving certain rights to the accused. *See* Dep't of Def., Military Commission Order No. 1 (Mar. 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

355 In upholding the use of a military commission in *Quirin* to try saboteurs acting on behalf of Germany, the Court noted that war had been declared on Germany. *See Quirin*, 317 U.S. at 21.

The real question, rather, is whether Congress has authorized the President to use military commissions, either in the AUMF or in some other statute.[356] As with other interpretive issues discussed in this Article, historical practice plays an important role in the analysis. Presidents and military commanders have established military commissions for a variety of purposes throughout U.S. history.[357] These commissions have been used in connection with formally declared wars as well as other military conflicts, such as the Civil War and conflicts with Indian tribes. As the Supreme Court has stated, "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war."[358] Consistent with the interpretive framework set forth above, this historical practice can help inform the meaning of congressional enactments relating to war.

Unlike most issues of presidential authority discussed in this Article, the AUMF is not the only possible source of statutory authority for presidential use of military commissions. A number of provisions in the Uniform Code of Military Justice (UCMJ) specifically refer to such commissions. Of most relevance, § 821 of the UCMJ states that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."[359] To understand the meaning of this reference, one must understand the statutory predecessor to § 821.

The UCMJ replaced the Articles of War, which had themselves been recodified in 1916. In the 1916 recodification, Congress expanded court-martial jurisdiction (that is, jurisdiction over members of the U.S. military) to include offenses against the laws of war.[360] Article 15 of the recodified Articles of War, the predecessor to § 821 of the UCMJ, stated that the creation of statutory jurisdiction for courts-martial did not "depriv[e] military commissions . . . of concurrent ju-

---

The Court did not, however, state that the declaration of war was a prerequisite for the use of military commissions. Moreover, as noted below, military commissions have been used historically by the United States in undeclared as well as declared wars.

356 The analysis in this and the next several paragraphs is drawn largely from Bradley & Goldsmith, *supra* note 238.

357 *See* AM. BAR ASS'N TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (2002), *available at* http://www.abanet.org/leadership/military.pdf; BIRKHIMER, *supra* note 76, at 351–69; 2 WINTHROP, *supra* note 76, at 1295–1302; David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993); A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948).

358 Madsen v. Kinsella, 343 U.S. 341, 346 (1952).

359 10 U.S.C. § 821 (2000).

360 *See* Act of Aug. 29, 1916, ch. 418, sec. 3, art. 12, 39 Stat. 619, 652.

risdiction in respect of offenders or offenses that . . . by the law of war may be triable by such military commissions."[361] Although by its terms this provision appeared simply to recognize the historical authority of the President to establish military commissions, the Supreme Court in *Quirin* held that this provision also constituted congressional *authorization* for the use of military commissions. The Court noted that "[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases," and held that "Congress [in Article 15] has authorized trial of offenses against the law of war before such commissions."[362]

As interpreted by the Supreme Court, therefore, Article 15 of the Articles of War authorized the President to use military commissions.[363] Congress in effect confirmed this interpretation when, in 1950, it recodified Article 15 into what would later become § 821 of the UCMJ without changing the reference to military commissions.[364] Indeed, the legislative history of § 821 makes clear that Congress was aware of and accepted the Court's interpretation.[365] Other provisions in the UCMJ contemplate the use of military commissions in ways that further confirm that Congress has authorized their use.[366]

---

361 *Ex parte* Quirin, 317 U.S. 1, 27 (1942) (quoting Article 15 of the Articles of War).

362 *Id.* at 28–29; *accord In re* Yamashita, 327 U.S. 1, 19–20 (1946) (quoting Article 15 of the Articles of War).

363 Some commentators have implied that the above statements in *Quirin* were dicta because Article 82 of the Articles of War, which authorized military commissions to try the offense of spying, provided a narrower basis for the Court's decision. *See, e.g.*, George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 642–45 (2002). There are at least two problems with this argument. First, the Court clearly believed that Article 15 was the primary congressional authorization for military commissions. *See Quirin*, 317 U.S. at 28 (noting that "especially [in] Article 15, Congress has explicitly provided" for military commissions). Second, in upholding the validity of the military commission in *Quirin*, the Court examined only the charges alleging violations of the laws of war, and had "no occasion to pass on" the other charges, including the spying charges or "to construe the . . . 82nd Article[] of War." *Id.* at 46.

364 *See* Act of May 5, 1950, ch. 169, sec. 1, art. 21, 64 Stat. 107, 115.

365 *See* S. REP. NO. 81-486, at 13 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2236; H.R. REP. NO. 81-491, at 17 (1949).

366 Most notably, 10 U.S.C. § 836 authorizes the President to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in . . . military commissions and other military tribunals." 10 U.S.C. § 836(a) (2000). Section 836 also requires that the President, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter*." *Id.* (emphasis added). Although beyond the scope of this Article, we are skeptical of the argument that the italicized language means that military commissions must use the same procedures that are provided for in the UCMJ for courts-martial, *see, e.g.*, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 166–68 (D.D.C. 2004); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2013–14 (2003). The UCMJ does not specify proce-

Notwithstanding this specific source of authority in the UCMJ, the AUMF is relevant to the issue of the President's authority to establish the commissions for two reasons. First, the AUMF probably provides an independent source of statutory authority for establishing the commissions. The historical practice of using military commissions during war, even without specific congressional authorization, suggests that they are part of the "incidents of war" that Congress implicitly authorized in the AUMF. Indeed, in upholding the use of a military commission in *Quirin*, the Supreme Court specifically noted:

> An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.[367]

The plurality in *Hamdi* quoted approvingly from this portion of *Quirin* in concluding that the AUMF implicitly authorized the detention of enemy combatants,[368] and also made clear that, to the extent there was any inconsistency between the allowance of the military commission in *Quirin* and the disallowance of the military commission in the Civil War–era decision *Ex parte Milligan*,[369] *Quirin* was controlling.[370]

A second reason that the AUMF is relevant to the President's statutory authority to establish military commissions is that, although the UCMJ authorizes the use of military commissions to try offenses against the laws of war, it does not itself authorize the President to prosecute a war. Presumably, the UCMJ's authorization for military commissions applies only in the context of a war waged by the President with either constitutional or statutory authority. There is general agreement that the President has some constitutional authority to wage war in the absence of congressional authorization (for example, to repel sudden attacks), but, as noted above, the precise scope of that authority is contested.[371] To the extent that the President needs Congress's authorization to prosecute the war on terrorism, that authorization would come from the AUMF, and the AUMF, as discussed above, authorizes presidential action only with respect to nations, organizations, and persons connected to the September 11 at-

---

dures for military commissions, so it is not clear why the President's adoption of procedures different from those specified in the UCMJ for courts-martial would be "inconsistent with this chapter." Section 836 does not say, after all, that the procedures for *military commissions* may not be "contrary to or inconsistent with" the procedures set forth in that chapter for *courts-martial*.

367 *Quirin*, 317 U.S. at 28–29; *accord Yamashita*, 327 U.S. at 11.

368 Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion).

369 71 U.S. (4 Wall.) 2 (1866).

370 *See Hamdi*, 124 S. Ct. at 2642–43.

371 *See supra* pp. 2051–52.

tacks. The November 13 Military Order, by contrast, purports to authorize the use of commissions for the prosecution of *any* individuals who carry out terrorist attacks against U.S. interests.[372] The legality of trying terrorists who are not covered by the AUMF in military commissions would therefore depend on the President's independent constitutional authority to wage war against those terrorists.

In addition to this possible nexus limitation, the President's statutory authority to use military commissions pursuant to the November 13 order is probably limited by international law. Historically, the United States has used military commissions for three basic purposes: to try enemy belligerents for crimes triable under the laws of war, to administer justice in territory occupied by the United States, and to replace civilian courts where martial law has been declared.[373] The commissions established pursuant to President Bush's November 13 order fall within the first category. Except for two offenses that Congress has specifically authorized to be tried before military commissions — spying and aiding the enemy — the historical jurisdiction of these commissions has been limited to trying offenses governed by international law.[374] Congress's authorization in the UCMJ and AUMF, because it is in effect an endorsement of this historical practice, is probably also limited to these offenses.[375] The November 13 order appears to recognize this limitation, noting in one of its "Findings" that it is appropriate that individuals subject to the order be tried "for vio-

---

372 To date, however, the individuals at Guantánamo Bay who have been deemed by the President to be eligible for trial before military commissions have all been alleged members of al Qaeda. *See* News Releases, U.S. Dep't of Def., Military Commissions, *at* http://www.defenselink.mil/news/Aug2004/commissions_releases.html.

373 *See* 2 WINTHROP, *supra* note 76, at 1295–1321.

374 In addition to war crimes, such as purposeful targeting of civilians, the jurisdiction of military commissions has always extended more generally to actions on the battlefield by unlawful combatants. There is a debate about whether such actions are best construed as war crimes, *see Ex parte* Quirin, 317 U.S. 1, 35–36 (1942) (suggesting this conclusion), or as crimes that, because they are committed by unlawful combatants, are not shielded from prosecution by combatant immunity, *see* Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 329–33 (1951) (suggesting this conclusion and disagreeing with *Quirin* on this point). Under either interpretation, these actions fall within the jurisdiction of § 821 as crimes that "by the law of war may be tried by military commissions." 10 U.S.C. § 821 (2000).

375 *See* AM. BAR ASS'N TASK FORCE ON TERRORISM AND THE LAW, *supra* note 357, at 6–8 (noting that the jurisdiction of military commissions is limited to trying offenses against the laws of war); *see also In re* Yamashita, 327 U.S. 1, 20 (1946) ("Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission *contemplated by the common law of war.*" (emphasis added)); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 922 (2003) ("[A] military commission convened under the [November 13 order] may try only violations of the law of war, and violations of the two statutory military commission offenses defined by Articles 104 and 106 of the UCMJ[: spying and providing aid to the enemy].").

lations of the laws of war and other applicable laws by military tribunals."[376]

VI. CONCLUSION

In evaluating what actions the President can take in the war on terrorism, it is essential to determine what Congress has, and has not, authorized. Although this inquiry will not resolve all questions of presidential authority, it can affect the presumptive validity of presidential actions and the role of the courts in assessing such actions. We have attempted in this Article to sketch a framework for interpreting the scope of the authorization of force that Congress enacted in the wake of the September 11 attacks. Our framework suggests that the President's congressionally authorized powers in the war on terrorism are broad, but not unlimited. As we have explained, the AUMF's September 11 nexus requirement is an important limitation on its scope. In addition, because the AUMF's scope is informed by the international laws of war, it does not, at least as a general matter, authorize military actions that are not permitted under the laws of war. A clear statement requirement is also an appropriate means of limiting the AUMF when actions taken under it restrict the liberty of noncombatants in the United States. Finally, the AUMF does not preclude judicial imposition of procedural requirements for Executive Branch determinations under the AUMF, especially in cases over which courts can exercise habeas corpus jurisdiction.

We make no claim that these limitations on what Congress has authorized suffice as a policy matter. Like many commentators, we would welcome additional congressional participation in resolving the many uncertainties concerning the war on terrorism, and our framework leaves room for such additional participation. Nor do we claim to have resolved all the interpretive questions that can arise under the AUMF. We simply hope to have provided a useful starting point for future discussion and analysis of this important enactment.

---

[376] *See* Military Order, *supra* note 95, § 1(e), 3 C.F.R. at 918. In addition, the Department of Defense stated in the crimes and elements that it adopted for the commissions that they "derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war." DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION § 3(A) (Apr. 30, 2003), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf.