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## NOTES

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### RE-IMAGINING THE POST-9/11 AUTHORIZATIONS FOR USE OF MILITARY FORCE IN THE ERA OF EMERGING CONSENSUS ON REFORM

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## INTRODUCTION

Representative Barbara Lee was not popular on September 14, 2001. In the days following one of the most stunning attacks on the United States, Representative Lee was the sole House or Senate member to vote against the Authorization for Use of Military Force (“2001 AUMF”). Lee voted against the 2001 AUMF because she felt it gave the president “the authority to wage war in perpetuity.”<sup>1</sup> Recent history has proven Lee’s point. Since the 2001 AUMF passed, presidents across four different administrations have cited the 2001 AUMF in reports on the use of force against purported enemies across the globe.<sup>2</sup> The 2001 AUMF alone has justified countless numbers of military operations, such as airstrikes, that are then vaguely reported to Congress, the branch tasked with declarations of war.<sup>3</sup>

Over the ensuing years, Lee’s argument against the 2001 AUMF has gained significant traction. A bipartisan chorus of legislators has introduced and endorsed various measures over the years that limit, curb, or remove presidential authority following strings of military actions that have questionable legality under our Constitution and the international legal system. The calls for greater congressional control over military actions have come to include another AUMF that has yet to be terminated: the 2002 Authorization for Use of Military Force against Iraq (“2002 AUMF”).

Domestically, the debate surrounding the AUMFs is primarily—although not exclusively—about war powers and the separation of powers in war and military decisions. Although these AUMFs were somewhat uncontroversial at the time, high-profile members of Congress have begun publicly pushing for their legislative branch to exert greater control over the president’s ability to engage in unilateral military decisions, with little restraint, by imagining a post-AUMF world.<sup>4</sup> Undoubtedly the greatest threat to the AUMFs came in 2021: the full House approved a measure that would rescind the 2002 AUMF from force if signed into law. While greater congressional control over the weightiest of decisions finds deep support from the members of both chambers of Congress<sup>5</sup> and the current administration, no one argues that the threat to homeland security is any less potent. Members of Congress propose new measures to replace the AUMFs that would retain operational flexibility for the president to take actions necessary to defend the country but give Congress a seat at the table in reviewing and permitting such actions to continue. The most popular provisions put forward

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<sup>1</sup> Jeremy Herb & Deirdre Walsh, *House Panel Votes to Repeal War Authorization for Fight Against ISIS and al Qaeda*, CNN (June 29, 2017, 5:00 PM), <https://www.cnn.com/2017/06/29/politics/house-panel-repeal-war-authorization-isis-al-qaeda/index.html> [https://perma.cc/AJ9M-LAEM].

<sup>2</sup> Stephanie Savell, *The 2001 Authorization for Use of Military Force: A Comprehensive Look at Where and How it Has Been Used*, in WATSON INST. OF INT’L & PUB. AFFS.: COSTS OF WAR 3 (Brown Univ., 2021), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War\\_2001%20AUMF.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf) [https://perma.cc/AL4V-3MLE].

<sup>3</sup> *Id.* at 7.

<sup>4</sup> Tim Kaine & Todd Young, Essay, *War, Diplomacy, and Congressional Involvement*, 58 HARV. J. LEGIS. 195, 207 (2021).

<sup>5</sup> S. J. Res. 10, 117th Cong., 1st Sess. (2021).

to require this are limitations on the duration and scope of the authorization of force.<sup>6</sup>

The growing support for reimagining a role for Congress in military decisions comes against the backdrop of violations of the use of force by others, most notably Russia in its invasion and sham annexation of parts of Ukraine. Often with the United States leading the pack, the international community has rightfully decried Russia's moves as violations of the use of force under international law. Russia's gross violation of international law underscores the fragility of the system<sup>7</sup>—a system that the United States has not always respected.<sup>8</sup> Absent a clear need for self-defense, the charter that founded the United Nations does not allow for the unilateral use of force.<sup>9</sup> Such actions, regardless of spin, are clear violations of international law in the eyes of experts.<sup>10</sup> Consequently, Congress has found the perfect environment to successfully reimagine how the United States engages in the use of force to bring its practices in line with the dictates of constitutional and international law.

This Note will argue that the post-9/11 AUMFs must be discarded and replaced with a reimagined AUMF(s). It takes for granted many of the suggestions offered by AUMF reform advocates but demands more, particularly surrounding US international law obligations. Future AUMFs will be legitimate only with robust and enforceable provisions honoring international law obligations. Too often, this part of the debate is missed; no longer. This Note hopes to illuminate—even to the most ardent AUMF reformers—that both the international and domestic situations should be considered when crafting reform.

Part I will describe the environment that led to the passage of the AUMFs, one which marks a struggle between the legislative and the executive branches of government. Part II will show how the AUMFs have been used (and abused) by each of the administrations that have followed their passage, while Part III will illustrate the congressional response to unilateral executive decisions on the scope of the AUMFs. The current political environment has led AUMF reform advocates to finally feel success within reach. Finally, Part IV will describe a way forward by offering three provisions that should be included in any future AUMF: respect for international law obligations, sunset provisions, and other scope-limiting provisions. Such authorization should be narrowly tailored in both scope and duration and include input from international law experts to see if it is possible to bring such provisions in line with the dictates of international obligations.

## I. HISTORY OF “WAR POWERS” AND THE POST-9/11 AUMFS

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<sup>6</sup> Kaine & Young, *supra* note 4, at 212–14.

<sup>7</sup> John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELS. (Feb. 28, 2022, 2:25 PM), <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law> [<https://perma.cc/Y2YK-PLWP>].

<sup>8</sup> See generally Mary Ellen O'Connell, *Forever Air Wars and the Lawful Purpose of Self-Defence*, 9 J. USE FORCE & INT'L L. 1, 16–22 (2022) (describing how actions of the Biden administration have violated international law).

<sup>9</sup> *Id.* at 2; see also U.N. Charter art. 2, ¶ 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or independence of any state”).

<sup>10</sup> *Id.* at 2–3.

The post-9/11 AUMFs exist against a backdrop of both constitutional and previous legislative initiatives that necessarily precipitate the form and substance of the AUMFs. The Constitution, as with numerous other powers, divides what, for lack of a better term, will be called “war powers” between the two political branches of the federal government.<sup>11</sup> The Constitution “vests Congress with substantial authority . . . ,”<sup>12</sup> including the power to “declare [w]ar.”<sup>13</sup> At the same time, the Constitution states that the “President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”<sup>14</sup> Such division has raised legitimate questions about the scope of each “respective role” played by either branch.

Indeed, it was the intense pressure instigated by decades-long involvement in the Vietnam War that drove Congress to flex its muscles and exert its power by targeting a key weakness. In drafting what became a joint resolution known as the War Powers Resolution,<sup>15</sup> Congress was determined not to repeat the mistakes of the Vietnam War, a war which raged out “for many years without a formal congressional declaration of war.”<sup>16</sup> Following a veto-override vote, the resolution adopted the following edict: to govern and limit the president's authority to involve the armed forces in hostilities.

The stated purpose of the resolution was to “fulfill the intent of the framers of the Constitution of the United States and [e]nsure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . is clearly indicated by the circumstances, and to the continued use of such force in hostilities or in such situations.”<sup>17</sup>

President Nixon is but one of many presidents to resist the War Powers Resolution (WPR). Presidents across the political spectrum have proffered that the WPR is unconstitutional while further citing the practical “need for greater flexibility” in military affairs,<sup>18</sup> though this matter has never been addressed directly by the Court.<sup>19</sup> Consequently, presidents have routinely read the law narrowly and have often pushed the bounds of its edict.<sup>20</sup> Notwithstanding this reality, the WPR sought to provide a check on the “executive branch’s power

<sup>11</sup> GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH* 393 (5th ed. 2021).

<sup>12</sup> *Id.*

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [t]o declare War . . .”).

<sup>14</sup> *Id.* at art. II, § 2, cl. 1.

<sup>15</sup> War Powers Resolution, H.R.J. Res. 542, 93d Cong. (1973) (enacted).

<sup>16</sup> MAGGS & SMITH, *supra* note 11, at 394 (quoting War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §1541(a)).

<sup>17</sup> *Id.*

<sup>18</sup> Letter from the Nixon Libr. Educ. & Pub. Programs Team to Educators (July 27, 2021) (on file with the Richard Nixon Presidential Library & Museum), <https://www.nixonlibrary.gov/news/war-powers-resolution-1973> [https://perma.cc/7P8T-2K4N].

<sup>19</sup> MAGGS & SMITH, *supra* note 11, at 395.

<sup>20</sup> *Id.*

when committing US military forces to an armed conflict without the consent of the US Congress.”<sup>21</sup> To that end, it “stipulates the president must notify Congress within [forty-eight] hours of military action and prohibits armed forces from remaining for more than [sixty] days,” if Congress fails to approve the action.<sup>22</sup> Congressional officials continue to strongly support the WPR as most feel it properly rebalances the power sharing of wartime powers envisioned in the Constitution.<sup>23</sup>

As a consequence of the WPR’s continued validity, presidents have submitted “over 132 reports to Congress” pertaining to the uses of force.<sup>24</sup> However, there are numerous high-profile instances of presidential non-compliance with the notification and withdrawal requirements.<sup>25</sup> Although the successive years include much worth discussing, for the purposes of this Note, it is necessary to jump forward in time, to just after the turn of the century, to address the war-making powers and the balance of power in the face of a novel threat.

The environment that precipitated the 2001 and 2002 AUMFs was one of uncertainty and legitimate terror. The 2001 AUMF was introduced into Congress just three days after “the United States had endured [the] unimaginable tragedy” that was 9/11, when hijackings in three separate areas showed that the United States was under attack on its home turf.<sup>26</sup> Thousands of families directly impacted by the tragedy were just beginning to grieve, and the nation was in shock. Little was known about the belligerents, but it was clear that an unprecedented attack was executed by a newly emergent type of enemy: non-state terrorists.<sup>27</sup> Unlike previous conflicts, “the enemy in [this instance] is not associated with any particular nation-state and for all practical purposes the identity of the enemy remain[ed] undetermined.”<sup>28</sup> A new tactical approach was necessary, one responsive to a “battlefield [that] lacks a precise geographic location and arguably

<sup>21</sup> Nixon Libr. Educ. & Pub. Programs Team, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> Kaine & Young, *supra* note 4, at 197 (“Congress asserted its constitutional responsibilities and institutional duties in war powers matters by enacting the War Powers Resolution over President Nixon’s veto in 1973. Congress’s intent to restore the constitutional balance of war-making powers is clear in the Act’s Purpose and Policy section . . . .”) (citing War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §1541(a))).

<sup>24</sup> Nixon Libr. Educ. & Pub. Programs Team, *supra* note 18.

<sup>25</sup> *Id.* (“Challenges to the resolution include Ronald Reagan’s deployment of troops to El Salvador in 1981, the continued bombing of Kosovo during Bill Clinton’s administration in 1999, and military action initiated against Libya by Barack Obama in 2011.”).

<sup>26</sup> Specifically referencing the attacks on “the World Trade Center, the Pentagon, and in a field near Shanksville, Penn[sylvania].” Barbara Lee, *Op-Ed: Three Days After 9/11, I Was the Lone Vote in Congress Against War*, L.A. TIMES (Sept. 13, 2021, 3:00 AM), <https://www.latimes.com/opinion/story/2021-09-13/barbara-lee-aumf-afghanistan-war-vote-2001> [https://perma.cc/L3HK-P6F6].

<sup>27</sup> Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2048–49 (2005) (“[t]he 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.”).

<sup>28</sup> Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons from the Vietnam War*, 53 WAYNE L. REV. 943, 951 (2007).

includes the United States.”<sup>29</sup> Former president Bush, realizing this, famously announced to a cheering crowd of first responders struggling to hear him, “I can hear you! I can hear you! The rest of the world hears you! And the people—and the people who knocked these buildings down will hear all of us soon!”<sup>30</sup> Congressional officials heeded the president’s calls and were unanimous in believing that some type of “military response to the 9/11 terrorist attacks” was necessary.<sup>31</sup> There was one dissenting voice. Rep. Barbara Lee decided to vote against the 2001 AUMF due to “concern[ ] [that] Congress was rushing to put its stamp of approval on a war without a clear strategy or endgame.”<sup>32</sup> Still, Lee described the vote as “the most difficult vote [she] cast in [her] career.”<sup>33</sup> But Lee’s position was an extreme outlier during the AUMF debate. That position would also cause her to face severe threats of physical violence.<sup>34</sup> By September 18, 2001, exactly one week after the egregious attacks, Bush signed into law the 2001 AUMF, which passed with a vote of 420-1 in the House of Representative and a unanimous 98-0 in the Senate days earlier.<sup>35</sup>

The 2001 AUMF authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>36</sup> It is worth dwelling on these twenty-eight words for a moment. Critically, the 2001 AUMF provides the president with the awesome power of deciding which “nations, organizations, or persons’ satisfy the September 11 nexus requirement.”<sup>37</sup> Importantly, the 2001 AUMF has been justifiably criticized for its expansive breadth; “[t]he law provides no expiration date, geographic limit, or process by which Congress may review the [p]resident’s determinations.”<sup>38</sup> The 2001 AUMF operates under the presumption that “once [the] war is authorized,” the war-making powers recede from Congress and “rests essentially in the hands of the [p]resident.”<sup>39</sup> The AUMF, still in effect,

<sup>29</sup> Bradley & Goldsmith, *supra* note 27, at 2049.

<sup>30</sup> George W. Bush, Bullhorn Address to Ground Zero Rescue Workers (Sept. 14, 2001), in AM. RHETORIC, <https://www.americanrhetoric.com/speeches/gwbush911groundzerobullhorn.htm> [<https://perma.cc/SS48-3DBQ>].

<sup>31</sup> This is extrapolated from the first-hand account of the sole member of Congress to vote against the 2001 Authorization for the Use of Military Force. Since the AUMF authorized the use of force, Representative Lee’s statements make Congress’s view on the use of force unanimous. Austin Wright, *How Barbara Lee Became an Army of One*, POLITICO (July 30, 2017), <https://www.politico.com/magazine/story/2017/07/30/how-barbara-lee-became-an-army-of-one-215434/> [<https://perma.cc/4K59-87CY>] (detailing an account of Barbara Lee where she stated that “there needed to be some military response to the 9/11 terrorist attacks”).

<sup>32</sup> *Id.*

<sup>33</sup> Lee, *supra* note 26.

<sup>34</sup> Wright, *supra* note 31 (explaining that after voting against the 2001 AUMF, Representative Lee “receiv[ed] death threats” which resulted in a determination by the Capitol Police that she needed a “24-hour security detail” to “accompan[y] her everywhere”).

<sup>35</sup> 147 CONG. REC. 17,156 (2001); 147 CONG. REC. 17,045 (2001); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>36</sup> Minda, *supra* note 28, at 953 (quoting Authorization for Use of Military Force).

<sup>37</sup> *Id.* at 954 (emphasis omitted).

<sup>38</sup> Kaine & Young, *supra* note 4, at 198.

<sup>39</sup> Minda, *supra* note 28, at 948.

precipitated a decades-long armed conflict in Afghanistan in pursuit of the terrorist units that perpetuated 9/11. Simultaneously, it also served as the basis for justifying attacks far beyond those borders (and that enemy).<sup>40</sup>

The 2002 AUMF differs from its predecessor in many notable ways. First, the 2002 AUMF faced considerably more backlash and was enacted after a bitter debate and divided opinion both in Congress and country. The basis for the 2002 AUMF fell within the broad bounds of Bush's "War on Terror," but unlike the 2001 AUMF, the 2002 AUMF focuses on a nation-state, Iraq. At the time, government officials believed that Iraq's then leader, Saddam Hussein, had weapons of mass destruction.<sup>41</sup> Opponents of the 2002 AUMF questioned the threat level and "bristled at President George W. Bush's broad request."<sup>42</sup> The Bush administration argued that the intelligence of Iraqi possession of weapons of mass destruction was indisputable. In reality, the record showed a "divergent intelligence assessment[]" on the matter.<sup>43</sup> Bush lobbied hard for congressional authorization and, along the way, found enough bipartisan support in both chambers to pass the 2002 AUMF.<sup>44</sup> Former Senator Chuck Hagel described the mood in the country as the Iraq authorization debate raged:

This country was really off balance and petrified and looking to the president to protect them[.] Members of Congress couldn't get too far out politically to push back on the president, to say, 'Well, I'm not sure that's that important, I'm not sure he has weapons of mass destruction.'<sup>45</sup>

With the widespread belief among elected officials that the president should not be "neuter[ed]"<sup>46</sup> when conducting the foreign policy duties of the office, the 2002 AUMF passed both houses of Congress and was signed into law on October 16, 2002.<sup>47</sup> In the end, 77 senators and 296 House representatives voted for the 2002 AUMF.<sup>48</sup> Soon after, American bombs began dropping on Iraq. Certain members described their decision to vote for the 2002 AUMF based on "Mr. Bush's reassurances of a diplomacy-first approach."<sup>49</sup> In fact, future President Biden, the senior senator from Delaware at the time, stated that he intended to vote for the 2002 AUMF because he "[did] not believe this [was] a

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<sup>40</sup> Savell, *supra* note 2, at 4–5.

<sup>41</sup> Katie Glueck & Thomas Kaplan, *Joe Biden's Vote for War*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/us/politics/joe-biden-iraq-war.html> [<https://perma.cc/S6CV-49ZQ>].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, § 3, 116 Stat. 1498 (2002).

<sup>48</sup> 148 CONG. REC. 20,490 (2002); 147 CONG. REC. 20,276–77 (2002); *see also* Glueck & Kaplan, *supra* note 41.

<sup>49</sup> Glueck & Kaplan, *supra* note 41.

rush to war.”<sup>50</sup> Senator Biden continued on to state that his vote and the 2002 AUMF reflected “a march to peace and security.”<sup>51</sup> Biden would later publicly regret his decision to rely on those assurances.<sup>52</sup> In reality, the 2002 AUMF:

[E]mpowers the [p]resident 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 [p]resident 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 [p]resident must report to Congress concerning the authorization every sixty days.<sup>53</sup>

Importantly, the 2002 AUMF, unlike the 2001 AUMF, is limited in geographic scope but “purports to give the president unlimited authority to wage war against Iraq, once [they] determine[] that war is necessary to defend the national security interests of the United States.”<sup>54</sup> Although arguably, it is the “legislative authority allowing the president to initiate a first strike, military attack and invasion of Iraq” that provides the greatest sweep of power to the executive branch.<sup>55</sup> The 2002 AUMF also mentions “enforc[ing] all relevant United Nations Security Council Resolutions,” which is notably absent from the 2001 AUMF.<sup>56</sup> The relevancy of such provision is understandably questionable given that the 2002 AUMF was authorized before the United Nations decided on the authorization for use of force. In the end, the UN vote was against authorizing such use of force.<sup>57</sup> Conversely, like the 2001 AUMF, the 2002 AUMF remains in force and has been relied on for the use of military force by the executive branch without congressional approval beyond Iraq’s territorial borders.<sup>58</sup> Moreover, the 2002 AUMF is similar to the 2001 AUMF in that it includes no expiration date

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting Mr. Biden on NBC’s “Meet the Press” in 2005, “It was a mistake to assume the president would use the authority we gave him properly.”).

<sup>53</sup> Bradley & Goldsmith, *supra* note 27, at 2076 (quoting Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501 (2002)).

<sup>54</sup> Minda, *supra* note 28, at 957.

<sup>55</sup> *Id.* at 956.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 958–59.

<sup>58</sup> Kaine & Young, *supra* note 4, at 206 (“The Soleimani strike represented an escalation of the AUMF creep, for President Trump was no longer using the 2002 AUMF as duplicative of the 2001 AUMF authority to justify action solely against terrorist groups; he was using it to justify killing a general of a sovereign state other than Iraq.”).

or any means for congressional review of military decisions made by the president.<sup>59</sup>

## II. USE AND ABUSE OF THE POST-9/11 AUMFs

As mentioned, both post-9/11 AUMFs remain in force and have been relied on by successive presidents of both parties to justify the use of force around the globe.<sup>60</sup> The AUMFs, in many ways, have taken on a life of their own. Each commander-in-chief following the passage of the post-9/11 AUMFs has utilized them to justify the use of force in a “growing number of countries to fight a growing number of militant groups.”<sup>61</sup> Over time, presidential administrations began to view the AUMFs as invitations to combat not just those connected with the 9/11 attacks and the Iraqi state, but any perceived terrorism “in general.”<sup>62</sup> Under the Obama administration, the post-9/11 AUMFs were used to justify drone strikes and other cyber operations in areas “outside of active hostilities, such as Somalia, Yemen, and Syria.”<sup>63</sup>

Of the pair, the 2001 AUMF is more often used (and abused) by presidential administrations to justify unilateral executive decisions to use force, mainly because of the breadth of the 2001 AUMF. The 2002 AUMF is “seemingly less prone to misuse” due to the Iraq nexus.<sup>64</sup> Unsurprisingly, subsequent presidential administrations have used the 2001 AUMF to justify the use of force in countries ranging from Djibouti to the Philippines.<sup>65</sup> Neither offensive had any basis nor discernable connection with the initial purpose behind the post-9/11 AUMFs. In the case of Djibouti, multiple administrations cited the 2001 AUMF as the basis for permitting the president to “[c]oordinate [counterterrorism] operations in Horn of Africa and the Arabian Peninsula.”<sup>66</sup> A similar justification was offered for involvement in the Philippines and nearly a dozen other instances.<sup>67</sup> A study conducted by the Watson Institute at Brown University found that, between 2018 and 2020, the 2001 AUMF was used to justify “counterterrorism trainings” in seventy-nine countries, “US trips in combat or potential combat via surrogates” in twelve, and “air & drone strikes” in seven.<sup>68</sup>

Successive presidential administrations have also interpreted the post-9/11 AUMFs to justify attacks against terrorist networks and combatants that

<sup>59</sup> *Id.* at 199.

<sup>60</sup> Savell, *supra* note 2, at 1–3.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> Amy Byrne, Note, *A Dangerous Custom: Reining in the Use of Signature Strikes Outside Recognized Conflicts*, 86 GEO. WASH. L. REV. 620, 635 (2018).

<sup>63</sup> Emmie Phillips, *Afghanistan on a Global Stage: The End of Armed Conflict and Congress’s Constitutional Powers*, 53 LOY. U. CHI. L.J. 817, 833 (2022).

<sup>64</sup> Kaine & Young, *supra* note 4, at 198–99.

<sup>65</sup> Savell, *supra* note 2, at 4–6.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.* at 4–6.

<sup>68</sup> Stephanie Savell, *United States Counterterrorism Operations: 2018–2020*, in 2020 WATSON INST. OF INT’L & PUB. AFFS.: COSTS OF WAR (Brown Univ. 2021), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/US%20Counterterrorism%20Operations%202018-2020%2C%20Costs%20of%20War.pdf> [<https://perma.cc/44FS-YRPU>].

were nonexistent at the time of authorization. Here, too, critics claim that the laws have been “stretched beyond recognition.”<sup>69</sup> President Obama used the post-9/11 AUMFs to justify attacks and other military operations against the Islamic State (ISIS), even though ISIS did not exist when the AUMFs were initially drafted.<sup>70</sup> When then Secretary of Defense Chuck Hagel was asked by the Senate Armed Services Committee what specific statutory authorization existed for the president to decide to combat the newly formed ISIS network unilaterally, Hagel “cited the 2001 AUMF and ‘probably’ the 2002 AUMF” as support.<sup>71</sup> Obama and his successors followed Hagel’s lead by continuing to cite the post-9/11 AUMFs as legitimizing the use of force against ISIS even though the main target of the 2001 AUMF was undoubtedly not ISIS. The already “attenuated connection” between ISIS and al-Qaeda became all the more diffused when, “in February of 2014, al-Qaeda declared that it was no longer affiliated with or related to ISIS.”<sup>72</sup>

The most egregious invocation of the post-9/11 AUMFs came from the Trump administration in early 2020 following the successful assassination of Iranian major general Qasem Soleimani in Baghdad, Iraq.<sup>73</sup> When compelled to expand on the justification for an attack on an Iranian national without advanced support or consent from either Congress or our Iraqi counterparts, the Office of Legal Counsel relied on the 2002 AUMF, which authorizes the president “to use the Armed Forces . . . to . . . defend the national security of the United States against the continuing threat posed by Iraq.”<sup>74</sup> Trump administration officials justified the attack by stating that the 2002 AUMF “has long been read, in accordance with its express goals, to authorize the use of force . . . [against] terrorist threats emanating from Iraq.”<sup>75</sup> Moreover, the justification continued that the 2002 AUMF covered the assassination of Soleimani on Iraqi soil because “[s]uch use of force need not address threats emanating from only the Iraqi government, but may address threats also posed by militias.”<sup>76</sup> The perceived militia threat was Iranian Hezbollah, who were “alleged to have launched a rocket, killing an American on Iraqi soil.”<sup>77</sup> True, Soleimani was in Iraq at the time of the offensive, but as a well-known Iranian official, it is hard to see a natural connection

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<sup>69</sup> Stephen M. Walt, *How Biden Benefits from Limiting His Own War Powers*, FOREIGN POL’Y (Mar. 11, 2021, 3:51 PM), <https://foreignpolicy.com/2021/03/11/biden-aumf-limit-war-powers/> [<https://perma.cc/2Z32-VJPD>].

<sup>70</sup> William W. Taub, Note, *Al Hela’s Deathly Silence: The Decline of International Law’s Role in Interpreting the 2001 AUMF*, 60 COLUM. J. TRANSNAT’L L. 560, 575 (2022).

<sup>71</sup> Kaine & Young, *supra* note 4, at 201.

<sup>72</sup> Byrne, *supra* note 62, at 640–41.

<sup>73</sup> Phillips, *supra* note 63, at 833.

<sup>74</sup> Fallon A. Voltolina, *Understanding Self-Imposed Limitations on the Executive as Meaningful Restrictions on Authorizations for the Use of Military Force (AUMFs)*, 83 LA. L. REV. 449, 451 (2022) (quoting Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002)).

<sup>75</sup> *Id.* at 463 (quoting Memorandum from Steven A. Engel, Assistant Attorney General, to John A. Eisenberg, Legal Advisor to the National Security Council (Mar. 10, 2020) (on file with The United States Department of Justice), <https://www.justice.gov/olc/opinions-main> [<https://perma.cc/D2WA-HA2N>]).

<sup>76</sup> *Id.*

<sup>77</sup> Phillips, *supra* note 63, at 834.

between the plain text of the 2002 AUMF and the offensive ordered to take Soleimani's life. The Trump administration, when pressed further, defended the attack against Soleimani as one necessary for "detering future Iranian attack plans."<sup>78</sup>

While Soleimani's demise did not disturb many Americans, the highly suspect and extremely attenuated justification under the 2002 AUMF did produce considerable consternation within the halls of Congress.<sup>79</sup> Senators Tim Kaine and Todd Young led a chorus of congressional pushback on the justification offered by the Trump administration. Both senators found the use of the 2002 AUMF to justify the assassination of Soleimani to be "completely misplaced."<sup>80</sup>

### III. CONGRESSIONAL RESPONSE

The expansive interpretation of the post-9/11 AUMFs and congressional failure to meaningfully respond in kind has led many, including William W. Taub, to ask if the unilateral interpretations to justify attacks around the globe will ever end:

The past three presidential administrations have invoked the AUMF in contexts beyond what a reader of its plain text could ever have envisioned. Further, the conflict it authorizes has gone on far longer than any war in our history, begging the question: When will it *really* end?<sup>81</sup>

As successive presidential administrations have illustrated, the plain text of the post-9/11 AUMFs is not enough to limit expansive interpretations of the power they vest in the Commander-in-Chief. The alarming result of the expansive reading of the AUMFs, divorced from the plain text, has given "the President the sole authority to interpret and execute [the] AUMFs in any way that he deems fit."<sup>82</sup>

Kaine and Young echo this critique and argue that such an argument "defies common sense and the plain meaning of any AUMF."<sup>83</sup> In their view, Congress did not intend to "rubber-stamp non-defensive engagements" around

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<sup>78</sup> O'Connell, *supra* note 8, at 14–15 (quoting Shawn Snow, et al., *Fears of New Conflict Rise After US Kills Qasem Soleimani, a Top Iranian General, in Strike on Baghdad Airport*, MIL. TIMES (Jan. 2, 2020), <https://www.militarytimes.com/news/your-military/2020/01/03/iraq-rockets-fired-at-baghdad-airport-7-people-killed/#:~:text=One%20of%20Iran's%20most,conflict%20spreading%20across%20the%20region> [https://perma.cc/H48W-96TH]).

<sup>79</sup> Kaine & Young, *supra* note 4, at 206 ("These episodes—airstrikes against ISIS, the combat deaths of US service members in Niger, and the assassination of Soleimani—represent extensive military engagement by the Executive Branch, yet at no point did congressional opposition result in a cessation of operations under the [War Powers Resolution], suggesting the [War Powers Resolution's] failure to achieve its stated goals.").

<sup>80</sup> *Id.*

<sup>81</sup> Taub, *supra* note 70, at 563.

<sup>82</sup> Voltolina, *supra* note 74, at 461.

<sup>83</sup> Kaine & Young, *supra* note 4, at 205.

the world when it passed the AUMFs.<sup>84</sup> Kaine and Young point to the administration statements made by the Obama administration’s Department of Defense General Counsel Stephen Preston for further proof of what they call “expansions of unilateral executive war-making claims.”<sup>85</sup> When questioned by Senator Bob Corker about the limits of AUMF’s authority, Mr. Preston was hard-pressed to discern any:

SENATOR CORKER: Are there groups today that the administration cannot go against because the AUMF does not allow you to do that? Terrorist groups.

MR. PRESTON: Senator Corker, I am not aware of any foreign terrorist group that presents a threat of violent attack on this country that the president lacks authority to use military force to defend against, as necessary, simply because they have not been determined to be an associated force within the AUMF.<sup>86</sup>

Mr. Preston’s view, from the perspective of an executive official, is far from unique. His view of the executive branch’s war-making power being expansively possessed and nearly limitless permeates the executive of all post-9/11 administrations.<sup>87</sup> And this broad interpretation of the AUMFs’ scope has had real-world implications. In the opinion of Kaine and Young, the Trump administration’s highly attenuated reliance on the 2002 AUMF for justification for the Soleimani attack is an “extension of the Bush, Obama, and Trump administrations’ successive expansions of unilateral executive war-making claims.”<sup>88</sup> The still valid AUMFs have “undergirded US military operations in the Middle East for the better part of the last [thirty] years, giving presidents wide and mostly unchallenged legal authority to put boots on the ground, conduct airstrikes and more.”<sup>89</sup> But is “*never*” the answer to Taub’s question; will the use and abuse of the post-9/11 AUMFs never end?

### *A. Emerging Consensus Around Reform*

Rep. Barbara Lee was always critical of the AUMFs. For that stance, she faced considerable pressure and bore the weight alone. Now, her position is supported by a cacophony of her colleagues, stretching across the political spectrum:<sup>90</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 206.

<sup>86</sup> *Id.* at 199 (quoting *Authorization for Use of Military Force after Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Rels.*, 113th Cong. 17–18 (2014) (statement of Stephen W. Preston, Gen. Couns., U.S. Dep’t of Def.)).

<sup>87</sup> *See id.* at 205.

<sup>88</sup> *Id.* at 206.

<sup>89</sup> Andrew Desiderio, *Why Congress is Finally Starting to Claw Back its War Powers from the President*, POLITICO (July 7, 2021, 12:00 PM), <https://www.politico.com/news/2021/07/07/congress-aumf-biden-498399> [<https://perma.cc/8NDT-X89E>].

<sup>90</sup> *Id.*

For years, lawmakers who pushed to rein in presidential war powers were relegated to the fringes, and the idea was slammed as a fantasy of the progressive left. Today, as the nation grows weary of so-called forever wars, the concept has near-unanimous support in the Democratic Party and buy-in from a significant cohort of Republicans—giving Congress its best chance in a generation to re-assert its authority over matters of war and peace.<sup>91</sup>

While Congress had previously “taken no effective action to curb executive power” in the misuse of the AUMFs,<sup>92</sup> the expansive use of unilateral executive war-making claims is finally coming under considerable congressional scrutiny.<sup>93</sup> The current 118th Congress contains “bipartisan majorities in both chambers in support of 2002 AUMF repeal . . . .”<sup>94</sup> In fact, it was the 117th Congress, which entered *adjournment sine die* on January 3, 2023,<sup>95</sup> that first appeared to have significant support and possible movement on repeal of at least the 2002 AUMF.<sup>96</sup> Ardent advocates of AUMF repeal and broader reform fervently believe that had the 2002 AUMF repeal amendment received a vote in the Senate as a part of the broader omnibus National Defense Authorization Act (NDAA), passed in late December 2022, “it would have likely passed and resulted in the inclusion of identical 2002 AUMF repeal language in both the Senate and House versions of the NDAA . . . [due to the] strong bipartisan and bicameral support of the repeal of the 2002 AUMF . . . .”<sup>97</sup>

Possible overhaul of the AUMFs, especially the 2002 AUMF, by the Article I branch, felt within reach—it had the support of President Joe Biden.<sup>98</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> Byrne, *supra* note 62, at 639.

<sup>93</sup> See Desiderio, *supra* note 89.

<sup>94</sup> Brian Finucane & Heather Brandon-Smith, *Missed Opportunities and Minor Progress: the FY 2023 National Defense Bill and War Powers*, JUST SEC. (Dec. 15, 2022), <https://www.justsecurity.org/84463/missed-opportunities-and-minor-progress-the-fy-2023-national-defense-bill-and-war-powers/> [<https://perma.cc/UW8U-EGPZ>] (“When the 118th Congress begins, it will do so with bipartisan majorities in both chambers in support of 2002 AUMF repeal and a supportive White House.”).

<sup>95</sup> 168 CONG. REC. H10,549 (daily ed. Jan. 3, 2023); 168 CONG. REC. S10,113 (daily ed. Jan. 3, 2023). “An adjournment that terminates an annual session of Congress. A ‘*sine die*’ (‘without day’) adjournment sets no day for reconvening, so that Congress will not meet again until the first day of the next session. Under the Constitution, *adjournment sine die* (except when the next session is about to convene) requires the agreement of both chambers, accomplished through adoption of a concurrent resolution, which in current practice also authorizes leaders of either chamber to reconvene its session if circumstances warrant.” *Glossary of Legislative Terms*, CONGRESS.GOV, [https://www.congress.gov/help/legislative-glossary#glossary\\_adjournmentsinedie](https://www.congress.gov/help/legislative-glossary#glossary_adjournmentsinedie) [<https://perma.cc/5YWS-VFRU>], (last visited Oct. 28, 2023).

<sup>96</sup> Finucane & Brandon-Smith, *supra* note 94.

<sup>97</sup> *Id.*

<sup>98</sup> OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 256—REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002 (2021) (“The Administration supports the repeal of the 2002 AUMF, as the United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and repeal of the 2002 AUMF would likely have minimal impact on

As mentioned in the president's *Statement of Administration Policy*, the effort to repeal the 2002 AUMF has strong bipartisan support.<sup>99</sup> That strong bipartisan support was reflected in the US House vote to rescind the 2002 AUMF, which forty-nine Republicans joined all but one Democrat in supporting.<sup>100</sup> Notably, only eleven Republicans joined a 2020 effort to repeal the 2002 AUMF.<sup>101</sup> That number rose sharply to include forty-nine Republicans just a year later.<sup>102</sup>

In the Senate, a vote to repeal the 2002 AUMF was favorably reported out of the Senate Foreign Relations Committee by a 14–8 vote.<sup>103</sup> The repeal of the 2002 AUMF continues to maintain bipartisan support but still faced possible opposition from parts of the Republican caucus, who argue that repealing the AUMFs without a replacement may threaten national security. Indeed, that sentiment was reflected by Senate Minority Leader Mitch McConnell in a statement accusing House Democrats of trying to “rip out one of the key authorities underpinning” the country’s ability to use force when needed by pushing for repeal of the 2002 AUMF.<sup>104</sup> But the general attitude towards the AUMFs, in current form, has soured considerably just within the past few years.

Significantly, the bill had the support of the powerful Senate Majority Leader Chuck Schumer, who, in a floor speech, promised to bring the bill to a full vote of the US Senate.<sup>105</sup> This, like many political promises was unkept. The senate version of the NDAA included no votes on amendments, the chosen vehicle intended for the 2002 AUMF repeal. Although the senate committee vote shows that Congress is “on the verge” of repealing the 2002 AUMF,<sup>106</sup> the Senate did not take final action to repeal the 2002 AUMF before the close of the 117th Congress.<sup>107</sup>

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current military operations. Furthermore, the president is committed to working with the Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework appropriate to ensure that we can continue to protect Americans from terrorist threats.”).

<sup>99</sup> *Id.* (“This bipartisan legislation would terminate the October 16, 2002, statutory authorization for the use of military force against Iraq.”).

<sup>100</sup> The final vote was 268–161. 167 CONG. REC. H2910 (daily ed. June 17, 2021); *see* H.R. 256, 117th Cong. (2021).

<sup>101</sup> 166 CONG. REC. H738 (daily ed. Jan. 30, 2020).

<sup>102</sup> 167 CONG. REC. H2910 (daily ed. June 17, 2021).

<sup>103</sup> Scott R. Anderson, *How the 2002 Iraq AUMF Got to be So Dangerous, Part 1: History and Practice*, LAWFARE (Nov. 15, 2022, 12:24 PM), <https://www.lawfareblog.com/how-2002-iraq-aumf-got-be-so-dangerous-part-1-history-and-practice> [https://perma.cc/3H4N-EDZP].

<sup>104</sup> Karoun Demirjian, *House Votes to Repeal 2002 Authorization for Military Force with Strong Bipartisan Support and a White House Endorsement*, WASH. POST (June 17, 2021, 4:07 PM), [https://www.washingtonpost.com/national-security/aumf-repeal-congress/2021/06/17/1bd1ec70-cf76-11eb-a7f1-52b8870bef7c\\_story.html](https://www.washingtonpost.com/national-security/aumf-repeal-congress/2021/06/17/1bd1ec70-cf76-11eb-a7f1-52b8870bef7c_story.html) [https://perma.cc/RD82-W8HR]. *See also* Finucane & Brandon-Smith, *supra* note 89 (“However, in a repeat of last year’s [National Defense Authorization Act] process, the Senate failed to hold votes on *any* individual amendments to the bill, leaving the Kaine-Young AUMF repeal amendment in the dust.”).

<sup>105</sup> Finucane & Brandon-Smith, *supra* note 94 (“Following the committee vote, Senate Majority Leader Chuck Schumer (D-NY) gave remarks on the Senate floor, saying ‘I strongly and fully support repealing the 2002 authorization for the use of military force in Iraq’ and pledging to hold a vote on the matter.”).

<sup>106</sup> Anderson, *supra* note 103.

<sup>107</sup> Finucane & Brandon-Smith, *supra* note 94.

On March 29, 2023, early in the new 118th Congress, in a necessary, but largely symbolic, vote, the Senate voted in the affirmative to rescind approval of the 2002 AUMF.<sup>108</sup> The 66-30 vote was bipartisan:<sup>109</sup> eighteen Republican senators joined forty-eight Democrats to surpass the majority threshold.<sup>110</sup> This vote also proved strong ideological support for rewrite or repeal of the 2001 AUMF. Republican Senators Rand Paul and Mike Lee introduced amendments that mirrored much proposed by their colleagues Kaine and Young.<sup>111</sup> Still, these amendments were “overwhelmingly rejected” by the full Senate.<sup>112</sup> With divided control of Congress, the prospect of even a morsel of cooperation seems like a pipedream. Whether the new Republican Speaker of the House, Mike Johnson, is willing to divide his caucus on a vote to repeal the 2002 AUMF remains unknown. If past votes are prologue, such a move would result in significant opposition from within his own party.<sup>113</sup> Despite this, former Speaker McCarthy, when addressing a possible House vote on repealing the 2002 AUMF, acknowledged the bill “has a good chance of . . . getting through the committee and getting to the floor.”<sup>114</sup> The House has—of yet—not acted on repeal in the 118th Congress: pressure for reform must persist despite the House’s stonewalling. Such discussion of any AUMF repeal should necessarily include plans for a replacement. Although there is broad agreement that the 2002 AUMF is outdated and lacking in relevance, the 2001 AUMF is relied on to combat contemporary threats to US security.<sup>115</sup> Still, that does not, nor should it, invite successive presidential administrations to rely on a tenuous connection to prior congressional authorization of force. On this point, Kaine and Young elucidate the point well:

In spite of our desire to revisit the 2001 AUMF, we do not want to deprive the President of the authority to defend our country, nor would we expect our congressional colleagues or President Biden to tolerate such a circumstance. We believe the 2001 AUMF should be repealed but only with the simultaneous passage of a replacement AUMF that reflects current threats, for it remains the only legal justification for certain military activities critical to our national defense.<sup>116</sup>

Such a replacement should work to curb executive abuse by honoring the principles of international law, including sunset provisions and other scope-limiting provisions.

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<sup>108</sup> Barbara Sprunt & Susan Davis, *Senate Votes to Repeal Iraq War Authorization*, NPR (Mar. 29, 2023, 1:05 PM), <https://www.npr.org/2023/03/29/1165581083/aumf-iraq-war-senate> [https://perma.cc/8L8W-48NT].

<sup>109</sup> *Id.*

<sup>110</sup> *See* 169 CONG. REC. S1,007 (daily ed. Mar. 29, 2023).

<sup>111</sup> Sprunt & Davis, *supra* note 108.

<sup>112</sup> *Id.*

<sup>113</sup> Finucane & Brendon-Smith, *supra* note 94.

<sup>114</sup> Sprunt & Davis, *supra* note 108.

<sup>115</sup> Kaine & Young, *supra* note 4, at 211.

<sup>116</sup> *Id.*

## IV. A NEW WAY FORWARD

AUMF reform should not proceed to “tie the hands of US operators overseas.”<sup>117</sup> Rather, it is worth underscoring the intent behind AUMF reform:

[I]s to limit the actions a single, powerful individual who can authorize the use of force outside of recognized theaters of war. Under section 2(a)(2), signature strikes in the conflicts in Iraq and Afghanistan are unambiguously permitted. Where the limitations work to prevent the use of augmented, and continually augmenting, executive authority is in regulating uses of force outside of those congressionally recognized conflicts.<sup>118</sup>

Against that backdrop, any AUMF reform worth supporting must further restrict the executive branch from exerting the current unilateral ability to expand its scope should limit abuse.

For AUMF reform to succeed, Congress must look to replace both the 2001 and 2002 AUMFs. As mentioned, repealing and replacing the 2001 AUMF requires an effective replacement authorization. Unlike the 2002 AUMF, the 2001 AUMF is continually relied on by US officials to repel real threats to the homeland.<sup>119</sup> Thus, AUMF reformers have smartly turned their attention to dismantling the 2002 AUMF, with hopes that future reforms will address the 2001 AUMF. Indeed, Kaine and Young consider repealing and replacing the 2001 AUMF a “[m]edium-[t]erm [g]oal.”<sup>120</sup> Moreover, advocates rightly understand that whatever bipartisan support exists for AUMF reform of the 2002 authorization exists at the expense of keeping the 2001 AUMF, at least for now. Still, as presidents of both parties have used both AUMFs to abuse their authority, both must fall.

But reformers can and must be calculated in their approach. First, Congress must repeal the 2002 AUMF. It operates as a “zombie war authorization”<sup>121</sup> that has outlived its necessity. In its wake, Congress should pass a narrower AUMF that incorporates many of the proposals offered by Kaine and Young. With only the 2001 AUMF in effect, Congress should work through crafting an AUMF that would allow for a flexible US response to threats but also honors obligations to both domestic and international law. Hopefully, this reformed AUMF will be effective enough to allow members of Congress to consider discarding the 2001 AUMF as well. Only with a clean AUMF, free from the previous

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<sup>117</sup> Byrne, *supra* note 62, at 652.

<sup>118</sup> *Id.*

<sup>119</sup> See Kaine & Young, *supra* note 4, at 211.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 209 (quoting Conor Friedersdorf, *Zombie Iraq War: Why Haven't We Repealed the Authorization to Fight There?*, ATLANTIC (May 29, 2013), <https://www.theatlantic.com/politics/archive/2013/05/zombie-iraq-war-why-havent-we-repealed-the-authorization-to-fight-there/276315/> [<https://perma.cc/B6QR-TUWB>]).

pitfalls of the current AUMFs, will the United States truly honor its obligations when combating threats abroad.

If Congress takes the bold step to repeal the 2002 AUMF, a new AUMF should be introduced to cover potential weaknesses within our defense authorizations and work towards dismantling the 2001 AUMF. AUMF reformers have accurately outlined a series of proposals likely to curb executive abuse under the AUMF regime, including sunset provisions and other scope-limiting measures.

This Note suggests that these are strong (and necessary) provisions that will bring the US use of force abroad more in line with our domestic and international obligations. What the current congressional proposals fail to consider is another source of law that must be honored: international law codified by the United States. Although the United States is known for a “go it alone” approach, the United Nations Charter requires precipitating events before the use of force is permitted. The Charter, ratified by the Senate in 1945,<sup>122</sup> is considered binding law.<sup>123</sup> Despite the binding nature of this obligation, it is unlikely that international law tenets will find enough domestic support to be included in any reform AUMF. Fully aware of international law’s limited support within the halls of Congress,<sup>124</sup> it is likely that such a provision is among the least likely to be included in a future AUMF. Nevertheless, true reformers must campaign for its inclusion.

This Note advocates for the inclusion of binding international law tenets within future AUMFs, in tandem with other provisions offered by the likes of Kaine and Young. This Note outlines three specific provisions that should be included in any future AUMF to prevent the abuse that has run rampant under the post-9/11 AUMFs. The provisions are offered in ascending order, both in that, the successive proposal is more feasible and critical for successful AUMF reform than its predecessor. First, any reform should honor international law principles. Although this is a necessary premise, alone, it may not be enough to satisfy congressional critics of the current system or prevent executive abuse. Therefore, second, allowing AUMF to sunset with reconsideration forced upon elected officials adds another layer of protection from executive abuse. Finally, any future AUMF must limit authorization to narrow geographic or group-specific criteria to prevent Commander-in-Chief abuse.

#### *A. Honoring Principles of International Law*

In the spirit of reform, it is incumbent on our elected officials to not only consider our perspective when reforming AUMFs to face continued threats to US security; the world is watching. And the United States has obligations to honor the international tenets it has adopted. The United States, as a member of the United Nations, has agreed to limits on the pre-emptive use of force. Article 51 of the UN Charter limits the permissible use of force to when “an armed attack

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<sup>122</sup> 91 CONG. REC. 8,190 (1945).

<sup>123</sup> U.N. Charter art. 2 ¶ 2, <https://www.un.org/en/about-us/un-charter> [<https://perma.cc/BNR6-63HB>] (last visited Oct. 28, 2023).

<sup>124</sup> See Frisbie & Qasim, *supra* note 138 and accompanying text.

occurs.”<sup>125</sup> Article 51 allows the use of force in cases of self-defense in cases where a precipitating attack is lacking. Regardless, every post-9/11 president has relied on Article 51 to rationalize air and drone strikes across the globe.<sup>126</sup> Still, according to use-of-force expert Mary Ellen O’Connell, under no circumstances, does Article 51 permit the self-defense exception to permit US “air attacks outside armed conflict zones in Afghanistan, Iraq, Somalia, and Syria.”<sup>127</sup> These airstrikes, O’Connell continues, are beyond the self-defense scope of Article 51 because such attacks are not supported by evidence of “halting and repelling armed attacks underway.”<sup>128</sup>

Professor O’Connell is far from the only critic of the United States’ invocation of Article 51 to rationalize near worldwide use of force under the auspice of “deterrence.”<sup>129</sup> Around the world, strong majorities of US allies roundly opposed the Iraq War, which followed from the 2002 AUMF.<sup>130</sup> These concerns, from domestic experts and our allies, should inform measures that will eventually replace the current post-9/11 AUMFs.

The need to establish US credibility on the use of force reached an apex following Russia’s illegal invasion of Ukraine. It is well-documented and widely accepted that Russia’s invasion of Ukraine in February of 2022 violated Article 2(4) of the Charter, which prohibits the “use of force against the territorial integrity or political independence of any state.”<sup>131</sup> And although pro-Putin voices are correct in noting previous violations of Article 2(4) of the Charter by critics of Putin’s war, “instances where states have blatantly invaded other states have remained rare.”<sup>132</sup> This has not stopped Russian President Vladimir Putin from decrying an international double standard as to the permissibility of the use of force. Putin believes there is one standard for the world and another for western democracies. In a meandering speech, delivered in late September of 2022, Putin cast western democracies as the true oppressors, saying that it was these countries that “trampled” on the principle of the “inviolability of borders,” citing examples of colonialism, the slave trade, and the use of nuclear weapons by the United States

<sup>125</sup> O’Connell, *supra* note 8, at 2.

<sup>126</sup> *Id.* at 6–9. Additionally, the only other meaningful exception to the ban on the use of force springs from United Nations Security Council sanctioning such use. *Id.*

<sup>127</sup> *Id.* at 1–2.

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *Id.* at 3.

<sup>130</sup> *Many Europeans Oppose War in Iraq*, USA TODAY (May 20, 2005), <https://usatoday30.usatoday.com/news/world/2003-02-14-eu-survey.htm> [<https://perma.cc/6P38-ZG2C>] (finding 74% of Spanish nationals answered ‘No’ when asked “[a]re you in favor of military action against Iraq?”; other countries with a majority responding ‘No’ to the same question includes: France (60%), Luxembourg (59%), Portugal (53%), and Germany (50%)).

<sup>131</sup> Milena Sterio, *The Russian Invasion of Ukraine: Violations of International Law*, JURIST (July 12, 2022, 8:45 AM), <https://www.jurist.org/commentary/2022/07/milena-sterio-russia-war-crimes-ukraine/> [<https://perma.cc/3U2T-JBD3>] (“Moreover, the Russian invasion of Ukraine has been characterized by various international humanitarian law violations, such as the intentional targeting of civilian objectives, torture, rape and sexual violence. Russian actions may have given rise to several atrocity crimes, such as war crimes, crimes against humanity, genocide, and aggression. Russian leaders and soldiers, responsible for the commission of such crimes, should be held accountable and be prosecuted before a domestic, hybrid, or international tribunal.”).

<sup>132</sup> *Id.*

against Japan during World War II.<sup>133</sup> No rational actor should take international law advice from President Putin. Listening to voices of those such as O'Connell and our closest allies, however, is worthwhile.

Incorporating tenets that respect the scope of international law and the limits of the use of force agreed to by the United States will be a challenge. The primary obstacle facing its incorporation remains convincing political actors that the current course of action runs perilously close to an indefensible violation of Article 51. Take, for example, Harold Hongju Koh's view. As the former legal adviser at the United States Department of State under the Obama administration, Mr. Koh, in a 2010 address to the American Society of International Law, answered his own rhetorical question, one he rightly believed was on the minds of many:

[L]et me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.<sup>134</sup>

Professor O'Connell disagrees: "[t]o be lawful, . . . the policies must fit the law, not the other way around."<sup>135</sup> O'Connell's view of the law is right—the Obama administration used the use of force in ways that did not fit the law.<sup>136</sup> The prevailing view of the Obama administration, followed by successive administrations, is perilously close to unjustifiable under the United States' commitment to international law. Even if those in power come to realize that US actions abroad have violated the UN Charter, it is altogether another battle to determine how to treat international law within AUMF reform. The boldest approach is also the simplest as it relies on law that already binds the United States. It is the soundest approach but also the most politically risky.

In pursuit of preventing flagrant abuse of the UN Charter, a replacement AUMF should not only acknowledge these obligations but also incorporate by reference such obligations as a United Nations member state. Any future AUMF should be clear that the United States has agreed that self-defense is a defense only when "an armed attack occurs."<sup>137</sup> Unfortunately, the likelihood of successfully including an incorporation by reference to the UN Charter remains slim. A likely reason for the dim odds for including international law within AUMF reform is

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<sup>133</sup> PTI, *Putin slams West and US for 'Double Standards'; Cites Plundering of India & Africa*, THE INDIAN EXPRESS (Oct. 1, 2022, 12:15 PM), <https://indianexpress.com/article/world/putin-slams-west-us-double-standards-plundering-india-africa-8184061/> [<https://perma.cc/7P39-AR3E>].

<sup>134</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 24, 2010) (transcript available at Diplomacy in Action, DEP'T OF STATE, <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/PPC9-HC7M>] (last visited Nov. 19, 2023)).

<sup>135</sup> O'Connell, *supra* note 8, at 10.

<sup>136</sup> *See id.* at 12–14.

<sup>137</sup> *See id.* at 2.

the lack of support for multilateralism and the actions of the United Nations within certain corners of the United States. Even though the United States was a founding member of the United Nations, less than half of Americans offered positive views on the institution. Within the Republican Party, that support stands at a mere thirty-six percent.<sup>138</sup> These polling numbers indicated to pollsters that “prevailing Republican sentiment suggests that a GOP-controlled Congress would pump the brakes on US reengagement with the United Nations.”<sup>139</sup> Still, even with Republican resistance to further US engagement in multilateralism, the UN obligations remain. The United States must abide by and respect the tenets of the UN Charter, regardless of the rhetoric from certain ideological spheres.

With apathy for international law and the United Nations clear throughout the United States, incorporating the UN Charter by reference to further restrict the executive branch to align with international obligations seems farfetched. Critics may point to the inflexibility of waiting for an attack to occur before self-defense is sanctioned under the UN Charter as a reason to exclude it from future AUMFs. This reality should not deter advocates from honoring international law, in some way, within future AUMFs.

Alternatively, future AUMFs could honor principles of international law, codified in the UN Charter, while also allowing the United States to remain agile in defending the homeland by “employing a flexible approach.”<sup>140</sup> A flexible approach could be:

[D]raft[ed] around the rigidity of U.S. case law and . . . codify those aspects of international law that best reflect the messiness of the current conflict. For example, an authorization for conflict can condition authority on the continued existence of the factual war, with reference specifically to the *Tadić* Tribunal’s characterization of a [ ] [non-international armed conflict] as reflecting a certain level of organization and a minimum level of intensity in the relevant hostilities.<sup>141</sup>

Under the *Tadić* framework, developed by the International Criminal Tribunal for the former Yugoslavia, the United States would have latitude to combat non-state actors in non-international armed conflicts if they have a “certain level

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<sup>138</sup> Sonnet Frisbie & Aleezah Qasim, *Despite the Body’s Global Popularity, Republicans’ Views of the United Nations Will Constrain US Engagement*, MORNING CONSULT (Sept. 20, 2022, 5:00 AM), <https://morningconsult.com/2022/09/20/united-states-united-nations-engagement-outlook/> [<https://perma.cc/7QSS-A4G8>].

<sup>139</sup> *Id.*

<sup>140</sup> Taub, *supra* note 70, at 602.

<sup>141</sup> *Id.* See also *id.* at 569 (“Defining exact standards for both of these prongs has proven elusive, but attempts have been made by international tribunals and the drafters of the Rome Statute. International tribunals have considered a variety of factors in determining the level of organization, including the existence of a command structure, military and logistical capacity, a disciplinary system, and the ability for a group to speak with one voice. Factors considered in determining the intensity of hostilities include the quantity and quality of troops and weapons deployed, the types of actions, the effects on the civilian population, and whether external actors are involved.”).

of organization” and “a minimum level of intensity in the relevant hostilities.”<sup>142</sup> Non-international armed conflicts, or “NIACs,” are defined as “[a]rmed conflicts not of an international character occurring in the territory of [a member’s country].”<sup>143</sup> Conflicts that precipitated from the 2001 AUMF—think al-Qaeda or ISIS—have been widely classified as NIACs by various entities, including the US government.<sup>144</sup> *Tadić*, at least in theory, allows countries to engage more proactively to combat NIACs as opposed to the more measured response required when a threat comes from a peer sovereign.<sup>145</sup>

As most threats to the US homeland that have compelled AUMF invocation have arisen from NIACs, the flexible approach would both assuage the concerns of international law skeptics and bring the United States more in line with its international law obligations. The post-9/11 era ushered in a new age and new enemy: NIACs, and NIACs rapidly became the greatest threat to the US homeland. Thus, a future AUMF that incorporated the *Tadić* standard for engaging, while not fully fleshed out, provides more vigorous justification that the United States honors its international law obligations because the formulation came from an international tribunal applying international law.<sup>146</sup> Although not as powerful as an invocation of international law as incorporating the UN Charter by reference, incorporating the *Tadić* framework to combat NIACs will provide stronger footing for the United States to claim that international law must be respected truly.

A wise adage once said, “knowing is half the battle”; clearly, much work must be done to convince those in power that the current path feeds into our enemies’ plan and weakens our legitimacy on the world stage. As our allies and enemies alike often have a higher regard for the United Nations and multilateralism, the eyes of the world are on the United States to see how it will treat international law.<sup>147</sup> In order to honor international law, US politicians must keep in mind our binding international commitments in pursuit of a healthier and more durable approach to US security. Although there is unlikely to be an appetite for full inclusion of US obligations under the United Nations in future AUMFs, some adherence to international law principles, such as adopting a view of the use of force as elucidated by the *Tadić* court, may be more appealing while remaining faithful to international law. Honoring international law will be difficult for our members of Congress, but the UN Charter is our law. It must be respected. In addition to the necessary international law considerations, any congressional reform to the current AUMF structure should consider limiting the duration of the authorization—commonly satisfied by a sunset provision.

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<sup>142</sup> *Id.* at 569.

<sup>143</sup> *Id.* at 568 (quoting INT’L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUG. 1949, Common Art. 3 (2001)).

<sup>144</sup> *Id.* at 571.

<sup>145</sup> *See id.* at 568–69.

<sup>146</sup> *See id.*

<sup>147</sup> Frisbie & Qasim, *supra* note 138 (finding that “[m]ajorities of adults in [twenty-seven] of [forty-three] countries where Morning Consult conducts daily surveys expressed favorable views of the United Nations”).

### B. *Sunset Provisions*

A more widely accepted replacement for future use of force authorizations are sunset provisions. Sunset provisions provide a mechanism for a congressional check on a president's use of force by "includ[ing] a date on which the authorization is terminated unless reauthorized by Congress."<sup>148</sup> In theory (and hopefully in practice), a sunset provision would provide "an expiration date after which a president could no longer use the law to justify military action."<sup>149</sup> Indeed, one need not look further for proof of significant support for sunset provisions in new AUMFs than Congress itself. A cursory look at past practice reveals that sunset provisions were included in "roughly one-third of past AUMFs and declarations of war."<sup>150</sup> Moreover, high-ranking executive branch officials from both parties have endorsed the use of sunset provisions.<sup>151</sup>

Fierce AUMF reform advocates, including Lee, Kaine, and Young, have all advocated for the use of sunset provisions to avoid sending a blank check to the president on matters of use of force.<sup>152</sup> Lee, for her part, introduced a provision that would endorse sunset provisions, to the House Appropriations Committee during the summer of 2021. The provision stated that:

(1) the inclusion of a sunset provision or reauthorization requirement in authorizations for use of military force is critical to ensuring Congress's exercise of its constitutional duty to declare war; and

(2) any joint resolution enacted to authorize the introduction of United States forces into hostilities or into situations where there is a serious risk of hostilities should include a sunset provision setting forth a date certain for the termination of the authorization for the use of such forces absent the enactment of a subsequent specific statutory authorization for such use of the United States forces.<sup>153</sup>

Lee's provision is a common-sense response to the executive branch's overreach in a decision that was for Congress to make and for the executive branch

<sup>148</sup> Tess Bridgeman, *In Support of Sunsets: Easy Yes Votes on AUMF Reform*, JUST SEC. (July 13, 2022), <https://www.justsecurity.org/82312/in-support-of-sunsets-easy-yes-votes-on-aumf-reform/> [<https://perma.cc/F449-FYV3>].

<sup>149</sup> Kaine & Young, *supra* note 4, at 212.

<sup>150</sup> Bridgeman, *supra* note 148.

<sup>151</sup> *Id.* (former CIA and Department of Defense General Counsel Stephen Preston advocated that a sunset provision shows "the United States is 'committed to the fight' and 'committed to our democratic institutions'").

<sup>152</sup> Kaine & Young, *supra* note 4, at 212 (explaining that any AUMF replacement "should include a sunset provision"). Lee offered an amendment to the Fiscal Year 2022 Defense spending bill that includes "[s]unsetting the 2001 AUMF." Press release, Barbara Lee, Rep. for the 12th Dist. of Cal., House of Reps., Congresswoman Barbara Lee's Amendments to Stop Endless Wars Adopted by House Appropriations Committee (July 13, 2021), <https://lee.house.gov/news/press-releases/congresswoman-barbara-lees-amendments-to-stop-endless-wars-adopted-by-house-appropriations-committee> [<https://perma.cc/QS5J-MU2K>].

<sup>153</sup> Bridgeman, *supra* note 148.

to *execute*. The benefits of sunset provisions are multifaceted. First, these provisions allow members of Congress to “review periodically how the mission has evolved since initial passage . . . .”<sup>154</sup> This mandatory review allows the legislative branch to re-exert its control over declarations of defense operations, bringing the use of force more in line with the Constitution’s requirements. Furthermore, the legislative control over the use of force authorizations through sunset provisions also allows Congress to assess “how the current administration is using the AUMF.”<sup>155</sup> Under the current AUMF regime, Congress has few options—other than repealing the AUMFs—to prevent a new administration from stretching the authorization well beyond what Congress intended. Sunset provisions allow Congress to recalibrate the authorization based on new information from the field and assess how much latitude should be given to the current administration based on its use (or misuse) of the “sunset” AUMF.

Still, there are multiple arguments presented against sunset provisions. While sunset provisions would allow Congress to re-exert its duty to determine whether US forces or weaponry will be used abroad, many members of Congress would rather not make those decisions. One possible reason that sunset provisions have been missing from the post-9/11 AUMFs and the debate surrounding them falls on congressional willingness (even eagerness) to “pass[] the buck” to the executive branch.<sup>156</sup> Congress has been ambivalent about getting involved in the granular details of the use of force and has all but “thus allowed the [p]resident to decide the important question of war and peace.”<sup>157</sup>

Another common objection to sunset provisions follows that they may result in Congress “prematurely disengag[ing] with the enemy[] for the sake of brevity.”<sup>158</sup> Instead, the proper view, offered by Kaine and Young, interprets such provisions to allow Congress “to debate whether continued engagement is in the public interest and, if so, to consider amending the authorization to meet current demands.”<sup>159</sup> Indeed, sunset provisions allow Congress to exert its constitutional duty to authorize the use of force and allow all parties to adapt the law. It is also possible that “requiring a new vote for new authorizations every so often”<sup>160</sup> would curb the executive branch from stretching the authorization when it knows Congress can and must revisit it periodically.

Although requiring congressional action on any measure is indeed a risky bet, Kaine and Young’s explanation that such fear is misplaced remains persuasive. Although these sentiments may be valid, the Constitution requires that members of Congress exert control over the use of force. If certain members are unwilling to fulfill this duty, Congress may not be for them.<sup>161</sup> Kaine and Young have

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<sup>154</sup> Kaine & Young, *supra* note 4, at 212.

<sup>155</sup> *Id.*

<sup>156</sup> Minda, *supra* note 28, at 960.

<sup>157</sup> *Id.*

<sup>158</sup> Kaine & Young, *supra* note 4, at 212.

<sup>159</sup> *Id.*

<sup>160</sup> Taub, *supra* note 70, at 596.

<sup>161</sup> These individuals would likely be welcomed with open arms by the lobbying industry, which often hires former members of Congress. *Former Members*, OPEN SECRETS, <https://www.opensecrets.org/revolving/top.php?display=Z> [<https://perma.cc/QYT3-5EUC>] (last visited

assured critics worried about the cumbersome procedure, and the political gridlock that “[a]s Congress has done with other national security legislation, a sunset provision would be coupled with expedited legislative procedures for passing a bill to renew the AUMF in the House of Representatives and, more importantly, because of the filibuster, the Senate.”<sup>162</sup>

Rational, time-limited authorizations not only allow for greater congressional control over the executive branch but also allow elected officials to recalibrate when faced with a novel threat. Many enemies that threaten US and world security “did not exist at the time of [the post-9/11 AUMFs] enactment and about which Congress never deliberated.”<sup>163</sup> Therefore, sunset provisions allow Congress to absorb new information and tailor any new plan to combat emerging threats. While sunset provisions would be a welcomed inclusion in any reform AUMF, there are other scope-limiting measures, such as geographic and group-specific controls, that Congress should also consider when drafting future reform AUMFs.

### *C. Geographic and Other Scope-Limiting Options*

Arguably, the most important restriction that Congress could place on the executive in any future reform AUMF is limitations on where force is permissible and who can be targeted. When discussing where force is permissible, AUMF reform advocates rightfully point to geographic limitations as a natural method to limiting the executive ability to expand the scope of any future AUMF. Simply, geographic limitations would permit the executive branch to use force only in areas pre-authorized and agreed to by both the legislative and executive branches. Kaine and Young proposed that replacement AUMFs could be based, as they say, on a variety of geographic limitations—varying from “strict” to “flexible.”<sup>164</sup> Mindful that each AUMF may need to be tailored to unique “parameters,” both

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Dec. 11, 2023) (“Dozens of former members of Congress now receive handsome compensation from corporations and special interests as they attempt to influence the very federal government in which they used to serve.”).

<sup>162</sup> Kaine & Young, *supra* note 4, at 212.

<sup>163</sup> Bridgeman, *supra* note 148.

<sup>164</sup> Kaine & Young, *supra* note 4, at 214 (“Geographic limitations in a new authorization can take many forms. A strict AUMF might designate specific locations where Congress authorizes military action and forbid action elsewhere. A more flexible one may authorize action in no more than a few countries by name and require the president to submit to Congress an initial list of additional countries where he or she anticipates using military force under the AUMF; it may also allow the president to later designate new countries where he or she deems action authorized under the AUMF. Such geographic designations should be subject to similar reporting and congressional review requirements as the president’s designations of new associated forces. Under such a legal regime, actions taken in far-off locales not anticipated by Congress (e.g., Niger, the Philippines) could more easily spark debate in Congress, and, if the people’s representatives in Congress deem such actions not in the national interest, they could readily be halted. An even more lenient version of the authorization could include no mention of geographic limitations whatsoever if Congress deems that the nature of our enemies requires the president to have flexibility to attack them wherever they emerge. However, such liberality should be counterbalanced by strong provisions regarding the definition of ‘associated forces’ to prevent engagement in new theaters where combatants are only tenuously connected to those designated by the text of the AUMF.”).

senators have expressed support for allowing AUMFs to “vary sizably” in terms of geographic limitations.<sup>165</sup> These sensible inclusions, which have support beyond the two senators, are necessary to strengthen congressional oversight over the executive’s AUMF interpretation.

Indeed, the notion of limiting the president’s authority to use force to specific geographic locations was proposed by former Representative Anthony Brown during the 116th Congress.<sup>166</sup> In a bill titled “Limit on the Expansion of the Authorization for Use of Military Force Act,” Brown sought “to prevent the [e]xecutive branch from relying on the AUMF as authorization to use force in even more countries—beyond those in which the United States already is engaged in [pursuant to the current AUMFs].”<sup>167</sup>

While Brown’s bill did not become law, there was significant bipartisan support for the measure in that Congress.<sup>168</sup> With support in both houses of Congress, geographic limitations could (and should) become part of a reform AUMF because, if executed properly, it would deliver a rebalancing of war powers to their original constitutional underpinning. For geographic limits to have teeth, the geographic limits must be crafted as narrowly as possible.<sup>169</sup> In some cases, individual provinces in lieu of the entirety of a country could be the limitation imposed by Congress if the current threat could be alleviated by imposing those conditions. Knowing that it must have a direct hand in re-evaluating where US force is authorized, Congress would require careful consideration of current threats. Thus, AUMFs are more likely to remain relevant instead of stale.<sup>170</sup>

Another limitation that Congress should place within any future AUMF is a “clear definition of the enemy to be defeated.”<sup>171</sup> One of the most essential proposed “guardrails”—defining the enemy—acts to curb executive abuse that has been commonplace under the current AUMFs.<sup>172</sup> Thankfully, Kaine and Young’s proposal would include a “clear definition” that would narrow future AUMFs, in contrast with the post-9/11 AUMFs. The current AUMFs use inarguably broad

<sup>165</sup> *Id.*

<sup>166</sup> Jennifer Daskal, et al., *An Incremental Step Toward Stopping Forever War?*, JUST SEC. (July 13, 2020), <https://www.justsecurity.org/71374/an-incremental-step-toward-stopping-forever-war/> [<https://perma.cc/8L7S-M7P6>] (“A bill introduced by a bipartisan group of lawmakers in the House of Representatives could offer some reason for hope. The ‘Limit on the Expansion of the Authorization for Use of Military Force Act,’ H.R. 7500, seeks to prevent the Executive branch from relying on the AUMF as authorization to use force in even more countries—beyond those in which the United States already is engaged in ‘hostilities pursuant to [the AUMF]’ as of the date the bill is enacted into law. Crucially, the bill is *expressly* not *ratifying* the Executive branch’s interpretation of *where* the AUMF currently applies. Rather, it explicitly states that it does not deem the use of force in any country in which the United States is ‘engaged in hostilities’ to be either lawful or unlawful. Nor does it operate as an authorization to use military force in those countries. It simply seeks to limit further creep.”).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *See generally id.* (“Now, a bipartisan group of Members is seeking to stop the Executive from using the 2001 AUMF as a blank check it can apply to ever-more theaters of conflict.”); *see also* Kaine & Young, *supra* note 4, at 214.

<sup>170</sup> Daskal, *supra* note 166.

<sup>171</sup> Kaine & Young, *supra* note 4, at 213.

<sup>172</sup> *See* Daskal et al., *supra* note 166.

language such as an authorization of force against those who “harbored such organizations or persons...that planned, authorized, committed, or aided the terrorist attacks that occurred on September 11” which has been relied on by presidential administrations to stretch the AUMFs beyond recognition.<sup>173</sup> The replacement AUMF “should specify by name the terrorist groups against which Congress authorizes the commander-in-chief to take military action and require him or her to take additional action, such as notifying Congress, in order to receive authorization to use force against ‘associated forces.’”<sup>174</sup> In practice, this approach, also outlined by the pair of senators, is easy to implement because there is an effective enforcement mechanism. Congress could enforce any enemy-specific limitation in future AUMFs while retaining the flexibility to modify the list as needed by updating the “list of targetable groups” through the National Defense Authorization Act passed each successive year.<sup>175</sup>

Realizing that future presidents may similarly exploit the term “associated forces,” Kaine and Young have provided the phrase would have a “narrow definition.”<sup>176</sup> This would also help prevent future administrations from “relying on the AUMF to use force against new enemies that are inside countries where it is currently engaged in hostilities.”<sup>177</sup> With an enemy-specific limitation included in AUMFs, future administrations would need to seek an expansion of the enemy list instead of unilaterally declaring that new groups that were not listed are deemed covered by the authorization.

Although geographic and enemy-specific limitations have found growing support within the halls of Congress, there are those who believe that “due to the nature of the adversaries of the United States, it is difficult to particularly codify a target since terrorist groups are constantly evolving, breaking off, and forming different alliances.”<sup>178</sup> While true that future AUMFs that include these limitations may run the risk of consistently becoming obsolete or useless, such limitations would force Congress to respond. Knowing that it must have a direct hand in re-evaluating where US force is authorized, Congress is more likely to consider the bounds of current threats carefully and methodically. Thus, AUMFs are more likely to remain relevant instead of obsolete.<sup>179</sup> Congress, when necessity demands, can act quickly. Indeed, the 2001 AUMF was introduced and signed into law just one week after the horrific attacks on September 11.<sup>180</sup> If a new threat from a new enemy or a new location comes forward, Congress can act quickly to give the president the necessary authorization to proceed. Novel threats should not be an excuse for broad authorizations. Instead, new threats should engage Congress to be on alert and respond when necessary.

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<sup>173</sup> Kaine & Young, *supra* note 4, at 213 (quoting Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

<sup>174</sup> Kaine & Young, *supra* note 4, at 213.

<sup>175</sup> Taub, *supra* note 70, at 597.

<sup>176</sup> Kaine & Young, *supra* note 4, at 213.

<sup>177</sup> Daskal et al., *supra* note 166 (emphasis omitted).

<sup>178</sup> Byrne, *supra* note 62, at 653.

<sup>179</sup> Daskal et al., *supra* note 166.

<sup>180</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

There is also the real possibility that a future president may still ignore Congress's role in deciding when and where to exercise the use of force. Again, regardless of the pressure from the executive branch, it is Congress—as the people's representatives—who should be responsible for deciding whether the new threat is within the national interest.<sup>181</sup> Under a reformed AUMF, the executive branch would need to cooperate with Congress to renew or revamp the AUMFs. It is not up to the president alone. This, in turn, would re-exert the constitutional limitations and separation of powers envisioned by our Framers.<sup>182</sup> This is both good policy and follows the Constitution.

Geographic and other scope-limiting provisions function similarly to sunset provisions in that such provisions allow Congress to respond to novel threats and recalibrate authorizations as necessary.<sup>183</sup> But geographic and other scope-limiting provisions do more. These provisions also put Congress at the center of deciding where to authorize the use of force. Narrow geographic or enemy-specific provisions would force the executive to come to Congress when a new threat arises, allowing Congress to craft a response tailored to the particular threat. In the end, while congressional involvement may delay authorizations, as more deliberation would occur, Congress knows how to act fast. Implementing geographic and other scope-limiting provisions may be the single most effective tool that Congress must use to exert greater control over use-of-force authorizations. Kaine and Young agree.<sup>184</sup> Hopefully enough of their colleagues do as well.

#### CONCLUSION

This is Barbara Lee's I-told-you-so moment. Although unlikely to speak those words, Lee is still willing to forcefully stand at the forefront of the movement to reform the post-9/11 AUMFs. Indeed, the current forecast is that Representative Lee hopes to become Senator Lee in 2024.<sup>185</sup> Although likely to face a difficult primary in the state of California, if elected, she would join a bipartisan group of senators that are finally ready to reconsider the post-9/11 AUMFs that every presidential administration has abused since their enactment. Senator Kaine, also recently announced that he will seek re-election, explaining that he decided to ask the people of Virginia once again to the Senate, by saying, "I got a whole lot more I want to do."<sup>186</sup> Undoubtedly, that includes AUMF

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<sup>181</sup> Kaine & Young, *supra* note 4, at 214.

<sup>182</sup> *See id.* at 214–15.

<sup>183</sup> *See id.* at 212.

<sup>184</sup> *See id.* at 212–15.

<sup>185</sup> Erin Doherty & Eugene Scott, *Rep. Barbara Lee Plans to Run for Senate in 2024*, AXIOS (Jan. 11, 2023), <https://www.axios.com/2023/01/11/barbara-lee-senate-bid-2024-california> [https://perma.cc/A4H2-3TDF] ("Rep. Barbara Lee (D-CA) plans to run for Senate in 2024, according to a source familiar with the matter. This comes after Rep. Katie Porter (D-CA) publicly announced her bid.").

<sup>186</sup> Marianne Levine, *Kaine Launches Senate Reelection Bid, Giving Dems a 2024 Boost*, POLITICO (Jan. 20, 2023, 12:06 AM), <https://www.politico.com/news/2023/01/20/tim-kaine-launches-senate-reelection-bid-2024-00078759> [https://perma.cc/3Y6C-N7Q9] ("A member of the

reform, which, if joined by Lee, would add another voice (and an impactful one) to the cause in the Senate.

If ever there was a moment for Congress to re-exert its constitutional duty over fundamental war powers decisions, it is now, a moment of relatively little US military action abroad. At this moment, reform is possible. With a bipartisan majority in both chambers of Congress and a presidential endorsement supporting the measure, repeal and replacement of the post-9/11 AUMFs are feasible. This just may be an area in which bipartisanship can win out.

The proposals laid out by Kaine, Young, and Lee rightly point to sunset provisions and other scope-limiting provisions as effective measures to curb executive abuse in any future AUMF. But these erudite members of Congress should remember US international obligations when crafting future AUMFs. The law of the UN Charter is part of “the supreme Law of the Land.”<sup>187</sup> Now more than ever, with threats to Ukrainian territorial sovereignty by Russian forces,<sup>188</sup> the United States must forcefully affirm the future authorizations on the use of force to limit not only the executive’s power but also respect the limits of US unilateral action. Force should be a last resort, and future AUMFs should reflect this reality. Thankfully, these provisions will likely make the use of force by the United States legal in the eyes of the international community and will represent good domestic policy. The American people deserve to have their representatives involved in deciding when, against whom, and where the United States exerts its mighty force. It is both good policy and constitutional.

A win–win.

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Senate Armed Services and Foreign Relations Committees, [Senator Tim Kaine (D-VA)] has also made limiting presidential war powers a key focus during his Senate tenure.”)

<sup>187</sup> U.S. CONST. art. VI, § 2; *The Application of the United Nations Charter to Domestic Law*, 20 FORDHAM L. REV. 91 (1951) (“[T]he United States Charter, being a duly ratified treaty, had become part of the supreme law of the land, together with the federal constitution and all the laws of the United States.”); *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law”).

<sup>188</sup> *See* Bellinger, *supra* note 7.