discharging their lawful duties; or (b) commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in . . . any section of the people; . . .

Russian law defines "terrorism" as "violence or the threat of violence against individuals or organizations, and also the destruction (damaging) of or threat to destroy (damage) property and other material objects." Russian Federation Federal Law No. 130-FZ, art. 3 (July 25, 1998). Terrorism includes, for example, to "threaten to cause loss of life, significant damage to property, or other socially dangerous consequences and are implemented with a view to violating public security, intimidating the population, or influencing the adoption of decisions advantageous to terrorists by organs of power, or satisfying their unlawful material and (or) other interests." Id. "[T]errorist crimes are crimes envisaged by Articles 205-208, 277, and 360 of the Russian Federation Criminal Code. Other crimes envisaged by the Russian Federation Criminal Code may be categorized as terrorist crimes if they are committed for terrorist purposes." Id. See also SCOR Report S/2001/1284 (Dec. 27, 2001).

Spanish law indicates that "terrorism" is defined in Spanish Criminal Code, art. 571-79 "of the, 'On crimes of terrorism', and also in the Organic Act on the Reform of the Criminal Code (LO 10/1995 of 23 November 1995)." 80 Under Article 571 of the Spanish Criminal Code terrorists are defined "as those who 'belonging, acting in the service of, or collaborating with armed groups, organizations or bodies whose objective is to subvert the constitutional order or seriously alter public peace', commit the acts described in Article 346." This article includes "attacks on buildings, transportation or communications infrastructure using explosive devices," or under Article 351 "arson causing risk of injury or death. . . . According to these articles, a crime of terrorism is [one that is] 'intended to subvert the constitutional order or seriously alter public peace.'"

Before September 11, 2001, "Swedish legislation . . . contained no reference to specific criminal offences for terrorist acts. Persons committing terrorist acts were punished under the general provisions in the Penal Code." SCOR Report S/2001/1233 at 4 (Dec. 24, 2001). To comply with the European Framework Decision on Combating Terrorism, Sweden enacted the Act on Criminal Responsibility for Terrorist Crimes, which entered into force on July 1, 2003. This act defines a terrorist act as one that is designed to:

1) Inflict serious fear on a population or group of population, 2) Unduly compel a public agency or an international organization to take measures or abstain from measures, or 3) Seriously destroy fundamental political,

80 Fundación para las Relaciones Internacionales y el Diálogo Exterior, Case Study: Spain, The Ethical Justness of Counter-Terrorism Measures, 11 (Oct. 27, 2008), http://www.transnationalterrorism.eu/tekst/publications/Spain%20case%20study%20(WP%206%20De1%2012b).pdf is the source for the facts and quotations in this paragraph.
constitutional, economical or social structures in a state or intergovernmental organization.

SCOR Report S/2004/476 at 3 (June 10, 2004). “Attempt, preparation or conspiracy to commit terrorist crimes or failure to disclose such crimes is also punishable.” *Id.*

The Terrorism Act of 2000 of the United Kingdom states that “terrorism” means the use or threat of action” if such action “(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person[']s life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public . . .” Terrorism Act 2000, ch. 11, pt. 1 § 1(1), 1(2) (July 20, 2000). [http://www.legislation.gov.uk/ukpga/2000/11/contents/enacted](http://www.legislation.gov.uk/ukpga/2000/11/contents/enacted). Such use or threat must be “for the purpose of advancing a political, religious or ideological cause,” or designed to influence the Government or intimidate a section of the public,” and be “made for the purpose of advancing a political, religious or ideological cause.” *Id.* at § 1(1). See also SCOR Report S/2001/1232 at 10 (Dec. 24, 2001).

The 2006 M.C.A. definition of terrorism is narrower in its prohibitions than the language of Common Article 3 and APII, consistent with international norms applicable at the time of the charged conduct, consistent with the general principles of law recognized by civilized nations, and constitutes conduct in violation of the common law of armed conflict. Congress acted within the scope of its constitutional authority in defining terrorism as an offense in the 2006 M.C.A. and in making such conduct punishable by military commission.

**B. Discussion**

Applying the elements in the M.M.C. Part IV, ¶ 6(25)bB, *supra* p. 50, to the facts in the Specification of Charge III reveals that at trial the Government proved, by legal and competent evidence, beyond a reasonable doubt that appellant:

(1) was an AUEC see 2006 M.C.A. § 948(a), *supra* nn. 22-24, 53;

(2) provided material support or resources to an international terrorist organization engaged in hostilities against the United States,” M.M.C. Part IV, ¶ 6(25)bB(1), when he provided himself and various services to bin Laden and al Qaeda by preparation of various propaganda products intended for al Qaeda recruiting and indoctrination training, and incited persons to commit terrorism; facilitated the pledges of loyalty to bin Laden and prepared the propaganda declarations styled as Martyr Wills for two suspected September 11, 2001 hijackers/pilots, researched the economic effect of those attacks on the United States and provided the results to bin Laden, and operated and maintained data
processing equipment and media communications equipment for the benefit of bin Laden and other al Qaeda leaders and to al Qaeda an international terrorist organization. Al Qaeda was engaged in hostilities against the United States from at least February 1999. The Specification of Charge III, ¶¶ e, g, h, j;

(3) intended to provide such material support or resources to such an international terrorist organization,” M.M.C. Part IV, ¶ 6(25)bB(2), as demonstrated by his “a. traveling to Afghanistan with the purpose and intent of joining al Qaeda; b. meeting with Saif al 'Adl, the head of the al Qaeda Security Committee, as a step toward joining the al Qaeda organization; c. undergoing military-type training at an al Qaeda sponsored training camp then located in Afghanistan near Mes Aynak; d. pledging fealty, or “bayat” to the leader of al Qaeda, Usama bin Laden, joining al Qaeda.” The Specification of Charge III, ¶¶ a-d;

(4) knew that such organization has engaged or engages in terrorism,” M.M.C. Part IV, ¶ 6(25)bB(3), as established by al Qaeda’s “violent attacks on the United States' embassies [in] Nairobi, Kenya and Dar es Salaam, Tanzania [on] August 7, 1998; on the U.S.S. COLE [near] Aden, Yemen [on] October 12, 2000, and; at various locations in the United States [on] September 11, 2001”); the Specification of Charge III; and

(5) That “the conduct took place in the context of and was associated with hostilities.” M.M.C. Part IV, ¶ 6(25)bB(4), as shown by a series of violent actions by al Qaeda against the United States and bin Laden’s declarations of his plans to attack the United States.

Providing material support for terrorism as codified and charged provided comprehensive notice of both the conduct in issue and the elements of the offense. In fact, the Government was required to prove that the material support provided satisfied both objective and subjective elements.

The objective elements include an actus reus: appellant’s provision of himself as a member of al Qaeda and various services as material support for al Qaeda; common element 1 - “alien unlawful enemy combatant element;” see supra pp. 37-45, common element 2 - that the conduct took place “in the context of and was associated with an armed conflict,” and that the recipient of the support was “an international terrorist organization engaged in hostilities against the United States.” See supra pp. 45-47. As alleged, the Government was required to prove that al Qaeda was “then engaged in hostilities against the United States” thus further narrowing the scope of punishable conduct.

The subjective elements include both a mens rea or intent element, and scienter or knowledge element. Specifically, the 2006 M.C.A. requires that the accused “intentionally provides material support and resources” to such an
international terrorist organization, with "kn[owledge] that such organization has engaged or engages in terrorism." 2006 M.C.A. § 950v(25).

Review of the elements of "providing material support for terrorism" amply demonstrates that appellant's charged conduct is not an inchoate offense. Instead, the charged offense makes punishable the provision of "material support or resources to an international terrorist organization engaged in hostilities against the United States," with knowledge of that organization's past or ongoing terrorism and with specific intent to "provide material support" to that international terrorist organization. This offense is akin to providing direct support to an ongoing criminal enterprise, in this case one engaged in terrorism, with knowledge of that enterprise's past or ongoing crimes and with specific intent to support that criminal enterprise.

Providing material support for terrorism is essentially co-perpetrator liability, analogous to membership in a criminal organization in that the essence is cooperation for criminal purposes, and akin to aiding and abetting, or complicity. As such, the theory of individual criminal liability has long been recognized as a general principle of law under the law of armed conflict and by civilized nations. This is particularly true where the accused voluntarily joins an organization, with knowledge of that organization's systematic engagement in criminal activity. See Hamdan, 2011 WL 2923945 at *32-*35. We recall two related and long-standing legal principles. In 1865, Attorney General James Speed explained that the act of "unit[ing] with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined." 11 Op. Atty. Gen. at 312, see supra p. 41. Similarly in 1942, the Supreme Court commented, "Unlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." Quirin 317 U.S. at 31 (emphasis added; citations omitted). There is also ample support for this conclusion in international jurisprudence.

1. Criminal Organizations – International Military Tribunal at Nuremburg

The London Charter established the International Military Tribunal (IMT) at Nuremburg "for the just and prompt trial and punishment of the major war criminals of the European Axis." The IMT was comprised of four members, including representatives from the Governments of the United States, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic. See

81 Charter of the IMT, art. 1, 1 T.M.W.C., supra n. 36, at 10. Annexed to the London Agreement was the London Charter, which served as the IMT's constitution. See London Agreement, art. 2, with Charter of the IMT, art. 2, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; 4 T.W.C., supra n. 60, at X-XIV.
Hamdan, 2011 WL 2923945 at *37 n. 149 (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 177 (2d Cir. 2009)); 1 T.M.W.C., supra n. 36, at arts. 1, 2, p. 10.

Article 9 of the London Charter empowered the IMT to “declare . . . that the group or organization of which the individual was a member was a criminal organization.” 1 T.M.W.C., supra n. 36, at 10, 255. Article 10 of the charter empowered the competent national authorities to try individuals for membership alone in any organization declared criminal by the IMT before national, military or occupation courts. Id. “In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.” Id.

Six organizations, with about 2,000,000 members in Germany and about 500,000 in the U.S. zone, were indicted as criminal organizations before the IMT.82 Following vigorous debate on the scope of membership liability, particularly concerns regarding the individual criminal liability of persons with widely disparate levels of knowledge, responsibility, and authority within their respective organizations, the IMT determined that:

In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice. . . .

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.83

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The IMT determined that the SA, Reich Cabinet, and General Staff and High Command (GSHC) were not criminal organizations and declared three other charged organizations criminal: the Leadership Corps of the Nazi (National Socialist German Workers') Party, the SS, the Secret State Police (Gestapo) and the SD (the Gestapo and SD were considered as one group because of their close working relationship). 22 T.M.W.C., supra n. 36, at 501–23. With respect to the three organizations declared criminal, "the court suggested, despite its inability to bind zonal governments, that future trials for criminal membership ought to include stiff due process guarantees." Jonathan Bush, The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said; 109 Colum. L. Rev. 1094, 1161 (2009) (citing 22 T.M.W.C., supra n. 36, at 499). Although members of the convicted organizations "could be tried for criminal membership in addition to or instead of predicate acts . . . the implication was that membership charges would not be a shortcut to conviction and would certainly not be available against average complicitous Germans[.]" Id.

2. Control Council 10 – Nuremberg Military Tribunals

In accordance with Article 10 of the charter the competent national authorities (e.g. Nuremberg Military Tribunals (NMT)) tried individuals for membership in the organizations declared criminal by the IMT before national, military and occupation courts. In some cases, the indictments before the NMT included four counts "corresponding to the categories of crime defined" in Control Council No. 10. Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council No. 10 (Taylor Report) 64-72, 79 (Aug. 15, 1949) (citing the "Medical," "Justice," and "Pohl" cases). Count One - Common Design or Conspiracy; Count Two - War Crimes; Count Three - Crimes Against Humanity; and Count Four - Membership in Criminal Organizations. 84

There were 12 trials conducted by the NMT administered by the United States with American judges. Id. at 35-36. Each trial included a group of defendants and the cases are generally referred to by the name of one lead defendant, type of case, common organization, or other trait of the accused. 85

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84 See, e.g., 1 T.W.C., supra n. 81, at 17 (The standard Indictment for Count Four read: “The defendants Karl Brandt, Genzken, Gebhardt, Rudolf Brandt, Mrugowsky, Poppendick, Sievers, Brack, Hoven, and Fischer are guilty of membership in an organization declared to be criminal by the International Military Tribunal in Case No. 1, in that each of the said defendants was a member of the [SS] . . . after 1 September 1939. Such membership is in violation of paragraph I (d), Article II of Control Council Law No. 10."). See also Taylor Report, supra n. 82, at 72.

85 1 T.W.C., supra n. 60, at VII (The case number, name of lead defendant, popular name, and volume are as follows: 1. Karl Brandt known as the “Medical Case” in vols. I and II; 2. Erhard Milch known as the "Milch Case" in vol. II; 3. Josef Altstötter known as the “Justice Case” in vol. III; 4. Oswald Pohl known as the “Pohl Case” in vol. V; 5. Friedrich Flick known as the “Flick Case” in vol. VI; 6. Carl Krauch known as the “I. G. Farben Case” in
Under Control Council No. 10, 185 persons were indicted, of those 177 stood trial, and 142 individuals were convicted by the NMT. Taylor Report, supra n. 82, 91. The last judgment of these tribunals was delivered on April 14, 1949. Taylor Report, supra n. 82, 94.

Eighty-seven defendants were tried for membership offenses, 74 were convicted of a membership charge among other charges, and 10 were convicted solely of a membership charge. Taylor Report, supra n. 82, at 93. The level of culpability of those convicted solely of membership in a criminal organization varied widely. “The great bulk of SS officers and Nazi Party officials were tried, if they were tried at all, before local German ‘denazification’ boards (Spruchkammern).”

By way of example, German Master Sergeant Mathias Graf was found guilty of membership in the SD. His service was deemed “voluntary” and he was found to have knowledge but not to have participated in any meaningful manner. After leaving the SD, he was drafted into the SS. As a draftee, he was found not guilty of SS membership. His sentence for membership in the SD was time served.

Doctor Helmut Poppendick, tried during the medical cases, was Chief Physician of the Main Race and Settlement Office, Chief of the Personnel Office in Grawitz, an active duty army surgeon, a lieutenant colonel in the SS, and a colonel in the Waffen SS. 2 T.W.C., supra n. 60, at 186, 248–50. The tribunal found the evidence “insufficient to sustain guilt under counts two and three of the indictment,” (war crimes and crimes against humanity), although the tribunal noted that Poppendick “at least had notice of [the experiments] and of their consequences.” Id. at 252. The tribunal found Poppendick guilty of membership in an organization declared criminal, and sentenced him to ten years imprisonment. Id. at 253, 299.

“Konrad Meyer-Hetling was the chief of the planning office within the Staff Main Office.” 5 T.W.C., supra n. 60, at 156. He was a professor and scientist of agriculture who worked part time developing the “General Plan


86 Taylor Report, supra n. 82, at 159, see also id. at 16 (“Defendants selected for trial on other charges who happened to be members of an organization declared criminal by the IMT were additionally charged with the crime of membership therein, but no one was ever charged at Nuernberg with the crime of membership alone.”).

87 4 T.W.C., supra n. 81, at 584–87 is the source for the information in paragraph. Our Court’s decision in Hamdan provides more details concerning the cases of Graf, Meyer-Hetling, Flick, and Steinbrinck. Id. 2011 WL 2923945 at *37–*40.
East” that was a “proposed plan for the ‘reconstruction of the East.’” Id. The Tribunal found him guilty of only membership in a criminal organization, namely that he was a member of the SS, id. at 157, 165, and sentenced him to time served. Id. at 165.

In the Flick Case, defendants Flick and Steinbrinck were charged with committing “war crimes and crimes against humanity . . . in that they were accessories to, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with: murders, brutalities, cruelties, tortures, atrocities and other inhumane acts committed by . . . principally the . . . SS.” 6 T.W.C., supra n. 60, at 23. The indictment charged the defendants, as members of the group “Friends of Himmler . . ., which . . . worked closely with the SS, met frequently and regularly with its leaders, and furnished aid, advice, and support to the SS, financial and otherwise.” Id. The Tribunal found that the “gist of [the charge] is that as members of the Himmler Circle of Friends, Flick and Steinbrinck with knowledge of the criminal activities of the SS contributed funds and influence to its support.” Id. at 1216.

The Tribunal reasoned that where clear crimes against humanity and war crimes were committed, an “organization which on a large scale is responsible for [crimes such as “mass murders”] can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, . . . certainly an accessory to such crimes.” Id. at 1217. The Tribunal noted that the monetary contributions commenced before the criminal activities of the SS were widely known, that the prosecution did not prove that the money contributed was directly used for criminal activities, that defendants “played but a small part in the criminal program of the SS,” and that some of the money was likely used for cultural purposes. Id. at 1219, 1222. Still, the Tribunal found that the criminal character of the SS “must have been known,” and that how the money was spent was immaterial. Id. 1220-21. The Tribunal found Flick and Steinbrinck guilty of committing war crimes and crimes against humanity by supporting the criminal organization responsible for such acts. Id. at 1222-23.

With respect to Steinbrinck the Tribunal noted that: “[h]e did not seek admission into the SS”; “[h]is membership was honorary”; he only had two official tasks, neither of which were criminal in nature; he had “no duties, no pay, and only casual connection with SS leaders;” and that his activities did not “connect him with the criminal program of the SS.” Id. at 1221-22. Yet the Tribunal found Steinbrinck guilty of “membership, subsequent to 1 September 1939, in the . . . [SS], declared to be criminal by the International Military Tribunal, and paragraph 1(d) of Article II of Control Council Law No. 10.” Id. at 25, 1223. Both were sentenced to confinement, Flick to seven years and Steinbrinck to five years. Id. at 1223.
Although the concept of organizational guilt was not used for the hundreds of thousands of people potentially liable under the London Charter and the decisions of the IMT, many businessmen, doctors, and jurists were tried by military tribunals in the American Occupied zone for their membership in these four criminal organizations. As Justice Thomas indicated:

For example, in Military Tribunal Case No. 1, United States v. Brandt, [The Medical Case, which included medial experiments on prisoners of war] Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim Mrugowsky, Wolfram Sievers, Viktor Brack, and Waldemar Hoven were convicted and sentenced to death for the crime of, inter alia, membership in an organization declared criminal by the IMT; Karl Genzken and Fritz Fischer were sentenced to life imprisonment for the same; and Helmut Poppendick was convicted of no other offense than membership in a criminal organization and sentenced to a 10-year term of imprisonment. 2 [T.W.C.] 180–300. [The U.S. Supreme] Court denied habeas relief, 333 U. S. 836 (1948), and the executions were carried out at Landsberg prison on June 2, 1948. 2 [T.W.C.] 330.

Hamdan, 548 U.S. at 696 (Thomas & Scalia, JJ., dissenting); see also 2 T.W.C., supra n. 60, at 298-300 (sentences in The Medical Case); Taylor Report, supra n. 82, at 91.

Similarly, in Einsatzgruppen, a U.S. Tribunal sitting at Nuremberg tried members of Einsatz units for a large number of murders, and noted that:

the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems . . . not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility . . . Any member who assisted in enabling these [Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder] to function, knowing what was afoot, is guilty of the crimes committed by the unit . . . The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the

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bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants . . . have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman.\textsuperscript{89}

More recently the \textit{Convention against Transnational Organized Crime}\textsuperscript{90} acknowledged participation in an organized criminal group in a manner virtually identical to the charged formulation of providing material support for terrorism constitutes criminal activity. Article 5 "Criminalization of participation in an organized criminal group," mandates each state party to:

establish as criminal offences, when committed intentionally:

(a) . . . (ii) \textit{Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, \textit{aiding}, \textit{abetting}, \textit{facilitating} or counselling the commission of serious crime involving an organized criminal group.

The 2006 M.C.A. uses language which is akin to the criminal organization provisions of the Nuremberg Charter, as implemented by the IMT. In fact, the crime of conspiracy and criminal organizations were the subject of correspondence from the uniformed services senior military legal advisors and topics of discussion during Congressional hearings.\textsuperscript{91} Congressional adoption of


\textsuperscript{91} On August 23, 2006, Senator John McCain sought the views of the senior military lawyers in the Department of Defense concerning the use of military commissions. In regard to the scope of membership offenses, Rear Admiral Bruce MacDonald, then Judge Advocate General of the Navy, responded:

Conspiracy should be included, but only conspiracies to commit one of the substantive offenses specifically enumerated and there must be a requirement to prove the defendant committed an overt act in furtherance of the conspiracy. This would mean, for example, that conspiracy to commit murder in violation of the laws of war would
this relatively broad scope of potential individual criminal liability with respect to international terrorism based, at least in part, upon membership in a criminal organization is a logical tack and evident in the plain language of the statute.

The 2006 M.C.A. is consistent with the IMT’s suggestion “that future trials for criminal membership . . . include stiff due process guarantees” to prevent injustice. Bush; supra n. 88, at 1161 (citing 22 T.M.W.C., supra n. 36, at 499). Providing material support for terrorism includes stringent procedural safeguards and comprehensive factual determinations which must be satisfied before a conviction may be returned or punishment imposed.

The charged conduct readily meets the requirements of membership in a criminal organization. Appellant pledged fealty to bin Laden and joined al Qaeda, an armed non-state international terrorist organization, engaged in armed conflict as a belligerent, not entitled to either combatant immunity or POW protection. From the time he joined al Qaeda until his capture in 2001, al Qaeda was engaged in hostilities and terrorism against the United States. Appellant had knowledge that al Qaeda engaged in terrorism before he joined and intentionally provided material support and resources to al Qaeda from February 1999 through December 2001.

That support included providing himself as a member of al Qaeda and various services including propaganda products intended for al Qaeda recruiting and indoctrination training; inciting others to commit terrorism; facilitating pledges of loyalty to bin Laden and preparing the propaganda declarations styled as Martyr Wills of two suspected September 11, 2001 hijackers/pilots; operating and maintaining data processing equipment and media communications equipment used to obtain the first reports of the September 11 attacks to bin Laden and other al Qaeda leadership; and researching the economic effect of those attacks on the United States and providing the results of his research to bin Laden.

Similar to the IMT’s declaration of groups and organizations as “criminal organizations,” Congress stated that an unlawful enemy combatant includes a

be a cognizable offense, but affiliation with a terrorist organization, standing alone, would not be cognizable.

Sen. Cong. Record S10411 (Sept. 28, 2006). This same person, as a retired vice admiral, is currently the Convening Authority for Military Commissions. Brigadier General James Walker, Staff Judge Advocate to the Commandant of the Marine Corps, stated in his letter to Senator McCain, “jurisdiction of the military commissions should be broad enough to facilitate the prosecution of all unlawful enemy combatants. . . . Jurisdiction must extend to other terrorist groups, regardless of their level of organization, and the individual ‘freelancers’ so common on the current battlefield.” Sen. Cong. Record S10412 (Sept. 28, 2006).
member of al Qaeda, not otherwise a lawful combatant in the 2006 M.C.A. However, unlike the IMT's determination of organizational guilt which was binding upon the NMT, the military commission judge made an initial determination that the military commission had personal jurisdiction, specifically that the evidence established appellant is an AUEC. Tr. 837, 873. And ultimately this determination was made by the members as an element of each offense, applying an evidentiary standard of proof beyond a reasonable doubt. Tr. 843-44, 916-17.

Finally, this proposition is also consistent with the long-held U.S. view expressed through successive U.S. Army Field Manuals that unprivileged belligerents who engage in hostilities are subject to punishment under the law of armed conflict. See supra pp. 42-44 (quoting 1914 Manual ¶¶ 369, 372, and 373; 1956 FM 27-10, ¶¶ 80, 81, and 82).

The Government has made a "substantial showing," see supra n. 32, that appellant's charged conduct, including his membership in al Qaeda, an international terrorist organization, and intentional provision of material support and resources to al Qaeda, with knowledge that al Qaeda engaged in or engages in terrorism and was engaged in armed conflict with the United States, constituted an offense against the law of armed conflict punishable by military commission when committed.

3. Joint Criminal Enterprise

As articulated in our recent decision in Hamdan, the relatively recent, yet widely accepted, theory of individual criminal liability known as "joint criminal enterprise" (JCE) provides additional support for the conclusion that the charged formulation of providing material support for terrorism was punishable by military commission when the offense occurred. JCE is rooted in the jurisprudence of Nuremberg and other post-World War II tribunals, and is derivative of direct commission of an offense or a form of co-perpetration.  

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92 See 2006 M.C.A. § 948a(1)-(3), supra nn. 23, 24 and 53 (defining the terms "alien," "unlawful enemy combatant," and "lawful combatants"). See also 2009 M.C.A. § 948a(7)(C), supra n. 58 (defining "unprivileged enemy belligerent").

93 Hamdan, 548 U.S. at 611 n. 40 (Stevens, Souter, Ginsburg, and Breyer, JJ, concurring) (acknowledged the doctrine of joint criminal enterprise (JCE) as applied by the ICTY, and referred to JCE as "a species of liability for a substantive offense (akin to aiding and abetting), not a crime on its own.") (citing Tadić Judgment, supra n. 89; Prosecutor v. Milutinović, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—JCE, Case No. IT–99–37–AR72, ¶ 26 (ICTY Appeals Chamber, May 21, 2003); Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 103-04 (2005).

JCE has been adopted or recognized as a theory of individual criminal liability based upon one’s participation in a criminal enterprise under customary international law in various treaties and international tribunal decisions since at least the 1990s. In 1993, the UN Security Council established the first of the modern international tribunals - the International Criminal Tribunal for the former Yugoslavia (ICTY) - as an ad hoc court to prosecute crimes committed during the period of armed conflict in the former Yugoslavia. Statute of the ICTY, S.C. Res. 827, 32 I.L.M. 1203 (1993). The Security Council’s mandate limited ICTY jurisdiction to those areas of “international humanitarian law which [were] ‘beyond any doubt’ part of customary international law[.]” The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 34 U.N. Doc. S/25704 (May 3, 1993). Since the first hearing in 1994, the Tribunal has indicted more than 160 individuals ranging from common soldiers to generals and Prime Minister Slobodan Milošević.

“Dusko Tadić was the first defendant tried before an international tribunal[, the ICTY,] since post-World War II courts ceased operating.” He was charged with participating with others in the commission of various crimes—including sexual assault, rape, beatings, killings, and other cruel conduct against Bosnian Muslims. During Appeals Chamber review of the Tadić case, the doctrine of JCE was first articulated as such by the ICTY.

The Appeals Chamber concluded that it was not limited to the liability theories specified in the ICTY statute reasoning that:

[Article 7(1) of the ICTY Statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons

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95 See 1997 Bombing Convention, art. 2(3)(c), quoted infra at n. 102; Rome Statute of the ICC, supra n. 51, art. 25(3)(d), quoted infra at p. 76. Cases tried by the ICTY, cited and discussed infra at pp. 72-77.

96 Ralby, supra n. 94, at 294 (citing Jacob A. Ramer, Hate by Association: Joint Criminal Enterprise Liability for Persecution, 7 Chi.-Kent J. Intl. & Comp. L. 31, 50 (2007)).

97 Id. (citing Prosecutor v. Tadić, Case No. IT-94-1-T, ¶ 9 (ICTY Trial Chamber Judgment, May 7, 1997). He was sentenced to 20 years in prison. Id. (citing Prosecutor v. Tadić, Case No. IT-94-1-T, Sentencing Judgment, ¶ 74 (July 14, 1997)).
or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable[.] 98

Also known as the common plan or purpose doctrine, the Appeals Chamber identified three types of JCE "basic," "concentration camp," and "extended." Tadić Judgment, supra n. 89, ¶¶ 196, 202, 203.204. We find the "basic" and "extended" categories of JCE particularly relevant here. The general actus reus requirements are the same for all three categories, while the mens rea elements are substantially different.

The Appeals Chamber summarized the objective elements, or actus reus, of JCE provided for in the ICTY statute as:

i. A plurality of persons. They need not be organised in a military, political or administrative structure, as is clearly shown by the Essen Lynching and the Kurt Goebbels cases.

ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.


The Appeals Chamber concluded that the mens rea element differs according to the category of common design under consideration summarized as follows:

[Basic JCE] what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).

[Extended JCE] what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the

98 Ralby, supra n. 94, at 296 (quoting Tadić Judgment, supra n. 89, Case No. IT-94-1-A, ¶ 190).
commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.


The evidence needed to prove participation in, and thus liability for participation in a JCE, is therefore distinct and dependent upon the type of JCE in issue. In Tadić, the Trial Chamber found no evidence that the accused had taken an actual part in the killings charged. Id. at ¶¶ 178-83. The Appeals Chamber, however, overturned the Trial Chamber and convicted Tadić, relying on the concept of common purpose. Id. at ¶¶ 230-37. The Appeals Chamber stated that criminal responsibility under Extended JCE “for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.” Id. at ¶ 228 (emphasis in original). As Tadić actively took part in the attack on the town, and was involved in beating a resident, the Appeals Chamber found him criminally liable because he shared the intent to ethnically cleanse the town of Jaskici of its non-Serb population. Id. at ¶¶ 232-33. He was, therefore, held to be responsible for the five deaths since they were perpetrated in the course of and were a foreseeable consequence of the common plan. Id. at ¶¶ 233-34.

The JCE doctrine, which extends individual criminal liability to each member of an organized criminal group for crimes committed by the group within the common plan or purpose, and requires an overt act in support of the offense, shares many attributes of providing material support for terrorism. For example, following World War II a British military court tried two German servicemen and five civilians for war crimes in the deaths of three British airmen, who were attacked and killed by a mob while under the escort of a German soldier in the “Essen Lynching” case.99 Prior to the attack, a German officer, in a loud voice and in the presence of a crowd, “ordered that the escort should not interfere if German civilians should molest the prisoners, adding that [the prisoners] ought to be shot, or would be shot.” Id. Although the officer was not present when the crowd attacked the British airmen, he and the escort were convicted of murder even though they had not struck the airmen. Id.

In the Milošević case, prosecutors argued that the indictments against Milošević were “all part of a common scheme, strategy, or plan on the part of the accused to create a ‘Greater Serbia,’ a centralized Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and all of Kosovo.

99 Tadić Judgment, supra n. 89, ¶ 207 (citing Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals, Essen, 1 UNWCC ¶ 88, at p. 91 (1945)).
and that this plan was to be achieved by forcibly removing non-Serbs from large geographical areas through the commission of the crimes charged in the indictments." \(^{100}\) Under this theory of liability, members of the JCE were held responsible for all of the crimes committed by the group in furtherance of the "Greater Serbia" plan. *Hamdan*, 2011 WL 2923945 at *23 and n. 78 (citations omitted).

At least three high-ranking members of the police and government, Nikola Sainović, Nebojsa Pavković and Sreten Lukić, were convicted as members of the JCE. *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-T (ICTY Trial Chamber Judgment Feb. 26, 2009). To satisfy the JCE element of the participation of the accused in the common purpose, an accused "may contribute to and further the common purpose of the JCE by various acts." *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-T, vol. 1, ¶ 1026 (ICTY Trial Chamber Judgment June 10, 2010). The *Popović* Tribunal observed that "[a]n accused may contribute to and further the common purpose of the JCE by various acts, which need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all." *Id.* at vol. 1, ¶ 1026 (citing *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment ¶ 99 (ICTY Appeals Chamber Judgment Feb. 28, 2005); other citations omitted). Indeed, "[a] participant in a [JCE] need not physically participate in any element of any crime" so long as other JCE requirements are met. *Id.* at ¶ 99.

JCE "responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution." *Id.* ¶ 104. JCE "does not require proof of intent to commit a crime." *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal ¶ 7 (ICTY Appeals Chamber Mar. 19, 2004). *See also* Intent necessary to establish "Extended JCE" *supra* at p. 73., "There is no specific legal requirement that the accused make a significant contribution" to the JCE. *Kvočka* Appeals Chamber Judgment at ¶ 97. "The contribution of the Accused need not have been either substantial or necessary to the achievement of the JCE’s objectives." *Id.* at ¶ 98. An accused may be found guilty even if his acts or omissions do not "assist, encourage, or lend moral support" to the commission of the underlying offence. *Milutinović* Trial Chamber Judgment, vol. I at ¶ 103. JCE responsibility "does require participation by the accused, which may take the form of assistance in, or contribution to, the execution of the common purpose." *Brdjanin* Appeal Chamber Judgment at ¶ 424.

Although the United States has not ratified the Rome Statute of the International Criminal Court (ICC), as of June 24, 2011, there were 115 state

parties, and 139 states have signed the Rome Statute of the ICC,\(^\text{101}\) creating a standing tribunal with jurisdiction over individuals alleged to have committed genocide, crimes against humanity, war crimes, and eventually, crimes of aggression. Rome Statute of the ICC, supra n. 51, art. 5. See also Report of the ICC to the UN General Assembly, A/65/313, pp. 6-7 (Aug. 19, 2010). Article 25 of the Rome Statute includes an expansive list of available theories of individual criminal liability including JCE. Specifically, Article 25(3)(d) provides that a person shall be “criminally responsible and liable for punishment in accordance with this statute” if he:

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

Thus, the ICC statute includes a JCE theory of individual criminal liability based upon the knowing or purposeful contribution to the commission or attempted commission of such crimes by a group acting with a common purpose. The incorporation of JCE in other international conventions including the 1997 Convention for the Suppression of Terrorist Bombings are reflective of the efficacy of JCE under international law.\(^\text{102}\)

C. Analysis

In response to issues specified by this Court, appellant asserts that for JCE “to be relevant here, the offenses charged would have to [establish his] co-perpetration of a specific and completed war crime,” and that such “completed elements were neither alleged nor found.” Brief on Specified Issue for Appellant 6. He further argues that the “Material Support charge” is not a completed offense, that it does not require intent “to further a foreign terrorist organization’s illegal activities,” and that “assuming the provisions of the [2006 M.C.A.] could be construed as requiring the equivalent of [JCE] liability for

\(^{101}\) Hamdan, 2011 WL 2923945 at *24 and n. 82 (citing Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 276 n. 9 (2d Cir. 2007) (noting that the Rome Statute of the ICC has been signed by most of the mature democracies of the world; however, the United States has not ratified it because of concerns about potential abuse of prosecutorial authority); other citation omitted).

\(^{102}\) 1997 Bombing Convention, supra n. 72, art. 2(3)(c) (“3. Any person also commits an offence if that person . . . (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”).
underlying crimes” that appellant was not on notice that he was subject to personal liability “as a principal for underlying war crimes.” Id. at 16-17 (citations omitted). We disagree.

Appellant correctly asserts that for JCE to be relevant, the specification must allege a completed offense, but contrary to his assertion, that requirement is satisfied here. For the reasons discussed supra, we conclude that the specification describes at least two theories of culpability: (1) membership in a criminal organization (e.g. intentionally joining or membership in al Qaeda, an international organization that engages in terrorism, with knowledge of that terrorism), and (2) terrorism (e.g. as a co-perpetrator of that offense).

The charged offense of providing material support for terrorism shares attributes with all three types of JCE, but most closely resembles “basic” and “extended” JCE. The charged conduct includes that appellant intentionally provided himself, as a member of al Qaeda, and various material support or resources to al Qaeda with knowledge that al Qaeda engaged in or engages in terrorism (e.g. intentional attacks on protected persons with the intent to terrorize the civilian population) and was then engaged in hostilities with the United States. Although the mens rea element of the charged offense is not identical to the mens rea requirements of either “basic JCE” or “extended JCE,” it is substantially similar to the intent element of both types of JCE. See supra p. 73 and n. 89.

In fact, the mens rea requirements of the charged offense of providing material support for terrorism may be more onerous than that present in either “basic” or “extended” JCE in that the Government must prove beyond a reasonable doubt that the accused with knowledge that al Qaeda engaged in or engages in terrorism, intentionally provided himself and other services, which requires two separate mens rea findings. First, that he intentionally provided himself and other enumerated services or resources to al Qaeda; and second that he did so with knowledge that al Qaeda “engaged in or engages in terrorism,” which incorporates an additional mens rea requirement attributable to the perpetrators of that terrorism (e.g. “intentionally kill[ing] or inflict[ion of] great bodily harm on one or more protected persons, or intentionally engages in an act . . . .”) 2006 M.C.A. § 950v(b)(24), supra p. 52. Again the military commission judge’s instructions reflect that the military commission applied the law in precisely this manner. Tr. 869-71.\(^\text{103}\)

At a minimum, the “extended JCE” mens rea requirement (e.g. “intent to participate in, contribute to, and further the criminal activity or criminal purpose of al Qaeda” see supra p. 73.) is implied in the specification, which provides examples of the hostilities al Qaeda engaged in both before appellant

\(^\text{103}\) The military commission judge incorporated by reference the definition of terrorism from 2006 M.C.A. § 950v(b)(24). Tr. 871. See supra p. 52, from his earlier instructions on the conspiracy charge. Tr. 856.
joined, and while he was a member of Al Qaeda. Indeed, the most notorious charged conduct was that appellant prepared “propaganda products including the video ‘The Destruction of the American Destroyer U.S.S. Cole,’ to solicit material support for al Qaeda, to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, and to solicit, incite and advise persons to commit terrorism,” a video titled to sensationalize one of the enumerated examples of al Qaeda’s violent attacks on the United States, the October 2000 attack on the USS COLE in Aden, Yemen. The Specification of Charge III, ¶ e, supra p. 48.

Even assuming arguendo that the providing material support for terrorism mens rea requirement is less arduous than that required in “Extended JCE,” and as such reduces the Government’s burden while expanding the scope of conduct punishable, we are convinced that Congress did not exceed its constitutional authority to define and punish offenses against the law of nations in codifying this formulation of providing material support for terrorism.

The charged conduct, of which the members ultimately returned findings of guilty, was that appellant travelled to Afghanistan with the purpose and intent of joining al Qaeda, met with a key al Qaeda figure as a step to joining al Qaeda, underwent “military-type” training at an al Qaeda sponsored training camp, pledged loyalty to al Qaeda’s then leader bin Laden, and joined al Qaeda with knowledge of its terroristic activities which continued throughout the entire period charged of February 1999 - December 2001.

The Government has made a “substantial showing,” see supra n. 32, that the JCE theory of individual criminal liability provides additional support for the conclusion that the charged offense of providing material support for terrorism was punishable by military commission at the time committed.

D. Complicity

“Principle VII of The Nuremberg Tribunal Report” also recognized complicity in the commission of a war crime as an offense under international law. 104 “The three essential elements of complicity are (1) the commission of a crime; (2) the accomplice’s—one who is complicit—material contribution to the commission of that crime; and (3) the accomplice’s intention that the crime be

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committed, or the accomplice's reckless disregard for the potential of its commission."\(^{105}\)

In the Tadić Judgment, supra n. 89, ¶ 191, the ICTY Appeals Chamber commented on the distinction between persons in organizations implicated in war crimes, particularly organizational leaders, who often are accomplices, as opposed to the physical perpetrators of the acts as follows:

Although only some members of the group may physically perpetrate the criminal act . . . the . . . contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows then that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.

One scholar recently argued in the context of genocide that:

The crime of complicity . . . exists to punish those who contribute in a material way to the commission of genocide, but who, because they lack the specific intent specific motive nexus, cannot be successfully prosecuted for aiding and abetting the crime of genocide. . . . Only by extending liability to the political actors, arms brokers, and States that facilitate genocide can the promises of the Genocide Convention be fulfilled.\(^{106}\)

Another scholar asserts that proof of complicity requires prosecutors "to show intentional participation in acts that contributed toward a criminal result without defendant’s prior agreement toward that end." Bush, supra n. 88, at 1208. The offense of complicity further supports the conclusion that appellant’s conduct violated the law of armed conflict at the time committed.

E. Aiding the Enemy

The historical U.S. practice of trying the offense of aiding the enemy by military commission provides additional support, or at a minimum, analogical


\(^{106}\) Id. at 951-52. See also Genocide Convention, infra n. 113, at art. III(e) (stating that complicity in genocide “shall be punishable”).
support, for the conclusion that appellant’s charged conduct as providing material support for terrorism was punishable by military commission.\textsuperscript{107}

Aiding the enemy has long existed in U.S. military jurisprudence. The Continental Congress enacted the American Articles of War of 1776, including Section XIII, Article 18, which punishes any person who provides relief of “the enemy with money, victuals, or ammunition,” or who “knowingly harbor[s] or protect[s] an enemy.” Winthrop, supra n. 32, at 967. Congress subsequently enacted Article of War 45, continuing the prohibition against aiding the enemy. Id. at 102. Winthrop concludes that civilians can be tried for aiding the enemy under this article. Id. at 102-104. On August 29, 1916, Congress included aiding the enemy as an offense in Article of War 81, and subsequently in UCMJ art. 104. United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957) (discussing genesis of Article of War 81 and Article 104, UCMJ); See MCM, 1920, MCM, 1950, MCM, 2008.

“Enemy” is defined in the 2006 M.C.A. §§ 948a(1) and 948a(2), and it includes persons who have “purposely and materially supported hostilities against the United States.” See 10 U.S.C. §§ 948a(1) and 948a(2), supra nn. 24, 53. See also Hamdan, 2011 WL 2923945 at *31 n. 130 (quoting 2008 MCM, Part IV, ¶ 23c(1)(b)). The term, “enemy,” clearly includes members of al Qaeda who have engaged in acts of terrorism. Id. at § 948a(1)(i). The elements of providing material support to terrorism are similar to the elements of Article 104, UCMJ. As Colonel Winthrop noted:

Infractions of [the rule forbidding trade or interchange with the enemy], by selling to, buying from or contracting with enemies, furnishing them with supplies, corresponding, mail carrying, passing the lines without authority, &c., are violations of the laws of war, more or less grave in proportion as they render material aid or information to the enemy or attempt to do so, and, as will hereafter be illustrated, are among the most frequent of the offenses triable and punishable by military commission.

\textsuperscript{107} The Supreme Court’s decision in Hamdan reveals possible disagreement over whether the crime of aiding the enemy under Article 104, UCMJ, requires the accused owe allegiance to the party whose enemy he is alleged to have aided to be triable by military commission. Compare Hamdan, 548 U.S. at 600-602 n. 32 (Steven, Souter, Ginsburg, and Breyer, JJ., concurring) (“the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U.S.C. § 904. Indeed, the Government has charged detainees under this provision when it has seen fit to do so. See Brief for David Hicks as Amicus Curiae 7.”) with Hamdan, 548 U.S. at 696-97 (Thomas and Scalia, JJ., dissenting) (not addressing the issue of allegiance under Article 104, UCMJ but stating, “[u]ndoubtedly, the conclusion that such conduct [like Hamdan’s conduct] violates the law of war led to the enactment of Article 104 of the UCMJ [aiding the enemy].”). In Hamdan, our Court found it unnecessary “to determine whether aiding the enemy under Article 104, UCMJ, applies . . . because [Hamdan was] not charged with violating Article 104, UCMJ [and the Court looked] to the law of war for the historical underpinnings of providing material support for terrorism.” Hamdan, 2011 WL 2923945 at *31 n. 130.
Winthrop, supra n. 32, at 777 (emphasis added). In 1916, Article of War 81,\(^{108}\) expanded the offense of aiding the enemy when “or other thing was added” to prohibit providing intangible aid to the enemy, which could include appellant’s conduct. See Olson, 7 U.S.C.M.A. at 466-67, 22 C.M.R. 256-57.

In conclusion, the Government has made a “substantial showing,” see supra n. 32, that the charged conduct, including appellant’s pledge of fealty to bin Laden and membership in al Qaeda, an international terrorist organization, and intentional provision of material support and resources to al Qaeda with knowledge that al Qaeda engaged in or engages in terrorism and was engaged in armed conflict with the United States, constituted an offense under the law of armed conflict when committed. Congress did not exceed its constitutional authority by defining and making such conduct punishable by military commission as providing material support for terrorism.

Appellant has simply proffered no persuasive argument under treaty or customary international law that membership in a terrorist organization such as al Qaeda, when engaged in armed conflict with a nation state, entitles an individual member to any special status under the law of armed conflict. To the contrary, customary practice has been to treat such persons as outside the protections of the law of armed conflict, punishable for their own criminal acts and, if membership is established, their membership in that criminal organization. The domestic laws of many nations prohibiting conduct similar to providing material support for terrorism also strongly suggest that such prohibitions constitute general principles of law recognized by civilized nations.

The statutory scheme employed by Congress in the 2006 M.C.A., including the common elements (AUEC and in the context of an armed conflict), stringent procedural safeguards and comprehensive factual determinations are consistent with international norms. Congress did not exceed its constitutional authority in choosing a name for the offense — “providing material support for terrorism” or in defining the elements of providing material support for terrorism.

\(^{108}\) Article of War 81, Relieving, corresponding with, or aiding the enemy, provides, “Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.” United States v. Olson, 7 U.S.C.M.A. 460, 465, 22 C.M.R. 250, 255 (1957). In Brig. Gen. Crowder’s statement to the Sen. Subcommittee on Military Affairs, Feb. 8, 1916, he explained Article of War 81, was a consolidation of Articles of War 45 and 46 of previous code. See Revision of the Articles of War, 1912-1920, vol. I at 79. He noted that “the offenses denounced by the present article may, and usually will be, committed by persons outside of the Army,” and commented that “the military commission will in time of war try most of these offenses.”
F. Ex Post Facto

Appellant had knowledge that al Qaeda engaged in terrorism before he joined and intentionally provided himself and other material support and resources to al Qaeda, including various propaganda products intended for al Qaeda recruiting and indoctrination training, and inciting others to commit terrorism. He was also convicted of facilitating the pledges of loyalty to bin Laden and preparing the propaganda declarations styled as Martyr Wills of two suspected September 11, 2001 hijackers/pilots, operating and maintaining data processing equipment and media communications equipment used to obtain the first reports of the September 11 attacks to bin Laden and other al Qaeda leadership. In addition, he was convicted of researching the economic effect of those attacks on the United States and providing the results of his research to bin Laden, and acting as media and personal secretary for bin Laden.

In light of our decision in Hamdan, 2011 WL 2923945 at *32, *37-*41, and consistent with our discussion, supra pp. 61-79, appellant’s charged conduct has long been punishable as membership in a criminal organization and at a minimum, each additional charged act relates directly to appellant’s knowledge, intent, or actions in support of al Qaeda, an international terrorist organization with no colorable claim of legitimacy under the law of armed conflict. The similarity of the charged conduct and statutory requirements in the 2006 M.C.A. of knowledge and intent to membership in criminal organizations, the JCE theories of individual criminal liability, complicity, and aiding the enemy reinforce our holding that appellant’s charged conduct violated the law of armed conflict when committed.

G. Instructional Error

Appellant also asserts the military commission judge erroneously included “propaganda” and “recruiting materials” within the definition of “material support” in his instructions to the members. Brief for Appellant 2, 19-21, 29-30; Reply Brief for Appellant 2, 19; Tr. 858. The military commission judge used the same definition for all three charges. Tr. 858, 868, 871. A military commission judge “shall give the members appropriate instructions on findings.” 2007 M.M.C., Part II, R.M.C. 920(a). See United States v. Martinez, 40 M.J. 426, 431(C.M.A. 1994) (citing United States v. Groce, 3 M.J. 369, 371 (C.M.A. 1977)). There was no objection to these instructions during trial by either party. Thus, pursuant to R.M.C. 920(f), the matter is waived absent plain error.

We have not previously addressed what constitutes “plain error” in the context of the 2006 M.C.A. and note that neither the statute nor M.M.C. defines “plain error.” The statute does limit our authority to act with respect to matters of law in that “[a] finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the
error materially prejudices the substantial rights of the accused.” 2009 M.C.A. §§ 950f(d) and 950a(a). This limitation is also present in the UCMJ, and closely resembles that applicable in Article III courts. 10 U.S.C. § 859(a) and Fed. R. Crim. P. 52(b). See supra p. 7.

The Supreme Court recently commented that Federal Rule of Criminal Procedure “Rule 52(b) permits an appellate court to recognize a ‘plain error that affects substantial rights,’ even if the claim of error was ‘not brought’ to the district court’s ‘attention.’” United States v. Marcus, ___ U.S. ___, 130 S. Ct. 2159, 2164, 176 L. Ed. 2d 1012, 1017 (2010). The Court noted:

the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where appellant demonstrates that (1) there is an “error”; (2) the error is “clear or obvious, rather than subject to reasonable dispute”; (3) the error “affected appellant’s substantial rights, which in the ordinary case means” it “affected the outcome of the district court proceedings”; and (4) “the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”

“We ‘review de novo the jury instructions as a whole and view them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case.” United States v. Prince, ___ F.3d ___, 2011 U.S. App. Lexis 16318 at *18 (10th Cir. 2011) (quoting United States v. Bedford, 536 F.3d 1148, 1152 (10th Cir. 2008).”

Appellant provided a variety of resources and services, including preparing propaganda and recruiting materials to an international terrorist organization. The statutory definition begins, “material support and resources

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110 See also Brown v. Greene, 577 F.3d 107, 111 (2d Cir. 2009) (quoting Gaines v. Kelly, 202 F.3d 598, 606 (2d Cir. 2000) (citing Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (“the challenged instructions must be viewed in context, not only with respect to the overall charge, but also with respect to the entire trial record”)); Bryan v. United States, 524 U.S. 184, 199 (1998) (“in the context of the entire instructions, it seems unlikely that the jury was misled”)(citing United States v. Park, 421 U.S. 658, 674-75 (1975)); United States v. Bayer, 331 U.S. 532, 536-37 (1947) (“the extent of [an instruction’s] amplification must rest largely in [the trial judge’s] discretion”); United States v. Castenada, 555 F.2d 605, 611 (7th Cir. 1977) (“the necessity, extent, and character of any supplemental instructions to the jury are matters within the discretion of the district court”).
means any property, tangible or intangible, or service, including . . . ." 18 U.S.C. § 2339A(b), supra n. 69 (emphasis added). Clearly propaganda and recruiting materials are within the terms “any property . . . and services.” The military commission judge was simply clarifying and amplifying the definition of “material support” and did not change the meaning of the defined term or expand appellant’s potential criminal liability. His instructions assisted the members in determining whether appellant committed the charged conduct. We note that the members’ determination of those facts was required to be by legal and competent evidence, beyond a reasonable doubt. Thus, we find no error.

IX. CONSPIRACY TO VIOLATE THE LAW OF WAR AS AN OFFENSE TRIABLE BY MILITARY COMMISSION

Appellant asserts that the offense of conspiracy is not recognized as a war crime under international law, and thus is not punishable by military commission. Brief for Appellant 21, 23-26. He acknowledges U.S. precedent for conspiracy prosecutions by military commission, but notes that those military commissions “exercised jurisdiction under martial-law as well as the law of war.” Reply Brief for Appellant 12. Appellant emphasizes the precedent of the Hamdan plurality opinion that “the government failed to make even a ‘merely colorable’ case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission.” Brief for Appellant 25 (citing Hamdan, 548 U.S. at 598-613); Reply Brief on Specified Issues for Appellant 12-13.

The Government argues that the constitutional authority to establish the jurisdiction of military commissions belongs to the political branches exercising their war powers. The Government asserts that terrorists are akin to “guerrillas” engaged in “irregular war,” and that “conspiracy has historically violated the law of war” and been tried by military commission. Brief for Appellee 22-23, 27-29; see also 1956 FM 27-10, supra pp. 43-44, at ¶¶ 80-82. In support of this argument, the Government cites the widespread acceptance of the JCE theory of individual criminal liability, international consensus on the illegality of conspiratorial type conduct and the long-standing U.S. view that conspiracy is punishable under the law of war. Specified Issues Brief for Appellee 1-18.

These diametrically opposed assertions represent more than adversarial hyperbole. The viability of conspiracy as a war crime has long been the subject of controversy. “Some form of conspiracy has been included as a charge and often as part of a judgment in every major American war crimes trial program, from the Civil War cases to Nuremberg and Tokyo after World War II . . . .” 111

111 Bush, supra n. 88, at 1097 and n. 5 (citations stating “Ex parte Quirin, 317 U.S. 1, 23 (1942) (citing but not discussing charge IV, conspiracy); Mudd v. White, 309 F.3d 819, 820 (D.C. Cir. 2002) (denying relief to descendant of one of eight persons convicted by military tribunal in May 1865 as conspirators in assassination of President Lincoln); United States v. Wirz (U.S. Mil. Comm’n Wash. D.C., Aug.–Sept. 1865), excerpted in 1 The Law of War: A Documentary History 783 (Leon Friedman ed., 1972) (charging first count as “combining, confederating and conspiring together with [named and unnamed persons] to injure the health
This controversy has persisted since the Nuremberg Tribunals with the views of highly qualified publicists ranging from "the IMT's rulings were dispositive on the subject of international conspiracy and that the restrictive interpretation is therefore the rule in modern international law," *Bush; supra* n. 88, at 1163 and n. 240 (citing Antonio Cassese, *International Criminal Law* 197 (2003)), to the counter observation that such a view "omits the teachings of the complex, underutilized Tokyo judgment, which assessed conspiracy far more permissively . . . as well as of the French war crimes trials that later were held under Control Council Law No. 10."*112* Bush emphasized in his thorough discussion of international conspiracy law:

Even skeptical international lawyers concede, however grudgingly, that conspiracy liability for at least certain acts was a cornerstone of Nuremberg and Tokyo, programs almost all nations either joined or later endorsed, and is specifically included in the Genocide Convention, through which it became part of the jurisdiction of the *ad hoc* and permanent international criminal courts.*113*

The IMT at Nuremberg "ruled that its own jurisdiction, under the London Charter, extended only to conspiracy to commit crimes against peace and not conspiracy to commit war crimes or crimes against humanity." *Bush* at 1162,

and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war"). Conspiracy at the Nuremberg and Tokyo tribunals is discussed in greater detail in [Bush at 1135-1140]. The Supreme Court most recently discussed conspiracy as a war crime in *Hamdan v. Rumsfeld*. See 548 U.S. 557, 598–612 (2006) (Stevens, J., plurality opinion); *id.* at 655 (Kennedy, J., concurring in part); *id.* at 592–705 (Thomas, J., dissenting). Justices Stevens and Thomas provide extended discussions of the American historical practice.

*112* *Id.* at 1163 and nn. 241, 242 (n. 241 stating, "For a summary of the Tokyo judgment's view of conspiracy, see Solis Horowitz, *The Tokyo Trial*, 28 Intl. Conciliation 473, 553-54 (1950). The relevant text is contained in the majority opinion, [reprinted in] 20 [The Tokyo War Crimes Trial (R. John Pritchard & Sonia Magbanua Zaide eds., 1981)], at 48, 439; *id.* at 4-7 (Bernard, J., concurring); *id.* at 1-7 (Jaranilla, J., concurring); *id.* at 475 (Webb, P.J., dissenting); *id.* at 491 (Pal, J., dissenting).""); n. 242 stating, "A summary with both trial and appellate court decisions was published along with the Nuremberg summaries as *France v. Roechling*, 14 T.W.C., *supra* [n. 81], at 1075 (Gen. Trib. of the Mil. Govt. 1948), *aff’d in part and rev’d in part*, 14 T.W.C., *supra* [n. 81], at 1097 (Super. Mil. Govt. Ct. 1949)."

*113* *Id.* at 1097 (citing *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention), art. III(b) (Dec. 9, 1948), entered into force Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277, 280, G.A. Res. 260 (III) (declaring "conspiracy to commit genocide" to be punishable act); see Statute of the International Tribunal for Rwanda (ICTR Charter), art. 2(3)(b) (Nov. 8, 1994), 33 I.L.M. 1602, 1603 (making "conspiracy to commit genocide" punishable by ICTR); Statute of the International Tribunal (ICTY Charter), art. 4(3)(b) (May 25, 1993), 32 I.L.M. 1192, 1193 (punishing "conspiracy to commit genocide"); see also William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 179–81 (2006) (viewing international crime of conspiracy to commit genocide as still largely common law based)).
supra n. 88, at n. 235 (citing The Nurnberg Trial, 22 T.M.W.C., at 469 ("[T]he Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war."). This controversy is also readily apparent in the Supreme Court's decision in Hamdan. Resolution of this enduring and complex controversy is not essential to decide appellant's challenge. Consistent with the issue presented, we will focus on whether "any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."

A. Conspiracy - The Charge and Specification

Appellant, as an AUEC "in the context of and associated with an armed conflict at various locations in Afghanistan and elsewhere, from in or about February 1999 through in or about December 2001" was convicted of conspiring: "with Usama Bin Laden, Saif al 'Adl, and other members and associates of al Qaeda, known and unknown, to commit one or more substantive offenses triable by military commission, to wit: Murder of Protected Persons; Attacking Civilians; Attacking Civilian Objects; Murder in Violation of the Law of War; Destruction of Property in Violation of the Law of War; Terrorism; and Providing Material Support for Terrorism and with knowledge of the unlawful purposes of the agreement . . . willfully entered the agreement with the intent to further those unlawful purposes and knowingly committed the following overt acts in order to accomplish some objective or purpose of the agreement:

a. traveled to Afghanistan with the purpose and intent of joining al Qaeda;

b. met with Saif al-Adel, the head of the al Qaeda security committee, as a step toward joining the al Qaeda organization;

c. underwent military type training at an al Qaeda sponsored training camp [in Afghanistan];

d. pledged fealty, or "bayat" to the leader of al Qaeda, Usama bin Laden, joined al Qaeda, and provided personal services in support of al Qaeda;

e. prepared and assisted in the preparation of various propaganda products including the video "The Destruction of the American Destroyer U.S.S. Cole," to solicit material support for al Qaeda, to recruit and indoctrinate

114 Justice Stevens, joined by Justices Souter, Ginsberg and Breyer, concluded that the Government failed to sustain its burden to establish that conspiracy was an offense triable by military commission under the common law of war. Hamdan, 548 U.S. at 595-613. While Justice Thomas and Justice Scalia concluded that by joining a guerilla-type organization (membership alone) Hamdan violated the law of war. Id. at 692-97. Justices Thomas, Scalia, and Alito agreed that conspiracy to commit a war crime, including conspiring to attack civilians and civilian objects, to commit murder by an unprivileged belligerent, and terrorism-type offenses violated the law of war and are punishable by military commission, and that Hamdan's conduct qualified as a law of war violation. Id. at 697-704.
personnel to the organization and objectives of al Qaeda, and to solicit, incite, and advise persons to commit Terrorism;

f. acted as personal secretary and media secretary of Usama bin Laden in support of al Qaeda;

g. arranged for Muhammed Atta . . . and Ziad al Jarrah . . . to pledge fealty or bayat to Usama bin Laden;

h. prepared the propaganda declaration styled as Martyr Wills of Muhammed Atta and Ziad al Jarrah in preparation for the acts of terrorism perpetrated by the said Muhammed Atta, Ziad al Jarrah, and others . . . in the United States on September 11, 2001;

i. at the direction of Usama bin Laden, researched the economic effect of the September 11, 2001 attacks on the United States and provided the result of that research to Usama bin Laden; [and]

j. operated and maintained data processing equipment and media communications equipment for the benefit of Usama bin Laden and other members of the al Qaeda leadership.

The similarity between appellant's conviction of conspiracy in the Specification of Charge I and providing material support for terrorism in the Specification of Charge III, ¶¶ a-j, supra pp. 49-49], including the same ten overt acts, informs our analysis of the assigned error.115 We next turn to the statutory definition.

B. Conspiracy under the 2006 M.C.A. and 2007 M.M.C.

The 2006 M.C.A. § 950v(b)(28) defines conspiracy as:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

The 2007 M.M.C., Part IV, ¶ 6(28)b, defines the elements of conspiracy as follows:

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115 "[B]y definition, many material support cases are also conspiracy cases." Testimony of Jeh Charles Johnson General Counsel, Department of Defense Hearing Before the Senate Armed Services Committee "Military Commissions" (July 8, 2009) at p. 4, http://armed-services.senate.gov/statement/2009/July/Johnson%2007-09.pdf.
(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and
(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

C. Analysis

The 2006 M.C.A. defines conspiracy more narrowly than the UCMJ, Title 18 of the U.S. Code, or common law. In addition to the common

116 See United States v. Harman, 68 M.J. 325, 327 (C.A.A.F. 2010) (“Under Article 81, UCMJ, conspiracy requires: (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. Conspiracy need not be in any particular form or manifested in any formal words, rather it is sufficient if the agreement is merely a mutual understanding among the parties. The existence of a conspiracy may be established by circumstantial evidence, including reasonable inferences derived from the conduct of the parties themselves. Any person subject to the [UCMJ] who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.” (internal quotation marks and citations omitted)); see also Commander Syed N. Ahmad, JAGC, USN, The Unconstitutional Prosecution of the Taliban under the Military Commissions Act, 55 Naval L. Rev. 1, n. 2 (2008).

117 The United States has a well-developed statutory and judicial system for resolving conspiracy to commit terrorism-type offenses. See SCOR S/2006/397 at 3, 6-7 (June 16, 2006); SCOR S/2001/1220 at 13-16, 22 (Dec. 21, 2001). See e.g., United States v. Moussaoui, 591 F.3d 263, 296-97 (4th Cir. 2010) (“The elements of a conspiracy charge are: (1) an agreement among the defendants to do something which the law prohibits; (2) the defendants’ knowing and willing participation in the agreement; and (3) an overt act by one of the conspirators in furtherance of the agreement’s purpose. See United States v. Hedgepeth, 418 F.3d 411, 420 (4th Cir. 2005). Because it is the agreement to commit the crime that creates the conspiracy, the defendant need not know the details of the underlying crime or “the entire breadth of the criminal enterprise.” United States v. Burgos, 94 F.3d 849, 858 (4th Cir. 1996) (en banc). “A conspirator need not have had actual knowledge of the co-conspirators,” and “a conspiracy conviction must be upheld even if the defendant played only a minor role in the conspiracy.” United States v. Morsley, 64 F.3d 907, 919 (4th Cir. 1995); see also United States v. Banks, 10 F.3d 1044, 1054 (4th Cir. 1993) (“It is of course elementary that one may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence.”). The defendant “may be liable for conspiracy even though he was incapable of committing the substantive offense.” Salinas v. United States, 522 U.S. 52, 64, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)). See also Whitfield v. United States, 543 U.S. 209, 211-14 (2005) (discussing the distinction between the absence of an overt act requirement in conspiracy under the
elements (AUEC and in the context of an armed conflict), the following distinctions are noteworthy.

First, only agreements to "commit . . . substantive offenses triable by military commission" under 2006 M.C.A. § 950v(b)(28) are punishable as conspiracies. Consequently, to be punishable as conspiracy under the M.C.A., the offense(s) object of the agreement must be punishable under the statute.

Second, the accused must "knowingly commit[] an overt act in order to accomplish some objective or purpose of the agreement or enterprise." Individual criminal liability is therefore limited to persons who have themselves (1) "committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise," and (2) "knowingly" done so. Under the UCMJ and the general conspiracy statute, 18 U.S.C. § 371, individual criminal liability attaches if an overt act is committed by any party to the agreement.

Finally, conspiracy as defined in the 2006 M.C.A. § 950v(b)(28) and the 2007 M.M.C. clearly casts a wide net of potential individual criminal liability; however, we are mindful that two Congresses and two Presidents have agreed that conspiracy to commit offenses enumerated in the 2006 and 2009 M.C.A. violate the law of armed conflict and are punishable by military commission.

Each of the seven offenses alleged as objects of the conspiracy in the Specification of Charge I is defined as an offense punishable by military commission in the 2006 M.C.A. See 2006 M.C.A. §§ 950v(b)(1), 950v(b)(2), 950v(b)(3), 950v(b)(15), 950v(b)(16), 950v(b)(24), and 950v(b)(25). The first five object offenses: (1) murder of protected persons; (2) attacking civilians; (3) attacking civilian objects; (4) murder in violation of the law of war; and (5) destruction of property in violation of the law of war constitute non-controversial, long-standing violations of the law of armed conflict punishable by military commission.118 The remaining two object offenses: (6) terrorism and

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118 See Rome Statute of the ICC, supra nn. 51, 66, art. 8(2) ("2. For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wil[l]ful killing; . . . (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. . . . " and “2(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(7) providing material support for terrorism are the subject of considerable discussion in this opinion. See supra pp. 52-61.

Congress did not exceed its constitutional authority by defining terrorism as an offense in the 2006 M.C.A. and in making such conduct punishable by military commission, when committed by an AUEC in the context of an armed conflict. See supra pp. 37-47; see also Hamdan, 2011 WL 2923945 at *24-*27. The 2006 M.C.A. offense of terrorism is consistent with Common Article 3 and APII, supra n. 39, firmly established international norms, and general principles of law recognized by civilized nations and was applicable at the time of the conduct alleged.

Similarly, Congress acted within the scope of its constitutional authority by defining “providing material support for terrorism” as an offense in the 2006 M.C.A. and in making the conduct alleged here and in Hamdan punishable by military commission, when committed by an AUEC in the context of an armed conflict. See supra pp. 45-47; see also Hamdan, 2011 WL 2923945 at *18 and nn. 48-54. In this case, we focused on the specific circumstances of appellant’s pledge of fealty to bin Laden, his membership in al Qaeda, an international terrorist organization, and his intentional provision of material support and resources with knowledge that al Qaeda engaged in or engages in terrorism and was then engaged in armed conflict with the United States. See supra pp. 45-47. Our conclusion was grounded in the customary practice of treating such persons as outside the protections of the law of armed conflict, punishable for their own criminal acts and those of the armed group of which they were a member.

Appellant was essentially charged with and convicted of conspiring and agreeing with bin Laden and other al Qaeda members to commit the seven object offenses, and with knowledge of the unlawful purposes of that agreement willfully entering into that agreement with the intent to further those unlawful purposes. He knowingly committed the enumerated overt acts “in order to

. . . (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; . . . (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; . . . (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; . . . (xiii) Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war; . . . 2(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities . . . : (i) Violence to life and person, in particular murder of all kinds . . . ” and “2(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; . . . ”).
accomplish some objective or purpose of the agreement” including traveling to Afghanistan with the intent of joining al Qaeda, undergoing military-type training at an al Qaeda camp, meeting with and pledging personal loyalty to bin Laden, and then joining al Qaeda. The Specification of Charge I ¶¶ a – d.

After joining al Qaeda, appellant committed numerous additional acts “in order to accomplish some objective or purpose of the agreement” including: “preparation of various propaganda products, including the video ‘The Destruction of the American Destroyer U.S.S. Cole,’ to solicit material support for al Qaeda, to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, and to solicit, incite and advise persons to commit Terrorism;” acting as a personal secretary and media secretary for bin Laden; facilitating the pledges of loyalty to bin Laden and preparing the propaganda declarations styled as Martyr Wills for two suspected September 11, 2001 hijackers/pilots, researching the economic effect of the acts of terrorism perpetrated on the United States by those two hijackers/pilots on September 11, 2001 and providing the results to bin Laden, and operating and maintaining data processing equipment and media communications equipment for the benefit of bin Laden and other al Qaeda leaders. The Specification of Charge I ¶¶ d-j.

This offense as codified and charged provided comprehensive notice of both the conduct in issue and the elements of the offense. In fact, the Government was required to prove both objective and subjective elements.

The objective elements include an actus reus, which is appellant’s agreement with bin Laden and others to commit the offenses that are the object of the conspiracy, and the charged overt acts included his pledge of fealty to bin Laden and membership in al Qaeda as well as the various support and services he personally provided al Qaeda; his status as an AUEC; and that the conduct took place “in the context of and was associated with an armed conflict.” The Specification of Charge I.

Additionally, the subjective elements include both a scienter or knowledge element, and mens rea or intent element. Specifically, that the accused “knew the unlawful purpose of the agreement” and “joined willfully, that is, with the intent to further its unlawful purpose.” 2007 M.M.C., Part IV, ¶¶ 6(28)b(2)-(3), supra p. 87. The military commission judge’s instructions to the members articulated these requirements and serve to illustrate the subjective elements of the offense.119

Likewise, “[t]he act of uniting with “banditti, jayhawkers, guerillas, or any other unauthorized marauders” has long violated the law of armed conflict

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119 The military commission judge’s instructions included in the elements of each of the seven offenses that are the object of the conspiracy that appellant knew the unlawful purpose of the agreement and joined or willingly joined the conspiracy with the intent to further its unlawful purpose. Tr. 846, 850, 851, 852, 854, 856, 857.
and that "offence is complete when the band is organized or joined," 11 Op.
Atty. Gen. at 312, see supra p. 41. Recent treaty law acknowledges participation
in a transnational organized criminal group in a manner similar to the charged
conspiracy as punishable conduct. See Convention against Transnational
Organized Crime, art. 5, quoted at p. 69 and cited supra n. 90. In addition,
punishment of such conduct under domestic criminal law reflects widespread
agreement on this fundamental principle.

Appellant's charged conspiracy is directly akin to the criminal
organization provisions of the Nuremberg Charter in Articles 9 and 10, as
implemented by the IMT. See discussion supra pp. 63-65. We also find that
appellant's conduct readily meets the requirements of membership in a criminal
organization. Appellant's conduct, including his agreement with bin Laden and
others to commit the object offenses, with knowledge of and intent to further the
unlawful purposes of that agreement, and commission of the enumerated overt
acts, including meeting with and pledging personal loyalty to bin Laden, and
then joining al Qaeda was punishable by military commission as an offense
against the law of armed conflict when committed.

Additionally, and like the conduct charged as providing material support
for terrorism, see JCE supra pp. 71-78 and complicity supra pp. 78-79, the
offense of conspiracy as charged is essentially co-perpetrator or principal
liability, akin to aiding and abetting, or complicity, theories of individual
criminal liability long recognized under the law of armed conflict, and in the
domestic law of civilized nations. This is particularly true where, as here, the
accused voluntarily conspires and agrees with al Qaeda's leadership to commit
at least seven separate offenses against the law of armed conflict and with
knowledge of and intent to further the unlawful purposes of that agreement,
knowingly commits various overt acts to accomplish some objective of that
agreement including pledging loyalty to bin Laden, joining al Qaeda, and
providing various services and resources to both. The mens rea element as
defined in 2006 M.C.A. § 950v(b)(28), supra p. 87, and the 2007 M.M.C., Part
IV, ¶¶ 6(28)b, supra p. 87, and as applied by the military judge at trial also
duplicates that required for "Basic JCE" (shared intent to perpetrate a certain
crime), and "Extended JCE" (intent to participate in and further the criminal
activity or the criminal purpose of a group). See supra p. 73.120

120 The 2007 M.M.C. incorporates as an element "an enterprise of persons who shared
a common criminal purpose," or JCE theory into the elements of the offense. Id. at Part IV, ¶¶
6(28)b, supra p. 87. The definition satisfies the actus reus requirements for all three types of
JCE (e.g. plurality of persons, existence of a common plan, design or purpose which amounts
to or involves the commission of a crime provided for in the Statute, and participation of the
accused in the common design involving the perpetration of one of the crimes provided for in
the Statute where this participation may take the form of assistance in, or contribution to, the
execution of the common plan or purpose). Appellant properly points out that the military
commission judge granted the Government's motion to strike the "enterprise language" from
the Specification of Charge I upon motion from the trial counsel, and this change was made
without explanation or objection from appellant. Tr. 109-113; Charge Sheet.
1. Non-U.S. Conspiracy-Type Laws

The domestic laws of many nations address conspiracy and conspiracy-like conduct and include similar language. See supra n. 76, for the locations of documents in this section.

In Afghanistan, before December 2001, "alliance in crime" was defined as "the joining of two or more persons in committing a specific or an unspecified felony or misdemeanor, or joining in equipment, facilities or supplementary works of the said crimes, provided that the alliance is regular and continuous, even if it has taken place at the formation stage of crime or for a short time." Afghanistan Penal Code, arts. 49, 50 (Oct. 7, 1976), Issue No. 13, Ser. No. 347. "Every individual shall be sentenced, . . . even if the felony for which the alliance was made has not been initiated." Id. at art. 50(1). Current Afghanistan law criminalizes "unit[ing] with another person in order to participate in the commission of [a terrorist] offence." Law on Combat against Terrorist Offenses, Art. 18 (July 2008). See also supra p. 57 (discussing helping or aiding in terrorism as an Afghan offense).

Brazilian law prohibits "association of more than three persons for the purpose of undertaking criminal activities." SCOR Report S/2001/1285 at 11 (Dec. 27, 2001) (citing the Penal Code of Brazil, art. 288). See also pp. 57, 103 (discussing Brazilian terrorism laws).

Egyptian law has criminal penalties for "anyone who invites another to join even a mere agreement aimed at the commission of crime in connection with terrorist activity, even if his invitation is not accepted." SCOR Report S/2001/1237 at 4 (Dec. 21, 2001) (citing Arts. 88(b), 97, 98 of the Egypt Penal Code). It also penalizes "anyone who has knowledge of the existence of a plan to commit such crimes and fails to inform the authorities thereof." Id.

Under French Law, "criminal conspiracy of a terrorist nature . . . [includes] 'participation in a group or an understanding established for the purpose of preparing, by means of one or more material actions, one of the aforementioned terrorist acts.'" SCOR S/2001/1274 at 18 (Dec. 27, 2001) (citing Act 96-647 of 22 July 1996). "The offense of criminal conspiracy for the purpose of planning terrorist acts is applicable to persons not only within French territory but also outside the country." Id. at 18-19 (citing Article 706-16 of the Code of Criminal Procedure).

German law punishes anyone who:

forms a group whose aims or activities are directed towards commission of certain criminal offenses [but not specifically terrorism] . . . [or] whoever participates in such a group as a member, [commits an offense and if these offenses are] intended to seriously intimidate the population,
to unlawfully coerce a public authority or an international organization through the use of force of the threat of use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization, and which, given the nature or consequences of such acts, may seriously damage a country or an international organization, is subject to punishment.


The law in India provides for punishment of anyone who “conspires or attempts to commit, or advocates, abets, advises or incites knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act” as well as “[a]ny person who is a member of a terrorist gang or a terrorist organization, which is involved in terrorist acts . . . .” Terrorist and Disruptive Activities (Prevention) Act, 1987, Part II §§ 3(3) and 3(5).

In Indonesia, a “‘conspiracy’ exists as soon as two or more persons agree to commit a crime.” Penal Code of Indonesia, as amended May 19, 1999, art. 88. Whoever “conspires[s] to commit various crimes] shall be punished . . . .” Id. at art. 187. Any person having knowledge of a conspiracy to commit . . . [various] crime[s] at a moment when the commission of said crimes may still be prevented, [who] deliberately omits to give timely adequate notice thereof either to the . . . police, or to the threatened person, shall, if the crime was committed, be punished. . . .” Id. at art. 164. See also pp. 105 (discussing Indonesian laws against terrorism).


Italy [has] . . . a wide ranging set of rules and regulations to counter . . . terrorism. In addition to existing legislation, Decree Law 374/2001 . . . criminalizes the financing of both international and domestic terrorist activities. Section 1 (“Provisions relating to conspiracy for the purposes of domestic or international terrorism”) updates article 270-bis of the Criminal Code and provides that “anyone promoting, instituting, organising, managing or financing organisations whose purpose is to propose acts of violence for the purposes of terrorism or for subverting the democratic order shall be liable for a term of imprisonment, . . . and that “anyone participating in the aforementioned organisations shall be
liable for a term of imprisonment . . ., specifying that “the pursuit of terrorism shall also apply when the acts of violence are directed against a foreign state, or an international organisation or institution”. The same article 1 also contemplates the crime of “providing assistance to associated persons” in article 270-ter of the Criminal Code . . . .

_id_. at 5. On December 15, 2001, the Italian Government enacted Law No. 438, and “introduced two new . . . types of [punishable] conduct.” SCOR Report S/2006/611 at 3 (Aug. 4, 2006). First, “promoting, setting up, organizing, heading or funding associations whose intent is to commit acts of violence for the purposes of terrorism and international terrorism” became a crime. _id_. Second, “supporting any one of the persons who participate in terrorist associations by . . . providing them with food, hospitality, and means of transportation or communication” became a new offense under Italian law. _id_.

Under the Japanese Penal Code, “culpability for acts of conspiracy or instigation where the ultimate criminal act is not completed [is applied] under limited circumstances.” Tom Stenson, Inchoate Crimes and Criminal Responsibility Under International Law, at 11-12, http://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Stenson_Thomas.pdf. For example, [t]he Subversive Activities Prevention Law allows prosecution for instigation of a homicide for political reasons, even where no homicide actually occurs.” Stenson, at 11 (citation omitted). “Insurrection, assisting the enemy, inducing a foreign nation to attack the home country, or waging private war are all crimes for which simple incitement or conspiracy to bring them about is sufficient to incur punishment.” _id_. at 11-12 (citing Japanese Criminal Code, Art. 129, 131, 134, 135, 138, 139, 140, 141 (1978)). “[W]hen a principal offender commences the commission of a crime, the provision or collection of funds is punishable as ‘aiding and abetting,’ or as ‘complicity.’” SCOR Report S/2001/1306 at 7 (Dec. 27, 2001). “[T]he provision or collection of funds alone is not punishable under the Penal Code” when “the principal does not commence the commission of a crime.” _id_.

Pakistani law authorizes prosecution for abetting terrorism and includes membership in specified terrorist groups. _See supra_ p. 59. Whoever abets an offense shall be punished, even if the offence is not committed. Pakistan Penal Code, Part V ¶¶ 115, 116 (Oct. 6, 1860); _see also id_. Abetment by Conspiracy §§ 107, 108. A criminal conspiracy requires an agreement to commit an offense and an act done in pursuance thereof by one or more of the parties to such an agreement. _id_. at Part VA § 120A, as inserted by Criminal Law (Amendment) Act, VIII of 1913. Conspiracy to take various actions against the State or Government of Pakistan is a criminal offense. _id_. at Part VI § 121A, as inserted by Penal Code (Amendment) Act, 1870 (XXVII of 1870).

Russian Federal Act. No. 95528-3 of December 2001 “increased
liability for creation of terrorist organizations, management of such organizations, recruitment to terrorist groups, supply of weapons and training of persons to commit crimes of a terrorist nature, as well as financing of terrorist organizations.” SCOR Report S/2001/1284 at 4 (Dec. 27, 2001). Terrorist activity includes:

1) the organization, planning, preparation, and implementation of terrorist action; 2) incitement to terrorist action, to violence against individuals or organizations, or to the destruction of material objects for terrorist purposes; 3) the organization of an illegal armed formation, criminal association (criminal organization), or organized group in order to perpetrate terrorist action, and also participation in such action; 4) the recruitment, armament, training, and use of terrorists; 5) the funding of a known terrorist organization or terrorist group or other assistance to them[.]

Russian Federation Federal Law No. 130-FZ, art. 3 (July 25, 1998), replaced by Federal Law No. 35-FZ of Mar. 6, 2006 (containing similar definition of terrorist activity).

Under Swedish law, “[c]onspiracy is defined as a decision to act in collusion with another person, or an offer to undertake or execute a crime or the attempt to incite another person to do so.” SCOR Report S/2001/1233 at 3 (Dec. 24, 2001); Swed. Penal Code, Ch. 23 §§ 2, 4, (through May 1, 1999 amendments). “All acts constituting an offence within the scope of and defined in the international criminal law conventions for the suppression of terrorism are . . . criminal offences in Sweden.” Id. at 9.

The law in the United Kingdom provides that membership in a proscribed terrorist organization is an offense, however, not participating in its activities when it was proscribed is a defense to this crime. U. K. Terrorism Act 2000, Ch. 11 § 11 (July 20, 2000). Under Section 12(1) of this chapter, “[a] person commits an offence if—(a) he invites support for a proscribed organization, and (b) the support is not, or is not restricted to, the provision of money or other property” and under Section 12(2) of this chapter:

[a] person commits an offense if he arranges, manages or assists in arranging or managing a meeting which he knows is (a) to support a proscribed organization, (b) to further the activities of a proscribed organization, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organization.

U. K. Terrorism Act 2000, Ch. 11 § 12(1) 12(2) (July 20, 2000), http://www.legislation.gov.uk/ukpga/2000/11/contents/enacted. Courts in the United Kingdom have jurisdiction over “offences of conspiracy to commit [a terrorism] offence, . . . inciting such an offence, attempting such an offence and

D. Conclusion

The Government has made a “substantial showing,” see supra n. 32, that the conduct alleged, including appellant’s (an AUEC’s) agreement with bin Laden and others to commit the object offenses, with knowledge of and intent to further the unlawful purposes of that agreement, and commission of the enumerated overt acts including meeting with and pledging personal loyalty to bin Laden, and membership in al Qaeda was punishable by military commission as an offense against the law of armed conflict when committed.

The specific statutory scheme employed by Congress in the 2006 M.C.A. including the common elements (AUEC and in the context of an armed conflict), stringent procedural safeguards, and comprehensive factual determinations are consistent with international norms. Congress did not exceed its constitutional authority in labeling appellant’s conduct “conspiracy” or in defining the elements of conspiracy. Our holding is necessarily limited to the matter before us – the conduct of an AUEC, as those terms are defined in the 2006 M.C.A., see supra nn. 23, 24, 53, who is a member of a non-state, transnational terrorist organization engaged in armed conflict with the United States.

X. SOLICITATION AS AN OFFENSE TRIABLE BY MILITARY COMMISSION

Appellant asserts that the inchoate offense of solicitation is not recognized as a war crime under international law, and thus is not punishable by military commission. Brief for Appellant 25-26.

The Government again argues that the constitutional authority to establish the jurisdiction of military commissions belongs to the political branches exercising their war powers. The Government cites descriptions of similar conduct as war crimes to include “recruiting for [the enemy] army,” and “distributing publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy.” Brief for Appellee 28 (quoting Winthrop, supra n. 32, at 833, 841).

A. Solicitation - The Charge and Specification

Appellant, as an AUEC “in the context of and associated with an armed conflict,” was charged in the Specification of Charge II with and convicted of:

Solicitation to commit Murder of Protected Persons, ... to Attack Civilians, ... to Attack Civilian Objects, ... to commit Murder in Violation of the Law of War, ... to Destroy Property in Violation of the
Law of War, . . . to commit acts of Terrorism, . . . and to Provide Material Support for Terrorism[.]

Charge Sheet, in violation of 10 U.S.C. §§ 950u, 950v(b)(1), 950v(b)(2), 950v(b)(3), 950v(b)(15), 950v(b)(16), 950v(b)(24), and 950v(b)(25).

The Specification of Charge II states that Appellant:

[who is] an alien unlawful enemy combatant, did, in the context of and associated with an armed conflict, from in or about February 1999 through in or about December 2001, at various locations in Afghanistan, Pakistan and elsewhere, wrongfully solicit, order, induce and advise [five named persons] and other persons, known and unknown, to commit [the aforementioned offenses] by preparing and assisting in the preparation of various propaganda products, including but not limited to the video “The Destruction of the American Destroyer U.S.S. Cole,” said propaganda products being intentionally designed, made, distributed and shown in order to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, an international terrorist organization, and to solicit, order, induce, and advise said persons to commit [the aforementioned offenses] with the intent that said offenses actually be committed.

Charge Sheet. We next turn to the statutory definition of the solicitation offense.

B. Solicitation under the 2006 M.C.A. and 2007 M.M.C.

Solicitation is defined in the 2006 M.C.A. § 950u as follows:

Any person [subject to the 2006 M.C.A.] who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

The 2007 Manual for Military Commissions defines the elements of solicitation as: “(1) That the accused wrongfully solicited, ordered, induced, or advised a person or persons to commit a substantive offense triable by military commission; and (2) That the accused intended that the offense actually be committed.” 2007 M.M.C., Part IV, ¶ 5b.
The charged solicitation, as instructed upon by the military commission judge and argued by appellant, constitutes an inchoate offense. We are mindful that two Congresses and two Presidents have agreed that solicitation to commit offenses enumerated in the 2006 and 2009 M.C.A. violate the law of armed conflict and are punishable by a law of war military commission.

C. Analysis

The seven object offenses of the solicitation specification are the same as the object offenses of the conspiracy specification. See supra p. 89. Each of these seven object offenses is defined as an offense punishable by military commission in the 2006 M.C.A., when committed by an AUEC in the context of an armed conflict. See supra pp. 45-47; see also Hamdan, 2011 WL 2923945 at *18 and nn. 48-54. These object offenses are punishable by military commission as violations of the law of armed conflict, and the Specification of Charge II and Charge II were charged and applied in accordance with the statutory and manual requirements, and provided appellant comprehensive notice of the conduct in issue and the elements of the offense. As charged, the Government was required to and did prove both objective and subjective elements.

The actus reus of the offense is the wrongful solicitation, order, inducement or advice through the “preparing and assisting in the preparation of various propaganda products, including but not limited to the video ‘The Destruction of the American Destroyer U.S.S. Cole,’” to commit the offenses that are the object of the solicitation. The objective elements include that actus reus, common element 1 - “alien unlawful enemy combatant element,” see p. 37 and supra nn. 23, 24, 53, and common element 2 - that the conduct took place “in the context of and was associated with an armed conflict.” See supra p. 45. While the mens rea required is the specific intent that those offenses be committed.

In addition, the Specification of Charge II also stated that the propaganda products were “intentionally designed, made, distributed and shown in order to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, an international terrorist organization” and to solicit, “induce, and advise said persons to commit Murder of Protected Persons” among other offenses that violate the law of war.

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121 The military commission judge’s instructions on this offense included, “You are further advised that proof that the [object] offenses listed in the Specification of Charge II actually occurred is not required. However, it must be proven beyond a reasonable doubt that the accused intended that persons known or unknown would commit every element of the offense or offenses listed in the Specification of Charge II.” Tr. 860.
1. International Law and Inchoate Liability

Since World War II inchoate liability for crimes against peace and genocide have been recognized as offenses under international law. This is appropriate given the seriousness and insidiousness of the object offenses.

The IMT at Nuremburg referred to “Crimes Against Peace” or aggressive war as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole,” and held that conspiracy to commit aggressive war was an offense under the London Charter. In the Far East, “General MacArthur . . . convened an international tribunal of eleven Allied nations to try twenty-eight former Japanese leaders, including four prime ministers and a field marshal. . . . [T]his was to be the sole international tribunal for the Far East, the counterpart to Nuremburg.” The court’s subject matter jurisdiction was similar to that at Nuremburg, except that Crimes against Peace charge was even more significant. Bush, supra n. 123, at 2375 (citing Horowitz, supra n. 123, at 487). None of the accused were acquitted, “seven were hanged, two were given lesser sentences, and all the others received life sentences.” Id.

“The United Nations [subsequently] endorsed the doctrine [of Crimes against Peace], as part of a more general endorsement of the Nuremburg proceedings and results.” Bush, supra n. 123, at 2388 (citing UN General Assembly Res. 95, A/Res/95(I) (Dec. 11, 1946); other citations omitted). We note that al Qaeda’s ultimate goal, establishment of an Islamic Caliphate spanning the Arabian Peninsula, North Africa and Asia, renders al Qaeda’s actions in pursuit of that goal akin to aggressive war.

The IMT’s disparate findings in the cases of two Nazi defendants, the publicist Julius Streicher and Head of the Radio Division of the Propaganda Ministry Hans Fritzsche, inform our analysis of punishing incitement through propaganda under the law of armed conflict. 1 T.M.W.C. supra n. 36, at 304, 338. When the IMT heard the case of Julius Streicher, the Nazi publisher of the anti-Semitic weekly newspaper, Der Sturmer, there was no extant treaty or established custom prohibiting genocide or incitement to commit genocide. However, the IMT concluded “Streicher’s incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial

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122 1 T.M.W.C., supra n. 36, at 186; see also, Nuremburg Justice Norman Birkett, International Legal Theories Evolved at Nuremburg, 23 Intl. Aff. 317, 322 (1947) (“The first international theory of supreme importance, which evolved from the Trial is that the waging, initiation and preparation of aggressive war is declared to be a crime.”).

grounds in connection with War Crimes as defined by the Charter, and constitutes a Crime against Humanity.” *Id.* at 304. The IMT “linked Streicher’s propaganda with the war crimes that had been carried out . . . to establish a parallel to the specific intent requirement in criminal law.” 124 He was sentenced “to death by hanging.” 1 T.M.W.C. *supra* n. 36, at 365.

The IMT acquitted Hans Fritzscbe, a senior official in Goebbels’s Ministry of Popular Enlightenment and Propaganda and host of a weekly radio show. *Id.* at 182, 336, 338. The prosecution argued that Fritzscbe “incited and encouraged the commission of War Crimes, by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities[.]” *Id.* at 337-38. However, the IMT reasoned:

His position and official duties were not sufficiently important . . . to infer that he took part in originating or formulating propaganda campaigns . . . [and] [i]t appears that Fritzscbe sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German People to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.

*Id.* at 338. The judgment suggests that the IMT’s “reasons for acquitting Fritzscbe lay in the fact that, first, he lacked the necessary intent or such intent had not been proved to the Tribunal’s satisfaction and second, his speeches were not sufficiently direct or unequivocal in calling for the murder of the Jewish people.” Wibke Timmermann, *Incitement in International Criminal Law*, 88 Intl. Rev. of the Red Cross, No. 864, 823, 829 (Dec. 2006) (citations omitted).

“Thus, the [IMT’s] death sentence for Streicher and acquittal of Fritzscbe suggested that, to be actionable, incitement [to commit genocide] required specificity and a direct link to the actions for which it called.” Jamie Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 Am. J. Intl. L. 628, 637 (1997) (citation omitted). Fritzscbe’s superior, Otto Dietrich, was “a Reichsleiter in the Leadership Corps of the Nazi Party in 1932. He maintained that position until the collapse. He was the Party Press Chief, Hitler’s Press Chief, Reich Press Chief, and State Secretary in the Ministry of Propaganda.” 14 T.W.C., *supra* n. 60, at 861. Dietrich was tried by the NMT at part of “The Ministries Case.” 11-14 T.W.C., *supra* n. 60. He was convicted of two charges, Count Five: “War Crimes and Crimes Against Humanity; Atrocities and Offenses Committed Against Civilian Populations” and Count VIII, “Membership in Criminal Organizations.” 14 T.W.C., *supra* n. 60, at 467, 576.

855, 861. The Tribunal found his press and periodical directives, "expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected." Id. at 576.

Following World War II, the United Nations General Assembly unanimously adopted the *Genocide Convention*. See *supra* n. 113. The *Genocide Convention* defined "genocide" as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id. at art. II(a)-(e). The *Genocide Convention* makes punishable not only genocide, but also inchoate offenses including conspiracy to commit genocide, and direct and public incitement to commit genocide, regardless of whether any acts of genocide were committed or even attempted. Id. at art. III(b)-(d). The *Genocide Convention* became part of the jurisdiction of the ad hoc and permanent international criminal courts. See *supra* n. 113.

In the Akayesu Trial Judgment, the International Criminal Tribunal for Rwanda (ICTR) emphasized the inchoate nature of the crime by declaring that, "genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator." *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, (Judgment) ¶ 562 (Trial Chamber, Sept. 2, 1998).

Similarly, "public provocation to commit terrorism" has been acknowledged as punishable under general principles of law recognized by civilized nations, including organizations and individual nations. Article 5(2) of *The Council of Europe Convention on the Prevention of Terrorism (European Terrorism Convention)* (May 16, 2005) mandates each party to criminalize "public provocation to commit a terrorist offence... when committed unlawfully and intentionally, as a criminal offence under its domestic law." The *European Terrorism Convention* defines "public provocation to commit a terrorist offence" as: "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed." Id. The *European Terrorism Convention* also mandates passage of legislation
prohibiting "[r]ecruitment for terrorism," defined as "means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group." Id. at art. 6(1).

The similarities between the prohibition against solicitation and recruitment in the European Terrorism Convention and solicitation as defined in the 2006 M.C.A. § 950u, supra p. 98, and charged here are manifest. The similarities include the *actus reus* ("public provocation to commit a terrorist offence" and public message), and *mens rea* (specific intent).

The *OIC Convention on Combating International Terrorism*, see supra n. 74, recognized the importance of preventing and combating terrorist crimes by cooperation and exchange of information regarding "[m]eans of communications and propaganda utilized by terrorist groups" and "arresting those accused of committing a terrorist crime ... or being implicated in such acts either by assistance, collusion, *instigation*, or financing." Id. at Ch. I, Div. II, art. 4.1(b) and 4.4(a)(emphasis added).

The general principles of law recognized by civilized nations also recognize inchoate liability for conduct akin to solicitation, inducement, or advice to another to commit terrorism. Following is a summary of those laws from various nations arranged alphabetically.

1. Solicitation-Type Laws

Before December 2001, under Afghan law, it was a crime to organize or encourage another to join an organization whose aim is to disturb or nullify "one of the basic and accepted national values in political, social, economic or cultural spheres of the State or makes propaganda for its extension or attraction to it, by whatever means it may be." Afghanistan Penal Code, arts. 221, 222 (Oct. 7, 1976). Current Afghan law criminalizes "recruit[ing] another person in order to participate in or carry out [a terrorist act]," or helping in any way in order to complete the commission of a terrorist act. Law on Combat against Terrorist Offenses, art. 19 (July 2008).

Brazilian law criminalizes the "association of more than three persons for the purpose of undertaking criminal activities," and the "recruitment of new members for terrorist groups would fall under the definition of this crime." SCOR Report S/2001/1285 at 11 (Dec. 27, 2001) (citing the Penal Code of Brazil, art. 288). Brazilian law also punishes "support to an association, party, committee, class entity or group whose goal is to change the current regime or of the Rule of Law, either by violent means or through serious threat." SCOR Report S/2006/680 at 3 (Aug. 21, 2006) (citing the National Security Law of Dec. 14, 1983, art. 16). "[I]ncitement to the commission of any crime in
general" violates Brazilian law. *Id.* at 9 (citing the Penal Code of Brazil, art. 286). “[P]ublic apologia (or glorification) of any crime or criminals” is prohibited. *Id.* (citing the Penal Code of Brazil, art. 287).

Egyptian criminal law punishes promoting a terrorist act:

by speech, writing or any other means, or any person directly or indirectly possessing or acquiring writings, writings, printed materials or recordings of any kind that promote or advocate [terrorism] for dissemination or viewing by others, or anyone who possesses or acquires any means of printing, recording or broadcasting that is used or intended to be used even temporarily to print, record or broadcast any of the aforementioned.


French law “criminalizes incitement to and advocacy of terrorism.” SCOR Report S/2006/547 at 3 (July 20, 2006) (citing Act of 1881, art. 24). “Article 23 defines the range of means used for such incitement, which can occur orally in a public place, or on any written material accessible to the public.” *Id.*

“Incitement to terrorism is punishable even if it has not resulted in an offence.” *Id.*

Under German law, “Public Incitement to Crime,” is an offense that provides, “[w]hoever publicly, in a meeting or through dissemination of writings, [and other media] incites an unlawful act, shall be punished as an inciter.” SCOR Report S/2006/527 at 4 (July 17, 2006) (citing German Penal Code § 111 as promulgated on Nov. 13, 1998); *see also id.* at 3 (citing German Penal Code §§ 26, 30(1)). It is “irrelevant in this context whether the incitement is successful or not.” *Id.* at 4 (citing German Penal Code § 111). “Whoever publicly, in a meeting or through dissemination of writings, approves of certain enumerated unlawful acts in a manner that is capable of disturbing the peace, is subject to punishment, . . . this includes urging or glorifying terrorism as necessary and justified.” *Id.* (citing German Penal Code § 140(2)).

The law in India punishes whomever “advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act.” 1987 Terrorist and Disruptive Activities (Prevention) Act (1987 TADAPA), pt. II, ¶ 3(3). The 1987 TADAPA defines “abet” as “i. the communication or association with any person or class of persons who is engaged in assisting in any manner terrorists . . . ; [and] ii. the passing on, or publication of, . . . or distribution of, any document or matter obtained from terrorists . . . .” *Id.* at pt. I, ¶ 2(1)(a).
The Penal Code of Indonesia contains two sections to stop recruiting of terrorists. First, “[a]ny person who orally or in writing incites in public to commit a punishable act, a violent action against the public authority or any other disobedience, either to a statutory provision or to an official order issued under a statutory provision, shall be punished. . . .” SCOR Report S/2001/1245 at 6 (Dec. 26, 2001) (citing Penal Code of Indonesia, Book II on Crimes, Ch. V on Crimes Against the Public Order, art. 160). Second, “[a]ny person who by one of the means . . . attempts to induce others to commit a crime, shall, if it does not result in the crime or a punishable attempt thereto, be punished.” Id. at 7 (Penal Code of Indonesia, Book 11 on Crimes, Ch. V on Crimes Against the Public Order, art. 163 bis). The Republic of Indonesia, Government Regulation in lieu of Legislation No. 1/2002 on Combating Criminal Acts of Terrorism, criminalizes assisting, facilitating, and inciting terrorist acts. Id. at §§ 11-15 (Oct. 18, 2002).

Under Italian law, incitement to commit an act of terrorism is punishable, but must involve a genuine risk of inducing someone to commit the actual crime. SCOR Report S/2006/611 at 3 (Aug. 4, 2006). The incitement itself need not be successful, nor the crime actually committed. Id. A second set of measures adopted just after the bomb attacks in London in 2005 added terrorist recruitment and training to the list of terrorism crimes. Id. at 4 (citing Italian Criminal Code, art. 270 (July 31, 2005)); Elies van Sliedregt, European Approaches to Fighting Terrorism, 20 Duke J. Comp. & Intl. L. 413, 420 (2010) (citing Italian Criminal Code of Italy, art. 270); see also Italian Criminal Code, arts. 39-40 (heightened penalties for anyone who incites or directs others under his authority to commit crimes).

The law in Japan provides:

when an act of terrorism which also constitutes a criminal offence such as homicide is committed, the incitement of such an act can be prosecuted either as an “incitement”, . . . or as an “accessoryship,” . . . In addition, . . . the incitement of insurrection, instigation of foreign aggression or assistance to an enemy [is prohibited]. . . . [T]he incitement of such offences as arson, homicide, [and] public disturbance . . . , with the purpose of promoting, supporting or objecting to a political ideology or measure. . . . [T]he incitement of the use of explosives with the purpose of disrupting public safety or harming another’s body or property [is prohibited].

SCOR Report S/2006/402 at 3 (June 16, 2006) (Penal Code, arts. 61, 62; Penal Code, Subversive Activities Prevention Act, arts. 38-40; Explosives Control Act, art. 4). The Japanese Criminal Code “only assigns culpability for acts of conspiracy or instigation where the ultimate criminal act is not completed under limited circumstances. . . . [such as] prosecution for instigation of a homicide for political reasons, even where no homicide actually occurs.” Stenson, at 11-12
(citing Shigemitsu Dando, *The Criminal Law of Japan*; The General Part 222 (B.J. George, trans., 1997). Similarly, "[i]nsurrection, assisting the enemy, . . . [and] waging private war are all crimes for which simple incitement or conspiracy to bring them about is sufficient to incur punishment." *Id.* (citing Japanese Criminal Code, arts. 129, 131, 134, 135, 138, 139, 140, 141 (1978)).


Russian law broadly criminalizes incitement to engage in terrorist activity and recruitment to a terrorist group. *See supra* p. 96 (quoting Federal Act No. 95528-3 of Dec. 2001 and Russian Federation Federal Law No. 130-FZ, art. 3 (July 25, 1998), replaced by Federal Law No. 35-FX of Mar. 6, 2006)).

Under Spanish law, "membership in an armed group or terrorist groups and organizations is defined as a criminal offense, . . . [as is] inciting others, conspiring or purposing to commit these offenses of illegal association." José Luis de la Cuesta, *Anti-Terrorist Penal Legislation and the Rule of Law: Spanish Experience* at 4, ¶ 3.2, (2007), (citing Arts. 515.2, 516.2, 519) [http://www.penal.org/IMG/JLDLCTerrorism.pdf]. The Organic Act No. 7/200 modified "exalting terrorism" as an offense in Penal Code, art. 578, and makes punishable "any praise or justification of terrorist offenses or of those involved in committing them through any form of public expression or broadcast. Exalting terrorism also covers acts that serve to discredit, scorn or humiliate the victims of terrorist offenses, their families or relations." *Id.* at 7, ¶ 4.4 (citation omitted).

Chapter 23, section 4, of the Swedish Penal Code provides:

punishment shall be imposed not only on the person who committed the crime but also on anyone who furthered it by advice or deed (e.g., financing). A person not regarded as the perpetrator shall, if he or she induced another person to commit the act, be sentenced for instigation of the crime or for aiding and abetting the crime. Each accomplice shall be judged according to the intent or the negligence attributable to him or her.

SCOR Report S/2001/1233 at 3 (Dec. 24, 2001) (emphasis in original). In response to the question from the UN Security Council, "what offences in your country prohibit (i) recruitment to terrorist groups?" Sweden responded, "[a] person who publicly urges or otherwise attempts to entice people to commit a criminal act can be sentenced for inciting rebellion. The act can be committed
orally, through a publication or in other messages to the public." *Id.* at 5. "A person who recruits people for military or comparable service without authority of the Government can be sentenced for unlawful recruiting." *Id.*

In the United Kingdom, under the common law it is an offense to incite another to commit an offense. SCOR Report S/2006/398 at 3 (June 15, 2006). "There is no need for the offense to be attempted or committed." *Id.* Section 1 of the Terrorism Act of 2006 provides that it is a criminal offense:

> to publish a statement which directly or indirectly incites or encourages others to commit acts of terrorism . . . if, at the time, the defendant intends to encourage terrorism . . . , or is reckless as to whether persons will be so encouraged. Indirect encouragement includes the glorification of terrorism of the specified offences, where it can reasonably be inferred that the conduct that is glorified should be emulated in existing circumstances.

*Id.* at 3.

Under U.S. law, "[d]irect incitement [to commit] crimes against peace, crimes against humanity and war crimes" has long been recognized as an offense punishable by military commission." 1956 FM 27-10 ¶ 500. Civil War era military commissions convicted individuals of violations of the law of war by inciting, soliciting, or encouraging others to violate the law of war. Headquarters District of Central Missouri issued General Order No. 17, Section II stated that "all persons who have or shall in future knowing" encourage guerillas "in their nefarious deeds will be arrested and kept in close confinement until by military commission or other court."125

The following examples are illustrative of such offenses: (1) falsely assuming "the character of a military officer" and then using such assumed character to "incite others to commit acts of hostility against the United States . . . contrary to the laws and customs of are in like cases," S.O. 28, pp. 406-27 (1862) (J. Owen); (2) aiding, assisting, and inciting others to damage railroad property, see S.O. 160, p. 457-64 (1862) (W. Petty); (3) "[i]nciting unlawful warfare" by "incit[ing], induc[ing] and procur[ing] persons to take up arms and commit acts of hostility against the . . . United States contrary to the laws and customs of war in like cases," see G.O. 15, p. 475 (1862) (E. Wingfield); (4) "[v]iolation of the laws of war" by "incit[ing] certain persons unknown to make an armed attack upon the dwelling-house . . . of a citizen of Missouri" with the intention that the occupants be murdered, see G.O. 19, p. 478 (1862) (J.

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Barnes); (5) “[v]iolations of the laws of war by the publication” in pamphlets and articles of information designed to “comfort the enemy and incite [the population] to rebellion” or to “incite to acts of insurrection,” see S.O. 160, p. 453-57 (1862) (E. Ellis); and (6) “[i]nciting insurrection” by making speeches, circulars, and other communications to “arouse sentiments of hostility” against the United States Government.” 126 Similarly, unlawfully recruiting for the enemy army was an offense tried by military commission. 127

In response to a U.N. Security Council resolution 1624 (2005), the United States listed three U.S. measures to prohibit and prevent incitement to commit terrorism stating:

(1) criminalization of solicitation to violence, seditious conspiracy, and advocacy of the overthrow of Government and criminalization of certain “inchoate crimes” that permit prosecution of preparatory acts to substantive criminal conduct, including acts of terrorism; (2) designation of terrorist organizations with the resulting legal consequences; and (3) making inadmissible to the U.S. aliens who have either incited terrorist activity with the intention to cause death or serious bodily injury, or endorsed or espoused terrorist activity, or persuaded others to endorse or espouse terrorist activity.


The U.S. submission to the UN explains:

First, the federal criminal solicitation statute, 18 U.S.C. § 373, makes it a crime “with intent that another person engage in [the] conduct,” to “solicit[], command[] induce[] or otherwise endeavor[] to persuade [an]other person to engage in” the use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States. 18 U.S.C. § 373(a). Significantly, this statutory prohibition makes speech punishable when the defendant specifically intends that “another person engage in [the] conduct constituting a felony” and where the surrounding circumstances are “strongly corroborative of that intent.” See 18 U.S.C. § 373(a). Such additional

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qualifications are intended to preserve the vitality of the solicitation statute from a First Amendment-based challenge.

However, the offense of solicitation is complete when the defendant attempts to persuade another to commit a crime. It is therefore inconsequential whether the contemplated federal crime of force or violence was actually consummated or whether the defendant even succeeded in inducing his subject to attempt such commission. United States v. Cardwell, 433 F.3d 378, 391 (4th Cir. 2005); see Initiative & Referendum Instit. v. U.S. Postal Service, 417 F.3d 1299, 1314 (D.C. Cir. 2005) ("In criminal law, solicitation is regarded as a freestanding offense: requesting the unlawful act is itself a crime, regardless of whether the offense was consummated"). Thus, solicitation does not require that the proponent of the criminal act successfully persuade his listener to use unlawful physical force so long as it is clear that he or she intended to do so.

SCOR S/2006/397 at 5 (June 16, 2006).

In 1996, Sheik Omar Amad Ali Abdel Rahman ("Rahman") was convicted of violating 18 U.S.C. § 2384 (conspiracy to advance the forceful overthrow of the U.S. Government), inter alia for his involvement in terrorist plots to bomb New York City facilities and to assassinate certain persons. Rahman’s codefendants actually heeded the exhortations of his sermons and were incited to commit acts of terrorism. Id. at 7 (citing United States v. Rahman, 189 F.3d 88, 116-17 (2d Cir. 1999)).

Inchoate liability under international law continues to evolve. Review of the general principles of law recognized by civilized nations reflects this to be particularly true in the case of terrorism. This is consistent with the evolutionary nature of common law of armed conflict, particularly in light of both the hybrid nature of terrorism and the awareness of the threat terrorism presents to both domestic stability and international peace and security.

Much like Julius Streicher, appellant’s efforts to incite others to murder and terrorize Americans reflect both his specific intent to arouse others to commit such atrocities and specific intent that such atrocities actually be committed. Unlike the IMT’s reasoning in the case of Hans Fritzsche, we find appellant’s position and official duties sufficiently important to establish beyond a reasonable doubt, that “he took part in originating or formulating propaganda campaigns . . . intended to incite [others, both named and unnamed] to commit atrocities on [Americans and others based solely upon their nationality or physical presence in the United States].” See 1 T.M.W.C., supra n. 36, at 338 (discussing the IMT’s basis for finding Streicher guilty).
Appellant’s incitement during an ongoing armed conflict in which al Qaeda used terror as its primary means and method of warfare clearly links his conduct to ongoing violations of the law of armed conflict’s most fundamental tenets. His efforts to encourage others to join al Qaeda and to commit such atrocities in furtherance of al Qaeda’s strategic goal of establishing control over the Arabian Peninsula, North Africa, and Asia are akin to inciting aggressive war, “the supreme international crime,” in a non-international armed conflict. See supra n. 122. We also note that the IMT held defendants individually criminally liable for their acts in furtherance of the common plan or conspiracy to engage in aggressive war. 1 T.M.W.C., supra n. 36, at 11 (IMT Charter, art. 6). See also id. at 186-226 (IMT Judgment, describing Germany’s aggressive war), 224-26 (IMT Judgment, discussing “The Law as to the Common Plan or Conspiracy” to engage in aggressive war). The IMT found eight defendants guilty of Count One, conspiracy to engage in aggressive war. Id. at 366-67.

Similarly, appellant’s incitement and efforts in support of bin Laden and al Qaeda to justify the intentional killing of civilians and destruction of their property based solely upon their nationality or physical presence in the United States, and his actions equate to conduct and intent akin to that punishable as genocide. Terrorism, as advocated by appellant and employed by al Qaeda, constitutes a modern incarnation of the insidious evils present in aggressive war and genocide, and exhibit the specific intent and contextual nexus to the actions to be actionable as an offense. Solicitation, as defined, alleged, and proven in this case, is far removed from an inchoate offense involving mere criminal suggestion or prompting. Rather, in its present guise, it is criminal incitement, recruitment, indoctrination, and motivation to violence, deliberately targeting without distinction persons and interests of a particular nationality. Appellant’s charged conduct is an offense against the law of nations. His relevant criminal conduct was prohibited under the laws of Afghanistan, where the conduct was committed; and the United States, the object of the solicited offenses, and the nation attacked by al Qaeda.

Upon consideration of the extant treaty law, customary international law, and general principles of law recognized by civilized nations, we conclude that the Government has made a “substantial showing,” see supra n. 32, that public solicitation, inducement, or advice to commit any of the charged object offenses (e.g. to attack protected persons and property in violation of the laws of armed conflict, to commit terrorism, or to recruit members for or otherwise indoctrinate members in an international terrorist organization) violates international norms. Moreover, Congress did not exceed the scope of its constitutional authority to define and punish offenses under the law of nations, by making such conduct, when committed by an AUEC in the context of or associated with a non-international armed conflict, punishable by military commission.128

128 See Generally The Preamble of the Rome Statute of the ICC, supra n. 51 (“... Mindful that during this century millions of children, women and men have been victims of
XI. FIRST AMENDMENT ISSUES

Appellant asserts he was convicted on the basis of political speech in violation of the First Amendment. He argues the First Amendment "bars the prosecution of political argument except in a few narrow circumstances, such as incitement." Brief for Appellant 9. And he avers this case does not rise to the level of incitement. Appellant states he "is not claiming First Amendment rights on the battlefield," but asserts once charges were filed against him, his foreign political speech is protected by the First Amendment. Id. Should this Court find he has no First Amendment rights personally, appellant argues that his prosecution for production of "The Destruction of the American Destroyer U.S.S. Cole" [hereinafter The Video] violates the First Amendment because it chills the dissemination of information available to U.S. citizens. Finally, appellant asserts the military commission judge erred in failing to properly instruct the members on the standard for incitement or on the probative value of protected speech as evidence.

Following the Supreme Court's decision in Holder v. Humanitarian Law Project, 561 U.S. ___; 130 S. Ct. 2705 (2010), appellant sought and was granted leave to file a supplemental brief. Appellant acknowledged that the Court's opinion in Holder "suggested that 'independent advocacy' can be distinguished from advocacy 'in coordination with or at the direction of' a terrorist organization. Supplemental Brief on Holder v. Humanitarian Law Project for Appellant 2 (citing Holder, 130 S. Ct. at 2723). Given the Supreme Court's determination that Congress could lawfully prohibit the latter conduct, appellant "concede[d] that the clear implication of the Court's opinion is that otherwise protected speech can underlie an overt act in support of a charge of [18 U.S.C.] § 2339B, if done in the manner the Court described." Id. Nevertheless, appellant maintains that the Government's pervasive exploitation of "[h]is] thoughts, [] beliefs, [] ideals" as incriminating evidence warranted special instruction from the military commission judge that his "political beliefs were not on trial." Id. (citing United States v. Salemeh, 152 F.3d 88, 112 (2d Cir. 1998)).

unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .") (emphasis in original).

129 Brief for Appellant 9-19, Reply Brief for Appellant 7-10. Although appellant focuses on Charge II for solicitation as grounds for his First Amendment argument, the evidence of The Video was used in Charges I and III, as well. We will address the First Amendment issue as it applies to all three charges.
For the reasons discussed below, we disagree. We hold the First Amendment does not apply to appellant's conduct, and if it did, the First Amendment was not violated. Further, we hold the military commission judge did not err in his instruction to the members.

A. Discussion

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. It is well established that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." Roth v. United States, 354 U.S. 476, 483 (1957).

The Supreme Court has not specifically held a noncitizen speaking abroad is protected by the First Amendment. In fact, in Boumediene v. Bush, 553 U.S. 723, 770 (2008), Justice Kennedy wrote that before that decision, the Court "has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution." In Boumediene, the Supreme Court concluded the constitutional privilege of habeas corpus pursuant to Article I, Section 9, Clause 2 extends to the detainees held at Guantanamo Bay. Id. at 771. It is important to note, that opinion was limited to Article I, Section 9, Clause 2 and did not address any other provisions of the Constitution. However, in order to determine if First Amendment protections extend to appellant, we will review recent habeas corpus jurisprudence.

In Johnson v. Eisentrager, 339 U.S. 763 (1950), the Court concluded that 21 German citizens, who had been captured in China, tried and convicted of war crimes by an American military commission and incarcerated in a prison in Germany, had no right of habeas corpus. See Rasul v. Bush, 542 U.S. 466, 475 (2004) (discussing Eisentrager). The Eisentrager opinion was based on six factors critical to the question of the prisoners' constitutional entitlements. Id. The six factors were that the prisoner is:

(a) an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Id. at 475-76 (citing Eisentrager, 339 U.S. at 777). Both Justice Stevens and Justice Kennedy distinguished the six factors when applied to the detainees held at Guantanamo.

In Rasul, the Supreme Court held that the federal courts had jurisdiction to hear the detainees' habeas corpus cases noting that nothing in the Court's
precedent categorically excludes aliens detained in military custody outside the United States from the "privilege of litigation." Id. at 484 (emphasis added). In Boumediene, Justice Kennedy discussed another case involving American citizens invoking the rights of the Fifth and Sixth Amendments to indictment and jury trial, Reid v. Covert, 351 U.S. 487 (1956), that held the Fifth and Sixth amendments apply to US citizen military dependents charged with criminal conduct in a foreign country. Boumediene, 553 U.S. at 759-62. In explaining why there seems to be a difference when the Supreme Court held the Constitution applied and when it held that it did not apply, Justice Kennedy noted practical considerations were at play in the decisions of Reid (for place of both confinement and trial) and Eisentrager (post-WWII reconstruction, security, logistics of transporting convicted Germans to the U.S., among other factors). Id. at 761-62. Justice Kennedy concluded, in Boumediene, 553 U.S. at 772, 798.

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years, render these cases exceptional. . . . We hold that petitioners may invoke the fundamental procedural protections of habeas corpus.

The end result in Boumediene and in Rasul was access to a judicial forum and the privilege of litigation based upon a fundamental constitutional right, the writ of habeas corpus. There is a distinction to be drawn between habeas corpus rights and First Amendment protections. Both Justice Stevens and Justice Kennedy distinguished Eisentrager with respect to rights to habeas corpus, and the Eisentrager opinion contains comment on constitutional rights in general which proves insightful in analyzing the issue at hand. In Eisentrager, 339 U.S. at 784, the Supreme Court wrote:

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "were wolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

In 1990, the Supreme Court held that the Fourth Amendment does not extend to a search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States. United States v. Verdugo-Urquidez, 494 U.S. 259, 264-75 (1990). The Fifth Amendment's privilege against self incrimination is a fundamental trial
right of criminal defendants, whereas the Fourth Amendment prohibits unreasonable searches and seizures occurring when committed, not at trial. *Id.* at 264. The Court also emphasized that the First, Second, Fourth, Ninth, and Tenth Amendments provide rights or powers reserved to “the people,” *id.* at 264-66. “The people” relates:

to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (Excludable alien is not entitled to First Amendment rights, because “he does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law”). The language of these Amendments contrasts with the words “person” and “accused” used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

*Id.* at 265-66. The Court also discussed the *Insular Cases*, 130 which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. *Id.* at 268-69 (declining to “endorse the view that every constitutional provision applies wherever the United States Government exercises its power.”). The Court clarified how rights attach to “the people” under the Constitution:

aliens receive constitutional protections when they have come within the territory of the United States and [have] developed substantial connections with the country. . . . But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. . . . [Verdugo-Urquidez] is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.131

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131 *Id.* at 270-71 (The Court distinguished six cases Verdugo-Urquidez, who was in the United States involuntarily, relied upon where the Court held, “that aliens enjoy certain constitutional rights. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a ‘person’ within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens). These cases, however, establish only that HN9 aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.”; other citations omitted).
In this case, appellant, a citizen of Yemen, prepared The Video in Afghanistan following al Qaeda’s attack on the USS COLE in 2000. The Video was shown to al Qaeda recruits and trainees in Afghanistan, and it was and is also widely available on the Internet. There is no question that, when he made The Video, appellant had no lawful connection with the United States. His only subsequent connection to the United States was his capture, detention, and trial. Such a connection does not thereby recast speech made years before with First Amendment protections. The First Amendment is not a right dealing with access to a judicial forum, or one regulating procedures during a criminal proceeding, but rather one concerning the freedom of speech. Under these facts, appellant is not entitled and does not have the rights and protections provided by the First Amendment.

B. The Military Commissions Act and the First Amendment

Assuming arguendo appellant is entitled to the protections of the First Amendment, we next address the First Amendment challenge to the M.C.A. Appellant contends his speech was political speech and thus protected by the First Amendment. He cites Brandenburg v. Ohio, 395 U.S. 444 (1969) and United States v. Aguilar, 883 F.2d 662, 684 (9th Cir. 1989), and states the facts of the case at hand do not rise to the level of inciting or producing imminent lawless action. Brief for Appellant 9-11; Reply Brief 9.

First, we must examine the M.C.A. to determine if it is facially overbroad. To review a law challenged on First Amendment grounds, the Supreme Court applies the overbreadth doctrine. United States v. Williams, 553 U.S. 285 (2008).

A statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.

Id. at 292 (citations omitted). A law is overbroad, and hence void, if it “does not aim specifically at evils within the allowable area of state control, but on the contrary sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech . . . .” Thornhill v. Alabama, 310 U.S. 88, 97 (1940).
In our review of the M.C.A., we focus on the three offenses of which appellant was charged and convicted: (1) providing material support and resources, including himself, to al Qaeda, an international terrorist organization then engaged in hostilities with the United States; (2) conspiring with Usama bin Laden and other members and associates of al Qaeda to, inter alia, commit murder, attack civilians and civilian objects in violation of the law of war, commit terrorism, and provide material support for terrorism; and (3) soliciting various persons to commit these same offenses.

The 2006 M.C.A. specifically addresses offenses fundamental to a Government's first duty to those governed – protection of its citizens. Charges I and II, the conspiracy and solicitation charges, are clearly speech-based offenses. However, as the Second Circuit held in Rahman, appellant was "not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech . . . [If appellant's] speeches crossed the line into criminal solicitation, procurement of criminal activity or conspiracy to violate the laws, prosecution is permissible." Rahman, 189 F.3d at 117.

Next we look to Charge III and the definition used in all three charges for providing material support for terrorism. See supra n. 69. The definition of material support includes prohibitions on certain types of speech, i.e., training and expert advice and assistance, but these prohibitions are directly connected to providing material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism. 2006 M.C.A. § 950v(b)(25). The creation of propaganda and recruiting materials are within the definition's terms "any product . . . or services" and necessarily involve speech. See supra p. 82.

Upon review of the entire M.C.A., we find the law is specifically aimed at the crime of terrorism, and that it does not intrude into an area of protected speech. The M.C.A., in its absolute sense and also relative to the statute's plainly legitimate sweep, is not overbroad. Thus, we find no facial First Amendment violation.

Assuming arguendo the M.C.A. suppressed appellant's political speech, we will subject the M.C.A. to strict scrutiny to determine if any such restrictions "further[] a compelling interest and [are] narrowly tailored to achieve that interest." See Citizens United v. Federal Election Commission, 130 S.Ct. 876, 899 (2010) (citing Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007) (WRTL)).

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When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In \textit{Ferber}, for example, we classified child pornography as such a category. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was \textit{de minimus}. But our decision did not rest on this “balance of competing interests” alone. We made clear that \textit{Ferber} presented a special case: The market for child pornography was “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials, an activity illegal throughout the Nation.” As we noted, “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” \textit{Ferber} thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.

“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” \textit{Brandenburg}, 395 U.S. at 447 (footnote omitted). The defendant in \textit{Brandenburg} was convicted based upon a filmed Ku Klux Klan rally which depicted hooded Klansmen brandishing firearms, parading around a burning cross, and shouting despicable racial epithets. The film showed the defendant proclaiming to the armed crowd, “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.” \textit{Id.} at 446. Quoting from an earlier decision, the Supreme Court noted that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” \textit{Id.} at 448 (quoting \textit{Noto v. United States}, 367 U.S. 290, 297-98 (1961)). The Court
continued, "A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.* In reversing the conviction, the Supreme Court held that the statute in question purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Moreover, "neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not to distinguish from incitement to imminent lawless action." *Id.* at 448-49 (footnote omitted).

The Second Circuit, in *Rahman*, examined a host of criminal statutes that provided a crime could be committed by speech alone. 189 F.3d at 116-117. It is well established that the Government may criminalize certain preparatory steps towards criminal action, even when the crime consists of the use of conspiratorial or exhortatory words. *Id.* The Second Circuit held the Government, who possessed evidence of conspiratorial planning, "need not wait until buildings and tunnels have been bombed and people killed before arresting the conspirators." *Id.* at 116. The Rahman Court explained:

> Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching. Of course, courts must be vigilant to insure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible.

*Id.* at 117. The following language falls outside the protections of the First Amendment: When Rahman was talking about killing President Mubarak: "make up with God . . . by turning his rifle's barrel to President Mubarak's chest, and killing him. . . . Depend on God. Carry out this operation. It does not require a fatwa . . . you are ready in training, but do it. Go ahead." *Id.* In consultation regarding the bombing of the United Nations Headquarters, Rahman told another, "Yes, it's a must, it's a duty." *Id.* In discussing the bombing of the UN, he advised that it would be "bad for Muslims," but added that they should "find a plan to destroy or to bomb or to . . . inflict damage to the American Army." *Id.* Rahman's speeches were not simply the expression of ideas, but in some instances constituted the crime of conspiracy to wage war on the United States, and solicitation of attack on the U.S. military installations, as well as the murder of the Egyptian President. The Second Circuit concluded "words of this nature - ones that instruct, solicit, or persuade others to commit crimes of violence - violate the law" and are not protected by the First Amendment. *Id.*
In *United States v. Sattar*, a federal district court found the defendant guilty despite his claims the test in *Brandenburg* was not met. The defendant in *Sattar* was charged with drafting and disseminating a fatwah to be issued under Rahman’s name that was entitled “Fatwah Mandating the Bloodshed of Israelis Everywhere” and that called on “brother scholars everywhere in the Muslim world to do their part and issue unanimous fatwah that urges the Muslim nation to fight the Jews and to kill them where ever they are.” *Sattar*, 272 F.Supp.2d at 374; *see also United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009) at 99, 114. The court found these specific acts to be sufficient to support the charge that Sattar solicited crimes of violence. And in each case, the courts held that such acts and statements that “instruct, solicit, or persuade others to commit crimes of violence” are not protected by the First Amendment and may be prosecuted.” *Stewart*, 590 F.Supp.2d at 115 (citing *Rahman*, 189 S. Ct. at 117); *Sattar*, 272 F.Supp.2d at 374 (citing *Rahman*, 189 F.3d at 117).

Appellant argues that Supreme Court opinions have “clarified that for lawless action to be ‘imminent’ the speaker must be addressing specific individuals, who are intended and likely to act without further deliberation.” Brief for Appellant 17 (citing *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973)). *Hess* is distinguishable on its facts. The *Hess* case involved a U.S. citizen defendant who was protesting the war and blocking a street on the campus of Indiana University. When he was required to move by the sheriff, he loudly said, “We’ll take the . . . street later.” *Hess*, 414 U.S. at 107. The Court held that Hess’s speech “was not directed to any person or group of persons” and found that he was not “advocating, in the normal sense, any action.” *Id.* at 108-09. In the case at hand, although specific individuals were not named in The Video, appellant was clearly advocating violent, lawless actions (to kill and destroy) against specific targets (Americans) by an identified group (Muslims). We note the affirmed cases of *Rahman and Sattar* discussed above contained similar threats against a specific large group or category of targets as opposed to merely threats against specifically named individuals. 134

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134 *Sattar*, 395 F.Supp.2d at 98-99 (the Government is not required to prove specific identity of victims of the conspiracy to kill or in which country or countries the victims would be killed or that that defendant knew the identity of or location of the intended victims
Applying strict scrutiny to the M.C.A., we conclude Congress had a compelling interest in prohibiting terrorism even if it impacted certain speech. Congress narrowly tailored the M.C.A. to focus on criminal activities of terrorists. We find appellant's claim he was convicted for making political speech unpersuasive. The Video's purpose was to incite listeners to join al Qaeda and kill Americans and others. Appellant himself described The Video as "one of the best propaganda videos the al Qaeda had to date . . . influential and produced good results for [al Qaeda]." Tr. 534. A government expert testified The Video may have been the number one al Qaeda propaganda video. The Video was repeatedly shown during training at al Qaeda safehouses and terrorist training camps. The Video was an important training and indoctrination tool for al Qaeda and is commercially available in numerous languages.

The obvious purpose of The Video was to incite others to join al Qaeda and to commit crimes against Americans or other U.S. interests or to support those who do. We find The Video constitutes incitement to imminent lawless action. Unlike Brandenburg, this is a case where The Video goes beyond mere advocacy, to that of incitement. The Video was aimed at inciting viewers to join al Qaeda, to kill Americans, and to cause destruction. The target was quite specific: all Americans and American interests. Like Rahman and Sattar, the target was not limited to a specific, named individual. The Video is an integral part of and intrinsically related to the commission of terrorism. We hold appellant's speech is not protected by the First Amendment as political speech, but is unprotected speech integrally tied to unlawful criminal activity.

C. Potential Chilling Effect on U.S. Citizens

Appellant argues that prosecution for his creation of The Video has a chilling effect on U.S. citizens in their exercise of the right to dissemination of information. Brief for Appellant 11-14. In Citizens United, 130 S. Ct. at 908, the Supreme Court declared:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

Appellant's prosecution does not adversely affect the rights of U.S. citizens to receive such information. The Video is readily available on the Internet and in numerous foreign languages. Possession or viewing of The Video is not criminalized by the M.C.A. — providing material support for terrorism is

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to establish intent to support conspiracy); United States v. Romero, 897 F.2d 47, 50-51 (2d Cir. 1990) (affirming conviction for conspiring to kill a federal officer where defendants conspired to kill "anyone posing a threat to them or [their narcotics] business").
the conduct that is prohibited. Nothing in the M.C.A. prohibits access to information such as The Video.

D. Military Commission Judge’s Instructions

Appellant asserts the military commission judge failed to instruct the members of a First Amendment defense that appellant could be convicted only if The Video was intended and likely to bring about specific and imminent illegality. This issue is raised for the first time on appeal. Appellant made no objection to the proposed instructions during trial, and raised no issue of the need for a First Amendment defense instruction. Pursuant to the 2007 M.M.C., Part II, R.M.C. 920(f), the issue is waived absent plain error. See supra p. 82 (explaining plain error rule for instructions). As noted above, appellant has no First Amendment right to commit the charged offenses, thus he has no right to have the instruction provided to the members. In review of the entire record, we find no error, let alone plain error, in the military commission judge’s failure to sua sponte provide a First Amendment defense instruction.

Assuming arguendo, that it was error since the instruction is of a “constitutional dimension,” we will examine the issue. United States v. Russell, 411 U.S. 423, 433 (1973). The Supreme Court has stated that “[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” Mathews v. United States, 485 U.S. 58, 63 (1988). The Ninth Circuit found that “[w]here there is some evidence . . . that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury’s consideration.” United States v. Freeman, 761 F.2d 549, 551 (9th Cir. 1985). The Freeman decision established, as a threshold for a First Amendment jury instruction, that there be “some evidence” that the defendant’s purpose or the likely effect of his words was “remote” from the commission of the crime. A First Amendment defense instruction need not be given when the words are more than mere advocacy but are “so close in time and purpose to a substantive evil as to become part of the crime itself.” Id. at 552.135

135 See also United States v. Fleschner, 98 F.3d 155, 158-159 (4th Cir. 1996)(The court held there was no evidence supporting a First Amendment instruction noting the defendant’s words and acts were not remote from the criminal acts, including meetings held to encourage people to unlawful actions, money collected, advice and instructions given and followed (citing United States v. Kelley, 769 F2d 215, 217 (4th Cir. 1955). “The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lend no protection to speech which urges the listener to commit violations of current law.”)); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (computer program was “too instrumental in and intertwined with the performance of criminal activities to retain First Amendment protection”); United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (appellants failed to establish some evidence their activities were remote from the crime in that “appellants instructed illegal aliens on how and where to cross the border and supplied them with sanctuary contacts . . . speech was inextricably intertwined with actions that facilitated the aliens’ illegal entry”); United States v. Holecek, 739 F.2d 331, 335 (8th Cir. 121
E. Conclusion

The Supreme Court’s observation in *Holder* is relevant to the instant case:

[P]laintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization . . . bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.

*Holder*, 130 S.Ct. at 2728.

We find The Video’s message to be more than mere advocacy, as discussed above. The message of The Video was an incitement to imminent lawless activity. A First Amendment defense instruction was not required.

XII. 2006 M.C.A. AND BILL OF ATTAINDER

Appellant states that the Military Commissions Act is a bill of attainder because Congress has, through the 2006 M.C.A., unconstitutionally identified him as an AUEC and punished him by depriving him of “previously enjoyed rights.” Brief for Appellant 30-36.

A. Bills of Attainder and Legislative Analysis

A bill of attainder “legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” 136 “The analysis necessarily requires an inquiry into whether the three definitional elements – specificity in identification, punishment, and lack of a judicial trial – are contained in the statute.” *O’Brien*, 391 U.S. at 384 n.30.


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1. Legislatively Determines Guilt

Appellant argues that he is being punished merely for being an AUEC. We disagree. His argument misapprehends the legal significance of the AUEC determination. Although the AUEC determination is an element of each charged offense and a jurisdictional prerequisite, his status as an AUEC, standing alone, is not punishable under the M.C.A. See supra pp. 37-45.

The term AUEC, in this context, is used synonymously with "unprivileged enemy belligerent." 2006 M.C.A. §§ 948a(1), (3); 2009 M.C.A. § 948a(7). Far from constituting a determination of guilt, this designation identifies one's status under the law of armed conflict including the Geneva Conventions. 2006 M.C.A. § 948c; 2009 M.C.A. § 948c; supra p. 20 and n. 21 (discussing military commission jurisdiction). The argument also ignores the additional procedural and substantive protections provided by the M.C.A., including the presumption of innocence and the Government's burden of proving every element of each offense, to include AUEC status, beyond a reasonable doubt by legal and competent evidence. The M.C.A., as implemented through the M.M.C., explicitly provides inter alia for example, the presumption of innocence, the right to have the AUEC finding and guilt determined beyond a reasonable doubt by impartial members, and the right to appellate review. 2006 and 2009 M.C.A. §§ 949a; 9491(c)(1); 950c. See also infra n. 138; see also e.g., 2007 M.M.C., Part II, R.C.M. 506, 701, 703, 806, 906, 912, 914, 916, 918, 920, 921, Chapters X-XII (listing numerous rights of the accused to a fair trial and substantial post-trial rights).

2. Legislatively Inflicts Punishment

Appellant also asserts that his punishment is the deprivation of rights that he "previously enjoyed." Specifically, he claims that before his status as an AUEC, he somehow enjoyed the rights to confront evidence against him, to petition for writ of habeas corpus and to protection against self-incrimination under the Constitution of the United States of America. Brief for Appellant 32. He also asserts that his status as an AUEC deprived him of his previously enjoyed rights under the Geneva Conventions. Id. at 33.

The Supreme Court has recognized three tests when analyzing whether a statute inflicts forbidden punishment: historical, functional, and motivational tests. Nixon, 433 U.S. at 472-78. Therefore, the inquiry requires the court to determine "(1) whether the challenged statute falls within the historical meaning

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137 Brief for Appellant 31 states, "AUEC status is therefore nothing other than a reverse-engineered definition, designed to impose the law's burdens upon GTMO detainees uniquely."
of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitively legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.” Selective Service System, 468 U.S. at 852 (quotation omitted).

a. Historical Test

In Nixon, the Supreme Court articulated the historical test standard by describing the history of bills of attainder. Nixon, 433 U.S. at 473. In England, bills of attainder “originally connoted a parliamentary Act sentencing named individual or identifiable members of a group to death.” Id. However, the prohibition against bills of attainder “also proscribes enactments originally characterized as bill of pains and penalties, that is, legislative acts inflicting punishment other than execution.” Id. at 474. The Court stated that “[o]ur country’s own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations . . . .” Id.

Appellant relies on cases which have expanded the notion of punishment to incorporate employment rights but those have little relevance here. In Lovett, the Supreme Court struck down a law designed to permanently bar three named, executive employees from government service based on their Congressionally-determined political beliefs. Lovett, 328 U.S. at 313-14. A special subcommittee of the Appropriations Committee, which charged those individuals with “subversive beliefs and associations” adjudicated their cases in secret executive sessions where those charged were not permitted to be present or represented by counsel. Id. at 310-11. The Court found that the law “inflict[ed] punishment without the safeguards of a judicial trial.” Id. at 316. The Court listed certain procedural safeguards required to ensure “the people of this country [are not subjected to] punishment without trial,” including the following rights: to be tried by a jury; to confront witnesses; to be represented by counsel; to be informed of the charges; to the right against self-incrimination; to not be subjected to double jeopardy, the ex post facto application of laws or cruel and unusual punishment. Id. at 317-18. Despite the fact that appellant is an AUEC, the M.C.A. provides the very procedural safeguards identified by the Supreme Court as required for citizens of this country to have a fair trial. 2006 and 2009 M.C.A. §§ 948-950; See also infra n. 138.

In each case cited by appellant as support for historically-recognized punishment, the decisions were based on U.S. citizens whose discernable rights were permanently denied without the requisite due process. As such, each case is readily and necessarily distinguishable. Further, the Geneva Conventions do not establish a private right of action, as appellant asserts; however, the United States has obligated itself to abide by those conventions. 2009 M.C.A.
§ 948b(e). The Supreme Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that Common Article 3 of the Geneva Conventions is applicable in military commissions and noted that the United States must fulfill its obligations. *Id.* at 631-35. We conclude that the military commission convened here under the 2006 M.C.A. qualified as a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Hamdan*, 2011 WL 2923945 at *7 n. 8 (quoting Article 3(1)(d) of GCIII, *supra* n. 6. The military commissions authorized in the M.C.A., afford extensive procedural guarantees, including the right to counsel, rights to present and respond to evidence and to present and cross-examine witnesses, the presumption of innocence, and the right against self-incrimination. 138 Congress, in the M.C.A., also provided defendants the right to be present during trial proceedings, the right to appeal to this Court (as well as the automatic right to appeal to the United States Court of Appeals for the District of Columbia Circuit, and the right to petition the Supreme Court of the United States), and the right to have a military commission judge preside over the trial. *See supra* n. 138.

Assuming *arguendo* that Common Article 3 grants privately enforceable rights, the M.C.A. affords those rights. 139 The M.C.A. does not summarily impose punishment, but rather provides a system by which to determine personal and subject matter jurisdiction, guilt or innocence, and appropriate punishment. Under the M.C.A., appellant enjoys benefits which exceed those required by Common Article 3, such as the rights to a public trial by members, to have witnesses produced for his trial, to limitations on admissibility of evidence, to raise affirmative defenses, among many other rights. *See Hamdan v. Rumsfeld*, 548 U.S. at 633; M.C.A. §§ 948-950; *see also supra* n. 138.

Just as the Court stated in *Nixon*, we too find here that "no feature of the challenged Act falls within the historical meaning of legislative punishment." *Nixon*, 433 U.S. at 475. Appellant argues that "Congress unconstitutionally" denied him eight previously available rights. However, appellant fails to articulate any viable legal support for his assertion of those rights.


139 *But see* 2006 M.C.A. § 948b(g) (stating Geneva Conventions Not Establishing Source of Rights.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights); 2009 M.C.A. § 948b(e) (stating "Geneva Conventions Not Establishing Private Right of Action—No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.")
b. Functional Test

The functional test analyzes whether “nonpunitive legislative purposes” are reasonably furthered given the burdens imposed. *Id.* at 475-76. Considering the facts and circumstances and the purpose of the M.C.A., just as in *Nixon*, “legitimate justifications for the passage of the Act are readily apparent.” Appellant argues that the “M.C.A. sought to reverse holdings of the Supreme Court as to the rights enjoyed by a known class of litigants.” Brief for Appellant 34. As previously stated, the M.C.A. defines the class of individuals subject to the jurisdiction of military commissions. We hold that by defining AUECs for jurisdictional purposes and limiting jurisdiction thereto, the M.C.A is “an act of nonpunitive legislative policy making.” *Nixon*, 433 U.S. at 477.

c. Motivational Test

The “third recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish.” *Id.* at 478. Appellant cites remarks from congressional floor debates and hearings as support of congressional intent to pass the M.C.A. as a punitive measure. Brief for Appellant 34-35. Even the broadest reading of these congressional records “cast no aspersions on appellant’s personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment.” *Nixon*, 433 U.S. at 479. Rather, they focus on the desire to protect Americans and America’s national security while also protecting human dignity. Brief for Appellant 35 (citing statement of Sen. Grassley, 152 Cong. Rec. S10401).

(1) Specificity of Identification

Appellant contends that “[w]hat distinguishes bills of attainder from Congress’ legitimate authority to make distinctions between classes of offenders is whether Congress is legislating ‘by rules of general applicability.’” Brief for Appellant 30-31 (citing *United States v. Brown*, 381 U.S. 437, 461 (1965)).

Arguing the specificity requirement, appellant states that Congress may legislate “by rules of general applicability” and that “[i]t cannot specify the people upon whom the sanction it prescribes to be levied.” *Brown*, 381 U.S. at 461. Nor can Congress designate persons “described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.” *Selective Service System*, 468 U.S. at 847 (citations omitted). However, the *Nixon* Court cautioned against extending the already “broad and generous . . . protection against bills of attainder” by presuming that “the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality.” *Nixon*, 433 U.S. at 469-470. The Supreme Court continued to articulate the standard, stating:
By arguing that an individual or defined group is attained whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

_Id._ at 470-71 (footnote and citations omitted).

Additionally, appellant argues that because there is nothing he can do to avoid the label of AUEC, the law is an unconstitutional bill of attainder. Brief for Appellant 31. However, appellant fails to articulate how his status determination as an AUEC, which initially serves as a jurisdictional predicate, constitutes punishment. The Supreme Court has expressly recognized that "[e]ven if the specificity element were deemed satisfied . . . the statute would not necessarily implicate the Bill of Attainder Clause." _Selective Service System_, 468 U.S. at 851. Appellant correctly states that AUEC is a status. Brief for Appellant 31. Status as an AUEC is not punishment. Rather, by defining the class of individuals subject to the jurisdiction of the M.C.A., Congress is exercising its inherent power under constitutional authority to "define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. The definitions of AUEC in the 2006 M.C.A., _see supra_ nn. 23, 24, 53, and "unprivileged enemy belligerent" in the 2009 M.C.A., _see supra_ n. 58, do not determine guilt or inflict punishment as a bill of attainder.

(2) Lack of Judicial Trial

Finally, appellant argues that, because the AUEC status "was devised in the midst of an intensely contested Congressional election and the fifth anniversary of the September 11th Attacks," the M.C.A. did not establish a "regularly constituted court." Brief for Appellant 36. Although appellant alleges that the M.C.A. substituted a legislative for a judicial determination of guilt, nothing in his arguments "suggest that Congress was intent on encroaching on
the judicial function of punishing an individual for blameworthy offenses.”
*Nixon*, 433 U.S. at 479.\(^{140}\)

Though more recent cases analyze whether punishment was administered without a judicial trial, historically, the inquiry and concern was whether the legislative enactment created “the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.” *Cummings*, 71 U.S. at 323. Congress properly acted within its enumerated power to enact legislation that gives substantive and procedural rights for the administration of justice in this case. Congress had no obligation under the Bill of Attainder Clause to establish courts or military commissions or tribunals identical to an Article III court.

**B. Conclusion**

The M.C.A. is not a bill of attainder, as it lawfully establishes comprehensive procedures for the impartial adjudication of guilt required by the Constitution and the law of armed conflict.

**XIII. EQUAL PROTECTION**

We resolve this assignment of error against appellant for the reasons stated in *Hamdan*, 2011 WL 2923945 at *44-*50.

**XIV. WAIVER OF ASSIGNMENTS OF ERROR I, III, IV AND V**

The Government asserts that appellant waived the First Amendment, *Ex Post Facto*, Bill of Attainder, and Equal Protection challenges raised in his appeal by failing to raise those issues below. Brief for Appellee 3-5. Specifically, the Government argues appellant’s failure to raise these issues at trial, trial defense counsel’s express waiver of “all pretrial motions of any

\(^{140}\) It is noteworthy that two Branches of our Government have found, after considerable debate, and the passage of several years that prosecution of AUECs by military commission under the M.C.A. is not abusive or unconstitutional, as our Court in *Hamdan* stated:

Justice Breyer suggested the President seek Congressional authorization for military commissions when those procedures are inconsistent with the UCMJ stating, “Indeed, Congress has denied the President the legislative authority [under Article 36, UCMJ] to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” *Hamdan*, 548 U.S. at 636. In response, Congress passed the 2006 M.C.A., and President Bush signed the Act into law. On October 28, 2009, President Obama signed into law the 2009 M.C.A. With the enactment of the 2009 M.C.A., two different Presidents and two different Congresses have spoken on the issue of how military commissions should be conducted.

*Hamdan*, 2011 WL 2923945 at *7-*8 (quoting *Hamdan*, 548 U.S. at 636 (Breyer, Kennedy, Souter, and Ginsburg, JJ., concurring)).
kind,” and confirmation of that waiver in response to the military judge’s explicit inquiry waives further consideration of those issues. *Id.* (citing *United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995); *Peretz v. United States*, 501 U.S. 923, 936 (1991), and 2007 M.M.C., Part II, R.C.M. 905(e)).

Appellant responds that the Government is wrong for three reasons. Appellant’s Reply of 12 November 2009 at 2-7. First, appellant’s challenges are not subject to implied waiver. Specifically the First Amendment challenge issue addresses the constitutional interests of society as a whole, and as such appellate courts are “obligat[ed] to make an independent examination of the whole record in order to make sure the judgment does not constitute a forbidden intrusion on the field of free expression.” *Id.* at 2-3 quoting *Bose Corp. v. Consumers Union of the U.S.*, 466 U.S. 485, 499 (1984). He also asserts the Ex Post Facto, Bill of Attainder and Equal Protection challenges are jurisdictional in nature and thus not subject to waiver. *Id.* citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (First Amendment); *Milhouse v. Levi*, 548 F.2d 357 (D.C. Cir. 1976) (Ex Post Facto); *United States v. Jones*, 527 F.2d 817 (D.C. Cir. 1975) (Due Process).

Second, the record does not support a conclusion that he knowingly or voluntarily waived those issues or empowered trial defense counsel to do so on his behalf. *Id.* at 3-6. Specifically, that trial defense counsel’s acknowledgements that appellant did not wish to be represented by counsel, “to have no further communication with counsel,” and that appellant did not “authorize[] [trial defense counsel] to speak on his behalf or to represent him in any way. . . .” reflect that trial defense counsel was not empowered to waive those issues. Appellant also argues that “[the military judge effectively] allowed him to represent himself,” that he raised the issues in controversy in colloquies with the military judge, that the military judge did not inform him of the purported waiver or ask “what he wanted to do,” and instead broadly referred to his “boycott” as preserving appellate challenges to the Military Commissions Act (MCA). *Id.*

Third, application of waiver is a matter of discretion for this Court and our duty to ensure that findings are correct in law and fact counsels against waiver.\(^{141}\)

**A. The Law**

The 2006 M.C.A. does not explicitly address waiver or forfeiture of issues not raised at trial, such as at issue here. However, R.M.C. 905(e) states:

"[f]ailure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under section (b)\(^{142}\) of this rule shall constitute waiver [and] Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the commission is adjourned... and, unless otherwise provided in this Manual, failure to do so shall constitute waiver."

The principles of "waiver" and "forfeiture" are similarly applied in U.S. Courts and Courts-Martial. See Federal Rules of Criminal Procedure 52(a), (b); 10 U.S.C. § 859(a) and R.C.M. 905(b). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also United States v Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." Olano, 507 U.S. at 733 (citations omitted).

The distinction between the terms "waiver" and "forfeiture" is important. "If an appellant has forfeited a right by failing to raise it at trial, courts review for plain error." Gladue, 67 M.J. at 313 (citations omitted). See also supra p. 82. When an appellant knowingly and voluntarily waives a known right at trial, it is generally "extinguished and may not be raised on appeal." Gladue, 67 M.J. at 313 (citing Olano, 507 U.S. at 733-34). The authority and responsibility of service Courts of Criminal Appeals to determine whether the findings and sentence "should be approved," includes discretionary authority "to determine the circumstances, if any, under which it would apply waiver or forfeiture." Nerad, 69 M.J. at 146-47 (citing United States v. Claxton, 32 M.J. 159, 164 (C.M.A. 1991)(approving Court of Criminal Appeals decision ordering rehearing in light of evidentiary error under circumstances in which waiver would ordinarily preclude relief).

B. Analysis

The Government's argument and appellant's reply raise potentially complex and wide-ranging issues including applicability of the principles of "waiver" and "forfeiture" to a military commission convened under the 2006

\(^{142}\) "The following must be raised before a plea is entered: (1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges; (2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings; (3) Motions to suppress evidence; (4) Motions for discovery under R.M.C. 701 or for production of witnesses or evidence; or (5) Motions for severance of charges or accused." R.M.C. 905(b).
M.C.A., and of defense counsel’s authority and responsibility when an accused voluntarily absents himself from a proceeding having repeatedly recorded his objections to counsel’s performance of any role as his defense counsel.

At trial the appellant failed to “make the timely assertion of” the First Amendment, Ex Post Facto, Bill of Attainder, and Equal Protection challenges before the military commission. There were no specific motions, requests, defenses, or objections to that effect raised before the commission was adjourned as required by R.M.C. 905(e). The record also reveals ambiguity surrounding detailed defense counsel’s authority to act in appellant’s stead when he “waived all motions,” and the absence of explicit, on the record discussion of the effect of, or appellant’s understanding of his voluntary absence on motions, defenses or objections.

Having previously addressed the substance of appellant’s challenges and having found those challenges without merit, we need not decide whether he forfeited or waived those challenges.

XV. SENTENCE APPROPRIATENESS

Appellant argues that as a “media man,” he was effectively sentenced to “life without parole for producing a video, writing speeches and providing tech-support.” Brief on Sentence Appropriateness for Appellant 3. He contends that the sentence imposed is inappropriately severe for the offenses of which he was convicted and in comparison to sentences of other “closely related cases involving al Qaeda members, who were sentenced to brief terms of years for personally perpetrating acts of violence.” Id. He further asserts that his “detention will continue irrespective of whether he is sentenced or even convicted of any crime,” and that “this Court should reduce [his] sentence to a reasonable term of years that reflects the comparative seriousness of his conduct rather than the offensiveness of his beliefs.” Id. at 1.

The Government responds that the adjudged sentence is fair and just given appellant’s character and the nature and seriousness of his crimes, and requests this Court to affirm the sentence, as approved by the convening authority. The Government also asserts that appellant mischaracterizes his sentence to confinement as “life without parole” and erroneously suggests that the President is deprived of authority to grant clemency or parole in such a case.

We find both appellant’s characterization of his conduct, advanced with a decidedly content-neutral view, and his arguments unpersuasive. We also decline to entertain appellant’s argument that he will be indefinitely detained regardless of his conviction and sentence, as it is irrelevant. This is a matter for the political branches and beyond the scope of our authority and responsibility in determining sentence appropriateness. 2009 M.C.A. § 950f(d).
A. Applicable Law

The 2009 M.C.A. requires this Court to make a de novo determination of the appropriateness of the sentence imposed. 2009 M.C.A. § 950f(d). "[W]e may affirm only such . . . sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Id. This mandate, unparalleled in the federal civilian sector, mirrors that exercised by the military service Courts of Criminal Appeals in review of certain courts-martial. 143 Accordingly, we consider decisions of those service courts and of the United States Court of Appeals for the Armed Forces particularly persuasive precedent on this issue. We adopt as our own the following fundamental premises articulated and applied by those courts.

Each sentence is judged "on the basis of the nature and seriousness of the offense and the character of the offender." 144 We may affirm only such sentence that we: "(1) find[] correct in law; (2) find[] correct in fact; and (3) determine[], on the basis of the entire record, should be approved." 145 In determining whether a sentence should be approved, our authority is "not legality alone, but legality limited by appropriateness." United States v. Nerad, 69 M.J. 138, 141 (C.A.A.F. 2010)(citation omitted)). This authority "is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." United States v. Baier, 60 M.J. 382, 384-85 (C.A.A.F. 2005)(citation omitted). In determining sentence appropriateness, we must consider the "entire record," which includes the allied papers, as well as the record of trial proceedings. See United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988).

We are not required to engage in sentence comparison between specific cases:

except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in

143 See 10 U.S.C. § 866(b), Uniform Code of Military Justice (Service Courts of Criminal Appeals review the record in each trial by court-martial referred by The Judge Advocate General, including cases in which the approved sentence includes death, a punitive discharge or confinement for one year or more); 10 U.S.C. § 866(c) ("In cases referred to it, the Court of Criminal Appeals . . . may affirm only such . . . sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved"); United States v. Lacy, 50 M.J. 286, 287-88 (1999) ("The power to determine whether a sentence should be approved has no direct parallel in the federal civilian sector . . . .").


closely related cases... [Closely related cases include] coactors involved in a common crime, [persons] in a common or parallel scheme, or some other direct nexus between the [individuals] whose sentences are sought to be compared... appellant bears the burden of demonstrating that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." If the appellant meets that burden... then the Government must show that there is a rational basis for the disparity.


"The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001). In execution of this highly discretionary function, we are neither required to, nor precluded from, considering sentences in other cases, even when those cases are not "closely related." 146

B. Analysis

1. The Offense and the Offender

Appellant was convicted, contrary to his pleas, of: (1) providing material support and resources including himself to al Qaeda, an international terrorist organization then engaged in hostilities with the United States; (2) conspiring with bin Laden and other members and associates of al Qaeda to, inter alia, commit murder in violation of the law of war, attack civilians and civilian objects, commit terrorism, and provide material support for terrorism; and (3) soliciting various persons to commit these same offenses.

All charged offenses allege a nexus to al Qaeda during the period February 1999 through December 2001. The nature and seriousness of these offenses are manifest in the charges themselves. The objects of both the conspiracy and solicitation charges include: committing murder in violation of the law of war, attacking civilians and civilian objects, committing terrorism, and providing material support for terrorism. At trial, the members were

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146 United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985); see also United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001)("Lacy required Courts of Criminal Appeals 'to engage in sentence comparison with specific cases ... in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.' Nothing in Lacy or its progeny suggests any limitation on a Court of Criminal Appeals' discretion to consider and compare other courts-martial sentences when that court is reviewing a case for sentence appropriateness and relative uniformity." (emphasis in original; citations omitted)).
presented with overwhelming, uncontested evidence that appellant was guilty, with much of the evidence provided by appellant in the form of voluntary admissions to investigators. Appellant also essentially admitted the same in his unsworn statement to the members during the presentencing hearing.

In his voluntary statements to investigators, appellant admitted on multiple occasions to traveling to Afghanistan with the intent to join al Qaeda, undergoing military-type training at an al Qaeda sponsored camp, and meeting with bin Laden following his training. During that meeting, appellant admitted discussing bin Laden's views on Islam and jihad against the United States, agreeing with those views, and then pledging personal loyalty to bin Laden. He then joined al Qaeda as a member, worked in al Qaeda's media office, and eventually took charge of that office, where he performed a number of acts to recruit, to incite others to join al Qaeda, and to indoctrinate prospective al Qaeda recruits into the al Qaeda Plan.

Appellant readily admitted developing and producing a videotape, at the personal request of bin Laden, capitalizing on al Qaeda's perfidious attack on the USS COLE in an effort to recruit and indoctrinate prospective members into al Qaeda. That videotape identified the United States as a source of Muslim suffering world-wide and demanded, as a religious duty, other Muslims to migrate to Afghanistan and engage in jihad against the United States and others. It was also described as one of the most, if not the most, important propaganda products produced by al Qaeda to recruit, incite and motivate potential terrorists including suicide bombers.

Evidence that al Qaeda was responsible for the 9/11 attacks on the United States was also overwhelming and uncontested by appellant. The record clearly reflects that 19 men recruited by al Qaeda hijacked 4 commercial airliners and crashed those aircraft into the Pentagon in Washington D.C., the World Trade Center in New York, and into a field in Pennsylvania. Those attacks resulted in the deaths of thousands of people. Appellant's conduct is directly linked to those attacks in that he facilitated the personal pledges of loyalty to bin Laden of two 9/11 hijackers/pilots, Muhammed Atta and Ziad al Jarrah, and prepared their propaganda declarations styled as "martyr wills." Also, he maintained and operated the media equipment used to inform bin Laden of completion of those attacks, and, at bin Laden's personal request, he researched the economic effect of those attacks on the United States and provided that research to bin Laden.

Appellant was also convicted of intentionally providing material support or resources to al Qaeda, an international terrorist organization engaged in hostilities against the United States, knowing that al Qaeda had engaged in or engages in terrorism, including the August 1998 attacks on U.S. embassies in Kenya and Tanzania. These attacks also resulted in hundreds of deaths, thousands of injuries, and extensive property damage. The members concluded by legal and competent evidence beyond a reasonable doubt that appellant, with
the requisite knowledge and intent, provided himself as a member to al Qaeda,
traveled to Afghanistan to join al Qaeda, met with al Qaeda leadership,
derwent military-type training at an al Qaeda sponsored camp, and met with
and pledged personal loyalty to bin Laden. The members also found, beyond a
reasonable doubt, that appellant provided services in direct support of bin Laden
and al Qaeda including: preparing various propaganda products intended for al
Qaeda recruiting; indoctrination training and inciting persons to commit
terrorism; facilitating the pledges of loyalty to bin Laden and preparing the
"martyr wills" for two suspected September 11, 2001 hijackers/pilots;
researching the economic effect of those attacks on the United States and
providing the results to bin Laden; and operating and maintaining data
processing equipment and media communications equipment for the benefit of
bin Laden and other al Qaeda leaders.

The record reflects that appellant was in his 30s, married with a family,
intelligent, well-educated, and that he traveled to Afghanistan to join al Qaeda
with knowledge that al Qaeda had engaged in terrorism and was engaged in
hostilities with the United States. The record also reflects that, armed with that
knowledge and following military-like training provided by al Qaeda, appellant
fulfilled his desire to join al Qaeda after personally meeting with Saif-al Adel
and bin Laden and discussing their beliefs and goals. He pledged loyalty to bin
Laden and remained devoted to bin Laden and al Qaeda throughout the charged
timeframe and for more than six years following his capture and detention up to
the day he was sentenced. Appellant’s words and actions at trial, particularly his
unsworn statement to the members, reveal his unwavering commitment to
violence, including the intentional killing of civilians and attacks on protected
persons and places. Tr. 963-80 (appellant’s unsworn statement); Appellate Ex.
19 (appellant’s Declaration of Renewal of the Allegiance to Usama Bin Laden).

The military commission judge properly advised the members that in
determining an appropriate sentence they should consider that society
recognizes five principle reasons for the sentence of those who violate the law:
(1) rehabilitation of the wrongdoer, (2) punishment of the wrongdoer, (3)
protection of society from the wrongdoer, (4) preservation of societal order, and
(5) deterrence of the wrongdoer and those who know of his crimes and his
sentence from committing the same or similar offenses. Tr. 949-50. The military
commission judge properly instructed the members on the presentencing
procedures including the evidence and appellant’s unsworn statement. Tr. 949-
51, 961-62 (sentencing instructions); 2007 M.M.C., Part II, R.M.C. 1001.

We are unmoved by appellant’s argument that he was a “media man,” who
was sentenced to confinement for “life without parole for producing a video,
writing speeches and providing tech-support,” and that his being a “shock-jock”
does not make him deserving of life without parole. Sentence Appropriateness
Brief for Appellant 3-4. We also decline appellant’s invitation to assess the
appropriateness of the sentence from his perspective, a perspective which
deliberately displaces the incitement to violence intended by the propaganda he produced, in deference to focus on the technical skills used in producing that propaganda. This argument grossly understates the significance of appellant’s contributions to al Qaeda, and appellant’s own opinion thereof. Both perhaps, were best summed up in appellant’s own words “I asked bin Laden for a martyrdom operation, suicide operation, but he refused. The reason why he refused was that [] recruiting people through media gets you more people than suicidal attacks (sic),” Tr. 978-79, and that “I was [to be the 20\textsuperscript{th} hijacker], but bin laden refused.” Tr. 195. Appellant’s contributions to al Qaeda were of strategic significance to recruiting, indoctrination, retention, and inciting others to support or join al Qaeda. He was more valuable in media or strategic communications than in suicide operations. In the case of two 9/11 hijackers/pilots, he directly facilitated their quest to kill themselves and as many others as they could in furtherance of al Qaeda’s goals.

After carefully considering the entire record of trial, the nature and seriousness of these offenses, and the matters presented by appellant, we find the sentence to be appropriate for this offender and his offenses.

2. Closely-Related Cases

Appellant also asserts that the sentence is inappropriately severe in comparison to closely-related cases involving al Qaeda members, who were sentenced to brief terms of years for personally perpetrating acts of violence. Appellant notes that, of the three individuals sentenced by military commission at the time of filing, he is the only one to receive a life sentence, a sentence that he contends is tantamount to confinement for life without the possibility of parole.

Appellant argues that there were two “closely related cases involving al Qaeda members, who were sentenced to brief terms of years for personally perpetrating acts of violence.” Sentence Appropriateness Brief for Appellant 3. In the first case, United States v. Hamdan, Hamdan was sentenced to 66 months confinement and served less than five months post-trial punitive confinement, after applying credit for time served. Appellant asserts that Hamdan “was convicted on the basis of being an armed body guard to bin Laden and an al Qaeda weapons courier.” Id. at 4. In the second case, United States v. Hicks, appellant asserts that “the members returned a seven-year sentence for which all but nine months was suspended pursuant to a guilty plea agreement.” Id. Appellant contends that “Hicks conceded that, despite owing allegiance as an Australian to a coalition allied to the United States, he shopped himself around to various terrorist organizations in Afghanistan and ultimately served as a Taliban fighter, guarding their positions and personally engaging coalition forces in combat.” Id.
Appellant has failed to sustain his burden of demonstrating that the Hicks case was "closely related" to his case. Appellant did not establish that he and Hicks were "involved in a common crime," or that they were "in a common or parallel scheme," nor did he prove any other "direct nexus between [himself and Hicks]." Lacy, 50 M.J. at 288. Additionally, Hicks was involved in "fighting with the Taliban," pleaded guilty, and accepted some responsibility for his actions, thereby providing a rational basis for any disparity in sentencing, even assuming the cases were "closely related." Even a cursory comparison of the two cases reveals significant differences in that Hicks pleaded guilty and was found guilty of only one specification of one charge, providing material support to terrorism, and the suspended sentence was predicated on multiple conditions of his cooperation. Military Commission Order Number 1, DoD, Office of the Military Commissions (1 May 2007).

Appellant's argument with respect to Hamdan bears a closer resemblance in that both were members of al Qaeda who pledged loyalty to bin Laden and provided varying forms of support directly to bin Laden and al Qaeda. Neither membership in an organization such as al Qaeda nor conduct in support of al Qaeda, standing alone, shall mandate treatment as "closely related." However, as both appellant and Hamdan were members of al Qaeda who performed substantial duties in direct support of and in close proximity to bin Laden, we will assume without deciding that these cases are "closely related." Based upon the variance in the sentences we will also assume that the sentences are "highly disparate" and determine whether "there is a rational basis for the disparity." Lacy, 50 M.J. at 288.

Under the facts presented, the basis for a disparity in sentence is readily apparent. While Hamdan may appropriately be referred to as a foot soldier, who provided personal services including physical security and driver services for bin Laden as well as courier services in transporting weapons, appellant is clearly of strategic significance to al Qaeda's "propaganda and recruiting efforts." Appellee's Sentence Appropriateness Brief at 4. Appellant was more significant to al Qaeda's broader purposes and sustainment as a terrorist enterprise and his impact both more insidious and more likely to have a significant impact than Hamdan. Although Hamdan no doubt contributed to al Qaeda's activities, his impact was more localized and limited, and he lacked appellant's technical acumen and strategic vision. Appellant's conduct was more strategic and international in scope, and he intended to inspire and motivate an untold number of individuals to join or otherwise provide support to al Qaeda. His behavior and statements at trial show no remorse and reflect his limited rehabilitative potential.

We conclude that each aforementioned distinction provides "a rational basis for the disparity" in the sentences. Id. Accordingly, we find the sentence correct in law and fact, and on the basis of the entire record, conclude that it should be approved.
XVI. CONCLUSION

The findings and approved sentence are affirmed.

Judge Sims concurring.

Although I concur in the analysis and the result reached by the majority, I write separately to emphasize the long-standing public position of the United States Army regarding the issue of whether the offenses in question in appellant’s case, as defined by Congress in the Military Commissions Acts of 2006 and 2009, were properly recognized as existing war crimes. From 1956 onward the United States Army has consistently and explicitly recognized the following acts as being war crimes punishable under international law:

1. Conspiracy to Commit a War Crime;
2. Direct Incitement of a War Crime;
3. Attempted Commission of a War Crime; and

See Field Manual 27-10, The Law of Land Warfare, Ch. 8, § II, Crimes under International Law, ¶ 500 (July 1956) (1956 FM 27-10).147 As such, this field manual predates the existence of al-Qaeda, the birth of appellant, the events of September 11, 2001, the enactment of the Military Commissions Acts, and appellant’s trial by military commission. Although the manual does not have the force of binding legal precedent, it nonetheless serves as persuasive evidence of the view of the United States as to the state of the law of armed conflict from the aftermath of World War II, through the Cold War, and to the present.

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147 1956 FM 27-10, Ch. 8, § II, ¶¶ 499-500 provide:

498. Crimes Under International Law. Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise: a. Crimes against peace. b. Crimes against humanity. c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned, only with those offenses constituting “war crimes.”

499. War Crimes. The term “war crime” is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.

500. Conspiracy, Incitement, Attempts, and Complicity. Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable.
Accordingly, when a person such as appellant chooses to commit any of the aforementioned acts against the United States, he or she should not be surprised to find themselves in the custody of the United States military facing trial by military commission for these long-standing violations of the law of war.

FOR THE COURT:

[Signature]
MARK HARVEY
Deputy Clerk of Court
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION; NEW YORK CIVIL LIBERTIES
UNION; and NEW YORK CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs,

v.

JAMES R. CLAPPER, in his official capacity as
Director of National Intelligence; KEITH B.
ALEXANDER, in his official capacity as Director
of the National Security Agency and Chief of the
Central Security Service; CHARLES T. HAGEL, in
his official capacity as Secretary of Defense; ERIC
H. HOLDER, in his official capacity as Attorney
General of the United States; and ROBERT S.
MUELLER III, in his official capacity as Director
of the Federal Bureau of Investigation,

Defendants.

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June 11, 2013
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This lawsuit challenges the government’s dragnet acquisition of Plaintiffs’ telephone records under Section 215 of the Patriot Act, 50 U.S.C. § 1861.¹ In response to information published by the media, the government has acknowledged that it is relying on Section 215 to collect “metadata” about every phone call made or received by residents of the United States. The practice is akin to snatching every American’s address book—with annotations detailing whom we spoke to, when we talked, for how long, and from where. It gives the government a comprehensive record of our associations and public movements, revealing a wealth of detail about our familial, political, professional, religious, and intimate associations.

2. The government has confirmed the authenticity of an order issued six weeks ago by the Foreign Intelligence Surveillance Court (“FISC”) requiring Verizon Business Network Services Inc. (“VBNS”) to turn over, every day, metadata about the calls made by each of its subscribers over the three-month period ending on July 19, 2013. Government officials have indicated that the VBNS order is part of a program that has been in place for seven years and that collects records of all telephone communications of every customer of a major phone company, including Verizon, AT&T, and Sprint.

3. Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation are current VBNS subscribers whose communications have already been monitored by the government under the VBNS order and whose communications continue to be monitored under that order now. Plaintiffs the New York Civil Liberties Union and the New York Civil Liberties Union Foundation are former customers of VBNS whose contract of service recently expired but whose telephony metadata likely remains in government databases. The

government’s surveillance of their communications (hereinafter “Mass Call Tracking”) allows
the government to learn sensitive and privileged information about their work and clients, and it
is likely to have a chilling effect on whistleblowers and others who would otherwise contact
Plaintiffs for legal assistance. This surveillance is not authorized by Section 215 and violates the
First and Fourth Amendments. Plaintiffs bring this suit to obtain a declaration that the Mass Call
Tracking is unlawful; to enjoin the government from continuing the Mass Call Tracking under
the VBNS order or any successor thereto; and to require the government to purge from its
databases all of the call records related to Plaintiffs’ communications collected pursuant to the
Mass Call Tracking.

JURISDICTION AND VENUE

4. This case arises under the Constitution and the laws of the United States and
presents a federal question within this Court’s jurisdiction under Article III of the Constitution
and 28 U.S.C. § 1331. The Court also has jurisdiction under the Administrative Procedure Act, 5
U.S.C. § 702. The Court has authority to grant declaratory relief pursuant to the Declaratory
Judgment Act, 28 U.S.C. §§ 2201–2202. The Court has authority to award costs and attorneys’

5. Venue is proper in this district under 28 U.S.C. § 1391(b)(2), (c)(2).

PLAINTIFFS

6. The American Civil Liberties Union (“ACLU”) is a 501(c)(4) non-profit, non-
partisan organization that engages in public education and lobbying about the constitutional
principles of liberty and equality. The ACLU has more than 500,000 members, including
members in every state. The ACLU is incorporated in Washington, D.C. and has its principal
place of business in New York City.
7. The American Civil Liberties Union Foundation ("ACLU") is a 501(c)(3) organization that educates the public about civil-liberties issues and employs lawyers who provide legal representation free of charge in cases involving civil liberties. It is incorporated in New York State and has its principal place of business in New York City.

8. The New York Civil Liberties Union ("NYCLU") is a 501(c)(4) non-profit, non-partisan organization that functions as the ACLU affiliate in New York and that has as its mission the advancement and protection of civil liberties and civil rights. The NYCLU is incorporated in New York and has its principal place of business in New York City.

9. The New York Civil Liberties Union Foundation ("NYCLU") is a 501(c)(3) non-profit, non-partisan organization whose mission is to defend civil rights and civil liberties and to preserve and extend constitutionally guaranteed rights to people whose rights have historically been denied. The NYCLU provides counsel in lawsuits seeking to advance civil liberties and civil rights. It is incorporated in Delaware and has its principal place of business in New York City.

DEFENDANTS

10. Defendant James R. Clapper is the Director of National Intelligence ("DNI"). DNI Clapper has ultimate authority over the activities of the intelligence community.

11. Defendant Lt. Gen. Keith B. Alexander is the Director of the National Security Agency ("NSA") and the Chief of the Central Security Service. Lt. Gen. Alexander has ultimate authority for supervising and implementing all operations and functions of the NSA, the agency responsible for conducting surveillance authorized by the challenged law.

12. Defendant Charles T. Hagel is the Secretary of Defense. Secretary Hagel has ultimate authority over the Department of Defense, of which the NSA is a component.
13. Defendant Eric H. Holder is the Attorney General of the United States. Attorney General Holder has ultimate authority over the Department of Justice and the Federal Bureau of Investigation ("FBI") and is responsible for overseeing aspects of the challenged statute.

14. Defendant Robert S. Mueller III is the Director of the FBI and is responsible for applications made to the FISC under Section 215 of the Patriot Act.

**BACKGROUND**

**The Foreign Intelligence Surveillance Act**

15. In 1978, Congress enacted the Foreign Intelligence Surveillance Act ("FISA") to govern surveillance conducted for foreign-intelligence purposes. The statute created the Foreign Intelligence Surveillance Court ("FISC"), a court composed of seven (now eleven) federal district court judges, and empowered the court to grant or deny government applications for surveillance orders in foreign-intelligence investigations.

16. Congress enacted FISA after years of in-depth congressional investigation by the committees chaired by Senator Frank Church and Representative Otis Pike, which revealed that the Executive Branch had engaged in widespread warrantless surveillance of United States citizens—including journalists, activists, and members of Congress—"who engaged in no criminal activity and who posed no genuine threat to the national security."

**Section 215 of the Patriot Act**

17. Section 215 of the Patriot Act is often referred to as FISA's "business records" provision. When originally enacted in 1998, this provision permitted the FBI to apply to the FISC for an order to obtain business records of hotels, motels, car and truck rental agencies, and storage rental facilities.
18. Section 215 broadened this authority by eliminating any limitation on the types of businesses or entities whose records may be seized. In addition, Section 215 expanded the scope of the items that the FBI may obtain using this authority from “records” to “any tangible things (including books, records, papers, documents, and other items).”

19. Section 215 also relaxed the standard that the FBI is required to meet to obtain an order to seize these records. Previously, FISA required the FBI to present to the FISC “specific and articulable facts giving reason to believe that the person to whom the records pertain [was] a foreign power or an agent of a foreign power.” In its current form, Section 215 requires only that the records or things sought be “relevant” to an authorized investigation “to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.”

20. Production orders issued under Section 215 are accompanied by gag orders generally forbidding recipients from revealing “that the Federal Bureau of Investigation has sought or obtained tangible things.” Recipients may challenge gag orders “[n]ot less than 1 year after the date of the issuance of the production order.” If a recipient challenges a gag order, the FISC must treat the government’s claim “that disclosure may endanger the national security of the United States or interfere with diplomatic relations . . . as conclusive.”

21. For the past several years, members of Congress have been warning the public that the Executive Branch was exceeding the limits of the Patriot Act. In 2009, Senator Russ Feingold stated during a hearing that “there . . . is information about the use of Section 215 orders that I believe Congress and the American people deserve to know,” adding later that “Section 215 has been misused.” In 2011, Senator Ron Wyden declared, “When the American people find out how their government has secretly interpreted the Patriot Act, they will be
stunned and they will be angry.” Similarly, Senator Mark Udall protested that “Americans would be alarmed if they knew how this law is being carried out.”

22. On June 5, 2013, The Guardian disclosed that, under Section 215, the NSA has been acquiring the metadata for every phone call made or received by customers of VBNS “on an ongoing daily basis.”

23. Since the disclosure of the VBNS order last week and the government’s official acknowledgement of it, the outcry in Congress has increased sharply. Representative Jim Sensenbrenner, an author of the Patriot Act and chairman of the House Judiciary Committee at the time of Section 215’s passage, called the Section 215 surveillance program “an abuse of that law.” He wrote that, “based on the scope of the released order, both the administration and the FISA court are relying on an unbounded interpretation of the act that Congress never intended.”

PLAINTIFFS’ ALLEGATIONS

24. Plaintiffs are non-profit organizations that engage in public education, lobbying, and pro bono litigation upholding the civil rights and liberties guaranteed by the Constitution. Collectively, Plaintiffs have more than 500,000 members, including members in every state. Plaintiffs’ employees routinely communicate by phone with each other as well as with journalists, current and potential clients, legislators and legislative staff, and members of the public. These communications relate to Plaintiffs’ advocacy, representation of clients, and efforts to lobby Congress. Plaintiffs’ communications are sensitive and often privileged.

25. For example, Plaintiffs frequently place or receive phone calls from individuals relating to potential legal representation in suits against the federal government or state governments. Often, the mere fact that Plaintiffs have communicated with these individuals is sensitive or privileged.
26. In ongoing litigation, Plaintiffs often communicate with potential witnesses, informants, or sources who regard the fact of their association or affiliation with Plaintiffs as confidential. Particularly in their work relating to national security, access to reproductive services, racial discrimination, the rights of immigrants, and discrimination based on sexual orientation and gender identity, Plaintiffs’ work often depends on their ability to keep even the fact of their discussions with certain individuals confidential.

27. Similarly, Plaintiffs often communicate with government and industry whistleblowers, lobbyists, journalists, and possible advocacy partners who consider the confidentiality of their associations with Plaintiffs essential to their work.

28. Plaintiffs ACLU and ACLUF are current customers of Verizon Business Network Services Inc. ("VBNS") and Verizon Wireless. VBNS provides the ACLU’s and ACLUF’s wired communications, including their landlines and internet connection. Verizon Wireless provides their wireless communications, including their mobile phones.

29. Plaintiff NYCLU was a customer of VBNS until early April 2013. Until that time, VBNS provided the NYCLU’s wired communications, including their landlines.

30. On June 5, 2013, The Guardian published a FISC order directing VBNS to produce to the National Security Agency "on an ongoing daily basis . . . all call detail records or 'telephony metadata'" of its customers' calls, including those "wholly within the United States." Secondary Order at 2, In re Application of the FBI for an Order Requiring the Prod. of Tangible Things from Verizon Bus. Network Servs., Inc. on Behalf of MCI Commc'n Servs., Inc. d/b/a Verizon Bus. Servs., No. BR 13-80 (FISC Apr. 25, 2013), available at http://bit.ly/11FY393. The VBNS order was issued on April 25, 2013 and expires on July 19, 2013. The order was issued ex parte, and there is no procedure for Plaintiffs to challenge it in the FISC.
31. In the few days since The Guardian disclosed the VBNS order, government officials have revealed more about the government’s surveillance under Section 215. On June 6, Defendant Clapper officially acknowledged the authenticity of the VBNS order and disclosed details about the broader program supported by the FISC’s orders issued under Section 215. Among other things, he stated that: “[t]he judicial order that was disclosed in the press is used to support a sensitive intelligence collection operation”; “[t]he only type of information acquired under the Court’s order is telephony metadata, such as telephone numbers dialed and length of calls”; and “[t]he FISC reviews the program approximately every 90 days.”

32. The following day, President Barack Obama also commented publicly on the Section 215 order. Like Defendant Clapper, the President acknowledged that the intelligence community is tracking phone numbers and the durations of calls.

33. Members of the congressional intelligence committees have confirmed that the order issued to VBNS was but a single, three-month order in a much broader, seven-year program that the government has relied upon to collect the telephone records of all Americans. Senator Dianne Feinstein has stated that “this is the exact three-month renewal of what has been the case for the past seven years. This renewal is carried out by the [FISC] under the business records section of the Patriot Act.” Senator Saxby Chambliss has likewise stated that “[t]his has been going on for seven years.”

34. News reports since the disclosure of the VBNS order indicate that the mass acquisition of Americans’ call details extends beyond customers of VBNS, encompassing all wireless and landline subscribers of the country’s three largest phone companies. See Siobhan Gorman et al., U.S. Collects Vast Data Trove, Wall St. J., June 7, 2013, http://on.wsj.com/lluD0ue (“The arrangement with Verizon, AT&T and Sprint, the country’s
three largest phone companies means, that every time the majority of Americans makes a call, NSA gets a record of the location, the number called, the time of the call and the length of the conversation, according to people familiar with the matter. . . . AT&T has 107.3 million wireless customers and 31.2 million landline customers. Verizon has 98.9 million wireless customers and 22.2 million landline customers while Sprint has 55 million customers in total.”); Siobhan Gorman & Jennifer Valentino-DeVries, Government Is Tracking Verizon Customers' Records, Wall St. J., June 6, 2013, http://on.wsj.com/13mLm7c (“The National Security Agency is obtaining a complete set of phone records from all Verizon U.S. customers under a secret court order, according to a published account and former officials.”).

35. As customers of VBNS, Plaintiffs ACLU and ACLUF are covered by the now-public order of the FISC requiring VBNS to turn over all of its customers’ call records—including all of Plaintiffs’ call records—on an ongoing basis. Upon information and belief, Plaintiff NYCLU was covered by a similar order prior to the expiration of their contract with VBNS. Also upon information and belief, Plaintiffs ACLU and ACLUF are covered by a similar order directed to Verizon Wireless. The information collected includes Plaintiffs’ numbers, the numbers of their contacts, the time and duration of every single call they placed or received, and the location of Plaintiffs and their contacts when talking on mobile phones. This information could readily be used to identify those who contact Plaintiffs for legal assistance or to report human-rights or civil-liberties violations, as well as those whom Plaintiffs contact in connection with their work. The fact that the government is collecting this information is likely to have a chilling effect on people who would otherwise contact Plaintiffs.
CAUSES OF ACTION


37. The Mass Call Tracking violates the First Amendment to the Constitution.

38. The Mass Call Tracking violates the Fourth Amendment to the Constitution.

PRAYER FOR RELIEF

WHEREFORE the plaintiffs respectfully request that the Court:

1. Exercise jurisdiction over Plaintiffs’ Complaint;


3. Declare that the Mass Call Tracking violates the First and Fourth Amendments to the Constitution;

4. Permanently enjoin Defendants from continuing the Mass Call Tracking under the VBNS order or any successor thereto;

5. Order Defendants to purge from their possession all of the call records of Plaintiffs’ communications in their possession collected pursuant to the Mass Call Tracking;

6. Award Plaintiff fees and costs pursuant to 28 U.S.C. § 2412;

7. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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American Civil Liberties Union Foundation
No. 13-

IN THE
Supreme Court of the United States

IN re ELECTRONIC PRIVACY INFORMATION CENTER,
Petitioner

On Petition for a Writ of Mandamus and Prohibition, or a Writ of Certiorari, to the Foreign Intelligence Surveillance Court

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION, OR A WRIT OF CERTIORARI

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July 8, 2013
QUESTIONS PRESENTED

Congress enacted the Foreign Intelligence Surveillance Act to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. In the Act, Congress authorized judges of the Foreign Intelligence Surveillance Court to approve electronic surveillance for foreign intelligence purposes.

In the Order below, the Foreign Intelligence Surveillance Court compelled Verizon Business Network Services to produce to the National Security Agency, on an ongoing basis, all of the call detail records of Verizon customers. Petitioner, a non-profit organization engaged in legal work and advocacy, is a Verizon customer.

The questions presented are:

1. Whether the Foreign Intelligence Surveillance Court exceeded its narrow statutory authority to authorize foreign intelligence surveillance, under 50 U.S.C. § 1861, when it ordered Verizon to disclose records to the National Security Agency for all telephone communications "wholly within the United States, including local telephone calls."

2. Whether Petitioner is entitled to relief pursuant to 28 U.S.C. § 1651(a) to vacate the order of the Foreign Intelligence Surveillance Court, or other relief as this Court deems appropriate.
PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Foreign Intelligence Surveillance Court ("FISC"):  
1. Federal Bureau of Investigation ("FBI") filed the application with the FISC for a production order.

The following are parties to this proceeding in the United States Supreme Court:  
1. Electronic Privacy Information Center ("EPIC") is the petitioner. EPIC was not a party to the FISC proceedings.  
2. The Honorable Roger Vinson, FISC, is the judge to whom mandamus is sought.
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IN THE

Supreme Court of the United States

IN RE ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner

On Petition for a Writ of Mandamus and
Prohibition, or a Writ of Certiorari, to the Foreign
Intelligence Surveillance Court

PETITION FOR A WRIT OF MANDAMUS AND
PROHIBITION, OR A WRIT OF CERTIORARI

The Electronic Privacy Information Center ("EPIC")
respectfully petitions for a writ of mandamus and
prohibition to vacate the order of the Honorable
Roger Vinson of the Foreign Intelligence Surveillance
Court and prohibit such future orders, or, in the
alternative, for a writ of certiorari to review the
judgment of the Foreign Intelligence Surveillance
Court.

OPINION BELOW

The order of the Foreign Intelligence
Surveillance Court is not reported, but is reproduced
at Pet. App. 1a-3a.
2

JURISDICTION


STATUTE INVOLVED

The Foreign Intelligence Surveillance Act authorizes certain governmental surveillance of communications for foreign intelligence purposes. 50 U.S.C. §§ 1801 et. seq. (2012). Section 1861 allows the Federal Bureau of Investigation ("FBI") to apply to the Foreign Intelligence Surveillance Court ("FISC") for an order to compel production of “tangible things . . . for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.” 50 U.S.C. § 1861(a)(1) ("Access to certain business records for foreign intelligence and international terrorism investigations."). The application must include a statement of facts showing “that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation,” 50 U.S.C. § 1861(b)(2)(A), and an enumeration of the minimization guidelines adopted by the Attorney General. 50 U.S.C. § 1861(b)(2)(B). If the application meets these statutory requirements, the FISC “shall enter an ex parte order as requested, or as modified, approving the release of tangible things.” 50 U.S.C. § 1861(c)(1).
INTRODUCTION

EPIC seeks a writ of mandamus to review the order of Judge Roger Vinson, United States Foreign Intelligence Surveillance Court ("FISC") requiring Verizon Business Network Services ("Verizon") to produce to the National Security Agency ("NSA") call detail records, or "telephony metadata," for all calls wholly within the United States. Mandamus relief is warranted because the FISC exceeded its statutory jurisdiction when it ordered production of millions of domestic telephone records that cannot plausibly be relevant to an authorized investigation. EPIC is a Verizon customer subject to the order. Because of the structure of the Foreign Intelligence Surveillance Act ("FISA"), no other court may grant the relief that EPIC seeks.

On April 25, 2013, the FISC compelled the ongoing disclosure of all call detail records in the possession of a U.S. telecommunications firm for analysis by the National Security Agency. The FISC exceeded its statutory authority when it issued this order. To compel production of "tangible things," the FISA requires the items sought be "relevant" to an authorized investigation. 50 U.S.C. § 1861(b)(2)(A). It is simply not possible that every phone record in the possession of a telecommunications firm could be relevant to an authorized investigation. Such an interpretation of Section 1861 would render meaningless the qualifying phrases contained in the provision and eviscerate the purpose of the Act.

The Verizon Order approved by the FISC implicates the privacy interests of all Verizon customers, including petitioner EPIC, a non-profit organization that engages in protected attorney-
client communications as it pursues litigation to safeguard privacy. However, the FISA does not allow Verizon customers, including, EPIC to challenge the order or seek review of the order before the FISC or Foreign Intelligence Surveillance Court of Review ("Court of Review"). See 50 U.S.C. § 1861(f); id. §§ 1803(a)-(b); Foreign Intelligence Surveillance Ct. R. 33. Consequently, EPIC can only obtain relief with a writ of mandamus from this Court. Mandamus is an extraordinary remedy, but the Verizon Order carries extraordinary ramifications.

The records acquired by the NSA under this Order detail the daily activities, interactions, personal and business relationships, religious and political affiliations, and other intimate details of millions of Americans. “Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.” United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring). As Justice Breyer has recently noted, “the Government has the capacity to conduct electronic surveillance of the kind at issue.” Clapper v. Amnesty Int'l, USA, 133 S.Ct. 1138, 1158-59 (2013) (citing, inter alia, Priest & Arkin, A Hidden World, Growing Beyond Control, Wash. Post, July 19, 2010, at A1 (reporting that the NSA collects 1.7 billion e-mails, telephone calls and other types of communications daily)). And because the NSA sweeps up judicial and Congressional communications, it inappropriately arrogates exceptional power to the Executive Branch.
STATEMENT OF THE CASE

I. The Foreign Intelligence Surveillance Act

Congress passed the Foreign Intelligence Surveillance Act ("FISA") in 1978 to prevent the indiscriminate and invasive domestic surveillance of Americans by government intelligence agencies. See S. Rep. No. 95-604(I) at 7 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3908 ("This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused."); 1 David S. Kris & J. Douglas Wilson, National Security Investigations & Prosecutions §§ 2.2-2.6, 3.4 (2d. ed. 2012) (discussing a "history of abuse" within the Intelligence Community) (hereinafter "Kris & Wilson"). The FISA required the Government to limit surveillance to specific, targeted investigations of foreign agents and foreign powers, and it created the Foreign Intelligence Surveillance Court ("FISC") to oversee and authorize such surveillance. As Justice Alito recently stated for the Court in Clapper:

1 "A modern reader may reasonably ask what motivated the abuses... A review of the historical record suggests that [the Intelligence Community's] excesses were motivated in substantial part by fear." Kris & Wilson § 2.5. The need for a statute and a court to oversee national security surveillance was anticipated several years before enactment of the FISA and the establishment of the FISC. See Report of the Chairman — Samuel Alito, Conference on the Boundaries of Privacy in American Society, Woodrow Wilson Sch. of Pub. & Int'l Affairs, Princeton Univ. at 5 (Jan. 4, 1972).

[...]

In FISA, Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power,” and that each of the specific “facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” § 105(a)(3), 92 Stat. 1790; see § 105(b)(1)(A), (b)(1)(B), ibid.; 1 Kris & Wilson § 7:2, at 194–195; id., § 16:2, at 528–529.

133 S. Ct. at 1143 (emphasis added).

Under section 1861, the FBI may apply for a FISC order to compel the production of “tangible things,” typically from a business. 50 U.S.C. § 1861(a)(1). The application must show that there are "reasonable grounds" to believe the tangible things sought are relevant to an authorized investigation, 50 U.S.C. § 1861(b)(2)(A), and the investigation must “be
conducted under guidelines approved by the Attorney General under Executive Order 12,333.” 50 U.S.C. § 1861(a)(2)(A). If and only if the FISC finds that the FBI’s application meets the statutory requirements, the FISC “shall enter an ex parte order as requested, or as modified, approving the release of tangible things.” 50 U.S.C. § 1861(c)(1).


II. The FISC Ordered Verizon to Turn Over “All Call Detail Records or ‘Telephony Metadata.’”

Through an order from the FISC, the National Security Agency obtained from Verizon Business Network Services, Inc. “telephony metadata” for all domestic phone calls on that company’s network. On April 25, 2013, the FISC ordered Verizon to:
[P]roduce to the National Security Agency (NSA) upon service of this Order, and continue production on an ongoing daily basis thereafter for the duration of this Order, unless otherwise ordered by the Court, an electronic copy of the following tangible things: all call detail records or "telephony metadata" created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls. . . . Telephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call.

In re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Serv., Inc. on Behalf of MCI Commc'n Serv., Inc. D/B/A Verizon Bus. Serv., Dkt. No. BR 13-80 at 1-2 (FISA Ct. Apr. 25, 2013) (hereinafter "FISC Order").

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The “call detail records” referred to in the Verizon Order likely include “[a]ny information that pertains to the transmission of specific telephone calls, including, for outbound calls, the number called, and the time, location, or duration of any call and, for inbound calls, the number from which the call was placed and the time, location, or duration of any call.” 47 C.F.R. § 64.2003 (2012) (defining “call detail information”).


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The FISC Order, which is classified, was acknowledged and confirmed by President Obama. See Remarks on Health Insurance Reform and an Exchange With Reporters in San Jose, California, 2013 Daily Comp. Pres. Doc. 201300397 (June 7, 2013). Senator Diane Feinstein, Chairwoman of the Senate Intelligence Committee, stated that this FISC Order is part of an ongoing electronic communications surveillance program that has been reauthorized since 2007. Charlie Savage, Edward Wyatt & Peter Baker, U.S. Confirms Gathering of Web Data Overseas, N.Y. Times, June 7, 2013, at A1. The Verizon Order is set to expire on July 19, 2013, FISC Order at 4. According to Senator Feinstein and other members of the Intelligence Community, the order has been routinely renewed and will likely continue to be renewed.

III. EPIC, a Verizon Customer, Conducts Privileged and Confidential Communications

Petitioner EPIC is a non-profit public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC is also a Verizon customer, and has been for the entire period the FISC Order has been in effect. See Rotenberg Decl. at 2, Pet. App. 5a. Because the FISC Order compels disclosure of “all call detail records,” FISC Order at 2, detailed information about

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all of EPIC's telephone communications, including the numbers dialed and when calls occurred, have been disclosed to the NSA.

In furtherance of its mission to protect privacy and advocate for civil liberties, EPIC engages in several activities involving telephonic communications. EPIC files Freedom of Information Act ("FOIA") requests with federal agencies and pursues those requests with litigation as needed. These requests are typically sent via facsimile over EPIC's Verizon business line. EPIC is currently engaged in multiple FOIA lawsuits, including one against the NSA, two against the FBI, one against the Office of the Director of National Intelligence ("ODNI"), and two against the Department of Justice ("DOJ"). See, e.g., EPIC v. DHS, No. 13-5113 (D.C. Cir. 2013); EPIC v. FBI, No. 13-442 (D.D.C. 2013); EPIC v. CIA, 12-2053 (D.D.C. 2012); EPIC v. ODNI, No. 12-1282 (D.D.C. 2012); EPIC v. FBI, No. 12-667 (D.D.C. 2012); EPIC v. DOJ, No. 12-127 (D.D.C. 2012); EPIC v. NSA, No. 10-196 (D.D.C. 2010); EPIC v. DOJ, No. 06-96 (D.D.C. 2006).

EPIC attorneys use EPIC's telephones to conduct privileged attorney-client communications regarding ongoing legal proceedings. EPIC also petitions for, comments on, and litigates federal agency rulemakings under the Administrative Procedure Act. See, e.g., EPIC v. Dep't of Educ., No. 12-327 (D.D.C. 2012). See also Rotenberg Decl. at 2, Pet. App. 5a. EPIC's petition initiatives involve communicating telephonically with consumers, advisers, coalition members, and executive and legislative branch officials.

EPIC also engages in policy advocacy through formal and informal consultations with various
parties via telephone. EPIC provides expert advice to Members of Congress regarding oversight and legislation, and consults with federal agencies on regulatory proposals and enforcement. Rotenberg Decl. at 2, Pet. App. 5a. In many cases, discussions with U.S. officials are conducted confidentially to facilitate a deliberative process. In addition, EPIC gives interviews and background briefings with news media, sometimes in a confidential, "off the record" capacity. Rotenberg Decl. at 2, Pet. App. 5a. All of these activities require communication via telephone.

Following the public disclosure of the Verizon Order, EPIC learned that the NSA had obtained vast amounts of call detail information and breached the confidentiality of its privileged and confidential communications.

This petition followed.

REASONS FOR GRANTING THE PETITION

The All Writs Act, 28 U.S.C. § 1651, authorizes the Supreme Court to issue extraordinary writs in its discretion. "To justify granting any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. See also U.S. Alkali Export Ass'n v. United States, 325 U.S. 196, 201-02 (1945); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

In this case, the Foreign Intelligence Surveillance Court ("FISC") exceeded its statutory
jurisdiction and as a direct consequence created the exceptional circumstances that warrant mandamus review. The ongoing collection of the domestic telephone records of millions of Americans by the NSA, untethered to any particular investigation, is beyond the authority granted by Congress to the FISC under the FISA. Because of the structure of the FISA and the FISC, EPIC can only obtain relief from this Court.

The Court may grant a petition for mandamus in its discretion, so long as it has jurisdiction over the matter. As the Court described in *Cheney v. U.S. Dist. Court for the Dist. of Columbia:*


542 U.S. 367, 380 (2004). The Court in Cheney made clear that three conditions must be satisfied before such an extraordinary writ must issue: (1) the party must have no other adequate means to attain the relief he deserves, (2) the party must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable, and (3) the issuing court must be satisfied that the writ is appropriate under the circumstances. Id. at 380-81. Petitioner EPIC satisfies the three conditions set out in Cheney.

I. EPIC Cannot Obtain Relief from Any Other Court or Forum

The Court will not grant an extraordinary writ if another avenue of relief remains available. Sup. Ct. R. 20.1. However, the relief EPIC seeks, a writ vacating the unlawful FISC Order, cannot be granted by any other court. The lower federal courts have no jurisdiction to hear EPIC’s appeal, and the Court has made clear that mandamus relief is available in such unique circumstances. See U.S. Alkali Export Ass’n, 325 U.S. at 202 (finding that a writ in aid of appellate jurisdiction must be to the Supreme Court where it has sole appellate jurisdiction).7

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7 See also In re Blodgett, 502 U.S. 236, 240 (1992) (denying mandamus where the state could have asked the Court of Appeals to vacate or modify its order); Will v. United States, 389 U.S. 90, 96 (1967) (noting that government appeals are disfavored in criminal cases, but that
The FISC and Foreign Intelligence Surveillance Court of Review ("Court of Review") only have jurisdiction to hear petitions by the Government or recipient of the FISC Order, and neither party to the order represents EPIC's interests. Other federal courts have no jurisdiction over the FISC, and thus cannot grant the relief that EPIC seeks.

A. EPIC Cannot Seek Relief from the FISC or Court of Review.

The plain terms of the Foreign Intelligence Surveillance Act and the rules of the FISC bar EPIC from seeking relief before the FISC or Court of Review. The FISC may only review business record orders upon petition from the recipient or the Government. 50 U.S.C. § 1861(f)(2)(A)(i); Foreign Intelligence Surveillance Ct. R. 33(a). See also Kris & Wilson § 19:7. 8

Further review of FISC orders and denials is also limited. Only the Government or the recipient of a business record order may petition for an *en banc* rehearing by the FISC. 50 U.S.C. § 1803(a)(2)(A); Foreign Intelligence Surveillance Ct. R. 46. The Court of Review only has jurisdiction to review denials of business record applications, 50 U.S.C. §

mandamus relief is allowed in certain narrow circumstances).

1803(b), and decisions to affirm, modify, or set aside business record orders after a petition by the Government or the recipient. 50 U.S.C. § 1861(f)(3). See Kris & Wilson § 5:7.⁹

EPIC is not the recipient of a Business Records order under § 1861, but rather EPIC’s communications are subject to the FISC Order. As a result, the FISC and Court of Review have no jurisdiction to grant EPIC the relief it seeks.

This Court can grant mandamus relief without causing piecemeal litigation. Mandamus should not be a substitute for an interlocutory appeal. Will, 389 U.S. at 97. The general policy against piecemeal appeals underlies much of this Court's mandamus jurisprudence. Id. at 96. Appellate review is ideally sought after a final judgment has been rendered. See Judiciary Act of 1789, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789). This case would not result in piecemeal litigation because EPIC seeks review of a final order of the FISC.

B. No Other Court Can Grant EPIC the Relief It Seeks.

No other court has the power to vacate the FISC Order. Other federal and state trial and appellate courts have no jurisdiction over the FISC. See generally 50 U.S.C. § 1803. Under the All Writs

⁹ Both the FISC and the Court of Review have the authority to issue a stay or modify an order during the pendency of any review by the Supreme Court, while an appeal is pending before the Court of Review, or while the FISC is conducting a rehearing. 50 U.S.C. § 1803(f)(1).
Act, federal courts are only empowered to issue writs “in aid of their respective jurisdictions.” 28 U.S.C. § 1651(a). Accord Moye v. Clerk, DeKalb Cnty Super. Ct., 474 F.2d 1275, 1275-76 (5th Cir. 1973) (holding that although the writ of mandamus was abolished by Fed. R. Civ. P. 81(b), federal district courts may still issue writs in aid of their jurisdiction). The FISC order is outside the jurisdiction of federal district and circuit courts. Only this Court, the Court of Review, and the FISC are empowered to consider petitions to affirm, modify, or set aside a FISA Business Records order. 50 U.S.C. § 1861(f)(3). As a result, EPIC cannot petition an inferior federal court to vacate the unlawful FISC Order.

Any alternative relief that EPIC could seek is directly limited by this order. Both Verizon and the government agents executing this order are granted immunities based on the presumed validity of a court order. See 50 U.S.C. § 1861(e). Furthermore, the parties to the FISC Order do not serve EPIC’s interests and their right to petition for review does not provide adequate oversight to the judge’s unlawful FISC Order. EPIC can only prevent the application of this unlawful order by having it vacated by this Court.

II. The FISC Order Exceeded the Scope of the FISC’s Jurisdiction Under the FISA

Writs of mandamus in aid of appellate jurisdiction are traditionally used to confine a lower court to the lawful exercise of its jurisdiction. Cheney, 542 U.S. at 380. Such a jurisdictional correction is required here: the FISC issued an order requiring disclosure of records for all telephone communications “wholly within the United States,
including local telephone calls.” FISC Order at 2. The Business Records provision does not enable this type of domestic programmatic surveillance.

Specifically, the statute requires that production orders be supported by “reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation. . . .” 50 U.S.C. § 1861(b)(2)(A). It is simply unreasonable to conclude that all telephone records for all Verizon customers in the United States could be relevant to an investigation. Thus, the FISC simply “ha[d] no judicial power to do what it purport[ed] to do.” De Beers, 325 U.S. at 217.

A. Mandamus Aids the Court's Appellate Jurisdiction When It Prevents a Lower Court from Exceeding Its Lawful Authority.

A petition for a writ of mandamus under 28 U.S.C. § 1651(a) “must show that the writ will be in aid of the Court’s appellate jurisdiction. . . .” Sup. Ct. R. 20.1. “The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction.” Cheney, 542 U.S. at 380 (quoting Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943)). Jurisdictional errors are not measured against “an arbitrary and technical definition of ‘jurisdiction,”’ Will, 389 U.S. at 95. Rather, petitioners need to show that there was a “clear abuse of discretion,” Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953), or judicial “usurpation of power.” De Beers, 325 U.S. at 217.
Thus, in *De Beers* the Court issued a writ to stop a district court from sequestering property when it was "not authorized" by the antitrust statute under which the case was brought; the court "ha[d] no judicial power to do what it purport[ed] to do." 325 U.S. at 217-23. See also *U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 204 (1945) (review of district court appropriate to avoid creating a "frustration of the functions which Congress" intended); *Ex parte Republic of Peru*, 318 U.S. 578, 586-90 (1943) (mandamus warranted when a district court exceeded the scope of its jurisdiction by proceeding in rem against a foreign steamship).

A court can exceed its jurisdiction by going beyond the bounds of its statutory instructions, not just by engaging in wholly unauthorized activity. In *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, mandamus was merited because the district court "did not lawfully exercise its jurisdiction" when it appointed an attorney to represent an indigent client, despite only being authorized to "request" the representation. 490 U.S. 296, 308-09 (1989). Similarly, in *Schlagenhauf v. Holder*, the Court prevented a district court from "disregarding plainly expressed [statutory] limitations" by ordering a physical and mental examination not justified by the Federal Rules of Civil Procedure. 379 U.S. 104, 121 (1964).

**B. The FISC Lacks the Legal Authority to Order Programmatic Domestic Surveillance Under 50 U.S.C. § 1861.**

The FISC exceeded its statutory authorization under the FISA when it ordered Verizon to disclose all domestic telephone communications records,
without limitation, to the NSA on an ongoing basis. Under the Business Records provision, the FBI may make an application to the FISC for an order requiring:

[T]he production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

50 U.S.C. § 1861(a)(1). If the FBI’s application meets the statutory requirements, the FISC “shall enter an ex parte order as requested, or as modified, approving the release of tangible things.” 50 U.S.C. § 1861(c)(1). The FISC’s responsibility to ensure adequacy of the application “is not merely a ministerial requirement; if the FISC concludes that the statement of facts does not make the necessary showing of relevance, it must deny the application.” Kris & Wilson ¶ 19:3.

The statute requires that the FBI's statement of facts show “that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2). . . .” 50 U.S.C. § 1861(b)(2)(A). An authorized investigation requires a factual predicate, whereas a
threat assessment does not.\footnote{Simply acquiring a haystack to go looking for a needle is a threat assessment. An authorized investigation would be specifically targeted on an identified needle based on a factual predicate.} See Attorney General's Guidelines for Domestic FBI Operations, U.S. Dep't of Justice, 17-18 (2008).\footnote{Available at http://www.justice.gov/ag/readingroom/guidelines.pdf.} "Reasonable grounds" is not defined in the statute, but according to Kris & Wilson it has been treated as equivalent to "reasonable suspicion." See, e.g., United States v. Banks, 540 U.S. 31, 36 (2003); United States v. Henley, 469 U.S. 221, 227 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975); Kris & Wilson § 19:3: "Reasonable suspicion" requires a showing of "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant" intrusion into a suspect's privacy. Terry v. Ohio, 392 U.S. 1, 21 (1968). Given that the FISC Order commands disclosure of all domestic telephone records, it is acutely implausible that the FBI alleged specific and articulable facts about each of Verizon's millions of customers.

What makes a tangible thing "relevant" to an authorized investigation is likewise not clearly delineated in the statute. However, in accordance with the foreign intelligence purposes of FISA, the Act says that tangible things are "presumptively relevant" if they

pertain to – (i) a foreign power or an agent of a foreign power; (ii) the
activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation[.]

50 U.S.C. § 1861(b)(2)(A). Common sense dictates that the vast majority of Verizon's customers will not fall into any of these three categories. Consequently, the vast majority of the telephone records conveyed to the NSA will not be presumptively relevant. The burden is therefore on the FBI to show, with specific and articulable facts, why those records are in fact relevant and should be included in the production order.

Moreover, the scope of the request cannot simply encompass all call records in the database. To define the scope of the records sought as "everything" nullifies the relevance limitation in the statute. If law enforcement has "everything," there will always be some subset of "everything" that is relevant to something. At that level of breadth, the relevance requirement becomes meaningless. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). In addition to showing a sufficient factual predicate, the FBI's investigation must also "be conducted under guidelines approved by the Attorney General under Executive Order 12333. . . ." 50 U.S.C. § 1861(a)(2)(A). The Executive Order emphasizes the need to limit the scope of domestic surveillance. "The United States Government has a solemn obligation,
and shall continue in the conduct of intelligence activities under this order, to protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law." Exec. Order No. 12,333 § 1.1(b).

In particular, Executive Order 12,333 requires intelligence agencies to "use the least intrusive collection techniques feasible within the United States or directed at U.S. persons abroad." Id. at § 2.4. The unbounded collection and review of the call detail records of all Americans is plainly not "the least intrusive technique feasible." It is difficult to conceive of any surveillance technique more intrusive than acquiring all communications records on all persons concerning all matters.

Finally, reading § 1861 in the context of the FISA as a whole, it becomes clear that this section is not meant to authorize the ongoing programmatic collection of telephone records. See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). While section 1861 authorizes the requisition of "tangible things," sections 1841-42 authorize the use of "[p]en registers and trap and trace devices for foreign intelligence and international terrorism investigations." A pen register is a device or process that "records or decodes dialing, routing, addressing, or signaling information" of electronic communications. 18 U.S.C. § 3127(3). A trap and trace device is a device or process that "captures the incoming electronic or
other impulses which identify the originating number or other dialing, routing addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication.” 18 U.S.C. § 3127(4).

Use of pen registers and trap and trace devices is the classic technique that this Court has recognized for the collection of call detail records, which were originally simply telephone numbers dialed. See Smith v. Maryland, 442 U.S. 735 (1979). Pen registers and trap and trace devices are also used for present and future monitoring of communications, as opposed to historical record collection. They are the sorts of devices and methods one would use to capture telephony metadata. To the extent that Congress intended to allow the FISC to order ongoing domestic communications surveillance for foreign intelligence purposes, such orders should be rooted in section 1842 concerning pen registers and trap and trace devices, not section 1861’s tangible things provisions.12

12 Chairman Sensenbrenner, an original co-sponsor of the Patriot Act, stated recently that Congress never intended or understood the Business Records section to authorize bulk surveillance of Americans’ activities. “Congress intended to allow the intelligence communities to access targeted information for specific investigations. How can every call that every American makes or receives be relevant to a specific investigation?” Rep. Jim Sensenbrenner, This Abuse of the Patriot Act Must End, The Guardian, June 9, 2013, http://www.guardian.co.uk/commentisfree/2013/jun/09/abuse-patriot-act-must-end.
The FISC order for the ongoing production of detailed telephone records, concerning solely domestic communications, went far beyond the authority set out in the Act. The FISC is required by FISA to approve applications that meet the statutory requirements and deny applications that fail to meet those requirements. 50 U.S.C. § 1861(c)(1). By approving this statutorily deficient application, the FISC exceeded its lawful authority.

III. The FISC Order Creates Exceptional Circumstances Warranting Mandamus.

A writ of mandamus may issue when “exceptional circumstances warrant the exercise of the Court’s discretionary powers.” Sup. Ct. R. 20.1. There are no formal bounds to what constitutes an exceptional circumstance; the Court's mandamus discretion is quite broad. See Steven Wisotsky, Extraordinary Writs: “Appeal” by Other Means, 26 Am. J. Trial Advoc. 577, 583 (2003); James E. Pfander, Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1494-97 (2000). Mandamus is also appropriate where the case presents an “issue of first impression” involving a “basic and undecided problem,” especially on an important issue like foreign intelligence surveillance that is rarely reviewed by the Supreme Court. United States v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division (Keith), 444 F.2d 651, 655-56 (6th Cir. 1971), aff’d, 407 U.S. 297 (1972) (quoting Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964)).

This case involves a far-reaching FISC order that gives the NSA access to the telephone call records of millions of Americans on an ongoing basis.
Such a broad grant of executive power is not permitted under the FISA and cannot be justified by a non-particularized connection to general national security threats. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).\textsuperscript{13}

\textbf{A. Telephony Metadata Reveals Significant Private Information About EPIC and Millions of Other Americans.}

Telephony metadata can be directly linked to each user's identity and reveal their contacts, clients, associates, and even the physical location. The FISC Order specifies that "[t]elephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call." FISC Order at 2.

Routing information refers to "the path or method to be used for establishing telephone

\textsuperscript{13} Even admirable ends do not justify the creation of a panopticon. See Maryland v. King, 569 U.S. __, 133 S.Ct. 1958, 1989 (2013) (Scalia, J., dissenting) ("Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches.").
connections or forwarding messages.” Telecomm. Indus. Ass'n, Routing, Glossary of Telecommunications Terms.\textsuperscript{14} Routing information therefore encompasses all information about the path of the telephone call, including the cell sites or switching stations used to complete the call. See generally, Ray Horak, Telecommunications and Data Communications Handbook 200-247; 550-600 (2007). IMSI and IMEI numbers are both unique identifiers related to mobile telephony. The IMSI number is a unique number used to identify a subscriber to a mobile network. ATIS – IMSI Oversight Council, Frequently Asked Questions.\textsuperscript{15} The IMEI number is a unique number assigned to a mobile device by the device manufacturer and used to identify the device on the network. CTIA – The Wireless Ass'n, Wireless Glossary of Terms (Oct. 2012).\textsuperscript{16} Finally, “trunk identifier” could refer to a number that uniquely identifies a group of communications channels or to the “trunk code” used to identify the home network or area inside a country where a call is to be routed. See Tarmo Anttalainen, Introduction to Telecommunications Network Engineering 32 (2d. ed.

\textsuperscript{14} Available at http://www.tiaonline.org/resources/telecom-glossary (search for "routing") (last visited July 1, 2013).

\textsuperscript{15} http://www.imsiadmin.com/imsi_faq.cfm (last visited July 1, 2013).

\textsuperscript{16} http://www.ctia.org/media/industry_info/index.cfm/AID/10409.
2003); Telecomm. Indus. Ass’n, *Trunk*, Glossary of Telecommunications Terms.\(^{17}\)

Because the routing information details the path taken by a call, it can be used to identify the location of the parties to the call. The connections made between an individual’s mobile phone and the antennas in a service provider’s network can be used to track location over time. *See* Junhui Zhao & Xueue Zhang, *Location-Based Services Handbook: Wireless Location Technology in Location-Based Services* § 2.2.1 (Syed A. Ahson & Mohammad Ilyas eds., 2011); Axel Küpper, *Location-Based Services: Fundamentals and Operation* § 6.2.1 (2006).

The FISC Order also compels disclosure of personally identifiable information. Telephone numbers, IMSI numbers, and IMEI numbers are unique and can be used to identify individuals. The NSA maintains a database of “telephone numbers and electronic communications accounts / addresses / identifiers that NSA has reason to believe are being used by United States Persons.” *Procedures used by the Nat’l Sec. Agency for Targeting Non-U.S. Persons Reasonably Believed to be Located Outside the U.S. to Acquire Foreign Intelligence Info. Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended, Nat’l Sec. Agency, at 3 (FISA Ct. filed Jul. 29, 2009).*\(^{18}\) These numbers collected under

\(^{17}\) *Available at* http://www.tiaonline.org/resources/telecom-glossary (search for “trunk”) (last visited July 1, 2013).

the FISC Order can be easily matched with the records maintained in the NSA identifying database. In fact, the NSA uses this matching process to “prevent the inadvertent targeting of a United States person” under directives issued pursuant to Section 702 of FISA. \textit{Id.}

Because telephone numbers identify individuals, they are protected as personal information under federal law. \textit{See, e.g.,} 15 U.S.C. § 6501(8)(A)-(E) (2012) (including “telephone number” within the definition of personal information); 18 U.S.C. § 2725(3) (2012), (including “telephone number” within the definition of personal information). \textit{See also} 47 U.S.C. § 222(h)(1)(A) (2012) (defining “customer proprietary network information” as “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service. . .”).

The telephony metadata obtained under the FISC Order is used by the NSA to create maps of an individual’s social connections. These social maps contain information about users private contacts and associations. This process is referred to as “contact chaining,” and it is used to structure and catalog the telephony metadata held by the NSA. \textit{See Memorandum from Kenneth Wainstein, Assistant Att’y Gen., Dep’t of Justice, to the Att’y Gen. of the United States, at 2 (Nov. 20, 2007).} Contact chaining allows the agency to “automatically identify

not only the first tier of contacts made by the seed telephone number or e-mail address, but also the further contacts made by the first tier of telephone numbers or e-mail addresses and so on.” *Id.* at 13. So if the NSA was investigating Bob’s telephone records, and saw he called Jane, the NSA would then collect and examine all of Jane's telephone records. If they saw that Jane called Steve, they would then collect and examine all of Steve's telephone records. Contact chaining was specifically designed as a means to analyze the communications metadata of U.S. persons. *Id.* at 2.\(^{20}\) But this process also gives rise to combinatorial explosion, permitting the creation of enormous data sets containing personal information completed unrelated to the purpose of the investigation.

The practical use of telephone numbers to identify individuals is well understood. In 2006, Senator Joe Biden told CBS News that “I don’t have to listen to your phone calls to know what you’re doing. If I know every single phone call you made, I’m able to determine every single person you talked to. I can get a pattern about your life that is very, very intrusive.” *The Early Show* (CBS News broadcast

\(^{20}\) *See also United States v. Jones*, 567 U.S. ___, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring) (“I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”).
May 12, 2006).21 And if all call record information is relevant under the FISA, then other categories of business records could also be obtained in bulk under the statute.

B. EPIC is in Active Litigation Against the Very Agencies Tracking EPIC's Privileged Attorney-Client Communications.

The FISC Order mandates that Verizon produce data about EPIC's confidential attorney-client relationships and other privileged information. The privacy of such communications is essential to the "public interests in the observance of law and administration of justice." *Upjohn v. United States*, 449 U.S. 383, 389 (1981). *See also* Kris & Wilson § 19:10 (noting that a tangible things order could be characterized as "unlawful" if it sought privileged communications).

EPIC frequently files Freedom of Information Act ("FOIA") requests with federal agencies and pursues those requests with litigation when necessary. At present, EPIC is in litigation with both the NSA and FBI, the two agencies responsible for tracking Americans' private communications under this order. *EPIC v. FBI*, No. 13-442 (D.D.C. 2013); *EPIC v. FBI*, No. 12-667 (D.D.C. 2012); *EPIC v. NSA*, No. 10-196 (D.D.C. 2010). Additionally, EPIC has ongoing FOIA lawsuits against other elements of the Intelligence Community, including the Office of the Director of National Intelligence and the Central

21 Available at http://www.cbsnews.com/video/watch/?id=1613914n.

Courts consider a threat to attorney-client communications an exceptional circumstance and have issued writs of mandamus to vacate production orders implicating privileged information. See, e.g., *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639 (8th Cir. 2001) (attorney-client); *Admiral Ins. Co. v. U.S. Dist. Court for the Dist. of Ariz.*, 881 F.2d 1486 (9th Cir. 1989) (attorney-client); *In re Fink*, 876 F.2d 84 (11th Cir. 1989) (doctor-patient). In this case, the FISC issued a blanket order for all domestic telephone records. Such a boundless order sweeps up not just communications protected by attorney-client privilege, but also those falling under marital communications privilege, psychiatrist-patient

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22 See also *Clapper v. Amnesty Int’l USA*, 568 U.S. __, 133 S.Ct. 1138, 1154 (2013) (stating that an attorney could have standing for a claim alleging unlawful FISA surveillance of attorney-client communications).
privilege, accountant-client privilege, and clergy-penitent privilege.

C. EPIC Confidentially Communicates with Members of Congress, Agency Officials, Journalists, and Others to Further its First Amendment-Protected Advocacy.

EPIC's ability to engage in open dialogue with the public, coalition members, and colleagues in government, non-government, and the private sector is protected by the First Amendment doctrines of freedom of association and freedom of speech. As described above, EPIC communicates regularly with coalition groups, international organizations, consumers, and government representatives. Members of EPIC's staff give telephone interviews to reporters and journalists, speak to members of Congress who seek expert opinions on privacy issues, and consult with other advocates about privacy law and policy. Many of these conversations are conducted with the expectation that they will remain confidential, to protect the deliberative process of those with whom EPIC consults.

This Court has frequently recognized the importance of preserving the First Amendment rights of advocacy groups. In Gibson v. Florida Legislative Investigation Committee, this Court ruled, "[t]he First and Fourteenth Amendment rights of free speech and free association are fundamental and highly prized, and 'need breathing space to survive.'" 372 U.S. 539, 892 (1963), citing N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). In N.A.A.C.P. v. Alabama, this Court explained why the protection of privacy is of Constitutional concern for advocacy organizations:
[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. 449, 462 (1958). Because of the confidential, candid nature of EPIC's consultations with various parties, NSA's surveillance chills EPIC's ability to advocate. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Id. at 523. See also Laird v. Tatum, 408 U.S. 1, 11, (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights."). A non-profit advocacy group engaging in political speech must be able to have private telephone communications without fear of constant monitoring by the government.

Given the vital importance of First Amendment protections for advocacy groups, appellate courts have recognized government threats
to free speech and association to constitute an "extraordinary circumstance" warranting mandamus review. See, e.g., Perry v. Schwarzenegger, 591 F.3d 1126 (9th Cir. 2009) (mandamus to protect campaign strategy communications from discovery, due to their effect of discouraging exercise of the right to associate with an advocacy group); CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (mandamus granted to protect the free speech rights of both student demonstrators and the national guard); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (mandamus to protect free speech rights of litigants).

By ordering surveillance of all Verizon customers, the FISC permitted the NSA to gather the metadata of EPIC's conversations with consumers, advisors and advisees, donors, other privacy advocates, Members of Congress, agency officials, and journalists. The government need not stage a "heavy-handed frontal attack" against EPIC's communications in order to threaten its right to free speech and association. Bates v. City of Little Rock, 361 U.S. 516, 523 (1980). The NSA does not need the contents of communications to stifle EPIC's advocacy. The metadata alone is sufficient to identify who has been talking to EPIC and to chill those communications and associations. See United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.").

The FISC Order threatens the autonomy of the Legislative and Judicial branches by authorizing the Executive to collect the telephone communication records of Members of Congress and federal judges. The Framers determined that the creation of three coequal branches of government was “essential to the preservation of liberty.” Mistretta v. United States, 488 U.S. 361, 380 (1989). Accordingly, the Constitution prohibits efforts by one branch to control, interfere with, or unduly burden the exercise of the constitutionally assigned functions of another branch. See Clinton v. Jones, 520 U.S. 681, 701 (1997) (“We have recognized that ’[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” (citation omitted)); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 509 (1977) (Appealing to the "necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.” (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935)).

Here, the Executive's collection of all Verizon call data unduly burdens the functioning of the other two coordinate branches. The Constitution vests “[a]ll legislative Powers herein granted” in the Congress of the United States, U.S. Const. Art. I, § 1, and “[t]he judicial Power” in “one supreme Court, and in such inferior Courts as the Congress may from time to
time ordain and establish.” U.S. Const. Art. III, § 1. In order to exercise the legislative power, members of Congress depend upon the ability to communicate frankly with staff members and with constituents, many of whom are Verizon customers. See, e.g., United States v. Ford, 830 F.2d 596, 601 (6th Cir. 1987) (holding that separation of powers protects the integrity of “political communication between a congressman and his constituents”).

Similarly, in order to exercise the judicial power, members of the federal judiciary need to communicate openly with each other and with staff members, attorneys, and litigants. See, e.g., Matter of Certain Complaints Under Investigation by an Investigating Comm. of Judicial Council of Eleventh Circuit, 783 F.2d 1488, 1519-20 (11th Cir. 1986) (“Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. . . . Confidentiality helps protect judges’ independent reasoning from improper outside influences.”). The Executive Branch is currently collecting metadata for all calls made by judges who are Verizon customers or who communicate with Verizon customers. As the Court has recognized, surveillance can impair open communication and intellectual exploration. This interference with the communicative freedom of members of the judiciary and legislature “impair[s] these branches in the performance of [their] constitutional duties,” Clinton v. Jones, 520 U.S. 681, 701 (1997), and thereby threatens the separation of powers. Thus, mandamus is warranted to remedy the interference.
CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant the petition for a writ of mandamus and prohibition, or, in the alternative, the petition for a writ of certiorari.

Respectfully submitted,

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July 8, 2013

*Member of the bar of the District of Columbia*

**Member of the bar of New York**

***Member of the bar of California***
APPENDIX A

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.
Docket Number: BR 13-80

IN RE APPLICATION OF THE FEDERAL BUREAU
OF INVESTIGATION FOR AN ORDER
REQUIREING THE PRODUCTION OF TANGIBLE
THINGS FROM VERIZON BUSINESS NETWORK
SERVICES, INC. ON BEHALF OF MCI
COMMUNICATION SERVICES, INC. D/B/A
VERIZON BUSINESS SERVICES.

SECONDARY ORDER

This Court having found that the Application of the Federal Bureau of Investigation (FBI) for an Order requiring the production of tangible things from Verizon Business Network Services, Inc. on behalf of MCI Communication Services Inc., d/b/a Verizon Business Services (individually and collectively "Verizon") satisfies the requirements of 50 U.S.C. § 1861,

IT IS HEREBY ORDERED that, the Custodian of Records shall produce to the National Security Agency (NSA) upon service of this Order, and continue production on an ongoing daily basis thereafter for the duration of this Order, unless otherwise ordered by the Court, an electronic copy of the following tangible things: all call detail records or "telephony metadata" created by Verizon for
communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls. This Order does not require Verizon to produce telephony metadata for communications wholly originating and terminating in foreign countries. Telephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 U.S.C. § 2510(8), or the name, address, or financial information of a subscriber or customer.

IT IS FURTHER ORDERED that no person shall disclose to any other person that the FBI or NSA has sought or obtained tangible things under this Order, other than to: (a) those persons to whom disclosure is necessary to comply with such Order; (b) an attorney to obtain legal advice or assistance with respect to the production of things in response to the Order; or (c) other persons as permitted by the Director of the FBI or the Director's designee. A person to whom disclosure is made pursuant to (a), (b), or (c) shall be subject to the nondisclosure requirements applicable to a person to whom an Order is directed in the same manner as such person. Anyone who discloses to a person described in (a), (b), or (c) that the FBI or NSA has sought or obtained tangible things pursuant to this Order shall notify such person of the
nondisclosure requirements of this Order. At the request of the Director of the FBI or the designee of the Director, any person making or intending to make a disclosure under (a) or (c) above shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

IT IS FURTHER ORDERED that service of this Order shall be by a method agreed upon by the Custodian of Records of Verizon and the FBI, and if no agreement is reached, service shall be personal.

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This authorization requiring the production of certain call detail records or "telephony metadata" created by Verizon expires on the 19th day of July, 2013, at 5:00 p.m., Eastern Time.

Signed 04-25-2013 P02:26 Eastern Time
/s/ ROGER VINSON
Roger Vinson
Judge, United States Foreign Intelligence Surveillance Court

/s/ I, Beverly C. Queen, Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.
APPENDIX B

DECLARATION OF MARC ROTENBERG,
PRESIDENT OF EPIC

1. My name is Marc Rotenberg. All statements made herein are true and based on my personal knowledge.

2. I am the President of the Electronic Privacy Information Center ("EPIC").

3. I have been employed by EPIC since 1994.

4. EPIC is a non-profit public interest research center founded in 1994 to focus public attention on emerging civil liberties and privacy issues.

5. EPIC’s office is located at 1718 Connecticut Ave., NW, Suite 200, Washington, DC, 20009.


7. EPIC employs attorneys and other staff, who investigate and litigate issues related to privacy law, the Administrative Procedure Act ("APA"), and the Freedom of Information Act ("FOIA").

8. EPIC employs nine attorneys, including myself.

9. EPIC files and pursues FOIA requests with federal agencies, including the National Security Agency ("NSA"), the Federal Bureau of Investigation, the Office of the Director of National Intelligence, and the Department of Justice, among others.
10. EPIC files and pursues APA rulemaking petitions with federal agencies, including the NSA and the Department of Homeland Security, among others.

11. EPIC routinely engages in APA and FOIA litigation against federal government agencies.

12. EPIC consults, often confidentially, with Members of Congress, state legislators, and federal and state officials about privacy law and open government issues.

13. EPIC gives interviews to journalists, sometimes in an “off the record” and confidential capacity.

14. EPIC’s office contains telephones and a facsimile machine that EPIC’s attorneys and staff use for the above activities.

15. EPIC’s attorneys often use the telephones to conduct confidential and/or privileged communications related to active litigations.

16. EPIC’s attorneys often transmit confidential and/or privileged drafts of attorney work product via facsimile.

17. EPIC is currently a Verizon telephone customer and has been since prior to April 2013.

18. I declare under penalty of perjury that the foregoing is true and correct. Executed on July 2, 2013.

/s/ Marc Rotenberg

Marc Rotenberg
President, EPIC
APPENDIX C

1. U.S. Const. Art. I, § 1 provides:
All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. U.S. Const. Art. III, § 1 provides:
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

3. 50 U.S.C. 1861 provides:
Access to certain business records for foreign intelligence and international terrorism investigations
(a) Application for order; conduct of investigation generally
   (1) Subject to paragraph (3), the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a
United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall—

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(3) In the case of an application for an order requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person, the Director of the Federal Bureau of Investigation may delegate the authority to make such application to either the Deputy Director of the Federal Bureau of Investigation or the Executive Assistant Director for National Security (or any successor position). The Deputy Director or the Executive Assistant Director may not further delegate such authority.

(b) Recipient and contents of application

Each application under this section—

(1) shall be made to—

(A) a judge of the court established by section 1803 (a) of this title; or

(B) a United States Magistrate Judge under chapter 43 of title 28, who is publicly designated by the Chief Justice of the United States to have
the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

(2) shall include—

(A) a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—

(i) a foreign power or an agent of a foreign power;

(ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or

(iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation; and

(B) an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation based on the order requested in such application.

(c) Ex parte judicial order of approval
(1) Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), the judge shall enter an ex parte order as requested, or as modified, approving the release of tangible things. Such order shall direct that minimization procedures adopted pursuant to subsection (g) be followed.

(2) An order under this subsection—

(A) shall describe the tangible things that are ordered to be produced with sufficient particularity to permit them to be fairly identified;

(B) shall include the date on which the tangible things must be provided, which shall allow a reasonable period of time within which the tangible things can be assembled and made available;

(C) shall provide clear and conspicuous notice of the principles and procedures described in subsection (d);

(D) may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things; and

(E) shall not disclose that such order is issued for purposes of an investigation described in subsection (a).

(d) Nondisclosure

(1) No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section, other than to—
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(A) those persons to whom disclosure is necessary to comply with such order;

(B) an attorney to obtain legal advice or assistance with respect to the production of things in response to the order; or

(C) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(2)

(A) A person to whom disclosure is made pursuant to paragraph (1) shall be subject to the nondisclosure requirements applicable to a person to whom an order is directed under this section in the same manner as such person.

(B) Any person who discloses to a person described in subparagraph (A), (B), or (C) of paragraph (1) that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section shall notify such person of the nondisclosure requirements of this subsection.

(C) At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under subparagraph (A) or (C) of paragraph (1) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(e) Liability for good faith disclosure; waiver

A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a
waiver of any privilege in any other proceeding or context.

(f) Judicial review of FISA orders

(1) In this subsection—

(A) the term "production order" means an order to produce any tangible thing under this section; and

(B) the term "nondisclosure order" means an order imposed under subsection (d).

(2)

(A)

(i) A person receiving a production order may challenge the legality of that order by filing a petition with the pool established by section 1803 (e)(1) of this title. Not less than 1 year after the date of the issuance of the production order, the recipient of a production order may challenge the nondisclosure order imposed in connection with such production order by filing a petition to modify or set aside such nondisclosure order, consistent with the requirements of subparagraph (C), with the pool established by section 1803 (e)(1) of this title.

(ii) The presiding judge shall immediately assign a petition under clause (i) to 1 of the judges serving in the pool established by section 1803 (e)(1) of this title. Not later than 72 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the petition. If the assigned judge determines that the petition is frivolous, the assigned judge shall immediately deny the petition and affirm the production order or
nondisclosure order. If the assigned judge determines the petition is not frivolous, the assigned judge shall promptly consider the petition in accordance with the procedures established under section 1803 (c)(2) of this title.

(iii) The assigned judge shall promptly provide a written statement for the record of the reasons for any determination under this subsection. Upon the request of the Government, any order setting aside a nondisclosure order shall be stayed pending review pursuant to paragraph (3).

(B) A judge considering a petition to modify or set aside a production order may grant such petition only if the judge finds that such order does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the production order, the judge shall immediately affirm such order, and order the recipient to comply therewith.

(C)

(i) A judge considering a petition to modify or set aside a nondisclosure order may grant such petition only if the judge finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.

(ii) If, upon filing of such a petition, the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director
of the Federal Bureau of Investigation certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive, unless the judge finds that the certification was made in bad faith.

(iii) If the judge denies a petition to modify or set aside a nondisclosure order, the recipient of such order shall be precluded for a period of 1 year from filing another such petition with respect to such nondisclosure order.

(D) Any production or nondisclosure order not explicitly modified or set aside consistent with this subsection shall remain in full effect.

(3) A petition for review of a decision under paragraph (2) to affirm, modify, or set aside an order by the Government or any person receiving such order shall be made to the court of review established under section 1803 (b) of this title, which shall have jurisdiction to consider such petitions. The court of review shall provide for the record a written statement of the reasons for its decision and, on petition by the Government or any person receiving such order for writ of certiorari, the record shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(4) Judicial proceedings under this subsection shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.
(5) All petitions under this subsection shall be filed under seal. In any proceedings under this subsection, the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions thereof, which may include classified information.

(g) Minimization procedures

(1) In general

Not later than 180 days after March 9, 2006, the Attorney General shall adopt specific minimization procedures governing the retention and dissemination by the Federal Bureau of Investigation of any tangible things, or information therein, received by the Federal Bureau of Investigation in response to an order under this subchapter.

(2) Defined

In this section, the term “minimization procedures” means—

(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(B) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in section 1801 (e)(1) of this title, shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand
foreign intelligence information or assess its importance; and

(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.

(h) Use of information
Information acquired from tangible things received by the Federal Bureau of Investigation in response to an order under this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures adopted pursuant to subsection (g). No otherwise privileged information acquired from tangible things received by the Federal Bureau of Investigation in accordance with the provisions of this subchapter shall lose its privileged character. No information acquired from tangible things received by the Federal Bureau of Investigation in response to an order under this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

4. 15 U.S.C. 6501 provides in relevant part:

(8) Personal information
The term “personal information” means individually identifiable information about an individual collected online, including—

(A) a first and last name;
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(B) a home or other physical address including street name and name of a city or town;
(C) an e-mail address;
(D) a telephone number;
(E) a Social Security number;

* * * * *

5. 18 U.S.C. 2725(3) provides:

(3) "personal information" means information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.

6. 18 U.S.C. 3127(3) provides:

(3) the term "pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business * * *
7. 18 U.S.C. 3127(4) provides:

(4) the term “trap and trace device” means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication ***

8. 28 U.S.C. 1651 provides:

Writs
(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

9. 47 U.S.C. 222(h) provides in relevant part:

Privacy of customer information

(h) Definitions
As used in this section:

(1) Customer proprietary network information

The term “customer proprietary network information” means—

(A) information that relates to the quantity, technical configuration, type, destination,
location, and amount of use of a telecommunications service subscribed to by any
customer of a telecommunications carrier, and
that is made available to the carrier by the
customer solely by virtue of the carrier-customer
relationship; and

(B) information contained in the bills
pertaining to telephone exchange service or
telephone toll service received by a customer of a
carrier;

except that such term does not include subscriber list
information.

* * * * *

10. 50 U.S.C. 1803 provides in relevant part:

Designation of judges

(a) Court to hear applications and grant orders;
record of denial; transmittal to court of review

(1) The Chief Justice of the United States shall
publicly designate 11 district court judges from at
least seven of the United States judicial circuits of
whom no fewer than 3 shall reside within 20 miles of
the District of Columbia who shall constitute a court
which shall have jurisdiction to hear applications for
and grant orders approving electronic surveillance
anywhere within the United States under the
procedures set forth in this chapter, except that no
judge designated under this subsection (except when
sitting en banc under paragraph (2)) shall hear the
same application for electronic surveillance under
this chapter which has been denied previously by
another judge designated under this subsection. If
any judge so designated denies an application for an
order authorizing electronic surveillance under this
chapter, such judge shall provide immediately for the record a written statement of each reason of his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b) of this section.

(2)

(A) The court established under this subsection may, on its own initiative, or upon the request of the Government in any proceeding or a party under section 1861 (f) of this title or paragraph (4) or (5) of section 1881a (h) of this title, hold a hearing or rehearing, en banc, when ordered by a majority of the judges that constitute such court upon a determination that—

(i) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(ii) the proceeding involves a question of exceptional importance.

(B) Any authority granted by this chapter to a judge of the court established under this subsection may be exercised by the court en banc. When exercising such authority, the court en banc shall comply with any requirements of this chapter on the exercise of such authority.

(C) For purposes of this paragraph, the court en banc shall consist of all judges who constitute the court established under this subsection.

(b) Court of review; record, transmittal to Supreme Court

The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall
comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

11. 50 U.S.C. 1841 provides:

Definitions

As used in this subchapter:

(1) The terms "foreign power", "agent of a foreign power", "international terrorism", "foreign intelligence information", "Attorney General", "United States person", "United States", "person", and "State" shall have the same meanings as in section 1801 of this title.

(2) The terms "pen register" and "trap and trace device" have the meanings given such terms in section 3127 of title 18.

(3) The term "aggrieved person" means any person—

(A) whose telephone line was subject to the installation or use of a pen register or trap and trace device authorized by this subchapter; or

(B) whose communication instrument or device was subject to the use of a pen register or trap and trace device authorized by this subchapter to capture incoming electronic or other communications impulses.
12. 50 U.S.C. 1842 provides:

Pen registers and trap and trace devices for foreign intelligence and international terrorism investigations

(a) Application for authorization or approval

(1) Notwithstanding any other provision of law, the Attorney General or a designated attorney for the Government may make an application for an order or an extension of an order authorizing or approving the installation and use of a pen register or trap and trace device for any investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution which is being conducted by the Federal Bureau of Investigation under such guidelines as the Attorney General approves pursuant to Executive Order No. 12333, or a successor order.

(2) The authority under paragraph (1) is in addition to the authority under subchapter I of this chapter to conduct the electronic surveillance referred to in that paragraph.

(b) Form of application; recipient

Each application under this section shall be in writing under oath or affirmation to—

(1) a judge of the court established by section 1803 (a) of this title; or

(2) a United States Magistrate Judge under chapter 43 of title 28 who is publicly designated by
the Chief Justice of the United States to have the power to hear applications for and grant orders approving the installation and use of a pen register or trap and trace device on behalf of a judge of that court.

(c) **Executive approval; contents of application**

Each application under this section shall require the approval of the Attorney General, or a designated attorney for the Government, and shall include—

(1) the identity of the Federal officer seeking to use the pen register or trap and trace device covered by the application; and

(2) a certification by the applicant that the information likely to be obtained is foreign intelligence information not concerning a United States person or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(d) **Ex parte judicial order of approval**

(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the installation and use of a pen register or trap and trace device if the judge finds that the application satisfies the requirements of this section.

(2) An order issued under this section—

(A) shall specify—

   (i) the identity, if known, of the person who is the subject of the investigation;
(ii) the identity, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied; and

(iii) the attributes of the communications to which the order applies, such as the number or other identifier, and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied and, in the case of a trap and trace device, the geographic limits of the trap and trace order;

(B) shall direct that—

(i) upon request of the applicant, the provider of a wire or electronic communication service, landlord, custodian, or other person shall furnish any information, facilities, or technical assistance necessary to accomplish the installation and operation of the pen register or trap and trace device in such a manner as will protect its secrecy and produce a minimum amount of interference with the services that such provider, landlord, custodian, or other person is providing the person concerned;

(ii) such provider, landlord, custodian, or other person—

(I) shall not disclose the existence of the investigation or of the pen register or trap and trace device to any person unless or until ordered by the court; and

(II) shall maintain, under security procedures approved by the Attorney
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General and the Director of National Intelligence pursuant to section 1805 (b)(2)(C) of this title, any records concerning the pen register or trap and trace device or the aid furnished; and

(iii) the applicant shall compensate such provider, landlord, custodian, or other person for reasonable expenses incurred by such provider, landlord, custodian, or other person in providing such information, facilities, or technical assistance; and

(C) shall direct that, upon the request of the applicant, the provider of a wire or electronic communication service shall disclose to the Federal officer using the pen register or trap and trace device covered by the order—

(i) in the case of the customer or subscriber using the service covered by the order (for the period specified by the order)—

(I) the name of the customer or subscriber;

(II) the address of the customer or subscriber;

(III) the telephone or instrument number, or other subscriber number or identifier, of the customer or subscriber, including any temporarily assigned network address or associated routing or transmission information;

(IV) the length of the provision of service by such provider to the customer or subscriber and the types of services utilized by the customer or subscriber;
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(V) in the case of a provider of local or long distance telephone service, any local or long distance telephone records of the customer or subscriber;

(VI) if applicable, any records reflecting period of usage (or sessions) by the customer or subscriber; and

(VII) any mechanisms and sources of payment for such service, including the number of any credit card or bank account utilized for payment for such service; and

(ii) if available, with respect to any customer or subscriber of incoming or outgoing communications to or from the service covered by the order—

(I) the name of such customer or subscriber;

(II) the address of such customer or subscriber;

(III) the telephone or instrument number, or other subscriber number or identifier, of such customer or subscriber, including any temporarily assigned network address or associated routing or transmission information; and

(IV) the length of the provision of service by such provider to such customer or subscriber and the types of services utilized by such customer or subscriber.

(e) Time limitation

(1) Except as provided in paragraph (2), an order issued under this section shall authorize the installation and use of a pen register or trap and
trace device for a period not to exceed 90 days. Extensions of such an order may be granted, but only upon an application for an order under this section and upon the judicial finding required by subsection (d) of this section. The period of extension shall be for a period not to exceed 90 days.

(2) In the case of an application under subsection (c) where the applicant has certified that the information likely to be obtained is foreign intelligence information not concerning a United States person, an order, or an extension of an order, under this section may be for a period not to exceed one year.

(f) Cause of action barred

No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance under subsection (d) of this section in accordance with the terms of an order issued under this section.

(g) Furnishing of results

Unless otherwise ordered by the judge, the results of a pen register or trap and trace device shall be furnished at reasonable intervals during regular business hours for the duration of the order to the authorized Government official or officials.

13. The Judiciary Act of 1789 provides in relevant part:

Sec. 21: And be it further enacted, That from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute
exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district. Provided nevertheless, That all such appeals from final decrees as aforesaid, from the district court of Maine, shall be made to the circuit court, next to be holden after each appeal in the district of Massachusetts.

Sec. 22: And be it further enacted, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be reexamined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court, the adverse party having at least twenty days’ notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days’ notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or
such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, feme covert, non compos mentis, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

* * * * *

Sec. 25: And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or
chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

14. 47 C.F.R. § 64.2003 provides in relevant part:

§ 64.2003 Definitions.

(d) Call detail information. Any information that pertains to the transmission of specific telephone calls, including, for outbound calls, the number called, and the time, location, or duration of any call and, for inbound calls, the number from which the call was placed, and the time, location, or duration of any call.

73 Fed. Reg. 45,325 (2008), provides in relevant parts:

§ 1.1 Goals

(b) The United States Government has a solemn obligation, and shall continue in the conduct of intelligence activities under this order, to protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law.

§ 1.7 Intelligence Community Elements

(c) THE NATIONAL SECURITY AGENCY. The Director of the National Security Agency shall:

(1) Collect (including through clandestine means), process, analyze, produce, and disseminate signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions;

§ 2.3 Collection of Information

(b) Information constituting foreign intelligence or counterintelligence, including such information concerning corporations or other commercial organizations. Collection within the United States of foreign intelligence not otherwise obtainable shall be undertaken by the Federal Bureau of Investigation (FBI) or, when significant foreign intelligence is sought, by other authorized elements of the Intelligence Community, provided that no foreign intelligence collection by such elements may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons;
§ 2.4 Collection Techniques
Elements of the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad. Elements of the Intelligence Community are not authorized to use such techniques as electronic surveillance, unconsented physical searches, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the Intelligence Community element concerned or the head of a department containing such element and approved by the Attorney General, after consultation with the Director. Such procedures shall protect constitutional and other legal rights and limit use of such information to lawful governmental purposes.

16. Foreign Intelligence Surveillance Ct. R.33(a) provides in relevant part:

**Petition Challenging Production or Nondisclosure Order.**

(a) **Who May File.** The recipient of a production order or nondisclosure order under 50 U.S.C. § 1861 ("petitioner") may file a petition challenging the order pursuant to 50 U.S.C. § 1861(f). A petition may be filed by the petitioner's counsel.

17. Foreign Intelligence Surveillance Ct. R.46 provides:

**Initial Hearing En Banc on Request of a Party.** The government in any proceeding, or a party in a
proceeding under 50 U.S.C. § 1861(f) or 50 U.S.C. § 1881a(h)(4)-(5), may request that the matter be entertained from the outset by the full Court. However, initial hearings en banc are extraordinary and will be ordered only when a majority of the Judges determines that a matter is of such immediate and extraordinary importance that initial consideration by the en banc Court is necessary, and en banc review is feasible in light of applicable time constraints on Court action.

18. Sup. Ct. R. 20.1 provides in relevant part:

Procedure On A Petition For An Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.
Panel III:

Do We Need A New AUMF?

Moderator:
Charles J. Dunlap, Jr.
Jihadist Terrorism: A Threat Assessment

September 2013
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Executive Summary

Today the United States faces a different terrorist threat than it did on 9/11 or even three years ago when the Bipartisan Policy Center’s Homeland Security Project last published its threat assessment.

Al-Qaeda’s core in Pakistan exerts less control over its affiliated groups and the CIA’s campaign of drone strikes in Pakistan has decimated the group’s leadership. Al-Qaeda affiliates in Yemen and Somalia have also suffered significant losses as a result of U.S. and allied countries’ counterterrorism operations over the past three years. As a result, many counterterrorism officials believe the chances of a large-scale, catastrophic terrorist attack by al-Qaeda or an al-Qaeda-affiliated or -inspired organization occurring in the United States are small.

At the same time, however, al-Qaeda and allied groups today are situated in more places than on September 11, 2001. They maintain a presence in some 16 different theatres of operation—compared with half as many as recently as five years ago. Although some of these operational environments are less amenable than others (South Asia, Southeast Asia), a few have been the sites of revival and resuscitation (Iraq and North Africa) or of expansion (Mauritania, Mali, Niger, Nigeria, and Syria).

In recent years, the threat from al-Qaeda and these allied groups has been confined to attacks on U.S. diplomatic facilities and Western economic interests abroad, as shown by the incident in Benghazi, Libya, on the 11th anniversary of 9/11 and by the attack on the In Amenas gas facility in Algeria earlier this year. However, no al-Qaeda threat has ever remained completely localized, and it has always assumed some regional or even international dimension, as underlined most recently by the threat emanating from al-Qaeda in the Arabian Peninsula that led to the unprecedented closure of 22 U.S. diplomatic facilities in 17 countries in the Middle East, Africa, and South Asia in July.

At home, the threat from jihadist violence has shifted away from plots directly connected to foreign groups to plots by individuals who are merely inspired by them. Though the potential for these individuals to conduct mass-casualty attacks is limited, the Boston Marathon bombings in April served as a reminder that the United States still faces a terrorism threat from disaffected individuals influenced by al-Qaeda’s ideology. It demonstrated that even though core al-Qaeda may be in decline, “al-Qaeda-ism,” the movement’s ideology, continues to resonate and attract new adherents.

Finally, the Middle East is experiencing a level of instability unknown in recent years. The civil war in Syria may provide al-Qaeda with a chance to regroup, train, and plan operations, much as the U.S. invasion of Iraq revitalized the network and gave it new relevance. Returning foreign fighters from the war in Syria may destabilize the region, or they might try to conduct attacks in the West. Sunni-Shia tensions are rising across the region, and the military overthrow of the Morsi government in Egypt may increase support among some disillusioned Islamists for al-Qaeda’s ideological rejection of democracy. Any of these factors might raise the level of threat from groups aligned with al-Qaeda.

A dozen years ago the enemy was clear and plainly in sight. It was a large terrorist organization, situated mostly in one geographic location, and led by an identifiable leader. Today, the borders between domestic and international terrorism have blurred, and the United States’ adversaries are not only organizations, but also individuals. The United States therefore needs to develop defenses against a more amorphous, diffuse threat posed by radicalized individuals while continuing to destroy and disrupt al-Qaeda and its associated groups, and the ideology that fuels and sustains them.

It is too soon to predict the long-term threat posed by al-Qaeda and allied groups as the movement is undergoing a transition that may end up proving to be its last gasp; but the right set of circumstances in the unstable Middle East could also revive the network.
Recommendations

I. For the Legislative Branch

1. Congress should overhaul its oversight committees on national security. The responsibilities of the different committees should be clearly defined and—to the extent possible—not overlap.

2. Congress should hold a series of public hearings on where the United States stand in its counterterrorism strategy 12 years after the 9/11 attacks.

3. Congress should use the withdrawal of combat troops from Afghanistan at the end of 2014 as an opportunity to review the Authorization for the Use of Military Force (AUMF).

4. Congress should put the CIA drone program on a more sound legal footing.

5. Congress should create an independent investigative body—similar to the National Transportation Safety Board (NTSB) —to investigate terrorist attacks in the United States, explain how the attackers evaded law enforcement, and identify the lessons to be learned.

II. For the Administration

1. The administration should repatriate some of the prisoners still being held at the Guantanamo Bay detention facility and should continue to use civilian courts to try terrorists.

2. The administration should create an Assistant Secretary for Countering Violent Extremism at the Department of Homeland Security.

3. The government should incorporate lessons learned from the Boston bombings into its current emergency-response plan to ensure a more measured reaction to tragic but small-scale terrorist attacks.

4. The U.S. government should make a concerted effort to track the flow of arms into Syria and urge U.S. allies to keep these weapons out of the hands of jihadist fighters to the extent possible. The United States should also keep careful track of the foreign fighters who have joined jihadist groups fighting in Syria.

5. The United States should maintain a military presence in Afghanistan after the NATO combat mission ends in December 2014.

6. The government should release additional Osama bin Laden documents captured at his Abbottabad compound.
Chapter 1: Overall Assessment

In the 37 months between August 1998 and September 2001, al-Qaeda launched a significant attack on the United States three times: first simultaneously bombing U.S. embassies in Kenya and Tanzania in August 1998, then bombing the USS Cole in October 2000 while it was anchored off the coast of Yemen, and finally attacking the World Trade Center and the Pentagon on September 11, 2001.

Since then, al-Qaeda is zero for 12 in the United States. It has been 12 years since 9/11 and there have been no major attacks on American targets. To be sure, the United States has suffered some tragic terrorist attacks—including the shootings by Major Nidal Malik Hasan at Fort Hood, Texas, in 2009; the attack on U.S. government facilities in Benghazi, Libya, in 2012; and the Boston Marathon bombings in 2013—but these do not represent a strategic attack by al-Qaeda or an affiliated group. They are tragedies but not catastrophes.

However, the fact that al-Qaeda and allied organizations have continued to attempt significant attacks in the United States, such as the 2009 plot to stage simultaneous suicide attacks on the New York City subway and the 2010 attempt by an individual linked to the Pakistani Taliban, a close al-Qaeda ally, to bomb Times Square, suggests that regardless of how weakened the core organization is, it remains determined to marshal what few resources it has, or to enlist its associates in its stead, to continue to try to attack the United States.

Since 2002, al-Qaeda has embraced a strategy that transformed it into a decentralized, networked, transnational movement, rather than the single monolithic entity it was on the eve of 9/11. This strategy was undoubtedly the result of necessity; U.S. counterterrorism efforts in the wake of the 9/11 attacks largely obliterated al-Qaeda as an organization. But it has allowed al-Qaeda to persist, and it now poses a threat that is more amorphous and difficult to pinpoint than it was in the early 2000s. Core al-Qaeda has been decimated by drone strikes and arrests in Pakistan, but continues to find some sanctuary in the country’s ungoverned tribal regions, and is potentially ready to move back into Afghanistan, should that country experience significant instability after NATO combat troops withdraw at the end of 2014.

CIA drone strikes have killed 33 al-Qaeda leaders or senior operatives in Pakistan since 2008. As a result, there are only around four al-Qaeda leaders in Pakistan today. The group’s overall leader, Ayman al-Zawahiri, has proved to be more capable than some analysts initially thought, officially bringing Somalia’s al-Shabaab group and Syria’s Jabhat al-Nusra organization into al-Qaeda’s fold. Zawahiri also had no problem transferring already existing al-Qaeda affiliates’ allegiances from Osama bin Laden to himself. In the three months following bin Laden’s death in May 2011, the leaders of al-Qaeda in Iraq (AQI), al-Qaeda in the Arabian Peninsula (AQAP), and al-Qaeda in the Islamic Maghreb (AQIM) all pledged their allegiance to Zawahiri as their new overall commander.

Bin Laden thus created a network that, despite more than a decade of withering onslaught, continues to demonstrate its ability to:

- preserve a compelling brand and message that still finds an audience and adherents in disparate parts of the globe, however modest that audience may be;
- pursue a strategy that continues to inform the movement’s operations and activities.

Al-Qaeda’s strategy today consists of two elements: increasingly encouraging “lone wolf” attacks in the West, and trying to take advantage of the recent revolutions and social upheaval in those Arab, North African, and West African countries where the network continues to operate.
This strategy is far cry from al-Qaeda's pre-9/11 strategy of inflicting massive well-organized attacks on the United States that were designed to push the U.S. out of the Muslim world. That strategy failed completely. After 9/11, the United States became more involved in the Muslim world than at any time in its history, occupying not only Afghanistan but also Iraq for many years; conducting multiple military operations in Yemen, Pakistan, Somalia, and the Philippines; and ramping up massive U.S. bases in Kuwait, Bahrain, and Qatar. September 11, in fact, resembled Pearl Harbor. Just as the Japanese scored a tremendous tactical victory on December 7, 1941, they also set in motion a chain of events that led to the eventual collapse of imperial Japan. So, too, the 9/11 attacks set in motion a chain of events that would lead to the destruction of much of al-Qaeda and, eventually, the death of its leader. Al-Qaeda ("the base" in Arabic) lost the best base it ever had in the pre 9/11-Afghanistan, a country where it once had free rein to train many thousands of fighters. Since then, the group has never been able to find a safe haven remotely as congenial for training its fighters.

The Boston Marathon bombings illustrate the threat posed by al-Qaeda-inspired individuals who radicalize in the online world and act as "lone wolves." Although difficult to detect, these individuals are unlikely to be capable of perpetrating anything on the scale of 9/11. Whether the Boston bombings are something of an outlier or a harbinger of things to come remains unclear. These "lone wolves" also demonstrate the difficulty of detecting would-be terrorists when plotters have few, if any, connections to known terrorist groups, are generally not known to have previously engaged in criminal activity—and when the type of information stowl-pipping and lack of inter-agency and federal-state-local coordination identified by the 9/11 Commission report still persists.

It is also not clear that the United States is any better at identifying the radicalization process or halting that process before individuals can be recruited and dispatched abroad for further indoctrination and training than it was in 2008, when groups of Somali American men from Minneapolis began traveling to Somalia to join al-Shabaab. And the fact that no federal agency "owns" the counter-radicalization portfolio means that if no one is directly responsible, few effective or coordinated actions are likely to be achieved.

The unrest that swept the Arab world in the wake of the Arab Spring provided extremist groups with more room to operate and injected large amounts of arms into the region.* Taking advantage of these circumstances, Al-Qaeda affiliates substantially gained significant footholds in Libya, Mali, Syria, and Yemen. Prison breaks across the region, including two major prison breaks in Pakistan and Iraq during July 2013, have also enabled al-Qaeda-assOCIated groups to regenerate some of their strength.† However, to date, jihadist violence in the Middle East has focused on domestic targets. And in countries such as Mali and Yemen, jihadist militants have overplayed their hands and have suffered real reverses in the past year or so. (We use the term "jihadist" in this paper because that is how these militants describe themselves).

The attacks on U.S. government facilities in Benghazi, Libya, in September 2012 and on the BP oil facility at In Amenas, Algeria, at the beginning of this year represent the current state of jihadist anti-Western capabilities abroad. The extent to which a shift to "far enemy" targets in the West might occur—as al-Qaeda shifted its focus during the late-1990s—will depend on the outcome of the Syrian civil war and the fortunes of al-Qaeda's affiliate there, Jabhat al-Nusra; the trajectory of al-Qaeda-aligned groups in other countries in the Middle East and Africa; and the impact of

*Al-Qaeda-affiliated groups currently have 16 different areas of operation around the world: Afghanistan, Algeria, Indonesia, Iraq, Lebanon, Libya, Mali, Mauritania, Nigeria, Pakistan, the Philippines, Somalia, Sudan, Syria, Tunisia, and Yemen. In 2008, the movement was active in just eight of these areas: Afghanistan, Indonesia, Iraq, Lebanon, Nigeria, Pakistan, the Philippines, and Somalia.
It is too soon to predict the long-term threat posed by al-Qaeda and allied groups as the movement is undergoing a transition that may end up proving to be its last gasp; but the right set of circumstances in the unstable Middle East could also revive the network.

However, encoded in the DNA of apocalyptic jihadist groups such as al-Qaeda and its affiliates are the seeds of their own long-term destruction: their victims are often Muslim civilians; they don't offer any real political or economic ideas to solve the problems of much of the Muslim world (but rather offer the prospect of Taliban-style regimes from Morocco to Indonesia); they don't implement practical local programs to make people's lives better (although recent developments in Syria suggest that the movement has deliberately changed its strategy in this respect); they keep expanding their list of enemies, including any Muslim who doesn't precisely share their worldview; and they seem incapable of becoming politically successful movements, because their ideology prevents them from making the real-world compromises that would allow them to engage in genuine politics.

These weaknesses are an impediment to al-Qaeda becoming any kind of political movement, but not continuing as a terrorist organization. Indeed, al-Qaeda would not be the first terrorist group to persist in spite of its many weaknesses. The Baader-Meinhof gang was able to inflict much harm on Germany for many years during the 1970s and 1980s even though it was consistently killing civilians and had virtually no public support.

It is too soon to predict the long-term threat posed by al-Qaeda and allied groups as the movement is undergoing a transition that may end up proving to be its last gasp; but the right set of circumstances in the unstable Middle East could also revive the network.
Chapter 2: The Threat at Home

Trends in “Homegrown” Radicalization

Since 2010, the threat of homegrown jihadist extremism has changed. The total number of extremists who have been indicted has declined from 33 in 2010 to six to date in 2013, domestic terrorist incidents are relatively rare, and the character of the perpetrators has shifted from a mix of plots conducted by groups of extremists or individuals to those entirely conducted by individuals or pairs. Extremists plotting attacks against the United States have shown little, if any, connection to foreign groups, and the network of Somali American men who organized to join al-Shabaab from 2007 onward has been largely dismantled.

The shift to plotting by individuals and pairs who lack ties to foreign groups poses a distinct type of threat—plots and attacks that are more difficult to detect but are also likely to be of a smaller scale. Because of the measures now in place to prevent the acquisition of precursor chemicals and materials suitable for making conventional explosives, homegrown extremists have also struggled to produce effective bombs.

They are also constrained by other systemic checks, including the use of informants by law enforcement and the cooperation of Muslim Americans during investigations. The Boston Marathon bombings, however, demonstrate the potential for these checks to fail when plotters have few, if any connections, to known terrorist groups. Also, should homegrown extremists elect to use firearms instead of bombs in attacks, this could pose a new kind of threat.

As long as al-Qaeda and affiliated entities are denied safe havens in North Africa, the Middle East, and South Asia to train militants for operations in the West, the United States will continue to face largely ineffectual homegrown extremists. But foreign militant groups continue to draw supporters and fighters from the United States who might be persuaded at some point to return to the U.S. to launch future attacks. And the ease with which two American citizens, Najibullah Zazi and Faisal Shahzad, were diverted from their original intentions to fight alongside the Taliban in Afghanistan and trained to carry out attacks in New York City in 2009 and 2010 cannot be ignored.

New groups, in particular Jabhat al-Nusra in Syria and several Uzbek militant groups, have emerged as the recent recipients of various kinds of support from a small number of U.S.-based militants. Militants from European countries have not used the Visa Waiver Program (which allows Europeans to enter the United States without a visa) to conduct an attack, but this possibility remains a perennial possibility, particularly given the growing number of Europeans traveling to join the rebels in Syria.

There is no single ethnic profile for homegrown jihadist extremists. This underscores the challenges that U.S. intelligence and law enforcement agencies face in effectively identifying threats. According to a count by the New America Foundation, of the 221 homegrown extremists who have been indicted or convicted since 9/11 or who have been killed by U.S. law enforcement or in an overseas conflict, 22 percent are of Middle Eastern or North African descent, 18 percent are of South Asian descent, 17 percent are of East African descent, 10 percent are African American, 10 percent are Caucasian, 9 percent are of Hispanic or Caribbean descent, and 3 percent are of Central Asian or Caucasian descent. A further 13 percent are of a mixed or unknown descent. The one identity they almost all share is that they are male. Only eight women have been indicted for a jihadist terrorist crime since 9/11.

(The New America Foundation dataset of homegrown jihadist extremists seeks to include all American citizens and residents indicted or convicted for crimes who were inspired by or associated with al-Qaeda and its affiliated groups, as well as those citizens and residents who were killed before they could be indicted but have been widely...
Homegrown Jihadist Ethnicity 2001-2013

The United States also faces a threat from homegrown violent extremists motivated by ideologies other than jihadism. According to data collected by the New America Foundation, since 2001, 29 people have been killed in politically motivated attacks by right-wing extremists in the United States, while 20 have been killed by jihadist militants. However, the focus of this report is on the threat posed by al-Qaeda and extremists influenced by jihadist ideology.

Number of Plots and Incidents Falling

The number of jihadist extremists indicted in the United States has declined over the past few years, according to New America Foundation data. As of July 2013, 44 people were indicted between 2011 and 2013 for connections to jihadist terrorism.

In addition to those indicted, several extremists were killed before an indictment could be handed down. These include four men—Mohamoud Hassan, Jamal Sheik Bana, Burhan Hassan, and Troy Matthew Kastigar—who traveled to fight in Somalia and died there prior to 2011; Anwar al-Awlaki, who was killed in a U.S. drone strike in Yemen in 2011; and Tamerlan Tsarnaev, who was killed in April 2013 during a police chase following the Boston Marathon bombings.

According to the New America Foundation data, the number of individuals indicted for plotting attacks within the United States—as opposed to being indicted for traveling to join a terrorist group or sending money abroad to a terrorist group—also declined from 12 in 2011 to only three in 2013.

Indictments per year, however, are not a perfect measure of the threat. Charges can vary from state to state, depending on decisions regarding about what and who to prosecute. Additionally, the year in which an indictment is handed down is not necessarily the most relevant year in

- African-American
- Central Asian / Caucasus Descent
- Hispanic/Caribbean Descent
- Mixed/Other/Unknown
- Caucasian
- East African
- Middle East/North African
- South Asian

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reported to have worked with or been inspired by al-Qaeda and its affiliated groups. The dataset does not include extremists tied to violent Islamist groups that do not target the United States as part of al-Qaeda’s war, for example Hamas and Hezbollah, nor does it include individuals who were acquitted or charged with lesser crimes, for example immigration violations, that cannot be shown to involve some kind of terrorism-related crime. The original dataset was a collaboration between the New America Foundation’s National Security Program and Syracuse University’s Maxwell School of Citizenship and Public Affairs, and underwent a full review and update by the New America Foundation in 2013.)
an extremist's activity. Despite these flaws, the declining numbers of indictments provide reason to believe the overall threat from domestic jihadist extremists may be decreasing.

While the number of terrorism-related indictments fell between 2009 and 2013, the number of terrorist incidents has stayed about the same—about one per year—though not all of them have been lethal. In June 2009, Abdulhakim Mujahid Muhammed killed a soldier outside a recruiting station in Little Rock, Arkansas. Five months later, Major Nidal Malik Hasan shot and killed 13 people at Fort Hood in Killeen, Texas. Faisal Shahzad’s 2010 attempt to bomb Times Square was foiled when his bomb did not ignite properly. Since then, individuals have been indicted in relation to two incidents, of which only one, the Boston Marathon bombings, was lethal.

The incidents carried out by homegrown extremists continue to be limited in their lethality, and major operations such as the 9/11 attacks are well beyond the skills of even the most capable domestic extremists. It is a problem, then, that the response such incidents provoke from the government is often disproportionate to the threat they pose to the public. The Boston Marathon bombings, for example, an undeniably tragic but comparatively modest terrorist incident, closed down not only the Boston suburb where the Tsarnaev brothers were believed to have fled, but the entire Boston metropolitan area and Logan International Airport. The lesson to future adversaries is that even a handful of deaths can elicit a large response.

Additionally, no homegrown jihadist extremist in the United States is known to have acquired or used chemical, biological, radiological, or nuclear (CBRN) weapons since the 9/11 attacks. This point bears repeating as there has been considerable overheated commentary on this subject over the past decade: of the 221 individual cases of jihadist extremism since 9/11, not one case involved an allegation of CBRN acquisition, manufacture, or use.
However, the fact that jihadist extremists in the United States have shown no interest in CBRN weapons does not eliminate the need for securing potential sources of chemical, biological, and radiological agents. According to a count by the New America Foundation, since 2001, 13 extremists motivated by right-wing ideologies, one left-wing militant, and two individuals with idiosyncratic motives have deployed, acquired, or tried to acquire chemical, biological, or radiological weapons. For example, William Kran and Judith Bruey, two anti-government extremists, possessed precursor chemicals for hydrogen cyanide gas, which they discussed deploying through a building’s ventilation system.10 They were arrested in 2003.

Reduced Ties to Foreign Groups, Increased Role of Individuals

Since 2010, the threat from homegrown extremists has trended away from association with any kind of organized group. Recent attack plots do not show signs of direction from foreign terrorist organizations, but instead are conducted by persons influenced by the ideology of violent jihad. None of the 21 homegrown extremists known to have been involved in plots against the United States between 2011 and 2013 received training abroad. Of these extremists, only Tamerlan Tsarnaev is known to have had contact with foreign militant operatives, but it remains unclear to what extent this contact played a role in his attack.

This lack of coordination between domestic extremists and overseas groups is likely the result of two factors. First, the ability of terrorist organizations to coordinate with extremists in the United States has been reduced by policing efforts inside the country and counterterrorism operations abroad. Second, Internet use among jihadist extremists enables them to come into contact with extremist communities abroad and be radicalized without face-to-face meetings. Of the 45 homegrown extremists who were indicted, convicted or killed between 2011 and 2013, 18 are known to have communicated with other extremists over the Internet or posted materials related to their radicalization online.

One factor in the radicalization of homegrown extremists in the United States is Anwar al-Awlaki’s propaganda. Because of Awlaki’s fluency in English and his talent for mixing religious theory with contemporary issues, he produced propaganda that has resonated powerfully for some. At least 31 homegrown extremists have cited or possessed Awlaki’s teachings and propaganda, according to a count by the New America Foundation. Awlaki is known to have directly communicated with four U.S.-based militants including Major Hasan. Even after Awlaki’s death in a 2011 U.S. drone strike in Yemen, his influence lives on. Alleged Boston bomber Dzhokhar Tsarnaev was in possession of some of his writings.

In addition to lacking direction from abroad, the 2011 to 2013 attack plots were carried out by individuals and pairs, rather than by groups of militants. Thirteen of the 21 extremists involved in U.S. attack plots acted individually. And only four pairs of plotters were involved in domestic plots: Ahmed Ferhane and Mohamed Mamdouh, who plotted to bomb a Manhattan synagogue in May 2011; Khalid Abdul-Latif and Wali Mujahidh, who planned to attack a Military Entrance Processing Center in Seattle in June 2011; Raeez and Shehreyar Qazi, who were arrested in 2012 for a plot to conduct an attack in New York City; and Tamerlan and Dzhokhar Tsarnaev, the perpetrators of the April 2013 Boston Marathon bombing.

Systemic Checks: Informants, Community Watchfulness, and Reports of Suspicious Activity

The threat from homegrown extremists to the U.S. homeland has been constrained in recent years by a variety of security measures. According to data collected by the
New America Foundation, family members of extremists and members of the wider Muslim American community provided useful information in the investigations of about a third of the homegrown jihadist extremists indicted or killed since 9/11. Non-community members provided useful reports of suspicious activity in another 9 percent of homegrown extremist cases, while almost half of all homegrown extremists were monitored by an informant or undercover agent. Only two plots in the past three years escaped all the systemic checks that are now in place: Yonathan Melaku's non-lethal drive-by shooting of military facilities in Northern Virginia in 2011 and the 2013 Boston Marathon bombings.

**The Boston Marathon Bombers: Lone Wolves?**

A key question concerning the Boston Marathon bombings is whether or not the Tsarnaevs are part of the trend in which plots are no longer directed by or connected to a foreign group. In January 2012, Tamerlan Tsarnaev traveled to Dagestan, Russia, and stayed there for six months. According to family members, he spent a month with them in the Dagestani capital, but did not travel to the mountains where rebel groups operate. Following the Boston attack, the Mujahideen of the Caucasus Emirate—the largest Islamist militant group in the country—denied any involvement with or connection to Tsarnaev. Friends and family have also argued that he became religious well before traveling to Dagestan.

Tsarnaev was also not widely accepted by others in Dagestan. He did, however, meet with Makhmud Nidal, a member of a rebel group, and according to an informant, they discussed ways he could aid Nidal's group. Nidal was later killed by Russian police, and the Russian government has alleged that he was also in contact with William Plotnikov, a Canadian citizen who traveled to Dagestan to fight.

Another question is how the Tsarnaevs were able to successfully construct their bombs made from pressure cookers. Authorities believe the Tsarnaevs built their bombs in and near Tamerlan's apartment using designs from AQAP's English-language magazine, *Inspire*. Prior to the Boston Marathon bombings, homegrown jihadists in the United States had shown little success at producing explosives. Indeed, Joseph Jeffrey Brice almost killed himself in April 2010 when a homemade bomb he was constructing exploded prematurely. A month later, Faisal Shahzad's car bomb failed to explode in Times Square, even though he had received explosives training in Pakistan. And the same bomb-making instructions used by the Tsarnaevs failed in 2010 when Taimour Abdulwahab, a jihadist extremist in Stockholm, built a pressure cooker bomb that didn't detonate.

If the Tsarnaevs built the bombs without guidance from jihadists abroad, it suggests that the difficulties earlier jihadists have had building explosives may have been overcome. On the other hand, the 'Tsarnaevs' success could just as easily have been a fluke.

A final question is: how were the Tsarnaevs able to avoid tipping off local and federal intelligence and law enforcement agencies, either through contact with an informant or from tips by the community? Russian officials had flagged Tamerlan Tsarnaev as a potential threat in 2011, though whether the quality of their evidence was sufficient to justify actions other than those taken is unclear. The FBI opened an investigation into Tamerlan, but closed it when they found no evidence of criminal or terrorist activity. Boston's Police Commissioner Edward Davis told the House Horrelend Security Committee at the first congressional hearing on the bombings, on May 9, 2013, that the Boston Police Department did not receive information regarding the Russian tip. In a statement later that same day, the FBI noted that several Boston police officers were part of the squad that investigated Tamerlan
in 2011, and they also had access to the Joint Terrorism Task Force database that included information on him.\textsuperscript{23} The statement also acknowledged, though, that the Boston Joint Terrorism Task Force (JTTF) conducted about 1,000 assessments in 2011, making it impossible for every officer to give each case close attention. The lack of a direct mechanism to share terrorism-related information between law enforcement agencies, along with the sheer amount of data that a JTTF in a major city has to sort through, are two issues that should be addressed in light of these attacks.

Additionally, while friends and family have declared their surprise at Tamerlan's violence, he now appears to be a suspect in a grisly 2011 triple murder in Waltham, Massachusetts.\textsuperscript{24} Tamerlan was also isolated by the local Muslim community after he accused an imam of being a "nonbeliever" for making some kind of comparison between Martin Luther King Jr. and the Prophet Muhammad.\textsuperscript{25}

Looking forward, a concern about the Boston Marathon bombings is whether or not it represents an intelligence failure that could have been avoided through a better implementation of existing policies, or a new trend where "lone wolf" extremism is largely undetectable with the existing systemic checks in place.

**U.S. Military Targets are Attractive for Jihadist Terrorists**

On November 5, 2009, Major Nidal Malik Hasan opened fire on soldiers getting ready to deploy to Iraq and Afghanistan at the Fort Hood Army base in Killeen, Texas, killing 13 people and wounding many others—a reflection of a trend in which homegrown al-Qaeda-inspired terrorists attack U.S. military targets. For those individuals who buy bin Laden's key claim that the United States is at war with Islam, American soldiers who are fighting wars in Muslim countries make compelling targets. Indeed, according to a count by the New America Foundation, 34 percent of all the jihadist extremists who have carried out or plotted attacks inside the United States since 9/11 have targeted the U.S. military.\textsuperscript{26}

Since 2010, the threat from homegrown extremists has trended away from association with any kind of organized group. Recent attack plots do not show signs of direction from foreign terrorist organizations, but instead are conducted by persons influenced by the ideology of violent jihad.

In the wake of the attack, the U.S. military tightened restrictions on who was allowed into Fort Hood, posted more armed guards in strategic locations around the base, and implemented the random searching of containers.\textsuperscript{27} An extensive independent review to find the "lessons from Fort Hood" focused on identifying radicalization within the U.S. armed forces, a phenomenon that poses a particularly grave threat because of soldiers' access to weapons and secure military facilities.\textsuperscript{28} A congressional review also identified some of the procedural problems that led to the military's failure to prevent the attack.\textsuperscript{29}

Following the review, then-Secretary of Defense Robert Gates issued a directive ordering the implementation of 47 recommendations to improve "force protection" at military bases in the United States.\textsuperscript{30} These included giving military personnel better guidance on identifying suspicious or radical behavior by their comrades, establishing better relations between the Pentagon and the FBI's Joint
Terrorism Task Forces, and improving communication mechanisms for sharing real-time crisis information across military commands and installations.

But while establishing methods to identify extremists is a somewhat feasible goal in a regimented, closely monitored system such as the U.S. military, it is not as easy to do in the broader community, particularly when the individuals are “lone wolves” who are not part of a formal terrorist group.

Two attacks on soldiers living in the West in 2013 fit this particular category. On May 22, 2013, two men rammed a car into British soldier Lee Rigby as he was walking down a street in suburban London. They then hacked at him with a meat cleaver and left his body in the road while a bystander filmed one of the attackers. In the video, the attacker claims the slaying was justified as “an eye for an eye, a tooth for tooth … because Muslims are dying daily.”

The following weekend, in what might have been a copycat attack, a young Muslim convert, who investigators believe “acted in the name of his religious ideology,” stabbed a 25-year-old French soldier in a Paris suburb. The soldier was likely targeted because French forces have served in Muslim countries, such as Afghanistan and Mali, in recent years. The suspect, identified only as Alexandre D., first came to law enforcement’s attention when he was questioned briefly in 2009, but French intelligence services only reportedly became aware of his increasing radicalization in February of this year.

Although there have been no successful attacks on U.S. military targets since 2009, ten of the 21 jihadist extremists who plotted attacks inside the United States over the past two years were targeting American soldiers or military installations.

The Pentagon’s concerted effort to identify and address the government failures that allowed Major Hasan to carry out his attack make another insider attack on a U.S. military facility significantly less likely than it was four years ago. That said, American soldiers will remain squarely in the crosshairs of those few individuals in the United States who are motivated by al-Qaeda’s ideology, and the attacks in London and Paris demonstrate the difficulty of combating such a decentralized threat.

**Terrorist Support Networks in the United States**

An aspect of the homegrown extremist threat that is worrisome is the continued ability of jihadist groups to mobilize networks in the United States that direct funds and personnel abroad. Twenty-four of the 44 people indicted between 2011 and 2013 were charged not because they were involved in plots against the United States, but because they provided “material support” to terrorist groups overseas or attempted to fight overseas with such groups.

A more positive note, however, is that the U.S.-based network that once provided funds and more than 30 recruits to al-Shabaab in Somalia appears to have been dismantled. Since 2011, only four people have been indicted for traveling to or planning to travel to Somalia to fight for al-Shabaab. Ahmed Hussain Mahmud was indicted in June 2011 for funding the group of Somali Americans who traveled from Minnesota to join al-Shabaab in 2009. In December 2011, Kenyan police apprehended Craig Baxam as he tried to make his way to Somalia, while Mohammad Abukhaidir and Randy Wilson were arrested in Georgia in December 2012 before they were able to travel to East Africa and join militant groups there. In none of these more recent cases did an individual successfully reach Somalia.

Additionally, the men who had previously traveled from the United States to join al-Shabaab have not returned to conduct attacks on U.S. soil. Some died fighting in Somalia, while al-Shabaab is believed to have killed one
individual, Burhan Hassan, rather than allow him to return to the United States. Moreover, a robust Somali American community response identified the men who had traveled to Somalia, making their return without arrest difficult.

In the past year or so, however, Syria has emerged as a destination for a handful of American jihadists. Nicole Mansfield from Flint, Michigan, was killed in Syria earlier this year where she may have joined the Syrian al-Qaeda affiliate, Jabhat al-Nusra.36 Eric Harroun from Arizona was indicted in 2012 for fighting in Syria with Jabhat al-Nusra; while 18-year-old Abdella Ahmad Tounisi from Chicago was arrested in a sting operation in April 2013 after he posted messages to a website purportedly recruiting people to fight in Syria.37,38

Uzbek militant groups have also made inroads in establishing a U.S. support network. In 2012, for example, Jamshid Muhtorov and Bakhtiyor Jamaev were indicted for attempting to provide material support to the Islamic Jihad Union (IJU) after Muhtorov, an Uzbek refugee, established contact with an IJU operative over the Internet.39 Another man, Fazliiddin Kurbanov, was indicted in 2013 on charges of explosives possession and providing material support to the Islamic Movement of Uzbekistan (IMU).40 He is alleged to have provided instruction to unidentified others in bomb-making, and he possessed components for an explosive device, specifically a hollow hand grenade, hobby fuse, aluminum powder, potassium nitrate, and sulfur. In another case, Ulugbek Kodirov, who claimed to be in contact with the IMU, was arrested in July 2011 after attempting to purchase an M-5 rifle from an FBI agent while making threats against President Obama.41

Also, American citizens and residents continue to be indicted for providing support to militant groups in Afghanistan, Pakistan, Yemen, and Iraq. Between 2011 and 2013, two men were indicted for providing support to insurgents in Iraq, one was indicted for attempting to provide support to AQAP, and another nine people were indicted for providing or attempting to provide support to the Taliban and similar groups in Afghanistan and Pakistan, according to a count by the New America Foundation. Lastly, one individual, Mohammad Hassan Khalid, was indicted in connection with the plot by Colleen LaRose, also known as “Jihad Jane,” and others to assassinate Lars Viks, a Swedish cartoonist, somewhere in Europe.42

The continued attempts and successes by foreign militant groups to establish support networks in the United States pose a potential future threat, as individuals sending funds to terrorist groups abroad could conceivably be directed to conduct attacks domestically, while American citizens fighting abroad may return to commit terrorism inside the United States. However, caution is required in predicting such future threats. Individuals willing to join jihadists in a warzone abroad are not necessarily willing to conduct terrorist attacks at home. The support for al-Shabaab amongst a relatively small group of Somali Americans did not, for instance, result in a wave of Somalia-related terrorism in the United States. And foreign conflicts are often deadly, reducing the number of potential returnees to the United States.
Chapter 3: The International Threat

1. Al-Qaeda Central

Threat Assessment

Al-Qaeda hasn’t conducted a successful attack in the West since the bombings on London’s transportation system that killed 52 commuters eight years ago, and it hasn’t carried out an attack in the United States for the past twelve years. However, al-Qaeda does continue to provide strategic guidance to its affiliates and ideological followers, and remains capable of carrying out small-scale operations in Afghanistan and Pakistan.

The killing of dozens of high-level al-Qaeda militants—foremost among them bin Laden in May 2011—has dealt a serious blow to al-Qaeda’s core leadership. Despite concerns that bin Laden’s “martyrdom” would provoke a rash of attacks in the West or against Western interests in the Muslim world, none ever materialized. Meanwhile, CIA drone strikes during President Obama’s tenure alone have killed 33 of al-Qaeda’s leaders in Pakistan, according to a count by the New America Foundation. A month after bin Laden’s death, senior al-Qaeda operative Ilyas Kashmiri was killed in a U.S. drone strike in Pakistan. Two months later, another U.S. drone strike killed Atiyah Abdul Rahman, who had become al-Qaeda’s deputy after Zawahiri assumed bin Laden’s role. In 2012, seven militants identified in reliable media reports as senior al-Qaeda militants were killed in U.S. drone strikes in Pakistan, including Abu Yahya al-Libi, who had replaced Rahman as al-Qaeda’s number two.

As the leaders of al-Qaeda have been forced to focus on survival, their ability to plan and conduct attacks has diminished. Documents recovered at bin Laden’s Abbottabad compound show his deep concern about U.S. drone strikes in Pakistan’s tribal regions. He recognized the devastation the drones were inflicting on his organization, writing a lengthy memo about the issue in October 2010 that advised his men to leave the Pakistani tribal regions where the drone strikes are overwhelmingly concentrated and to head to a remote part of Afghanistan. He also suggested that his son Hamza decamp for the prosperous and safe Persian Gulf kingdom of Qatar. However, the documents additionally indicate that it was not difficult for al-Qaeda fighters to travel from Iran to Pakistan, or between Afghanistan and Pakistan.

We should also note that al-Qaeda is holding one American hostage, Warren Weinstein, a 70-year-old American contractor for USAID, who was kidnapped on August 13, 2011, from his home in Lahore, Pakistan. Pakistani security forces arrested three suspects in the kidnapping less than two weeks after it happened, but little information was released about them. Four months later, Zawahiri released a video message claiming his group was holding Weinstein, saying, “Just as the Americans detain all whom they suspect of links to al-Qaeda and the Taliban, even remotely, we detained this man who is neck-deep in American aid to Pakistan since the ‘70s.” In May 2012, al-Qaeda released a proof-of-life video featuring Weinstein, who made a plea directly to President Obama: “My life is in your hands, Mr. President. If you accept the demands, I live; if you don’t accept the demands, then I die.” Weinstein has not been heard from since.

Control over the al-Qaeda Network

The Abbottabad documents that have been released by the U.S. government reveal telling details of al-Qaeda’s inner workings, including its leaders’ attempts to assert influence over their affiliates. In a letter dated December 3, 2010, an unidentified al-Qaeda leader scolded the Pakistani Taliban for their indiscriminate attacks against civilians, while a letter bin Laden sent around the same time to the leaders of al-Shabaab advised the East African group not announce its merger with al-Qaeda because it would be bad for fundraising and would attract greater attention from the United States and its allies.
These letters show that al-Qaeda's operational control over its affiliated organizations is limited. The Pakistani Taliban continues to kill large numbers of Pakistani civilians and al-Shabaab formally announced its merger with al-Qaeda after bin Laden had died. Further, while some affiliates still look to al-Qaeda for notional leadership and guidance, most of them do not appear to have embraced al-Qaeda's traditional focus on attacking the "far enemy," the United States, choosing instead to wage local power struggles.

The government has only released 17 of the thousands of documents that were found at bin Laden's compound, and any conclusions drawn from them at present are, at best, an incomplete picture of al-Qaeda's intentions and capabilities, as well as bin Laden's role in them.

A recent illustration of the fractured nature of the al-Qaeda network was provided during the spring of 2013 when Zawahiri personally intervened to settle a dispute between Jabhat al-Nusra and al-Qaeda in Iraq (AQI). Zawahiri rejected AQI's assertion of control over al-Nusra and declared the Syrian group to be under his direction. In doing so, Zawahiri was trying to assert control over two of al-Qaeda's most virulent affiliates. AQI had mounted a series of spectacular attacks in Iraq over the past year, demonstrating that it was a force to be reckoned with. According to the Congressional Research Service, there were some dozen days in 2012 in which AQI carried out simultaneous multicity attacks that killed hundreds of Iraqis. And the al-Qaeda affiliate in Syria is widely acknowledged as the most effective fighting force in the war against Bashar al-Assad's regime.

In closing his letter to the two affiliates, Zawahiri appointed a man named Abu Khalid al-Suri to resolve any future disputes that might arise between them. Zawahiri said he made these decisions "after holding consultations with my brothers in Khorosan," an ancient word for the region that today contains Afghanistan, indicating that Zawahiri is able to communicate with, or perhaps even meet with, al-Qaeda leaders along the Afghanistan-Pakistan border. The mere existence of the Zawahiri memo shows that he is able to communicate with al-Qaeda's affiliates in the Middle East. Because of the now well-documented dangers of using any kind of electronic communication system, Zawahiri, like bin Laden before him, is almost certainly using a courier network to hand-deliver his letters.

However, in June 2013, Abu Bakr al-Baghdadi, the leader of AQI, posted an audio recording online rejecting the order from Zawahiri. This shows that AQI is willing to go public to dismiss the directives of AQC's leader, something that would have been unimaginable when bin Laden was in charge. That Zawahiri continues to try to assert his control over al-Qaeda-affiliated groups is not surprising considering that bin Laden did the same thing while he was holed up in the Abbottabad compound. Documents found at the compound show that al-Qaeda's founder was deep in the weeds of key personnel decisions. In a letter to the Yemen-based AQAP, bin Laden was adamant that Awlaki not be made AQAP's new leader. Awlaki never was promoted.

**Future of the Organization**

Since 2008, the CIA drone campaign in Pakistan has devastated the bench of al-Qaeda leaders, as this only partial list of operatives killed demonstrates:

- January 29, 2008: Abu Laith al-Libi, al-Qaeda's then-number three
- September 8, 2008: Abu Haris, al-Qaeda's chief in Pakistan
- October 16, 2008: Khalid Habib, a senior member of al-Qaeda
October 31, 2008: Abu Jihad al-Masri, al-Qaeda’s propaganda chief

November 19, 2008: Abdullah Azzam al-Saudi, a senior member of al-Qaeda

November 22, 2008: Abu Zubair al-Masri, a senior member of al-Qaeda

2009 (exact date unknown): Saad bin Laden, Osama bin Laden’s second-eldest son and a leader of al-Qaeda

January 1, 2009: Osama al-Kini, al-Qaeda’s then-chief of operations in Pakistan

January 1, 2009: Sheikh Ahmed Salim Swedan, al-Kini’s lieutenant who also played a role in the 1998 embassy bombings

December 8, 2009: Saleh al-Somali, al-Qaeda’s external operations chief

May 21, 2010: Mustafa Abu al-Yazid, al-Qaeda’s then-number three

September 26, 2010: Sheikh al-Fateh, an al-Qaeda chief in Afghanistan and Pakistan

June 3, 2011: Ilyas Kashmiri, a senior al-Qaeda commander in Pakistan

August 22, 2011: Atiyah Abd al-Rahman, al-Qaeda’s then-number two September 11, 2011: Abu Hafs al-Shahri, al-Qaeda’s then-chief of operations in Pakistan

February 9, 2012: Badar Mansoor, thought to be al-Qaeda’s most senior leader in Pakistan

June 4, 2012: Abu Yahya al-Libi, al-Qaeda’s then-number two

December 6, 2012: Abdel Rehman al-Hussainan, a senior member of al-Qaeda

July 2, 2013: Abu Saif al-Jafari, a senior al-Qaeda operative

In 2011, the Pakistani intelligence service also arrested Younis al-Mauretani, a senior al-Qaeda leader, in Quetta.61

It is significant that only four notable senior al-Qaeda members are believed to now remain at-large in Pakistan: the emir of the organization, Zawahiri; the Arab American chief of external operations, Adnan Shukrijumah; its chief of internal operations (in Pakistan and Afghanistan), Khalid al-Habib; and longtime senior al-Qaeda commander, Saif al-Adel.

Likely because the bench of al-Qaeda leaders in Pakistan has been so decimated Zawahiri recently appointed to the number two position in al-Qaeda the Yemen-based Nasir al-Wuhayshi who is the founder of al-Qaeda in the Arabian Peninsula and was once bin Laden’s personal secretary.

In the past year, Zawahiri has also brought two new official affiliates into the al-Qaeda network: Somalia’s militant al-Shabaab group and Syria’s Jabhat al-Nusra, which is widely regarded as the most effective force fighting the Assad regime.

Al-Qaeda was founded a quarter century ago in August 1988 in Peshawar, Pakistan. Zawahiri’s success or failure as the head of al-Qaeda will be crucial to how the terror network moves forward as it marks its first 25 years of existence. A 2012 Harvard Kennedy School study of 131 terrorist groups that have gone out of business found that they averaged 14 years of existence. Al-Qaeda has already shown an ability to survive well beyond the life of an average terrorist group. The big question is whether Zawahiri can successfully lead the al-Qaeda network so it can thrive in today’s chaotic conditions in the Middle East.

Though it has been badly battered, al-Qaeda’s demise is neither ordained nor imminent. One can make a reasonable argument that the group has:
a threatened but still standing sanctuary in Pakistan that has the potential to expand across the border into Afghanistan as the U.S. military and coalition forces continue to withdraw from that country;

- a defined and articulated strategy for the future;

- an overall leader in Zawahiri who, over the past year—despite predictions to the contrary—has been able to keep the movement alive and, as outlined above, forge new alliances;

- that said, core al-Qaeda, the once-global organization, seems to be devolving into just another Pakistan-based jihadi group with no ability to carry out operations outside of Pakistan except in neighboring Afghanistan.

**Western Recruitment**

Western members of core al-Qaeda are now relatively rare and appear to be limited to two senior operatives who remain at large; Shukrijumah and Adam Gadahn. But al-Qaeda does cooperate closely with the numerous jihadist militant groups active in the “Af-Pak” region; their Western recruitment efforts are covered in later sections of this report. It is often difficult to parse out exactly which Western militants belong to which group.

The last time a Western-based al-Qaeda member was publicly identified was in May 2011, when coalition and Afghan forces captured a “Germany-based Moroccan al-Qaeda foreign fighter facilitator” in southeast Afghanistan. In the same operation, coalition forces discovered passports and identification cards from France, Pakistan, and Saudi Arabia on ten killed insurgents. The facilitator told the International Security Assistance Force (ISAF) about his travel from Germany and said foreign fighters were “converging” on southern Afghanistan, primarily via Pakistan’s tribal regions, to fight ISAF forces there. At that time, the U.S. military estimated al-Qaeda’s presence in Afghanistan to be no more than 100 fighters at any given time. Most of those fighters were said to be Arabs and Pakistanis.

At least one American, Jude Kenan Mohammad, has been killed by a U.S. drone strike in Pakistan’s tribal areas; though he was not specifically targeted and it is not publicly known when exactly he was killed. In October 2010, German al-Qaeda operative Ahmed Siddiqui was captured in Afghanistan, where he told his American interrogators about a multicity attack plot that was to be carried out in Europe and that had been personally approved by bin Laden. In 2007, two American citizens traveled to Pakistan to join al-Qaeda: Bryant Neal Vinas and Najibullah Zazi, the latter of whom also trained at an al-Qaeda camp in Pakistan in 2008.

As other battlefields have opened up or expanded across the Muslim world, Western-based jihadists have likely been drawn away from the Af-Pak theater.

**Media Activity**

As-Sahab, al-Qaeda’s once-prolific media arm, has seen its influence decline in recent years as affiliates create their own propaganda channels and leading al-Qaeda spokesmen are killed or arrested. According to IntelCenter, a company focused on counterterrorism intelligence, of the senior al-Qaeda leaders who used to produce original content for as-Sahab (“the clouds” in Arabic), Zawahiri is the only one left. Almost all of the second-tier al-Qaeda spokesmen have been killed or arrested, leaving just three other figures—Ahmad Farouq, the Pakistani head of al-Qaeda’s media department; Gadahn, an American-born al-Qaeda spokesman; and Maulana Asam Umar, a militant Pakistani cleric—who can direct al-Qaeda’s message.

The growing influence of Farouq and Umar has also, quite literally, changed the language of al-Qaeda’s messages. In May 2013, for the first time in 13 years, Urdu—the national language of Pakistan—replaced Arabic as the predominant
Al-Qaeda Video Releases

As of August 2013

The focus of al-Qaeda’s videos has also shifted toward Pakistan. Of the 23 videos released by as-Sahab so far in 2013, more than a quarter focus on Pakistan. India is a close second, with 13 percent of the videos referencing the country. Although the United States is only mentioned once, these two trends are indicative of al-Qaeda’s operational focus, they suggest that, over time, the once-global organization may become just another Pakistan-based jihadi group with limited or no ability to operate outside of Pakistan.

As for as-Sahab’s releases, the numbers increased steadily between 2002 and 2007, but have fluctuated dramatically since then. In 2008, there were only 57 videos, a significant decrease from the 97 releases in 2007. In 2009 and 2010, there were 91 and 109 video releases, respectively, but they dropped again in 2011 to 52. While the number of videos increased again in 2012, to 91, there have only been 11 videos thus far in 2013, which could be a further indicator of the growing pressures on core al-Qaeda.

To be sure, as-Sahab is still a sophisticated extremist messaging engine, but much as how CNN, MSNBC, and Fox News compete for viewers in the United States, as-Sahab has to compete with newer media channels produced by AQAP, al Shabaab, the Afghan Taliban, and the Pakistan Taliban. And it is here where the loss of leaders like bin Laden and Libi may be most keenly felt. With fewer on-camera personalities, it is harder for core al-Qaeda to produce the number of videos it did in the mid-2000s, when it released new audio or video messages an average of every three to four days.
Zawahiri has been an extremely prolific media figure, releasing some 35 audio and video statements over the past three years according to a count by the New America Foundation, indicating that wherever he is, Zawahiri is living in relative safety and with easy access to an administrator of al-Qaeda’s media arm, as-Sahab.

2. Al-Qaeda in the Arabian Peninsula

Threat Assessment

Because AQAP remains interested in launching attacks against the West, and its chief bomb-maker, Ibrahim al-Asiri, remains at large, senior American counterterrorism and defense officials, including Director of National Intelligence James Clapper and former Secretary of Defense Leon Panetta, have assessed that al-Qaeda’s affiliate in Yemen poses the greatest immediate threat from a jihadist group to the United States. In testimony before the U.S. Senate Select Committee on Intelligence in January, Clapper said that while AQAP is under attack in Saudi Arabia and Yemen, “the group continues to adjust its tactics, techniques and procedures for targeting the West.”

However, AQAP has not attacked a U.S. target since its October 2010 attempt to plant bombs hidden in printer cartridges on cargo planes destined for the United States. And while the organization gained significant territories in Yemen as it exploited the popular uprising in the country in 2011, it also lost these gains within about a year.

Nonetheless, AQAP presents a lesson of how terrorist groups in the 21st century can become more lethal and shift their focus abroad more quickly than their 20th-century counterparts. It took core al-Qaeda a full decade from its founding to launch its first significant international terrorist attack—the 1998 bombings of U.S. embassies in Kenya and Tanzania. By comparison, it took AQAP less than nine months from its emergence out of the remnants of decimated al-Qaeda cells in Saudi Arabia in 2009 to launch its first transnational attack, the near-miss assassination of the senior Saudi prince responsible for counterterrorism, and less than a year to launch its first attack against the United States, another near-miss, but one that, on Christmas Day 2009, shook American confidence that the terrorist threat to commercial aviation had receded. Had the AQAP suicide terrorist, a young Nigerian man recruited into the group by Awlaki been successful, nearly a decade’s worth of successes in the war on al-Qaeda and its allies could have been reversed in a matter of minutes.

AQAP Activities Since 2009

In the last few years, while core al-Qaeda declined in Pakistan, AQAP strengthened in Yemen. AQAP’s core membership grew from approximately 300 members in 2009 to around 1,000 in 2012, as hundreds of tribesmen joined AQAP in the fight against the U.S.-backed Yemeni government. Then—National Security Council spokesman Tommy Vietor stated in May 2012 that, “while AQAP has grown in strength … many of its supporters are tribal militants or part-time supporters who collaborate with AQAP for self-serving, personal interests rather than affinity with al-Qaeda’s global ideology. The portion of hard-core, committed AQAP members is relatively small.”

In the summer of 2010, AQAP increased its attacks in Yemen, assassinating dozens of Yemeni security officials while simultaneously plotting to place printer cartridges containing explosives on U.S.-bound flights. The packages were intercepted on October 29 while en route to the United States due to a tip from Saudi intelligence. AQAP also launched Inspire magazine in July 2010 and established the Arabic-language al-Madad News Agency in 2011.

In March 2011, when Yemen’s then-President Ali Abdullah Saleh sanctioned the killing of Arab Spring–inspired protesters in the Yemeni capital, Sana’a, his allies turned against him and a substantial portion of his army deserted.
Soldiers in the south, who hadn't been paid in weeks, abandoned their posts, leaving the area open for AQAP to move in. Other troops returned to Sana’a to support the government there. The United States was forced to pull some Special Operations Forces out of Yemen, and counterterrorism training there slowed dramatically.Fighters from Jordan, Saudi Arabia, and Somalia are believed to have joined the insurgency, and in the spring of 2011, AQAP gained control of two Yemeni provinces and increased their presence in ten more.

In a sign that AQAP may have learned from some of the mistakes other al-Qaeda affiliates have made in the past, it has provided some services to Yemeni citizens. It has also, on occasion, operated without using the al-Qaeda name, a brand that even bin Laden understood to be deeply tarnished. For instance, AQAP operates under the name “Ansar al-Sharia” when reaching out to Yemeni locals and aims to demonstrate its adherence to Islamic law. According to Christopher Swift, a Georgetown University researcher who has done field work in Yemen, economic factors, rather than religious extremism, provide AQAP with influence among locals. Insurgents offer local men “the promise of a rifle, a car and a salary of $400 a month—a veritable fortune in a country where nearly half the population lives on less than $2 a day.”

AQAP has also given towns new wells, water, and food in exchange for the tribal elders’ help in recruiting. In areas of the country with the most chaotic security environments, AQAP has used a combination of armed militias to gain control of territory, gifts of money and weapons to prop up local sheikhs, and sharia courts to prosecute criminals and provide some semblance of law and order. “In doing so, the movement exhibits a pragmatic approach that has more in common with the Taliban’s operations in Afghanistan than it does with Osama bin Laden’s globalized, decentralized jihad,” Swift says.

In mid-2011, as the fight between the Yemeni government and armed opposition groups escalated, AQAP moved to seize more territory in southern Yemen, and the Yemeni government launched aggressive counter-assaults. The United States also resumed its campaign of air and drone strikes, which had been halted the previous year. In February 2012, under pressure from the Obama administration, President Saleh signed an agreement to step down. Abd Rabu Mansur Hadi took over as president and subsequently gave the U.S. drone program unfettered access to targets in Yemen.

With the broad permission granted by Yemen’s new president, the United States greatly expanded its drone campaign in 2012 and began to train and equip the Yemeni military to better combat AQAP. Since 2010, U.S. drone strikes in Yemen have killed at least 31 high-level al-Qaeda operatives, including Awlaki and Samir Khan, the AQAP operative believed to have been the driving force behind Inspire magazine.

Awlaki’s death likely reduced the organization’s ability to plan transnational attacks because he was a key operational planner. The group has not attempted an actual attack on the West since the failed 2010 cartridge-bomb plot. (A 2012 AQAP bombing plot was, in actuality, controlled by Saudi intelligence, which had inserted an informer into the group.)

With his native English-speaking ability, Awlaki was also AQAP’s chief recruiter of foreigners, particularly those with Western connections; the group’s foreign recruitment has dried up since his death. However, even in death, his voice continues to resonate with militants in the West. The surviving Boston bombing suspect, for example, admitted to watching Awlaki’s sermons online, though there is no evidence that the Boston bombers ever communicated with him.
On July 17, 2013, AQAP confirmed the death of Said al-Shihri, the group's deputy commander, in a video posted to jihadist websites. Shihri, a Saudi and six-year resident of the U.S. detention facility in Guantanamo Bay, Cuba, had long been reported dead from wounds he received from a drone strike in late 2012. The statement said Shihri had indeed died in a U.S. drone strike and that "lax security measures during his telephone contacts enabled the enemy to identify and kill him," though it did not confirm the date of his death.94

Shihri's death is another blow to the organization, which as of mid-2013 is battered, though not defeated. In the past three years, as outlined above, more than 30 al-Qaeda leaders and other senior operatives in Yemen have been killed by U.S. drone strikes, according to a count by the New America Foundation.95 AQAP's only remaining leaders appear to be its chief bomb-maker, Asiri; AQAP's leader and founder, Nasser al-Wuhayshi; and the man who delivered Shihri's eulogy, Ibrahim al-Rubaish, another former Guantanamo detainee.

In June 2012, AQAP elements withdrew from their southern Yemen strongholds when Yemeni military forces—with the support of local tribesmen and U.S. airstrikes—regained control of cities and towns in Abyan and Shabwah provinces.96 They have since been reduced to carrying out smaller-scale, hit-and-run attacks; nothing close to the massive attack in May 2012, when an AQAP suicide bomber blew himself up at a military parade rehearsal in Sana'a, killing upward of 100 people, mostly soldiers, and injuring more than 200.97

Western Recruitment
AQAP has led global online radicalization efforts and has made Western recruitment to its cause a priority in its propaganda. This "lone wolf" strategy is spearheaded by AQAP's al-Malahem Media Foundation. Written in eloquent English and formatted like a U.S. tabloid, al-Malahem's Inspire magazine incites Western youth to join the jihad and carry out attacks within their own communities. According to the spring 2013 issue of Inspire, "Lone-Jihad is impossible to counter and stop, except when basic cooking ingredients and building material become illegal."98

3. Al-Qaeda in Iraq

Threat Assessment
AQI remains very active in Iraq and has played an important role in the civil war in neighboring Syria. It also appears to have learned from its past: mistakes of alienating the local Sunni population by imposing Taliban-style rule on the population and is now far more integrated in the Iraqi Sunni population, leveraging the Sunni community's legitimate grievances against an increasingly sectarian central government to obtain safe haven and support.99 That said, AQI hasn't attacked an American target outside of Iraq since it launched rockets at a U.S. warship anchored at the Jordanian port city of Aqaba in 2005 and hasn't shown much of an intent or capability to do so since.100

Activities Since 2011
Since the last American troops left Iraq at the end of 2011, AQI has scaled up its attacks against the Iraqi state and the Shia population. On July 23, 2012, 13 Iraqi cities were rocked by bomb and gun attacks in a massive coordinated assault claimed by AQI leader Baghdadi. More than 100 people were killed, mostly Shia Muslim civilians, a gruesome reminder of the bloody, sectarian nature of AQI's campaign.101 According to the Iraq Body Count project, more than 4,500 people were killed in violence across the country in 2012, which was the first year since 2009 in which civilian casualties have increased.102

Prime Minister Nouri al-Maliki, a Shia, has arrested countless Sunni Muslims in Iraq, hardening that minority
group against the government and allowing AQI to put down deeper roots in the population. In December 2011, Maliki charged Vice President Tariq al-Hashemi, a Sunni, with terrorism and ordered his arrest. Iraq expert Lieutenant Colonel Joel Rayburn wrote in early 2012, “[T]he ongoing political struggle creates more space in which Iraq’s sectarian militants—especially al-Qaeda in Iraq among Sunnis and the old Mahdi Army among the Shias—can operate.” Another Iraq expert, Michael Knights, observed around the same time, “It is clear that Al-Qaeda in Iraq (AQI) is now experiencing something of arenaissance in the country.”

The group does not appear to have the capability to strike the U.S. homeland, though it continues to show at least nominal interest in doing so. On July 22, 2012, one day before the massive coordinated attacks, Baghdad issued a statement in honor of the beginning of Ramadan, the Muslim holy month, that directly addressed Americans: “You will soon witness how attacks will resound in the heart of your land, because our war with you has now started.” Today, after the withdrawal of American forces from Iraq, the relationship between U.S. intelligence services and Iraqi intelligence services is more limited, making it difficult to understand AQI and its intentions.

AQI is also deeply involved in the Syrian civil war. In April 2013, Director of National Intelligence Clapper told the Senate Armed Services Committee that extremist militias are present in 13 of Syria’s 14 provinces, and AQI is believed to have been providing fighters, weapons, training, and supplies to extremist Syrian groups. And hundreds of prisoners, including senior members of al-Qaeda, broke out of Baghdad’s Abu Ghraib prison on July 22, 2013. According to The Washington Post, “U.S. officials closely monitoring the jailbreak said the number of escapees was thought to be 500 to 600, including a significant number of al Qaeda operatives.”

Western Recruitment
AQI primarily recruits from disaffected Sunni youth. In May 2011, two Bowling Green, Kentucky-based Iraqi men—Waad Ramadan Alwan and Mohanad Shareef Hammadi—were arrested for aiding AQI. The two had attempted to send money, machine guns, IED material, and other weapons to their al-Qaeda handlers in Iraq, but were foiled in an FBI sting. However, Alwan was an insurgent in Iraq prior to his activity in the United States, and both men were Iraqi nationals who had entered the United States in 2009.

A Cautionary Note
The December 2011 withdrawal of U.S. and coalition forces from Iraq helped breathe new life into AQI. Moreover, the movement’s Iraqi branch also demonstrates the limitations of decapitation as an effective long-term counterterrorism strategy, given that its first three commanders—Abu Musab al-Zarqawi, Abu Ayyub al-Masri, and Abu Abdullah al-Rashid al-Baghdadi—have all been killed, yet the group is perhaps more threatening and consequential today than it has been at any time since the height of its power in 2006. (That said, AQI does not control territory in Iraq today as it did in seven years ago when it effectively ran Anbar Province; about a third of the land mass of Iraq.)

4. Jabhat al-Nusra

Threat Assessment
A long-term safe haven for Jabhat al-Nusra, al-Qaeda’s affiliate in Syria, in the heart of the Arab world and next door to Israel, could create an organization with the intention and capability to attack the West. It could also be the success al-Qaeda needs to revive itself. For the moment, however, the group, which is widely regarded as the most effective fighting force in Syria, is focused on overthrowing the Assad regime, a project that may take years to achieve. Potential jihadi access to the vast stockpile of chemical weapons...
assembled by the Assad regime and scattered across Syria is a potential game-changer though—not only because they could be used there, but because they could be smuggled out of the country as well.

Activities Since 2012

Jabhat al-Nusra, which means the “Victory Front,” is the most effective militant group in Syria and was listed as a foreign terrorist organization by the U.S. State Department in December 2012, essentially as a splinter of AQI. Barak Barfi, a journalist specializing in militant Arab groups, explains that al-Nusra could develop into a regional menace, saying: “A new al-Qaeda base in the Levant is highly strategic, and could be used to destabilize American allies like Jordan and Lebanon, who have historically tottered from one domestic crisis to another. Proximity to Europe and Israel can serve as a launching pad for attacks against both.” though there is confusion about how exactly al-Nusra fits into the larger Al-Qaeda network.

AQI released a statement in April 2013 announcing the official merger of AQI and al-Nusra, proclaiming that their joint organization would be called the Islamic State of Iraq and the Levant. A leader of al-Nusra later rejected the merger, but pledged the group’s support for Zawahiri. On June 9, 2013, Al Jazeera obtained a copy of a letter from Zawahiri annulling the merger. But a week later, in an audio recording posted online, AQI rejected Zawahiri’s annulment of the merger, likely adding to the confusion of al-Qaeda cadres.

Al-Nusra’s military prowess and close ties to al-Qaeda make it a potentially serious threat to U.S. interests in the region, and the group has shown it has the ability to conduct massive suicide bombings. In November 2012, al-Nusra claimed responsibility for 45 attacks in the provinces of Damascus, Deraa, Hama, and Homs that killed dozens of people, including one suicide bomb that reportedly resulted in 60 casualties. It was the first insurgent organization in Syria to claim responsibility for attacks that caused civilian casualties.

Despite these civilian casualties, the group has been able to garner considerable support from Syria’s Sunni population, if only because it is the premier fighting force in the campaign to topple Assad, and because it is involved in providing critical services, such as food, hospitals, and sharia courts to the embattled population.

Also, for the moment, al-Nusra is not imposing Taliban-style rule on the population as AQI did in Anbar province during the first years of the Iraq War. AQI’s harsh rule precipitated the 2006 Sunni Awakening, in which Iraq’s Sunni tribes rose up against the group. Al-Nusra seems to have learned from this mistake and is operating in a Hezbollah-like manner as a large-scale provider of social services, and with the consent of the population in the areas it controls. This is something of a first for an al-Qaeda affiliate; developing a Mao-like “population-centric” approach to implementing a successful insurgency.

Al-Qaeda Affiliations

Al-Qaeda’s interest in Syria is longstanding. As the Council on Foreign Relation’s Ed Husain points out, “The territory in the Middle East that al-Qaeda covets most is of course Saudi Arabia, but Syria is next on the list.” Bin Laden often referenced the events following World War I that resulted in the dismemberment of the Ottoman Empire and the end of both Islamic rule of Muslims and the demise of the Caliphate. His videotaped statement on October 7, 2001, in response to the commencement of U.S. military operations in Afghanistan, referred specifically to the 1920 Treaty of Sèvres, which detached the Arab Ottoman provinces from Muslim rule. And, in one of al-Qaeda’s major addresses before the 2003 American-led invasion of Iraq, bin Laden cited the 1916 Sykes-Picot Agreement—the secret understanding between Britain and France that
divided the Levant and surrounding countries into British and French spheres of influence.\textsuperscript{126}

So Syria has long been an idée fixe for al-Qaeda, and the war there has even more of the characteristics of a perfect jihadi storm than Afghanistan possessed three decades ago: a conflict in the heart of the Arab world with widespread support among Sunni Muslims, the provision of financial assistance from wealthy Gulf supporters, a popular cause that readily attracts foreign volunteers, and a contiguous border with a number of Muslim states that facilitates the movements of fighters into and out of the battle space.

Syria also has several other compelling factors that have figured prominently in the attention al-Qaeda has focused on it:

- It is sacred land referred to in early Muslim scripture and history.
- In the geographical scheme of traditional Ottoman rule, it contains al-Haram al-Sharif—the “Holy Precinct” of Jerusalem, where the Dome of the Rock (from which the Prophet Muhammad is reputed to have ascended to heaven) and the al-Aqsa Mosque, Islam’s third-holiest shrine, are located.
- The enemy are the hated Shia apostate Alawite minority sect whom Ibn Taymiyah—the revered 13th-century Islamic theologian and author of the key jihadi text *The Religious and Moral Doctrine of Jihad*—called upon Sunnis to do battle with.\textsuperscript{127} “For Sunni jihadi fighters,” Husain explains, “the conflict in Syria is religiously underwritten by their most important teacher.”\textsuperscript{128}
- Unlike Afghanistan, which was part of the *Ummah* ("community") but distant from Arab countries, Syria offers al-Qaeda a base in the Arab heartland.
- Assad is the perfect al-Qaeda villain. He is an Alawite and therefore a heretic, he is a secularist and therefore an apostate, and he is conducting a war without quarter against much of his Sunni population.

Syria is also a particularly agreeable environment for al-Qaeda. During the 2003 to 2009 Sunni insurgency in Iraq, it was a key base for training and supporting foreign fighters, many of whom were Syrian jihadists themselves. Shortly after the U.S. invasion of Iraq in 2003, the late Zarqawi, the founder and then-leader of AQI, established operations in Syria that contributed enormously to the escalation of violence in Iraq.\textsuperscript{129,130,131}

Some 2,000 to 5,500 foreign fighters are believed to have traveled to Syria since the beginning of the conflict to join the rebels who aim to topple Assad’s regime.\textsuperscript{132} Not all of these individuals have necessarily joined jihadist factions of the rebel forces, but because most foreign fighters are drawn to the conflict impelled by a perceived religious responsibility, it is likely that these groups have drawn the lion’s share of the foreigners. Even at high-end estimates, foreign fighters make up a small portion of the forces arrayed against the Assad regime: no more than 10 percent.\textsuperscript{133} Nonetheless, their influence is palpable through Syrian rebel organizations such as al-Nusra.

According to the Quilliam Foundation’s Noman Benotman, a former jihadi himself and a founding member of the Libyan Islamic Fighting Group (LIFG), which was once an al-Qaeda affiliate, al-Nusra “is largely influenced by al-Qaeda’s rigid jihadi ideology,” and, while its main enemy is the Syrian government and armed forces, it has been rhetorically hostile to the United States, in addition to promulgating harshly sectarian views that are focused mostly on Syria’s ruling Alawite minority.\textsuperscript{134} Al-Nusra’s emerging role as the spearhead of the most bloody and spectacular opposition attacks is demonstrated by the nearly tenfold escalation of its operations between March and June 2012.\textsuperscript{135}
It is in Syria then that al-Qaeda’s future—its relevance and perhaps even its longevity—turns.

**Western Recruitment**

Counts of foreigners and Westerners fighting in Syria rarely provide numbers fighting for the many, diverse rebel groups. However, al-Nusra is the opposition group in Syria that attracts the most foreign fighters. It is believed that there are about 100 foreign fighters from the United Kingdom alone fighting in Syria. But a study of 249 foreign-fighter martyrdom videos posted on jihadist websites reveals that just eight of them were for individuals of European origin, representing about 3 percent of the total.

Experts say the number of Americans fighting in Syria is likely less than ten, and only a couple of instances of Americans fighting with al-Nusra have been confirmed. As outlined above, Eric Harroun, a former American soldier, was charged in 2013 with conspiring to use a rocket-propelled grenade in Syria, and he admitted to fighting with al-Nusra. In May 2013, Nicole Mansfield, an American woman from Michigan, was killed by Syrian government forces, though none of her family members seem to know when she left for Syria or what exactly she was doing there.

### 5. Egyptian Jihadist Groups

**Threat Assessment**

Egyptian terrorist groups currently threaten Egyptian security. These groups have rekindled jihadi violence in the Sinai Peninsula, which has become an increasingly violent region. The Sinai’s proximity to Israel and to Western targets in Cairo, as well as its lack of strong government control, makes it a safe haven for terrorist groups.

**Activities Since 2011**

Since the ouster of longtime Egyptian president Hosni Mubarak in February 2011, Islamist militants have been waging a low-level insurgency in the Sinai. Many of their early attacks focused on the Arab Gas Pipeline, which runs through Jordan, Lebanon, and Syria, and has an offshoot into Israel. On August 18, 2011, groups of militants launched a multipronged cross-border attack on Israel from the Sinai, killing six Israeli civilians, a police sniper, and soldier. In August 2012, a militant attack on the Egyptian army near Egypt’s border with Israel and the Gaza Strip triggered a massive crackdown.

**Al-Qaeda Affiliations**

In May 2013, three Sinai-affiliated militants were arrested for their alleged involvement in a plot to detonate car bombs outside the U.S. and French embassies in Cairo. These men reportedly had ties to al-Qaeda operatives outside of Egypt who helped them coordinate and prepare for the attack. Egyptian militant groups that have had contact with al-Qaeda include Tawhid-wal-Jihad, the group responsible for the bombings of three tourist hotels in the Sinai in 2004, and another that calls itself al-Takfir Wal-Hijra.

The Egyptian government claimed in August 2012 that the Sinai insurgency comprised 1,600 al-Qaeda-aligned militants, but two months later, the mediator between the Egyptian government and the insurgents, Mohammed Ghazlani, claimed there was no operational relationship between al-Qaeda and the Sinai militants.

### 6. Al-Qaeda in the Islamic Maghreb and its Splinter Groups

**Threat Assessment**

AQIM and its splinter groups have little ability to target the West, but do pose a threat to Western interests in their areas.
of operation. The movement’s access to large stockpiles of weapons from Libya, including perhaps MANPADs (man-portable air-defense systems), has the potential to enhance the group’s power and enable it to arm terrorist groups elsewhere in the region.

AQIM and its splinter groups remain active in parts of Algeria, where they attacked a British oil facility in early 2013, and northern Mali, where they launched an offensive against the government alongside separatist Tuareg rebels in early 2012. However, AQIM and its splinter groups were pushed out of major Malian cities by a French military intervention earlier this year.

**Activities Since 2010**

AQIM primarily operates in the northern coastal and southern desert regions of Algeria, and in northern parts of Mali. The group uses traditional insurgency tactics such as ambushes and mortar, rocket, and IED attacks in its areas of operation, but has been unable to carry out attacks in the West.\(^\text{149}\)

While members of the group have been associated with high-profile attacks, such as the storming of U.S. government facilities in Benghazi, Libya, on September 11, 2012, the organization has largely focused on small-scale operations in the Sahel.\(^\text{150}\) The greater threat now comes from AQIM splinter groups like Ansar al-Din and the Movement for Unity and Jihad in West Africa, but even these offshoots appear more interested in acquiring territory and instituting sharia law than attacking the United States or other targets in the West.

In January 2013, the Associated Press discovered a 26-page manual in a building once occupied by AQIM in Timbuktu that could be helpful in using the portable SA-7 surface-to-air missile.\(^\text{151}\) French forces also reportedly recovered a battery pack and launch tube for such a missile, causing concern that AQIM could be in possession of the weapon and could use it to target civilians.\(^\text{152}\) While most military aircraft now have countermeasures in place for these types of missiles, civilian aircraft usually do not. The SA-7 is not an easy weapon to use, particularly in hot climates like those of North Africa, and requires training to deploy; but if militants were to bring down a civilian airliner, it would have a serious impact on the aviation industry around the world.

Thus far, AQIM has been unable to repeat the success of the high casualty attacks it conducted in 2009, such as the car bomb in August of that year that injured 25 people at a police station in a city just east of Algiers.\(^\text{153}\) The group has been targeted not only by multinational counterterrorism efforts, but by the Algerian government as well.\(^\text{154}\) As a result, it has become fairly isolated within the country.\(^\text{155}\) That said, the group is “prospering in areas where the state is absent or failing,” according to Abdel-Rahim al-Manar Slimi, a professor at Morocco’s Mohammed V University.\(^\text{156}\)

It has taken advantage of the downfall of Moammar Gaddafi’s regime in Libya—and the resulting loose arms caches. Gaddafi was believed to have acquired 20,000 MANPADs, but, according to then-Assistant Secretary of State for Political and Military Affairs Andrew Shapiro, as of February 2012, only 5,000 systems had been recovered by the U.S. government.\(^\text{157}\)

AQIM is also thought to be operating in Mali, Mauritania, and Niger—three countries that have suffered military coups in the last five years.\(^\text{158}\) Of the three countries, its presence is most strongly felt in Mali where it worked with the National Movement for the Liberation of Azawad to secure an independent northern stronghold for ethnic Tuaregs in 2012.\(^\text{159}\) According to residents of northern Mali, AQIM even brought terrorist trainers from Pakistan to teach recruits guerrilla tactics, arms smuggling, weapon types and uses, and money laundering.\(^\text{160}\)
However, once militants held the northern cities of Kidai, Gao, and Timbuktu, a group of dissident AQIM members broke ranks and formed the Movement for Unity and Jihad in Western Africa, and began supporting Ansar al-Din, another Islamist militant group. Ansar al-Din is notorious for having destroyed several UNESCO World Heritage sites in Timbuktu and enforcing a severe form of sharia law in the city during 2012. After French troops liberated Timbuktu in February 2013, France’s President Francis Hollande was greeted with much local fanfare, a sign that Ansar al-Din had alienated the people it hoped to recruit to its cause.

AQIM also received considerable international media coverage in January 2013 when Islamist militants captured a natural gas facility in In Amenas, Algeria. Mokhtar Belmokhtar, a former AQIM lieutenant, led the attack on the facility, which ultimately resulted in around 70 deaths. However, while Belmokhtar had ties to AQIM, the fact that his splinter group—known alternately as “The Masked Brigade” and “Those Who Sign with Blood”—captured the facility shows that AQIM is not monolithic and suffers from divisions among cells led by individuals with distinct goals and ambitions.

In January 2013, after the Islamist militants had been pushed out of northern Mali by the French military, the Associated Press found a letter from AQIM leader Abdelmalak Droukdel to Ansar al-Din members and AQIM lieutenants in the field. In the letter, written sometime around May 2012, Droukdel criticized almost every major decision the militants had made in Mali, pointing out that declaring an independent territory in northern Mali had been premature and enforcing strict sharia law had turned off the locals. The letter also showed a leader who was not in firm control of his network.

**Al-Qaeda Affiliations**

The leaders of AQIM’s predecessor group, the Salafist Group for Preaching and Combat (known by its French initials, GPSC), pledged allegiance to core al-Qaeda several times throughout the 2000s, but the partnership was not formally recognized until 2006. To become an al-Qaeda affiliate, GPSC expanded its aims and declared its intention to attack Western targets; however, to date, no known attacks or aborted attacks in the West have been directly linked to the group. As the group is widely considered the weakest of the al-Qaeda affiliates—it didn’t even merit significant mention in the papers that were found in bin Laden’s Abbottabad compound—its alignment with al-Qaeda seems to be an AQIM strategy aimed at retaining the group’s relevance and improving its recruitment and training.

AQIM’s main appeal today is its wealth, as its focus on kidnappings for ransom has earned it an estimated $90 million in funds. With those funds, it has supported a number of al-Qaeda fighters and militant groups in the region, including Nigeria’s Boko Haram.

**Western Recruitment**

Individuals linked to AQIM have been arrested in Germany, Italy, Portugal, Spain, the Netherlands, and the United Kingdom. The most well-known Western recruits are the two Canadian men who died in the attack earlier this year on the In Amenas gas facility in Algeria: Christos Katsiroubas and Ali Medlej. A third Canadian, Aaron Yoon, is currently being held in a Mauritanian jail after being convicted of membership in a terrorist group last year. While family members and friends of the three men all say they underwent a radical change in the last few years, no one could explain what had prompted the change.

7. **Boko Haram**

**Threat Assessment**

Since its creation in 2002, Boko Haram has only attacked international interests once, when it bombed the United Nations office in Abuja, Nigeria, in August 2011. The
group has consistently shown little inclination or capacity for attacking Western targets and is principally interested in putting Nigeria under its version of sharia law.\textsuperscript{178} The organization is predominantly focused on withdrawing from a society it sees as corrupt and beyond hope, and has constructed a "state within a state" with its own cabinet and religious police.\textsuperscript{179} Like a number of other militant groups, Boko Haram offers welfare handouts, food, and shelter to its followers, and uses the money it steals to pay the widows of slain members.

Activities Since 2010

On Christmas Eve 2010, at least six bombs were detonated near crowded churches and markets, killing dozens of people. Seventeen days later, on New Year's Eve, ten more people died when a bomb exploded in a popular open-air market.\textsuperscript{180} In the summer of 2011, the group detonated its first car bomb outside the national police headquarters in June and attacked the United Nations headquarters in Abuja in August, killing and wounding dozens.\textsuperscript{181}

In January 2012, Boko Haram launched coordinated attacks on the police headquarters and the offices of the Nigeria Immigration Service and the State Security Service in Kano, killing more than 200. The group's last major attack came in March of that year, when its followers burned down 12 public schools in Maiduguri and forced 10,000 students out of school.\textsuperscript{182} (Boko Haram, a derisive name given to the group by locals, means "Western education is forbidden.")

Since the 2012 attacks, Boko Haram has focused on a broad array of targets, including Christians, Nigerian security and police forces, the media, schools, and politicians, though the attacks are confined to northern Nigeria.\textsuperscript{183}

Al-Qaeda Affiliations

According to Guardian correspondent and al-Qaeda expert Jason Burke, who was briefed on a letter that was recovered in the 2011 raid on bin Laden's compound in Abbottabad and that was not included in the 17 letters seized at the compound that were later publicly released, bin Laden had taken an interest in expanding al-Qaeda's operations to West Africa as far back as 2003 and was in direct contact with leaders of Boko Haram.\textsuperscript{184}*

In July 2010, Abubakar Shekau, Boko Haram's leader, released a statement expressing solidarity with al-Qaeda and threatening the United States, but it does not appear al-Qaeda ever formalized the partnership.\textsuperscript{185} The group's main connection to al-Qaeda seems to be the funding it receives from AQIM.\textsuperscript{186}

8. Al-Shabaab

Threat Assessment

Over the past few years, al-Shabaab has lost substantial territory and influence in Somalia. While it could remain a threat to Western targets, due to the group's influence among the Somali diaspora population and its formal merger with al-Qaeda in 2012, recent battlefield defeats have forced it to focus internally. It has never conducted a successful attack in the West, and it has not been linked to any mass-casualty attack outside of Somalia since its launched bombings in Kampala, Uganda, in July 2010.\textsuperscript{187}

Activities Since 2010

Al-Shabaab controlled most of Somalia south of autonomously governed Puntland in 2010, but recent operations by African Union and Kenyan forces have ended its domination of southern Somalia.\textsuperscript{188} In 2011, the U.N.-sanctioned African Union Mission to Somalia (AMISOM) partnered with Somali troops to fight al-Shabaab militants,

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*The first document released by the Combating Terrorism Center at West Point begins with the serial number SOCOM-2012-0000003; both 00000001 and 00000002 have not been published.*
and in August of that year, AMISOM and Somali transitional federal government (TFG) forces defeated al-Shabaab forces in Mogadishu, forcing the militants from a stronghold they had controlled since 2009.

Afterward, the militants began employing guerilla tactics in Mogadishu, conducting bombings against AMISOM and TFG military bases. According to the National Counterterrorism Center, "al-Shabaab is responsible for the assassination of Somali peace activists, international aid workers, numerous civil society figures, and journalists." The National Counterterrorism Center also noted, "The group gained additional notoriety by blocking the delivery of aid from some Western relief agencies during the 2011 famine that killed tens of thousands of Somalis." Somalia expert Ken Menkhaus observes that despite these weaknesses, al-Shabaab will "remain one of the most powerful militias in southern Somalia for some time to come. It continues to possess a network of cells in all of Somalia’s major urban areas and a capacity to engage in acts of terrorism." 

**Al-Qaeda Affiliations**

Although al-Shabaab has long been regarded as a regional offshoot of al-Qaeda, its leaders only declared their formal ties to the international terror organization in February 2012. While the group seems to have been interested in an alliance before then, in 2010, bin Laden instructed the group's leaders to keep their association with al-Qaeda a secret, fearing that openly linking the groups would put al-Shabaab at a disadvantage. By February 2012, however, bin Laden was dead and al-Shabaab had just suffered significant losses in its southern Somali safe haven. Zawahiri, who had petitioned bin Laden to reconsider his views about the proposed merger between Shabaab and al-Qaeda, believed the time was right to announce formal ties between the two groups.

As al-Shabaab was then in the midst of its struggle against AMISOM and Kenyan forces, this was likely a move to bolster support from the international extremist community and out-of-area fighters. With al-Shabaab controlling significant—albeit shrinking—swaths of land in southern Somalia, however, its newfound alliance with al-Qaeda's central leadership and its recognition of Zawahiri's authority creates a risk of terrorist plots in the West. For instance, in 2010, a militant linked to al-Shabaab traveled to Denmark to kill Kurt Westergaard, a Danish cartoonist who had drawn cartoons of the Prophet Muhammad that were deemed offensive by many Muslims. Westergaard only survived the assault because he had installed a safe room in his house.

**Western Recruitment**

By recruiting English-speaking Muslims and members of the Somali diaspora, al-Shabaab has been able to persuade a number of British and American citizens to die for its cause. In October 2007, for instance, an unnamed British Somali was one of the first Western-based jihadists to kill himself in the name of al-Shabaab when he detonated a suicide vest at an Ethiopian army checkpoint and killed at least 20 soldiers.

While there are a number of American citizens fighting for a variety of al-Qaeda-affiliated or -inspired organizations, al-Shabaab seems to boast the most American fighters. According to a 2011 report by the House Committee on Homeland Security, an estimated 40 Americans have joined al-Shabaab in the last few years, at least 24 of them coming from the Somali community in Minnesota.

Al-Shabaab has prominently featured these recruits in its propaganda operations, releasing three official videos that starred Abu Mansoor al-Amriki ("the father of Mansoor, the American"), who is actually Omar Hammami, a 25-year-old from Alabama who was raised as a Baptist and converted to
Islam in high school. One of the videos shows Hammami preparing an ambush against Ethiopian forces and features English rap lyrics extolling jihad.

Three of al-Shabaab’s American recruits have died in suicide attacks. Al-Shabaab has also been able to attract a similar number of members from the Somali Canadian community. The group’s online presence has enabled its mobilization of Western sympathizers, particularly in Somali chat rooms, where al-Shabaab militants are able to persuade their ethnic brethren to sympathize, join, or financially support their cause.

9. Ansar al-Sharia in Libya

Threat Assessment

Islamist militant groups are a threat to stability in post-Muammar Gaddafi Libya, but because Ansar al-Sharia (“Supporters of Islamic Law”) is more of a label for militants who want to impose sharia law in Libya than a defined organization, they are not as organized as a formal al-Qaeda affiliate. Though Ansar al-Sharia’s loose network of Islamist militants have conducted attacks in Libya, it will have to consolidate its power base and establish a central command structure to elevate its posture from a loosely organized movement to a larger threat. Its ability to solidify into a more serious threat will depend on how long it takes the Libyan government to provide adequate security for the population.

Activities Since 2011

Ansar al-Sharia was one of many groups that sought to fill the security vacuum in Libya after Gaddafi’s regime crumbled in 2011, and its members have tried to win over the population by guarding hospitals and other civilian facilities, doing charity work, and preaching. Its first major appearance occurred in June 2012, when 300 armed men appeared in Benghazi’s Tahrir Square and demanded the introduction of sharia law in Libya. They, along with other Salafi groups, have also been blamed for the destruction of Sufi mosques, mausoleums, and shrines.

Ansar al-Sharia’s involvement in the September 11, 2012, attack on U.S. government facilities in Benghazi, Libya, remains the subject of an ongoing federal investigation. The attack, which claimed the lives of four Americans, including Ambassador J. Christopher Stevens, certainly illustrates the elevated clout of Libyan jihadi groups in the wake of Gaddafi’s ouster. Due to their significant influence in Benghazi, reports of affiliated militants at the scene, and the visibility of the group’s logo during the attack, it is evident that the Ansar al-Sharia network participated in the attack in some way. However, the group’s leaders officially denied any involvement, and a spokesperson for the group said that although some Ansar al-Sharia members participated in the attack, it had not been sanctioned by the top commanders. It is likely that localized, loosely affiliated networks were responsible for mobilizing the militants who attacked the consulate.

It also appears that external terrorist groups played a role in the attack, as elements of AQIM and the Egypt-based Muhammad Jamal Network are reported to have teamed up with the Benghazi-based extremists. Although he was later released, the only suspect to be arrested in connection to the attacks had ties to both Ansar al-Sharia and AQIM.

After the assault, locals in Benghazi attacked Ansar al-Sharia’s fortified bases and forced the group to scatter. While some members were absorbed into other armed groups in Libya, many returned to Benghazi in February 2013 to protect the city’s hospital (at the request of hospital staff) and to man checkpoints. Some Benghazi residents have even welcomed Ansar al-Sharia as protectors due to the lack of security provided by the new government in Tripoli.
Al-Qaeda Affiliations

In September 2012, a leader of Ansar al-Sharia, Mohammed Ali al-Zahawi, said that while his brigade was not linked to al-Qaeda, he “approves” of its strategy.\textsuperscript{212}

10. Tehrik-i-Taliban Pakistan

Threat Assessment

Tehrik-i-Taliban Pakistan (TTP) is engaged in a regional insurgency and has only attempted two attacks outside of the Af-Pak region, including the ultimately unsuccessful 2010 car bombing in Times Square—its only attempted attack on U.S. soil. Although the TTP also conducted fewer attacks in Pakistan over the past year, it continues to be a significant threat in northwestern Pakistan and to coalition efforts in Afghanistan.\textsuperscript{213}

Activities Since 2010

Over the past three years, the TTP has been responsible for frequent attacks within Pakistan, including many suicide bombings, and has killed hundreds. While many of these attacks have been aimed at police or military installations, the indiscriminate and potent nature of the blasts causes high numbers of civilian casualties. In response to the killing of bin Laden by U.S. Navy SEALs, for example, TTP operatives carried out a massive suicide bombing at a paramilitary police academy in Shabqadar, Pakistan, that killed at least 80 people.\textsuperscript{214} The TTP took credit for a number of other attacks on Pakistani government installations that year, including bombings in Karachi and Peshawar, saying they were also in response to bin Laden’s death.\textsuperscript{215}

Prior to the May 2013 Pakistani elections, the TTP made an effort to diffuse its operations across the country’s urban centers in hope of influencing the national vote.\textsuperscript{216} In Karachi, TTP militants carried out a number of attacks; assassinated Sadiq Zaman Khattak, a secular candidate; and detonated a bomb on Election Day in an attempt to assassinate another politician.\textsuperscript{217}

The CIA drone program, which primarily targets Afghan and Pakistani Taliban elements in Waziristan, has killed many of the groups’ leaders, including its founder, Baitullah Mehsud; “mentor of suicide bombers,” Qari Hussain; and deputy commander, Wali-ur Rehman.\textsuperscript{218} Since 2008, drone strikes have killed at least 19 Taliban leaders in Pakistan, according to a count by the New America Foundation.\textsuperscript{219} The physical displacement of TTP cells, due to drone strikes and Pakistani military operations in the Federally Administered Tribal Areas, has led to turf wars that are splintering the already-splintered organization.\textsuperscript{220}

Al-Qaeda Affiliations

Due to the TTP’s history of cooperation with and geographical proximity to al-Qaeda’s leadership, the two groups maintain relatively close relations. Documents found in bin Laden’s Abbottabad compound show that orders have passed from al-Qaeda leaders to the TTP. Additionally, the TTP may have received technical support from al-Qaeda.\textsuperscript{221}

Western Recruitment

The TTP primarily recruits from the local Pashtun population that lives along the Af-Pak border, though they have also branched out into social media. In December 2012, Facebook shut down a TTP recruiting page that was advertising positions with the group’s new magazine, Ahyah-e-Khilafat (or “Sign of the Caliphate”).\textsuperscript{222}

There are a few exceptions to the TTP’s recruitment of local Pashtuns, namely that of Pakistani American Faisal Shahzad, the would-be Times Square bomber. And in December 2009, five men from northern Virginia were detained in Pakistan when they attempted to join local militant groups. According to Pakistani prosecutors, they
had contacted several militant organizations about waging jihad and met with a TTP recruiter.\textsuperscript{223}

11. Afghan Taliban

\textbf{Threat Assessment}

The Afghan Taliban continue to lead a potent insurgency in Afghanistan, launching persistent attacks against American forces, as well as military, diplomatic, and aid facilities. They remain in control of significant swaths of land in rural Afghanistan and will continue to threaten Afghan stability after the NATO combat mission ends in December 2014. However, they have shown no interest in mounting an attack against the U.S. homeland and, in June 2013, reopened direct negotiations with senior American officials at their new office in Qatar. However, like the previous attempts at negotiation, those talks quickly stalled.

\textbf{Activities Since 2010}

Since the troop surge in late 2009, ISAF's increased presence and frequent operations—especially in the Taliban's safe haven of southern Afghanistan—have decreased the group's freedom of movement. However, the Taliban continue to threaten the country's stability by conducting mass-casualty attacks, exploiting tribal and historical rivalries, and continuing its involvement in the country's opium trade.

In June 2013, the Taliban proved they were still capable of launching large-scale attacks in the heart of Afghanistan's capital city. In the span of three weeks, the Taliban launched three suicide attacks in Kabul: first at Kabul International Airport; then outside the Supreme Court, killing at least 17 civilians; and finally in Kabul's “Green Zone,” where the presidential palace, ISAF headquarters, and multiple foreign embassies are located.\textsuperscript{224,225,226} The Taliban also continue to hold one American prisoner of war. On June 30, 2009, then-23-year-old U.S. Army Sergeant Bowe Bergdahl went missing during his unit's regular patrol in Paktika province. The Taliban quickly took responsibility for the kidnapping and have released five videos of Bergdahl since then. In September 2012, the Taliban-linked Haqqani Network released a statement affirming Bergdahl's safety, and the International Committee of the Red Cross delivered a letter from Bergdahl to his parents in June 2013.\textsuperscript{227,228} The U.S. government has been in talks with the Taliban about a potential prisoner exchange—releasing a handful of Taliban leaders from Guantanamo Bay in return for Bergdahl—but that deal has not materialized yet.\textsuperscript{229}

An overall peace deal between the Afghan Taliban, the Afghan government, and the United States before the end of NATO's combat mission in December 2014 is quite unlikely.\textsuperscript{230} And the Taliban will continue to pose a military threat long after the majority of American troops have left. U.S. military officials have repeatedly claimed that the Afghan National Army (ANA) will be capable of maintaining security by the end of 2014, but in December 2012, the Pentagon released a report saying that only one of the ANA's 23 brigades was able to operate without air or other military support from its NATO partners.\textsuperscript{231,232} However, less than a year later, as ANA units faced the Taliban's summer offensive alone for the first time, some brigades were holding their own, even in the country's most violent areas.\textsuperscript{233}

\textbf{Al-Qaeda Affiliations}

Despite its historical ties to al-Qaeda, the Afghan Taliban's goals are local, not international. A January 2012 ISAF report titled “The State of Taliban” even notes that some senior Taliban commanders have shown an interest in separating themselves from al-Qaeda were the Taliban's Quetta Shura (“leadership council”) to pursue the issue.\textsuperscript{234}
12. The Haqqani Network

Threat Assessment

The Haqqani Network’s collaboration with and support for al-Qaeda and the Taliban’s Quetta Shura make it a continued threat to U.S. interests in the region. While the Haqqanis have never engaged in violence outside of the Af-Pak region, they have attacked NATO and U.N. targets in Afghanistan, as well as high-profile Afghan politicians. Additionally, the group continues to shelter international terrorists and has held Western hostages, such as New York Times reporter David Rohde.235

Activities Since 2011

On September 13, 2011, the Haqqani Network carried out a complex assault on the U.S. Embassy and NATO headquarters in Kabul, killing seven Afghans.296 Later that month, the Haqqanis were presumed responsible for an attack on a NATO military base in Wardak province that killed four Afghans and injured 77 American troops.237 In response to this violence, then-Chairman of the Joint Chiefs of Staff Admiral Mike Mullen publicly asserted that Pakistan’s intelligence service, the ISI, was ultimately responsible, stating, “The Haqqani Network … acts as a veritable arm of Pakistan’s Inter-Services Intelligence agency.”238

The Haqqanis are also presumed to be behind many attacks for which the Afghan Taliban claims credit. Haqqani expert Vahid Brown has explained that the group “has some utility in using the Taliban brand. The Taliban brand kind of represents opposition to foreign intervention in Afghanistan. … They try to appear as a unified front.”239

Shortly after Mullen’s statement, President Obama and the National Security Council adopted a more aggressive policy toward the group and expanded their targeting of the Haqqani’s safe haven in North Waziristan.240 According to the New America Foundation’s drone database, 31 drone strikes have targeted the Haqqani Network since Obama took office in 2009, whereas only two Bush-era strikes went after Haqqani targets.241 And in August 2012, American officials said a drone strike had killed Badruddin Haqqani, the network’s operational commander.242

Al-Qaeda Affiliations

The Haqqani Network’s relationship with other militant groups in the Af-Pak border region is as complex as it is murky. A 2012 report published by the Countering Terrorism Center at West Point defines the Haqqani Network as a “nexus” organization that helps other insurgent and terrorist groups.233 The Haqqani Network has a history of collaboration with al-Qaeda, the Afghan Taliban, and Hizb-e-Islami, the militant group run by Afghan warlord Gulbadin Hekmatyar.

13. Lashkar-e-Taiba

Threat Assessment

Although the Pakistan-based Lashkar-e-Taiba (LeT) has not conducted a mass-casualty attack outside of the Af-Pak region since its lethal rampage in Mumbai, India, in 2008, it is still a potential threat to regional security and U.S. interests in the area. In 2012, the commander of U.S. Pacific Command, Admiral Samuel Locklear, stated that “Lashkar-e-Taiba remains one of, if not the most operationally capable terrorist groups through all of South Asia.”244

Activities Since 2010

LeT has primarily targeted Indians and Indian facilities, but it also assists insurgents in Afghanistan. According to LeT expert Stephen Tankel, “Since November 2008, its militant activities in Afghanistan and throughout South Asia have expanded, while its operational integration with the jihadist
nexus in Pakistan has grown.” But in 2011, Tankel found that LeT’s role in Afghanistan was also expanding: “Lashkar boasts a stable of explosives experts and its fighters are adept at small-unit tactics, meaning it can make a qualitative contribution to the [Afghan] cause even without substantially increasing its quantitative input.” In April 2013, ISAF Joint Command reported that “an Afghan and coalition security force arrested a senior Lashkar-e Taiba leader” in Ghazni province, Afghanistan.

Because LeT shares its core sentiments—opposition to India and U.S. involvement in Afghanistan—with the Pakistani government and ISI, it operates with few constraints in Pakistan. LeT leader Hafiz Muhammad Saeed, for example, is able to live freely and promote LeT—often receiving protection from the Pakistani police despite the $10 million bounty on his head from the U.S. government—from his residence in Lahore. And LeT continues to draw fighters from all Pakistani social strata, even competing directly with the military for fighters in some areas.

**Al-Qaeda Affiliations**

While LeT does not claim official ties to al-Qaeda, there is evidence of communication and cooperation between the two groups. Al-Qaeda operatives have attended LeT training camps and have used LeT safe houses since 9/11.

**Western Recruitment**

“Shoe bomber” Richard Reid and Shahzad Tanweer, one of the London subway suicide bombers, are believed to have attended LeT training camps or interacted with LeT militants in the early to mid-2000s. More recently, David Coleman Headley, an American citizen, was instrumental in the 2008 LeT massacre in Mumbai. Headley traveled to Mumbai five times to scope out targets and provided critical reconnaissance to LeT operatives. He also surveyed other potential targets in India and, in 2009, planned to attack a Danish newspaper that had published controversial cartoons of the Prophet Muhammad. In January 2013, following a plea bargain with U.S. federal prosecutors, Headley was sentenced to 35 years in prison.

LeT has the potential to attract additional Western-based extremists. According to Tankel, “One could imagine a scenario in which would-be Western jihadis looking to fight in Afghanistan, linked up with a facilitator connected with Lashkar to access a training camp in territory controlled by the Haqqani Network where al-Qaeda convinced them to launch a terrorist attack in a Western country and Lashkar trainers provided some of the instruction.” It’s a bit of a convoluted scenario, but it serves to illustrate LeT’s power to connect people to disparate groups with similar ideologies.

**14. Uzbek Militant Groups**

**Threat Assessment**

The IJU and IMU continue to pose a threat to U.S. interests in Afghanistan and Pakistan, but they have showed no interest in or ability to engage in international terrorism since an alleged IJU-linked terrorism cell was broken up in Sauerland, Germany, in 2007.

**Activities Since 2010**

Established in the late 1990s to overthrow the Karimov regime in Uzbekistan, the IMU moved to bases in Afghanistan in the early 2000s. After the U.S. invasion of Afghanistan in 2001, the IMU fled to Pakistan, where it has developed close ties with the Pakistani Taliban. The IMU has released videos featuring leaders from both organizations, and the two groups have conducted several joint operations, including the attack that released 400 prisoners from Pakistan’s Bannu Prison in 2012. Both groups also rely on Abu Zarr al-Burmi, a militant Pakistani preacher and religious scholar, for rulings on religious law.
In 2009, the IMU moved its fighters to North Waziristan, bringing it into close contact with the Haqqani Network; the two organizations began to cooperate shortly thereafter. The IMU even helped expand the Haqqani Network’s control and ability to operate in Afghanistan, increasing the Uzbek group’s role in the insurgency.\textsuperscript{257} ANA General Zalmay Wesa stated in April 2013 that IMU operatives are the focus of northern-based Afghan Special Forces units and that they have played a key role in spreading explosives knowledge to other insurgents.\textsuperscript{258}

U.S. counterinsurgency and counterterrorism operations have broadened their focus on the IMU in the past year, increasing the number of drone strikes and raids against IMU strongholds. U.S. drone strikes have killed two of the group’s leaders—Tahir Yuldashev in September 2009 and Abu Usman Adil in August 2012—and at least 38 raids were conducted against IMU operatives in Afghanistan in 2012.\textsuperscript{259} This targeting has continued in 2013 with ISAF troops conducting 26 raids against IMU forces as of May 8, 2013.\textsuperscript{260}

Following a number of member deaths—52 and 85 in 2010 and 2011, respectively—the U.S. State Department estimated that the IMU had about 200 to 300 members in 2012.\textsuperscript{261,262} Despite its losses, however, the IMU continues to pose a threat in Afghanistan and Pakistan. On May 12, 2013, the IMU conducted a suicide bombing in Quetta that killed ten people and wounded 75 others.\textsuperscript{263} Its training of fighters is among the more rigorous of the jihadist groups in the region, and it has a robust media operation.\textsuperscript{264}

While the IMU has drawn support from radicalized Westerners and developed close ties with al-Qaeda-linked militant groups, its website has only addressed jihad in the West in general terms.\textsuperscript{265} The IJU—which split from the IMU in the early 2000s to pursue a more global vision of violent jihad—has been involved in and claimed responsibility for attempted attacks in Europe. In September 2007, the IJU released a statement claiming responsibility for a disrupted plot to attack U.S. targets in Germany and threatening similar attacks in the future.\textsuperscript{266}

**Western Recruitment**

Both the IJU and IMU have specifically targeted their Western recruitment efforts at Germany. In 2009, the IMU released a video subtitled in German showing its leader, Tahir Yuldashev, meeting with Hakimullah Makhud, the leader of the Pakistani Taliban.\textsuperscript{267} In August 2010, the IMU’s media arm released a video showing German militants in action that included instructions and subtitles in German.\textsuperscript{268}

A number of Germans and other Europeans have trained in IMU camps, and some of these individuals have been involved in plots in Germany.\textsuperscript{269} In September 2009, Pakistani authorities uncovered an IMU-controlled training camp attended by mostly Germans, as well as a few Swedes.\textsuperscript{270} Ahmad Siddiqui and Rami Makanesi, German citizens who joined the IMU in Pakistan in March 2009, were caught in mid-2010 in Afghanistan and Pakistan respectively, as they were planning to return to Germany to fund-raise for al-Qaeda. They were allegedly sent by Yunis al-Mauretani, an al-Qaeda operative they had met earlier in the year at an IMU training camp.\textsuperscript{271}

The IJU has also been linked to a cell in Sauerland, Germany, that stockpiled explosives for an attack on U.S. targets in Germany and is believed to have developed a network to funnel individuals to militant groups in Pakistan.\textsuperscript{272} German-born Muslim convert Eric Breininger was allegedly involved in both the 2007 Sauerland plot and in attacks on ISAF forces in Afghanistan.\textsuperscript{273}

Since 2010, a number of extremists linked to these Uzbek militant groups have been indicted in the United States. Jamshid Muhtorov and Bekhtiyor Jumaei were arrested in 2012 for attempting to provide material support to IJU after Muhtorov, an Uzbek refugee, established contact with
an IJU operative over the Internet. An Uzbek national, was indicted in 2013 on charges of explosives possession and providing material support to the IMU. He is also alleged to have provided bomb-making instructions to unnamed others.

15. Jemaah Islamiyah

**Threat Assessment**

Due to continuing government crackdowns throughout Southeast Asia, the once-virulent threat posed by the al-Qaeda-aligned Jemaah Islamiyah (JI) has decreased significantly over the past few years. The weakened group is evolving into a more media-focused organization, distributing propaganda through books, magazines, and social networks to radicalize new members and boost its dwindling ranks.

**Activities Since 2010**

With the goal of establishing an Islamic caliphate in Southeast Asia, JI's activities are focused regionally, particularly in Indonesia and the Philippines. In recent years, the organization has been involved in just a few small-scale attacks that have primarily targeted moderate Muslim figures promoting religious tolerance and Indonesia's National Narcotics Agency, which combats terrorism. JI's weakened network and decimated leadership have caused the group to fracture, with JI members leaving to form their own networks. This splitting has blurred the lines between JI and other organizations, and has inspired "lone-wolves," as well as loosely connected jihadists, to initiate some attacks.

According to JI expert Sidney Jones, "Although Jemaah Islamiyah is past its prime, it is not vanished. Islamist radical groups in Southeast Asia, particularly those in the Philippines, Indonesia, and Malaysia, have been damaged but they are still dangerous." These militant groups are often interconnected and have shared training camps and weapons experts. JI itself is reportedly linked to other Southeast Asian Islamist groups, such as Abu Sayyaf and the Moro Islamic Liberation Front in the southern Philippines. Although there are currently no operational links between the two groups, and the Front claims to not have ties to JI, the U.S. and Philippine governments believe the group has helped to train JI insurgents in the past.

**Al-Qaeda Affiliation**

Due to its debilitated leadership and fractured network, JI has been largely cut off from al-Qaeda's core. While some individual JI operatives have ties to al-Qaeda members, maintaining those connections has reportedly grown difficult. Al-Qaeda's ideology is still influential within JI, but there are no longer any operational or organizational links between the two groups. Abu Sayyaf, which formerly had ties to al-Qaeda, has turned from "ideology-based" operations to more financially lucrative ones, such as kidnapping for ransom.

16. Al-Qaeda's Ambiguous Relations with Iran

The news that Canadian law enforcement arrested two men accused of planning to derail a passenger train in the Toronto area in April 2013 attracted much attention, in part, because the plotters were also charged with "receiving support from al-Qaeda elements in Iran." If this allegation is true, it would mark the first time al-Qaeda elements based in Iran have directed some kind of plot in the West. It also underlines the perplexing relationship between the Sunni ultra-fundamentalist al-Qaeda and the Shia-led theocratic state of Iran, which al-Qaeda regards as heretical, but with which they have had some kind of a marriage of convenience for many years. While there is no evidence that al-Qaeda and the Iranian government have ever cooperated on a terrorist attack, al-Qaeda's ties to Iran stretch back more than a decade.
Al-Qaeda’s Iranian presence began after the fall of the Taliban in 2001, when some of bin Laden’s family members and top lieutenants fled to Tehran and lived under some form of house arrest. This group included Saad bin Laden, one of the al-Qaeda leader’s older sons and a former leader in the organization; Saif al-Adel, the Egyptian military commander of al-Qaeda; and Sulaiman Abu Ghaith, bin Laden’s son-in-law and spokesman. Saad also helped bin Laden’s oldest wife, Khairiah bin Laden, and a number of his father’s children move to Iran in 2002. Eventually, bin Laden’s sons Ladin, Muhammad, and Uthman, and his daughter Fatima, who is married to Abu Ghaith, also settled in Tehran.291,292

According to Saudi officials, it was al-Qaeda’s leaders in Iran who approved a number of terrorist attacks in Saudi Arabia that killed scores of Saudis and Westerners in 2003, and targeted the kingdom’s oil infrastructure.

In 2008, al-Qaeda kidnapped Heshmatollah Attarzadeh-Niyaki, an Iranian diplomat living in the Pakistani city of Peshawar. According to a Pakistani intelligence official familiar with the deal, al-Qaeda released Niyaki to Iran in 2010 as part of a negotiation that allowed some of bin Laden’s family members and al-Qaeda fighters to leave Iran.293 And in 2011, the U.S. Treasury named six al-Qaeda members living in Iran as “terrorists,” who it alleged were sending fighters and money to Syria to fight the Assad regime and were also funding terrorism in Pakistan.294

But recent relations between al-Qaeda and Iran have been tense. In a letter recovered from the Abbottabad compound, bin Laden urged caution when his family members traveled out of Iran “since the Iranians are not to be trusted.” He wrote that his family “should be warned about the importance of getting rid of everything they received from Iran like baggage or anything even as small as a needle, as there are eavesdropping chips that have been developed to be so small they can be put inside a medical syringe.”295

In March 2013, Abu Ghaith was brought to a Manhattan courtroom to face charges of conspiracy to kill Americans.296 He had left the comparative safety of his longtime refuge in Iran for Turkey only a few weeks earlier. Turkey then deported him to his native Kuwait via Jordan, where he was detained by FBI agents who escorted him to New York.

Abu Ghaith and the two suspects arrested in Canada in early 2013, 30-year-old Chiheb Esseghaier of Montreal and 35-year-old Raed Jaser of Toronto, will continue to be the subjects of much interest from American and Canadian intelligence officials. Those officials will surely be seeking answers to the precise nature of the Iranian government’s relationship with al-Qaeda over the past decade.

17. Muslim Public Opinion about Jihadist Groups

With little exception, jihadist groups are not winning the battle for the hearts and minds of local populations. According to the 2012 Pew Research Center’s Global Attitudes Project, there is little popular support for any of the militant groups operating in Pakistan. Al-Qaeda, the Afghan Taliban, TTP, and the Haqqani Network all have favorability ratings of less than 20 percent, and even LeT is just above that at 22 percent favorability. Al-Qaeda and the TTP both have negative ratings of more than 50 percent (55 percent and 52 percent respectively), while the Afghan Taliban (45 percent) and LeT (37 percent) are slightly below that.297

Interestingly, the Pew survey, which covered about 82 percent of the Pakistani population, also found that Pakistanis who pray five times a day are more likely to view extremist groups negatively than those who pray less than five times a day. These religiously observant Pakistanis are between 6 and 14 points more negative in their assessments of extremist groups than those who are less observant.
This negative view of extremism is replicated across the Middle East with countries as diverse as Egypt, Jordan, Lebanon, and Turkey citing higher disapproval ratings of al-Qaeda and the Taliban than Pakistan. According to the 2012 Pew survey responses, more than two-thirds of the populations in those Middle Eastern countries view al-Qaeda and the Taliban negatively.298 Lebanon is particularly against al-Qaeda, where the group has a negative rating of 98 percent.

Majorities in these countries also disapprove of attacks against civilians, regardless of whether those attacks are instigated by the military or individual attackers. According to a 2011 Gallup poll that measured public attitudes about attacks against civilians in 131 countries, more than half of the populations across the Middle East, North Africa, and Southeast Asia said individual attacks against civilians were never justified.299 Of the percentages that said individual attacks against civilians were sometimes justified, Egypt (2 percent) and Lebanon (5 percent) were at the bottom of the list, while Afghanistan (21 percent) was at the higher end of the regional spectrum. Pakistan (11 percent) was somewhere in the middle. Countries with more developed and stable societies, and stronger governance structures, rejected any kind of violence against civilians.300

However, it is not the “Arab street” or the populace amenable to responding to polling questions that comprise terrorist groups. Instead, their members are often disenfranchised, disillusioned, and marginalized youth, and there is no evidence that the potential pool of young “hot heads” to which the core’s message has always been directed will necessarily dissipate or constrict in light of the Arab Spring. In fact, it may actually grow as impatience over the slow pace of democratization and economic reform takes hold, and many who took to the streets find themselves excluded from or deprived of the political and economic benefits that the upheavals in their countries promised. The “losers” of the Arab Spring may thus provide a new reservoir of recruits for al-Qaeda in the near future—especially in those countries across North Africa and the Middle East with large populations below the age of 20. The recent events in Egypt, in particular, may yet attract the disillusioned and the disenchanted to the ranks of al-Qaeda or one of its local affiliates.
Chapter 4: Assessing the U.S. Government Response to al-Qaeda and its Allies

As detailed above, al-Qaeda has weakened considerably over the past few years, while U.S. defenses have been strengthened. Just consider the following changes since the 9/11 attacks:

- On 9/11, there were 16 people on the “no fly” list.\(^{301}\) Now there are more than 20,000.\(^{302}\)
- In 2001, there were 32 Joint Terrorism Task Force “fusion centers” where multiple law enforcement agencies work together to chase down leads to build terrorism cases.\(^{303}\) Now there are 103.\(^{304}\)
- A decade ago, the Department of Homeland Security, National Counterterrorism Center, Transportation Security Administration, U.S. Northern Command, and U.S. Cyber Command didn’t exist. All of these new institutions currently make it much harder for terrorists to operate in the United States.
- Before 9/11, Special Operations Forces were rarely deployed against al-Qaeda and allied groups.\(^{305}\) Now they perform nearly a dozen operations every day in Afghanistan, as well as missions in other countries such as Yemen and Somalia.\(^{306,307,308}\)
- At the beginning of the 21st century, the American public didn’t comprehend the threat posed by jihadist terrorists, but that changed dramatically after 9/11. In December 2001, it was passengers who disabled Richard Reid, “the shoe bomber.”\(^{309}\) Similarly, it was fellow passengers who tackled Umar Farouk Abdulmutallab, the “underwear bomber,” eight years later.\(^{310}\) And the following year, it was a street vendor who spotted the bomb-laden SUV Faisal Shahzad had parked in Times Square.\(^{311}\)
- Before 9/11, the CIA and the FBI barely communicated about their respective investigations of terrorist groups. Now they work together quite closely.
- The U.S. intelligence budget grew dramatically after 9/11, giving the government large resources with which to improve its counterterrorism capabilities. In 2010, the United States spent more than $80 billion on intelligence collection and other covert activities, a total more than three times what it spent in 1998.\(^{312}\)

CIA Drone Campaign

According to data gathered by the New America Foundation, the CIA drone campaign in Pakistan killed some 2,000 to 3,400 people between 2004 and late-July 2013.\(^{313}\) Of those killed, 55 individuals were identified in reliable news reports as militant leaders, representing only 2 percent of the total. This trend has become particularly marked under President Obama, as the drone program morphed from a decapitation strategy aimed primarily at al-Qaeda’s top leaders to a counterinsurgency air force that largely targeted Taliban foot soldiers. According to an analysis by the New America Foundation, under President George W. Bush, one-third of the drone strikes appeared to target militant leaders, but under President Obama, that proportion has fallen to 13 percent.\(^{314}\)

President Obama also rapidly scaled up the pace of the drone campaign, reaching a peak of 122 strikes in 2010—roughly one every three days. But in 2011, the number of strikes in Pakistan’s tribal regions fell by 40 percent, to 73. In 2012, drone strikes in Pakistan decreased by another 34 percent, to 48 strikes.

In Yemen, U.S. drone strikes spiked dramatically in 2012, from 11 to 47. Between 600 and 900 people have died in U.S. air and drone strikes in Yemen between 2002 and early August 2013. Reliable news outlets have identified 33 of those individuals as militant leaders, about 4 percent of the total.\(^{315}\)

The CIA drone campaign has been critical to disrupting al-Qaeda activity in both Pakistan’s tribal regions and Yemen. In addition to killing key militant leaders involved in plots
against the West, drone strikes in North Waziristan forced militants to abandon satellite phones and avoid gathering in large groups, which made planning and training for large-scale attacks difficult. Militants also reported having to sleep outside under trees, because their compounds were being targeted so frequently.\(^{316}\)

As outlined above, bin Laden recognized the devastation the drones were inflicting on his organization and advised his men to leave their base in Pakistan’s tribal regions, where the drone strikes are overwhelmingly concentrated, for a remote part of Afghanistan. Similarly, in Yemen, militants have reportedly been forced to reduce the length of time spent in training camps, and government forces supported by the U.S. drone strikes were able to push al-Qaeda fighters out of major southern cities in 2012.

However, the drone program has also intensified anti-American sentiments in Pakistan and created an open sore in the countries’ bilateral relationship. The killing of Anwar al-Awlaki, an American citizen, in a September 2011 drone strike also sparked increased public debate about the legality of the program in the United States. The level of public scrutiny surrounding the program today makes it impossible for the strikes to continue with the same frequency and secrecy in which they operated over the past several years. And in May 2013, during a major counterterrorism speech, President Obama made it clear that he intends to restrict the program going forward. As of this writing, drone strikes have occurred in Pakistan every 14 days on average in 2013, which is their lowest rate since 2007, when just four such strikes were conducted. In Yemen, drone strikes were occurring every ten days on average as of this writing—substantially fewer strikes than were seen in 2012—though an uptick has occurred recently. There were eight drone strikes in Yemen during the first 12 days of August, and for the first time ever, the annual number of strikes in Yemen has passed the number in Pakistan.
NSA Surveillance

Earlier this year, it was revealed that the National Security Agency (NSA) has been collecting phone-records metadata from Americans for many years and that it had secured the right to access overseas Internet traffic and content from every U.S. Internet service. This sparked a debate between those who saw an overly expansive government fishing expedition that infringed Americans’ privacy and those who pointed out that the NSA programs were carefully managed to protect the rights of American citizens. Beyond the privacy issues that the NSA programs raise: How successful have these programs been in interrupting terrorist plots? So far the evidence on the public record suggests that the programs have been of far less utility than recent U.S. government claims about their ability to disrupt terrorist plots.

Sometime in late 2007, Basaaly Saeed Moalin, a cabdriver living in San Diego, began a series of phone conversations with Aden Hashi Ayrow, one of the leaders of al-Shabaab. He had no idea the NSA was listening in. In one of those phone calls, Ayrow urged Moalin to send money to al-Shabaab, telling him that he urgently needed several thousand dollars. At one point, Ayrow told Moalin that it was “time to finance the jhad” and at another: “You are running late with the stuff. Send some and something will happen.”

Over several months in 2008, Moalin transferred thousands of dollars to al-Shabaab. He even told Ayrow that he could use his house in Mogadishu, and “after you bury your stuff deep in the ground, you would, then, plant the trees on top.” U.S. prosecutors later asserted that Moalin was offering his house to al-Shabaab as a place to hide weapons, and earlier this year, he was convicted of
conspiracy to provide material support to al-Shabaab and of money laundering for the terrorist organization. However, there is nothing on the public record to suggest he was planning an attack in the United States.

Another terrorist financier detected by NSA surveillance was Khalid Ouazzani, a Moroccan native and naturalized American living in Kansas City, Missouri. Sometime in 2008, Ouazzani swore an oath of allegiance to al-Qaeda and sent around $23,000 to the group before he was arrested two years later. In June 2013, at a hearing for the House Select Committee on Intelligence on the NSA surveillance programs, FBI Deputy Director Sean Joyce testified that Ouazzani also had some kind of a “nascent” plan to attack the New York Stock Exchange. Ouazzani’s attorney denied that claim and court documents in his case do not mention any such plan.

At the same hearing, Joyce and other top government officials pointed to these two cases as examples of the kinds of terrorist conspiracies NSA surveillance has disrupted in recent years, but they gave no new public information to substantiate a claim made by General Keith Alexander, NSA’s director, a week earlier that “dozens of terrorist events” had been averted both in the United States and abroad. Alexander said he would provide members of the House Intelligence Committee with additional information about the some 50 other terrorist plots that had been averted as a result of NSA surveillance, but this would be behind closed doors as the details of these plots remain classified. Speaking at Black Hat, an information-security conference, a month later, General Alexander provided more specific numbers, saying that NSA surveillance had prevented 54 terrorist-related activities worldwide, including 13 terrorist activities within the United States.

The public record suggests that few of these plots involved attacks within the United States, because traditional law enforcement methods have overwhelmingly played the most significant role in foiling terrorist attacks. According to a survey by the New America Foundation, jihadist extremists based in the United States have mounted 47 plots to conduct attacks within the United States since 2001. Of those plots, nine involved an actual terrorist act that was not prevented by any type of government action, such as the 2009 shooting spree at Fort Hood, Texas. Of the remaining 38 plots, the public record shows that at least 33 were uncovered by using standard policing practices such as informants, undercover officers, and tips to law enforcement.

At the House Intelligence Committee hearing, the FBI’s Sean Joyce also pointed to the 2009 plots by Najibullah Zazi as well as David Coleman Headley’s plan to attack a Danish newspaper as attacks that were also disrupted by NSA monitoring. As Joyce explained, the plot by Zazi to attack the New York subway system around the eighth anniversary of the 9/11 attacks was “the first core al-Qaeda plot since 9/11” that was directed from Pakistan inside the United States.

There is no doubt that it was a serious plot, but if it was the only such plot on U.S. soil that the government averted as a result of the NSA’s surveillance monitoring, the public will have to decide whether it justifies the large-scale government surveillance programs—no matter how carefully they are run.

Countering Violent Extremism at Home

In August 2011, in response to growing concerns about homegrown violent extremism, the White House released a national strategy to counter violent extremism titled “Empowering Local Partners to Prevent Violent Extremism in the United States.” In it, the government emphasized three areas for priority action: federal engagement with local communities, increased law enforcement and
government expertise in countering violent extremism, and the promotion of American ideals as a counter to al-Qaeda's ideology. Yet two years later, it remains unclear to what extent America's institutional response to and understanding of radicalization has improved. A thorough examination of the 2011 strategy's implementation is necessary, but that task is beyond the scope of this report. Instead, what is presented below is a summary of some early findings and comments on this implementation.

**Strategic Implementation**

An initial examination suggests a mixed record in the implementation of the strategy. During a 2013 event on online radicalization at the New America Foundation, Mohamed Elibiary, a member of the Homeland Security Advisory Council, said that progress has been made, but that the countering violent extremism (CVE) initiative has been limited in its execution at the agency level. Rabia Chaudry, a fellow at the New America Foundation, noted that knowledge regarding the prevention of radicalization tended to remain among policymakers and not reach local communities. Haris Tarin, the director of the Muslim Public Affairs Council, voiced a similar belief that issues regarding radicalization are not a dinner table topic for Muslim families who, like most other Americans, are focused on more immediate economic issues.

In 2012, the Government Accountability Office (GAO) used participant surveys and interviews with officials to assess how well the Department of Justice (DOJ) and Department Homeland Security (DHS) were defining and communicating their CVE objectives. The GAO found that “DHS has identified CVE-related training topics but DOJ has not, making it difficult for DOJ to demonstrate how it is meeting its CVE responsibilities.”

The GAO also reviewed 8,424 feedback forms that DHS and DOJ had collected and retained from the more than 28,000 state, local, tribal, and territorial law enforcement officials, prison officials, and community members who had participated in the different training courses. Of those surveys, the oversight agency found that the majority of participants viewed the trainings favorably. According to the GAO's findings, trainees felt that the courses were among the most challenging they had taken, the instructors were knowledgeable, and the materials helped them better understand various extremist groups.

However, the assessment noted that many sub-agencies lacked effective methods of evaluating CVE trainings, particularly within the Department of Justice. For example, neither the FBI nor the U.S. Attorneys' Offices (USAOs) required feedback on presentations relating to CVE, and only four of 21 FBI field offices and 15 of 39 USAOs chose to ask for feedback. According to the USAO Executive Office, many of these presentations are given in a particular geographic location and focus on a particular threat for that area, so feedback may not be as widely applicable as it is for a curriculum-based CVE training course.

In addition to questioning the implementation of the existing strategy, some analysts have criticized the models upon which the strategy is based. Will McCants, a research scientist with CNA Analysis, and Clint Watts, a senior fellow at the Foreign Policy Research Institute, have argued that the strategy's model of community policing and a whole
of government approach may be an overreaction to a problem best resolved through decentralized traditional law enforcement.\textsuperscript{333} They have suggested that promoting a focus on vulnerable communities in an environment where homegrown extremism has largely taken the form of alienated lone individuals may waste funds, establish a relationship between Muslim communities and the government overly defined in terms of policing, and provide extremism a coolness factor similar to the one generated by the DARE campaign's anti-drug efforts.\textsuperscript{334}

In fairness, the CVE field is in its infancy and the administration’s strategy is only two years old. Further study, evaluation, and development of core concepts are necessary, though two issues require substantial attention as the field develops.

The first issue concerns the risk of overemphasizing the security role of law enforcement officials at the expense of their cooperation with local communities. In 2011, as the national strategy was being formulated, the Bipartisan Policy Center released a report on CVE in the United States. The report noted that, while it is important to maintain a bridge between counter-radicalization efforts and police functions, there must be a separation or counter-radicalization can itself become a grievance, perhaps even alienating the communities needed for an effective counter-radicalization policy.\textsuperscript{335}

The second key issue is the role the Internet plays in radicalization. In 2012, the Bipartisan Policy Center published a report titled “Countering Online Radicalization in America” that provides a more detailed examination of the Internet’s role in radicalization and potential policy responses.\textsuperscript{336} However, one of the important points raised in the report is that though the administration’s 2011 strategy identified the role of the Internet in online radicalization and called for the development of a separate strategy focused this concern, that strategy remains to be completed.
Chapter 5: Future Wild Cards for al-Qaeda and its Allies

Although the ability of al-Qaeda and its sympathizers to conduct large-scale attacks inside the United States and against U.S. interests has declined since our last report three years ago, there are several wild cards that could create an environment that allows al-Qaeda and allied groups to resuscitate themselves.

1. Unrest in Egypt and the Fate of Democratic Islamism

On June 30, 2013, millions of protesters took to the streets of Cairo and demanded that President Mohammed Morsi resign. A few days later, the Egyptian military removed Morsi from power. Following the initial euphoria of the Arab Spring, many saw the rise of the Muslim Brotherhood (of which Morsi is a leader) and other Islamist parties willing to engage in the democratic process as a repudiation of al-Qaeda’s anti-democratic message of violence. With the removal of a democratically elected Islamist government by a Western-backed military, and the Army’s mid-August killings of hundreds of Islamist protestors however, some may view the jihadists’ rejection of the democratic process as vindicated.

Shadi Hamid, the director of research at the Brookings Institution’s Doha Center, warns, “The Brotherhood’s fall will have profound implications for the future of political Islam, reverberating across the region in potentially dangerous ways.” One only has to recall the Algerian military coup in 1991—which started as an attempt to prevent the possibility of an elected Islamist government taking power and which plunged the country into a decade of civil war that killed 100,000 Algerians—to recognize the truth of that statement.

2. Prison Breaks

Another wild card is the capability al-Qaeda affiliates and allied groups have shown to launch successful prison breaks. In July 2013, 250 prisoners, most of whom were militants, were freed by the Pakistani Taliban in an attack led by a commander who had been freed in a massive prison break the year before. Just a few days earlier, hundreds of prisoners, including senior al-Qaeda figures, were freed in a prison break in Iraq. In fact, in July 2012, AQI’s Baghdadi announced the “Breaking the Walls” campaign, a yearlong effort to release his group’s prisoners. The attack on Abu Ghraib appears to be the culmination of those efforts.

The strategy of initiating prison breaks has a long history among al-Qaeda-associated groups, beginning with the Yemeni jailbreak in 2006 that led to the emergence of AQAP. During that breakout, 23 inmates escaped through a 460-foot tunnel into a nearby mosque; two of the escapees went on to become the leader and deputy leader of the al-Qaeda affiliate. In 2008 and 2011, the Afghan Taliban led attacks on the Sarposa prison in Kandahar province that freed an astounding 1,700 prisoners. Many prisons in the Middle East and South Asia lack the capacity to defend themselves against these kinds of armed attacks, and the ability of al-Qaeda-associated groups to free imprisoned militants may enable certain affiliates, such as AQI, to regenerate their capabilities.

3. Growing Sunni-Shia Rift in the Middle East and South Asia

From Lebanon to Afghanistan, the two dominant sects of Islam—Sunnism and Shiism—are in increasingly violent opposition to one another. The bloody conflict in Syria has morphed over its three-year lifespan from a popular uprising against a repressive ruler into a sectarian civil war pitting the country’s Sunni Muslim majority against President Assad’s minority Alawite sect, which is associated with Shia Islam and has been supported with weapons and funds by Iran’s Shia rulers. Factions of the armed opposition have reportedly targeted Shia and Alawite civilians purely on the
basis of their religion, and rebel leaders have threatened to destroy entire Shia and Alawite villages.\textsuperscript{344}

Meanwhile, continued AQI terrorist attacks targeting Iraqi state security services, as well as civilian centers, have prompted Iraq’s Shia leaders to crack down on the country’s Sunnis, hardening the minority group against their Shia compatriots and deepening the sectarian divide. In May 2013, the United Nations recorded the highest death toll in Iraq since 2008, when the U.S. war there was still raging. In that month alone, more than 1,045 civilians and security personnel were killed according to the U.N. data, primarily as a result of bombings claimed by AQI.\textsuperscript{345} It shows that AQI is becoming increasingly entrenched in Iraq’s Sunni community, and it is becoming impossible to disentangle the group’s violent tactics from the growing hostility the country’s Sunnis and Shias feel toward one another.

The sectarian conflicts in Syria and Iraq have also spilled over into Lebanon and Egypt. On June 23, 2013, in Lebanon’s port city of Sidon, soldiers clashed with supporters of a hard-line Sunni cleric, Sheikh Ahmed al-Assir, who had spoken out vehemently against the Syrian regime, as well as the Lebanese militant group Hezbollah, which had entered the Syrian conflict on the government’s side. Al-Assir’s supporters had previously fought with supporters of Hezbollah, but the June gun battles marked the first time that Lebanese security forces had clashed with a domestic militant group since the beginning of the Syrian war.\textsuperscript{346}

On the same day, four Egyptian Shia Muslims were stabbed, beaten, and dragged through the streets by members of a hard-line Sunni group in the Giza neighborhood of Cairo. As in Iraq, intensifying sectarian tensions in Egypt are partially the fault of the government, which has on multiple occasions stoked the fire. A week before the Giza attack, for example, President Morsi had appeared on stage with hard-line clerics who called Shias “filthy.”\textsuperscript{348} And in May, Salafist members of Egypt’s parliament denounced Shias as “a danger to Egypt’s national security.”\textsuperscript{349}

Sectarian violence has also soared in South Asia over the past few years.\textsuperscript{350} More than 180 members of Pakistan’s minority Shia Hazara community were killed in two massive bombings in the first two months of 2013 alone.\textsuperscript{351} In neighboring Afghanistan, violent attacks on Shia Muslims are somewhat more rare, but in December 2011, two nearly simultaneous suicide bombs in Kabul and Mazar-i-Sharif killed more than 60 Shia civilians as they celebrated the annual religious festival of Ashura.\textsuperscript{352}

We can expect sectarian tensions to continue boiling across the Muslim world, as the Syrian conflict grinds on and political and social unrest persist in many countries in the region. Al-Qaeda-affiliated groups will seek to exploit these sectarian divisions to garner support for their own violent agenda, and may well find greater room to operate because of it. Saudi Arabia and Qatar have mobilized their deep coffers to support extremist Sunni groups in the past and will continue to do so as long as it means they are able to counterbalance Iran and its support for Shia regimes and militant groups. This use of regional proxies has been seen across the region for decades and will likely continue exacerbating the Shia-Sunni divide.

4. A Syrian Training Ground

Another wild card is the potential for the Syrian civil war to provide a locus for training and indoctrination of jihadist fighters, including those from Western countries, who may commit acts of terrorism upon their return home. Syria has drawn foreign fighters from many countries in the region, including Egypt, Libya, Saudi Arabia, and Tunisia, as well from places like Russia, Dagestan, and Chechnya.\textsuperscript{353}

As noted earlier, the Syrian civil war has also drawn fighters from Europe. Charles Farr, Britain’s director general of the
Office for Security and Counter-Terrorism, has called the flow of European fighters to Syria “a very profound game changer.” Comparing it to Iraq, Farr noted that the Syrian fighters “are much closer to us, in much greater numbers and fighting with an intensity that we have not seen before.” The counts of European fighters in Syria vary, but between 70 and 100 fighters from the United Kingdom alone are believed to in the country. French Interior Minister Manuel Valls has estimated that there are more than 600 Europeans fighting in Syria, including 140 French citizens. And German officials estimate that there are 60 Germans in Syria. According to a study by the International Centre for the Study of Radicalisation, Europeans account for approximately 7 to 11 percent of the foreign fighters in Syria.

Because of this movement, some European countries have stepped up efforts to counter the flow of fighters to Syria. Belgium, for example, has established a network to track these foreign fighters. In April 2013, Belgian police detained six individuals, including the leader of Shariah4Belgium, who they accused of sending fighters and support to Syria, and prosecutors stated that they knew of at least 33 people linked to the Shariah4Belgium group fighting in Syria.

A compounding concern is that the arming of Syrian rebel groups may allow heavy weapons to fall into the hands of jihadist groups. The vast majority of the rebels fighting to topple Assad’s regime were ordinary civilians before the conflict began. In many initial battles, they were armed with simple stones and firearms bought for hunting. But civilians trained in technical careers soon taught themselves to make small homemade bombs. As professional soldiers began to desert and join the rebel movement, they acquired assault rifles, machine guns, rocket-propelled hand grenades, as well as captured armored vehicles and tanks.

As the conflict gathered speed, weapons began pouring into Syria from across the region. In October 2012, The New York Times reported that portions of the arms shipments, at the time coming from Saudi Arabia and Qatar, were reaching hard-line jihadist groups. But by May 2013, likely under pressure from the United States, Qatar was reportedly focusing on keeping weaponry out of the hands of al-Qaeda-linked fighters and coordinating all weapons and aid shipments to the rebels. The weapons were said to be going through the Syrian National Coalition’s General Command, the leadership of the loose coalition of Syrian rebel groups that are not believed to be militantly jihadist or anti-Western.

5. Afghanistan Post-2014

Lastly, a deeply flawed Afghan presidential election in April 2014 might be an inflection point for the beginning of intensified conflict in Afghanistan and would likely benefit the Afghan Taliban and allied groups.

However, none of the above is preordained, much less certain. Though at least three scenarios are possible. In the first, core al-Qaeda continues to degenerate. This could be accompanied by the continued ascendance of affiliates and associated groups within a broad ideological and strategic framework bequeathed by the core organization.

A second scenario would see a continually weakened core al-Qaeda producing an even more fragmented jihadi movement. These smaller, less capable entities would continue to pose a terrorist threat, but a far weaker, more sporadic, and perhaps less consequential one. However, as previously noted, they would likely be more difficult to track, identify, and counter.

A third scenario is dependent upon whether the Syria conflict revitalizes core al-Qaeda and the attendant movement. The big question is whether al-Qaeda can avoid making the same mistakes that previously undermined its struggle in Iraq, and how successfully it manages relations with its regional affiliates and associated groups.
Chapter 6: Recommendations

I. For the Legislative Branch

1. Congress should overhaul its oversight committees on national security. The responsibilities of the different committees should be clearly defined and—to the extent possible—not overlap.

A mind-boggling 108 congressional committees and subcommittees now oversee the Department of Homeland Security (DHS), up from the already large number of 86 in 2004. Too many of these committees have concurrent or overlapping jurisdiction, which results in conflicting guidance to the 22 agencies that make up DHS.

Congress should instead create a principal point of oversight and review for homeland security. As the legislative branch, it should be helping DHS integrate the various agencies it oversees, not adding to the confusion. After all, the two Armed Service Committees, which oversee the Pentagon and the armed services, do so quite well without all of the multiple redundancies that are found when it comes to homeland security.

Recent revelations that the NSA is collecting the phone-records metadata of American citizens, even if it is not privy to the content of those communications, reinforce the urgent need for a legislative branch that exercises appropriate oversight of the executive branch. The NSA program was created with virtually no public debate, setting a potentially dangerous precedent for future such national security programs.

Spying and surveillance are parts of the national security tool kit and should be used to understand and thwart an evolving jihadist terrorist threat. But these programs are inherently secretive, and to ensure they do not constitute government overreach, American citizens must rely on Congress to protect their constitutional rights. It was clear from the reaction on Capitol Hill that most U.S. legislators were not aware either of the extent of the NSA’s monitoring program or that it existed at all. Oversight committees with clear missions can play a vital role in balancing national security interests with civil liberty values and should examine these programs to determine if their large scope is necessary.

Congress should also constantly be ensuring that the immense amount of money spent on national security is being used effectively. In 2010, the intelligence budget alone topped $80 billion. It has fallen by small amounts since then, but remains a large expenditure. Effective oversight committees are the only mechanism for ensuring that taxpayer dollars are being spent well.

2. Congress should hold a series of public hearings on where the United States stand in its counterterrorism strategy 12 years after the 9/11 attacks.

Some key questions legislators should ask include:

- Do the various components of U.S. counterterrorism strategy match the shape of the threat today?
- Are all of these components being implemented? And with what success?
- Is the nation absorbing the institutional lessons learned over the past 12 years?
- Is the government spending money in the right places and getting the most bang for its buck?
- What is missing from the strategy?

3. Congress should use the withdrawal of combat troops from Afghanistan at the end of 2014 as an opportunity to review the Authorization for the Use of Military Force (AUMF).

Eight days after 9/11, Congress passed the AUMF, giving President George W. Bush the legal authority to go to war
against al-Qaeda and its Taliban allies in Afghanistan. Few in Congress understood then that they were voting for what has become America’s longest war. The AUMF has since been used to justify the CIA drone campaign in countries with which the United States is not at war, such as Pakistan and Yemen.

Almost twelve years after the AUMF was passed, President Obama gave a major speech arguing that the time had come to redefine the kind of conflict the United States has been engaged in, saying, “We must define the nature and scope of this struggle, or else it will define us.”365 The president went on to discuss the AUMF, saying he hoped to “ultimately repeal [its] mandate. And I will not sign laws designed to expand this mandate further.”

This potential recalibration of the “war on terror” has significant implications for the CIA drone program, which relies in good measure on the AUMF for its legal justification, and which was rapidly accelerated under President Obama. If the AUMF were to expire when U.S. combat operations in Afghanistan cease at the end of 2014, future drone strikes could only occur when the U.S. government is responding to some kind of “imminent” threat and would be justified only under the president’s Article II authority as commander-in-chief. As a practical matter, this would restrict the occasions on which drone strikes could be deployed.

For some, this is a welcome sign of potential change to the CIA drone program. While the program’s expansion was undoubtedly necessary because of the continued threat posed by al-Qaeda and its affiliates, the dramatic acceleration of the strikes under President Obama has sometimes overwhelmed other important objectives, namely maintaining cordial relations with Pakistan, the world’s second-largest Muslim nation. Also, the excessive deployment of CIA drones to target militants could provide an unwelcome precedent for countries such as China, Russia, and Iran as they begin to have the capacity to target individuals they regard as terrorists with drones.

While only three nations are currently confirmed to possess armed drones—Israel, the United Kingdom, and the United States—at least 80 countries have drones of some kind and a number of them may already be able to arm them, according to a count by the New America Foundation. In February 2013, for example, a Chinese state-run newspaper reported that the Chinese government had contemplated deploying an armed drone in a remote, mountainous area to kill a drug lord, but decided to capture him instead.366 And Iran claimed it had successfully armed a drone in 2010.367 A congressional debate about the future of the AUMF would be the forcing mechanism American officials need to create a more stringent legislative framework around the use of armed drones to target suspected terrorists.

4. Congress should put the CIA drone program on a more sound legal footing.

This could include transferring the program to the military, setting up a court to rule on targeting decisions, creating an independent committee to review strikes post facto, and improving the program’s overall transparency.

The functioning of the CIA drone program remains largely shrouded in secrecy, though mounting pressure from the public and Congress over the past couple of years have forced the administration to reveal more details about its decision-making process for the strikes. In 2012, President Obama’s then-top counterterrorism adviser at the White House, John Brennan, was reportedly working on writing an extensive “playbook” that would lay out the rules developed by the administration for the drone program over the previous several years.368 Since Brennan moved to take over as director of the CIA in February 2013, the White House has leaked some new guidelines for the program, which likely came from Brennan’s playbook.
One significant new rule, which came to light in May 2013, was the administration’s intention to apply the same rules it uses to target American citizens who have joined terrorist groups abroad to target foreign terrorists.  

This is an important step for the program for two reasons. One, thanks to a Justice Department memo leaked in early February 2013 that justified the targeting of Awlaki in Yemen, the public already has access to at least some version of the legal rationale for targeting American citizens in drone strikes. Two, that rationale requires a senior government official to be certain the targeted individual is a senior member of al-Qaeda or an allied group, which appears to eliminate the possibility of conducting so-called “signature strikes” that are particularly concerning from both a legal and a moral standpoint. Signature strikes are those that target groups of individuals who display a particular behavioral “signature” associated with militancy, but whose identities are not known. The cessation of signature strikes would be a critical change as it reduces the likelihood of civilian casualties.

Another possible solution would be to move the CIA drone program under the control of the Pentagon. On the surface, there is much that is appealing about this idea: it would bring what is essentially a military function to an organization that is far more accountable to Congress and to the public than the CIA is; and the families of those civilians who are inadvertently killed by drone strikes would be compensated for their losses, something that doesn’t seem happen with the CIA strikes. That said, if the program were simply taken over by Joint Special Operations Command (JSOC), which has conducted its own drone strikes in countries like Yemen, this may not be much of a fix as JSOC operates with just as much, if not more, secrecy than the CIA.

Another potential fix to the drone program that has also received a good deal of attention is the proposal to set up some kind of “drone court” that would be analogous in some respects to the Foreign Intelligence Surveillance Court (FISA) court that considers U.S. government requests for surveillance in the United States of those suspected of terrorism or espionage. The FISA court, however, is hardly much of check on the power of the executive. For example, The Wall Street Journal reports that the FISA court has turned down only 11 of the some 33,900 surveillance requests that were made over the past three decades. There is little reason to believe that a drone court would be any less of a rubber stamp on government decisions about whom it can kill with a drone. And a drone court might be quite unwieldy at those times when a suspected terrorist target has been identified and a targeting decision must be taken quickly.

Perhaps the most practical idea is to set up some sort of government body, independent of both the CIA and the Pentagon, to conduct after-action reviews of drone strikes, ensuring that the victims of the strikes were not civilians and did indeed pose some kind of threat to the United States. The creation of such a council would also enable the issuance of compensation payments for civilian victims.

As Bem Emmerson, the U.N. special rapporteur for counterterrorism and human rights, has rightly observed, the rapid proliferation of drone technology means that whatever structural and legal framework the United States finally puts together for its targeted killing campaign “has to be a framework that the U.S. can live with if it is being used by Iran when it is deploying drones against Iranian dissidents hiding inside the territory of Syria or Turkey or Iraq.”

5. Congress should create an independent investigative body—similar to the National Transportation Safety Board (NTSB)—to investigate terror attacks in the United States, explain how the attackers evaded law enforcement, and identify the lessons to be learned.
The NTSB has a proven track record of conducting thorough, unbiased investigations into large-scale transportation disasters, which are relatively rare but can be exceedingly deadly and traumatic. It makes sense that such a body should be created for terrorist attacks. It is not enough that the FBI and other law enforcement agencies already write their own internal reports on the failures that may have led to a successful terrorist attack, because they have an inescapable institutional bias. An independent review board would not only be immune from this bias, but would also be able to hold law enforcement accountable for their failures and ensure that suggested improvements are implemented.

II. For the Administration

1. The administration should repatriate some of the prisoners still being held at the Guantanamo Bay detention facility and should continue to use civilian courts to try terrorists.

Eighty-six of the 166 prisoners still being held in Guantanamo were cleared for transfer to the custody of their home countries three years ago following a year-long investigation of their cases by an interagency task force.\textsuperscript{373} Fifty-six of those 86 are from Yemen, which has an insecure prison system and makes their repatriation problematic.\textsuperscript{374} The remaining 30 prisoners, however, are from other countries and should be released into the custody of their home countries. These detainees have good reason to despair that they will remain in Guantanamo forever. Their cases have been exhaustively investigated. They have found to be guilty of nothing, yet they are being held indefinitely, a policy usually associated with dictatorships, not democracies.

As the United States winds down its targeted killing program and is no longer sending prisoners to Guantanamo, it has shown signs that it may increasingly turn to the use of domestic civilian courts to try terrorists captured abroad. For example, Ahmed Abdulkadir Warsame, who was captured in the Gulf of Aden on April 19, 2011, was flown to New York to stand trial on federal charges in July 2011.\textsuperscript{375} He pled guilty to all nine terrorism-related counts that were brought against him.\textsuperscript{376} And, as outlined in an earlier section, in 2013, the United States captured Sulaiman Abu Ghaith, bin Laden’s son-in-law and an al-Qaeda spokesman, in Jordan after he was deported from Turkey.\textsuperscript{377} He will also be tried in New York.

Trying terrorists in a civilian court is a sound decision for several reasons. First, the Obama administration’s goal is to close Guantanamo, not add prisoners there. Second, the conviction rate in these kinds of terrorism cases since 9/11 is 100 percent in jurisdictions such as New York. The New America Foundation maintains a database of jihadist terrorism cases involving American citizens and residents as well as individuals acting within the United States, and of the 38 such cases tried in New York since 9/11, 20 defendants pleaded guilty and 15 were convicted, while three either await or are currently on trial.\textsuperscript{378} When international terrorists—for example, Ahmed Warsame—have been transferred to stand trial in New York courts, they have also been convicted.

In contrast, the military commission system at Guantanamo is largely untested. The operational commander of 9/11, Khalid Sheikh Mohammed, for example, was arrested in Pakistan a decade ago but has yet to face trial; and it’s quite possible it may be many more years before his trial even begins.

Indeed, of the 779 prisoners who have been held at Guantanamo, only six have been convicted by military commissions, according to a study by the Congressional Research Service.\textsuperscript{379} In other words, while courts in New York have convicted alleged terrorists at a 100 percent
rate, fewer than 1 percent have been successfully tried at Guantanamo.

2. **The administration should create an Assistant Secretary for Countering Violent Extremism at the Department of Homeland Security.**

There is currently no single government official responsible for U.S. CVE policy, making it difficult for different government agencies to coordinate their efforts and for anyone to assess the success or failure of these programs. As the agency in charge of coordinating U.S. homeland security policies, DHS is the right place to house such an authority. An assistant secretary would be tasked with setting policy, holding government officials accountable for implementing that policy, and evaluating performance and impact.

3. **The government should incorporate lessons learned from the Boston bombings into its current emergency-response plan to ensure a more measured reaction to tragic but small-scale terrorist attacks.**

Shutting down large metropolitan areas and international airports, for example, tells the enemy that they can make a large impact with a small incident, and makes terrorists appear more powerful than they are. Low-grade attacks by domestic extremists are likely to continue, albeit infrequently. When they do happen, the United States must have both the infrastructure to respond and the demonstrated ability to move on afterward. President Obama’s 2011 National Counterterrorism Strategy highlighted this need to actively develop a culture of resilience that might deter potential terrorists from attacking the homeland:

Presenting the United States as a “hardened” target is unlikely to cause al-Qa’ida … to abandon terrorism, but it can deter them from attacking particular targets or persuade them that their efforts are unlikely to succeed. The United States also contributes to its collective resilience by demonstrating to al-Qa’ida that we have the individual, community, and economic strength to absorb, rebuild, and recover from any catastrophic event, whether man-made or naturally occurring.

In the wake of tragedies like the attack on U.S. government facilities in Benghazi, Libya, and the Boston Marathon bombings, the government should continue to emphasize the strength of America’s institutions and social fabric, both in order to minimize the likelihood of panic or the exaggeration of the threat by the American public, and to demonstrate to terrorists that such attacks are not a strategic threat to the United States.

4. **The U.S. government should make a concerted effort to track the flow of arms into Syria and urge U.S. allies to keep these weapons out of the hands of jihadist fighters to the extent possible. The United States should also keep careful track of the foreign fighters who have joined jihadist groups fighting in Syria.**

The shadowy nature of the arms shipments going into Syria, along with the growing intensity of the conflict, make it unlikely that the U.S. government will be able to keep close tabs on heavy weaponry in the country. The administration should therefore work closely with the Qatari government to maintain logs of the weapons and their serial numbers, so that when the conflict has lessened and a stable government is formed, it can know how many remain unaccounted for. It should also continue to pressure Qatar and other weapons donors to choose their recipients carefully. The likelihood, however, that these measures will keep weapons out of the hands of jihadists is unclear, and the al-Qaeda-linked groups in Syria will likely emerge from this conflict with significant battle experience, as well
as large caches of weapons. The key factor for the United States will be whether or not they also emerge with an anti-American agenda.

After the wars in Afghanistan during the 1980s and in Bosnia during the 1990s returning foreign fighters formed the heart of al-Qaeda and affiliated groups. The United States therefore should also make a careful effort to track the foreign fighters who have joined jihadist groups fighting in Syria.

**5. The United States should maintain a military presence in Afghanistan after the NATO combat mission ends in December 2014.**

According to recent press reports, President Obama is now contemplating withdrawing all American troops from Afghanistan sometime in 2014. While the administration had been considering leaving a force of at least several thousand soldiers to act as trainers and to hunt leaders of the Taliban and other militant groups, Obama has grown increasingly frustrated with Afghan President Hamid Karzai, who cut off negotiations about the size of the post-2014 American military force in June 2013.

Let us stipulate that Karzai can be a frustrating leader to deal with and that he can even be quite mercurial on occasion. That said, the Obama administration should not be making important strategic decisions merely on the basis of whether or not its leader likes dealing with another country’s leader. Zeroing out U.S. troop levels in the post-2014 Afghanistan is a bad idea on its face—and even raising this concept publicly is maladroit strategic messaging to Afghanistan and the region writ large.

Afghans well remember that after the Soviet Union withdrew in 1989, something that was accomplished at the cost of more than a million Afghan lives and billions of dollars of U.S. aid, the United States closed its embassy in Afghanistan during the George H.W. Bush administration and zeroed out its aid to one of the poorest countries in the world under the Clinton administration. It essentially turned its back on the Afghans once they had served their purpose of dealing a deathblow to the Soviets. As a result, the United States had virtually no understanding of the subsequent vacuum that allowed the Taliban to rise to power in the mid-1990s and grant shelter to bin Laden and al-Qaeda.
The current public discussion of the so-called “zero option” will encourage those hard-line elements of the Taliban who have no interest in any kind of a negotiated settlement and believe they can simply wait the Americans out. It also discourages the many millions of Afghans who see a longtime U.S. presence in the country as the best guarantor that the Taliban won’t come back in any meaningful way, and as an important element in dissuading powerful neighbors such as Pakistan from interfering in Afghanistan’s internal affairs.

A much smarter American messaging strategy for the country and the region would be to emphasize that the Strategic Partnership Agreement, negotiated between the two countries last year, guarantees the United States will have some form of partnership with the Afghans until 2024. The point should also be made that the exact size of the U.S. troop presence after 2014 is less important than the fact that American soldiers will stay in the country for many years, with Afghan consent, as a guarantor of Afghanistan’s stability.

6. The government should release additional bin Laden documents captured at his Abbottabad compound.

The small number of documents released by the Countering Terrorism Center at West Point thus far present an incomplete picture of al-Qaeda’s internal operations. Of the thousands of documents recovered in the 2011 U.S. Navy SEAL raid on bin Laden’s Abbottabad compound, only 17 have been publicly released. It is in the public interest to release additional documents that do not have any operational or intelligence significance from the “treasure trove” found at the compound. The release of these documents will continue the necessary process of further understanding and demystifying bin Laden and his al-Qaeda organization.
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The war against al-Qaeda is over
By Kenneth Roth, August 02, 2013
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What stops the U.S. government from declaring war on a person it perceives as a security threat and summarily attacking and killing him? The fact that doing so would violate the target’s right to life and fundamental due process, you might say. But in war, killing an enemy’s combatants is permitted. So can the United States declare war and designate as a combatant such perceived threats as a drug kingpin in New York, a Mafia don in Chicago or even Julian Assange or Edward Snowden?

More than moral revulsion militates against such abuse of war powers. There are also legal limits on who is properly viewed as a combatant and when war is an appropriate response to a threat. Those limits are rarely discussed, but nearly 12 years after the Sept. 11, 2001, attacks, with U.S. involvement in the traditional civil war in Afghanistan winding down, it is time to apply those limits to the global “war” against al-Qaeda and its armed affiliates.

President Obama recognized the problem in his May 23 speech at the National Defense University. He warned that “a perpetual war . . . will prove self-defeating, and alter [the United States] in troubling ways.” Quoting James Madison, Obama warned: “‘No nation could preserve its freedom in the midst of continual warfare.’”

But the president did not take the next step of declaring an end to the war with al-Qaeda or even explaining how citizens will know when it is over. International law provides guidance. The standard for when a legally recognized “armed conflict” exists between a state and an armed group appears in the protocols and official commentary to the Geneva Conventions and has been fleshed out by various international tribunals. An armed conflict requires a certain level of hostilities — judged by factors such as the number, duration and intensity of individual confrontations; the use of military weaponry; the number of participants in the fighting; and the casualties and displacement caused. It also requires the antagonists to possess armed forces under a command structure with the capacity to sustain military operations.

The al-Qaeda threat to the United States, while still real, no longer meets those standards. At most, al-Qaeda these days can mount sporadic, isolated attacks, carried out by autonomous or loosely affiliated cells. Some attacks may cause considerable loss of life, but they are nothing like the military operations that define an armed conflict under international law.

Obama himself has said that the core of al-Qaeda — the original enterprise now based, if anywhere, in the tribal areas of northwestern Pakistan — has been “decimated.” Its affiliates, such as al-Qaeda in the Arabian Peninsula and al-Qaeda in the Islamic Maghreb, are more robust armed groups but have limited capacity to project their violence beyond their regions. These affiliates are significant actors in Yemen and northern Africa, but it is far from clear that they pose a threat to the United States greater than, for example, Mexican drug cartels or international organized-crime networks — organizations for which few would characterize U.S. containment efforts as “war.” That the United States continues to deploy military force against al-Qaeda is not enough to qualify that effort as an armed conflict, because if it were, a government could justify the summary killing of “combatants” simply by using its armed forces to do so.
Admitting that the contest with al-Qaeda is no longer a war does not mean that the United States is defenseless or even that lethal force is forbidden. In the absence of war, U.S. conduct is governed by international human rights law, which favors arrest and prosecution but still permits lethal force, if necessary, to stop an imminent threat to life. In his May speech, Obama said that the United States is already abiding by this standard beyond the Afghan theater. “[O]ur preference is always to detain, interrogate and prosecute,” he explained, and “we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”

Those are the standards for policing, not war. So why not take the next logical step and declare the war against al-Qaeda over? Yes, there may be a price to pay. Obama’s political opponents will holler and score points after the next, inevitable terrorist attack. But the cost of using war rhetoric to shunt aside appropriate limits on lethal force is even higher. Plenty of governments are eager for excuses to summarily kill their enemies, however tenuously defined — even those living in the United States. The U.S. government has also committed abuses in the name of fighting terrorism. The Obama administration should rethink its overly elastic definition of war on al-Qaeda and call an end to it.
Does it really matter, from a legal perspective, whether the U.S. government continues to maintain that it is in an armed conflict with al Qaeda? Critics of the status quo regarding the use of lethal force and military detention tend to assume that it matters a great deal, and that shifting to a postwar framework will result in significant practical change. Supporters of the status quo tend to share that assumption, and oppose abandoning the armed-conflict model for that reason. But both camps are mistaken about this common premise. For better or worse, shifting from the armed-conflict model to a postwar framework would have far less of a practical impact than both assume.

Consider lethal force first. The Obama administration has made clear that lethal force would remain on the table even under a postwar model, and more specifically that it would remain an option against “continuous” terrorist threats. This in itself is not surprising; the U.S. government took a similar position for decades preceding 9/11. What is surprising is the capaciousness of the continuous-threat framework, and the extent to which it turns out to be consistent with the government’s existing approach to targeting even while we remain within the armed-conflict model. The capaciousness is not new. It was built into the continuous-threat model all along, in fact, as a review of key events in the 1980s and 1990s reveals. But the flexibility of the continuous-threat model was thoroughly obscured in the pre-9/11 period thanks to certain non-legal constraints, including especially the limited technology then available to carry out airstrikes in denied areas and the paucity of actionable intelligence. A variety of technological and institutional changes over the past dozen years—particularly the emergence of armed drones and the expansion of CIA and JSOC capabilities—have sharply eroded those constraints, altering what it would mean in practice to operate under the continuous-threat model once more. This helps explain why the government, though still maintaining the relevance of the armed-conflict model as a formal matter, has in fact already returned to the continuous-threat model as a matter of policy for operations outside of Afghanistan. There was relatively little cost to doing so in terms of operational flexibility, and by the same token there would be surprisingly little loss of operational flexibility should the underlying armed-conflict framework be abandoned.

The situation with respect to military detention is different, but only marginally so. The demise of the armed-conflict model will certainly matter for the dwindling legacy population at Guantanamo (and, perhaps, for a handful of legacy detainees in Afghanistan). It will not matter nearly so much for potential future detainees, however, for the simple reason that the United States long-ago got out of the business of taking on new detainees outside of Afghanistan. There are several reasons for the demise of long-term military detention as a policy option, including the fact that it has become unattractive compared to alternatives such as prosecution, the use of lethal force, and encouraging detention in the hands of other countries. The theoretical loss of legal authority to detain in the postwar period will have comparatively little real consequence in light of this larger dynamic.

None of this is an argument for or against declaring an end to the conflict with al Qaeda. The debate over that issue is badly distorted, however, by the shared and mistaken assumption that status quo targeting and detention policies depend on the armed-conflict model. Moving to postwar would not generate the sea change that advocates seek and opponents fear.
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POSTWAR
Robert M. Chesney∗

I. AN EVENING AT THE OXFORD UNION

The Oxford Union is a lovely place to give a speech. It has seen its share of major public figures over the years, with everyone from Margaret Thatcher to Michael Jackson dropping by to weigh in on the issues of the day. It certainly suited the occasion when Jeh Johnson, the General Counsel of the U.S. Defense Department, appeared on a cold evening in late November 2012 to discuss “the conflict against al Qaeda and its affiliates,” as the bland title in the Union’s promotional tweets and posts had put it.1

Johnson was not the first U.S. government lawyer to stand before a skeptical audience to defend the position that an armed conflict exists between the United States and al Qaeda. During the Bush administration, State Department Legal Adviser John Bellinger had done precisely that in a speech delivered just down the road at Oxford University, and his Obama administration successor, Harold Koh, had given a surprisingly-robust defense of the proposition before a packed gathering of the American Society of International Law in 2010.2 Several other Obama administration officials had followed Koh with similar speeches, moreover, and Johnson himself had already given a few such talks.3 But tonight would be novel in an important respect. Johnson was not merely going to mount another rote defense of the armed-conflict model. He also intended to foreshadow its demise and the corresponding prospect of a postwar era.

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1 See, e.g., https://www.facebook.com/events/262801320509981/.

2 See John Bellinger, Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007); Harold Koh, The Obama Administration and International Law (Mar. 25, 2010).

3 See, e.g., John Brennan, Speech at Harvard Law School; John Brennan, Speech at the Woodrow Wilson Center; Eric Holder, Speech at Northwestern University School of Law; Stephen Preston, Speech at Harvard Law School; Jeh Johnson, Speech at Yale Law School. For a comprehensive treatment of these speeches, as well as Johnson’s Oxford Union speech, see BENJAMIN WITTES & KENNETH ANDERSON, SPEAKING THE LAW (2013).
This was a risky move from a political perspective.\footnote{Jeh Johnson was an excellent choice to take this risk. A Morehouse man and graduate of Columbia Law, he was widely-respected for his acumen and sober judgment. More importantly in this context, Johnson could not readily be depicted as a sheep in wolf’s clothing working from within the administration to shut down the armed-conflict approach to counterterrorism. Over the past several years, a steady stream of media accounts had shed light on the internal legal debates that periodically emerged within the Obama administration in connection with counterterrorism policy, particularly with respect to the use of military detention and lethal force. \textit{See, e.g., Daniel Klaidman, Kill or Capture} (2013). These stories tended to depict Johnson as cautious yet more likely than certain other administration lawyers—particularly Koh—to support the legality of using the military option. At any rate, no one could say he was holding down the left flank amongst the members of Obama’s national security law team. Of course, it also did not hurt that Johnson already planned to retire from public service in the near future, and hence did not have to worry quite so much about the personal political consequences his speech otherwise might entail.} It was an article of faith in some quarters that the U.S. government prior to 9/11 had responded to terrorism through a feckless combination of indictments, extradition requests, and \textit{Miranda} warnings. From this perspective, 9/11 was a wakeup call that belatedly stirred America to adopt a more appropriate model—specifically, the armed-conflict model—thereby paving the way for the use of military detention without criminal charge, “enhanced interrogation techniques,” rendition, prosecution by military commission, and, of course, lethal force. And in those same quarters, it was equally assumed that the country in recent years had grown sleepy once again and was now at grave risk of reverting to a dangerous “pre-9/11 mindset.” For an Obama administration official to speak publicly of the possibility of an end to the armed conflict with al Qaeda would be to invite criticism of precisely this kind, without even satisfying those who instead wished to see an immediate end to militarized approaches to counterterrorism.

So much easier to let sleeping dogs lie, then. Yet it was past time for a U.S. government official to acknowledge that the possibility of moving on to a “postwar” phase was more than merely theoretical. In the face of economic, political, and diplomatic pressure (or perhaps the better word is exhaustion), the United States was drawing down rapidly in Afghanistan. And while there was talk of leaving some forces in that country to assist with training and possibly to conduct episodic counterterrorism missions (much as once had been said about the post-drawdown role of the United States in Iraq), the days of sustained combat operations in Afghanistan plainly were numbered by the fall of 2012. At the same time, the original post-9/11 enemy—al Qaeda—was undergoing its own transformation. Faced with unrelenting pressure from the United States and its allies, and driven by the logic of its own organizational structure and strategic preferences, al Qaeda for years had been fragmenting, with its
core gradually ceding center stage to a profusion of co-branded affiliates with varied objectives and considerable operational independence.⁵

Taken together, these trends were making it ever less clear precisely where and with whom the United States was engaged in armed conflict. Just how we might move on to a postwar phase—and what might follow from this in terms of the policy and legal architectures of counterterrorism—were thus increasingly-pressing questions. Johnson's speech would be an important first step in suggesting answers.

After the usual opening pleasantries, Johnson took to the podium. He began in conventional fashion, defending the now-familiar proposition that the U.S. government remains engaged in an armed conflict with al Qaeda and its "associated forces."⁶ Toward the end of the speech, however, he came around at last to the topic of war's end.

No one seriously expects al Qaeda to participate in a peace treaty or surrender ceremony, Johnson acknowledged; its implacable ideological commitments would seem to foreclose that path. Nor is it realistic to expect the conflict phase to end based on the literal destruction of the enemy—what the Romans called *debellatio*—in light of al Qaeda's lack of a physical center of gravity, its fuzzy organizational and individual boundaries, and the ease with which new persons and groups in any event could emerge to take up its name and cause. But there was another possibility, Johnson suggested.

The United States had enjoyed considerable success in its struggle with al Qaeda during the post-9/11 period. Eventually, Johnson asserted, there would come a "tipping point" beyond which al Qaeda and its affiliates might still remain in existence, yet would no longer have the practical capacity "to attempt or launch a strategic attack against the United States."⁷ When that time arrived, the need to suppress al Qaeda's remnants might still remain, yet it would no longer be appropriate to drape counterterrorism efforts in the mantle of armed conflict. "At that point," Johnson explained, "we must be able to say to ourselves that our efforts should no longer be considered an 'armed conflict' against al Qaeda and its associated forces." Instead, the governing rubric would be that of "a counterterrorism effort against individuals" who

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⁷ The phrase "strategic attack" is marvelously indeterminate. Which attacks, or series of attacks, would qualify for this label necessarily is a subjective matter, not the sort of thing one could or should expect to be determined judicially rather than politically.
happened to be the “scattered remnants of al Qaeda,” or who were members of other, unaffiliated groups. In such cases, “the law enforcement and intelligence resources of our government [would be] principally responsible, in cooperation with the international community.”

This sounded very much like the law-enforcement-oriented scenario long feared by some on the right and long sought by some on the left. That is, it sounded like a vision of demilitarized counterterrorism, a literal return to what is widely-understood to be the pre-9/11 paradigm. It is conventional wisdom among both supporters and critics of post-9/11 arrangements, after all, that the resort to military force for counterterrorism purposes depends as a legal matter on the continuation of the armed-conflict model. And had Johnson stopped there, his speech certainly would have been consistent with that keystone assumption. But he did not stop there. Immediately after describing the primacy of law enforcement and intelligence methods in a postwar phase, Johnson issued a brief but important caveat: even after the armed conflict with al Qaeda ended, “our military assets [should remain] available in reserve to address continuing and imminent terrorist threats.”

What to make of this? Johnson plainly thought that something important turned on whether the tipping point had been reached. “War must be regarded as a finite, extraordinary and unnatural state of affairs,” he had intoned, adding that “we must not accept the current conflict, and all that it entails, as the ‘new normal.’” The obvious implication is that the postwar world would differ sharply from the status quo. Certainly that is the working assumption of many if not most participants in the current debate. But would things really be so different? Not so much as critics of the status quo assume and supporters of the status quo fear.

II. THE MILITARY DETENTION OPTION IS LARGELY DEFUNCT ALREADY

The question is more complicated than it seems. Plainly, it has a legal dimension. But a number of non-legal factors come into play as well, including domestic political considerations, the international diplomatic context, and even what we might call the balance of equities among institutions within the executive branch. Each of those also might be impacted in a significant way by adopting a postwar posture, and I’ll have

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much to say about that below. I begin, however, with the question of how moving to a
postwar model would alter the prevailing legal architecture with respect to the most
important manifestations of the armed-conflict model: the powers to kill and to detain.

a. The Armed-Conflict Model Matters for the Dwindling Group of Legacy Detainees

Consider detention first. Throughout the post-9/11 period, the legal architecture
undergirding the U.S. government’s use of military detention has depended on a series
of claims: that a state of armed conflict exists, that the law of armed conflict (LOAC)
therefore applies, and that LOAC rules permit detention without criminal charge for the
duration of the conflict when it comes to at least some persons associated with the
enemy. Each step in that chain of reasoning has been met with fierce objections from
various quarters, but nonetheless this analysis has undergirded the government’s use of
military detention for the past dozen years. And yet, despite the resilience of the
government’s detention framework, it is not perpetually sustainable.

By definition, the authority the government has asserted will collapse once the
underlying armed conflict ends. Moving to a postwar model thus unavoidably entails
an end to the authority to continue to hold the last remaining military detainees in U.S.
custody. Currently, that would mean the 164 remaining detainees at Guantanamo, and
the several dozen detainees still in U.S. custody in Parwan, Afghanistan. Of course, the
U.S. government could plausibly continue to hold those individuals in military
detention for a limited additional period upon the end of the armed-conflict stage,
while unwinding their situations in a safe and orderly fashion. But such wind-up
authority would be temporary at best. The government eventually would have no
choice but to prosecute the detainees (an option that lately seems viable for ever-fewer
detainees), 10 transfer them to the custody of another country, or simply release them

9 The United States continues to maintain custody of several dozen non-Afghan detainees at Parwan,
notwithstanding a much-ballyhooded process through which detention operations otherwise (that is, in
cases involving Afghan detainees) have been handed over to the Government of Afghanistan. U.S.
officials have declared their interest in ending this detention operation as well, but though the looming
withdrawal of U.S. forces suggests this may be inevitable, it is not yet clear how the situation will be
resolved. See Kevin Sieff, In Afghanistan, a Second Guantanamo, Wash. Post (Aug. 8, 2013), at
http://www.washingtonpost.com/world/in-afghanistan-a-second-guantanamo/2013/08/04/e33e8658-f53e-
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10 Cf. The Lawfare Podcast Episode #34: Brig. Gen. Mark Martins on His Decision to Drop Standalone
Conspiracy Charges Against 9/11 Defendants,” Jan. 10, 2013 (describing implications of the D.C. Circuit’s
decision in Hamdan v. United States, which rejected an attempt to prosecute detainee on “material
support” grounds for conduct pre-dating 2006), at http://www.lawfareblog.com/2013/01/the-lawfare-
podcast-episode-23-brig-gen-mark-martins-on-his-decision-to-drop-standalone-conspiracy-charges-
against-911-defendants/.
outright. Habeas review that already exists for Guantanamo detainees—and that most likely would soon be brought to bear for detainees in Afghanistan—would serve to enforce this outcome.\footnote{\textsuperscript{11}}

As to the small and dwindling population of legacy detainees at Guantanamo and in Afghanistan, then, moving to the postwar era would have genuine legal consequences. Those consequences would surely be magnified in the public’s eye, moreover, thanks to the media spotlight that shines perpetually on all things Guantanamo. The unwinding of detention there surely would be portrayed as an unmistakable sign of a sea change. Yet the legacy cases are only part of the story. When we turn our attention to what the postwar model would mean for potential detainees going forward, the extent to which such a change would actually matter is much less obvious.

\textit{b. The Decline of Detention}

As an initial matter, consider that the Obama administration has made clear since 2009 that it will not bring new detainees to Guantanamo; that Congress simultaneously has made clear its opposition to hosting detainees in the United States; that new detainees may not be brought into Afghanistan for holding in facilities there; and that there are no other long-term detention facilities available.\footnote{\textsuperscript{12}} So long as these conditions hold, the existence or absence of detention authority based on the law of armed conflict is entirely academic for persons not already in custody. Of course, perhaps something could change. A future administration might feel differently about Guantanamo, for example. But might there be larger factors, applicable across administrations, suggesting that new long-term detainees nonetheless would be few and far between? In fact, there are several.

\footnote{\textsuperscript{11}} The existence of habeas jurisdiction at Guantanamo would ensure some role for the courts in policing the unwinding of detention authority there, though the court’s mixed experience with the release of Uighur detainees at Guantanamo provides reason to manage one’s expectations as to how hard court’s would push in circumstances involving diplomatic obstacles to release. \textit{See}, e.g., Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (refusing to direct the government to release into the United States a detainee who had prevailed in habeas but had not yet been released). Habeas does not similarly extend to Parwan detainees at this time, but that very likely would change in the event that the government were to perpetuate its custody of non-Afghan detainees there substantially past the point in time when the armed-conflict phase of the conflict might be declared over. \textit{Cf.} al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (declining habeas jurisdiction while holding out the prospect of a different result in the event of different circumstances).

\footnote{\textsuperscript{12}} This dilemma was summarized by Admiral William McRaven during his testimony before the Senate Armed Services Committee in June 2011. \textit{See} Nomination Hearing, Senate Armed Services Committee, June 28, 2011.
Let’s begin by noting that the bulk of Guantanamo’s growth occurred between 2002 and 2004, peaking in 2004 at approximately 660 detainees. After that, it began shrinking, reaching 164 detainees as of the end of July 2013. True, some additional detainees did arrive between 2005 and early 2008, but the pace declined over time, and ground to a halt early in the last year of the Bush administration; the last individual brought there, Muhammed Rahim al-Afghani, arrived in March 2008.

This slowdown was inevitable for various reasons. Most obviously, there just weren’t as many people who might be detained in the first place once a few years had gone by after 9/11. The circumstances of the immediate post-9/11 period were unique from this perspective. Both al Qaeda and the Taliban were concentrated in Afghanistan in the fall of 2001, and operated relatively openly there. The U.S. invasion of Afghanistan drove both groups from the field, providing opportunities for large numbers of captures both within Afghanistan and in Pakistan (including, alas, captures of persons who were not actually linked to either group). It was never likely that the pace of captures that occurred under those circumstances could be perpetuated beyond a year or two; only the emergence of new conflict zones with large-footprint combat deployments could result in comparable occasions for detention on a high-volume basis, as events in Afghanistan and Iraq would illustrate. The erosion of al Qaeda’s leadership core and the geographic shift of its center of gravity (from an overt, concentrated grouping in Afghanistan to a dispersed, gone-to-ground network with elements in areas such as Pakistan, Yemen, and Somalia) meant that the flow of new detainees to Guantanamo was bound to drop off sharply even if no other factors emerged to push against using the facility.

Of course, other such factors did emerge. The political and diplomatic costs of using Guantanamo increased over time, to the point that President Bush himself frequently referred to the desirability of shuttering the facility by the end of his time in office and 2008 Republican presidential candidate John McCain likewise endorsed closure. At the same time, the pressure to rely on U.S.-administered military detention dropped off to some extent.

In part this had to do with the fact that the interrogation programs facilitated by that detention had become known to the public and extraordinarily controversial. And in part it had to do with the increasing attractiveness of alternative dispositions that could provide incapacitation with less legal, political, and diplomatic friction. First, the

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domestic criminal justice system in the United States expanded both its substantive reach and its procedural flexibility in terrorism-related cases, and the Justice Department's mounting record of success in a long line of terrorism-related cases helped establish the reliability of that approach.\textsuperscript{15} Second, there has long been the option of taking advantage of the willingness of another country to take custody of a particular individual, either with or without U.S. assistance in capturing the person, and that approach has continued in more recent years.\textsuperscript{16} At any rate, as U.S.-administered detention grew more controversial, it likewise grew more appealing to have some other country do the honors whenever this might be a reliable option, sufficiently likely to address U.S. security concerns. Third, some have suggested that the expanding practical capacity to carry out lethal strikes via drone also has played a role in disincentivizing detention,\textsuperscript{17} though in fairness it remains to be demonstrated that drone strikes have been used with any frequency in circumstances where a capture operation truly was a reasonable alternative (and the Obama administration has vigorously denied doing so).\textsuperscript{18}

There was more. The wave of habeas litigation generated by detention at Guantanamo grew increasingly complex over the years, becoming a cause célèbre at the center of intense media scrutiny. Things then boiled over in the summer of 2008 with the Supreme Court's Boumediene ruling, establishing at last that the detainees could litigate their claims on both legal and evidentiary grounds.\textsuperscript{19} This launched years' worth of intensive litigation across dozens of cases—litigation that continues to this day—with the government responding to discovery requests, haggling over the


\textsuperscript{16} See, e.g., Eli Lake, "Somalia's Prisons: The War on Terror's Latest Front," \textit{The Daily Beast} (June 27, 2012) (reporting more than a dozen persons transferred into Somali custody by U.S. forces since 2009), \url{http://www.thedailybeast.com/articles/2012/06/27/somalia-s-prisons-the-war-on-terror-s-latest-front.html}. Of course, there may be a very fuzzy line between circumstances in which another country is affirmatively interested in taking custody of such a person and circumstances in which another country instead is induced to take such a step.

\textsuperscript{17} See, e.g., "Wishful Thinking on the War on Terror," \textit{Wash. Post} (Aug. 5, 2013) (speculating that President Obama's opposition to holding prisoners in long-term custody may have contributed to an increase in the use of lethal force in recent years), \url{http://www.washingtonpost.com/opinions/wishful-thinking-on-the-war-on-terror/2013/08/05/3485e982-fde3-11e2-9711-3708310f6f4d_story.html}.

\textsuperscript{18} Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, as Prepared for Delivery, Harvard Law School, Cambridge, MA (Sep. 16, 2011).

disclosure of classified information, and, ultimately, having to prove the factual basis for particular detentions in federal court.\textsuperscript{20} Whether this process ultimately tilts substantially in the government's favor has generated much debate; some critics take the view that, in the end, it is an exceedingly—excessively—deferential system.\textsuperscript{21} The fact remains, however, that nothing in the history of warfare compares to it in terms of its procedural and logistical demands. On that dimension, it necessarily makes detention at Guantanamo less appealing to the government (though one might argue that the legitimacy that such judicial review can confer is well worth the candle in circumstances such as this in which there is a manifest and persistent risk of false positives).\textsuperscript{22} Meanwhile, Congress eventually did its part to reduce Guantanamo's appeal to the executive branch, albeit unintentionally, when it decided to impose draconian constraints on the discretion of the Commander-in-Chief to release or transfer detainees who are taken there.\textsuperscript{23}

The picture is made still more complicated by the increasing marginalization of the core al Qaeda network in favor of regional "affiliates" and independent-but-like-minded groups and individuals. This shift matters in part because the government's detention model rests on the claimed existence of an armed conflict with al Qaeda, and the shift makes it harder to determine whether particular individuals are part of that conflict in a relevant sense in the first place. And it matters in part because the government's detention model also rests, from a domestic separation of powers perspective, on the applicability of the 2001 Authorization for Use of Military Force and the National Defense Authorization Act for Fiscal Year 2012, which likewise are harder to connect to a given individual's circumstances in light of these larger changes. Even if we assume there are persons whom the government would want to hold and could actually capture, then, in a growing set of circumstances it is hardly obvious that detention authority exists even now.


The upshot of all this is clear. The long-term military detention option has largely ceased to matter in actual practice other than in connection with the small legacy populations at Guantanamo and Parwan. Shifting to a postwar legal architecture would indeed matter a great deal for those legacy cases, but it would hardly matter at all little when it comes to the potential detention of those not already in custody.

III. LETHAL FORCE, CONTINUOUS THREATS, AND THE SURPRISING PRE-9/11 FRAMEWORK

Would shifting to a postwar framework impact the status quo regarding the use of lethal force more so than it does detention? Surprisingly, no.

That some amount of targeting authority would remain even under the postwar rubric is not in doubt. Jeh Johnson said as much, after all, when he indicated that military options would remain available in the postwar period for “continuing and imminent threats.” But that’s not the interesting question. The interesting question is whether postwar targeting authority would be narrower than the scope of authority currently asserted by the government even under the armed-conflict model, such that drone strikes (and other exercises of lethal force) in the postwar world would have to be eliminated or at least curtailed substantially as compared to the status quo.

a. Policy Constraints on Attacks Outside the Hot Battlefield

It is tempting to assume that the answer must be yes, that the postwar model surely would be a narrower affair—a much narrower affair—than the status quo when it comes to lethal force. On close inspection, however, that proves not to be the case. Why? For two seemingly-contradictory reasons. First, the government for reasons of policy already embraces an approach that is more restrictive than the armed-conflict model arguably would require. Second, the legal framework the government most likely would apply in the absence of the armed-conflict model is considerably less restrictive than one might expect. Indeed, it is the same framework that applies already as a matter of policy. Let me explain.

It helps to begin by clarifying the U.S. government’s baseline position on what legal boundaries follow for the use of lethal force—i.e., for targeting—under the armed-conflict model. Setting aside important issues such as proportionality (i.e., the prohibition on attacks that will have an impact on civilians or civilian objects exceeding

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24 I certainly do not mean to suggest there will never be new occasions for the use of military detention. Sooner or later, the United States will have a significant new boots-on-the-ground, combat deployment overseas, and detention no doubt will be part of it as in all past wars. Cf. Benjamin Wisses, Detention and Denial: The Case for Candor after Guantanamo (2011) 103-10 (pointing out that it would be foolish to assume we will never again be in such a position, and that we will in that case almost certainly have to (and should) resort to military detention on a substantial scale).
what is necessary to achieve the concrete and direct military objective of the attack) and questions involving the sovereignty rights of a state in which an attack occurs, the U.S. government’s position is straightforward. It maintains that it is in an armed conflict with al Qaeda, the Afghan Taliban, and certain “associated forces”; that the law of armed conflict (LOAC) governs its uses of force against those groups irrespective of the location of an attack; and that the members of these organization as a result may lawfully be targeted based simply on their membership status (as opposed to only targeting them while directly participating in hostilities, or having to attempt to capture such persons alive).25

This analysis has no shortage of critics, to be sure, but the important point here is that this has been the position of the U.S. government over the past dozen years, and it is an approach that leaves the government with considerable targeting flexibility. Or at least it would, if the government’s policy was to exploit those legal boundaries to the maximum extent. But that is not current U.S. government policy outside of Afghanistan, nor has it been for some time.

Simply put, the U.S. government years ago decided not to use the full scope of its LOAC-based targeting authority outside of “hot battlefields” such as Afghanistan. That is, it decided not to make full use of the status-based targeting authority in places like Yemen and Somalia, even while maintaining that LOAC did indeed govern those strikes.

John Brennan made this clear in a speech at Harvard Law in the fall of 2011, more than a year before Johnson’s Oxford Union address.26 Brennan at that time was the White House’s top counterterrorism official, and he was at Harvard to deliver a robust defense of the administration’s policies. When he turned to the topic of lethal force, he opened by reminding the audience that the government did not view its “authority to use military force against al-Qa’ida as being restricted solely to ‘hot battlefields’ like Afghanistan,” but rather saw the conflict as extending to those locations where al Qaeda

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26 Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, as Prepared for Delivery, Harvard Law School, Cambridge, MA (Sep. 16, 2011).
might be found. That said, Brennan observed that there nonetheless was much less of a
gap between the government and its critics than many assume. Outside of Afghanistan
and Iraq, he asserted, the U.S. government chose as a matter of policy not to embrace
the full scope of its claimed authority under LOAC, allowing for targeting of all
members of al Qaeda and its associated forces. Instead, the government chose to
"focus[] on those individuals who are a threat to the United States," and more narrowly
than on those "whose removal would cause a significant—even if only temporary—
disruption of the plans and capabilities of al Qaeda and its associated forces."

There is no question that this policy, for better or worse, amounted to a constraint
above-and-beyond the limits of the LOAC model (as the U.S. government understood
those limits, at any rate). And at first blush, it seemed a very significant constraint
indeed. It was an "imminent threat" test, after all, and to a layperson the use of the
word "imminent" might have strict connotations, conjuring images of police snipers at
a hostage scene holding their fire until it becomes clear that the perpetrator is about to
harm the hostages. That would certainly be a far cry from the LOAC model described
above. There was, however, a catch.

b. Imminence Does Not Mean Imminence

The key, Brennan explained, was "how you define 'imminence.'" Contrary to that
word's connotations of temporal exigency, Brennan asserted that there is

increasing recognition in the international community that a more flexible
understanding of 'imminence' may be appropriate when dealing with terrorist
groups, in part because threats posed by non-state actors do not present themselves
in the ways that evidenced imminence in more traditional conflicts.

Al Qaeda was a case in point, he went on to say. It "does not follow a traditional
command structure, wear uniforms, carry its arms openly, or mass its troops at the
borders of the nations it attacks," and yet "it possesses demonstrated capability to strike
with little notice and cause significant civilian or military casualties." These qualities,
Brennan asserted, make it impractical and decidedly unwise to interpret "imminence"
in strict temporal terms when applying that test to al Qaeda. We would not know when
that moment of exigency arrived, in most instances, and it made little sense to wait for it
insofar as the organization had already attacked once and was bent on doing so again.
America's allies, Brennan added, were coming to the same conclusion: "Over time, an
increasing number of our international counterterrorism partners have begun to
recognize that the traditional conception of what constitutes an 'imminent' attack
should be broadened in light of modern-day capabilities, techniques, and technological
innovations of terrorist organizations."
If Brennan’s speech left any doubt as to whether the Obama administration construed the imminent-threat standard as, in substance, merely a continuous-threat standard, that doubt should have been dispelled a few months later when Attorney General Eric Holder made the same point in a speech at Northwestern University. 27 A U.S. drone strike recently had killed a U.S. citizen in Yemen (a member of al Qaeda in the Arabian Peninsula named Anwar al-Awlaki), generating heated debate about the manner in which the U.S. Constitution applies in such circumstances. Holder contended that the Constitution permits the government to kill a citizen purposefully, and without prior judicial involvement, at least when certain factors are present. One such factor, he argued, was the existence of an “imminent threat of violent attack against the United States.” To be sure, this was a different context than the one Brennan had addressed; Brennan spoke of a constraint embraced by the government on policy grounds in cases involving non-Americans abroad, whereas Holder spoke of what the Constitution required for attacks on Americans. But the specific issue was much the same: what does “imminence” mean in the context of using force for counterterrorism purposes?

Not surprisingly, Holder closely tracked Brennan’s analysis, rejecting a strict-imminence test in favor of a continuing-threat understanding. And he did so for much the same reasons. In the context of terrorism, Holder contended, imminence must turn on “considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future attacks against the United States.” The same view, moreover, would later appear in a “white paper” produced by the Justice Department concerning the al-Awlaki situation, a document that underscored the position that some groups should be thought of as continuously in the act of planning attacks, thus making an attack always imminent. 28

The U.S. government’s embrace of the continuous-threat standard for attacks outside the hot battlefield of Afghanistan was further underscored in May 2013, when the president gave an address at the National Defense University. 29 The speech was billed as the culmination of a multi-year effort to tailor and clarify the legal and policy frameworks through which the U.S. government should approach counterterrorism. In many respects it echoed what Johnson had said at the Oxford Union previously, both defending the proposition that the United States currently remains in an armed conflict


28 Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force.

with al Qaeda but also warning against allowing the war to continue indefinitely. And like the Brennan speech, Obama’s address also emphasized just how constrained U.S. targeting practices actually are even while the government is still operating under the armed-conflict rubric.30 Outside of Afghanistan,31 the president explained, attacks would occur only when capture is not an option, when no other authority can address the threat, and the persons to be attacked “pose a continuing and imminent threat to the American people.”32

This was at least as restrictive as the policy constraint Brennan had first acknowledged back in 2011, and by the same token it too was a clear departure from what the LOAC framework ostensibly would allow. At the same time, however, it did not follow that drone strikes would suddenly become rare under this approach. Drone strikes had continued to occur and to spark controversy after Brennan’s speech, and as we soon found out they would continue under the president’s re-formulation as well. Indeed, during a two-week span in late July and early August 2013, the United States

30 With respect to detention, as one might expect, the president highlighted that we long-since have ended detention operations in Iraq, that we are in the midst of ending them in Afghanistan, and that we ought to end them as soon as possible at Guantanamo as well (though he did not foreclose persevering with detention of legacy detainees at some other location).

31 Even within the hot battlefield of Afghanistan, in fact, U.S. policy had come to limit targeting to situations involving either “high value al Qaeda targets” or else other forces “massing to support attacks on coalition forces.” This could be a version of the so-called signature strike approach, in which the individual identity of the targets is unknown but circumstances make sufficiently clear that it is an enemy armed group involved in the conflict.

32 The same day, President Obama issued a new Presidential Policy Directive (PPD) implementing these standards. According to the declassified “fact sheet” released by the White House, the new PPD governed the use of force “outside the United States and areas of active hostilities.” Consistent with the president’s speech, the PPD states that lethal force cannot be used outside the hot battlefield unless (1) the strike will “prevent or stop attacks against U.S. persons” in the sense that the target “poses a continuing, imminent threat,” (2) “capture is not feasible,” (3) and “no other reasonable alternatives exist to address the threat effectively.” The PPD adds that lethal force may not be used against a “non-combatant,” which at first blush sounds like a prohibition on using lethal force outside the context of armed conflict altogether. But the PPD defines “non-combatant” in a footnote that puts things in a different light. As one would expect, the PPD defines phrase “non-combatant” to exclude both actual combatants in armed conflict and civilians who directly participate in hostilities during armed conflict. In addition to those armed-conflict scenarios, however, the PPD definition also goes on to exclude “an individual who is targetable in the exercise of national self-defense.” The net result of it all is that the existence of a state of armed conflict already has become irrelevant to the question of targeting authority for all scenarios arising outside of Afghanistan.
apparently carried out at least nine airstrikes in Yemen while operating under the
continuous-threat standard, resulting in some 38 deaths.33

Critics of the status quo—those coming from the left and the libertarian right, I
mean—might respond to this analysis by arguing that they reject not only the armed-
conflict model but also the "continuous-threat" conception of imminence as well. That
is, they might argue for rejecting both the armed-conflict model and the continuing-
threat standard, in favor of an approach that permits the use of force solely when harm
is strictly imminent in a temporal sense. This is an approach often described—by
supporters and critics alike—as the pre-9/11 model, reflecting the widespread
assumption that this standard was the norm before the Bush administration embraced
the armed-conflict approach. But it was not the norm then, and it is not likely what Jeh
Johnson and the president are referring to when they speak of a postwar period today.

c. The Continuous-Threat Model in the Pre-9/11 Era

Though this fact is not widely appreciated, counterterrorism in the pre-9/11 period
was very much influenced by the continuous-threat standard.34 The issue arose
explicitly at least as early as 1984. Hezbollah had carried out a series of bombings and
kidnappings targeting Americans in Lebanon, most notably the infamous Marine
Barracks bombing. When then NSC-staff Oliver North proposed that the CIA should
train and field a small group of foreign operatives to kill Hezbollah's leadership in
response, it set off a fierce debate.35 Would this amount to "assassination" of the kind
that was exposed and denounced during the tumultuous years of the 1970s—that is, the
use of lethal force simply to advance foreign policy interests? Or would it instead
amount to national self-defense, using lethal force for the same reasons as in wartime
but in a manner falling below the threshold of conflict due to its limited scope and to
the non-state nature of the opponent?

The debate resulted in an opinion from the CIA general counsel, the thrust of which
was to categorize the proposed operation as national defense rather than assassination,

http://www.washingtonpost.com/world/middle_east/yemen-officials-say-7-saudi-militants-killed-in-
recent-wave-of-us-drone-strikes/2013/08/09/4040bbba-0150-11e3-8294-0ec5075b840d_story.html.

34 No one has played a more important role in emphasizing the pre-9/11 roots of this model, under
the label of national self-defense, than Professor Kenneth Anderson. See, e.g., "Targeted Killing in U.S.
Counterterrorism Strategy and Law," in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM
(Benjamin Wittes, ed. 2009), at 355.

on the theory that the organization in question had already attacked Americans and was capable of and willing to do so again.\textsuperscript{36} Backed by this continuous-threat understanding of its self-defense authority, the Reagan administration accepted the plan, authorizing it to proceed as a covert action program.\textsuperscript{37} Ultimately, this particular operation fizzled (it seems that the proxy force involved made a poor impression on special operations forces sent to observe them, and the plug was pulled as a result).\textsuperscript{38} A 1986 successor to this underlying presidential authority stayed on the books, available should future occasions present a similar continuous-threat scenario involving terrorism.\textsuperscript{39} Reagan administration officials went on to differ sharply and publicly over whether, as a matter of policy, overt military force ought to be used. Secretary of State George Shultz was hawkish on the point, giving speeches explicitly endorsing the self-defense rationale; Secretary of Defense Cap Weinberger pushed back, having concluded after Vietnam that military force ought not to be used on an isolated or limited basis.\textsuperscript{40} Faced with a terrorist attack sponsored by Libya, however, the Reagan Administration ultimately was willing to carry out a limited but substantial set of overt airstrikes as a continuing-self-defense response.\textsuperscript{41}

A decade later, the Clinton administration found itself wrestling with the same legal and policy questions as the significance of the threat posed by the emergent al Qaeda network grew clearer. Its decisions reinforced the Reagan model in which continuing terrorist threats could be met with lethal force, quite apart from any claim of an armed conflict.

Prior to the 1998 East African Embassy bombings, U.S. officials were not prepared to use lethal force against al Qaeda. This changed after the attacks on the American embassies in Ethiopia and Tanzania, however. Following Reagan’s Libya example, the

\textsuperscript{36} See id. at 361-62.


\textsuperscript{38} See NAFTAII, supra note 37, at 151-52.


Clinton administration launched airstrikes via sea-launched cruise missiles on al Qaeda targets in Afghanistan and the Sudan, including an attempt to kill the entire senior leadership of al Qaeda in one fell swoop. The results were meager; thanks to the significant time-delay between the decision to launch and the moment of impact (many hours in the case of sea-launched cruise missiles operating at a long distance from the target) the attempted strike on the leadership in Afghanistan achieved only limited success, and the strike in the Sudan ultimately proved exceptionally controversial as it became apparent that the building involved might not have been involved in manufacturing materials for chemical weapons after all. The fact remained, however, that the administration had deployed lethal force against a demonstrated and continuing terrorist threat, without making any claim that its right to do so stemmed from the emergence of a state of armed conflict. It was not merely a fleeting claim of authority, either; though the U.S. government did not carry out another overt attack on al Qaeda in the years that followed, it was not for lack of legal authority or policy commitment to doing so; the problem, rather, was exclusively a matter of practical and political incapacity.

The United States at that time largely lacked real-time, sustained intelligence regarding conditions on the ground in Afghanistan, and even if it were otherwise, the only available option for conducting an attack at that time involved sea-launched cruise missiles that, as noted above, involved multi-hour windows between launch orders and impact. Even absent such practical obstacles, moreover, there were significant political hurdles in the form of both diplomatic pressure (fueled particularly by the possibility that the Sudan strike had been a mistake) and domestic pressure (fueled by accusations that the Clinton administration was using force abroad in "wag the dog" fashion in order to distract the public from the Lewinsky scandal at home). Legal authority, in contrast, was not perceived to be an obstacle. At least from the fall of 1998 onward, in fact, the government's formal legal position was that it had the authority to attack al Qaeda if the right opportunity were to arise, without regard either to whether there was a state of armed conflict and without need to await the moment when a new attack might be imminent in temporal terms. On multiple occasions senior officials came extremely close to ordering new attacks, in fact, though they never were convinced that the opportunity was right to take the final step in light of recurring doubts about the

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43 See id. at 130-31.

44 See id.
reliability of the intelligence (which generally involved second-hand reporting from Afghan agents) and the time delays involved with the cruise missile option.\textsuperscript{45}

Critically, the existence of these practical and political constraints tended to obscure the fact that the government was claiming authority to attack al Qaeda based on the demonstrated and continuing threat that it posed, quite apart from any claim that another attack was strictly imminent, let alone a claim that there was now an ongoing state of armed conflict. Those constraints have not been static over time, however. Today the government’s capacity to generate actionable intelligence is considerably greater, and more importantly it now has the capacity to carry out airstrikes very soon after the decision to attack is made. The emergence, evolution, and proliferation of armed drones is central to both these developments. Armed drones were pushed into development and production prior to 9/11, in fact, precisely in order to address these twin limitations on the ability to attack al Qaeda in Afghanistan, and they have certainly gone on to serve that function there and in many other locations as well. Of course, the rapid expansion of CIA and military intelligence-gathering capacities of other kinds, particularly with respect to HUMINT, also has mattered a great deal, as has the corresponding institutionalization of procedures and personnel dedicated to rapidly integrating the inflow of intelligence with operational planning (a process pioneered in Iraq by special operations forces, and visible as well in the CIA’s development of its own manhunting-and-targeting systems).\textsuperscript{46}

\textit{d. What Sort of Legal Claim Is the “Continuous-Threat” Model Anyway?}

It is worth pausing at this stage to address a pressing question: what sort of legal claim does invocation of the continuous-threat model reflect? The whole point of surveying its use in the 1980s and 1990s is that the U.S. government did not claim that those uses of force were part-and-parcel of an armed conflict. And thus the continuous-

\textsuperscript{45} See \textit{id.} The Clinton administration simultaneously became more aggressive with respect to the \textit{covert} use of lethal force, making use of the still-active 1986 Reagan administration finding. Or at least it did so at times. As the 9/11 Commission Report famously recounted, the Clinton administration produced a series of decisions on the use of proxy forces to try to capture, if not kill, bin Laden. At least one of these fairly clearly embraced the use of lethal force, on continuing-threat grounds. Ultimately, however, the shifting and not-altogether-clear statements of authority in this sequence of approvals muddied the water considerably. Combined with doubts about the capacities of these proxy forces—again, shades of the early 1980s experience—the covert action track ultimately fizzled. \textit{See id.} at 126-33; Coll, supra note 39, at 491-93.

threat model is not a creature of the law of armed conflict. But if not that, then what is it in legal terms?

It has a clear character in terms of domestic U.S. law perspective, for what that is worth. On this view, the continuous-threat model describes a position one might take in relation to the constitutional law debates surrounding the separation of war powers between Congress and the executive branch. Specifically, it is a claim about the president’s authority to direct the use of military force as an exercise of national self-defense even in the absence of explicit Congressional authorization. Put another way, the continuous-threat model is a way of articulating the proposition that the executive branch has inherent authority to use force against a terrorist organization that has attacked before and is capable and willing to do so again, even absent evidence of a particular, looming plot to be stopped.

So far so good. But this does not address the international law issues raised by the use of force abroad. How should we understand the continuous-threat model from that perspective?

There are two ways in which international law might be implicated by invocation of the continuous-threat model. One pertains to the sovereignty interests of the state in whose territory force is used and the other concerns the rights of the targeted individuals themselves.

Under the sovereignty heading, the continuous-threat model can be understood as an invocation of the right to use force in self-defense under Article 51 of the U.N. Charter, subject to considerations of necessity and proportionality. This argument might run in either of two directions. One version would hold that a terrorist attack triggered Article 51 and that the resulting right to use force remains in effect over time insofar as the perpetrating organization intends to strike again. Another version partakes of the controversial notion of preemptive self-defense, pursuant to which a terrorist attack might not be strictly imminent in temporal terms yet is sufficiently certain and serious so as to justify a preemptive attack nonetheless. Either line of argument would raise a host of complicated issues, but the important point for now is that the continuous-threat model on this view functions simply to explain why the attacking state is not in violation of the U.N. Charter, and does not address the question whether a particular attack violates rights that the targeted individual may have under one international law regime or another.

What regimes might matter? Under an armed-conflict model, of course, we would look first to the law of armed conflict to resolve this issue. But the point of the current discussion is to understand how to think about the continuous-threat model when a state uses force outside the context of armed conflict (as arguably was the case for some if not all the pre-9/11 examples recounted above). In that case, there is a threshold question as to whether another body of international law applies, or if instead international law is silent aside from the Article 51 constraints mentioned above.
For many observers, the obvious response is that international human rights law would apply in such a circumstance. It is far from clear that the U.S. government took that view in the pre-9/11 period, however, as opposed to embracing the position that human rights law obligations extend only to territories formally subject to U.S. jurisdiction and control. If that was indeed the U.S. position at that time, it would seem to follow that the U.S. government did not recognize any international law constraints on the continuous-threat model, aside from the elements of necessity and proportionality woven into the Article 51 self-defense framework, outside the armed-conflict context.

If on the other hand human rights law does govern in such non-armed-conflict circumstances, the question then arises as to whether the continuous-threat model can be squared with that regime. This draws our attention back to John Brennan in his Harvard speech, as he suggested that there was increasing willingness on the part of allies to recognize that the “imminence” requirement woven into the human rights law framework can encompass the continuous-threat concept. Needless to say, there are many who would not agree with that assessment. That said, what matters here is that the continuous-threat model could thus be understood as a human rights law claim—albeit a highly-controversial one—in addition to being a claim about domestic separation of powers law and U.N. Charter sovereignty-protection norms.

e. Returning to the Pre-9/11 Era: We Already Are There

Whatever its legal nature, the important point is that the continuous-threat model is not an Obama administration novelty, not a post-9/11 development of some other kind, and not nearly as constraining as one might expect. It was woven into the fabric of the pre-9/11 counterterrorism policy, but its potential scope was obscured in those years by a number of non-legal constraints. Those constraints have since been substantially eroded by technological and institutional developments, and this erosion in turn has quietly paved the way for the government in recent years to embrace, as a matter of policy, a set of targeting constraints over-and-above the limits inherent in the armed-conflict model. In effect, this has superimposed the continuous-threat model on top of the armed-conflict model. If and when the supporting-structure of the armed-conflict model is removed,⁷ the continuous-threat model will remain. And from that

⁷ Declaring an end to the armed-conflict model vis-à-vis al Qaeda is one path through which the U.S. government might end up relying upon the continuous-threat model once more. It is not the only path, however. Even while the armed-conflict model remains in force vis-à-vis al Qaeda, it is certainly possible that an unrelated terrorist threat prompting a self-defense response might emerge. That said, the uncertainties surrounding the organizational and individual boundaries of al Qaeda and its “associated forces” are such that, for many such emerging threats, it is possible if not probable that the government would subsume action against them under the armed-conflict model after all.
perspective, it makes little sense to speak of a potential return to the pre-9/11 framework; in practical terms we already are there.

IV. THE LIMITED IMPACT OF NON-LEGAL CONSTRAINTS UNDER A POSTWAR FRAMEWORK

Let us assume for the sake of argument that the foregoing analysis is correct, and that the legal consequences of abandoning the armed-conflict model will have little practical effect given the policy constraints already adopted and the native breadth of the continuous-threat model. Is it possible that the move to postwar might nonetheless produce a significant departure from status quo targeting practices thanks to the impact of such a switch on other, non-legal mechanisms of constraint?

Possibly so. To be sure, moving to a postwar framework will not directly cause the technological constraints on the projection of force to resume their previous degree of constraining effect, nor will it necessarily inhibit the production of actionable intelligence (though the looming withdrawal of all or even most U.S. ground forces from Afghanistan—which might or might not precipitate a decision by the government to embrace a postwar framework—may well inhibit such collection). But there are other non-legal constraints to consider.

Three stand out as both particularly important and likely to be impacted by a formal shift to a postwar model. First, consider the domestic political climate. I do not mean partisan politics as such, though this can matter too. Rather, by “domestic politics” I mean to refer simply to the influence of American public opinion on the calculations of legislators and executive branch officials. On that dimension, what impact might follow from a formal proclamation recognizing an end to the armed conflict with al Qaeda? Such a move would be widely publicized and endlessly discussed in the media, and for at least some members of the public it would likely alter baseline assumptions regarding the sorts of activities they might expect to see the government engaging in for counterterrorism purposes going forward. The continued use of military detention would surely seem incongruous to many, for example, or at least it would begin to seem increasingly so as time passed. Likewise, the further use of armed attacks—whether using drones, manned aircraft, or some other weapons platform—would also be surprising to some under the postwar rubric.

Such incongruities would not necessarily spark a negative reaction in every quarter. Those who would prefer not to move to a postwar model, after all, might be pleasantly surprised by them. But there is little doubt that incongruous actions would generate a negative reaction in at least some quarters, and it is possible that the negative reaction would in fact be substantial—particularly if the surrounding circumstances contributed to a perception that the government must have been acting hypocritically all along in proclaiming an end to the armed conflict. Of course, insofar as incongruous actions are conducted in secret (a quite-likely state of affairs for a postwar model, given the
extensive reliance on the CIA and Joint Special Operations Command to conduct lethal operations on a covert or clandestine basis even while still under the armed-conflict model) the constraining impact of public opinion would be substantially muted. Even then, though, the possibility of eventual public disclosure would remain (as the Snowden affair in the summer of 2013 reminds us). Government officials operating in the shadow of these considerations could be expected to take them into account, even if they would not be dispositive. In that sense, domestic political considerations would be more constraining in the postwar context than they are under the status-quo model of armed conflict.

Something similar can be said about the constraining impact of diplomatic considerations. By “diplomatic considerations” I mean to refer broadly to the full spectrum of actions other governments might take in order to express displeasure with American policy (whether out of actual disagreement or in response to their own domestic political considerations). There are many possibilities in addition to the easily-billeted example in which a state merely expresses displeasure (privately or publicly). A given country may be in a position to decrease cooperation on security issues (decreased sharing of intelligence, for example, or withdrawal of personnel from a joint deployment), or it might reduce or refuse valuable cooperation on unrelated subjects. At any rate, two points follow from all this. First, proclaiming the end to the armed conflict with al Qaeda unquestionably will be very well-received in most foreign capitals and among most foreign populations. Second, if the U.S. government ended up persisting in the use of military detention or lethal force for counterterrorism purposes despite such a proclamation, it seems likely that the aforementioned diplomatic costs will be higher than is currently the case, for the same reasons of incongruity and surprise mentioned above in the context of domestic politics. This suggests that diplomatic pressure, too, will be more constraining postwar than currently.

Finally, consider the constraint embodied in what we might call the “balance of equities” across departments and agencies within the executive branch. Many different agencies and departments (and different organizations within agencies and departments) have a stake in the development and implementation of counterterrorism policy—what insiders usually refer to as “equity”—and of course they do not always agree. As they contend with one another in the interagency process, it may matter a great deal whether the president continues to assert that a state of armed conflict exists or instead that it has ended. The former tends to empower the military around the interagency conference table by directly implicating its equities, while the latter would tend to weaken it for the same reason.

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48 See Mark Mazzetti, The Way of the Knife (2013); David E. Sanger, Confront and Conceal (2012); Daniel Klaidman, Kill or Capture (2012).
In summary, a formal shift from war to postwar would tend to increase the bite of at least three distinct soft-constraint mechanisms, and the collective impact from these changes could be substantial. This in turn could tend to dissuade the executive branch from employing the full potential for using lethal force that follows from the combination of the continuing-threat legal model and the technological and intelligence advances described above. That said, it is unlikely that these soft-constraint mechanisms would dissuade the executive branch altogether from acting on the continuous-threat model. There are powerful offsetting domestic political costs to be born, after all, should a given administration forego an opportunity to use force against a target that later is linked to a successful terrorist attack. The government might resort to lethal force less often in a postwar setting than it would under the status quo model, then, but it nonetheless will likely use force much more often than both critics and supporters of the status quo assume would be the case in that circumstance. And that is the critical point that seems to be missing from the current debate, fixated as it is on the question of whether to persist with the armed-conflict framework.

V. CONCLUSION

Writing in response to President Obama’s National Defense University speech, a triumphalist New York Times editorial page recently declared:

While there are some, particularly the more hawkish Congressional Republicans, who say this war should essentially last forever, Mr. Obama told the world that the United States must return to a state in which counterterrorism is handled, as it always was before 2001, primarily by law enforcement and the intelligence agencies. That shift is essential to preserving the democratic system and rule of law for which the United States is fighting, and for repairing its badly damaged global image.⁴⁹

The Times was right to note the importance of ensuring democratic accountability and legal compliance in connection with counterterrorism. But it was mistaken in assuming that the postwar model necessarily will depart from the status quo in terms of the use of lethal force and military detention. The fact of the matters is that the armed-conflict model has never been terribly important as a legal matter when it comes to using lethal force in the counterterrorism setting in the contexts that matter most (that

is, locations other than boots-on-the-ground combat deployments, as in Afghanistan and Iraq), while the military detention option many years ago became largely defunct (aside from the handful of legacy cases). The sooner all sides in these debates come to appreciate this, the better.
Law at the End of War

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INTRODUCTION

The existence of war, variously defined, is the sine qua non condition for the lawful exercise of a wide range of statutory authorities that have supported the past decade of U.S. counterterrorism operations worldwide. Some of these laws are relatively low profile in their operation. Civilians may be subject to the U.S. military justice system (rather than the civilian judicial system) if they are “serving with or accompanying an armed force in the field... [i]n time of declared war or a contingency operation.” Private security contractors implicated in misconduct are immune from tort suits for a wide swath of activities if performed “during time of war.” Other such statutes are of greater political salience. Under the Military Commissions Act of 2009 (MCA), offenses are triable by military commission “only if the offense is committed in the context of and associated with hostilities.” The 2001 Authorization for Use of Military Force (AUMF), as interpreted by the Supreme Court, authorizes the President to detain certain individuals “engaged in an armed conflict against the United States,” only “for the duration of these hostilities.” This AUMF “armed conflict” has also been one of the

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3 10 U.S.C. § 950(c).
central domestic legal justifications for targeted killing operations by the United States abroad.6

The question when such laws are triggered and for how long they remain in effect is rapidly becoming more than academic. The latest generation of military commission prosecutions, for example, features some of the highest profile terrorist suspects, including several charged for their role in attacking American warship the U.S.S. Cole, an attack attributed to Al Qaeda that killed 17 U.S. service members in October 2000.7 That attack took place before the events of September 11, 2001, before Congress passed the AUMF authorizing the use of military force against Al Qaeda. For purposes of establishing lawful military commission jurisdiction, was the United States already at war then? The issue arises equally at the end of war, as for example, with the President’s announcement that the United States will conclude combat operations in Afghanistan by the end of 2014.8 Indeed, a growing collection of policy-makers and security experts agree that the hostilities authorized by the AUMF more broadly will at some point have run their course.9 The 166 men

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6 Speech of White House Counterterrorism Adviser John Brennan at the Woodrow Wilson Center, Washington, D.C., April 30, 2012, http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy (“In this armed conflict, individuals who are part of al-Qa’ida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.”).
8 See, e.g., Speech of President Barack Obama, May 23, 2013, available at http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pageId=all (“Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end.”) [hereinafter Obama NDU Speech]; Speech of President Barack Obama, June 22, 2011, available at http://www.whitehouse.gov/the-press-office/2011/06/22/remarks-president-obama-visit-camp-david (“After this initial reduction, our troops will continue coming home at a steady pace as Afghan Security forces move into the lead.... By 2014, this process of transition will be complete, and the Afghan people will be responsible for their own security....”).
9 See, e.g., Obama NDU Speech, supra, note _; see also Defense Department General Counsel Jeh Johnson, Speech to Oxford Union, Nov. 30, 2012, available at http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/ (“[O]n the present course, there will come ... a tipping point at which so many of the leaders and operatives of Al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that Al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.”); Michael Leiter, Testimony Before the U.S. Senate Committee on Foreign Relations, March 2013; Robert Chesney, Beyond the
still held at Guantanamo Bay are detained under the authority of the AUMF. Do "hostilities" end when the United States leaves Afghanistan, such that the statutory authority for continued detention runs out?

Notwithstanding the frequency of such war-related conditions in key statutory authorities, legal scholars have largely assumed that the question of when war begins and ends is one the courts play little role in answering. Supreme Court decisions like the World War II-era case *Ludecke v. Watkins* and the Civil War-era *Prize Cases* have been read to suggest that the existence of armed conflict is a political question, beyond the competence and the jurisdiction of the judiciary to answer. If anything, the argument goes, contemporary courts are more apt to rely on political question doctrine among threshold jurisdictional hurdles that preclude review of subjects from targeting to rendition to torture. It should thus be unsurprising to conclude, as Stephen Vladeck puts it directly: "[W]hen the war has ended is a political question."

But the non-justiciability of the question whether war exists for statutory purposes is far less certain than scholars have assumed. The political question assumption flows in part from a longstanding misreading of standard cases. Supreme Court decisions noting that the existence of war depends on a "political act" (that is, something political actors do in the world) are regularly, and wrongly, taken to stand for the distinct notion that war's existence is a "political question" (that is, something the

*Battlefield, Beyond Al Qaeda, Mich. L. Rev. (2013); Elizabeth Bumiller, "Panetta Says Defeat of Al Qaeda Is 'Within Reach.,'" N.Y. Times, July 10, 2011, p. A11 (quoting then-Defense Secretary Leon Panetta that the United States was "within reach of strategically defeating Al Qaeda")).


13 Vladeck, supra note 11, at 94; see also, e.g., Curtis Bradley and Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047 (2005) (noting that "courts often defer to the President's determinations concerning the status of military conflicts"). While political question doctrine has been subject to harsh scholarly criticism for decades, see, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* (1992); Louis Henkin, it retains both scholarly and at least some doctrinal salience.
courts lack jurisdiction to consider). More, the political question assumption tends to discount or ignore the varied lines of cases over decades in which courts have been called upon to decide, and have decided, whether a statutory condition of war, variously defined, continues to hold. More properly understood, the cases stand for the proposition that the existence of war is often justiciable, and that the answer to whether war exists depends centrally on the statutory reason why one is posing the question.

In the present context – in particular with respect to the war-based statutory triggers contained in the MCA and AUMF – the existence of hostilities may well be determined with reference to ordinary principles of statutory interpretation. As the Supreme Court recently clarified, the applicability of the political question doctrine depends principally on whether the issue for decision has been textually committed by the Constitution to another branch of government, and whether there are judicially manageable standards for resolving it. In neither statutory example examined here is it clear that the Constitution allocates sole power to another branch of government. More, both the MCA and AUMF require that the existence of “hostilities” be determined with respect to a standard established by the international law of armed conflict – a body of law that offers detailed, even manageable, guidance on how to identify whether hostilities exist.

Yet just as the detailed nature of the applicable law here helps ensure that the question of the existence of hostilities is susceptible of judicial resolution, it also demonstrates how possible it is that a court’s answer, independently reached, might differ from that of the executive. In the military commission war crimes

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14 See, e.g., Vladeck, supra note 11, at 94; John M. Hagan, From the XYZ Affair to the War on Terror, 61 WASH. & LEE L. REV. 1327 (2004); Brief of Defendants in Al Nashiri; Government Motion to Dismiss in Al Aulaqi.
15 See, e.g., Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), cert. denied, 508 U.S. 960 (“‘Time of war’ within Federal Tort Claims Act exemption does not require express declaration of war, but applies when, as a result of deliberate decision by executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation.”); United States v. Sobell, 314 F.2d 314 (2d Cir. 1963) (determining when World War II ended for purposes of determining statutory sentence applicable “in time of war”); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948) (interpreting terms of life insurance contract providing for a lower rate of pay out if death occurred during “war”); see also United States v. Prosperi, 573 F.Supp.2d 436 (D. Mass. 2008) (interpreting meaning of “end of hostilities” for purpose of tolling of statute of limitations under Wartime Suspension of Limitations Act).
16 See infra, Part II.
18 See infra, Part II.
prosecution of Abd Al Rahim Hussayn Muhammad Al Nashiri for his role in the bombing of the U.S.S. Cole, the executive has maintained that the United States was at war in October 2000, and indeed, dating back to 1996. At the same time, the set of objective factors the relevant law demands be considered – including not only the warring parties’ statements at the time, but also the factual evidence of war on the ground – make a more than colorable argument that war did not commence until the attacks of September 11, 2001. Similarly, the President may wish to continue to detain some of the men held at Guantanamo after 2014 and thus maintain that hostilities with Al Qaeda continue. But it may by then be possible to make out a case that the “hostilities” authorized against Al Qaeda have come to an end (because, for example, hostilities are no longer sufficiently intense, or the group as such no longer exists). If a court reaches this conclusion, must it then insist upon the detainees’ release?

The instinctive strangeness of the notion that a court might determine whether or not the United States is at war for any purpose is undoubtedly part of what animates the assumption that war’s existence is a political question. If the Constitution’s promise of democratic governance means anything, then surely it means that the political branches should have fundamental control over whether we are or are not at war. More, what could a court possibly add to the executive’s own findings of the factual existence of war on the ground? Such concerns have regularly been salient in understanding the role of the courts in statutory interpretation. But they have been addressed less by political question doctrine, as by a range of interpretive practices commonly called judicial deference. Informed by the same separation-of-powers purposes underlying political question doctrine – the maintenance of democratic accountability, the promotion of governmental effectiveness, the protection of individual liberty – judicial deference in principle enables courts to retain their formal role as independent checks on executive authority while still serving the functional goals of the separation of powers. So long as the judicial branch retains enough power “to resist

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19 Government Response to Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission, United States v. Al Nashiri, 13 Sept. 2012.
20 See infra, Part III.
21 See supra note ___ (quoting officials).
22 See Deborah Pearlstein, The Soldier, the State, and the Separation of Powers, 90 Tex. L. Rev. 797 (2012).
23 See, e.g., Deborah Pearlstein, Form and Function in the National Security Constitution, 41 Conn. L. Rev. 1549 (2009) (discussing judicial and scholarly accounts of the purposes of the separation of powers).
encroachments of the others, courts may in this sense cede some of their interpretive authority under Article III without threatening the formal constitutional scheme.

To the extent judicial deference to the executive on questions of statutory interpretation serves these functional separation-of-powers interests, deference may play a useful role. But whether deference in fact advances separation-of-powers interests in construing the statutory existence-of-war conditions examined here is far from clear. As this Article shows, determining whether hostilities exist within the meaning of the MCA and AUMF involves various types of inquiries. Some demand, for example, predictive or policy judgment; others depend on publicly demonstrable facts of which the courts have long taken judicial notice. Executive expertise matters centrally for some of these judgments; others are the bread-and-butter of judicial work. The constitutional value of political accountability may likewise be sometimes served better by judicial assertiveness than passivity. If the authority Congress has granted does not clearly afford the President the power he seeks to assert, the Court may best promote democratic deliberation by saying so – applying canons of interpretation geared toward limiting excessively broad delegations of power, favoring interpretations that promote dialogue between the President and Congress, and tailoring remedies to afford the branches time for political clarification before taking irrevocable judicial action. Without foreclosing policy options, active judicial participation in statutory interpretation may create incentives for congressional action that had previously been absent, making it harder for Congress to sit out of democratic debates in which the Constitution expects it to engage. Given the context-dependent nature of such interests, this Article contends that the degree of any deference accorded even in the war setting should depend on a determination whether deference in fact serves the Constitution’s functional goals.

This Article proceeds as follows. Part II examines the reasons why scholars have tended to assume that the existence of hostilities poses a non-justiciable political question, and argues that the relevant case law reveals how this categorical assumption is misplaced. Part III explores how justiciability concerns might arise

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in the current examples of the MCA and AUMF, and concludes that they do not preclude judicial engagement in resolving the existence-of-hostilities questions at issue there. Part IV then turns to the separation-of-powers interests that animate political question doctrine and related mechanisms of deference the courts employ for negotiating inter-branch conflict. It considers how courts might approach existence-of-hostilities questions in this setting to attend to interests of expertise and accountability while fulfilling their Article III duties of judicial review. Part V concludes.

II. WHEN WAR IS NOT A POLITICAL QUESTION

Supreme Court decisions such as the Prize Cases and Ludecke v. Watkins,26 as well as a handful of prominent lower court decisions turning away constitutional challenges to the President’s use of force abroad,27 have led several scholars to conclude that questions regarding the existence and nature of war are matters for the political branches.28 But the non-justiciability of such questions for statutory purposes is far less certain. On the contrary, while the Court has often looked closely at statements and actions by the President and Congress in interpreting statutes with war-related conditions, its examination has been in the service of an otherwise unremarkable assertion of judicial authority to interpret the meaning of the law, sometimes in ways directly contrary to the asserted position of the executive. As the first section below demonstrates, rich and varied cases over decades have called on courts to decide when a legal condition of war applies.29 In none of these cases did the Court hold that the statute itself was beyond its jurisdiction to interpret. Moreover, as Section B explains, while political question doctrine generally survives, its application in the existence-of-hostilities context is far from clear.

A. The Existence of Hostilities Cases

27 See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (challenge to the on-going bombing in Cambodia was a political question); DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973) (Vietnam war was “constitutionally authorized by the mutual participation of Congress and the President,” and that the judiciary lacked power to review such a determination); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967) (commander-in-chief’s decision to send troops to Vietnam is non-justiciable political question).
28 See, e.g., Vladeck, supra note 11, at 94; see also, e.g., Curtis Bradley and Jack Goldsmith, Congressional Authorization and the War on Terrorism, 118 HARV. L. REV. 2047 (2005) (“courts often defer to the President’s determinations concerning the status of military conflicts”).
29 See supra, note ___ (citing cases).
LAW AT THE END OF WAR

The Supreme Court began facing questions of war almost immediately after the country's founding, beginning with the quasi-war in which French privateers attacked U.S. ships trading goods with Britain. In that conflict, the Court was called to decide who counted as an "enemy" within the meaning of a 1799 federal statute, which provided for certain rights to salvage for American ships "re-taken from the enemy." Rejecting plaintiff's argument that France could not really be considered an "enemy" under the statute, Bas v. Tingy made clear that, even in the absence of a declaration of war by Congress, the Court would interpret the law in the face of the world the justices themselves perceived. As Justice Moore put it:

[B]y what other word [can] the idea of the relative situation of America and France ... be communicated, than by that of hostility, or war? And how can the characters of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for the honour and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse, the scene of bloodshed, depredation and confiscation, which has unhappily occurred.

Justice Washington's opinion examined the interpretive problem in greater detail, finding significance in the facts that Congress had by then raised an army, suspended intercourse with France, dissolved a treaty between the nations, and authorized U.S. armed ships to attack France's ships (and defend our own against armed attack) on the high seas. Neither Congress' failure to mention France in the statute by name, nor Congress' refusal to call its separate authorization to use force against France a "war," could overcome the reality that, in the Court's view, "[i]n fact and in law we are at war."

The Prize Cases, though most commonly cited in support of a broad reading of presidential power under Article II of the Constitution, in fact take a strikingly similar approach to resolving the existence-of-war question the cases presented. The Court there faced the question whether President Lincoln had a "right" to impose a naval blockade of southern ports following the

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30 Bas v. Tingy, 4 U.S. 37 (1800).
31 Bas, 4 U.S. at 39.
32 Bas, 4 U.S. at 42.
Confederate attack on the federal base at Fort Sumter in 1861.34 Notably, the key war-related question presented was not one of statutory interpretation, but of international law: whether war existed at the time the ships were captured such that the law of prize applied.35 That the Court was in the first instance concerned with the meaning of international law is made clear not only in its statement of the question (as whether “the President [had] a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law”), but also in its answer (as “the opinion that the President had a right, jure belli, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard”).36

Rejecting the executive’s vigorous arguments urging judicial abstention from any question regarding the President’s actions,37 the Court likewise rejected the notion that the existence of war within the meaning of international law required a congressional declaration. A civil war, between a state and an insurgent group, was something whose existence the Court was bound to notice, whether the governments of the warring parties had acknowledged or declared it legally or not.38

A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.... As a civil war is never publicly proclaimed, eo

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34 67 U.S. (2 Black) 635 (1863).
35 Prize Cases, 67 U.S., at 666.
36 Prize Cases, 67 U.S., at 666; see also id., at 674 (“[Enemy] is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.”); id. at 671 (“The objection made to this act of ratification [by Congress], that it is ex post facto, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.”).
37 Prize Cases, 67 U.S. at 645 (“The counsel for the United States, speaking for the President ... testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done.”).
38 For a version of this argument rejecting the reading of the Prize Cases as one showing great deference to the President, see Deborah Pearlstein, Contemporary Lessons from the Age-Old Prize Cases, 53 St. Louis U. L. J. 73, 79-81 (2008).
nomine, against insurgents, its actual existence is a fact in
our domestic history which the Court is bound to notice and
to know.... [Petitioner] cannot ask a Court to affect a
technical ignorance of the existence of a war, which all the
world acknowledges to be the greatest civil war known in
the history of the human race.\textsuperscript{39}

Thus, “war may exist without a declaration on either side,” as it
existed here, no matter what the warring governments might say.\textsuperscript{40}

Despite this pronouncement, much has been made of the
opinion’s subsequent statement that the “Court must be governed
by the decisions and acts of the political department of the
Government” on the question of “what degree of force the crisis
demands.”\textsuperscript{41} Yet the Court in this passage was concerned not with
its stated question presented – whether war existed for purposes of
triggering the law of prize – but rather, separately, with whether
the President had the authority under Article II of the Constitution
to respond to the southern attack without first going to Congress.

Whether the President in fulfilling his duties, as
Commander-in-chief, in suppressing an insurrection, has
met with such armed hostile resistance, and a civil war of
such alarming proportions as will compel him to accord to
them the character of belligerents, is a question to be
decided by him, and this Court must be governed by the
decisions and acts of the political department of the
Government to which this power was entrusted. ‘He must
determine what degree of force the crisis demands.’ The
proclamation of blockade is itself official and conclusive
evidence to the Court that a state of war existed which

\textsuperscript{39} Prize Cases, 67 U.S. at 667-69; see also Matthews v. McStea, 91 U.S. 7
(1875) (recognizing that war may exist whether or not declared, and finding that
“hostilities had commenced” and a state of war existed before presidential
proclamation declaring blockade of South); The Neustra Senora de la Caridad,
17 U.S. 497, 502 (1819) (“War notoriously exists, and is recognized by our
government to exist, between Spain and her colonies.”) (emphasis added).

\textsuperscript{40} Prize Cases, 67 U.S. at 668 (internal citations omitted); see also id., at 668-69
(“This greatest of civil wars was not gradually developed by popular
commotion, tumultuous assemblies, or local unorganized insurrections.
However long may have been its previous conception, it nevertheless sprung
forth suddenly from the parent brain, a Minerva in the full panoply of war. The
President was bound to meet it in the shape it presented itself, without waiting
for Congress to baptize it with a name; and no name given to it by him or them
could change the fact.”) (emphasis added).

\textsuperscript{41} See Vladeck, supra note 11, at 62-63 (citing Prize Cases, 67 U.S. at 667-70);
see also LOUIS FISHER, PRESIDENTIAL WAR POWER 6-7 (1995) (recounting
acceptance at constitutional convention of power “to repel sudden attacks”).

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demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Put differently, in the Court’s view, it was entirely up to the President to decide, having been attacked, whether or not to shoot back. That decision was indeed within the President’s constitutional power. It was likewise a matter of executive discretion under then prevailing international law whether or not to afford the opposing party “belligerent rights.” But once such political actions were taken, the Court would determine for itself whether war existed as a matter of law, no matter what the Congress or the President called it.

Indeed, the Court’s confidence in its ability to recognize the existence of war or not would lead it to reject the 1864 military trial of U.S. citizen Landin Milligan—despite the executive’s insistence that war existed such that military trial was justified. While perforce acknowledging that the Civil War was actively ongoing at the time of Milligan’s arrest, the Court held that the state of Indiana, where the arrest occurred, was not part of it.

The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theater of military operations. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the

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42 One might well question under contemporary international law whether the Court was right that the President is entitled to complete discretion on the matter of what degree of force is appropriate in self-defense. See, e.g., U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

43 Prize Cases, 67 U.S. at 669 (“The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.”).

44 The Court also noted that foreign sovereigns had reacted to the attack on Fort Sumter by declaring their neutrality. See Prize Cases, 67 U.S. at 669.

45 Ex parte Milligan, 71 U.S. 2, 84-85 (1866) (reporting the government’s argument that “every specification upon which the petitioner was tried by the military commission” contained the averment that the relevant acts were committed in “a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy”

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national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law.... If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.... Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.\footnote{Ex parte Milligan, 71 U.S. 2, 126-27 (1866) (emphasis added).}

One might reasonably note that \textit{Milligan} was decided (in 1866) the year after the war had ended, and that it was thus politically easier for the Court to reach the conclusion it did then.\footnote{The Court itself hints as much. \textit{See Milligan}, 71 U.S., at 109 ("During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question.... Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.").} Yet the passage of a mere 10 months (from the end of shooting to the issuance of the decision in \textit{Milligan}) should not obscure the remarkable sweep of the Court’s rejection of the government’s argument. The record before the Court established that at the time of Milligan’s arrest, the state “was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion.”\footnote{\textit{Milligan}, 71 U.S., at 140.} As the dissent pointed out, it also appeared that “a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.”\footnote{\textit{Milligan}, 71 U.S., at 140.} Yet the Court nonetheless concluded not only was a military trial unnecessary under the circumstances, but also that the circumstances in Indiana did not amount to “actual war.”

The many other Civil War-era cases requiring the \textit{statutory} construction of existence of hostilities provisions are consistent with the reading that while political actions matter in the

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\item[46] Ex parte Milligan, 71 U.S. 2, 126-27 (1866) (emphasis added).
\item[47] The Court itself hints as much. \textit{See Milligan}, 71 U.S., at 109 ("During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question.... Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.").
\item[48] \textit{Milligan}, 71 U.S., at 140.
\item[49] \textit{Milligan}, 71 U.S., at 140.
\end{footnotes}
determination of war’s existence, which actions matter most
depends upon the statute, and in all events is a question that may
be determined by the Court. In 1869, United States v. Anderson
required the Court to decide how to construe a statute giving
property owners a cause of action in the Court of Claims for any
proceeds from property abandoned or captured during the war —
provided the claim was brought "within two years after the
suppression of the rebellion." In resolving the question when the
rebellion was suppressed for purposes of the statute, the Court
began by noting its expectation that the question of when the war
ended would arise for any number of legal purposes. Disclaiming
any suggestion that its opinion on the scope of the Captured and
Abandoned Property Act (CAPA) at issue should bear on any other
potentially applicable laws, the Court looked carefully to
Congress’ purpose in passing CAPA itself. Here, the Court
reasoned, Congress was especially concerned to aid residents of
the South who had remained loyal to the federal government
during the conflict. Especially as to that population, "Congress did
not intend to impose … the necessity of deciding [when the
rebellion ended] for themselves." Rejecting, then, the [southern
party’s] suggestion that the rebellion ended upon the last surrender
of a Confederate general (in May 1865), the Court instead
concluded that it should prefer to look for clues to statutory
meaning in pronouncements of the federal government in fixing a
date when the conflict ended. Since Congress had determined in
separate legislation setting the pay of members of the Union army
that the rebellion closed on August 20, 1866, the Court reasoned
that that (later) date should hold as well for CAPA, aimed at
claimants "whose interests [Congress] equally desired to
protect."54

50 See The Protector, 79 U.S. 700 (1871) (construing a statute providing that
claims by owners of abandoned or captured property any time "within two years
after the suppression of the rebellion"); Stewart v. Kahn, 78 U.S. 493 (1870).
52 Anderson, supra note __, at 69 ("The point, therefore, for determination is,
when, in the sense of this law, was the rebellion entirely suppressed. … [T]he
purposes of this suit do not require us to discuss the question … whether the
rebellion can be considered as suppressed for one purpose and not for another,
nor any kind of the kindred questions arising out of it, and we therefore express
no opinion on the subject.") (emphasis added).
53 Anderson, supra note __, at 70.
54 Anderson, supra note __, at 71; see also McElrath v. United States, 102 U.S.
426 (1880) (construing statute prohibiting dismissal of officers except by court
martial "in time of peace") (finding "time of peace" determined by presidential
proclamation of peace as subsequently recognized by separate act of Congress
regulating soldiers' pay); Lamar v. Browne, 92 U.S. 187 (1876) (finding
property in Georgia still in "hostile possession" and therefore subject to federal
capture because "territory within the limits of the State of Georgia [was]
Indeed, a number of contemporaneous statutes required similar inquiries into the beginning and/or ending date of the war, and while the Court sometimes addressed the matter with little or no analysis, in no case did it appear to contemplate declining jurisdiction over the issue as political question doctrine would require. In Stewart v. Kahn, for example, the Court was asked to decide whether a federal law passed near the end of the war in 1864 applied retroactively to provide for the wartime-long tolling of state statutes of limitation barring late-filed civil suits.\textsuperscript{55} The federal law provided that statutes of limitation be tolled during such time as a civil defendant (here, a Louisiana debtor) was “beyond the reach of legal process.” Rejecting the argument that the statute was written to operate only prospectively, the Court again looked to Congress’ particular purpose in passing the law and insisted that Congress could not have intended a construction that would effectively deny relief to any northern claimant (here, a New York creditor) who had been unable to proceed against southern defendants throughout the war. Instead, the Court looked on this occasion to presidential proclamations of the existence of a southern rebellion to demonstrate the minimum time after which plaintiffs would have had no access to any Louisiana courts, and applied the statute retroactively to allow plaintiffs claim to proceed.

\textit{The Protector}, a more well-known but even shorter squib of a case from the era, likewise involved a dispute over how long a statute of limitations (governing the time for seeking appeal of federal judgments) should be tolled to exclude the time of the Civil War.\textsuperscript{56} Here, the Court did look squarely to the acts of the political branches – but not because it was discernibly concerned with its own jurisdictional limitations. Rather, because in the Court’s own estimation “[a]cts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance … that it would be difficult, if not impossible, to say on what precise day [the war] began or terminated,” it would be necessary “to refer to some public act of the political departments to fix the dates.”\textsuperscript{57} In this regard, the Court found statements of the executive most convenient to employ because Congress was in recess when hostilities began. Likewise, because the war began and ended at

\textsuperscript{55} Stewart v. Kahn, 78 U.S. 493 (1870) (noting without discussion that Presidential proclamation established southern states were in rebellion as of April 1861).
\textsuperscript{56} The Protector, 79 U.S. 700 (1871).
\textsuperscript{57} \textit{Protector}, supra note \_, at 702.
different times in different states (a finding the Court made entirely on its own, without reference to any statements or actions of the political branches), the executive’s proclamations declaring various ends of the war would be most helpful to use.

Critically, the *Protector* Court cautioned, it was relying on presidential proclamations to set the end date of the war only “[i]n the absence of more certain criteria, of equally general application.”58 When, in a later conflict, the executive’s own statements on the existence of war were unclear, the Court would take upon itself the task of “constru[ing]” what other evidence might exist to determine, “for example, whether the situation is such that statutes designed to assure American neutrality have become operative.”59 And when more certain criteria were available – as happened, for example, thirty years later when the Court looked to the ratification of a peace treaty with Spain, rather than a presidential proclamation suspending hostilities – the Court would prove quite content to embrace them instead.60

World War I brought with it a new set of war-dependent laws, and with them, a new set of court challenges surrounding their application. Yet while the Court occasionally interpreted these laws to authorize the continued exercise of power beyond the occurrence of events, such as the actual end of hostilities, which might intuitively be assumed to constitute the end of the war, the cases reflect no obvious hesitation by the Court to assert its own interpretive power. They seem instead most easily read as classic exercises in employing the tools of statutory interpretation – which tools led them in the particular cases to other indicia of war’s end.61 Consider *Hamilton v. Kentucky Distilleries*,62 concerning whether the War-Time Prohibition Act, passed ten days after the signing of the armistice with Germany on November 11, 1918, could be construed to continue prohibiting the sale of distilled liquors a year later, when, according to the statute, prohibition was for the limited purpose of “converting the man power of the Nation, and to increase efficiency in the production of arms”

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58 Protector, supra note __, at 702.
59 Baker v. Carr, 369 U.S. 186, 212-13 (1962) (citing The Three Friends, 166 U.S. 1, 63, 66 (1897)).
60 J. Ribas y Hijo v. United States, 194 U.S. 315 (1904) (determining whether a merchant ship captured by the United States was lawfully subject to wartime capture) (“The President had not the power to terminate the war by treaty without the advice or consent of the Senate of the United States”).
needed for the war effort. The war effort was by now manifestly over, plaintiffs argued, and indeed, according to a series of statements by the President himself, the process of termination must now be understood as complete.

Rejecting plaintiffs’ argument that, in light of the statute’s purpose, the “conclusion of war” should be construed to mean simply the end of hostilities, the Court relied on the express terms of the statutory text, fixing the end of the statutory authority as “until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States.” The event was thus to be fixed, the Court held, by “a phrase so definite as to leave no room for construction.” While the President had indeed spoken publicly on many occasions about the end of the war, while the Treaty of Versailles had been concluded, while the President had even mentioned, in a veto message to Congress, the “demobilization of the army and navy” — such popular or passing references could not overcome the reality that the President had yet “refrained from issuing the proclamation declaring the termination of demobilization for which this act provides.”

It is not until 1923’s Commercial Trust Co. v. Miller that the Court first engaged directly, if briefly, the question of the judicial role in recognizing war’s end. Commercial Trust involved the 1917 Trading with the Enemy Act (TWEA), which provided that “[i]f the President shall so require, any money or other property ... held ... for the benefit of an enemy” be conveyed to an Alien Property Custodian, who would hold all rights in the property unless and until any disputes involving the legitimate

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64 Hamilton, 251 U.S., at 159 (citing presidential statements announcing, inter alia, the end of the war, discontinuation of various wartime agencies, resumption of trade with Germany, signing of the Treaty of Versailles, and demobilization of troops).
65 Hamilton, 251 U.S., at 153 (emphasis added).
67 Hamilton, 251 U.S., at 160; see also id., at 168 (noting that “in fact demobilization had not terminated at the time” of the President’s veto message, or at the time the suit was brought, and, “for aught that appears, it has not yet terminated”); Kahn v. Anderson, 255 U.S. 1 (1921) (citing related statutes in construing act providing that “no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace,” as meaning “peace in the complete sense, officially declared”).
ownership of the property required its return. Plaintiffs had argued that because the Act should be understood only as "a provision for the emergency of war," its authority should be construed to expire at the end of the war — an event marked by the joint resolution of Congress, and proclamation of the President, declaring the war between Germany and the United States at an end.

In the concluding paragraph of an otherwise terse opinion, the Court rejected plaintiffs' suggestion that the legislation was no longer operative: "[T]he power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of conflicts in the field."

It is perhaps unsurprising that such sweeping language would come to be invoked as a general rejection of the idea the Court could properly play any role in establishing the duration of statutory authority for any law whose operation depended upon the existence of war, no matter what the statutory scheme provides. But such a reading would have the Commercial Trust Court making a striking break with the many earlier cases in which it had looked to the law's text and purpose in helping it to identify sources that could establish war's beginning or end — sources that included, variously, other acts of Congress, proclamations of the President, treaties, or the Court's assessment of acts of hostilities themselves. Yet the Court gave no indication that it intended to embrace any such shift in view. On the other hand, what did distinguish this case from its predecessors was the breadth of the interpretive leap plaintiffs were asking the Court to take in declaring the custodial authority of the act no longer in effect. Unlike the statute at issue in, for example, Hamilton, which provided that it was to be of limited duration (and indeed, expressly set the condition upon which its effectiveness would cease), TWEA contained no such limits, either in the text of the statute, or by implied reference to another body of law. Core provisions of TWEA were written with general regard to a "war" or an "enemy," without reference to what the statute elsewhere

69 Commercial Trust, 262 U.S., at 53.
70 Commercial Trust, 262 U.S., at 57.
71 Commercial Trust, 262 U.S., at 57.
called "the present war," key provisions of TWEA indeed remain in effect today. Commercial Trust is thus better read for the proposition that, in the absence of any indication the portion of TWEA was meant to be limited to one war in particular, the Court would unremarkably understand the authority given by the Act as it understood any Act of Congress – as continuing in effect unless and until repealed.

In any case, whatever significance might be attributed to the Commercial Trust dictum (and perhaps not much, as the case has been by the Court not at all in the past nearly fifty years), the case rightly pales in significance to Ludecke v. Watkins for advocates of the argument that the existence of war poses a political question. Decided three years after the United States publicly celebrated its victory in World War II, Ludecke called on the Court to interpret the Alien Enemy Act (AEA), first passed in 1798, providing for the deportation of foreign nationals from countries with which the United States is at war. By its terms, the AEA applies upon presidential proclamation of a "declared war between the United States and any foreign nation or government, or [upon] any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government."

Petitioner Kurt Ludecke, a German national ordered subject to removal in 1946, challenged the Act’s applicability, arguing that whatever power Congress had intended to delegate the President in the AEA, that power did not “survive cessation of actual hostilities” following World War II. The Court rejected the argument, over dissents that focused their primary criticism against the Act’s disturbing lack of provision for notice, hearing or judicial review. As for the effect of the war, the Court held, the power granted by the AEA “is a process which begins when war is

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72 The statute defined “enemy” as a subject of any nation with which the United States is “at war,” without reference to the particular war in which the United States was then engaged, implying the law would be effective, without additional action required, during any wartime period now or in the future. Commercial Trust, 262 U.S., at 52-53.
74 Indeed, the paradigmatic political question case, Baker v. Carr, 369 U.S. 186 (1962), later makes clear this “cessation of hostilities” language from Commercial Trust was rather an overstatement. For a more detailed discussion of Baker, see below.
75 See, e.g., Vladeck, supra note 11, at 77-78 (citing Ludecke v. Watkins, 335 U.S. 160, 167-70 (1948) (finding that a state of war continued following Germany's surrender in World War II)).
77 Ludecke, 335 U.S., at 166.
declared but is not exhausted when the shooting stops.”

It then added in a footnote, “when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government." Where, as here, “the political branch of the Government has not brought the war with Germany to an end,” and indeed, the President had issued a proclamation that “a state of war still exists,” judges having “neither technical competence nor official responsibility” would not question the judgment that those deportable at the height of hostilities would still be deported “during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.”

It is not difficult to see why such language would lead some to conclude that Ludecke imposes sharp limits on the Court’s role in recognizing the end of a war. But it is important to understand what this language does not do. First and foremost, as the Court is elsewhere in its opinion at pains to point out, there is a difference between the position, which it takes, that the end of war depends, for purposes of the statute, on some kind of political act, and the view, which it avoids, that war’s existence vel non is a non-justiciable political question.

‘The state of war’ may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.

The question was not compelled in Ludecke. A self-described Nazi, Mr. Ludecke had been arrested in the United States on December 8, 1941, and detained throughout the lengthy administrative process that ultimately resulted in a final order of removal by the Attorney General in January 1946. The Court’s passing statement about its own incompetence in such matters came only after it had conducted a fairly pedestrian exercise in statutory interpretation, rejecting Ludecke’s “reading of the statutory phrase ‘declared war’ to mean ‘state of actual

78 Ludecke, 335 U.S., at 167.
79 Ludecke, 335 U.S., at 168 n. 13.
80 Ludecke, 335 U.S., at 169.
81 Ludecke, 335 U.S., at 168-69.
82 Ludecke, 335 U.S., at 166.
hostilities," and instead reading the statute to require an inquiry into what had actually been declared. Among other factors persuading the Court its reading of the statute was right, Ludecke’s proposal that the power to deport under the Act “did not survive cessation of actual hostilities” would “effect[ively] nullif[y] the power to deport alien enemies, for such deportations are hardly practicable during the pendency of what is colloquially known as the shooting war.”

Further testing the Court’s insistence upon its own incompetence, its passing modesty came only after it devoted a lengthy set of paragraphs to analyzing in detail the factual and political state of affairs surrounding Ludecke’s final order of removal in 1948: the country still had “armies abroad exercising our war power,” no treaty of peace had been concluded with our enemies, the President had issued a proclamation providing that while hostilities had ended “a state of war still exists,” the President had recently addressed Congress recommending the reenactment of selective service legislation (among other things), and had even more recently issued an executive order asserting his authority “in time of war” to assume control of transportation systems. Such a fact-intensive analysis is not what one would expect of a case concluding the matter of war was nonjusticiable; it is rather the analysis one finds in a case, as in Ludecke, in which the Court asserts its jurisdiction and interprets and applies a statute for itself. Much in the same way the Court did four years later when, in interpreting the 1951 Joint Resolution of Congress providing that the “state of war declared to exist between the United States and the Government of Germany... is hereby terminated,” German citizens subject to removal under the Alien Enemy Act could no longer be removed.

If there were any doubt of the lasting impact of Ludecke’s dictum on judicial competence on these questions, the military justice cases of the era – involving laws tying the authority of

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83 Ludecke, 335 U.S., at 166.
84 Ludecke, 335 U.S., at 166 n.11.
85 Ludecke, 335 U.S., at 169-71 (internal citations omitted).
86 Ex Rel. Jaegeler v. Carusi, 342 U.S. 347, 348 (1952); see also Ex Rel. Knauff v. Shaughnessey, 338 U.S. 537 (1950) (holding special procedures for the exclusion of aliens applicable “[w]hen the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941” continued to apply in 1948 in light of 1947 presidential proclamation declaring the national emergency continues to exist); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947) (rejecting construction of War Powers Act provision for expiration of certain powers six months after “the termination of the war” as synonymous with termination of “hostilities”).
various military trial regimes to the existence of war, decided both before and after Ludecke – make clear the Court’s determination to treat end-of-war authority triggers as standard questions of statutory interpretation. In re Yamashita, for instance, involved a challenge to the legality of a U.S. military commission trial of a Japanese general following the end of hostilities between the United States and Japan. Among the questions presented was whether the executive’s authority to conduct the commission trial continued after the cessation of hostilities. In reaching its answer, the Court looked first to the statutory Articles of War that it read as authorizing military commissions. But both Article 15 of the statute, and the relevant international law of the time, were silent on the question of the duration of the authority to conduct such trials. As the Court put it: “We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.”

In the absence of any limit in federal or international law on the President’s Article 15 authority to conduct military trials, the power to prosecute violations of the law of war would be understood, as with all prosecutions, to remain at the discretion of the prosecutor/executive.

Perhaps most important, the corollary proposition would again prove true: a war-based condition in a statute or in a relevant treaty could be interpreted to constrain the power granted – even in the face of executive branch opposition. This was the Court’s conclusion a decade later in Lee v. Madigan, a case involving the scope of the statutory power to try American soldiers before courts.

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87 327 U.S. 1 (1946).
89 Articles of War, art. 15, 10 U. S.C.A. 1486. As of 1916, Article 15 provided that any provisions “confer[ing] jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders of offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals.” The Court also noted that it could find no authority for or against such trials in international law, and no prohibition on post-war trials for war crimes committed during the war.
90 327 U.S. 1, 12 (1946). Indeed, the court reasoned, it seemed practically impossible to conduct such a trial while active hostilities were still underway. Id., at 12.
91 358 U.S. 228 (1958) (holding that terms such as war and peace “must be construed in light of the precise facts of each case and the impact of the particular statute involved”).
martial. U.S. soldier John Lee was tried by court martial for his involvement in a murder committed at Camp Cooke, California in June 1949. Article of War 92 (the statute applicable before the adoption of the modern Uniform Code of Military Justice) provided "[t]hat no person shall be tried by court-martial for murder or rape committed within the geographical limits of [the United States] in time of peace."92 Recalling that "the Nation may be 'at war' for one [statutory] purpose, and 'at peace' for another,"93 the Court construed "time of peace" for court martial purposes to preclude the court martial of a soldier accused of conspiring to commit murder at his Army base in June 1949. Applying a canon of constitutional avoidance to favor a narrow construction of statutes permitting military trial in particular, the Court rejected the executive's arguments otherwise.94

The rule that emerges from these cases — that the existence of "war" depends on the legal context in which it arises, and that context and meaning are generally susceptible of judicial identification — has guided the courts through multiple subsequent conflicts in which the nature of available criminal sanctions has regularly depended on the existence of "war" or not.95 It has likewise prevailed in judicial efforts to understand the scope of U.S. sovereign immunity from tort suits, an immunity preserved under the Federal Tort Claims Act (FTCA) for "any claim arising out of the combatant activities of the military or armed forces, or the Coast Guard, during time of war."96 Here, too, the courts have applied "normal tools of our trade—reason and judgment" in

92 Madigan, 358 U.S. 229 (emphasis added).
93 Id., at 231.
94 Id., at 236 ("[W]e cannot readily assume that the earlier Congress used 'in
time of peace' in Article 92 to deny soldiers or civilians the benefit of jury trials
for capital offenses four years after all hostilities had ceased. To hold otherwise
would be to make substantial rights turn on a fiction.... The meaning attributed
to them is at war with common sense, destructive of civil rights, and
unnecessary for realization of the balanced scheme promulgated by the Articles
of War.").
95 See also, e.g., Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972) (holding that
airman's desertion, occurring after Gulf of Tonkin Resolution but before general
ground fighting in Vietnam, was "in time of war" within UCMJ provision
allowing for prosecution without regard to otherwise applicable statute of
limitation) ("for purposes of [statute], 'time of war' refers to de facto war and
does not require a formal Congressional declaration"); United States v.
Anderson, 38 C.M.R. 386 (Ct. Mil. App. 1968) (determining that the Vietnam
conflict counted as "time of war" such that soldier could be prosecuted for
absence without leave without regard to otherwise applicable statute of
limitation); United States v. Sobell, 314 F.2d 314 (2d Cir. 1963) (determining
when World War II ended for purposes of setting statutory sentence applicable
"in time of war")
statutory interpretation, finding that, for example, U.S. military involvement in the Gulf during the Iran-Iraq war would count as “time of war” for FTCA purposes, as would any instance “when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation.”97 And the courts have engaged in similar inquiries in interpreting the applicability of the Wartime Suspension of Limitations Act (WSLA), the federal law suspending statutes of limitations otherwise applicable in federal fraud cases for so long as the United States is “at war.”98 As the federal court recently tasked with sorting out fraud claims arising out of Boston’s “big dig” construction project explained, “not every shot fired or every armed skirmish is of sufficient magnitude to stop the running of the statute of limitations.” Accordingly, the court looked to legislative history, case law, historical practice, and “common sense” to identify a set of factors relevant to determining whether the United States was “at war” for purposes of that Act. In that instance, the factors included: “(1) the extent of the authorization given by Congress to the President to act; (2) whether the conflict is deemed a ‘war’ under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict (including the cost of the related procurement effort); and (4) the diversion of resources that might have been expended on investigating frauds against the government.”98

Applying these factors to both the post-9/11 conflicts in Afghanistan and Iraq, the court found the United States was “at war” from the authorizations for use of military force passed by Congress in each case, until the formal recognition of the Karzai

97 Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), cert. denied, 508 U.S. 960; see also Minns v. United States, 974 F.Supp. 500 (D. Md. 1997) (Persian Gulf War was “time of war” under FTCA notwithstanding lack of formal declaration of war), aff’d 155 F.3d 445, cert. denied, 525 U.S. 1106; Vogelaar v. United States, 665 F.Supp. 1295 (E.D.Mich. 1987) (Combat activities exception to FTCA bars claims against United States based on alleged failure to identify remains of servicemember killed in Vietnam, to extent that alleged omissions occurred before end of Vietnam War); Rotko v. Abrams, 338 F.Supp. 46 (D.Conn. 1971), aff’d 455 F.2d 992 (Vietnam is “time of war” for purposes of FTCA even though no declaration of war); Williams v. United States, 115 F.Supp. 386, aff’d 218 F.2d 473 (N.D.Fla. 1953) (“time of war” exception inapplicable to cases involving military aircraft explosions); cf. Saleh v. Titan, 580 F.3d 1, 9 (D.C. Cir. 2009) (quoting 28 U.S.C. § 2680(j) (“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”)


government in the case of Afghanistan, and until the President’s
address declaring “major combat operations” over in the case of
Iraq. While other courts have construed the WSLA “at war”
trigger to turn on other events, none to date has suggested the
term was beyond standard methods of statutory interpretation.

B. Where Political Question Doctrine Survives

If the cases most directly requiring the Court to construe
provisions pegging statutory authority to the existence of wartime
reveal no categorical refusal to adjudicate the question, what of
political question doctrine more broadly? Whether or not the Court
found the war-condition questions before it justiciable in those
particular cases, it is possible that a non-justiciability principle
should be understood to apply in other statutory settings. Where,
for example, the nature of the conflict in which the United States is
generated, at the least, unusual, and where the existence of
hostilities underlies a vast array of federal government trial,
targeting and detention powers exercised worldwide. As the Court
has often explained, political question doctrine is “primarily a
function of the separation of powers.” While “it is error” to
assume every case touching on foreign relations is “beyond
judicial cognizance,” some cases more than others implicate the
prerogatives of the other branches.

The Court’s most comprehensive effort to define the
parameters of political question doctrine came in a case far
removed from matters of war or its duration, and in which the
Court concluded that the dispute before it did not present a
political question. Yet despite the dicta-twice-removed nature
of 1962’s Baker v. Carr, its frequent invocation in political
question debates makes it a necessary starting point here.
Following a detailed review of the Court’s political question
jurisprudence to that point, the Baker Court famously identified a
set of six elements common to the cases it had found.

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101 See, e.g., United States v. Pfluger, 685 F.3d 481 (5th Cir. 2012); United
States v. Western Titanium, Inc., 2010 WL 2650224 (S.D. Cal. 2010)
(“extensive post-hoc factual determinations required by Prosperi render its
application too ambiguous and uncertain in the context of a criminal statute of
limitation,” thus “at war” clause must be narrowly construed to include only
wars formally declared by Congress).
more broadly are the subject of Part IV, below.
103 Baker, 369 U.S., at 211.
104 Baker, 369 U.S., at 237 (holding a constitutional challenge to a state
legislative reapportionment did not present a political question).
nonjusticiable: "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."\footnote{105}

In its review of prior foreign relations cases, the \textit{Baker} Court emphasized two factors especially—"the lack of satisfactory criteria for a judicial determination," and the need to "attribute[e] finality to the action of the political departments"—as of central importance.\footnote{106} While the decision to recognize a foreign government was, in these respects, the kind of discretionary decision without "judicially discoverable standards" the Court thought not susceptible of judicial evaluation,\footnote{107} the existence of hostilities was another matter:

Though it has been stated broadly that 'the power which declared the necessity is the power to declare its cessation, and what the cessation requires,' here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands 'A prompt and unhesitating obedience.' .... But deference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality—e.g., a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such cases the political question barrier falls away: '(A) Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared.... (It can) inquire whether the exigency still existed upon which the continued operation of the law depended.' On the other hand, even in private litigation which directly implicates no

\footnote{105} \textit{Baker}, 369 U.S., at 217.

\footnote{106} \textit{Baker}, 369 U.S., at 210.

\footnote{107} \textit{See}, e.g., Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (quoting Jones v. United States, 137 U.S. 202, 212 (1890)).

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feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments’ determination of dates of hostilities’ beginning and ending.\textsuperscript{108}

Both factors the \textit{Baker} Court identifies as central to its analysis—the availability of “judicially discoverable standards,” and a need for finality in the political determination, particularly (or perhaps solely) in an emergency—have benefited from some subsequent explication.

The existence of “definable criteria” by which a legal decision may be made remains a determinant of overriding importance in assessing the justiciability of a question. Indeed, rather than invariably reciting \textit{Baker v. Carr}’s full 6-factor test, the Court has, in its handful of political question cases since, emphasized this as one of few still relevant in identifying the existence of a political question.\textsuperscript{109} \textit{Zivotofsky v. Clinton} most recently took this approach to determine whether the case before it had triggered the “narrow” political question exception to the general rule that “the Judiciary has a responsibility to decide cases properly before it.”\textsuperscript{110} Zivotofsky, whose son was born in Jerusalem, had sued under the federal statute providing a cause of action for aggrieved parents to challenge the Secretary of State’s refusal to list Israel, rather than Jerusalem, as a child’s place of birth on his passport.\textsuperscript{111} Rejecting the argument embraced by the lower courts, that deciding Zivotofsky’s claim would have the courts impermissibly interfering with an exercise of constitutional power committed to the executive alone, the Court emphasized that “[t]he existence of a statutory right … is certainly relevant to the Judiciary’s power” to decide the case. As the majority reasoned:

\textsuperscript{108} \textit{Baker}, 369 U.S., at 213-14 (internal citations omitted).
\textsuperscript{110} \textit{Zivotofsky v. Clinton}, 132 S.Ct. 1421, 1427 (2012) (also identifying the “textually demonstrable constitutional commitment of the issue to a coordinate political department”).
\textsuperscript{111} \textit{Zivotofsky}, 132 S.Ct., at 1427. State Department guidelines had required passport officials to record Jerusalem as the place of birth when requested by American parents for their child born in the country. When Congress passed a law requiring the Secretary of State to record Israel as the place of birth at a citizen’s request, providing aggrieved plaintiffs with a statutory cause of action to enforce that right, the President challenged Congress’ authority, arguing that the statute impermissibly interfered with the President’s authority to conduct foreign affairs, and that plaintiffs’ case (challenging the Secretary’s refusal to record “Israel” as their son’s place of birth) presented a political question.
The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.\textsuperscript{112}

To determine whether judicially “definable criteria” could be found, the Court canvassed what scant constitutional text, structure and history exists on whether the executive or Congress was given constitutional primacy over the birthplace designation on passports. Relying on such guidance as the President’s Article II power to “receive Ambassadors and other public Ministers,” the Court concluded that there were ample “definable criteria” even in this constitutional realm to provide sufficient guidance for resolving the legal question of power.\textsuperscript{113}

Given the modern Court’s willingness to find adequate judicial guidance in even broad structural terms of the Constitution,\textsuperscript{114} it should be unsurprising that it has never found

\textsuperscript{112} Zivotofsky, 132 S.Ct., at 1427.

\textsuperscript{113} Zivotofsky, 132 S.Ct., at 1430 (citing as relevant text the President’s Article II power to “receive Ambassadors and other public Ministers,” and Congress’ Article I powers over naturalization and foreign commerce). Zivotofsky’s conclusion in this regard is notably different from that of the Rehnquist plurality in \textit{Goldwater v. Carter}, 444 U.S. 996, 1002-03 (1979) (Rehnquist, J., concurring). Rehnquist had reasoned that although the Constitution provided clear guidance on how a treaty was to be \textit{made}, its silence on the question how a treaty could be \textit{terminated} meant there was insufficient legal guidance for a court to settle the dispute about whether the termination power was the President’s alone. The Zivotofsky Court, with arguably less textual guidance on the passport question, seemed untroubled by its analogous task of constitutional interpretation.

\textsuperscript{114} Most recently, a plurality of the Court found insufficiently manageable standards for resolving a constitutional challenge to a congressional redistricting scheme. In Vieth v. Jubelirer, 541 U.S. 267 (2004), Justice Scalia explained that the Article III “judicial power” is “the power to act in the manner traditional for English and American courts.” Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (“Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”). While the plurality despaired of finding a rational constitutional standard, Justice Kennedy concurred separately to emphasize that while “the failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper[,] [i]f workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.” Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).
insufficient guidance for deciding questions of statutory interpretation. "As Baker plainly held..., the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." Thus, even where the interpretation of a federal statute would compel the Secretary of Commerce to certify that Japan was not complying with its treaty obligations, undermining the President’s recently concluded negotiations with Japan resolving the nations’ whaling dispute, “a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below” was squarely within the Court’s power.\textsuperscript{115}\textsuperscript{117}

The Court in\textit{ Japanese Whaling Ass’n v. American Cetacean Society} went on to side with the Secretary’s interpretation of the statute, holding that the statute did not compel certification. But it reached its conclusion under the familiar administrative law test of\textit{ Chevron v. Natural Resources Defense Council}.\textsuperscript{118} While interpretive deference is another mechanism by which the Court might mediate separation of powers conflicts with the political branches— a point to which the Article returns in Part IV below—it is quite a different approach than that required by political question doctrine, namely, foregoing the exercise of jurisdiction entirely.\textsuperscript{119}

In some contrast, the scope of the\textit{ Baker} factor regarding emergency-related interests in finality is rather less clear. To the extent the idea is that courts should hesitate to “interven[e] in exigent disputes,” judicial caution in such settings no doubt

\textsuperscript{117} Id., at 230 (“We are cognizant of the interplay between these [statutory] Amendments and the conduct of this Nation’s foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).
\textsuperscript{118} 467 U.S. 837, 843 (1984) (providing that if a statute is silent or ambiguous as to its meaning in the instant situation, the Court would defer to any reasonable construction of the statute by the agency).
\textsuperscript{119} As John Hart Ely explained in the wake of the\textit{ Japanese Whaling} decision: “It is sometimes said that a question is ‘political’ if there is ‘a lack of judicially discoverable and manageable standards for resolving it.’ The Court has come generally to recognize, however, that if the issue is otherwise properly before it... its first duty is to try to fashion manageable standards.” JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 55-56 (1993).
continues to prevail. The factor is about an “unusual need to unquestioning adherance to a political decision already made,” such that judicial review is inappropriate even after the exigency is passed, its continued salience is less certain. In the single security-related case post-Baker that the Supreme Court declined to adjudicate on political question grounds, its ruling turned not on issues of exigency, but on the near-certain mootness of the question presented, and on the textual commitment of the relevant power to the political branches. Most recently, the Zivotofsky majority made no mention of the ‘finality’ factor. And in an illuminating concurrence, Justice Sotomayor emphasized that it is among the Baker factors that courts “should be particularly cautious” in invoking “before foregoing adjudication of a dispute.” As Sotomayor’s concurrence explains, many of the concerns that might drive an “unusual need for adherence to political decisions already made” may be better handled through abstention doctrines, “under which considerations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better suited to another time.”

The Court’s post-9/11 approach to statutory interpretation in security-related cases seems broadly in keeping with that more

120 Zivotofsky v. Clinton, 132 S.Ct. 1421, 1432 (2012) (Sotomayor, J., concurring) (citing Luther v. Borden, 48 U.S. 1 (1849) (“Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people?... If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, not of order.”)).

121 See Gilligan v. Morgan, 413 U.S. 1, 10-11 (1973) (declining to assert jurisdiction over plaintiffs’ due process request for continuing judicial monitoring of rules and training of Ohio National Guard on the grounds that, now that the Guard had already changed their rules and training to the requirements plaintiffs preferred, any judicial decree would be essentially advisory in nature); see also id., at 6 (noting the power to “provide for organizing, arming and disciplining the Militia...” was expressly allocated to Congress) (citing U.S. Const., art. I, s. 8).

122 Zivotofsky is consistent with earlier Supreme Court cases suggesting that textual commitment and judicially discoverable standards were the most important of the Baker factors. See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality opinion) (“These tests are probably listed in descending order of both importance and certainty.”); Nixon v. United States, 506 U.S. 224, 228 (1993) (highlighting the first two Baker factors).


124 Zivotofsky, 132 S.Ct., at 1434 (Sotomayor, J., concurring) (emphasis added) (citing, e.g., DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (“The doctrines of mootness, ripeness, and political question all originate in Article III’s ‘case’ or ‘controversy’ language.”)).
limited view of the relative unimportance of finality. In holding
that a battlefield-captured U.S. citizen was entitled to due process
to test the legality of his detention, the Court in *Hamdi v. Rumsfeld*
emphasized that its ruling that detainee’s process rights did not
attach immediately upon capture in the throes of battle. 125
Nonetheless, once the government had decided the detainee should
continue to be held, the Court was willing to engage so far as
insisting that due process was required. 126 Once the exigency had
passed, so too the justification for judicial abstention. Likewise in
2006’s *Hamdan v. Rumsfeld*, involving a challenge to the legality
of the original military commission trial system, the Supreme
Court (with the lower courts) brushed aside vigorous government
arguments that it should abstain from deciding the case, at least
until Mr. Hamdan’s commission prosecution had reached its
conclusion. 127

Yet despite the apparent narrowing of the *Baker* criteria for
determining the applicability of the political question doctrine to a
more manageable two – the existence of “judicially manageable
standards” for adjudication, and (as Zivotovsky reminds us) the
absence of a textual commitment of the issue to another branch –
there is a final case in the Court’s post-9/11 jurisprudence
necessary to examine in this context. In 2008’s *Munaf v. Geren,*

(recognizing the government’s concern that additional process for detainees
would mean soldiers “engaged in the serious work of waging battle would be
unnecessarily and dangerously distracted by litigation half a world away”).
(“The parties agree that initial captures on the battlefield need not receive the
process we have discussed here; that process is due only when the determination
is made to continue to hold those who have been seized…. [A]rguments that
military officers ought not have to wage war under the threat of litigation lose
much of their steam when factual disputes at enemy-combatant hearings are
limited to the alleged combatant’s acts. This focus meddles little, if at all, in the
strategy or conduct of war, inquiring only into the appropriateness of continuing
to detain an individual claimed to have taken up arms against the United
plaintiff injunction against military targeting of U.S. citizens abroad absent
finding of “imminent” threat, to be enforced “through an after-the-fact contempt
motion or an after-the-fact damages action”) (“It is not the role of judges to
second-guess, with the benefit of hindsight, another branch’s determination that
the interests of the United States call for military action.” Such military
determinations are textually committed to the political branches. Moreover, any
post hoc judicial assessment as to the propriety of the Executive's decision to
employ military force abroad ‘would be anathema to … separation of powers’
principles…. [A]ny after-the-fact judicial review of the Executive's decision to
employ military force abroad would reveal a ‘lack of respect due coordinate
branches of government’ and create ‘the potentiality of embarrassment of
multifarious pronouncements by various departments on one question.’”).
U.S. citizen habeas petitioners had raised the prospect that a federal statute prohibiting transfer to foreign custody where there was a likelihood of torture would bar their transfer from U.S. to Iraqi custody to face criminal prosecution. In a per curiam opinion, the Court refused to inquire beyond the executive’s determination that the detainees were not likely to face torture.\footnote{128}

The Solicitor General explains that such determinations are based on “the Executive’s assessment of the foreign country’s legal system and ... the Executive[s] ... ability to obtain foreign assurances it considers reliable.” The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is.\footnote{129}

It is not entirely clear what to make of the Munaf Court’s refusal to consider the validity of the executive’s determination of the likelihood of torture. The Court indicated that because the issue had not been especially litigated on certiorari, it would refuse to consider the question on its merits.\footnote{130} And the Court does not mention political question doctrine per se, much less cite Baker or its progeny. Yet the concerns the Munaf Court raises plainly echo some of the less favored Baker criteria—“the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unqueenng adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”\footnote{131} And the concerns recall non-jurisdictional instances in which the Court has ceased its interpretive inquiry in favor of the executive’s statutory interpretation on similar grounds.\footnote{132} At a minimum, it seems wise to leave open the possibility that considerations of embarrassment may yet inform the Court’s evaluation of statutory claims.


\footnote{129}\textit{Munaf}, 553 U.S., at 702-03 (citing The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations”) (internal citations omitted).

\footnote{130}\textit{Munaf}, 553 U.S., at 703.


III. THE MANY WORDS FOR WAR

While the previous Part demonstrates that there is no categorical political question bar to judicial interpretation of statutory existence-of-hostilities triggers, it leaves open the possibility that the determination whether we are at war may yet present a political question in certain statutory settings – where the law lacks judicially manageable standards for interpretation, or where the issue has been textually committed by the Constitution to another branch of government. This Part thus examines whether the doctrine precludes judicial resolution of the war conditions applicable in two contemporary statutes of significant political salience: the Military Commissions Act of 2009 (MCA) and the Authorization for Use of Military Force of 2001 (AUMF).

The MCA provides that offenses are triable by military commission “only if the offense is committed in the context of and associated with hostilities.” Thus, for example, courts now face the question whether commission defendants charged with acts committed before the attacks of 9/11 acted “in the context of and associated with hostilities.” The AUMF has been a central font of authority for the conduct of U.S. counterterrorism operations, including the power to detain and lethally target individuals who are “part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” As interpreted by the Supreme Court, the AUMF delegates the President the power to use force only “for the duration of these hostilities.” Those still detained by the United

135 10 U.S.C. § 950p(c).
137 Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010), reh’g denied en banc, 619 F.3d 1 (2010).
138 Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (opinion of O’Connor, J.); see also id., at 520 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T. I. A. S. No. 3364 (‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities’).”)
States pursuant to the AUMF may thus present habeas courts with arguments that “these hostilities” have come to an end.\textsuperscript{139}

In both statutory contexts, the term “hostilities” is defined with reference to the meaning of that term under the international law of war, also known as the law of armed conflict (LOAC). Under the MCA, the meaning of “hostilities” is set forth in a definitions section at the outset of the statute as “any conflict subject to the laws of war.”\textsuperscript{140} In interpreting the AUMF, the Supreme Court likewise relied on LOAC in noting that “detention may last no longer than active hostilities,”\textsuperscript{141} and Congress has since affirmed the President’s authority to detain under the AUMF is “pending disposition under the law of war.”\textsuperscript{142} Understanding the relevant provisions of LOAC is thus essential to determining whether there are judicially manageable standards for interpreting the statutes. Below, LOAC is primarily addressed in the MCA discussion that is first to follow; to the extent the application of LOAC differs or needs elaboration with respect to the AUMF, it is addressed again in the discussion of that statute. A final section then considers whether the Constitution must be read to commit the determination of the existence of hostilities to one of the political branches.

A. The Military Commissions Act

The question of the existence of hostilities arises in prosecutions under the MCA in two ways. First, the statute provides that the war crimes offenses it enumerates are triable by military commission “only if the offense is committed in the context of and associated with hostilities.”\textsuperscript{143} It is thus necessary

\textsuperscript{139} See, e.g., Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010), reh’g denied en banc, 619 F.3d 1 (2010).

\textsuperscript{140} 10 U.S.C. §948a(9).


\textsuperscript{143} 10 U.S.C. § 950p(c). The meaning of the term “hostilities” is defined by the statute as “any conflict subject to the laws of war.” 10 U.S.C. §948a(9). As the D.C. Circuit recognized, the law of war “has long been understood to mean the international law of war,” Hamdan v. United States, 696 F.3d 1238, 1245 (D.C. Cir. 2012) (citing Hamdan v. Rumsfeld, 548 U.S. 557, 603, 610 (2006))
to prove the existence of hostilities as an element of each charging offense. Abd Al Rahim Hussayn Muhammad al Nashiri, for example, has been charged with a set of military commission offenses for his alleged involvement in the 2000 bombing of the USS Cole. Among Nashiri’s defenses: the conduct of which he has been accused occurred before the attacks of September 11, 2001, and was thus not committed “in the context of and associated with hostilities.”

The existence of hostilities is also, separately, relevant in establishing the military commission’s jurisdiction at the outset. Commission jurisdiction extends only to persons subject to trial under the MCA, namely “alien unprivileged enemy belligerents,” a term defined by the statute to include three types of defendant. The first two include defendants who “engaged in hostilities against the United States or its coalition partners,” or who have “purposefully and materially supported hostilities against the United States or its coalition partners.” In cases involving such defendants, unless the defendant is alleged to have engaged in or supported “hostilities” as defined by the law of war, the commissions lack jurisdiction to proceed. The third category of defendant over whom the military commission may have jurisdiction – an individual who was “a member of Al Qaeda” when the alleged offense was committed – does not by its terms require a finding of hostilities. But even where the existence of hostilities is not part of the statutory requirement for jurisdiction, commission jurisdiction remains subject to limits imposed by the U.S. Constitution. As the Supreme Court has noted, military commissions may substitute for civilian trials or traditional military justice processes to prosecute only those acts “incident to the conduct of war,” for events occurring “within the period of the war.” In this setting, commissions are only constitutionally permissible when the offense alleged was “committed ... during, not before, the relevant conflict.”

(plainty); id. at 641 (Kennedy, J., concurring); Ex Parte Quirin, 317 U.S. at 27–30, 35–36 (1942).
10 U.S.C. §§948a, 948e, 948d.
14 Hamdan v. Rumsfeld, 548 U.S. 557, 596 (2006) (quoting Quirin, 317 U.S., at 28-29); see also id., at 597-98 (“No jurisdiction exists to try offenses ‘committed either before or after the war.’”).
existence of war in some fashion is thus unavoidable in establishing commission jurisdiction.

While it may seem at first blush unnecessary to distinguish the jurisdictional question of the existence of hostilities from the element-of-offense question of the existence of hostilities, the different contexts in which the issue arises highlight the complexity of understanding which decision-making actor is best suited to the determination. The question of the commission’s jurisdiction – either as a statutory or constitutional matter – is manifestly a question of law, presumably resolvable with reliance on ordinary tools of statutory interpretation (including any applicable canons of deference). Yet the MCA also makes “hostilities” an element of each offense; the U.S. Constitution requires that elements of criminal offenses be proven by the prosecution to commission members (the commission equivalent of a jury) beyond a reasonable doubt. 149 Could the presiding officer (the commission equivalent of a judge) determine “hostilities” or “the relevant conflict” were sufficient to establish its jurisdiction, and the members then conclude after trial that the prosecution had not succeeded in proving the existence of hostilities as an element of the offense? In principle, yes. 150 For present purposes, the following analysis treats the existence-of-hostilities question as one for the court – both because the jurisdictional test requires it, and because, even if the determination ultimately requires a finding of fact, the presiding officer must in all events provide members with a jury instruction of what “hostilities” means as a matter of law. 151

Deciding whether Al Nashiri is guilty of a war crime then requires the court to determine whether his alleged conduct was

149 See Apprendi v. New Jersey, 530 U.S. 466 (2000) (affirming defendant entitled to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)) (citing also Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S., at 364 (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”). This is indeed how the question was treated when it arose in the prosecution of Salim Hamdan for material support to Al Qaeda. United States v. Hamdan, 801 F.Supp.2d 1247, 1278 (C.M.C.R. 2011).

150 The resolution to the question turns in part on a host of issues beyond the scope of this Article, including continued uncertainty about the extent to which the U.S. Constitution applies in commission proceedings at Guantanamo Bay. Hamdan v. United States, 696 F.3d 1238, 1245 (D.C. Cir. 2012).

151 Drawing on the applicable international law precedent discussed below, the Hamdan commission presiding officer did just that. Hamdan, 801 F. Supp. 2d at 1278 n.54 (quoting Hamdan Tr. 3752-53).
committed "in the context of and associated with hostilities." Under the MCA, "hostilities" is defined as "any conflict subject to the laws of war."\textsuperscript{152} Before discussing the meaning of "hostilities" within that body of law, a brief note on interpretive background may be helpful. LOAC is embodied in the first instance in a set of treaties called the Geneva Conventions, each of which the United States has signed and ratified, and each of which provide individuals caught up in armed conflict with a basic set of humanitarian protections.\textsuperscript{153} In addition to the four principle Geneva treaties, many states have adopted two related treaties, called Additional Protocols, elaborating on the law described in the four main treaties.\textsuperscript{154} While the United States has not ratified either of the Additional Protocols, it recognizes a number of their provisions as customary international law — that is, as binding on the United States nonetheless.\textsuperscript{155} Beyond the treaty texts themselves, the Commentaries to the Conventions — prepared at the time the Conventions were drafted, essentially as a form of interpretive 'legislative' history — are considered by courts and legal scholars as a highly persuasive source of meaning.\textsuperscript{156} Finally, 

\textsuperscript{152} 10 U.S.C. \S 948a(9).
\textsuperscript{156} See, e.g., Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War (Jean de Preux ed.). The International Committee of the Red Cross (ICRC) Commentary is widely viewed as the informal legislative history of the Conventions. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 620 & n.48 (2006) ("The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.")
the meaning of LOAC “hostilities” has been elucidated by a number of national and international courts whose rulings, while of varying degrees of binding significance, now regularly inform judicial interpretations in the field. This section relies on all of these sources in elucidating the meaning of hostilities.

Questions of the existence of war under LOAC arise most commonly in two interpretive settings. The first is in efforts to define the LOAC term “armed conflict,” the existence of which triggers the applicability of the entire body of law, as set forth in Common Articles 2 and 3 of all four Geneva Conventions. The issue has arisen internationally most often just as it now arises in the example of the MCA – in determining whether war crimes tribunal jurisdiction exists. Violations of certain provisions of the Geneva Conventions constitute “grave breaches” of the treaties, and may be prosecutable as war crimes before a jurisdictionally relevant tribunal. War crimes are not prosecutable as such unless there is a war; thus, various war crimes tribunals have had to determine whether and when a dispute rose to the level of “armed conflict” within the meaning of LOAC such that war crimes jurisdiction may attach.\(^{157}\) Second, LOAC elsewhere uses the term “hostilities” expressly, as in Common Article 3, which defines the group of individuals entitled to its protection as those “[p]ersons taking no active part in the hostilities.”\(^{158}\) (Perhaps most relevant for AUMF purposes, discussed below, in setting forth rules governing the disposition of prisoners at the end of an international armed conflict, Article 118 of the Third Geneva Convention provides that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”\(^{159}\)) Because the terms “armed conflict” and “hostilities” are themselves different, and appear in different provisions of the Conventions, the following discussion treats them each separately. But both are relevant for understanding the meaning of “hostilities” within the statutory context of the MCA and AUMF.

1. The Existence of an Armed Conflict

\(^{157}\) See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment ¶ 562 (May 7, 1997).

\(^{158}\) Geneva III, art. 3.

\(^{159}\) Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (citing Geneva III, art. 118 (“In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.”)).
The Geneva Conventions recognize two kinds of armed conflict: international (a conflict between one or more states) and non-international (a conflict between a state party and a non-state actor, or between two or more non-state actors). In its global counterterrorism operations post-9/11, the United States has taken the position that it is involved in a non-international armed conflict (NIAC) with the Taliban, and with the terrorist organization Al Qaeda and “associated forces.” While the ICRC has never embraced the view “that a conflict of global dimensions is or has been taking place [between the United States and Al Qaeda],” a point to which the Article returns below, this section examines NIAC-related law in light of the U.S. view.

Common Article 3, which prohibits torture and unfair trials, among other things, recognizes “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.” The phrase “not of an international character” is meant to distinguish such conflicts from those described in Common Article 2 of the Conventions as conflicts between “two or more of the High Contracting Parties.” As the U.S. Supreme Court explained in Hamdan v. Rumsfeld, a NIAC is “distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character’ bears its literal meaning.”

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160 See, e.g., Geneva III, arts. 2 and 3.
163 Geneva III, art. 3. Common Article 3 provides a baseline set of safeguards against torture and other cruel treatment for a broad set of protected persons.
165 Hamdan, 548 U.S. at 630 (citing Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987)) (“[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other”).
remains substantial dispute surrounding the extent to what NIACs exist under law *transnationally* – that is, not simply as a conflict internal to a single state – the requirement that an armed conflict must occur “in the territory of one of the High Contracting Parties” of itself is small hurdle; the Geneva Conventions have now been ratified by every nation in the world.166

From the outset of treaty negotiations, it was clear that Common Article 3 NIACs were meant to encompass internal armed conflicts or civil wars, which had not been plainly covered by the Geneva regime until the modern conventions of 1949. It was also clear that the primary interpretive challenge arising from the advent of Common Article 3 would center on how to distinguish an “armed conflict” from any lesser “act committed by force of arms.”167 What was the difference between a war on the one hand, and terrorism, domestic riots or simple crime on the other? The distinction was of no small moment to state parties. States, while accepting of the need for basic humanitarian protections in the bloody civil wars that had proliferated in the decades before the modern Conventions were ratified, had previously viewed all such matters as properly within the realm of sovereign discretion. Among states’ other concerns was the “risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention, representing their crimes as ‘acts of war’ in order to escape [criminal] punishment for them.”168

Despite this concern, negotiators rejected limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion.”169 They likewise rejected a set of criteria some had developed for determining whether violence had reached the level of armed conflict, including whether the non-state actor had an organized

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166 ICRC, “How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” (17-03-2008) at: http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm (“Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.”).
167 Geneva IV Commentary, at 35-36; see also Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment ¶ 562 (May 7, 1997) (describing the need for factors to distinguish a NIAC from “banditry, unorganized short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”).
168 GC III Commentary.
169 *Id.*
military force, with an authority responsible for its acts; and that the legal government “recognized the insurgents as Belligerents,” and was “obliged to have recourse to the regular military forces” in response. While acknowledging the criteria as “convenient” but not at all “obligatory,” the Commentaries ultimately urged that “the scope of the Article must be as wide as possible.” In essence, the Commentaries less than helpfully concluded: “[T]he conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities.’”

The Commentaries’ seemingly tautological definition gained substantial clarification during the proceedings of the International Criminal Tribunal for the Former Yugoslavia (ICTY), an international court created by UN Security Council Resolution in 1993 to conduct trials for war crimes arising out of the conflict in Bosnia and Kosovo. Drawing on the Commentaries for guidance, the case of Prosecutor v. Tadic gave the ICTY an opportunity to elaborate on the Common Article 3 definition of armed conflict for purposes of determining whether an “armed conflict” existed at the time the allegedly unlawful conduct occurred. In Tadic, the Court held that a NIAC exists when two factors are present: “protracted armed violence between governmental authorities, and organised armed groups or between such groups within a State.” In a brief analysis applying this standard, the Tadic court concluded that the violence in Bosnia and Herzegovina in early 1992 had been sufficient. While noting that the UN Security Council had acted during this period to maintain peace and security in the region, the court heavily emphasized the intensity of hostilities.

Subsequent ICTY decisions elaborated on the intensity of “protracted armed violence” required, developing a robust list of factors to be considered in a totality-of-the-circumstances type inquiry. The lengthy list of determinants the court came to

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170 Id.
171 Id.
174 Id. ¶ 565.
175 See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 134 (Nov. 16, 1998) (describing 2-day artillery bombardment killing more than 800 villagers, destroying property, and creating numerous refugees); see also Prosecutor v. Milosovic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 27 (June 16, 2004); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (ICTY Nov. 30, 2005); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (ICTY Apr. 3, 2008). Prosecutor v. Boskoski & Tarculovski, Case No. IT_04-82-T, Judgment ¶ 248 (July 10, 2008); Prosecutor
examine was predominated by factual indicators of violence: the number, duration, and intensity of individual confrontations; types of weapons used; number and types of forces engaged in the fighting; the geographic and temporal distribution of clashes (including whether attacks were increasing over the relevant period); any territory captured; the extent of material destruction; the number of civilians fleeing combat zones; and of course the number of casualties.\textsuperscript{176} Only one factor on the list required semi-direct consideration of the government’s political decision-making: whether the government felt obliged to use military (not just police) force in response to insurgent attacks.

The ICTY cases likewise shed light on the second requirement that a non-state party to the conflict possessing organized armed forces, with an identifiable command structure and the capacity to sustain military operations.\textsuperscript{177} The degree of the non-state party’s organization could also be determined by assessing a range of factual criteria: the group’s organizational structure; its ability to recruit and train fighters and conduct operations using military weapons and tactics; its recognition (formal or otherwise) by international representatives and its ability to enter peace or cease-fire agreements; its ability to issue and enforce internal regulations; and its ability to coordinate multiple units, any degree of territorial control and administration.\textsuperscript{178}

As LOAC scholars have since pointed out, the effect of the two-part ICTY standard has been to clarify the objective nature of the inquiry in the interest of ensuring law application:

Just as Common Article 2’s paradigm for international armed conflict eliminates the opportunity for states to engage in law avoidance by creating an objective trigger

v. Mrksic, Radic & Sljivancanin, Case No. IT-95-13/1-T, Judgment ¶ 419 (Sept. 27, 2007).
\textsuperscript{176} Haradinaj, at ¶ 49; Limaj, at ¶¶ 135–43; Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶¶ 564–65 (May 7, 1997).
\textsuperscript{178} See e.g. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 95-109 (ICTY Nov. 30, 2005); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (ICTY Apr. 3, 2008); Prosecutor v. Lukic, Case No. IT-98-32/1-T, Judgment, ¶ 884 (ICTY July 20, 2009).
untethered to declarations of war or other public pronouncements, so Common Article 3 also introduced the same objective approach to internal armed conflict. [T]he nature of the government’s actions cannot be the determinative or exclusive component, for the very reason that the Geneva Conventions substituted the term ‘armed conflict’ for war: any trigger for the law that rests solely on governmental rhetoric or action will lose that essential objectivity.\textsuperscript{179}

At the same time, some have cautioned that applying too formulaic a test to the determination can have the effect of undermining the protection of humanitarian interests that is the central purpose of the LOAC. In the context of the current bloody civil war in Syria, for instance, Laurie Blank and Geoff Corn note that the international community failed to “acknowledge the existence of armed conflict until the legalistic elements test was apparently objectively satisfied, in the summer of 2012, at least fifteen months after the violence erupted.”\textsuperscript{180} Blank and Corn argue that such reluctance is especially troubling given “the motivation for adopting the armed conflict trigger: mitigate the impact of technical legal formulas when determining the applicability of humanitarian protections.”\textsuperscript{181}

Blank and Corn are surely right in cautioning against the application of an overly technical definition if its effect is to weaken the humanitarian protections that animate the entire body of law. In the case of Syria, it may well be that other states’ reluctance to acknowledge the existence of an armed conflict there strengthened the ability of the Syrian government to use force in ways manifestly contrary to the law of war. However, it is not clear the non-recognition of armed conflict will invariably have this effect. As the ICRC and others have noted, because LOAC “rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts government other bodies of law,” it is “inappropriate and unnecessary to apply” LOAC to circumstances not amounting to armed conflict.\textsuperscript{182} Humanitarian interests could equally be compromised when states use the armed conflict designation as a

\textsuperscript{179} Laurie R. Blank and Geoffrey S. Corn, Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition, 46 VANDERBILT J. TRANSNATIONAL L. 693 (2013).

\textsuperscript{180} Blank and Corn, supra note __, at 696.

\textsuperscript{181} Id., at 697.

\textsuperscript{182} ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts, presented to the 30th International Conference of the Red Cross and Red Crescent, Geneva, October 2007, 30IC/07/8.4, p. 8.
way of circumventing greater legal protections that would otherwise apply in times of peace. Indeed, LOAC in many places recognizes the applicability of certain of its provisions unless the individuals to be protected would receive more favorable treatment under some other body of law. In this respect, the law is designed to be flexible enough to apply as a baseline, but not a ceiling, of humanitarian protections.

2. The Cessation of Hostilities

As the foregoing demonstrates, “protracted armed violence” (as the ICTY puts it) or “hostilities” (in the Commentary’s term) is one of two central elements in the Conventions’ definition of “armed conflict.” Yet the Conventions at times use the term “hostilities” independently as well. In particular, in setting forth rules governing the disposition of prisoners at the end of an international armed conflict, Article 118 of the Third Geneva Convention provides that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.” While Article 118’s requirement that prisoners be released when “active hostilities” are over applies by its terms only to situations of international armed conflict, it is relevant here at least by analogy and perhaps as more direct interpretive guidance as well. It is Article 118 on which the Hamdi plurality relied in holding that the AUMF authorized the detention of certain individuals “engaged in an armed conflict against the United States,” only “for the duration of these hostilities.”

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183 See, e.g., Geneva III, art. 4 (recognizing the entitlement of “merchant marine and the crews of civil aircraft of the Parties to the conflict” to prisoner of war protection if they “do not benefit by more favourable treatment under any other provisions of international law”).
184 Geneva III, art. 118 (“In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.”).
185 Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (opinion of O’Connor, J.) (emphasis added); see also id., at 520 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3406, T. I. A. S. No. 3364 (‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities’).”); Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010), reh’g denied en banc, 619 F.3d 1 (2010). The Hamdi Court limited its analysis to the conflict in Afghanistan in which they understood Mr. Hamdi had been captured, noting that “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan,” and holding that “[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants ...” Hamdi, 542 U.S., at 521 (“If the record
The purpose of marking the cessation or close of "hostilities" in the detention provision of Article 118, as well as in analogous portions in the related Conventions, is addressed in the Commentaries with some clarity.

In calling for the general repatriation of all prisoners of war once active hostilities have ceased, the 1949 Diplomatic Conference took account of the experience of the Second World War. It recognized that captivity is a painful situation which must be ended as soon as possible, and was anxious that repatriation should take place rapidly and that prisoners of war should not be retained in captivity on various pretexts. In time of war, the internment of captives is justified by a legitimate concern — to prevent military personnel from taking up arms once more against the captor State. That reason no longer exists once the fighting is over.

Negotiators were particularly conscious of avoiding the perceived inadequacies of the predecessor Geneva Conventions on this point. That is, cognizant of the notion that hostilities could cease well before any peace treaty or formal settlement was adopted (if ever any was adopted), it was "essential to lay down that repatriation should take place as soon as possible after the end of hostilities, and to make this requirement unilateral so that its implementation would not be hampered by the difficulty of obtaining the consent of both parties." As with the recognition of the existence of an "armed conflict" in the first instance, the cessation of hostilities would depend on a factually objective test: "The words 'close of hostilities' express a notion which has already been met with several times in the Convention: they mean the actual end of the

establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF.").

See, e.g., Geneva IV, art. 46 ("In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities."); Geneva IV, art. 49 ("The Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. . . . Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."); Geneva IV, art. 133 ("Internment shall cease as soon as possible after the close of hostilities.").

Commentaries, at pp. 546-47.

Commentaries, at pp. 541-42.
fighting and not the official termination of a state of belligerency.”

As the next section discusses, an argument might be made that Article 118 is not the LOAC element that most usefully informs the interpretation of the AUMF here. It is, after all, strictly applicable only in international armed conflicts, and was designed to ensure that the members of state armed forces were returned promptly to their home country at war’s end. Some scholars have thus suggested it might be more appropriate to look to other Geneva provisions that require release from detention not when fighting stops, but rather when the reason for the individual’s detention – for example, the threat he poses to security – ceases to exist. For reasons discussed below, this Article concludes such an interpretation of the AUMF is unlikely to be correct. For present purposes, it may suffice to note the prospect of a difference between Article 118 “hostilities” and the statutory meaning of the AUMF.

3. Applying the Law in Al Nashiri’s Case

A “conflict subject to the laws of war” – the language used in the MCA statute – seems plainly to mean an “armed conflict” as defined by Common Articles 2 or 3 of the Geneva Conventions – a finding of which triggers the application of the Geneva law-of-war regime. In Al Nashiri’s case, the United States alleges a non-international armed conflict between the United States and Al Qaeda, and thus embraces the definition described above by Tadic – a condition of “protracted armed violence between governmental

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189 Geneva IV Commentaries, at 514-515 (“The expression ‘the close of hostilities’ should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities. The similar provision concerning prisoners of war speaks of ‘the cessation of active hostilities’ and the wording of the paragraph here should be understood in the same sense.”); see also id., at pp. 270 (“This rule, which is in accordance with the usual practice among States, is justified by the fact that a fairly long time may elapse between the close of hostilities and the conclusion of a peace treaty; during that time the continuation of security and control measures would no longer be warranted.”).


191 See infra, Part III.
authorities and organised armed groups or between such groups within a State."^{192}

As the ICTY has demonstrated, as has the U.S. Supreme Court in other contexts,^{193} an assessment of "protracted armed violence" requires a remarkably common form of judicial inquiry: the application of a multi-pronged standard to set of empirical facts and circumstances in the world. It is certainly true that the Tadic test is multi-factor and complex. But the Court has never suggested that complex standards are perforce unmanageable; on the contrary, it has embraced just such "totality-of-the-circumstances" measures for the purpose of determining police compliance with U.S. constitutional law.^{194}

What, then, might the application of the Tadic standard tell us about the existence of an armed conflict at the time of Al Nashiri’s alleged conduct? In the U.S. government’s estimation, both the organization of the non-state group Al Qaeda, and the level of hostilities by the year 2000, suffice to trigger the recognition of an armed conflict. Osama bin Laden began issuing statements “declaring war” against the United States in 1996, publicly announcing the formation of an organization he called the “International Islamic Front for Jihad Against the Jews and the Crusaders” in 1998, and urging Muslims to kill Americans wherever they may find them.^{195} The now rich publicly available literature on the nature of the Al Qaeda organization at this time suggests Al Qaeda in the 1990’s was a highly structured organization.^{196} While there is no suggestion Al Qaeda has ever asserted any degree of territorial control or administration, there is evidence that the group had the ability to recruit and train fighters and conduct operations using military weapons and tactics, and could issue and enforce internal regulations and coordinate multiple units.^{197}

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192 See Government Response to Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission, United States v. Al Nashiri, 13 Sept. 2012 (citing Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70) [hereinafter Government Nashiri Response].
193 See supra, Part II.A.
194 See, e.g., Illinois v. Gates (holding that courts should examine the totality of the circumstances in determining whether probable cause existed to obtain a warrant required by the Fourth Amendment).
195 Government Nashiri Response, supra note __, at 3.
197 See id. For the relevant organizational factors, see, for example, Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 95-109 (ICTY Nov. 30, 2005); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (ICTY Apr. 3,
The first acts of violence the government cites in this conflict are Al Qaeda’s coordinated attacks on August 7, 1998 against U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 213 people and injuring approximately 4,000 in Nairobi; and killing 11 and wounding 85 in Dar es Salaam. On August 20, 1998, in response to these attacks, U.S. armed forces struck terrorist suspected Al Qaeda training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan. The attacks in which Al-Nashiri is charged with participating occurred a year and a half later: an attempted attack on USS The Sullivans on January 3, 2000; and the successful attack on the USS Cole on October 12, 2000, which killed 17 U.S. sailors, injured 37 others, and caused significant property damage. While the scope and relatively sporadic nature of these attacks over a period of two years pale in comparison to the statistics the ICTY confronted in finding sufficient level of armed violence to recognize the existence of an armed conflict in Bosnia, relatively smaller absolute numbers need not necessarily foreclose the possibility that an armed conflict exists.

Yet despite the presence of an organized enemy and multiple incidents of violence preceding Al Nashiri’s alleged war crimes, the government’s case for the existence of an armed conflict faces some substantial hurdles. During the primary period of the indictment – alleging conduct by Nashiri between August 1996 and October 2000, the level of actual violence between the United States and Al Qaeda amounted to two attacks in four years. The October 2000 attack on the USS Cole was met by the United States with only a law enforcement response; the bombing of the U.S. embassies in 1998 did produce a one-time missile strike by the United States against two suspected Al Qaeda targets, but it was also met with a series of criminal prosecutions of those involved.

Throughout the period, there was no territory
captured, no civilians fleeing combat zones, no sustained military engagement. Beyond Tadic, the United States remains in a stark minority of states to understand the sporadic attacks of an international terrorist organization like Al Qaeda as triggering an armed conflict. The vast majority of U.S. allies, the ICRC and others have generally treated incidents of terrorism – particularly those incidents not tied to any particular territory by either the organization’s national affiliation, its possession of land, or the geographic locus of its targets – as precisely that kind of sporadic violence such as “banditry, unorganized short-lived insurrections, or terrorist activities,” which activities the definition of “armed conflict” meant to except.\textsuperscript{202}

What then of the attacks that followed within the year after the bombing of the USS Cole – the attacks of 9/11 themselves, killing 3,000 people? After those attacks, the United States embarked upon vast and sustained U.S. military operations against Al Qaeda in Afghanistan, killing at least that number of Afghans or more in its first months of operations alone. Even the U.S. Supreme Court has recognized the existence of an armed conflict between the parties in Afghanistan after that.\textsuperscript{203} Indeed, while the primary charges against Nashiri relate to his role in the attack on the Cole, he is also charged with participation in an October 2002 attack on a French oil tanker, the MV Limburg, resulting in the death of one person, injuries to 12 others, and serious damage to the tanker. The period of the full indictment, the government will contend, should thus be understood to include the hostilities between the United States and Al Qaeda in 2001-2002, and Nashiri’s pre-2001 conduct should be recognized as earlier salvos in what plainly became an armed conflict by 2001. A contrary approach – treating the 1998 and 2000 attacks in isolation from these later events – risks just the kind of overly technical definition of “armed conflict” of which Blank and Corn warned.\textsuperscript{204}

Yet this argument, too, is not without problem. Among them, it is not at all clear why an attack by Al Qaeda against a French vessel should be understood as evidence of the intensity of hostilities between Al Qaeda and the United States (any more than a U.S. attack on Iran should be viewed as evidence of hostilities between Iran and Iraq). In any case, Blank and Corn’s concern about the dangers of undue technicality were to a very particular end, namely, that an unduly limited conception of “armed conflict” might result in the weakening of humanitarian protections that

\textsuperscript{202} Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment ¶ 562 (May 7, 1997).
\textsuperscript{203} Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
\textsuperscript{204} See Blank and Corn, supra, note __.
attach once LOAC is triggered. For the purpose of determining war crimes liability in this context, however, there is no such concern. If a court were to determine no armed conflict existed at the time Nashiri carried out his attacks, the effect would not be to weaken protections otherwise available to Nashiri, but rather to make clear that his conduct must be treated not as a war crime per se, but as an ordinary domestic criminal law offense. Instead of being subject to trial by military commission, broadly recognized to carry modestly weaker procedural protections for defendants that civilian criminal justice, Nashiri would presumably be entitled to the robust rights attendant criminal prosecution under U.S. law in the ordinary course. In this regard, one might argue that the definition of “armed conflict” is most consistent with LOAC principles if construed narrowly, to ensure that individuals caught up in conflict are not stripped of more favorable treatment available under another applicable body of law.\footnote{Speech of Brig. Gen. Mark Martins to the Royal Institute of International Affairs, Chatham House, London, September 28, 2012 available at http://www.lawfareblog.com/2012/09/brig-gen-mark-martins-address-at-chatham-house/.}

The foregoing analysis is not intended to insist that there is a singular necessary resolution to the question of “armed conflict” in Nashiri’s case. It is rather to demonstrate two points. First, the detailed LOAC standards for determining the existence of an armed conflict are both familiar in nature and manageable in application for courts needing to confront them. Indeed, the quantity of text, structure and history available to shed light on the meaning of “armed conflict” is at least as substantial as that available to the Court faced with construing the rather more vague constitutional provisions at issue in \textit{Zivotofsky}.\footnote{Cf., e.g., Geneva III, art. 4 (recognizing the entitlement of “merchant marine and the crews of civil aircraft of the Parties to the conflict” to prisoner of war protection if they “do not benefit by more favourable treatment under any other provisions of international law”).} While the legal standard for “armed conflict” requires a fact-intensive inquiry, political question doctrine is designed to limit court jurisdiction not for fear that the courts will confront complex patterns of fact, but rather to disengage the courts from deciding questions in the absence of identifiable law. That is not the case here. Second, the preceding analysis shows there are at least colorable arguments on both sides of the question of the existence of hostilities for the

\footnote{Zivotofsky v. Clinton, 132 S.Ct. 1421, 1430 (2012) (citing as relevant text the President’s Article II power to “receive Ambassadors and other public Ministers,” and Congress’ Article I powers over naturalization and foreign commerce). \textit{Zivotofsky}'s conclusion in this regard is notably different from that of the Rehnquist plurality in \textit{Goldwater v. Carter}, 444 U.S. 996, 1002-03 (1979) (Rehnquist, J., concurring).}

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purpose of applying the MCA. As a result, the how much weight
courts afford the views of the executive (here, executive as
prosecutor) may matter substantially in the outcome.

B. Authorization for Use of Military Force

As noted above, the AUMF authorizes the President to
detain individuals “engaged in an armed conflict against the United
States,” only “for the duration of these hostilities.” 208 To date,
judicial elaboration of this standard has been driven by the
Guantanamo habeas cases, an “overwhelming majority” of which
“concern persons who were captured in Afghanistan, captured
fleeing from Afghanistan, or captured in more remote locations
where they allegedly were engaged in activities linked to the
hostilities in Afghanistan (such as recruiting fighters to go
there).” 209 Even before U.S. operations there began more actively
to wind down, the issue of when those hostilities were to be
considered over had already begun to arise. Ghaleb Nassar Al-
Bihani, seized in Afghanistan in late 2001, argued in his 2009
petition for habeas corpus that he must be released because the
U.S. conflict with the Taliban had come to an end. 210

The D.C. Circuit’s analysis in Al-Bihani’s case provides a
useful partial roadmap to how courts will be required to resolve the
duration of the AUMF’s detention authority going forward. On its
way to rejecting Al-Bihani’s argument that hostilities had ceased in
2010, the D.C. Circuit adopted the Supreme Court’s assumption in
Hamdi that the most relevant provision of the Geneva Conventions
was Article 118 of Geneva III, requiring “release and repatriation
only at the ‘cessation of active hostilities.’ ” 211

208 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a),
O’Connor, J.) (emphasis added); see also id., at 520 (“It is a clearly established
principle of the law of war that detention may last no longer than active
hostilities.” (citing Geneva III, art. 118); Al-Bihani v. Obama, 590 F.3d 866, 878
(D.C. Cir. 2010), reh’g denied en banc, 619 F.3d 1 (2010).

209 Robert Chesney, Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing

210 Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) (describing Al-
Bihani’s argument that the relevant conflict had ended either when the Afghans
established a post-Taliban interim authority, when the United States recognized
that authority, or when Hamid Karzai was elected President).

211 Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010) (quoting Third
Geneva Convention art. 118). The panel decision emphasized here, and on more
than one occasion in the course of its opinion, that “we do not rest our resolution
of this issue on international law or mere common sense.” Al-Bihani v. Obama,
590 F.3d 866, 874 (D.C. Cir. 2010), reh’g denied en banc, 590 F.3d 866, 389
U.S.App.D.C. 26 (publishing multiple opinions addressing the panel’s treatment
of international law).
significance in the Conventions’ use of the term “active hostilities” in this context instead “armed conflict,” the Court reasoned that the difference “serves to distinguish the physical violence of war from the official beginning and end of a conflict because fighting does not necessarily track formal timelines.”\textsuperscript{212} LOAC thus “codifies” what common sense tells us must be true: release is only required when the fighting stops.\textsuperscript{213}

As judicially manageable standards go, this inquiry is perhaps as clear as it gets. In Al-Bihani’s case, the Court found the notion that the relevant fighting had stopped in Afghanistan impossible to accept. Among other things: “[T]here are currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan, with tens of thousands more to be added soon.”\textsuperscript{214} While the Taliban had been forced out of power in 2002, the fighting plainly continued. Examining the factual state of affairs in a way quite consistent with Tadic and the Geneva Commentaries,\textsuperscript{215} the court’s opinion thus rejected an interpretation of the law that would require the release of detained fighters under those circumstances.

This is not to suggest that the application of the “cessation of hostilities” standard is always straightforward. What if, for example, fighting between parties was limited to a single exchange of fire over a period of a year? Or, in present terms, what if Al Qaeda as an organization had been rendered substantially incapable of conducting attacks against U.S. interests,\textsuperscript{216} but the United States continued to bomb alleged “Al Qaeda” targets overseas? Under such circumstances, the court might be required to determine whether there was a certain level of hostilities beneath which no “armed conflict” could be said to exist, falling back on

\textsuperscript{212} Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010) (quoting GCIII art. 2 (provisions apply “even if the state of war is not recognized”) and GCIII, art. 118 (discussing the possibility of the cessation of active hostilities even in the absence of an agreement to cease hostilities)).
\textsuperscript{213} Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010).
\textsuperscript{214} Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010) (internal citations omitted).
\textsuperscript{215} Geneva IV Commentaries, at 514-515 (“The expression ‘the close of hostilities’ should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities.”).
\textsuperscript{216} See supra, note __ (quoting officials). In international armed conflict, the analogous circumstance is known as debellatio, when “all organized resistance has disappeared,” and the enemy state “has been reduced to impotence.” YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 50 (5th ed. 2011). Debellatio is recognized as one of the modes by which international armed conflict may come to an end. Id., at 48.
the Tadic standard outlined in the previous section. The nature of the inquiry will undoubtedly vary according to the circumstances. But such variance hardly makes it judicially unmanageable. It makes the result a function of the application of a definable legal standard to varying facts.

Indeed, the fact-intensive nature of the inquiry demonstrates the extraordinary control the political branches retain over the end-of-hostilities finding — even if the courts engage in review. The parties' behavior is the determinative factor. So long as the U.S. armed forces keep shooting, the government has at least a colorable argument that hostilities continue. The legal test thus puts a heavy thumb on the political branches' side of the scale. In this sense, the Al-Bihani court was right in later concluding that "when hostilities have ceased is a political decision." Indeed, the Al-Bihani opinion highlights the key difference between a political question and a political decision. The former forecloses the possibility that the courts may exercise jurisdiction. The latter allows the courts to hold the executive to the legal results of its political decisions. Thus, once a political judgment is made to stop shooting, it is within the power of the courts to determine under the objective standard given by law — whatever the government subsequently says — that hostilities have come to an end.

While Article 118 thus seems to offer judicially typical manageable standards, the prospect that the "hostilities" contemplated by the AUMF describe a non-international armed conflict between the United States and Al Qaeda does raise another legal concern: the possibility that Article 118 is not the relevant test for when detainees in this conflict must be released. As mentioned above, Article 118 applies by its terms only to international armed conflicts arising under the Conventions. One could argue, as some scholars have, that the end of detention in NIACs is more appropriately understood by reference to the idea contained in the Geneva Conventions' Additional Protocol II (APII), a treaty applicable directly to NIACs between states and non-state actors. On the question of detention, Article 2 of APII

\[217\] In the one-sided-fight scenario, for example, one might argue that it is not possible for there to be an "armed conflict" of any kind if there are not at least two parties to the conflict. The effective failure of one side to fight back in any way suggests there is no longer a sufficiently organized force to constitute a party. In other wars, in other times, such a circumstance has been called defeat.


\[219\] See, e.g., John B. Bellinger III & Vijay M. Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva
provides that "[a]t the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of [the Protocol] until the end of such deprivation or restriction of liberty." Because this provision does not require release, as Article 118 does, it has been read to suggest that detention authority may in some circumstances continue even after active hostilities are over as long as there is a security-related reason to continue. Yet there are at least three problems with the notion that APII's standard in this regard should guide the interpretation of the AUMF. First, while the United States is a party to the Third Geneva Convention (containing Article 118); it is not a party to APII. That APII is not legally binding on the United States as treaty law need not necessarily be dispositive. The United States has submitted APII for ratification, so is required at a minimum not to undermine its object and purpose. Moreover, the ICRC contends that the restriction on detention in NIACs is the same under customary international law (to which the United States is

Conventions and Other Existing Law, 105 Am. J. Int'l L. 201, 228-29 (2011); see also Curtis Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2124 (2005) (suggesting, without reference to Additional Protocol II, that whether hostilities have ceased should be based on a determination as to whether the individual detainee "no longer poses a substantial danger of rejoining hostilities" based on, for example, "the detainee's past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile").

220 Protocol II, art. 2.

221 See, e.g., Commentary, at p. 1360 (noting that the parties had rejected an amendment to the Protocol that would have required its application cease "upon the general cessation of military operations"); Commentary, at p. 1359 ("In principle, measures restricting people's liberty, taken for reasons related to the conflict, should cease at the end of active hostilities, i.e., when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken."); ICRC Customary Int'l L., Rule 128 ("Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist."); id., Summary ("Refusal to release detainees when the reason for their detention has ceased to exist would violate the prohibition of arbitrary deprivation of liberty...").

bound whether a signatory to the treaty or not) as under APII. At the same time, the methodology of the ICRC's customary international law study has been subject to strong criticism by the United States and others. More, ICRC's statement of the customary international law principle in the case of NIAC detention is centrally concerned not with legal support for prolonged detention authority, but with preventing unjustified delays in release.

A second reason the APII argument is problematic is also related to its applicability. To the extent the argument in favor of relying on the law of APII is that the conflict authorized by the AUMF is more like a NIAC than an IAC, it is worth noting that neither the classic IAC model (contemplating conflicts between two states), nor the NIAC model (contemplating conflicts internal to a single state) actually reflects the unusual nature of the conflict between the United States and Al Qaeda – a transnational conflict between a state and a non-state actor. Indeed, it is in part for this reason that the United States is largely alone in the world in describing the violence between it and Al Qaeda as an "armed conflict" of any kind.

Third, and most important, APII can be read to stand at most for the proposition that NIAC law does not prohibit detention beyond the cessation of hostilities. This is far from the same thing as a claim that APII itself somehow authorizes such detention. The United States has consistently rejected the idea that international law may serve as a source of authority enlarging government power beyond that authorized by our own Constitution or laws. Indeed, APII rules are based on the assumption that the primary law regulating intra-state conflicts would remain the law of the state in which the conflict occurred. To understand which standard – GCIII, Article 118 or APII, Article 2 – best applies here, one must ask which is most consistent with the meaning of

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223 ICRC Customary Int’l Law, Rule 128.
224 See, e.g., PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2007).
225 ICRC Customary Int’l Law, Rule 128 ("The United Nations and other international organizations have on various occasions highlighted the importance of the release of detainees held in connection with non-international armed conflicts...").
227 To the extent the ongoing NIAC in which the United States is involved is one between it and non-state actors in Afghanistan, it was most properly Afghan law, not U.S. law, which should have been recognized as the key source of law authorizing the continued detention of those picked up in the course of that conflict now at Guantanamo.
the domestic law authorizing the power, namely, the statutory AUMF.

Here, there are several reasons to think the IAC standard is the best reading of the AUMF. Congress' most immediate focus in enacting the AUMF was the pending invasion by the United States of Afghanistan, for the stated purpose of ridding that country of a government that had harbored Al Qaeda.\textsuperscript{228} Shortly after the passage of the AUMF, the invasion happened. And the United States entered into an IAC in the classic sense – an armed conflict between two state parties to the Geneva Conventions. Further, the notion that what Congress meant to authorize was instead a NIAC between the United States and Al Qaeda – or perhaps an IAC with Afghanistan and a broader NIAC with the terrorist organization worldwide – raises far more concerns under international law. The notion that a conflict between a state and a terrorist organization might rise to the level of an "armed conflict" covered by LOAC is a novel interpretation of international law, one that has not gained acceptance by the ICRC or by other state parties to the Conventions. Longstanding canons of construction requiring the Court to favor interpretations of ambiguous statutes that are more, rather than less, consistent with international law would thus also tend to favor the IAC interpretation here.\textsuperscript{229}

In this respect, it is of no small matter that both the D.C. Circuit and the Supreme Court have now held that the AUMF is informed by Article 118,\textsuperscript{230} a conclusion that Congress even in subsequent legislation has done nothing to dispel.\textsuperscript{231} Precisely to avoid interpreting the scope of the AUMF in a way that might raise broader legal concerns, the courts have embraced the view that the detention authority granted by Congress was not meant to be unlimited, but was intended to be cabined by this particular "longstanding principle" of the law of war.\textsuperscript{232} In all events, just as

\textsuperscript{228} See Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (opinion of O'Connor, J.) ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.").
\textsuperscript{229} See Murray v. Schooner Charming Betsy, 2 Cranch 64, 118, 2 L.Ed. 208 (1804).
\textsuperscript{230} Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Al-Bihani v. Obama, 590 F.3d 866, 874-75 (D.C. Cir. 2010).
\textsuperscript{231} See, e.g., NDAA, Pub. L. No. 112-81, Section 1021.
\textsuperscript{232} Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that
the Court did in *Hamdi*, the choice of which provision of international law best informs the meaning of the AUMF is a classic question of statutory interpretation for the courts.

C. Textual Commitments

However manageable the standards available for discerning the existence of war may be, there remains the outstanding central element of political question doctrine that requires considering whether the U.S. Constitution textually commits the inquiry into the existence of hostilities to one of the political branches. While the Court’s historical resolution of such questions would seem to foreclose such an argument, it is worth briefly contemplating here.

In the MCA context, the strongest argument that an aspect of the statute’s meaning is textually committed to another branch is the Article I provision allocating to Congress the power to “define and punish offenses against the law of nations.”

To the extent the existence of an “armed conflict” is an element of a military commission offense, one might argue that defining the scope and nature of those hostilities is part and parcel of Congress’ power to define the offense. While the meaning of the Define and Punish Clause is, to say the least, contested,

at least one federal judge has embraced the view that Congress’ power in this respect is substantial, and not limited by international law.

The problems with this argument are severalfold. For one, as explained above, the question of the existence of hostilities in the MCA arises both as an element of the offense, and in connection with the jurisdiction of the commissions in the first instance.

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233 The Define and Punish Clause provides that Congress has the power: “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10.


235 *Hamdan v. United States*, 696 F.3d 1238, 1247, fn. 6 (D.C. Cir. 2012) (opinion of Kavanaugh, J.) (“Congress’s war powers under Article I are not defined or constrained by international law.”)
While Congress may have a special claim to defining the offenses established pursuant to its power under that Clause, it is difficult to see how the Clause could give Congress sole textual claim to the jurisdictional question—that is, to deciding whether commissions are constitutionally permitted as to a particular offender at all. The Court in Hamdan certainly gave no indication that this was the case in its study of commission jurisdiction. Indeed, as scholars have long pointed out, giving Congress unfettered (unreviewable) power to create or expand the jurisdiction of non-Article III courts would pose a fundamental challenge to the Constitution's separation-of-powers scheme. In Richard Fallon's account: “[C]onstitutional principles must be derived to circumscribe the role of legislative courts, or else the functions of the article III judiciary could, at Congress's option, be all but obliterated.”

In any case, even if Congress' power under the Define and Punish Clause affords it exclusive power to define offenses as war crimes, there is no reason to assume that in allocating to Congress this power, the Constitution meant thereby to deprive the courts of their Article III power to review the legality of trials and convictions of those offenses, much less of their power to construe the statutory meaning of the offenses Congress defines. Just as the Court has not hesitated to decide whether Congress has by statute invoked its Article I power to suspend the writ of habeas corpus, so too the Court must be able to interpret statutes invoking Congress' Article I power to define and punish offenses against the law of war.

In contrast, the argument that the scope of the hostilities authorized by the AUMF is textually committed to Congress likely turns first on Congress' Article I power to "declare war." Whether or not expressly invoked in particular legislation, one might imagine a reading of the Declare War Clause that would give Congress exclusive power to say whether "war" exists. It would, after all, seem ludicrous to suggest that the federal courts could, for example, constitutionally "declare war" in the sense of initiating a conflict with another nation or group.

Yet recognizing that Congress holds the exclusive power to declare war does not necessarily deprive the courts of otherwise

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239 U.S. CONST., art. I, sec. 8.
extant Article III power to interpret a statute describing the scope of the war Congress has declared, or even taking notice of a condition in which the country is or is not at war. Indeed, a contrary reading of the Declare War Clause would seem flatly inconsistent with the Supreme Court's treatment of the question in, among others, the Prize Cases, in which it explained that a civil war in particular was "never publicly proclaimed," but was rather "a fact in our domestic history which the Court is bound to notice and to know." 240 Here, the statutory question in the AUMF context is not whether war has been declared but rather whether the "hostilities" Congress has authorized continue to exist. At least as a matter of textual commitment of power under the Constitution, there seems no difference between the power to resolve the question in one direction and the power to resolve it in another.

IV. BEYOND THE DOCTRINE

In one sense, the conclusion that the existence-of-war conditions in the MCA and AUMF are not political questions flows unremarkably from the existence of a law of armed conflict. A body of law that has in some form existed for centuries, its rapid growth following World War II, led in large measure by political leaders of the United States, reflected a commitment to the idea that law should constrain the conduct of war, whether the war was between nation states or between a state and a non-state organization. State parties to the Conventions thus embraced a singular bargain: individuals who would in any other circumstance be prosecuted for murder for the act of killing would be relieved of this liability, provided they abided by a set of rules in the exceptional circumstance in which a dispute among parties rose to the level of "armed conflict." 241 Because the consequences of triggering LOAC were so stark -- allowing killing where it would otherwise be murder -- the law required that there be a meaningful, legal distinction between a state of war and a state of peace. The notion that it is impossible to distinguish legally between the state of affairs in which killing may be lawful, and the state of affairs in which it is not, is anathema to LOAC's central scheme.

The conclusion is likewise consistent with U.S. legal traditions, particularly courts' historical insistence, even in the face of

240 Prize Cases, 67 U.S. at 667-69; see also Matthews v. McStea, 91 U.S. 7 (1875); The Neustra Senora de la Caridad, 17 U.S. 497, 502 (1819).
241 Defense Department General Counsel Jeh Johnson, Speech to Oxford Union, Nov. 30, 2012, available at http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/ (""War" must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man -- if he is a 'privileged belligerent,' consistent with the laws of war -- to kill another.")
executive opposition, that they determine for themselves whether war exists. This has been expressly true in the context implicated by the MCA: whether criminal military jurisdiction exists and what criminal punishment may be affixed. The reasons for judicial engagement in such cases seem readily understandable. As the Court and scholars have long recognized, political question doctrine is best understood as a function of the separation-of-powers interests it serves, interests that begin with the protection of individual liberty. Individual rights are acutely implicated in matters of criminal justice; indeed, fully half of the Bill of Rights is devoted to establishing process constraints on the government’s power in the application of criminal law, including the right to trial by jury. It is difficult to imagine how many of these rights could be protected if courts could opt out of the process of criminal justice that the Constitution commits to judicial supervision.

Indeed, because the existence of hostilities under the MCA is not only a question of jurisdiction, but also an element of a charging offense in commission prosecutions, the Constitution requires that the government prove their existence to a commission jury beyond a reasonable doubt. In the context of a standard criminal prosecution in particular, the Constitution insists that an independent jury, not the executive, serve as a neutral finder of fact. Ceding to the executive the effective power to determine the presence of this circumstance would present a grave constitutional

242 See supra, Part II. A (citing Milligan, Madigan, et seq.).
245 See, e.g., see also A1 (public trial), A4, A5, A6, A8.
246 See Apprendi v. New Jersey, 530 U.S. 466 (2000) (affirming defendant entitled to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)) (citing also Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S., at 364 (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”)). This is indeed how the question was treated when it arose in the prosecution of Salim Hamdan for material support to Al Qaeda. United States v. Hamdan, 801 F.Supp.2d 1247, 1278 (C.M.C.R. 2011).
question, effectively relieving the prosecuting power of its obligation to prove a key element of the defendant's guilt.

Yet if the separation-of-powers interest in protecting individual rights weighs heavily against less than full-throated participation by the judicial branch in that context, what of the similarly fact-intensive the inquiry into the end of hostilities posed by the AUMF? True, individual rights are equally implicated in, for example, the long-term detention of prisoners carried out under AUMF authority. And the Prize Cases Court and others have insisted on recognizing the fact of war's existence for themselves when they found that war was present.247 But to what extent would a court really be willing to find that hostilities were over— even in the face of, for example, a presidential statement that hostilities persist? After all, earlier formulations of political question doctrine included consideration not only of the Constitution's textual commitment of a question to another branch of government, and the availability of judicially manageable standards, but also of the concern that the Court not express a lack of respect to its coordinate branches of government, and recognize when there might be an unusual need for finality in a political decision already made.248

More important, separation-of-powers interests have never been thought limited to the protection of individual rights. As the Court and scholars have variously recognized, they also include the maintenance of democratic accountability, and, in contrast to the Articles of Confederation regime the Constitution replaced, the promotion of governmental effectiveness.249 Political question doctrine emerged largely as a narrow exception to the presumption in favor of judicial engagement to serve these other two goals.250

247 See supra, Part I.I.A.
250 Marbury v. Madison, 5 U.S. 137, 165-66 (1803) ("By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. ..."
So, for example, where effectiveness in foreign policy might require that the Government speak with one voice in international relations, the political branches' superior electoral accountability favors the President (or even Congress) over the Court as the voice to do it.\footnote{See Munaf v. Geren, 553 U.S. 674, 702-03 (2008) (citing The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").} Particularly where the question implicates the President's power to target or detain individuals he maintains continue to plan attacks against the United States, it seems a direct challenge to these interests for the Court to insist on second-guessing the executive's assessment of the nature of the conflict.

Here, it is helpful to recall that judicial engagement in law interpretation has never been limited to an on/off switch, one position where jurisdiction exists and independent decision-making follows, another position in which no jurisdiction exists, and the courts are therefore silent. Rather, political question doctrine is best viewed as on one end of a continuum of mechanisms by which the courts tailor their interpretive role to recognize the varied separation-of-powers interests that shape the Court's power.\footnote{See Baker v. Carr, 369 U.S. 186 (1962) (describing political question doctrine as "primarily a function of the separation of powers"); see also Rachel Barkow, The Rise and Fall of the Political Question Doctrine, in The Political Question Doctrine and the Supreme Court of the United States (Mourtada-Sabbah and Cain eds., 2007).} If the political question end of the continuum reflects a judgment that some separation of powers interests prohibit judicial engagement at all, and at the other end is the pursuit of full-throated independent judicial review, in the middle are various doctrines of judicial deference, in which the views of the executive are afforded more or less dispositive weight in interpretation.\footnote{See, e.g., William Eskridge, Jr. and Lauren Baer, The Continuum of Defe rence: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Geo. L. J. 1083 (2008) (describing a continuum of judicial deference regimes to executive branch interpretation) (citing, e.g., United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).} It is among these options one finds, for example, what Robert Chesney has called "national security fact deference" – a mode of review in which the executive's superior expertise and access to information, its need to protect operational security and efficiency, and its direct accountability to the voters – are said to justify the executive's
demand that the Court defer to its findings of fact. \textsuperscript{254} Indeed, our system vests all kinds of fact-finders—from juries to administrative agencies—with enormous authority to determine facts with severe consequences for individual rights. That the Commander-in-Chief should be entitled to deference on the question of whether hostilities exist seems, in the scope of our system, a rather less challenging allocation than many.

Yet as the following discussion shows, it is far from clear that deference to the executive on the existence of hostilities in these contexts invariably advances any of the separation of powers purposes just named. Assuming that individual rights under the AUMF and MCA are better served by judicial engagement, this Part focuses in particular on the interests in promoting political accountability and government effectiveness. It examines how such interests are or are not served by deferring to executive interpretation of existence-of-war conditions in the MCA and AUMF, and argues that just as the Court has developed varied regimes and degrees of deference depending on the subject and nature of the judicial inquiry, it should tailor the degree of deference given based on the extent to which it serves the interests separating powers were meant to advance.

A. Accountability

The expectation that it is the job of the electorate to hold political actors accountable for certain kinds of decision-making is a core animating principle of political question doctrine. \textsuperscript{255} Not only in the context of war-making, but throughout administrative law, the notion that the executive is better positioned in this respect to resolve uncertainties in statutory interpretation is central. As the Court put it perhaps most famously:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the


administration of the statute in light of everyday realities.\textsuperscript{256} That the President is elected and the justices are not is beyond dispute. But would denying the courts the power to conduct a de novo inquiry into the existence of hostilities really serve the interests of accountability at stake in applying the MCA and AUMF?

The argument that simple deference to the executive’s view of when hostilities begin best serve political accountability fails for several reasons. First, the notion that the executive is substantially more politically accountable than the courts may be especially questionable in the national security context.\textsuperscript{257} Whereas in other realms of administrative law it may be plausible to argue that major executive agency decisions will enjoy “the kind of public scrutiny that is essential in any democracy,”\textsuperscript{258} appropriate government interests in secrecy surrounding certain aspects of security may make it impossible for political accountability checks to function effectively. That is, because security sometimes requires secrecy, the involvement of multiple branches may be required to make accountability possible at all.

Second, it is too facile to assume that judicial involvement in the determination of the existence of hostilities somehow deprives the political branches of the ability to exercise authority they are most institutionally suited – because most politically accountable – to exercise. Congress could readily have written statutes that made the condition of their operation dependent on the existence of a political trigger (a presidential proclamation, for example), rather than a factual one. Congress has certainly written such authorizations in the past.\textsuperscript{259} Yet neither the MCA nor the AUMF is such a statute. Both laws make their operation dependent on the application of an external body of law, which body self-consciously requires an objective determination of whether hostilities exist. Congress and the Presidents’ decisions to embrace

\begin{footnotesize}
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\item \textsuperscript{257} Pearlstein, \textit{supra} note \_\_\_, at 1577–78 (on executive’s political accountability, secrecy); Jinks and Katyal, \textit{supra} note \_\_, at 1246 & n.58.
\item \textsuperscript{258} Food & Drug Admin. v. Brown & Williamson Corp., 529 U.S. 120, 190–91 (Breyer, J., dissenting); \textit{cf. also} Elena Kagan, \textit{Presidential Administration}, 114 Harv. L. Rev. 2245, 2331–32 (2001) (“Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy . . . .”).
\item \textsuperscript{259} \textit{See supra}, Part II.A.
\end{itemize}
\end{footnotesize}
this legislative scheme took place in full view of the electorate. Such decisions are surely within the competence of the political branches to make.

Indeed, there is reason to imagine Congress and the President wanted to leave key questions of detention and trial to the courts finally to resolve because judicial engagement could make it easier for the political branches to avoid electoral accountability for security decision-making.\(^\text{260}\) Political scientists have long noted that Congress has tended to shirk decision making responsibility on questions of the use of force, effectively ceding key questions of force to executive control in the interest of avoiding the political cost of engagement.\(^\text{261}\) Recent scholarship has persuasively demonstrated how the executive, too, has in some instances relied on judicial involvement to avoid taking direct public responsibility for its foreign policy goals.\(^\text{262}\) Such behavior is in striking contrast to the framers’ expectation that the branches would seek to enlarge their control, and that checks on power must be established in order to counteract such natural institutional ambition.\(^\text{263}\) But

\(^{260}\) See, e.g., National Defense Authorization Act for FY 2012 (NDAA), 157 Cong. Rec. S8632-01, S8658 Dec. 15, 2011, Statement of Sen. Feinstein (describing the import of her proposed, later adopted, amendment) (describing the agreed upon amendment as “preserv[ing] current law for the three groups specified, as interpreted by our Federal courts, and to leave to the courts the difficult questions of who may be detained by the military, for how long, and under what circumstances”); NDAA, 157 Cong Rec S 8094, 8123-24, Dec. 11, 2011, Statement of Sen. Durbin (“[T]he latter amendment that makes it clear that this bill does not change existing detention authority in any way...It means the Supreme Court will ultimately decide who can and cannot be detained indefinitely without a trial...The Supreme Court will decide who will be detained; the Senate will not.”); President Obama, Speech at the National Archives, May 21, 2009 (“The third category of detainees includes those who have been ordered released by the courts. ... This has nothing to do with my decision to close Guantanamo. It has to do with the rule of law. The courts have spoken. They have found that there’s no legitimate reason to hold 21 of the people currently held at Guantanamo. Nineteen of these findings took place before I was sworn into office. I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.”), available at http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.


\(^{262}\) David Sloss, Judicial Foreign Policy: Lessons from the 1790’s, 53 St. Louis U. L.J. 145 (2008) (detailing how the George Washington Administration “chose to defer to the Judicial Branch and allow judicial decision making in the privationing cases to guide the implementation of U.S. neutrality policy”).

\(^{263}\) See, e.g., The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he greatest security...against a gradual concentration of the several powers in the same department, consists in giving to those who
where, as here, the Constitution allocates both Congress and the President substantial roles in regulating the use of force; and where shirking makes it more difficult for the public to hold elected officials accountable for use of force decisions, judicial interpretation may be especially valuable. Particularly where there is evidence of such political process failure, robust judicial engagement may force the disgorgement of legal and factual findings from the executive otherwise inappropriately withheld – better informing public deliberation. And if the Court misconstrues one or the other statutory command, Congress may have new incentive to engage in difficult policy decision-making. In this respect, if the authority Congress has granted in the MCA or AUMF does not clearly afford the President the power he seeks to assert, the Court can promote democratic deliberation by saying so.

Finally, it bears returning to a point made above for the purpose of understanding why the political branches may have made the decision they did. The decision to make the duration of statutory authorities turn substantially on the existence of hostilities vel non in practical operation gives the political branches an extraordinary degree of control, especially over the end of the war. So long as the U.S. armed forces keep shooting, the government has at least a colorable argument that hostilities continue. Once the political judgment is made to stop shooting, it is within the power of the courts to determine – whatever the government subsequently says – that hostilities have come to an end. In effect, all allowing the courts to adjudicate these issues accomplishes is that the courts are able to hold the government to the legal consequences of the political decisions already made. Active judicial engagement in these existence-of-hostilities questions thus facilitates political accountability in the most direct sense.

B. Effectiveness

There is little question that the Constitution’s framers, Alexander Hamilton above all, believed that however the new government was designed, it should address the inadequacy of the Articles of Confederation government in being capable of effectively repelling a foreign attack.264 The notion that there should be a “unitary executive,” rather than a committee body in

\[\text{administer each department, the necessary constitutional means, and personal motives, to resist encroachments of others.}^{264}\].

264 The Federalist No. 15, at 146 (Alexander Hamilton) (Isac Kramnick ed., 1987) (“Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.”).
the executive, was among the results of this imperative.\footnote{265} At the same time, Hamilton’s goal of “good government” applied equally to all branches and every sector of government affairs.\footnote{266} It has thus been in a wide variety of settings that the Court has attended in its decision making to the perceived efficacy of a given separation-of-powers outcome. That is, by considering whether it is necessary to alter the usual distribution of powers among the branches in order to make a legitimate mission of government work.\footnote{267} Where an executive agency enjoys special expertise in a subject area, or unique access to information, or where secrecy may be thought essential to protect operational security or

\footnote{265 See Martin S. Flaherty, The Most Dangerous Branch, 105 YALE L.J. 1725, 1786 (1996) (“The advocates of [a unitary executive] prevailed over noisy opposition—primarily with the argument that a single magistrate would give the most ‘energy’ . . . .”) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64–65 (Max Farrand ed., rev. ed. 1937)); see also The Federalist No. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“Energy in the executive is a leading character in the definition of good government.”); Joseph Story: Commentaries on the Constitution of the United States § 767, at 546–47 (Ronald D. Rotunda & John E. Nowak eds., 1987) (“Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand.”).}

\footnote{266 The Federalist No. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis added); see also The Federalist No. 37, at 243 (James Madison) (Isaac Kramnick ed., 1987) (“Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government.”); The Federalist No. 27, at 201 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“[C]onfidence in and obedience to a government: will commonly be proportioned to the goodness or badness of its administration.”).}

\footnote{267 See, e.g., Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 847-48 (1986) (“[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III . . . . It was only to ensure the effectiveness of [the regulatory] scheme that Congress authorized the [CFTC] to assert jurisdiction over common law counterclaims. Indeed . . . , absent the CFTC’s exercise of that authority, the purposes of the reparation procedure would have been confounded. . . .”); Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (opining that habeas hearings “would hamper the war effort and bring aid and comfort to the enemy [and . . . ] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.”); see also Boumediene v. Bush, 128 S. Ct. 2229, 2261 (2008) (“The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”); Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (“We think it unlikely that this basic process will have the dire impact on the central functions of waging that the Government foresees.”); id. at 535 (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”) (quoting Sterling v. Constantin, 287 U.S. 378, 401 (1932)); Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 426 (1934) (“[T]he war power ‘is a power to wage war successfully . . . .”)).}
efficiency, judicial deference might be thought essential for effectiveness.\textsuperscript{268}

Is deference to the executive on the existence of hostilities necessary to make the legitimate aims of the MCA and AUMF effective? Consider first the MCA. The existence of hostilities for purposes of military commission jurisdiction turns on \textit{Tadic}’s two-factor test: protracted armed violence, and a sufficiently organized armed group as a party to the conflict. While there is likely little dispute over Al Qaeda’s relative organizational sophistication at the time of the bombing USS Cole,\textsuperscript{269} there is much dispute as to whether the intensity of violence in the year 2000 rose to the level of an “armed conflict,” as distinct from criminal activity or terrorism.\textsuperscript{270} In making the distinction, the \textit{Tadic} court considered not only whether the government was obliged to use military (not just police) force in response to the violence, but also the number, duration, and intensity of individual confrontations; the types of weapons used; the number and types of forces engaged in the fighting; the geographic and temporal distribution of clashes; any territory captured or material destruction; refugees fleeing combat; any casualties suffered.

In evaluating these factors, the executive surely has several functional advantages. It enjoys first and most direct access to information about the number of strikes it has ordered, the types of forces and weapons engaged in the fighting, and the pattern of clashes. While it may have incomplete information about the tactics pursued and casualties sustained by the enemy, it enjoys significant expertise in estimating the likely effects of weapons on casualties and property loss, and in any case has manifestly better access to such insights than do the courts. Above all, the government is in sole possession of information – about, for example, the extent and nature of the government response or attacks still being planned by either party – that it may have powerful operational interests in keeping secret.

Without doubting that the executive enjoys superior access to information, it is not immediately apparent why access alone necessarily requires restricting the ordinary function of the court. Typically, parties before a court are required to disgorge what information they have — through processes of discovery, record-making, and the like — in order to aid judicial decision making. To the extent expert estimates offer the best information available,

\textsuperscript{268} See, \textit{e.g.}, Munaf v. Geren, 553 U.S. 674, 702-03 (2008).

\textsuperscript{269} See supra (citing Wright).

\textsuperscript{270} See supra, Part III.
they have likewise regularly been subject to discovery and judicial evaluation across a vast array of complex fields. More, unlike the fact deference the Munaf Court seemed inclined to show on the question of the likelihood of torture upon transfer of custody, here, there is no predictive or discretionary judgment involved. The relevant period of inquiry is that covered by the allegations in the indictment the government itself set forth; the court is not required to anticipate whether fighting will (much less should) continue.

More complex is where the executive has some legitimate claim to resisting discovery in order to keep information secret, as in the context of ongoing fighting imagined above. But such interests seem unlikely to be at stake in the criminal prosecutions authorized by the MCA. The inquiry into the existence of hostilities there is retrospective in nature – whether hostilities existed during the period of the acts alleged to be part of the charging offenses. By definition, any operational exigency inherent in those events has passed. A retrospective legal determination of the start date of war likewise imposes non-apparent costs on strategic decision-making in a conflict ongoing. It need not affect how (or whether) the government engages in current war-fighting, it does not limit current battlefield choices. In any case, the practical possibility of sustained secrecy in such circumstances is limited; particularly because there must be demonstration of some degree of personal and material destruction of at least one organizational party outside the executive branch, many such events are, to a great extent, public facts in our "history which the Court is bound to notice and to know." 272

In some contrast, consider the position of, for example, a Guantanamo detainee arguing in 2015 that the AUMF no longer authorizes his detention because hostilities with the Taliban and Al Qaeda have come to an end. Assume he is able to argue based on

272 Prize Cases, 67 U.S. at 667-69. Indeed, the Court has regularly engaged in its own detailed factual analysis about conditions of war. See Oetjen v. Central Leather Co., 246 U.S. 297, 299-300, 301 (1918) ("It appears in the record, and is a matter of general history, that .... General Carranza ... inaugurated a revolution against the claimed authority of Huerta and ... proclaimed the organization of a constitutional government ..., and that civil war was at once entered upon between the followers and forces of the two leaders."); The Three Friends, 166 U.S. 1, 63, 66; see also Matthews v. MeStea, 91 U.S. 7 (1875) (recognizing that war may exist whether or not declared, and finding that "hostilities had commenced" and a state of war existed before presidential proclamation declaring blockade of South); The Neustra Senora de la Caridad, 17 U.S. 497, 502 (1819) ("War notoriously exists... ").

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judicially noticeable information that U.S. combat troops have left Afghanistan, and there have been no (or a glancing number of) attacks by Al Qaeda or its co-belligerents against the United States or its interests. Hostilities, he argues, are thus not intense enough to constitute an armed conflict. He will likewise point to government officials’ public statements about the organizational deterioration of core Al Qaeda, and that group’s inability to exercise effective command over its constituent parts.

As with the MCA, the existence of hostilities in the AUMF context is largely a question about actual events in the world, and in this sense a discoverable set of facts. The inquiry is not retrospective in nature, but neither does it require predictive judgment — it is about what currently is. At the same time, the inquiry involves a set of facts to which the executive may, under some circumstances, wish to preserve special access. If the government’s position is that hostilities continue, it may well wish to maintain secrecy about attacks one or both sides have planned but not yet carried out.\(^{273}\) Or, the executive might concede that there have been few or no successful attacks against the United States by the other party, but argue the reason that no attacks have been successful is not because they have ceased to be launched, but because U.S. forces have been effective — using sources or methods it would like to preserve the ability to use in secret — in repelling those attacks before they are complete. While it may be that the application of law to fact required for resolving the AUMF question is, broadly speaking, justiciable, the executive’s claim to effectiveness-based fact deference here is stronger.

Yet even here, it is not apparent that effectiveness \(^{273}\) per se requires categorical deference to the executive’s factual assertions. The lessons of administrative law, organization theory, and a host of related fields suggest that it is not only possible, but wise, to impose at a minimum a requirement that the executive have a reasonable basis for its conclusions, even if the facts underlying

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\(^{273}\) While a more legally problematic practice, the government may likewise wish to retain the ability to deny official involvement in ongoing conflicts. Cf. Earth Pledge Found. v. CIA, 988 F.Supp. 623, 628 (S.D.N.Y. 1996) (official confirmation of CIA field station the Dominican Republic could cause a disruption of foreign relations because “countries are willing to tolerate the presence of CIA installations in their country only if the United States does not officially acknowledge that such stations exist”). Many public reports reveal the use of U.S. drones against targets in Pakistan, for example, but the U.S. government has insisted upon the importance of not only operational secrecy but also diplomatic deniability in its drone program; only the U.S. government thus has full information on the extent of the use of force.
those conclusions are themselves not wholly subject to scrutiny.\footnote{274} In such cases, reasonableness could be tested against an objective measure of accuracy, but it could also be based on an evaluation of process indicators demonstrating that the executive’s findings were based on adequate internal assessments.\footnote{275} To the extent information publicly available would tend to undermine the executive’s position on the factual existence of armed conflict, it may be appropriate to place the burden on the executive to come forward with reasons, even if necessarily subject to in camera review, why that information is not dispositive. Interests in effectiveness may require the protection of secrecy surrounding such operations, and in this respect may favor deference to the executive to an extent. But given the individual interests at stake, and as the Baker Court recognized, “a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared.... [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.”\footnote{276} Once a political judgment is made to stop shooting, it must be within the power of the courts to determine under the objective standard given by law – whatever the government subsequently says – that hostilities have come to an end.

V. CONCLUSION

For much of the past decade, it has been difficult to overstate the depth of the public and scholarly consensus that existed around the view that when Congress authorized the use of armed force against “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided” the attacks of September 11, the “war” thus undertaken was one without identifiable limits in time.\footnote{277} That is, the view has been that not only would it be impossible in advance to identify when

\footnote{274} See, e.g., Hamdan v. Rumsfeld; Massachusetts v. EPA.
\footnote{275} See, e.g., Chesney, supra note ___; Pearlstein, supra note ___.
\footnote{276} Baker v. Carr, 369 U.S. 186, 213-14 (1962) (internal citations omitted); cf. also Ex Parte Milligan, 71 U.S. 2, 126-27 (1866) (rejecting the government’s argument that Indiana was a theater of war).
\footnote{277} See, e.g., Vladeck, supra note 11 (“Just what will mark the conclusion of hostilities? ... [T]here do not appear to be clearly identifiable objectives that allow for the successful completion of the conflict. There is no physical territory to conquer, no clear leadership structure to topple, no Reichstag over which to fly a foreign flag.”); see also John B. Bellinger and Vijay M. Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, 105 AMER. J. INT’L L. 201, 229 (2011) (citing Matthew C. Waxman, The Structure of Terrorism Threats and the Laws of War, 20 DUKE J. COMP. & INT’L L. 429, 435-36 (2010)).
the use of armed force would cease – it has of course never been possible at war’s beginning to identify on which definite date war will end – but there would be no set of events, circumstances, or conditions that could be imagined, the occurrence of which might bring about a recognition of the political, or in any objective way factual, end of the war. That consensus no longer exists. Indeed, as the United States prepares to conclude combat operations in Afghanistan,\textsuperscript{278} and as executive branch officials contemplate the likelihood of Al Qaeda’s “strategic defeat,”\textsuperscript{279} courts are already beginning to contend with the complexity of when that war began and when it should be understood to end.

Given the legal significance of the question across a range of present authorities, it is important to recognize both the long history of courts’ engagement in such questions, and to identify what factors are relevant in informing their answer here. More, as concepts of war and national security expand, and as boundaries between affairs that are purely “foreign” and those exclusively “domestic” collapse, it is essential to revisit old assumptions about the role of the courts in this vast field of government activity. Deference to the judgment of other branches in matters of interpretation has always challenged constitutional concepts of judicial independence. But uncritical deference serves no constitutional end – even at the threshold of war.

\textsuperscript{278} See, e.g., supra, note ___ (quoting Obama speeches).
\textsuperscript{279} See supra note ___ (quoting officials).
DINNER KEYNOTE:

CYBERSECURITY: COUNTDOWN TO ACTION

SPEAKER:
MELISSA E. HATHAWAY
“In one year, five years, ten years, and twenty-five years, will we look back and see this as a time when normal market behavior and normal government actions failed to achieve our common goals? Or, will we see this as the period when goals were met through new ideas, expanded thinking, and the combined efforts of industry and government working as one?”

—MELISSA E. HATHAWAY
Espionage, "the practice of spying or using spies to obtain information about the plans and activities especially of a foreign government or a competing company" is pervasive in the United States. Foreign governments and criminal networks are stealing our ideas, counterfeiting our goods, and putting our future economic well-being at risk. The number of businesses falling victim to these crimes increases daily, and no sector is without compromise. Secretary of Commerce Gary Locke recently stated that, "every year, American companies in fields as diverse as energy, technology, entertainment and pharmaceuticals lose between $200-$250 billion to counterfeiting and piracy." But it is not just about counterfeiting and piracy; companies and governments regularly face attempts by others to gain unauthorized access through the Internet to their data and information technology systems by, for example, masquerading as authorized users or through the surreptitious introduction of malicious software.

We did not arrive at this place overnight. The Internet, born with its first transmission on October 29, 1969, was never conceived as the backbone of global commerce. Rather, it evolved into this role through a series of events including: (1) the first virtual data communication with Europe in 1973; (2) the first cellular portable telephone in 1973; (3) the first automated commercial cellular network in 1979; (4) the advent of the personal computer in 1981; (5) the introduction of top-level-domains (for example, .mil, .com, .edu, .gov) in 1985; (6) the creation of hyper-text mark-up language (HTML) in 1990, which enabled expanded and user-friendly information sharing on the Internet—which ultimately became the World Wide Web; (7) the relaxation of export controls for encryption.
products to foster global electronic commerce in 1996; (8) international adoption of the domain name system (DNS) to enable a framework for global electronic commerce; and (9) the widespread adoption of new technologies like voice over Internet protocol (1996), WiFi (1997), wikipedia (2001), the Google search engine (1997), social networking technology (2002), and voice and video over Internet with Skype (2003). The private sector is driving innovation and adoption of technology with the promise of lower costs, increased productivity, and consumer usability without much discussion of security. In contrast, and very much the reality we face, this same technology and attendant services are being exploited for crime and conflict.

In 1988, the release and propagation of the Morris Worm affected 10 percent of the Internet’s computers and disrupted Internet services for days. As one of the first major “infections” experienced by both governments and businesses, it inspired the information security commodity market. Digital Equipment Corporation developed the first packet filter firewall in 1988 and so began the evolution of security products to protect us from the insecurity of doing business on the Internet.

Over the course of the next twenty years, we experienced breaches to our banks (Citibank in 1984), theft of our passwords and credit card information (AOL in 1995), penetration of the Department of Defense unclassified networks (Solar Sunrise in 1998), theft of our personal identifiable information (Choice Point in 2005), illegal copying of defense industrial base critical program information (weapon system designs in 2007 and ongoing), penetration of the Department of Defense classified networks (Buckshot Yankee in 2008), and targeting of our children (Sony 2011). These and other cyberattacks on Internet commerce, vital business sectors, and government agencies have grown exponentially. Some estimates suggest that in the first quarter of 2011 security experts were seeing almost 67,000 new malware threats on the Internet every day. This means more than forty-five new viruses, worms, spyware, and other threats were being created every minute—more than double the number in January 2009. As these threats grow, security policy, technology, and procedures need to evolve even faster to stay ahead of the threats.” A recent Symantec report indicates that these trends will continue. From 2010 to 2011 the differences are discouraging. In fact: There were 286 million unique variants of malware that exposed and potentially exfiltrated our personal, confidential, and proprietary data; each data breach exposed, on average, 260,000 identities; there was a 93 percent increase in web-based attacks (compromised/hijacked websites that would infect individuals’ computers if visited); the underground economy paid anywhere from $.07 to $100 for our stolen credit card numbers; and realizing that mobile payments
and mobile platforms (like smartphones and the iPad) would be the newest vector of technology adoption, there was a 42 percent increase in mobile operating system vulnerabilities and subsequent exploitation.

As American businesses, inventors, and artists market, sell, and distribute their products worldwide via the Internet, the threat from criminals and criminal organizations who want to profit illegally from their hard work grows. The threat from other nations wanting to jump start their industries without making the intellectual investment is even more disturbing. This fleecing of America must stop. We cannot afford complacency and silence—we must find and use as many market levers as possible to change the path we are on.

This chapter discusses three different approaches to addressing the problem. First, it is possible to apply tax incentives to businesses for innovation and consumers to patch the problem. While this may not be a fiscally responsible approach given the current debt crisis and constrained economic environment, it should nonetheless be considered. Second, Congress could consider reviewing the applicability of the National Defense Production Act to provide our IT industry a fighting chance against the predatory pricing and industrial espionage being practiced by other nations. Finally, this chapter will discuss four unique private-public partnerships that deserve attention as regional and potentially national agents of change.

Use Tax Incentives

It is estimated that the G-20 economies have lost 2.5 million jobs to counterfeiting and piracy, and that governments and consumers lose $125 billion annually, including losses in tax revenue. The underground economy makes it easy for anyone to get started in cybercrime. The tools and services are readily available to take advantage of the average consumer and exploit the industry's latest product. So why can't we help our information security industry innovate as fast as the criminals? The research and experimentation credit under section 41 of the Internal Revenue Code provides a tax credit for incremental investment in research, which could be applied to address this innovation gap. There is a 20 percent credit for incremental research over a base period, or an alternative simplified credit of 14 percent for incremental research over the previous three years. Originally enacted in 1986, the research credit is a temporary provision that must be extended regularly. In its FY2012 budget proposal, the Obama administration proposed to make the research credit permanent, and to increase the credit percentage on the alternative simplified credit to 17 percent.
The research credit is not specific to any particular type of research or industry, but is available for any research that is technological in nature. So, just as the Digital Equipment Corporation introduced some of the first technology (the firewall) to address exploitation of our systems, our industry could apply its research toward monetizing products that begin to close the gap between criminal exploitation and successful protection. The innovation agenda could also be applied to data correlation, detection of network and system anomalies, and identification and evidence gathering of criminal "fingerprints."

Because the research credit is focused on basic research, it serves as an incentive for companies to develop new ideas that can be deployed in their business. However, the credit does not extend to purchases of products or technologies that are used in a business. If an incentive is needed to encourage companies to acquire tools that can be used to enhance their cybersecurity, the research credit will not suffice. Rather, Congress could consider tax incentives to encourage taxpayers to acquire and deploy new security tools by providing an investment credit to encourage such investments. For example, since 1992, Congress has provided incentives for taxpayers to invest in renewable energy through the energy investment credit under section 48 of the Internal Revenue Code and through the renewable energy production credit under section 45. These incentives have helped to encourage taxpayers to deploy resources to develop wind, solar, geothermal, and other types of renewable energy. Similar programs could be implemented to assist in the development of new tools to protect the security of our information and communications infrastructure.

While tax credits can help incentivize taxpayers to focus investment on favored items, a tax credit is only useful to a taxpayer with positive taxable income who can use the credit to shelter the tax burden on that income. For companies in depressed markets, with net operating losses, a tax credit has no value and will not provide any incentive for new investment. In recognition of this problem, in 2009 Congress provided a temporary program for grants in lieu of the low-income housing and energy credits. A similar type of temporary grant program might be appropriate to kickstart intensive investment in technology to improve cybersecurity.

Whether a credit or a grant program is established, key drafting considerations would need to ensure that the benefits are provided only for new investment in the type of technology that Congress wants to incentivize, that the investment is made in the United States, and that research and manufacturing relating to the favored products is conducted in the United States. In addition, to ensure that the benefits are used solely for innovation, the provisions should be drafted to ensure that only the
taxpayers who invest in and deploy the technology can receive the benefits provided. This would stand in contrast to the low-income housing and energy credit programs that have been developed over the years to permit financial investors to take advantage of their benefits.

Offering a similar incentive to the average consumer may also go a long way toward improving the nation’s security posture. Because consumers may not keep pace with the latest technology improvements or band-aids in security, Congress also should consider providing targeted incentives for consumers to invest in securing their personal computers and home networks. Again, the energy sector provides a useful precedent: Section 25C of the Internal Revenue Code provides a credit of up to $500 per year for individual investments in residential energy efficiency improvements. This credit has encouraged investments in energy-efficient appliances, HVAC systems, and windows and doors. Separately, section 25D provides a 30 percent investment credit for investments in residential solar, wind, and geothermal systems. And over the past decade the hybrid vehicle industry has flourished in the United States, in large part due to the tax credits provided to incentivize these purchases. In the case of cyber investments in the home, the average dollar cost per household is relatively small, so tax credits may not impact the economic decision as much as in the case of the energy examples described above. Nevertheless, a credit of even $25 per taxpayer who purchases new security software each year could help further proliferate these important safeguards.

Leverage the Authorities in the National Defense Production Act (NDPA)

In addition to using taxes as a market incentive, Congress should also consider applying the NDPA to counter the broad based espionage being conducted against our defense industrial base coupled with the predatory pricing and acquisition strategies of our core telecommunications technologies by foreign corporations. Foreign companies are gaining an ever-increasing share of the U.S. commercial technology market, while at the same time our national security networks, critical infrastructure, and weapons systems are growing more reliant on products and services from that market. This is further complicated by the fact that China is our largest supplier of telecommunications imports (42 percent) and is our eighth largest export market for U.S.-based telecommunications technologies. The NDPA could be applied in the absence of industrial policy or market levers that can shore-up the competitive position of U.S.-based information and communications technology (ICT) companies.
In response to the start of the Korean War, the NDPA was enacted in 1950 as part of a broad civil defense and war mobilization effort in the context of the Cold War. The act contained seven sections, of which three major sections remain active today. The first (Title I: Priorities and Allocations) authorizes the president to require businesses to sign contracts or fulfill orders deemed necessary for national defense. The second (Title III: Expansion of Productive Capacity and Supply) authorizes the president to establish mechanisms (such as regulations, orders, and agencies), to develop, modernize, and expand defense productive capacity. The third area (Title VII: General Provisions) provides antitrust protection for voluntary industry agreements serving defense interests, and established a voluntary reserve of trained private sector executives available for emergency federal employment. Beginning in the 1980s, the Department of Defense (DoD) began using the contracting and spending provisions of the NDPA to provide seed money to develop new technologies. Using the NDPA, DoD assisted in the development of a number of new technologies and materials, including silicon carbide ceramics, indium phosphide and gallium arsenide semiconductors, microwave power tubes, radiation-hardened microelectronics, superconducting wire, and metal composites.

In the late 1980s and early 1990s, U.S. industry faced fierce competition in the area of micro-electronics, specifically with semiconductors from Japan. The U.S. government co-invested with industry to establish Sematech to upgrade the production environment and improve quality and yield of product to market. New technologies create new opportunities and one could argue these investments led to many of the micro-electronics that are part of the American household today, including cell phones, netbooks, and iPads, among others.

The information technology industry is critical to the economic and national security of the nation, much as the aerospace industry was crucial to our security posture during the 1960s. The pace of innovation and marketplace dynamics are threatening U.S. leadership in communications, computing, networking, and security technologies, and it may be time to provide government assistance to enhance the competitiveness and preserve the leadership of this critical sector. For example, Congress could leverage the special authorities contained in the NDPA to help subsidize and accelerate DoD access to commercial production technologies and capacity. The NDPA also provides for anti-trust protection for voluntary agreements among business competitors to enable cooperation to plan and coordinate measures to increase the supply of materials and services needed for national economic and defense
purposes. The NDPA also authorizes the establishment of the National Defense Executive Reserve (NDER) (what some would call the Civilian Cyber Reserve Corps), a cadre of persons with recognized expertise who could step into executive positions in the Federal government in the event of an emergency. One could argue that the Department of Defense information technology exchange program (DITEP) initiative could be the long-term pipeline for this NDER. The government should recognize that our national telecommunications infrastructure is vital to U.S. interests and consider better protecting it. Any discussion of government protection of the industry should include the primary and subsidiary providers and suppliers. Furthermore, the government should consider a broad definition of the IT environment, to include current and future converged communications, infrastructures, and services. It may be wise to draw upon the Electronic Communications and Privacy Act (ECPA) definition: “including voice over Internet-Protocol communications; by the aid of wire, cable, or other like connection including wireless connections such as mobile phones, satellites, and fiber-optic cables.”

It is desirable to use Title III authorities to upgrade suppliers’ production capabilities to improve quality and yield on new technologies that would enhance the security of our critical infrastructures, networks, and mobile devices while at the same time making our IT corporations more competitive. Example areas for technology investments include: systems architectures that permit the secure use of commercial-off-the-shelf (COTS) computers, software, and networks; mechanisms, including intelligent agents, for locating and retrieving information from complex database structures; automated systems for reverse engineering based on scanning of an actual part; design of interruption-free connector systems for ultra-high-speed data rates; high performance computing (HPC) and advanced visualization of petabyte data sets; advanced visualization; and environments to perform at scale network simulations and rapid prototype testing.

Why should we explore the NDPA option? The United States’ ability to project power is wholly reliant on the strength of our IT sector. Other countries (for example, China and Russia), recognizing the importance of the IT industry to their overall national economic health, are pursuing strategies that support their IT industry leadership. The United States needs to find equivalent market levers to shore up our indigenous IT companies and help drive focused research and development (R&D) for the next generations of innovation with the goal of building a more secure, resilient infrastructure.
Accelerate and Seed Private-Private and Private-Public Initiatives

Finally, as discussed above, the proposed tax incentives coupled with the NDPA could enhance emerging private sector initiated partnerships and innovation to close the security gap. These grassroots efforts are being initiated by businesses who can no longer tolerate being victimized by criminals and foreign governments alike. Each program aspires to reduce the overall incidence and harm caused by cyber incidents and each program is improving collaboration and operational information-sharing while simultaneously protecting sensitive data and ensuring the security of the broader community. Four initiatives—the Cyber Accelerator, the Network Security Innovation Center, the Advanced Cybersecurity Center, and the National Economic Security Grid—are discussed in detail below.

The Cyber Accelerator is a structured consortium that uses DoD’s transaction authority to invert the acquisition model from pull- to push-sourcing and repurposes private sector innovation to meet DoD’s needs. The government enters into a technology investment agreement (TIA) with the non-profit consortium lead to assist in research and development of commercial technologies to apply to DoD use cases and defense technology allowing tech transfer of intellectual property to commercial entities. The goal of the effort is to expand integration of innovative technologies within the commercial marketplace (for example Google, Intel, McAfee, and VMware) to add value beyond the large-scale system (weapon system) integrators (Lockheed Martin, General Dynamics, and Northrop Grumman). The Cyber Accelerator seeks to lower the private sector barrier to working with the DoD while simultaneously providing the DoD with shorter product cycles, lower life cycle costs, and privileged access to commercial innovation.

Two benefits converge to open up a new set of vendors and new innovation for the government. First, identifying and funding the development of “dual-use” capabilities attracts private sector investment and at the same time addresses an operational and technical shortfall in DoD. Second, it attracts companies that are reticent to deal with DoD by protecting their intellectual property and seeding capability development that leads to both company and investor profits and DoD operational needs.

The work of the consortium follows an agreed upon multi-year technology roadmap with an annual funding plan that complies with authorities and appropriations. Some technology initiatives that this effort will explore include: (1) enhanced authentication (endpoint, application, and data); (2) identity and behavior recognition (correlating user behavior across multiple personas, devices, and
accounts); (3) trusted data provenance (tied to identity for source, application, and user roles); and (4) automated learning for remediation and response.

Lessons learned from these dual-use product initiatives will provide the government with insight for future acquisition reform and potential innovative models. It also provides a mechanism to use market incentives for rapid innovation and deployment.

The Network Security Innovation Center (NSIC) is an industry driven initiative based out of Silicon Valley to create a government, academic, and industry partnership to foster innovation and information-sharing in cybersecurity. The NSIC brings together the talent of the largest IT companies and entrepreneurs of the Bay Area with the computational capacity and unique capabilities of the FFRDC (Federally Funded Research and Development Center) status of Lawrence Livermore National Lab (LLNL). This initiative is striving for "extreme security innovation," says Jacques Francoeur, executive director of the Bay Area CSO Council, who played an instrumental role in bringing industry stakeholders to the table, using intellectual power, computational power, and most importantly industry power. In a recent speech at the center, Gary Terrell, Adobe's chief information security officer, described the top strategic initiatives businesses must launch to meet the growing threats of worldwide cybercrime, stating that, "security leadership needs to fundamentally change its perspective and, in many cases, make a 180-degree turn to protect their digital assets, and the time is now." 11

The NSIC has two "anchor" IT firms initiating focused collaborative R&D projects. These projects are indicative of what the center could offer, as an incubator and a direct path for moving R&D results to sustainable innovative products. For example, McAfee, which has an Internet threat sensor network collecting data in 120 countries, and LLNL are jointly working on probability models for dynamics on graphs. They are trying to run analytics to winnow out critical threats from this massive data set (of 100 billion queries per month), to see if they can find interesting patterns with significantly greater computing capacity. By partnering with LLNL, McAfee gains access to the lab's supercomputing and highly specialized scientific resources, allowing it to handle large data analysis requirements and potentially enabling McAfee to develop new technologies to counter advanced threat techniques, profile hackers, and insider threats. Cisco is also partnering with LLNL on a focused project regarding network simulation and virtualization. The goal of this project is to simulate large-scale exploits without disrupting operational networks in order to discover the second-order effects of exploits with the aim of developing techniques for early detection. By having a large-scale network simulator that has access to large
volumes of real world data (provided by the Cisco IOS platform that is currently operating on millions of active systems, ranging from the small home office router to the core systems of the world’s largest service provider networks), it may be possible to create an environment and technology that can lead to attacker attribution. The simulation creates flexible honeypots and “hacker treadmills” to keep adversaries engaged while allowing the time and interactions required to gain attribution.

The NSIC is working to become fully operational in the next six months. It is currently in the process of defining a governance framework and intellectual property rights model that meets the needs of all parties. The NSIC shows great promise as an innovation engine that addresses some of our toughest cybersecurity problems, especially around big-data and malicious behavior analysis.

The Advanced Cybersecurity Center (ACSC) was created to establish Massachusetts—and the New England region more broadly—as a leader in the development of next generation cybersecurity R&D and education programs. This industry-driven initiative brings together university and government entities to address advanced cyber threats by sharing insights on attacks and mitigation strategies and cultivating the next generation of talent for employment in the region. The ACSC supports a collaborative, cross-sector research environment (and facility) using the region’s unparalleled university, research, and industrial resources to focus on areas not addressed by commercial security solutions and thereby strengthen members’ defensive capabilities. The ACSC has formed working groups to drive the Center’s collaborations across a range of initiatives including: (1) threat evaluation and data sharing, (2) university-industry partnerships, and (3) policy and legal challenges. Specific technology projects seek to enable trusted collaborations in the pre-competitive space and foster innovations and improvements in predictive analytics, incident monitoring and analysis, intrusion detection and eradication, and deployment, incident scenarios and response strategies.

As the ACSC becomes operational it intends to establish federal and national partnerships to extend the region’s influence and enhance coordination with key resources, becoming a vital component in protecting the region’s and nation’s key assets.

Finally, the National Economic Security Grid (NESG) is a grassroots-based independent non-profit organization established in 2010 as a resource for metropolitan area public and private sector entities. The NESG is committed to dedicating resources and capability to local small and medium enterprises (SMEs) in each of
the metropolitan areas across the country and providing them with information, processes, proven practices, and solutions to the risk, threats, and hazards they face every day. The goal is to establish NESG operations in every metropolitan area in every state across the country to truly create a “National Economic Security Grid.”

NESG selected metropolitan Los Angeles as its inaugural site after LA County Sheriff Leroy Baca expressed a strong desire to launch this grassroots initiative as a means of strengthening the local partnership between the public and private sectors, with a focus on safeguarding the economic security of the city. As such, the NESG will collect “intelligence” data on a broad range of external and internal risks, threats, and hazards that may affect the local SME community and will turn this data into tailored actionable information for delivery to online secure escrow accounts accessible by SME members. It also plans to establish a Risk Solution Center that provides tested and vetted risk mitigation solutions to SMEs.

While not yet fully operational, the NESG intends to make a difference by: (1) establishing strong local partnerships between SMEs, local law enforcement, prosecutors, politicians, and other community-based support groups to focus on the stability, viability, and resiliency of the local community and its economic environment; (2) providing actionable information to SMEs on the real world risks and threats they face every day; and (3) identifying sound and affordable risk mitigation solutions to ensure high survivability of SMEs, which ultimately improves the economic conditions of the community.

Conclusion

Notwithstanding all of the efforts made to date by many well-intended professionals and organizations, and despite significant advances in technology, we are still struggling to stay on top of the cybersecurity problem. Indeed, the problem is growing faster than the solution and we cannot afford to be faced with strategic surprise as we falter in addressing it. The national economic security agenda for the United States needs disruptive ideas that reinvigorate our innovation engine, our intellectual creativity, and our law enforcement capability and capacity.

We need to expand our options, and to do so quickly. In one year, five years, ten years, and twenty-five years, will we look back and see this as a time when normal market behavior and normal government actions failed to achieve our common goals? Or, will we see this as the period when goals were met through new ideas, expanded thinking, and the combined efforts of industry and government working as one?
We cannot continue along the current path and expect to make adequate progress to confront the cybersecurity dilemma. Our country has at its disposal market levers, unique authorities, advanced technology, public-private partnerships, and a culture of innovation and creativity. The full gambit of market levers—especially incentives-based levers—is needed to advance research and development, drive innovation, and close the gap between adversary successes and industry defenses. We need a more secure resilient infrastructure. Can we find the wherewithal to stop the bleeding of America?

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1 Merriam-Webster's Dictionary, 11th ed..


7 Joint Committee on Taxation, Description of Revenue Provisions Contained in the President's Fiscal Year 2012 Budget Proposal (JCS-3-2011) (June 2011).


14. Information presented here is derived from discussions with the founder, Lynn Mattice.