
MILITARY FORCE AND VIOLENCE, BUT NEITHER WAR NOR HOSTILITIES

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ABSTRACT

Against all hope for change, President Barack Obama has been a war president and a vigorous one at that. This Article considers the legality of his uses of force in Libya and against ISIS. When the President waged war against Libya in 2011, he acted contrary to the Constitution and its allocation of the declare war power to Congress. In simple terms, the President unconstitutionally declared war against Libya. Moreover, the aerial bombardment of Libyan forces constituted hostilities under the War Powers Resolution. Given that Resolution's time constraint on hostilities, the President's failure to halt the war against Libya infringed that Resolution. With respect to ISIS, however, I believe that the President's continuing war is legal. The 2001 Authorization for Use of Military Force sanctions the use of necessary and appropriate force against those organizations that conducted the 9/11 attacks. Because al Qaeda perpetrated the 9/11 attacks, when the predecessor of ISIS joined al Qaeda in 2004, the predecessor thereby made itself a lawful target under the 2001 Authorization. Though ISIS splintered from al Qaeda in 2014, it retains the stigma of its former association with al Qaeda and remains subject to uses of military force by the United States.

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I. INTRODUCTION

President Barack Obama came into office and, eight months later, received the Nobel Peace Prize.¹ Though the President had done rather little to advance peace, he could hardly be faulted for accepting the award. To many observers, the prize was awarded by the Nobel Committee not so much for what the President had done, but for what he yet might do and for what he might choose not to do.²

The hope was that President Obama would be the anti-Bush, much like President Jimmy Carter was, in many respects, the anti-Nixon. The expectation was that he would wind down the United States's wars.³ The United States would negotiate for peace in Afghanistan and allow Iraqis to manage what was left of Iraq.

Yet Obama, against all hope, has been a war president, one not appreciably different from his predecessor. The United States seems ensnared in a "Forever War" against al Qaeda, Islamic State in Iraq and Syria (ISIS), and affiliated forces.⁴ While a committed Gandhian might say that all wars are wars of choice, others would beg to differ, supposing that sometimes events conspire to make war all but impossible to avoid.⁵ Nations are not impervious to external threats and Americans expect their presidents to defend the nation from such menaces, even ones that are not existential. Moreover, presidents cannot control or dictate what unfolds during their stints in the Oval Office.⁶ Abraham Lincoln put it best when he admitted, "I

1. *The Nobel Peace Prize 2009*, NOBELPRIZE.ORG, www.nobelprize.org/nobel_prizes/peace/laureates/2009/ (last visited Sept. 1, 2016).

2. Katrin Bennhold & Rick Gladstone, *Peace Prize Seen Not Necessarily for Achievements, but Hopes*, N.Y. TIMES (Oct. 7, 2016), http://www.nytimes.com/2016/10/08/world/europe/nobel-peace-prize-juan-manuel-santos.html?_r=0 (noting the Nobel Peace Prize has been awarded as encouragement of what the committee hoped would occur).

3. See Edward Delman, *Obama Promised to End America's Wars—Has He?*, ATLANTIC (Mar. 30, 2016), <http://www.theatlantic.com/international/archive/2016/03/obama-doctrine-wars-numbers/474531>.

4. Jack Goldsmith, *The Forever War Is Entrenched*, LAWFARE (Oct. 19, 2015, 7:57 AM), <http://www.lawfareblog.com/forever-war-entrenched> [hereinafter Goldsmith, *Forever War*].

5. See David Nichtern, *Are Conflict and War Inevitable?*, HUFFINGTON POST: THE BLOG (May 10, 2011, 2:44 AM), http://www.huffingtonpost.com/david-nichtern/conflict-resolution_b_859372.html.

6. See Letter from President Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1864–1865, at 282 (Roy P.

claim not to have controlled events, but confess plainly that events have controlled me.”⁷ In some measure, events have exerted a commanding force on our Commander in Chief, just as events often control the rest of us.

President Obama wound down the Iraqi occupation at the beginning of his first term, only to wind-up his second term by reintroducing troops into Iraq.⁸ The President sought to end the military’s deployment in Afghanistan but has had to beat a belated retreat from that policy.⁹ When the opportunity to rid Libya of Moammar Qaddafi popped up, the President “lead[] from behind,”¹⁰ ordering not war or hostilities, but mere violence consisting of air-to-ground strikes.¹¹ We now war against the Taliban, al Qaeda, the Islamic State in Iraq and Syria (ISIS), and their affiliates or franchises in Afghanistan, Pakistan, Iraq, Libya, Yemen, Syria, Somalia, and Nigeria.¹²

In this Article, I discuss legal issues enveloping two of President Obama’s wars. Part I considers the President’s war of choice, the improvident war against Libya. Part II considers the war the President did not want, the war against ISIS. To cut to the chase, the war against Libya was contrary to law. Neither the Constitution nor federal statutes authorized the bombing of Libya and the deposing of Qaddafi.¹³ However, the continuing war against ISIS is legal.¹⁴ The 2001 Authorization for Use of Military Force (AUMF) authorizes the use of necessary and appropriate force against those organizations that conducted the 9/11 attacks.¹⁵ Al Qaeda is clearly such an organization. When it joined al Qaeda in 2004, the defunct precursor to ISIS became targetable under the 2001 AUMF. ISIS’s subsequent messy split from al Qaeda did not wash away the blemish it acquired while its leadership were members of al Qaeda.

Basler ed., 1953).

7. *Id.*

8. *See* Delman, *supra* note 3.

9. *See id.*

10. *See* Ryan Lizza, *Leading from Behind*, NEW YORKER (Apr. 26, 2011), <http://www.newyorker.com/news/news-desk/leading-from-behind>.

11. Auth. to Use Military Force in Libya, slip op. at 6, 35 Op. O.L.C. (Apr. 1, 2011) [hereinafter *Krass Memo*], <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

12. *See* Delman, *supra* note 3.

13. *See infra* Part II.

14. *See infra* Part II.

15. *See* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

II. HAIRSPPLITTING ON LIBYA

A civil war began in early 2011, as the Libyan version of the Arab Spring became a bloody internal conflict.¹⁶ Overt international involvement began with a series of United Nations resolutions.¹⁷ U.N. Resolution 1973 authorized member states “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack” in Libya and imposed a no-fly zone over Libya.¹⁸

Under the rubric of enforcing this resolution, the Obama Administration committed naval, marine, and air force assets to an operation called “Odyssey Dawn.”¹⁹ Odyssey Dawn continued for fewer than two weeks before NATO assumed operational control under the moniker “Operation Unified Protector.”²⁰ These operations, supposed to last weeks, actually endured for six months.²¹ During those months, U.S. aircraft flew thousands of sorties.²² Additionally, the United States provided the bulk of intelligence, surveillance, targeting, and reconnaissance.²³

A. Bombardment Without War

In the early days of the conflict, the Office of Legal Counsel (OLC) in

16. Nick Robins-Early, *Was the 2011 Libya Intervention a Mistake?*, WORLDPOST (Mar. 7, 2015), http://www.huffingtonpost.com/2015/03/07/libya-intervention-daalder_n_6809756.html.

17. See Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 376–78 (2012).

18. S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

19. The name, Odyssey Dawn, might be read to imply a long conflict. Odysseus's journey took 10 years. Dan Colman, *An Interactive Map of Odysseus' 10-Year Journey in Homer's Odyssey*, OPEN CULTURE (Dec. 16, 2013), <http://www.openculture.com/2013/12/odysseus-journey.html>. But apparently the name was chosen somewhat randomly. See Ed O'Keefe, *Why Is It Called 'Operation Odyssey Dawn'?*, WASH. POST (Mar. 22, 2011), https://www.washingtonpost.com/blogs/federal-eye/post/why-is-it-called-operation-oddysey-down/2011/03/22/ABLaFDB_blog.html.

20. U.S. Dep't of State & U.S. Dep't of Def., Report from the Administration to Congress: United States Activities in Libya 11 (2011), <https://fas.org/man/eprint/wh-libya.pdf> [hereinafter Dep't of State Report].

21. See *id.* at 11–12.

22. See *id.* at 11; see also Jack Goldsmith, *Is the Obama Administration's Original Legal Rationale for the Libya Intervention Still Valid?*, LAWFARE (June 9, 2011, 10:09 AM), <https://www.lawfareblog.com/obama-administrations-original-legal-rationale-libya-intervention-still-valid> [hereinafter Goldsmith, *Obama Administration's Legal Rationale*].

23. Goldsmith, *Obama Administration's Legal Rationale*, *supra* note 22.

the Department of Justice supplied advice as to whether the military operations were consistent with the Constitution.²⁴ The principal questions were whether the President had constitutional authority to use military force against Libya, and what effect, if any, the Declare War Clause had on the President's freedom of action.²⁵

Caroline Krass, then the Principal Deputy in the OLC, authored an opinion that concluded that “the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad [in Libya], even without prior specific congressional approval.”²⁶ She noted that Presidents had long used military force without a declaration of war.²⁷ More particularly, she recounted presidential uses of military force over the past three decades, some of which occurred without any prior congressional authorization.²⁸ According to Krass, such practices had put a “gloss” on the “executive power.”²⁹ The result was that Presidents could attack other countries.³⁰ But the President could go too far, for certain sorts of conflicts would constitute a “war.”³¹ Given the Declare War Clause and its strong implication that the President cannot declare war, such conflicts required congressional approval.³²

The war test she gleaned from previous opinions of the OLC consists of a highly intensive facts-and-circumstances test, an approach requiring the weighing of factors.³³ She highlighted three factors—the “anticipated nature, scope, and duration” of U.S. involvement—and concluded that they militated against a conclusion that the United States would be waging war against Libya.³⁴ As to “nature,” she noted that the Libya action was to be an air campaign with no intent to insert ground troops.³⁵ In an air war, as

24. See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST 9-11 PRESIDENCY* 637 (2015).

25. Krass Memo, *supra* note 11, slip op. at 1, 8.

26. *Id.* at 6.

27. *Id.* at 6–9.

28. *Id.* at 9.

29. *Id.* at 6, 7.

30. *Id.* at 7.

31. *Id.* at 8.

32. *See id.*

33. *Id.*

34. *Id.* at 8, 12–13.

35. *Id.* at 6.

opposed to a ground war, the risks of escalation and difficulties of withdrawal were not present to the same degree.³⁶ On “scope,” she said that because the nominal goal was the protection of civilians and did not encompass regime change, the operations were to be narrow.³⁷ Finally, with respect to “duration,” the opinion noted the President’s assertion that the action was to be short-lived and that prior OLC opinions had found that a two-month bombing campaign was not war.³⁸

The opinion is not without its virtues. Yet I believe it to be wrong. The OLC’s judgment assumed that the contours of presidential power and, perhaps by implication, the scope of congressional power, could change over time.³⁹ Hence, the opinion’s idea of gloss on executive power and the importance put on practice as establishing the scope of presidential powers.⁴⁰

This mode of reasoning is mistaken: Presidential power should not be understood to contract or grow based on actions taken by presidents. Presidents, as Justice Antonin Scalia once argued, do not enjoy a power of constitutional “adverse possession.”⁴¹ Indeed, the Constitution specifically enjoins presidents to preserve, protect, and defend it.⁴² It does not permit presidents to violate, undermine, and thereby (via a process of dogged transgressions) amend it.⁴³ Extralegal amending is wholly inconsistent with defending.

I do not mean to deny wholly the relevance of practice. Where meaning is deeply uncertain, perhaps practice can serve as a tiebreaker between two plausible interpretations of the Constitution.⁴⁴ But practice should have no other function in determining the meaning of the Constitution.⁴⁵ It should not be a means of generating new amendments or otherwise changing the Constitution.⁴⁶

36. *See id.* at 13.

37. *Id.* at 10 n.3.

38. *Id.* at 13.

39. *See id.* at 7, 8.

40. *See id.*

41. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2605 (2014) (Scalia, J., concurring in the judgment).

42. U.S. CONST. art. II, § 1, cl. 7.

43. *See Noel Canning*, 134 S. Ct. at 2605 (Scalia, J., concurring in the judgment).

44. *See id.* at 2600.

45. *See id.*

46. *See id.*

The contrary view has no logical stopping point: On the view that practice makes the Constitution, there is literally no limit to what presidents might do, what powers they might acquire, and what rights they may extinguish.⁴⁷ They might reduce Congress to the status of a glorified advisory council, rendering them a large Privy Council.⁴⁸ Chief executives might usurp the judgment function of courts and sit, like the English kings of old, as judges in cases.⁴⁹ They might diminish—indeed eliminate—our rights found in the Bill of Rights and elsewhere.⁵⁰

The obvious alternative to a living presidency is recourse to the original version. Taking this route requires us to discern what it meant to be a commander in chief, what it meant to declare war, and why the Founders ceded the power to declare war to Congress and not the President.⁵¹ One missing feature of the OLC opinion is any reference to what “declare war” meant at the founding, or for that matter, most of the nation’s existence.⁵² In one way, this is not remarkable, for if practice matters *über alles*,⁵³ the text and original understanding matter not. In fact, highlighting the latter two considerations would prove troublesome, for they would underscore that modern war-powers practice is at war with the original constitution.

Samuel Johnson’s 1755 Dictionary of the English Language defined war as the “exercise of violence under sovereign command,” presumably against a foreign nation.⁵⁴ When discussing the concept of declaring war, Americans and Europeans understood the power to “declare war” principally to encompass the power to decide whether to wage war.⁵⁵ By the

47. *See id.* at 2605–06. (discussing the aggrandizement of the Executive at the expense of the Legislative Branch).

48. *See id.* “In the United Kingdom, the principal council of the sovereign, composed of the cabinet ministers and other persons chosen by royal appointment to serve as privy councilors. The functions of the Privy Council are now mostly ceremonial.” *Privy Council*, BLACK’S LAW DICTIONARY (10th ed. 2014).

49. *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 269 (2015).

50. *See id.*

51. *See id.*

52. *See* Krass Memo, *supra* note 11, slip op. at 8.

53. This German term means “above everything else.” *Über Alles*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/%C3%BCber%20alles> (last visited Sept. 17, 2016).

54. *War*, 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755).

55. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 48 (2007) [hereinafter Prakash, *Unleashing*

eighteenth century, most wars were not presaged by formal declarations.⁵⁶ Rather the commencement of hostilities was itself the declaration of war, for initiating warfare signaled that the sovereign had chosen to use violence to resolve disputes.⁵⁷ Hence, as British Prime Minister Robert Walpole put it, most wars were declared from the “[m]ouths of [c]annons,” not via a formal declaration of war.⁵⁸

By taking the international law concept of “declaring war” and vesting that authority with Congress, the Framers believed that they were granting a monopoly on war initiation to Congress.⁵⁹ After all, if the President started a war, he would be declaring it and thereby usurping a power expressly granted to Congress.⁶⁰ Indeed, no one from the founding generation supposed that the President could take the nation to war.⁶¹ Luminaries including George Washington, James Madison, Thomas Jefferson, and a host of others concluded that only Congress could decide that the nation would wage war.⁶² Even Alexander Hamilton, an energetic advocate for broad executive power, observed that the President could not take the nation to war.⁶³

When the U.S. military—on the instructions of the President—bombed the government of Libya, it warred against Libya in the constitutional sense.⁶⁴ More to the point, President Obama declared war on Libya.⁶⁵ This

the Dogs of War].

56. *See id.*

57. *Id.*

58. *Id.* at 48–49 (quoting *Second Parliament of George II: Fourth Session (9 of 9, Begins 12/5/1738)*, BRIT. HIST. ONLINE, <http://www.british-history.ac.uk/commons-hist-proceedings/vol10/pp292-338> (last visited Sept. 17, 2016)).

59. THE FEDERALIST NO. 41, at 223–24 (James Madison) (Clinton Rossiter ed., 1961).

60. *See id.*

61. *See* Prakash, *Unleashing the Dogs of War*, *supra* note 55, at 50.

62. *Id.* at 50–51.

63. *Id.* at 117–18.

64. I do not mean to suggest that *any* use of force against Libya would have been war under the Constitution. But even as the precise boundaries of war are uncertain, the use of thousands of bombs to kill innumerable members of the Libyan government can hardly be considered a military kerfuffle short of war.

65. *See* Amos N. Guiora, *Intervention in Libya, Yes: Intervention in Syria, No: Deciphering the Obama Administration*, 44 CASE W. RES. J. INT’L L. 251, 268 (2011) (discussing the Libya decision and volume of the United States’s role in the assault on Libya).

was something only Congress could do.⁶⁶ Hence the President's orders not only marked a sharp departure from legal assurances he made while a presidential candidate,⁶⁷ they were, more importantly, utterly inconsistent with the original Constitution.⁶⁸

How does the Founders' reading of the power to declare war cohere with the President's power as Commander in Chief? It fits rather well, once one grasps what it meant to be a chief commander in the eighteenth century. Some today suppose that a commander in chief must have some autonomy over military matters.⁶⁹ A few also imagine that commanders in chief must have at least some authority to decide to wage war, else he or she is not a commander in chief.⁷⁰

But this understanding of commander in chief has absolutely no support from the founding. In England, "commander in chief" meant nothing more than command of a military unit, be it a platoon, brigade, or any other unit.⁷¹ Hence, subdivisions of the English army had their own commanders in chief,⁷² and there were commanders in chief of the British Army for India, North America, and Canada.⁷³ The title did not imply any autonomy from others because every commander in chief had a superior, be it another military officer, Parliament, or the monarch.⁷⁴

The United States borrowed this understanding from England, lock,

66. U.S. CONST. art. I, § 8, cl. 11.

67. See Charlie Savage, *Barack Obama Q&A*, BOST. GLOBE (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/> (quoting then-Senator Obama declaring that "[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation").

68. See Delman, *supra* note 3; George F. Will, Opinion, *Obama Is Defying the Constitution on War*, WASH. POST (Sept. 17, 2014), https://www.washingtonpost.com/opinions/george-will-obama-needs-congress-to-approve-this-war/2014/09/17/26de9d3e-3dc9-11e4-b0ea-8141703bbf6f_story.html?utm_term=.1c317e857d02.

69. See, e.g., John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 612 (2011).

70. See Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1348 (1984) (discussing reasons supporting the President's right to initiate hostilities).

71. Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 368 (2008) [hereinafter Prakash, *Separation and Overlap*].

72. *Id.*

73. *See id.*

74. *Id.*

stock, and barrel. In June of 1775, the Continental Congress created a commander in chief for the Continental Army.⁷⁵ Though the office surely conveyed limited authority over the army, it did not convey any exclusive, illimitable authority. Indeed, Congress micromanaged the commander in chief in all sorts of ways.⁷⁶ Delegates of Congress knew that the title implied command but not any autonomy from legislative control.⁷⁷

When the Constitution made the President Commander in Chief, it replicated a known office.⁷⁸ The Constitution's Framers thus invoked and relied upon the prevailing sense of that office, never hinting that the Constitution had inaugurated a new and hitherto unknown chief commander.⁷⁹ Rather than Congress appointing a commander in chief as it had under the Articles of Confederation, however, electors in the states would select a President constitutionally invested with many executive authorities, including command of the Army, Navy, and federalized state militias.⁸⁰

As before, Congress—using its considerable constitutional authority over the military—could direct the military and its chief commander.⁸¹ Congress could declare war, including order the use of military force.⁸² Moreover, Congress could make “[r]ules for the [g]overnment and [r]egulation” of the armed forces⁸³—that is, promulgate rules that would shape, constrain, and command them. These two powers—the declare war power and the government and regulation authority—gave Congress close to plenary authority over the military and its Commander in Chief.⁸⁴

75. 2 JOURNALS OF THE CONTINENTAL CONGRESS 91–92 (Worthington Chauncey Ford ed., 1905) (resolving to create a general for the entire army and noting that Washington would be commander in chief).

76. Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021, 1037 (2008) [hereinafter Prakash, *Imperial and Imperiled*] (“[H]e was subject to continual congressional direction in matters large and small . . .”).

77. *Id.* at 1036.

78. See Prakash, *Separation and Overlap*, *supra* note 71, at 303.

79. See Prakash, *Imperial and Imperiled*, *supra* note 76, at 1036–38.

80. See *id.*

81. *Id.* at 1037.

82. U.S. CONST. art. I, § 8, cl. 11.

83. *Id.* art. I, § 8, cl. 14.

84. See Prakash, *Imperial and Imperiled*, *supra* note 76 (noting the few restraints on congressional power in this field).

In sum, the OLC understanding of the declare war power conflicts with the original metes and bounds of the Declare War Clause.⁸⁵ Likewise, the OLC reading of “Commander in Chief,” one that encompasses some sort of operational autonomy, conflicts with the ancient contours of the office.⁸⁶

In place of the original understanding, the OLC approach requires that we take up the problematic task of ascertaining non-textual constitutional amendments in the aftermath of numerous unilateral presidential overseas adventures.⁸⁷ Moreover, the OLC’s approach essentially makes the President a powerful engine of constitutional change, not only allowing him to put a new “gloss” on executive power, but also empowering him to remove the original sheen from enumerated congressional powers.⁸⁸ Whereas the Founders established a coherent, fixed system of war and military powers, a regime where Congress could control a powerful military office, we are now left with a commander in chief that may gather the reins of power ever tighter, amending the Constitution as he fights overseas wars.

B. Bombardment Without Hostilities

Enacted in the midst of the Vietnam War, the War Powers Resolution was meant to fulfill the Framers’ allocation of war powers.⁸⁹ Section 4(a) of the Resolution requires the President to report to Congress “in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances”⁹⁰ Section 5(b) provides: “Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces” unless Congress authorizes the action.⁹¹ Essentially, the Resolution declares that when the President unilaterally orders troops into hostilities or imminent hostilities, he must eventually wind down those hostilities unless he receives congressional approval for the continued use of force.⁹²

85. *See supra* notes 51–68 and accompanying text.

86. *See supra* notes 69–84 and accompanying text.

87. *See* STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 224–26 (2013).

88. *See id.*

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

90. *Id.* § 4(a)(1), 87 Stat. 555, 555 (codified at 50 U.S.C. § 1543(a)(1)).

91. *Id.* § 5(b), 87 Stat. at 556 (codified at 50 U.S.C. § 1544(b)).

92. *See id.*

During the war against Libya, the key question was whether the “United States Armed Forces” were involved in “hostilities.”⁹³ This mattered for purposes of sections 4 and 5.⁹⁴ President Obama, based on advice received from his White House Counsel and the Department of State Legal Adviser, concluded that the termination provisions of the War Powers Resolution did not apply because the U.S. Armed Forces were not involved in hostilities when the 60-day clock expired.⁹⁵ In so doing, he rejected the advice of the Office of Legal Counsel in the Department of Justice.⁹⁶

In defense of the President’s conclusion, Administration lawyers argued that the War Powers Resolution was concerned with situations involving significant and extensive military involvement, primarily the use of ground troops.⁹⁷ It was about “No More Vietnams,” with the reference to “Vietnam” meant to conjure up the image of ground troops ensnared in a protracted, deadly quagmire.⁹⁸

Libya was no Vietnam, or so the lawyers argued.⁹⁹ In Libya, because there were meaningful limits to the military’s involvement, they were not involved in hostilities at the end of the 60-day period.¹⁰⁰ The mission was limited to helping NATO implement a United Nations Security Council resolution.¹⁰¹ The threat to U.S. forces was limited because there was little

93. See, e.g., Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), http://www.nytimes.com/2011/06/16/us/politics/16powers.html?_r=0.

94. See *id.*

95. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 16–17 (2011) [hereinafter *Libya and War Powers Hearing*] (prepared statement of Hon. Harold Koh, Legal Advisor, United States Department of State); Dep’t of State Report, *supra* note 20, at 25.

96. See SAVAGE, *supra* note 24.

97. See *Libya and War Powers Hearing*, *supra* note 95, at 15–16 (prepared statement of Hon. Harold Koh, Legal Advisor, United States Department of State); see also Akhil Reed Amar, *Bomb Away, Mr. President*, SLATE (June 29, 2011), www.slate.com/articles/news_and_politics/jurisprudence/2011/06/bomb_away_mr_president.html.

98. See *Libya and War Powers Hearing*, *supra* note 95, at 16 (prepared statement of Hon. Harold Koh, Legal Advisor, United States Department of State).

99. See *id.*

100. See *id.* at 8–9, 58 (comments and answers of Hon. Harold Koh, Legal Advisor, United States Department of State).

101. *Id.* at 9 (statement of Hon. Harold Koh, Legal Advisor, United States Department of State); Dep’t of State Report, *supra* note 20, at 25.

chance of significant U.S. casualties.¹⁰² The possibility of escalation was remote because no ground troops were present or contemplated.¹⁰³ The military means were constrained to intelligence gathering, targeting, refueling, and aerial bombing.¹⁰⁴ Based on these limits, Administration lawyers concluded that at least by early April of 2011, the U.S. Armed Forces were not involved in hostilities.¹⁰⁵

The War Powers Resolution does not define “hostilities.”¹⁰⁶ Like “war,” the word “hostilities” lacks the precision of “four,” or even “blue.” Indeed, members of Congress understood that “hostilities” was a vague term.¹⁰⁷ Yet certain boundaries seem obvious and are worth considering. Words can be quite “hostile,” but a war of words between U.S. Marines and foreign soldiers would certainly not constitute hostilities. At the other extreme, 20,000 ground troops combating another nation’s army would certainly constitute “hostilities.”¹⁰⁸

Judging by the President’s initial notification to Congress on March 21, 2011, the Administration thought that the War Powers Resolution applied at the outset of warfare.¹⁰⁹ In other words, the Administration presumably thought that the United States was involved in hostilities, at least in March. It seems that the Administration thought that something had materially changed from April 4th onwards.¹¹⁰ In a June letter to Congress, the President claimed that from April 4th, NATO assumed the lead in flying sorties, with the U.S. Armed Forces limited to the use of drones and support

102. *Libya and War Powers Hearing*, *supra* note 95, at 9 (statement of Hon. Harold Koh, Legal Advisor, United States Department of State).

103. *Id.*

104. Dep’t of State Report, *supra* note 20, at 25.

105. *Libya and War Powers Hearing*, *supra* note 95, at 8–9 (statement of Hon. Harold Koh, Legal Advisor, United States Department of State); Dep’t of State Report, *supra* note 20, at 25.

106. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2012).

107. H.R. REP. NO. 93-287, at 7 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2346, 2351.

108. *See id.*

109. *See* Letter from President Barack Obama to John Boehner, Speaker, U.S. House of Representatives and Daniel Inouye, President Pro Tempore, U.S. Senate (Mar. 21, 2011) (noting that the report was sent “consistent with the War Powers Resolution”), *reprinted in Letter from the President Regarding the Commencement of Operations in Libya*, WHITE HOUSE (Mar. 21, 2011), <https://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

110. *See* Dep’t of State Report, *supra* note 20, at 10–11.

for NATO bombing runs.¹¹¹ Also in June, a lawyer for the Administration claimed that “[a] very significant majority of the overall sorties are being flown by our coalition partners, and the overwhelming majority of strike sorties are being flown by our partners.”¹¹² U.S. bombing sorties were limited “to the suppression of enemy air defenses to enforce the no-fly zone” and drone strikes.¹¹³

Bombing a nation territory, whether by planes, warships, missiles, or by drone, constitutes hostilities within the meaning of the War Powers Resolution.¹¹⁴ Similarly, supplying significant logistical, surveillance, and intelligence assistance to other countries also fits within hostilities.¹¹⁵ The fuzziness of the concept should not detract from the commonsensical conclusion that U.S. Armed Forces conducted hostilities against Libya for 60 days and beyond.

As noted, the Resolution was meant to “fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”¹¹⁶ Accordingly, it makes sense to read the Resolution as at least implementing the *Constitution’s* division of war powers and thereby restricting the Executive’s ability to wage war. The Resolution would implement the Constitution’s division of war powers were we to read hostilities as synonymous with war.¹¹⁷ In other words, we are at war when the U.S. Armed Forces are engaged in hostilities or in danger of engaging in imminent hostilities.¹¹⁸ Because we were warring against Libya within the meaning of

111. See Letter from President Barack Obama to John Boehner, Speaker, U.S. House of Representatives and Daniel Inouye, President Pro Tempore, U.S. Senate (Jun 3 15, 2011), reprinted in Letter from the President on the War Powers Resolution, WHITE HOUSE (June 15, 2011), <https://www.whitehouse.gov/the-press-office/2011/06/15/letter-president-war-powers-resolution>.

112. *Libya and War Powers Hearing*, supra note 95, at 16 (prepared statement of Hon. Harold Koh, Legal Advisor, United States Department of State).

113. *Id.*

114. See *id.* at 5 (opening statement of Richard Lugar, U.S. Senator from Indiana).

115. See *id.* at 6.

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

117. See MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 44–45 (2015), <https://www.fas.org/sgp/crs/natsec/R42699.pdf>.

118. See *id.* at 45–46.

the Constitution, the U.S. military was engaged in hostilities as they targeted and killed members of the Libyan armed forces.¹¹⁹

Moreover, one must keep in mind the historical context in which Congress enacted the War Powers Resolution.¹²⁰ The aerial bombing of Cambodia was surely one of the precipitating factors for enacting the War Powers Resolution.¹²¹ The debates preceding passage of the War Powers Resolution are suffused with discussions about Cambodia with no indication that the Resolution did not apply because the bombing involved a limited objective (denying a safe haven and transportation routes for the Viet Cong) implemented by low-risk, high-altitude bombing.¹²² Hence the War Powers Resolution was not only a demand for “No more Vietnams,” it also reflected a congressional insistence that there be “No more Cambodias.” In all relevant respects, Libya was Cambodia all over again. Because we were involved in hostilities in Cambodia, we were involved in hostilities in Libya.

The Administration’s lawyers failed to pay heed to the express goals of the War Powers Resolution or its historical context because they focused on various limits on the use of force in Libya.¹²³ Limits surely matter. In gauging whether we are in hostilities, a focus on constraints makes eminent sense because if relatively insignificant uses of military force are brought to bear, it is hard to say that we are engaged in war or hostilities.¹²⁴ Or put another way, if there are enough restrictions on the use of force, we will be involved in neither war nor hostilities. For instance, if, on the orders of the President, U.S. border guards briefly fired at sentries in a neighboring country, those shots likely would not constitute hostilities. Similarly, a Marine at a U.S. embassy might, at the behest of the President, engage with another nation’s

119. See, e.g., Ilya Somin, Opinion, *Obama Admits That His Handling of the Libya War Was His Worst Mistake—But Not That It Was Unconstitutional*, WASH. POST (Apr. 13, 2016), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/13/obama-admits-that-his-handling-of-the-libya-war-was-his-worst-mistake-but-not-that-it-was-unconstitutional/>.

120. See generally *Nixon and the War Powers Resolution*, BILL RTS. INST., <http://www.billofrightsinstitute.org/educate/educator-resources/lessons-plans/presidents-constitution/war-powers-resolution/> (last visited Aug. 26, 2016).

121. See *id.*

122. See, e.g., *War Powers: A Test of Compliance: Hearings Before the Subcomm. on Int’l Sec. & Sci. Affairs of the H. Comm. on Int’l Relations*, 94th Cong. 39 (1975) (statement of Clement J. Zablocki); H.R. REP. NO. 93-287, at 5 (1973), as reprinted in 1973 U.S.C.C.A.N. 2346, 2348.

123. See Krass Memo, *supra* note 11, slip op. at 8.

124. See *id.* at 13.

military or paramilitary forces and still not have engaged in hostilities.

Yet the analysis of the limits was flawed. Though there were constraints on the use of force in Libya, they were not of a nature that signaled the absence of hostilities. The number of sorties, bombs dropped, and U.S. military assets involved is unclear, in large part because the United States has yet to provide an accounting of its involvement.¹²⁵ Libya consisted of sustained bombing and extensive use of U.S. aircraft and naval warships.¹²⁶ No one doubts that thousands of bombs were dropped and that hundreds of Libyan soldiers were killed.¹²⁷ Libya was not some desert dust up, some trifling bushfire. It was war under the Constitution and hostilities under the War Powers Resolution.¹²⁸

The limits identified by Administration lawyers did little to advance their assertion that the military was engaged in violence short of hostilities. At the outset, one must remember that most wars are limited, in that nations typically pursue limited objectives using limited means. Moreover, the modern law of war greatly constrains warfare between civilized nations. The fact that modern wars are almost invariably limited as to objectives and means in no way detracts from the conclusion that modern wars consist of hostilities. Put another way, one need not be engaged in total war, a war of all against all, in order for hostilities to exist.

Consider the mission in Libya. The ostensible mission was protection of civilians.¹²⁹ But judging by the bombing of Qaddafi's villa and the exultation after his death, another real goal was regime change.¹³⁰ Indeed, Leon Panetta, the Director of the Central Intelligence Agency at the outset of the Libyan war, declared in Afghanistan "that our goal in Libya was regime change," an end that "everyone in Washington knew but we couldn't

125. See Eileen Burgin, *War over Words: Reinterpreting "Hostilities" and the War Powers Resolution*, 29 *BYU J. PUB. L.* 99, 101–02 (2014).

126. See Dep't of State Report, *supra* note 20.

127. C.J. Chivers & Eric Schmitt, *In Strikes on Libya by NATO, an Unspoken Civilian Toll*, *N.Y. TIMES* (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html>.

128. See *id.*

129. Jamie Herron, Note, *Responsibility to Protect: Moral Triumph or Gateway to Allowing Powerful States to Invade Weaker States in Violation of the U.N. Charter?*, 26 *TEMP. INT'L & COMP. L.J.* 367, 368 (2012).

130. See generally Stephen B. Weissman, *Presidential Deception in Foreign Policy Making: Military Intervention in Libya 2011*, 46 *PRES. STUD. Q.* 669 (2016).

officially acknowledge.”¹³¹ In his memoirs, the Secretary of Defense, Robert Gates, wrote about opposing the plan for “regime change” in Libya and expressed alarm about what would come after Qaddafi’s fall and “an open-ended conflict, [and] an ill defined mission.”¹³²

But even if regime change were a mere by-product of the desire to protect civilians as opposed to a principle goal, most wars are fought for narrow goals.¹³³ Some wars are fought to acquire small bits of territory.¹³⁴ Others are waged due to wounded national pride.¹³⁵ And some are focused on the need for natural resources.¹³⁶ If the United States, in a bid to expand her borders, launched cruise missiles against Mexico, bombed the Mexican leadership using jets and drones, and supplied munitions, targeting, intelligence, and surveillance to our allies doing the same, the U.S. government’s insistence that regime change was not the impetus behind the use of force would be immaterial. The United States would be at war and U.S. Armed Forces would be engaging in hostilities. The same logic applies to the significant, but limited, objectives (civilian protection and regime change) of the Libyan war.

Next, consider the means of warfare. A nation can be involved in hostilities even if the means used to wage it are severely restricted.¹³⁷ If the United States wages war using ground troops—but not jets, warships, missiles, or drones—the U.S. Armed Forces are engaged in hostilities.¹³⁸ The same is true when the United States uses jets, warships, missiles, and drones, but not ground troops.¹³⁹ Long ago, as the United States of America fought a naval war with France—with narrow goals, limited means, and constrained targets—Justices of the Supreme Court of the United States noted that we

131. LEON PANETTA, *WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE* 354 (2014).

132. ROBERT GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 511, 522 (2014).

133. See *Why Wars Happen*, *ECONOMIST* (Dec. 16, 2008), www.economist.com/node/12758508.

134. *Id.*

135. *Id.*

136. *Id.*

137. See, e.g., Prakash, *Separation and Overlap*, *supra* note 71, at 330.

138. See Jack Goldsmith, *Problems with the Obama Administration’s War Powers Resolution Theory*, *LAWFARE* (June 16, 2011, 8:38 AM), <https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory> [hereinafter Goldsmith, *War Powers Resolution Theory*].

139. See *id.*

were at war with France.¹⁴⁰ To paraphrase one of them, a limited war is nonetheless a war.¹⁴¹ The fact that hostilities in Libya were limited to aerial bombardment did not signal or suggest the absence of hostilities.

The low risk of escalation matters only if armed forces are not otherwise involved in hostilities.¹⁴² Because U.S. forces were certainly involved in hostilities in Libya, the risk that those hostilities might escalate further was irrelevant.¹⁴³ Put another way, if 20,000 ground troops fighting a ground war involves “hostilities,” then the chances that ground forces might double or triple is beside the point.¹⁴⁴ Similarly, because we were involved in a massive aerial bombardment of Libya, the low probability that we might insert ground troops was immaterial.¹⁴⁵

Finally, the limited risk of casualties matters to Americans because we do not want our men and women in the armed forces to die. That low risk does not matter for purposes of whether the armed forces of the United States are committing hostilities under the War Powers Resolution.¹⁴⁶ A nation may commit hostilities whether or not it puts its soldiers and sailors at risk, and nothing in the Resolution suggests otherwise.¹⁴⁷ Otherwise, attacking non-nuclear states using hundreds of nuclear weapons or the use of machine guns against armies equipped with swords, knives, and bows would not constitute hostilities.¹⁴⁸

If the shoe were on the other foot, no one would gainsay the presence of hostilities. Imagine that the President wanted to use federal statutory authority that required a finding that another country had used its armed forces in “hostilities” against the United States. Further, imagine that Canada was bombing the United States with aircraft and drones, conducting surveillance, selecting targets, and supplying logistical and refueling support to other nations bombing the United States. Would the President say Canada was not engaged in “hostilities” because Canada did not wish to change the U.S. government or had not deployed ground troops? No one in

140. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 41 (1800).

141. *See id.* at 43.

142. *See* War Powers Resolution, 50 U.S.C. §§ 1541(a), (c), 1542 (2012).

143. *See id.* § 1542.

144. *See id.*

145. *See id.*

146. *See id.* § 1547(c).

147. *See id.* §§ 1541–1548.

148. *See id.*

the United States would harbor any doubts about the existence of Canadian hostilities. The answer does not change because the United States was the aggressor in Libya.¹⁴⁹

NATO's involvement only underscores that the armed forces of the United States were conducting hostilities. At the time, the Supreme Allied Commander of NATO was also an admiral in the U.S. Navy.¹⁵⁰ Moreover, the United States was "by far the largest contributor to [O]peration Unified Protector."¹⁵¹ It expended over a billion dollars, deployed a large naval armada, lent munitions, and conducted 75 percent of reconnaissance and refueling.¹⁵² Finally, the President admitted that U.S. pilots flew the warplanes of an ally.¹⁵³ In other words, *U.S. service members* were flying foreign aircraft at a time when Americans were told that our allies were shouldering the lion's share of such flights.¹⁵⁴ Hence, statistics about sorties of French and U.K. *aircraft* may obscure the actual extent of American involvement in Unified Protector.

In any event, U.S. military personnel assigned to NATO remain members of the U.S. Armed Forces.¹⁵⁵ They do not lose that association merely because they are also tasked to NATO.¹⁵⁶ Indeed, the War Powers Resolution provides that "the term 'introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, [or] participate in the movement" of foreign military

149. See Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Powers of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 62 (2011).

150. Goldsmith, *War Powers Resolution Theory*, *supra* note 138.

151. Goldsmith, *Obama Administration's Legal Rationale*, *supra* note 22 (citing Jeremy Lemer & Christine Spolar, *Pentagon Sees Libya Military Costs Soar*, FIN. TIMES (June 9, 2011), <http://www.ft.com/cms/s/0/11d5624c-920f-11e0-b8c1-00144feab49a.html#axzz4JXRR5u1a>).

152. Kevin Baron, *For the U.S., War Against Qaddafi Cost Relatively Little: \$1.1 Billion*, ATLANTIC (Oct. 21, 2011), <http://www.theatlantic.com/international/archive/2011/10/for-the-us-war-against-qaddafi-cost-relatively-little-11-billion/247133/>; Eric Westervelt, *NATO's Intervention in Libya: A New Model?*, NPR (Sept. 12, 2011), <http://www.npr.org/2011/09/12/140292920/natos-intervention-in-libya-a-new-model>.

153. See Donna Miles, *Obama: Libya Mission Underscores the Effectiveness of NATO*, AM. FORCES PRESS SERV., <http://archive.defense.gov/news/newsarticle.aspx?id=65965> (Obama noting that American pilots flew French jets off a French carrier).

154. *See id.*

155. *Unit Info*, U.S. ARMY NATO, <http://www.usanato.army.mil/sites/unitinfo/index.html> (last visited Aug. 27, 2016).

156. *See id.*

forces in a context where those forces are engaged in acts of military force.¹⁵⁷ Congress clearly did not want the President to avoid the War Powers Resolution's strictures by hiding behind another country's armed forces.¹⁵⁸

Judging by the extent to which the Obama Administration underscored NATO's role in the Libyan war, the transfer to NATO of operational control seems, in part, to have been designed to obfuscate the significant role that the armed forces of the United States played.¹⁵⁹ The Obama Administration acted as if NATO were some autonomous, non-U.S. military entity, when in fact NATO is dominated by the United States and in a context where the United States supplied a huge portion of the funding.¹⁶⁰ The War Powers Resolution and its limits are not so easily evaded. U.S. military assets and personnel cannot be loaned to NATO and then ignored for purposes of gauging whether the U.S. Armed Forces were involved in hostilities.¹⁶¹

When U.S. military forces bombarded Libyan forces over the course of months, they conducted hostilities in, and against, Libya. Because the President did not withdraw our armed forces from their ongoing hostilities against Libya prior to expiration of the 60-day clock, he violated the War Powers Resolution. It is of no consequence that the Libyan war could have been more costly, risky, and colossal. Even little wars consist of real hostilities.

III. STRETCHING TO REACH ISIS

The relationship between ISIS and al Qaeda has been complicated and murky, to say the least.¹⁶² In 1999 Abu Musab al-Zarqawi met with Osama bin Laden and received "seed money" to set up his own training camp in Herat, Afghanistan, far away from al Qaeda's facility.¹⁶³ Al-Zarqawi

157. War Powers Resolution, 50 U.S.C. § 1547(c) (2012).

158. H.R. REP. NO. 93-287, at 9 (1973), as reprinted in 1973 U.S.C.C.A.N. 2346, 2357.

159. Cf. Goldsmith, *War Powers Resolution Theory*, supra note 138 (arguing that the Resolution covers American military action conducted under the auspices of NATO).

160. See *id.*

161. See, e.g., *id.*

162. See Natasha Bertrand, *We're Getting to Know Just How Different ISIS Is from al Qaeda*, BUS. INSIDER (May 21, 2015), <http://www.businessinsider.com/difference-between-isis-and-al-qaeda-2015-5> (explaining the different approaches each group has to achieving the same goal).

163. Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, ATLANTIC (June 8, 2016), <http://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983>.

apparently never took an oath of loyalty to al Qaeda, despite being asked to do so five times.¹⁶⁴ Yet after the U.S. invasion of Afghanistan, his group “Jund al-Sham” fought alongside the Taliban and al Qaeda for several months.¹⁶⁵

Eventually, al-Zarqawi refashioned his organization as Jama’at al-Tawhid w’al-Jihad (JTJ).¹⁶⁶ Only in 2004 did he take a pledge of loyalty to Osama bin Laden and merge his organization into al Qaeda.¹⁶⁷ The renamed entity was informally called al Qaeda in Iraq, the Iraqi branch of al Qaeda.¹⁶⁸

After a U.S. airstrike killed al-Zarqawi in 2006, Abu Omar al-Baghdadi eventually took over the renamed subunit, now called Islamic State of Iraq.¹⁶⁹ In 2013, as the group expanded into Syria, it became known as Islamic State in Iraq and Syria (ISIS).¹⁷⁰ The next year, after a protracted power struggle, Ayman al-Zawahiri, bin Laden’s successor, declared that ISIS was no longer part of al Qaeda.¹⁷¹ The split continues to this day, with al Qaeda and ISIS at war in parts of Syria.¹⁷²

In September 2014, the President ordered strikes in Syria and Iraq against ISIS targets.¹⁷³ Regarding the legality of those strikes, the

164. *Id.*

165. *Id.*

166. Richard Boucher, *Press Statement: Foreign Terrorist Organization: Designation of Jama’at al-Tawhid wa’al-Jihad and Aliases*, U.S. DEP’T STATE (Oct. 15, 2004), <http://web.archive.org/web/20070711131613/http://www.state.gov/r/pa/prs/ps/2004/37130.htm>.

167. Stephen W. Preston, Gen. Counsel, U.S. Dep’t of Def., *The Legal Framework for the United States’ Use of Military Force Since 9/11* (Apr. 10, 2016), in U.S. DEP’T DEF., <http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911> (last visited Oct. 28, 2016).

168. *Id.*

169. William McCants, *Who Is Islamic State Leader Abu Bakr al-Baghdadi?*, BBC NEWS (Mar. 8, 2016), <http://www.bbc.com/news/world-middle-east-35694311>.

170. Liam Stack, *How ISIS Expanded Its Threat*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/interactive/2015/11/14/world/middleeast/isis-expansion.html>.

171. See Ryan Goodman, *Obama Can’t Declare a New Iraq War Without Approval. Even Bush Knew That*, GUARDIAN (June 19, 2014), <http://www.theguardian.com/commentisfree/2014/jun/19/obama-iraq-war-approval-air-strikes>.

172. Jack Moore, *Al-Qaeda’s Zawahiri Calls on Supporters to Reject ISIS and Support Taliban*, NEWSWEEK (Aug. 22, 2016), <http://www.newsweek.com/al-qaedas-zawahiri-calls-supporters-reject-isis-and-support-taliban-492337>.

173. Helene Cooper & Eric Schmitt, *Airstrikes by U.S. and Allies Hit ISIS Targets in Syria*, N.Y. TIMES (Sept. 22, 2014), <http://www.nytimes.com/2014/09/23/world/middle>

Administration has cited various sources of authority: the Constitution, the 2001 AUMF, and the 2002 AUMF.¹⁷⁴

Some have criticized the Administration for advancing a shaky, inconsistent foundation for the war against ISIS.¹⁷⁵ The rationales seem to have changed over time.¹⁷⁶ What started mostly as a constitutional claim gave way to assertions grounded on statutory authority, particularly the 2001 and 2002 AUMFs.¹⁷⁷

east/us-and-allies-hit-isis-targets-in-syria.html.

174. See MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS, 1–3 (2016), <https://fas.org/sgp/crs/natsec/R43760.pdf>; Letter from President Barack Obama to John Boehner, Speaker, U.S. House of Representatives and Patrick Leahy, President Pro Tempore, U.S. Senate (Sept. 23, 2014), reprinted in *Letter from the President—War Powers Resolution Regarding Iraq*, WHITE HOUSE (Sept. 23, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>; Letter from President Barack Obama to John Boehner, Speaker, U.S. House of Representatives and Patrick Leahy, President Pro Tempore, U.S. Senate (Sept. 23, 2014), reprinted in *Letter from the President—War Powers Resolution Regarding Syria*, WHITE HOUSE (Sept. 23, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>; Email from Senior Obama Admin. Official to The N.Y. Times (Sept. 12, 2014), reprinted in *IS War Powers Theory Background Statement*, ASSETS.DOCUMENTCLOUD.ORG, <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>; Charlie Savage, *Obama Sees Iraqi Resolution as a Legal Basis for Airstrikes*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>.

175. See Jack Goldsmith, Opinion, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush>; Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), <http://newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-seek-congressional-authorization>; Eli Lake, *Obama's New War on ISIS May Be Illegal*, DAILY BEAST (Sept. 10, 2014), <http://www.thedailybeast.com/articles/2014/09/10/is-obama-s-new-war-against-isis-illegal.html>; Rand Paul, *Obama's ISIS War Is Illegal*, DAILY BEAST (Nov. 10, 2014), <http://www.thedailybeast.com/articles/2014/11/10/obama-s-isis-war-is-illegal.html>; Marisa Taylor & Jonathan S. Landay, *Obama's Legal Rationale for War Against Islamic State Secret and 'Very Thin'*, MCCLATCHYDC (June 12, 2015), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article/24785632.html>; Benjamin Wittes, *Not Asking the Girl to Dance*, LAWFARE (Sept. 10, 2014, 9:41 PM), <https://www.lawfareblog.com/not-asking-girl-dance>.

176. See, e.g., Taylor & Landay, *supra* note 175.

177. See Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces*, LAWFARE (Sept. 10, 2014, 11:46 PM),

For reasons discussed earlier, I do not regard the President's constitutional claim as having any merit.¹⁷⁸ The Commander in Chief may recommend war; he may press for it within the congressional chambers, twisting arms and the like; and he may veto a proposed declaration of war and thus rebuff congressional war hawks.¹⁷⁹ But the Constitution does not grant the President the declare war power.¹⁸⁰ It grants that power to Congress.¹⁸¹

The 2002 AUMF is also a non-starter. Although it has language that authorizes force in order to neutralize “the continuing threat posed by Iraq,”¹⁸² that text was a reference to Saddam Hussein and his regime.¹⁸³ The preamble repeatedly condemns the Hussein government and its actions.¹⁸⁴ It does not speak to other actors that might one day, in the distant future, pose a threat to the United States from the territory of Iraq.¹⁸⁵ Hence that text is not best understood as encompassing *any* threat that might emanate from Iraq. If remnants of the Baathist regime were still fighting against us in Iraq, then I suppose we could still be waging war to suppress “the *continuing* threat posed by Iraq.”¹⁸⁶ But from what I know, ISIS does not wish to restore Baathism and is a *new* threat, in the sense of being relatively unconnected to the previous regime and having new motives and objectives.¹⁸⁷ Because the novel threat comes from some other entity that merely happens to have found a haven in parts of Iraq, an AUMF focused on Saddam Hussein is a

<http://www.lawfareblog.com/2001-aumf-associated-forces-disassociated-successor-forces>; Jack Goldsmith, *The Administration's Hard-to-Fathom Draft AUMF*, LAWFARE (Feb. 12, 2015, 6:33 AM), <https://www.lawfareblog.com/administrations-hard-fathom-draft-aumf>; Harold Hongju Koh, *Obama's ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY (Sept. 29, 2014), <https://www.justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really>; Derek Tsang, *To Justify ISIS Airstrikes, Obama Using Legislation He Wants Repealed*, PUNDITFACT (Sept. 18, 2014), <http://www.politifact.com/punditfact/statements/2014/sep/18/julie-pace/justify-airstrikes-against-islamic-state-obama-usi>.

178. See *supra* notes 39–88 and accompanying text.

179. See U.S. CONST. art. I, § 7, cl. 3; *id.* § 8, cl. 11.

180. See *id.* art. I, § 8, cl. 11.

181. *Id.*

182. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (codified at 50 U.S.C. § 1541 note (2012)).

183. *Id.* pmbl., at 1498–1500.

184. *Id.*

185. See *id.*

186. See *id.* § 3(a)(1), at 1501.

187. See Bertrand, *supra* note 162.

poor foundation for a war against ISIS.¹⁸⁸

While the Constitution and the 2002 AUMF are unavailing, I agree with the Administration that the 2001 AUMF authorizes the war against ISIS. But the analysis is complicated and not without its considerable difficulties. The 2001 AUMF provides that the President may use necessary and appropriate force against the “nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . .”¹⁸⁹ This is an expansive delegation to the President of authority to make judgments regarding responsibility for 9/11.¹⁹⁰ In my view, though ISIS did not exist in 2001, it is, nonetheless, an organization that planned, authorized, and committed the 9/11 attacks.

This conclusion may seem strikingly odd, bordering on the paradoxical. Critics have argued that if an organization did not exist in 2001, it cannot be subject to the 2001 AUMF.¹⁹¹ Because ISIS did not exist until February 2014, when it split from al Qaeda, it is not targetable.¹⁹² Moreover, critics have pointed out that al Qaeda and ISIS are fighting each other, making it hard

188. Cf. Wells Bennett, *Congressional Intent, the 2002 AUMF, and ISIS*, LAWFARE (June 13, 2014, 3:32 PM), <https://www.lawfareblog.com/congressional-intent-2002-aumf-and-isis> (arguing that reference to Iraq may refer to the Hussein government and not all threats from Iraq).

189. AUMF, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

190. See, e.g., Memorandum from Matthew Weed, Cong. Research Serv., Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress, 2 (May 11, 2016), <https://www.fas.org/sgp/crs/natsec/pres-aumf.pdf> (chronicling the 37 occurrences of an official record, disclosed publicly, of presidential reference by the Bush and Obama Administrations to the 2001 AUMF in connection with military action).

191. See Jennifer Daskal, Ryan Goodman & Steve Vladeck, *The Premature Discussion of ISIS and the 2001/2002 AUMFs*, JUST SECURITY (June 17, 2014), <http://www.justsecurity.org/11692/isis-aumfs>; Bruce Fein, *Obama Dethrones Rule of Law*, WASH. TIMES (Sept. 12, 2014), <http://www.washingtontimes.com/news/2014/sep/12/fein-obama-dethrones-rule-law/>; Goodman, *supra* note 171; Harold Hongju Koh, *The Lawful Way to Fight the Islamic State*, POLITICO (Aug. 29, 2014), <http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444?o=0>; Marty Lederman, “Associated Forces” Has a Legal Meaning . . . But It’s Not “Every Group That Calls Itself al Qaeda,” JUST SECURITY (Feb. 4, 2014), <http://www.justsecurity.org/6756/associated-forces-has-legal-meaning-not-every-group-calls-al-qaeda>.

192. See, e.g., Fein, *supra* note 191.

to say that ISIS is al Qaeda.¹⁹³

These arguments have an undeniable power. But I regard them as ultimately mistaken. Both focus on points that should be seen as irrelevant under the best reading of the AUMF. Entities otherwise targetable under the AUMF do not shed or evade that status merely because they war with other targetable entities. More generally, persons, organizations, and nations that did not exist in 2001 may nonetheless be targetable under the AUMF.¹⁹⁴

Take the first point first. Early on, President George W. Bush determined that the AUMF authorizes the use of force against al Qaeda and the Taliban, the first for conducting the 9/11 attacks and the second presumably for harboring the first.¹⁹⁵ Now imagine that the two former allies are now at loggerheads, waging war against each other, for whatever reason. Would one or both no longer be targetable because they no longer were allied? They both would be targetable, clearly, because both are still covered by the AUMF.¹⁹⁶ Their present relationship to each other, whether extremely warm, arm's length, or hostile, is irrelevant to whether they are the enemy under Congress's declaration of war.¹⁹⁷ The same could be said of broken alliances amongst the Axis Powers during World War II. Because there were declarations that covered Germany and Japan, both would have remained an enemy of the United States even if each turned on the other.¹⁹⁸ In sum, the deadly struggle between ISIS and al Qaeda is not relevant so long as the AUMF covers both.

This takes us to the second point and the status of ISIS under the AUMF. At the outset, the AUMF evidently presupposes that some belligerent nations, organizations, and persons are *not targetable*.¹⁹⁹ A nation, organization, or person can war against the United States yet not be targetable because the AUMF evidently does not turn on the bare fact of hostilities against the United States.²⁰⁰ Instead its focus is on the 9/11 attacks,

193. See Goodman, *supra* note 171; Lake, *supra* note 175.

194. See *infra* notes 201–07 and accompanying text.

195. Weed, *supra* note 190.

196. See AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

197. See *id.*

198. See Declaration of State of War with Japan, Pub. L. No. 77-328, 55 Stat. 795, 795 (1941); Declaration of State of War with Germany, Pub. L. No. 77-331, 55 Stat. 796, 796 (1941).

199. See AUMF, § 2(a), 115 Stat. at 224

200. See *id.*

its perpetrators and planners, and their aiders and abettors.²⁰¹ The enumeration of one attack presupposes that other attacks are not the subject of the AUMF.²⁰² Hence if, after the passage of the 2001 AUMF, Canada waged war against the United States, that AUMF has nothing to say about whether the United States can use military force against Canada. Similarly, prior declarations of war were fixated on particular nations.²⁰³ This explains why the United States declared war against six separate nations in World War II.²⁰⁴ For instance, declaring war on Germany was necessary if we were to war with it, notwithstanding the U.S. declaration against Japan. Put another way, the December 8, 1941, declaration against Japan did not authorize warfare against any nation that took up arms against the United States.²⁰⁵

The question under the AUMF is which nations, organizations, and persons are targetable. The list might seem static, fixed for all time based on September 18, 2001, the day the AUMF was enacted into law.²⁰⁶ Yet one must bear in mind that none of these entities are ever static. Nations change—their leaders, territory, interests, and population—yet they remain the same nation, at least for some purposes. The same is true for organizations; their management, objectives, tactics, etc. will vary over time. Yet they too can remain the same organization, in some senses, even as their attributes change over time. Finally, as everyone knows from personal experience, people change on a cellular basis and with respect to maturity, beliefs, and temperament.

Members of Congress certainly knew of such possibilities when they authorized the use of military force against nations, organizations, and persons. That nations, organizations, and people change over time is a matter of common knowledge, much like awareness of the changing seasons. For our purposes, the question is when do changes in name, methods, ideology, and membership matter for purposes of the AUMF? This is part of a broader question of when alterations to the targets of the AUMF are

201. *Id.*

202. *See id.* (“the terrorist attacks that occurred on September 11, 2001”).

203. *See Official Declarations of War by Congress*, U.S. SENATE, http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Aug. 27, 2016).

204. *See id.*

205. Declaration of State of War with Japan, Pub. L. No. 77-328, 55 Stat. 795, 795 (1941).

206. *See* Fein, *supra* note 191.

relevant.

Some changes may well cause an entity to fall outside of the AUMF.²⁰⁷ If al Qaeda conspicuously and credibly renounced violence and came to admire the United States, one might well question whether members who joined after that point were still targetable because it might truly be said that the al Qaeda covered by the AUMF—the one responsible for committing the 9/11 attacks—no longer exists. If the Taliban refused to ally itself with al Qaeda and adopted a policy of non-interference with U.S. forces in Afghanistan, it too might lose its targetable status.

Other changes are beside the point. In many senses, al Qaeda in 2016 is not the same organization as the entity that perpetrated 9/11 because its personnel and structure have changed in vast ways (e.g., Osama bin Laden is no longer its emir).²⁰⁸ But these alterations, by themselves, do not render it immune from targeting because the organization is not relevantly different from what it was in 2001.²⁰⁹ Its leadership, which remains partially intact from the days of 9/11, remains dedicated to attacking the United States and forcing the withdrawal of the U.S. military from the Middle East.²¹⁰ The same reasoning applies to the Taliban.²¹¹ Even though it is now headed by its third emir (Mullah Omar and his successor were both killed), it remains a proper target because it has not changed in any germane respect.²¹²

Consider other changes in membership and affiliation. I believe the coverage of the AUMF can expand over time to encompass entities previously not targetable. Take John the jihadist. If John did not exist on 9/11 or was too young to have aided in the attacks, he could not be targetable solely as a “person” under the AUMF. Yet if John joins the military forces of a nation or organization responsible for the 9/11 attacks, then he is

207. See AUMF, pmb., 115 Stat. at 224.

208. See *Al Qaeda*, STAN. U., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/21> (last updated Aug. 18, 2015); Oren Dorell, *Al-Qaeda Morphs into a New Movement Since 9/11*, USA TODAY (Sept. 10, 2014), <http://www.usatoday.com/story/news/world/2014/09/09/arab-states-mobilizing-to-stop-al-qaeda-spread/15342155/>.

209. See *Al Qaeda*, *supra* note 208.

210. See *id.*

211. See *The Taliban*, STAN. U., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367> (last updated July 13, 2016).

212. See Bill Roggio, *Taliban Names Mullah Haibatullah as New Emir*, LONG WAR J. (May 25, 2016), <http://www.longwarjournal.org/archives/2016/05/taliban-name-mullah-haibatullah-as-new-emir.php>; *The Taliban*, *supra* note 211.

targetable even if he was a committed Gandhian in 2001. He is a proper target because he has joined an entity that is a proper target.²¹³

As with persons, new nations and organizations can become targetable over time. Take an easy case. If the President newly determines that some other nation (say Pakistan) was responsible for harboring al Qaeda, he can target that nation.²¹⁴ The same would be true for organizations recently discovered to have participated in the 9/11 attacks.²¹⁵ The President did not need to make such determinations under the AUMF within one or two years after the attacks because the AUMF lacks such a limitation period.²¹⁶

Similarly, entities that were entirely innocent in relation to 9/11 can become targetable. If small nation S merges into larger nation L, in a context where L is targetable under the AUMF, the armed forces of S become targetable because they are now part of L's armed forces. Had Austria become part of Germany in 1943 after (rather than before) the December 11, 1941, declaration of war against the latter, that declaration would have covered Austrian military forces only in 1943 because only then would they have become part and parcel of Germany's forces.

Likewise, if an organization merges with al Qaeda after the AUMF, it subjects itself to warfare as part of al Qaeda. The new subunit assumes the burdens of its status as part of al Qaeda. If the group Al-Shabaab joined al Qaeda in 2012, as is reported,²¹⁷ it became targetable under the 2001 AUMF because al Qaeda remained a proper target.²¹⁸ The addition of hundreds or thousands of new fighters does not change al Qaeda in any relevant sense.²¹⁹

The same argument applies to al-Zarqawi's organization, the JTJ. Even if his organization were separate in 2001, its distinctiveness for purposes of

213. See Dominic Casciani, *Islamic State: Profile of Mohammed Emwazi aka 'Jihadi John'*, BBC NEWS (Nov. 13, 2015), <http://www.bbc.com/news/uk-31641569>.

214. See AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

215. See *id.*

216. See *id.*

217. See LAUREN P. BLANCHARD, CONG. RESEARCH SERV., IN10432, THE FIGHT AGAINST AL SHABAAB IN SOMALIA IN 2016 (2016), <http://www.fas.org/sgp/crs/row/IN10432.pdf>; Charlie Savage, *Is the U.S. Now at War with the Shabab? Not Exactly*, N.Y. TIMES (Mar. 14, 2016), <http://www.nytimes.com/2016/03/15/us/politics/is-the-us-now-at-war-with-the-shabab-not-exactly.html>.

218. See AUMF § 2(a), 115 Stat. at 224.

219. See Dorell, *supra* note 208.

the AUMF disappeared after the 2004 agreement to join al Qaeda.²²⁰ At that point, JTJ and its military members became targets as a subsidiary of al Qaeda.²²¹ JTJ had become part of an organization—al Qaeda—that had committed the 9/11 attacks and that had not changed in any pertinent way.²²²

The general principle is that when a person, organization, or nation joins an AUMF target, that entity becomes part and parcel of that target and may be subject to attack under the AUMF. Again, Congress must have known that the traits of targets would change over time. Knowing this, Congress's AUMF did not require revision or rethinking every time some nation or organization added new territory, subdivisions, or people.

Having said this, I do not mean to suggest that merger into a target is always irrelevant. If Russia fused into the Taliban and had the Taliban remained bent on safeguarding al Qaeda and attacking the United States, one might well say that the change in the Taliban is sufficiently significant to refute the idea that it is still the same organization that conducted the 9/11 attacks. Similarly a merger into al Qaeda that triggered seismic shifts in al Qaeda's ideology, power, or goals might make the AUMF inapplicable. But in the case of the JTJ, its addition to al Qaeda did not fundamentally alter the latter in any meaningful or relevant sense.²²³

Take a different case, one involving a split. Imagine that Germany, in 1944, had fragmented into two nations, the western portion controlled by Adolf Hitler and the eastern one by Hermann Goering. Both continued to war against the United States. In this context, I believe that the December 11, 1941, declaration would have covered both as successors to Germany. The changes to Germany, as significant as they would be, would not be relevant for purposes of the 1941 declaration because the two Germanys continued to wage war against the United States.

The same arguments about splitting apply to the AUMF and the Taliban. If the Taliban ever fragmented into two but continued to wage hostilities against the United States, its successors would remain targetable. The new entities would be proper targets because Congress, in enacting the 2001 AUMF, was focused on whether the relevant entities were continuing to wage war against the United States rather than whether they remained

220. See *The Islamic State*, STAN. U., http://web.stanford.edu/group/mapping_militants/cgi-bin/groups/view/1 (last updated Apr. 4, 2016).

221. *Id.*

222. *See id.*

223. *See Al Qaeda*, *supra* note 208.

cohesive.²²⁴ In other words, the 2001 AUMF does not implicitly signal that the use of force must cease merely because an enemy has fragmented.

What is true for the Taliban is no less true for al Qaeda. Because the AUMF covers al Qaeda, the AUMF covers any successors that emerge from any breakup or fracturing of al Qaeda. Again, Congress would never allow its AUMF to be vitiated merely by a fracturing of an organization because such fracturing could have been engineered as a means of forcing a revote in Congress.²²⁵ The AUMF is not so inelastic and brittle; its application is not so easily manipulated and circumvented.

If I am right, what accounts for the strong predisposition to suppose that al Qaeda remains targetable and that ISIS is not? I think people are overly influenced by designations: One is “al Qaeda” and the other, “ISIS.” Several thought experiments show that this is folly. Suppose al Qaeda had fractured into two, with both parts claiming to be the real al Qaeda and with both using the name. Are both targetable only because they both claim to be al Qaeda? If so, perhaps because one supposes that names are the touchstone, suppose both give up the name and each adopts a new one. Are we to conclude that neither is targetable? Counterfactually, suppose Ayman Al-Zawahiri’s faction took on the name “ISAFPAK” (Islamic State for Afghanistan and Pakistan) and al-Baghdadi’s faction used “al Qaeda.” Would the first group’s members no longer be targetable as being part of al Qaeda even though they maintained the al Qaeda ideology and continued to wage war against the United States? Would the latter be clearly targetable merely because it retained the al Qaeda moniker?

All this is meant to show that the names are hardly dispositive. The organizations behind the 9/11 attacks are not reducible to a series of names any more than nations or people are.²²⁶ Suppose that Japan, in 1942, had changed its official name to “Oyashima” or “eight islands.” That change would not matter for purposes of the December 8, 1941, U.S. declaration of war against the “Imperial Government of Japan.” The name of the nation is

224. See AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

225. Now no one imagines that the split between al Qaeda and ISIS was manufactured for the purposes of evading the 2001 AUMF. Everyone understands it to be real. But my point is that the mere fact of a split does not allow one or both entities to avoid the sting of the AUMF.

226. See Faisal Irshaid, *Isis, Isil, IS or Daesh? One Group, Many Names*, BBC NEWS (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-27994277> (noting the name of the organizations have changed several times).

not dispositive because Congress's declaration did not turn on labels.²²⁷ "The Imperial Government of Japan" signifies the intended target of the declaration and applies (or does not apply) independent of names. The Japanese government could not vitiate Congress's declaration of war merely by changing its moniker or the name of the nation it governed. Nor could the United States wage war on another country, say Argentina, even if the latter decided (for whatever odd reason) to rename its nation "Japan" and styled its government "the Imperial Government of Japan."

The same sorts of arguments apply to al Qaeda. Without more, division and name changes do not matter because one supposes that Congress would not have meant for its statute to turn on superficial changes.²²⁸ The reason why we might be fooled by names is because the retention (or change) of a name suggests something about the group.²²⁹ Retention suggests continuity and identification with the goals of the past; change suggests a break, perhaps with ideology or objectives.²³⁰

In sum, the applicability of the 2001 AUMF to ISIS is complicated. Al-Zarqawi brought ISIS's predecessor, JTJ, into al Qaeda in 2004.²³¹ Al-Zarqawi's successor, al-Baghdadi, took ISIS out in 2014.²³² At the break with al Qaeda, ISIS implicitly rejected the "al Qaeda" tag and now wars with "al Qaeda," both on the battlefield and for the hearts and minds of Islamists.²³³ That war is real and deadly.

Yet for purposes of the AUMF, when al-Zarqawi merged JTJ with al Qaeda, the JTJ acquired the latter's associational taint. Likewise, for purposes of the AUMF, ISIS did not lose that status when it broke free from al Qaeda. In other words, the AUMF does not regard ISIS as relevantly different from al Qaeda, notwithstanding their real split and hostilities. Hence, even though ISIS did not exist in 2001, it is an "organization" that helped plan the attacks on September 11, 2001.

227. See Declaration of State of War with Japan, Pub. L. No. 77-328, 55 Stat. 795, 795 (1941).

228. See *supra* notes 226–27 and accompanying text.

229. See Irshaid, *supra* note 226.

230. See *id.*

231. See Bobby Ghosh, *ISIS: A Short History*, ATLANTIC (Aug. 14, 2014), <http://www.theatlantic.com/international/archive/2014/08/isis-a-short-history/376030/>.

232. See *id.*

233. See *Al Qaeda*, *supra* note 208; *The Islamic State*, *supra* note 220.

IV. CONCLUSION

If I am right that al Qaeda can undergo significant changes and that its additions and spinoffs will themselves often be targetable, some may well lose hope that the war will ever conclude.²³⁴ I share this dread of a “Forever War” even as I believe that the concern misidentifies the problem.

The possibility that additions and spinoffs are targetable does not make the warfare authorized by AUMF a forever war because all previous war declarations had the same flexibility.²³⁵ Not all previous wars were forever wars merely because they had such flexibility.

If we have a forever war, we have one for two reasons: First, the AUMF, like the Social Security Act, has no sunset.²³⁶ Perhaps we ought to have sunsets for all legislation, including war resolutions. You can have a forever war when you have a forever war resolution. Second, and perhaps more importantly, al Qaeda has proven stubbornly resilient.²³⁷ If al Qaeda chose to direct its destructive energies elsewhere, this war would be over.²³⁸ This President does not want to wage war against al Qaeda. Few Americans want to fight al Qaeda indefinitely. In sum, we have a forever war because we have a toxic blend of a forever AUMF and a forever enemy.

234. See, e.g., Goldsmith, *Forever War*, *supra* note 4.

235. See *supra* notes 199–205 and accompanying text.

236. See AUMF, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

237. See *supra* notes 208–12 and accompanying text.

238. See *supra* notes 208–12 and accompanying text.