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Back to the Congressional Drawing Board: Inapplicability of the AUMF to Al-Shabaab and Other New Faces of Terrorism

BY PIERCE RAND*

“Now, make no mistake, our nation is still threatened by terrorists. From Benghazi to Boston, we have been tragically reminded of that truth. But we have to recognize that the threat has shifted and evolved from the one that came to our shores on 9/11. With a decade of experience now to draw from, this is the moment to ask ourselves hard questions—about the nature of today’s threats and how we should confront them.”¹

- President Barack Obama

INTRODUCTION

Following the 9/11 attacks, Congress enacted the Authorization for the Use of Military Force (AUMF) in order to safeguard our nation from future terrorist threats.² The language of the AUMF denotes a narrow scope—sanctioning military action exclusively against Al-Qaeda and other responsible entities. To best serve the needs of America’s “War on Terror,” however, this narrow scope has now expanded to include alternative global Islamist terrorist organizations.³

Over the last twelve years, America’s efforts during this “War on Terror” have achieved mixed results. Most authorities would agree that the death of Osama Bin Laden, coupled with the frequent drone and military strikes against prominent Al-Qaeda officials, have drastically

* J.D., Loyola Law School, Los Angeles. I would like to thank Professor David Glazier for all of his help navigating the complexities of this topic. Additionally, I would like to thank the editors and staff of the ILR for all of their hard work on this article.

1. Barack Obama, President of the United States, Remarks at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [hereinafter Obama’s Remarks].

2. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001).

3. Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, LAWFARE, 5-6, <http://www.lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf> (last visited March 27, 2015); *see also* Philip H. Gordon, *Can the War on Terror Be Won? How to Fight the Right War*, FOREIGN AFF. (Nov. 6, 2007), at 1-3, <http://www.foreignaffairs.com/articles/63009/philip-h-gordon/can-the-war-on-terror-be-won>.

diminished Al-Qaeda's prominence and operational capacity.⁴ The same, however, cannot be said of other more recently established Islamist terrorist organizations, which have not only persisted in the face of American military might, but also stiffened their resolve and deepened their militant roots.⁵ Al-Shabaab in Somalia represents a prime example of this phenomenon; the increased American military attention has failed to deter the organization's continuous rise in prominence predicated on acts of violence and terror.⁶ This has allowed Al-Shabaab, along with other organizations, to readily fill the vacancy left in the wake of Al-Qaeda's inescapable decline, and these emboldened Islamist groups have developed into significant international terrorist threats.⁷ As President Obama aptly put it, the landscape of international terrorism has indeed "shifted and evolved."⁸

Armed with over a decade of experience from combating amorphous terrorist cells and a rapidly growing fleet of technologically advanced drones capable of delivering lethal payloads to the far corners of the globe, America is militarily and tactically prepared to combat these evolving adversaries.⁹ Indeed, military action against many of these groups have already begun, as evidenced by the drone and military strikes launched against Al-Shabaab over the past several years.¹⁰ While strategically effective, these strikes are not without controversy; in fact, a growing question among the legal community espousing concern has emerged: *are these drone and military strikes legal?*¹¹

The following discussion will explore this question by applying

4. BUREAU OF COUNTERTERRORISM, U.S. DEPT. OF STATE, COUNTRY REPORTS ON TERRORISM 2011 5 (2012), available at <http://www.state.gov/documents/organization/195768.pdf>.

5. *Id.*

6. *Id.*

7. *Id.*

8. Obama's Remarks, *supra* note 1.

9. Thomas Michael McDonnell, *Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists*, 44 GEO. WASH. INT'L L. REV. 243, 255 (2012), available at <http://docs.law.gwu.edu/stdg/gwlr/PDFs/44-2/2-%20McDonnell.pdf>.

10. Chris Woods, *Militants and Civilians Killed in Multiple US Somalia Strikes*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 22, 2012), <http://www.thebureauinvestigates.com/2012/02/22/militants-and-civilians-killed-in-up-to-20-us-somalia-strikes-new-study-shows/>.

11. Robert Chesney, *Back to Lethal Force in Somalia: What If Anything Does the Drone Strike on Ibrahim Ali Signify?*, LAWFARE (Oct. 31, 2013, 5:38 PM), <http://www.lawfareblog.com/2013/10/back-to-lethal-force-in-somalia-what-if-anything-does-the-drone-strike-on-ibrahim-ali-signify/>.

domestic legal authority—specifically the 2001 Authorization for Use of Military force (AUMF) and its dubious “*Associated Forces*” expansion—to Al-Shabaab, a terrorist organization that has recently made headlines with its violent attack on a Nairobi mall resulting in over sixty-seven deaths.¹² It is true that one could potentially derive alternative domestic authority from the Presidential powers enumerated in Article II of the United States Constitution.¹³ However, the scope of these powers is particularly convoluted, and application of Article II would present complicated questions of Constitutional law that warrant independent consideration. Consequently, this discussion will presume that the 2001 AUMF operates as a congressional declaration of war and thus provides the preeminent authority used to justify American use of force against Al-Shabaab. As will be demonstrated in the subsequent analysis, the AUMF is a relic from the previous decade applicable to an international armed conflict in its final stages. Such an aged authority not only offers an attenuated legal basis for American military action against Al-Shabaab and other new faces of terrorism, but has also created the impression in the international community that our war on terror is boundless, extrajudicial, and impenetrably veiled in secrecy.

This discussion will be developed in the following format: Section II will explore the history of Somali Islamism and the development of Al-Shabaab. This historical perspective will provide context and establish the foundation for later legal analysis when searching for a substantive connection between Somali Islamist organizations and Al-Qaeda. Section III will briefly discuss the recent acts of Al-Shabaab terrorism and America’s military response to these acts. The purpose of this section is to unambiguously demonstrate Al-Shabaab’s prominence among international terrorist organizations as well as delineate the scope of American use of force against Al-Shabaab. Section IV will evaluate the legality of America’s military strikes against Al-Shabaab by determining whether the terrorist organization falls within the parameters of the 2001 AUMF as outlined by Congress. In addition, this section will explore the development of the *Associated Forces* label and evaluate the legal permissibility of this broad extension to AUMF authorization. Section V will conclude that the AUMF’s limited scope cannot be construed to cover Al-Shabaab and other modern terrorist organizations and

12. Daniel Howden, *Terror in Nairobi: the Full Story Behind al-Shabaab’s Mall Attack*, THE GUARDIAN (Oct. 4, 2013, 8:09 AM), <http://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya>.

13. U.S. CONST. art. II, § 2, cl. 1

thus, further congressional action is required to ensure the legality of military strikes against these new faces of terror

II. SOMALI ISLAMISM AND THE HISTORY OF AL-SHABAAB

Somalia is a small, impoverished, mostly ungoverned nation bordered by Ethiopia and Kenya in Southeastern Africa.¹⁴ Nearly all Somalis identify as Sufi Muslims.¹⁵ Sufism is a non-extremist branch of Islam focused on prayer and worship, and is less concerned with adherence to the Sharia.¹⁶ A comparatively small minority of Somalis, however, adhere to Salafism, an Islamist¹⁷ and militant branch of the Muslim faith divergent from Sufism. Salafism is primarily focused on strict adherence to the Sharia and is also often associated with terrorist organizations.¹⁸

The stark ideological differences apparent in the belief system of the Sufi majority and Salafi minority have created significant friction relevant to understanding the development of Islamism in Somalia today.¹⁹ This section will explore the impact of this ideological friction on the development of militant Islamism in Somalia from its largely innocuous and unfocused origins during the 1991 Somali civil war into Al-Shabaab, one of the most active and notorious contemporary terrorist organizations.²⁰ Additionally, this section will evaluate the scope and effectiveness of Al-Qaeda's efforts to propagate Salafist militant ideology in Somalia, which ran parallel to, but sometimes intersected with, the historical development of Somali Islamism from the early 1990's through the present.²¹

14. Markus Virgil Hoehne, Max Planck Institute for Social Anthropology, *Counterterrorism in Somalia: How external influences helped to produce militant Islamism*, CRISIS IN THE HORN OF AFRICA, 1 (Dec. 17, 2009), http://webarchive.ssrc.org/Somalia_Hoehne_v10.pdf.

15. *Id.*; see George-Sebastian Holzer, *Political Islam in Somalia: A Fertile Ground for Radical Islamic Groups?*, 1 GEOPOLITICS OF THE MIDDLE E. 23 (June 2008), available at http://www.operationspaix.net/DATA/DOCUMENT/5337~v~Political_Islam_in_Somalia__A_Fertile_Ground_for_Radical_Islamic_Groups.pdf.

16. THE CTR. FOR SEC. POL'Y, TEAM 'B' II, *SHARIAH: THE THREAT TO AMERICA*, 2-3 (2010), <http://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The%20Threat%20to%20America%20%28Team%20B%20Report%29%20Web%20Version%2009302010.pdf>.

17. For a definition of Islamism, see Hoehne, *supra* note 144, at 2.

18. *Somalia's Islamists*, INT'L CRISIS GROUP (Dec. 12, 2005), <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/somalia/100-somalias-islamists.aspx>.

19. *Id.* at 2.

20. See generally Jonathan Masters, *Al-Shabaab*, COUNCIL ON FOREIGN RELATIONS (Sept. 23, 2013), <http://www.cfr.org/somalia/al-shabab/p18650>.

21. See generally Clint Watts, Jacob Shapiro, & Vahid Brown, *Al-Qa'ida's (Mis) Adven-*

It is wise to approach this subject with a *tabula rasa* and disregard any preconceived notion that the radically charged Islamist atmosphere existing in Somalia today is indicative of the country's cultural norm.²² If one allows their views to be clouded by contemporary events, it is easy to misestimate the varying historical motives and tenacity of Somali Islamist groups. Those who make this error often espouse the one-dimensional theory that the existence of Islamist organizations and mere presence of Al-Qaeda operations in the Horn of Africa during the 1990's is sufficient to prove that Somalia served as a "fertile ground for Al-Qaeda terrorism" in modern history.²³ Those maintaining this belief typically argue that this "fertile ground" was not only integral to the development of Somali Islamist organizations, but also supports the notion that a meaningful nexus exists between Al-Shabaab and pre-9/11 Al-Qaeda.²⁴ Although available support for this theory is far from dispositive, the existence of such a connection could profoundly impact the applicability of the AUMF to Al-Shabaab. As a result, understanding the true nature of Somalia's Islamist roots, particularly before 9/11, is necessary to perform a proper legal analysis of American contemporary use of force against Al-Shabaab.

Part A will evaluate the birth and initial development of the Al Itihad Al Islam (AIAI) and Somali Islamism pre-9/11. Part B will discuss the successes and failures of Al-Qaeda's operations in Somalia during this same period. Part C will outline the post-9/11 development of the Islamic Courts Union (ICU) and the beginning of Islamist extremism. Finally, Part D will explore the emergence of Al-Shabaab as a prominent terrorist group and consider the organization's future intentions. Dividing the history of Somali *Islamism* in this way will draw contrast between the prevailing ideology and methodology during the pre- and post- 9/11 periods. This in turn will lead to a better understanding of how Al-Shabaab came into existence and provide clarity about the AUMF's applicability to this organization.

tures in the Horn of Africa, HARMONY PROJECT, WESTPOINT (July 2, 2007), available at <http://www.ctc.usma.edu/posts/al-qaidas-misadventures-in-the-horn-of-africa>.

22. Hoehne, *supra* note 14, at 1.4

23. *Id.*

24. *Id.*; see also James Phillips, *Somalia and al-Qaeda: Implications for the War on Terrorism*, THE HERITAGE FOUND. (Apr. 5, 2002), available at <http://www.heritage.org/research/reports/2002/04/somalia-and-al-qaeda-implications-for-the-war-on-terrorism>. This assumption will be important for application to the AUMF *infra* Part IV.

1. The AIAI and Pre-9/11 Islamism

Prior to 1990, Islamism held minimal significance in Somali politics and culture.²⁵ As mentioned, the vast majority of Somalis have historically identified themselves as Sufi Muslims, a group that holds contrasting views to the fundamentalist ideology promoted by Salafism.²⁶ Additionally, Islamism was suppressed under the Somali Democratic Republic headed by Mohamed Siyad Barre for much of the 20th century.²⁷ It was not until the civil war in 1991, which brought about the collapse of this government, that Islamism took root and began to emerge (albeit largely ineffectively) as an ideology in Somalia.²⁸

The primary Islamist organization that materialized from this civil war was known as the AIAI.²⁹ Religiously, the AIAI identified itself as Salafist and promoted strict adherence to the Sharia.³⁰ The religious and ideological beliefs within the AIAI, however, were not uniform and scholars have characterized the AIAI as an “umbrella organization” that loosely unified the different Islamist sects in Somalia.³¹ Although largely diluted by clan politics and ideological differences, the fundamental purpose of the AIAI was to establish an Islamist state in Somalia governed by strict adherence to Sharia law and to also reclaim Ogaden, a contested territorial region bordering southwestern Somalia and Ethiopia.³²

The AIAI gained initial success in establishing territorial presence; they had convinced a number of Somalis in regions under their control to embrace the Sharia.³³ This success, however, was short lived and the AIAI struggled to retain and expand power for four reasons. First, the absence of a unified religious ideology weakened the AIAI's foundation; this ultimately led to an internal schism in the mid-1990's.³⁴ Secondly, the AIAI as an organization was not impervious to the clan politics ubiquitous in Somali society;³⁵ these clan ties, and the inevitable

25. *See id.* at 1-2.

26. Holzer, *supra* note 15, at 26.

27. Hoehne, *supra* note 14, at 2-3.

28. *Id.* at 3.

29. Holzer, *supra* note 15, at 26-27.

30. *Id.* .

31. Hoehne, *supra* note 14, at 3.

32. *See Mapping Militant Organizations: Al Ittihad Al Islamiya*, STAN. U., <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/99> (last visited Dec. 15, 2015).

33. *Id.*

34. Hoehne, *supra* note 14, at 4.

35. *Id.* at 3.

conflicts they created, strongly degraded the cohesiveness within the AIAI.³⁶ Thirdly, the AIAI failed to gain the necessary public support;³⁷ this was partly because the organization failed to convey an impression of strength or unity, but mostly because the AIAI adhered to a disfavored Islamist ideology.³⁸ And lastly, the Sufi majority rejected the AIAI's interpretation of Sharia law because "its punishments . . . were perceived as cruel and un-Somali."³⁹ While not an exhaustive list, these detrimental factors created fissures within the AIAI that strongly undermined the organization's foundation.

The AIAI tried to gain military and ideological strength in Somalia throughout the 1990's, but their efforts yielded little success.⁴⁰ After several crushing military defeats, what little unity the AIAI enjoyed began crumbling as faction leaders acted unilaterally and turned their aggression toward reclaiming lost territory in Ethiopia.⁴¹ These fragmented AIAI militant groups established bases in the Lu'uq and Ogaden regions of southwestern Somalia, where they launched attacks against the Ethiopian government and its civilian targets.⁴² These attacks elicited an overwhelming military backlash from the Ethiopian government and in 1996, the AIAI Islamists in Lu'uq and Ogaden were forced to abandon their positions.⁴³ Since the organization's internal conflicts had already placed the AIAI in a weakened state, the Ethiopian retaliation proved to be a crippling blow.⁴⁴

By 1996, nearly all unity within the AIAI dissolved and the organization faded from Somalia's volatile political landscape.⁴⁵ The failure of the AIAI, however, did not prove fatal to Islamism in Somalia as a whole. The legacy of the AIAI endured and ex-members—many of whom were wealthy and influential—reemerged in prominent positions within their communities.⁴⁶ These ex-AIAI members created moderate

36. *Id.*; see also Holzer, *supra* note 15, at 27-28.

37. Hoehne, *supra* note 14, at 3.

38. *Id.* at 2-6; see also *Mapping Militant Organizations: Al-Shabaab*, STAN. U., available at <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61>, (last visited Dec. 15, 2015).

39. Holzer, *supra* note 15, at 28.

40. Hoehne, *supra* note 14, at 3-4.

41. Watts et al., *supra* note 20, at 35-36.

42. *Id.*; see also Holzer, *supra* note 15, at 28.

43. Watts et al., *supra* note 21, at 36; see also Holzer, *supra* note 15, at 28.

44. *Id.*

45. Hoehne, *supra* note 14 at 4; see also Holzer, *supra* note 15, at 28.

46. Watts et al., *supra* note 21, at 36.

Sharia courts throughout Somalia that operated both as judicial and political institutions.⁴⁷ As will be explained later, these new courts became popular among Somalis who viewed them both as a semblance of order in an otherwise order-less state and also as a means of retaliation against external influence.⁴⁸ This favorable shift in perception regarding the Sharia courts was initially subtle, yet substantively important since these courts would later serve as the foundation for Islamist resurgence under the ICU.⁴⁹

2. Beginning of Al-Qaeda Operations

Before continuing with the evolution of militant Islamism in Somalia, it is important to note how Al-Qaeda's operations in the Horn of Africa influenced the development of the AIAI in the 1990's.⁵⁰ According to Al-Qaeda documents (Harmony Documents) recently declassified by the American government, it is well established that Al-Qaeda believed that the poverty and destabilization in the Horn of Africa would encourage the establishment of an Islamist state from which Al-Qaeda could expand their base of operation beyond the Arabian Peninsula.⁵¹

Al-Qaeda specifically targeted Somalia after the fall of the Siad Barre regime in 1991, which left Somalia destabilized.⁵² The Harmony Documents indicate that shortly after the onset of the 1991 civil war, Al-Qaeda began operations in Somalia by sending agents to recruit members, establish military camps, and propagate Jihadist ideology.⁵³ Despite these efforts, Al-Qaeda operatives found themselves unwelcome in Somalia and faced repeated unexpected hurdles that they were ultimately unable to overcome.

The first hindrance to Al-Qaeda's operations stemmed from the Somalis' unwavering clan loyalty and different ideological values.⁵⁴ While these two factors may seem distinct they are actually intercon-

47. Holzer, *supra* note 15, at 29-30; *see also* Watts et al., *supra* note 21, at 36.

48. Watts et al., *supra* note 21 at 36; *see also* Hoehne, *supra* note 14, at 4-5.

49. Watts et al. *supra* note 21, at 36; *see also* Hoehne, *supra* note 14, at 29-30.

50. Watts et al., *supra* note 21, at 34-35.

51. *Id.* at 21.

52. *Id.* at 77-78.

53. *Id.* at 37-39; *see also* Sayf al-Islam, *The Ogaden File: Operation Holding (Al-MSK)*, Harmony Program AFGP-2002-600104, COMBATING TERRORISM CENTER AT WEST POINT (Jan. 26, 1993), https://www.ctc.usma.edu/v2/wp-content/uploads/2013/09/The-Ogaden-File-Operation-Holding-Al-Msk_-Original.pdf (describing a document being sent by Al-Qaeda to the Ogaden region of Ethiopia to construct training camps.).

54. Watts et al., *supra* note 21, at 37-39.

nected.⁵⁵ Nearly all Somali's, including Salafists and Islamists are, first and foremost, loyal to their clan.⁵⁶ In its attempt to recruit Islamists from the AIAI, Al-Qaeda was ill-prepared to deal with the complexities underscoring this clan-oriented mentality.⁵⁷ Unlike the AIAI that temporarily managed to coexist with clan friction because of their homogeneity, Al-Qaeda was perceived as foreign and intrusive.⁵⁸ As a result, Somali individuals who joined Al-Qaeda risked severe punishment or clan isolation because they were often perceived as having abandoned their clan.⁵⁹ Overcoming this clan identity proved to be such an obstacle to Al-Qaeda's efforts that operatives considered the elimination of clan leaders to be second in priority to expelling western forces.⁶⁰ As Al-Qaeda quickly learned, the pecuniary and ideological benefits of joining their organization did not outweigh the risk of "tribal exclusion" for most Somalis and ultimately, the predominance of Somali tribal loyalties strongly contributed to the failure of Al-Qaeda's recruitment efforts during this period.⁶¹

The logistical and financial challenges that arose from functioning in the "security vacuum" of Somalia comprised the second significant hindrance to Al-Qaeda's operations.⁶² This difficulty was demonstrated in a letter from Abu Hafas, a prominent Al-Qaeda operative in Somalia, where he stated, "we found out that it is difficult to do this in the areas that we visited because of dangers pertaining to security. This is why it is preferred that the courses be done by you in Khartoum. As a result

55. *Id.* at 29 (defines Clannism as "Somalia is a lineage-based society, where virtually all members of society are identified in part by their clan family. Somali clannism is fluid, complex, and frequently misunderstood. At the risk of oversimplification, one can make the case that clannism— especially since the collapse of the state in 1991—forms the basis for most of the core social institutions and norms of traditional Somali society, including personal identity, rights of access to local resources, customary law (*xeer*), blood payment (*diya*) groups, and social support systems.")

56. *Id.*

57. Abu Belal, *Abu Belal's Report on Jihad in Somalia*, Harmony Program AFGP-2002-800640, COMBATING TERRORISM CENTER AT WEST POINT, <http://www.ctc.usma.edu/posts/abu-belals-report-on-jihad-in-somalia-english-translation-2> (last visited Aug. 27, 2014); *see also* Watts et al., *supra* note 20, at 22.

58. Watts et al., *supra* note 21, at 22.

59. *Id.*

60. *Id.* at 6; *Report on the Needs of the Mujahidin in Somalia*, Harmony Program AFGP-2002-800600, COMBATING TERRORISM CENTER AT WEST POINT (Feb. 19, 1993), <http://www.ctc.usma.edu/wp-content/uploads/2013/10/Report-on-the-Needs-of-the-Mujahidin-in-Somalia-Partial-Translation.pdf>.

61. Watts et al., *supra* note 21, at 22.

62. *Id.* at 14.

this will save us transportation expenses and others.”⁶³ This statement demonstrates that maintaining security was unexpectedly expensive and proved to be an impediment to Al-Qaeda’s operations. Furthermore, poverty and poor infrastructure made obtaining and transporting supplies, weapons, and basic equipment in Somalia excessively difficult and expensive.⁶⁴ As a result, Al-Qaeda training camps were consistently undersupplied and isolated.⁶⁵ A letter from an unknown Al-Qaeda agent pleading for assistance best expressed this frustration; according to him, the training camps “start from nothing, and [is] in need of everything—food, car, ammunitions and weapons.”⁶⁶ Further exacerbating the situation, much of the supplies requested by Al-Qaeda operatives never arrived,⁶⁷ and the supplies that did survive would often disappear into the coffers of warlords by means of theft and extortion.⁶⁸ Al-Qaeda operatives did not expect operational expenses in Somalia to be high, they also did not account for the Somali warlords and clan leaders’ uncooperative nature.⁶⁹ These factors negatively impacted Al-Qaeda operations and appeared to have contributed to Al-Qaeda’s ultimate failure in Somalia during this period.

The consistent theme underlying these two factors is that the destabilized atmosphere in Somalia, which Al-Qaeda believed to be advantageous to its operational capacity, actually proved to be an unanticipated obstacle. Navigating the complexities of Somalia’s clan-oriented culture while financially covering the exorbitant cost of bribes and supplies, generated a far greater burden than Al-Qaeda had expected.⁷⁰ These obstacles simply could not be overcome during the 1990’s, and Somalia neither provided the “fertile grounds for Al-Qaeda terrorism” nor the jihadist ideology they promoted.⁷¹ As a result, it is logical to conclude that Somali Islamists were not closely aligned with Al-Qaeda

63. *Id.* at 15; see also *Mapping Militant Organizations: Al Ittihad Al Islamiya*, *supra* note 32.

64. Watts et al., *supra* note 21, at 15, 19-20.

65. *Id.* at 19-20.

66. *Letters on Al-Qaeda’s Operations in Africa*, Harmony Program AFGP-2002-800621, COMBATING TERRORISM CENTER AT WEST POINT, <http://www.ctc.usma.edu/wp-content/uploads/2013/10/Letters-on-al-Qaida%E2%80%99s-Operations-in-Africa-Translation1.pdf> (last visited Aug. 27, 2014).

67. Watts et al., *supra* note 21, at 19.

68. *Id.* at 19-20.

69. *Id.*

70. *Id.* at 19-20.

71. Hoehne, *supra* note 14, at 1.

during the 1990's.⁷²

3. Post 9/11 Islamism, the ICU, and the Transition into Terrorism

Despite the AIAI's decline forcing Somali Islamists into a "re-building period" and Al-Qaeda operations in the region having fundamentally failed, America incorrectly presumed the existence of a strong working relationship between Al-Qaeda and the AIAI.⁷³ For example, when Al-Qaeda claimed to have assisted in the battle of Mogadishu in 1993 and the U.S. Embassy attacks in Dar el Salaam and Nairobi in 1998, America assumed that Somali Islamists must have also contributed.⁷⁴ There is, however, an utter lack of evidence demonstrating Somali Islamist participation in the battle of Mogadishu, and "no one really knows" if the AIAI was linked to the embassy bombings.⁷⁵ Casting further doubt on this presumed relationship is the fact that the AIAI had been "defunct" since the above-mentioned 1996 Ethiopian incursion resulting from the AIAI's violence in Ogaden.⁷⁶ At that time, the AIAI simply lacked the motivation and capacity to materially participate in these attacks.⁷⁷ In summation, there is insufficient evidence to link the AIAI and Somali Islamists to Al-Qaeda terrorism and 9/11.

However, in the midst of the charged atmosphere surrounding the aftermath of 9/11, America continued to overestimate Al-Qaeda's relationship with the AIAI and Somali Islamists.⁷⁸ For instance, America mistakenly suspected that the Somali bank, Al-Barakaat, participated in the financing of the 9/11 attacks.⁷⁹ As a result, Somalia became a focal point of American scrutiny, which prompted America to launch a joint effort with Ethiopia to disrupt suspected terrorist activity.⁸⁰ In this joint operation, America hired Somali warlords to target prominent Islamists and persons believed to be affiliated with Al-Qaeda.⁸¹ On this note, recall that Islamism was not historically popular among the predominantly

72. *Id.*

73. Watts et al., *supra* note 21, at 38.

74. Holzer, *supra* note 15, at 28.

75. *Id.*

76. *Id.* at 28-29.

77. *Id.*

78. *Id.* at 37.

79. John Roth, Douglas Greenburg, & Serena Wille, Staff Report to Commission, *Monograph on Terrorist Financing*, NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S. 10, 82-84, http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf (last visited Sept. 26, 2014).

80. Hoehne, *supra* note 14, at 8.

81. *Id.*

Sufi majority in Somalia. Nevertheless, America's "dirty war" generated a great deal of Anti-American sentiment, which in turn engendered support for the Sharia courts and Islamist ideology generally.⁸² This public support bolstered the courts' influence, and in 2006, eleven prominent Sharia courts united and organized into the Islamic Courts Union (ICU).⁸³ It is difficult to determine with exact precision when the remnants of the AIAI merged with the ICU, but it is clear that after 9/11, the Sharia courts, and later, the ICU, operated as the primary Islamist institution in Somalia.⁸⁴ Like the AIAI, the ICU served as an umbrella organization for a diversity of Islamist views; and while the bulk of ICU factions were ideologically moderate, a small vein did practice more militant extremism.⁸⁵ Although this extremist network can trace its roots back to 2003, it did not emerge as an essential component of the ICU until 2006.⁸⁶

Despite the ICU's predominantly moderate tendencies, America imputed the violence of the extremist minority to the organization as a whole. This in turn perpetuated America's belief that Somali Islamists were intrinsically connected to Al-Qaeda.⁸⁷ As a result, America escalated its operations in Somalia by launching the Alliance for Restoration of Peace and Counter Terrorism (ARPCT) in 2006.⁸⁸ The ARPCT was another "dirty war" operation where American-funded warlords were tasked with abducting suspected terrorists and curtailing Islamist influence in Mogadishu, the capital of Somalia.⁸⁹ The ICU responded to this domestic aggression with escalated force, and after several months of intense fighting, the ICU gained total control of Mogadishu, which solidified their authority in Somalia.⁹⁰

Further exacerbating the situation, in July 2006, Osama Bin Laden

82. *Id.* at 8-9.

83. Isaac Kfir, *Islamic Radicalism in East Africa: Is There a Cause for Concern?*, 31 STUDIES IN CONFLICT & TERRORISM 829, 842 (2008), available at http://www.tandfonline.com/doi/abs/10.1080/10576100802291584#.Uq_vu2RDvN.

84. *Id.*

85. Hoehne, *supra* note 14, at 9.

86. Holzer, *supra* note 15, at 33.

87. *Id.*; see also Hoehne, *supra* note 14, at 10.

88. Holzer, *supra* note 15, at 34.

89. Hoehne, *supra* note 14, at 8.

90. BRONWYN E. BRUTON, COUNCIL ON FOREIGN RELATIONS, SOMALIA: A NEW APPROACH 7 (Special Report 52, Mar. 2010), available at http://www.worldcat.org/wcpa/oclc/792737380?page=frame&url=http%3A%2F%2Fwww.cfr.org%2Fcontent%2Fpublications%2Fattachments%2FSomalia_CSR52.pdf%26checksum%3D584621b9306f8aa15d495cc5eac2eac&title=&linktype=digitalObject&detail.

issued a message encouraging the ICU takeover and vocally threatening backlash should any international intervention occur.⁹¹ While unsolicited by the ICU, Bin Laden's statement only worsened America's perception of Somali Islamists by bolstering the organization's perceived relationship with Al-Qaeda.⁹² Rhetoric comparing the ICU to the Taliban was common during 2006 despite the fact that Sheikh Sharif Sheikh Ahmed, the leader of the ICU at this time, was widely regarded as a "moderate."⁹³ America's miscalculation of Al-Qaeda's relationship with the ICU is embodied in the official statement of Jendayi Frazer, the assistant Secretary of State for African Affairs during this time, in which she declared that the ICU is now "controlled by al-Qaeda cell individuals. The top layer of the Court are extremists. They are terrorists."⁹⁴ This statement possessed only a kernel of truth. While some Islamists with extremist tendencies transitioned from the AIAI to the ICU and ultimately to Al-Shabaab, these individuals represent the *exception*, not the rule.⁹⁵ Since the base majority of Somali Islamists held moderate beliefs, labeling Somali Islamists as terrorists and analogizing the ICU to the Taliban served only to strengthen the extremist minority and further elevate tension.⁹⁶ To make matters worse, Ethiopia and the recently ousted Transitional Federal Government (TFG), also perceived the growing strength of the ICU as a serious threat, causing the TFG to happily follow the United States' lead in adopting rhetoric artificially linking Somali Islamists to Al-Qaeda.⁹⁷

In December of 2006, Ethiopia launched an American-supported invasion that wrestled away control of Mogadishu from the ICU.⁹⁸ Ultimately, the ICU's military capacity lacked endurance and the Ethiopi-

91. Hoehne, *supra* note 14, at 10.

92. *Id.* at 10-11.

93. *Id.* at 1, 10, 25. See Kfir, *supra* note 83, at 842 (for an example of Taliban ICU comparison).

94. Gwynne Dyer, *Somalia: Back to Perpetual War*, GWYNNE DYER (Mar. 10, 2007), <http://gwynnedyer.com/tag/uic/>.

95. See Watts et al., *supra* note 21, at 113, 131.

96. Hoehne, *supra* note 144, at 25.

97. This was demonstrated in a formal 2006 letter to the Monitoring Group on Somalia in which Ethiopian officials emphatically asserted that "[t]he Horn of Africa region is currently the target of active destabilization by dangerous international terrorist groups." See Letter from Dawit Yohannes, Ambassador of Ethiopia, to Monitoring Group on Somalia (Oct. 9, 2006), reprinted in U.N. S.C. Rep. of the Monitoring Group on Somalia, Nov. 22, 2006, U.N. Doc. S/2006/913, Annex X, available at <http://www.fas.org/asmp/resources/govern/109th/S2006913.pdf>.

98. Hoehne, *supra* note 144, at 20, 25.

an occupation successfully forced the ICU's descent from prominence.⁹⁹

4. Rise of Al-Shabaab

Although the ICU was only in power for one year, the organizations meteoric rise and decline had a radicalizing effect that generated nationalist sentiment among many Somalis and established credibility for the Islamist movement.¹⁰⁰ This in turn opened the door for jihadist extremist factions to emerge from the remnants of the ICU, the most prominent of which would become known as the youth movement—Al-Shabaab.¹⁰¹ As the ICU declined, Al-Shabaab jihadists remained resilient and employed unconventional warfare and terrorist tactics against Ethiopian and TFG targets.¹⁰² In addition, the residual public support for the ICU was shifted to Al-Shabaab and as outrage toward the Ethiopian occupation grew, so too did Al-Shabaab's level of public support.¹⁰³

Since 2006, Al-Shabaab has emerged as the predominant Somali Islamist organization.¹⁰⁴ In 2008, America officially declared Al-Shabaab to be a terrorist organization and began conducting military operations.¹⁰⁵ Despite Al-Shabaab's continued increase in power and influence, it is important to note that the organization does not enjoy universal favor among the Somali people.¹⁰⁶ While some Somalis credit Al-Shabaab with improved regional security and stability, many actually criticize Al-Shabaab's ruthless recruitment tactics, punishments, and over-zealous religious mandates.¹⁰⁷

While instances of Al-Shabaab's violence have remained mostly localized in the Horn of Africa, the nature of their aggressive tactics may indicate that the organization is transitioning into an expansive international threat.¹⁰⁸ The most concerning of these tactics has been Al-

99. Hoehne, *supra* note 14, at 1.

100. Hoehne, *supra* note 144, at 9-11.

101. *Id.* at 12, 17-18; *see also* Watts et al., *supra* note 21, at 36.

102. Masters, *supra* note 20.

103. *Id.*; *see also* *Mapping Militant Organizations: Al Ittihad Al Islamiya*, *supra* note 32.

104. Masters, *supra* note 20.

105. *Id.*

106. *Mapping Militant Organizations: Al Shabaab*, *supra* note 38.

107. *Id.*; Mohamed Mohamed, *Somali Justice – Islamist Style*, BBC (May 20, 2009, 8:55 AM), <http://news.bbc.co.uk/2/hi/africa/8057179.stm>. For example, Al-Shabaab's requirement that women wear the traditional hijab and be fully covered at all times in public is greatly disfavored; these practices are foreign to Somali culture and counterproductive in the agrarian economy of rural Somalia.

108. *See* *Mapping Militant Organizations: Al Shabaab*, *supra* note 386 (specifically, in December 2010 an Al-Shabaab official stated that the group "would attack the U.S. if President

Shabaab's effective use of the Internet and social media websites, such as Twitter, to recruit foreigners into their ranks.¹⁰⁹ Americans comprise a substantial portion of foreign enlistments; it is estimated that from 2007 to 2010, Al-Shabaab had recruited more than forty Americans from Somali communities in Phoenix and Minneapolis to join their cause.¹¹⁰ Not only is this a novel method to spread jihadist propaganda, but it also presents a dangerous means of infiltration that could potentially produce catastrophic results. This threat of catastrophe nearly manifested itself in 2009 when the Australian government thwarted an attack on the Holsworthy Army Barracks in Sydney meant to be executed by Australian Somalis connected to Al-Shabaab.¹¹¹

Although Al-Shabaab is a prominent international terrorist organization, the extent of Al-Shabbab's connection with Al-Qaeda remains unclear.¹¹² Although Al-Shabaab's former leader, Mukhtar Abu al-Zubair, vocally pledged allegiance to Al-Qaeda in 2012, there is no indication that Al-Shabaab has wavered from its primary goal of "[turning] Somalia into a Shabab-ville where strict Islamic law rules everything,"¹¹³ Nonetheless, the future plans of Al-Shabaab remain unknown and only time will tell whether this terrorist organization will continue focusing its efforts within the Horn of Africa or if it is poised to act internationally.

III. AL-SHABBAB TODAY

The landscape of international Islamist terrorism is presently in flux. In the 2011 Report on Terrorism, the State Department concluded that the loss of Osama Bin Laden and the death of other prominent leadership has forced Al-Qaeda "on a path of decline that will be difficult to

Obama refuses to embrace Islam.").

109. Seth G. Jones, *The Terrorist Threat From Al Shabaab*, RAND CORP. 5 (Oct. 3, 2013), http://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT400/RAND_CT400.pdf.

110. *Id.* at 3.

111. *The enemy within: al-Shabab in Australia*, AUSTRALIAN NEWS COMMENT, <http://australian-news.net/articles/view.php?id=148> (last visited Sept. 25, 2014); *see also Al-Shabaab's American Recruits*, ANTI-DEFAMATION LEAGUE 2 (Oct. 2013), <http://www.adl.org/assets/pdf/combating-hate/al-shabaabs-american-recruits.pdf>.

112. *Mapping Militant Organizations: Al-Shabaab*, *supra* note 38.

113. *Id.*; *see also Mapping Militant Organizations: Al Shabaab*, *supra* note 38; CNN Wire Staff, *Al-Shabaab Joining Al-Qaeda, monitor group says*, CNN WORLD (Feb. 10, 2010, 1:07 AM), <http://www.cnn.com/2012/02/09/world/africa/somalia-shabaab-qaeda/>. (Mukhtar Abu al-Zubair stated: "[o]n behalf of the soldiers and the commanders in al-Shabaab, we pledge allegiance to you. So lead us to the path of jihad and martyrdom that was drawn by our imam, the martyr Osama.")

reverse.”¹¹⁴ In direct contrast, that same report focused in depth on the emergence of Al-Shabaab and described Al-Shabaab as possessing the “willingness and ability to conduct attacks outside of Somalia.”¹¹⁵

While it is unclear whether Al-Qaeda truly is in decline,¹¹⁶ the emphasis this report placed on Al-Shabaab is indicative of America’s growing apprehension towards the rapid development of this young, yet increasingly aggressive, terrorist organization.¹¹⁷ This concern has gained momentum and was especially relevant following Al-Shabaab’s attack on a Nairobi mall that resulted in at least sixty-seven deaths on September 21, 2013.¹¹⁸ Further complicating matters was the revelation that several Americans who joined Al-Shabaab participated in the attack.¹¹⁹

America’s response to this act of terror was both immediate and forceful. On October 5, 2013, American Navy SEALs conducted a raid on an Al-Shabaab compound in a failed attempt to capture a senior official in the group.¹²⁰ On October 29, 2013, an American drone strike killed two Al-Shabaab officials, including a top explosives expert.¹²¹ It is important to note that these examples are not isolated instances of forceful incursion. America has been openly conducting military operations against Al-Shabaab long before the organization gained the level of international notoriety it presently holds.¹²²

114. BUREAU OF COUNTERTERRORISM, *supra* note 4, at 5.

115. *Id.*

116. See generally Brian Michael Jenkins, *Al Qaeda in Its Third Decade: Irreversible Decline or Imminent Victory?*, RAND CORP. (2012), http://www.rand.org/pubs/occasional_papers/OP362.html.

117. *Id.*

118. *Kenya mall attack terrorists included “two or three” Americans, Kenyan foreign minister Amina Mohamed says*, CBS NEWS (Sept. 24, 2013, 1:18 AM), <http://www.cbsnews.com/news/kenya-mall-attack-terrorists-included-two-or-three-americans-kenyan-foreign-minister-amina-mohamed-says/> [hereinafter *Kenya mall attack included Americans*].

119. *Id.*; Lisa Millar, *Fears Al Shabaab a significant global terror threat*, ABC NEWS (Sept. 23, 2013, 8:30 AM), <http://www.abc.net.au/news/2013-09-23/fears-al-shabaab-a-significant-global-terror-threat/4974224>; see also *Al-Shabaab’s American Recruits*, *supra* note 111, at 2-5.

120. Abdalle Ahmed, Spencer Ackerman & David Smith, *How the US raid on al-Shabaab in Somalia went wrong*, THE GUARDIAN (Oct. 9, 2013, 8:35 AM), <http://www.theguardian.com/world/2013/oct/09/us-raid-al-shabaab-somalia-navy-seals>.

121. David Smith, *US drone strike in Somalia kills top al-Shabaab explosives expert*, THE GUARDIAN (Oct. 29, 2013), <http://www.theguardian.com/world/2013/oct/29/us-drone-strike-somalia-al-shabaab-expert>.

122. Woods, *supra* note 10.

IV. LEGAL ANALYSIS

The sole fact that Al-Shabaab is suspected of committing acts of terror does not by itself validate American drone and military strikes under domestic law. Although an official legal rationale for these strikes has never been promulgated, it has been strongly suggested that American officials believe Al-Shabaab falls within the authority granted by Congress in the 2001 AUMF.¹²³ This section will evaluate the validity of this belief by testing the applicability of the AUMF as well as the legally precarious *Associated Forces* expansion to Al-Shabaab. This discussion will comprehensively analyze and demonstrate that Al-Shabaab does not fulfill the AUMF's requirements. Therefore, authorizing military force against Al-Shabaab under the *Associated Forces* interpretation not only produces inconsistent results, but also raises serious legal questions. The ultimate purpose of this analysis is not narrowly focused on the legality of American use of force against Al-Shabaab. Rather, Al-Shabaab is merely a case study used to scrutinize the AUMF's viability in confronting this new generation of terrorist organizations.

Furthermore, none of this analysis is meant to imply that Al-Shabaab is harmless. On the contrary, Al-Shabaab's violent proclivities and proven ability to recruit American citizens into its ranks presents deeply troubling security concerns.¹²⁴ Even this, however, is no excuse for extralegal military action, and for the sake of transparency and credibility, America should cease these military strikes or congressionally evolve the AUMF to encompass Al-Shabaab and other emerging terrorist threats.

Part A will begin by providing a brief overview of the AUMF and how it has been applied during its lifetime. Part B will discuss the legislative history and subsequent application of the AUMF as well as explore the development of the expansive *Associated Forces* interpretation. Part C will conclude with an analytical comparison of the AUMF's application to Al-Qaeda versus the AUMF's application to Al-Shabaab. The purpose of this comparison is to illustrate a stark contrast and ultimately demonstrate that Al-Shabaab does not comfortably fall within any interpretation of the AUMF.

123. Bill Roggio, *US justifies Somalia raid under AUMF, which Obama seeks to repeal*, THE LONG WAR J. (Oct. 8, 2013), http://www.longwarjournal.org/archives/2013/10/us_justifies_somalia.php.

124. Jones, *supra* note 109, at 5.

1. The AUMF

In response to Al-Qaeda's terrorist attack on the Pentagon and World Trade Center, the AUMF, which Congress passed into law on September 18, 2001, provides:

"That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹²⁵

While clearly authorizing military action against Al-Qaeda and those responsible for 9/11, the AUMF, which remains unchanged after twelve years of conflict, has outgrown its purpose and seemingly evolved into a catchall justification for drone strikes against any Islamist organization with a proclivity towards terrorism.¹²⁶ Al-Shabaab is one such organization, and the use of AUMF language in conjunction with American drone and military strikes in Somalia strongly suggests that American officials believe that Al-Shabaab falls under the AUMF.¹²⁷ However, this broad application of the AUMF contradicts the express scope and language of the statute. On its face, the AUMF's limiting language and intentional use of the past tense narrowly construes authorization of force towards those persons, groups, or nations with some nexus to the 9/11 attacks.¹²⁸ As will be demonstrated in the subsequent analysis, Al-Shabaab lacks the requisite 9/11 connection, therefore, asserting the AUMF as justification for military strikes against Al-Shabaab is in clear violation of the statute's plain language.

This, however, is not the end of the analysis. During its extended life, the AUMF has found itself subject to gratuitous presidential interpretation that has expanded authorization to also encompass *Associated Forces*.¹²⁹ Regardless of the fact that this questionable expansion re-

125. Authorization for Use of Military Force, *supra* note 2, § 2(a).

126. See Roggio, *supra* note 106; see also Maria Newman, *Bin Laden Takes Responsibility for 9/11 Attacks in New Tape*, N. Y. TIMES (Oct. 29, 2004), http://www.nytimes.com/2004/10/29/international/30osamaCND.html?_r=0.

127. See *id.*

128. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (2007), available at <http://www.fas.org/sgp/crs/natsec/RS22357.pdf>; see also Interview with David Glazier, Int'l Law Professor, Loyola Law School, in L.A., Cal. (Sept. 20, 2013) (discussing the importance of tense in the AUMF).

129. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009).

mains entirely absent from the original language of the AUMF, alleged terrorist organizations are ostensibly labeled as *Associated Forces* and somehow shoehorned into the parameters of the AUMF.¹³⁰

2. *The History of the AUMF*

If the meaning of a statute is not clear from the plain language, meaning may also be derived from an analysis of the drafters' intent, the statute's subsequent interpretive application, and an examination of the statute's legislative history.¹³¹ While the language of the AUMF does not appear to be ambiguous, an evaluation of these factors is helpful to establish context and discover any implied authorization that may exist.

By design, no formal reports on the AUMF's legislative process were produced.¹³² However, comparing the language differences in each draft, can provide clarity as to the meaning behind the words.¹³³ The initial AUMF drafts proposed by the White House sought presidential authorization "to deter and pre-empt any future acts of terrorism or aggression against the United States."¹³⁴ The lack of clear target and durational parameters in this language raised controversy.¹³⁵ As Representative DeFazio argued on the floor: "[t]he earlier drafts ceded too much authority to the executive branch."¹³⁶ The congressional majority agreed with this notion, and the overly broad language in these early White House drafts was ultimately rejected by Congress in the final draft, which instead authorized the President "to use all necessary and appropriate force" in pursuit of those responsible for 9/11.¹³⁷ This revision makes it clear that Congress did not intend to provide broad and all-encompassing authorization for the President to confront all future terrorist threats with force.¹³⁸ To the contrary, Congress clearly intended

130. Lauren Harper, *Want to Know Who the US is at War With? Too Bad, Says Pentagon*, NAT'L SECURITY ARCHIVE (Sept. 4, 2013), <http://nsarchive.wordpress.com/2013/09/04/want-to-know-who-the-us-is-at-war-with-too-bad-says-pentagon/> (discussing how the list of "Associated Forces" remains classified. According to the Department of Defense, revealing the list could cause "serious damage to Security.").

131. For a description of Statutory Construction, see 48A FLA. JUR. 2D *Statutes* § 113 (2014).

132. GRIMMETT, *supra* note 128, at 2.

133. *Id.*

134. *Id.*

135. *Id.* at 2-3.

136. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 n.134 (2005).

137. Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (May 23, 2010), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>.

138. GRIMMETT, *supra* note 128, at 2.

to limit the AUMF to individuals, organizations, and nations that had some ascertainable connection to the 9/11 attacks.¹³⁹ As Representative Udall summarily noted: “[the AUMF] is broad, but it is not unlimited. It covers the culpable but it is not aimed at anyone else. In other words, in voting for this resolution, I am voting not for vengeance but for justice.”¹⁴⁰

Congress’s clear limiting intent did not insulate the AUMF from gratuitous interpretation. On September 20, 2011, just two days after the AUMF was codified, President Bush proclaimed: “[o]ur enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”¹⁴¹ This broad generalization of an “unbound war” against terrorism stands in stark contrast to the congressional intent encapsulated in the plain language of the AUMF.¹⁴² Indeed, President Bush’s statement seems to more readily coincide with the White House’s *proposed* authorization—“to deter and pre-empt any future acts of terrorism or aggression against the United States”—which was specifically rejected by Congress in favor of more limiting language.¹⁴³

When evaluating whether President Bush’s broad characterization of the AUMF possibly passes judicial muster, we are guided by Justice Jackson’s famous, yet admittedly oversimplified, classifications of presidential power from his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁴⁴ Justice Jackson’s concurrence provides that “the strongest of presumptions and the widest latitude of judicial interpretation” attach “[w]hen the President acts pursuant to an express or implied authorization of Congress.”¹⁴⁵ Some have argued that because Congress expressly authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons *he* determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,”¹⁴⁶ the President is awarded “the strong-

139. *Id.*

140. 147 CONG. REC 120, H5671, para. 3 (daily ed. Sept. 14, 2001), available at <http://www.gpo.gov/fdsys/pkg/CREC-2001-09-14/pdf/CREC-2001-09-14-pt1-PgH5638-4.pdf>.

141. Bradley & Goldsmith, *supra* note 136, at 2049.

142. *Id.* at 2049-52.

143. GRIMMETT, *supra* note 128, at 2-3.

144. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

145. Bradley & Goldsmith, *supra* note 136, at 2050; *see also* *Youngstown Sheet & Tube Co.*, 343 U.S. at 635, 637.

146. Authorization for Use of Military Force, *supra* note 2, § 2(a)

est presumption and the widest latitude” to make these arguably unreviewable determinations as he sees fit.¹⁴⁷ This argument, however, fails to consider Jackson’s Category 3, which provides that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb”¹⁴⁸ As clearly indicated in the AUMF’s drafting process and floor debates, Congress expressly intended the AUMF to be constrained only to those “nations, organizations, or persons” with a nexus to the 9/11 attacks.¹⁴⁹ Thus, construing this limited authorization expansively is “incompatible with the expressed or implied will of Congress” and therefore President Bush’s broad interpretation should be categorically rejected.¹⁵⁰

However, in the wake of 9/11, President Bush’s broad characterization of the AUMF was largely ignored because all the initial targets at that time clearly possessed the requisite 9/11 nexus and thus comfortably fell within the express authorization granted by Congress. Nevertheless, the residual effects were profound and President Bush’s expansive interpretation of the AUMF, made only days after its enactment, set precedent for broad Presidential interpretation inconsistent with the intended scope of the AUMF’s Congressional authorization.

3. *Development of the Associated Forces Expansion*

Application of the AUMF to the War on Terror quickly proved to be problematic.¹⁵¹ While the AUMF gave the President authorization to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,”¹⁵² actual application of the conventional wartime terminology to the amorphous and far from conventional War on Terror proved challenging. For example, in Afghanistan, Al-Qaeda was so interwoven with the Taliban and general populace that it proved difficult to simply identify and de-

147. Bradley & Goldsmith, *supra* note 140, at 2050, 2082.

148. *Id.* at 2050; *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

149. S.J. Res. 23, § 2(a).

150. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

151. Detention of Enemy Combatants Act, H.R. 1076, 109th Cong. (2005) (explaining that “The term ‘enemy combatant’ has historically referred to all of the citizens of a state with which the Nation is at war, and who are members of the armed force of that enemy state. Enemy combatants in the present conflict, however, come from many nations, wear no uniforms, and use unconventional weapons. Enemy combatants in the war on terrorism are not defined by simple, readily apparent criteria, such as citizenship or military uniform. And the power to name a citizen as an ‘enemy combatant’ is therefore extraordinarily broad.”)

152. *Id.*; S.J. Res. 23, § 2(a).

fine an individual's capacity in the hostilities.¹⁵³

In an attempt to alleviate this problem, President Bush issued a military order on November 13, 2001. Section 2 of this order provided that detention authority extended to individuals if:

“(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as [Al-Qaeda];

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor[e], that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.”¹⁵⁴

It is important to note that this order treated all detainees as “enemy combatants” subject to trial by military tribunals without application of the rules of evidence.¹⁵⁵

The parameters for detention authority set forth in section 2 of the order do not, in isolation, seem problematic. The language of the military order was largely adopted from the AUMF and the acceptable detainees under this order possess a nexus to Al-Qaeda.¹⁵⁶ While this may be true, the budding expansion to the AUMF did not reside within the express language of the order, but rather in the addition of the category *Associated Forces*, which appeared in the definition of “enemy combatant” on all the Combatant Status Review Tribunal (CSRT) forms:

An enemy combatant has been defined as “an individual who was part of or supporting the Taliban or [Al-Qaeda] forces, or *associated forces* that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”¹⁵⁷

153. See Detention of Enemy Combatants Act, *supra* note 151.

154. *Id.*

155. *Id.*

156. Compare Detention of Enemy Combatants Act, *supra* note 151 (language) with S.J. Res. 23. At this point Al-Qaeda was known to be the “nations, organizations, or persons [that] planned, authorized, [and] committed, the terrorist attacks that occurred on September 11, 2001.” See also Graham Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 377, 378 (2012) (emphasis added).

157. Combatant Status Review Board, *Summary of Evidence for Combatant Status Review*

As will be discussed below, the inclusion of *Associated Forces* to the “enemy combatant” umbrella expanded the parameters of the War on Terror beyond what the AUMF originally authorized. Nevertheless, the *Associated Forces* terminology received legislative support and was incorporated by Congress in the Military Commissions Act of 2006 and later again in the 2012 National Defense Authorization Act.¹⁵⁸

In the 2009 case *Hamlily v. Obama*, the D.C. Circuit affirmed the addition of *Associated Forces* with respect to the governments’ detention authority over alleged enemy combatants.¹⁵⁹ In its holding, the court provided that such authority extended to Al-Qaeda, the Taliban, and their “*Associated Forces*.”¹⁶⁰ The court defined *Associated Forces* as “co-belligerents” operating in conjunction with the goals of Al-Qaeda and the Taliban.¹⁶¹ In effect, the addition of *Associated Forces* in the *Hamlily* holding supported the assertion that America’s detention authority was not wholly constrained by the AUMF’s express limitations.¹⁶²

When President Obama took office in 2009, he vocally rejected the War on Terror and its attendant terminology popularized by the prior administration.¹⁶³ However, this rejection later proved to be hollow as AUMF authorization has further expanded under his administration’s watch.¹⁶⁴ Of particular note, President Obama’s administration has embraced the *Associated Forces* terminology, which was previously only applied in detention authority cases, and shoehorned the label into the umbrella of AUMF targets against which America is authorized to use lethal force.¹⁶⁵

This expansion was clearly demonstrated in the Department of Justice’s White Paper, which was allegedly leaked to the press on February

Tribunal, U.S. DEP’T OF DEFENSE (Aug. 7, 2004), http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/detainees.pdf (emphasis added).

158. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 948(a), 120 Stat. 2600, available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf; see also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298 (2011), available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>.

159. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009).

160. *Id.*

161. *Id.* at 70.

162. *Id.*; see also Combatant Status Review Board, *supra* note 157.

163. Daniel Halper, *Obama Rejects ‘Global War on Terror,’* THE WEEKLY STANDARD, (May 23, 2013, 2:04 PM), http://www.weeklystandard.com/blogs/obama-rejects-global-war-terror_728944.html.

164. See Peter Baker, *Obama’s War Over Terror*, N.Y. TIMES (Jan. 4, 2010), http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html?pagewanted=all&_r=1&.

165. Cronogue, *supra* note 156, at 378, 393-95.

4, 2013 in response to the controversy surrounding the killing of Anwar Al-Awlaki, and American citizen.¹⁶⁶ The White Paper outlined the legality of American international use of force and conspicuously included *Associated Forces* in conjunction with the AUMF authorization language: “[t]he President has authority to respond to the imminent threat posed by [Al-Qaeda] and its *Associated Forces* . . . [with] Congress’s authorization of the use of all necessary and appropriate military force against this enemy.”¹⁶⁷ President Obama corroborated this expansion of *Associated Forces* in a speech given to the National Defense University on May 23, 2013: “America’s actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces.”¹⁶⁸ Furthermore, in a speech given on November 30, 2012, Jeh Johnson, General Counsel for the Department of Defense from 2009 to 2012, stated: “[t]he United States government is in an armed conflict against al Qaeda and associated forces, to which the laws of armed conflict apply.”¹⁶⁹

How *Associated Forces* became acceptable targets in America’s War on Terror is puzzling and there has been surprisingly little discussion about how this expansion is legally permissible.¹⁷⁰ Nonetheless, the prior examples clearly indicate that the *Associated Forces* label has been constructively imputed into the framework of the AUMF despite the fact that this expansion contradicts the statute’s intended scope of authorization.¹⁷¹

166. Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS (Feb. 4, 2013, 5:57 PM), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans (explaining that Anwar Al-Awlaki was an American citizen that allegedly joined the Al-Qaeda branch in Yemen and was killed by a drone strike).

167. 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*, MSNBC, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (last visited Sept. 25, 2014) (emphasis added).

168. Obama’s Remarks, *supra* note 1.

169. Jeh Johnson, Gen. Counsel of the Dep’t of Def., Speech at Oxford Union (Feb. 30, 2012), available at http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/#_ftn11 (emphasis added).

170. Daskal & Vladeck, *supra* note 3, at 123.

171. Additionally, if the United States purports to abide by international law, then *Associated Forces* that have not engaged in hostilities against the United States are not legally permissible targets. While the details of international law fall outside the scope of this discussion, it is worth noting that the AUMF is essentially domestic legal recognition that America is involved in an

4. Analysis: Is Al-Shabaab an Authorized Adversary Under the AUMF?

After considering the plain language of the AUMF, its legislative history, and its recent application, it is appropriate to determine whether Al-Shabaab is subsumed under AUMF authorization. In answering this question, it is beneficial to first show the proper function of an AUMF application. Thus, each of the substantive elements in the AUMF will be delineated and briefly applied to clearly acceptable targets—Al-Qaeda and the Taliban.¹⁷² Such an application will benefit later analysis by demonstrating an applicable standard under the plain language of the AUMF that will be subsequently compared to Al-Shabaab.

The first element of the AUMF states, “[t]hat the President is authorized to use all necessary and appropriate force.”¹⁷³ As a preliminary matter, this language presumably encompasses drone and Special Forces strikes because these attacks have proven to be a highly successful and efficient means of combating terrorist organizations.¹⁷⁴ Additionally, common sense indicates that surgical military strikes result in less cumulative loss of life than utilizing American soldiers in traditional combat roles. Indeed, if these surgical strikes do not constitute “necessary and appropriate force,” then this AUMF element is effectively rendered useless. Of course, these strikes are not without controversy. Drone strikes in particular present substantial legal and ethical concern.¹⁷⁵ However, these concerns fall outside the scope of this analysis and America’s military strikes will be presumed “necessary and appropriate” when applied to Al-Qaeda and Al-Shabaab.¹⁷⁶

The second element authorizes force against “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁷⁷ This element, hereinafter the *Authorized Adversary* element, clearly encompasses—if not

armed conflict with Al-Qaeda, a group that engaged in sufficiently intense hostilities to justify the existence of an armed conflict under article 51 of the UN charter. However, *associated forces* that have never engaged in hostilities against the United States, such as Al-Shabaab, cannot be considered part of this armed conflict, and they cannot be included simply out of convenience. See Bradley & Goldsmith, *supra* note 136, at 2067-70, 2089-91.

172. Cronogue, *supra* note 156, at 378.

173. Authorization for Use of Military Force, *supra* note 2, § 2(a).

174. McDonnell, *supra* note 9, at 249, 279.

175. See generally McDonnell, *supra* note 9.

176. *Id.* at 264; see also S.J. Res. 23, § 2(a), § 2(a).

177. S.J. Res. 23, § 2(a).

expressly targets—both Al-Qaeda and the Taliban.¹⁷⁸ Al-Qaeda represents the organization that both planned and committed the 9/11 attacks while the Taliban in Afghanistan represents the government that harbored Al-Qaeda both before and after the attack.¹⁷⁹

The final AUMF element establishes the purpose of the AUMF: “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”¹⁸⁰ According to this *Purpose* element, for a target to fall within the AUMF’s umbrella, it must pose a future threat of terrorism to the United States.¹⁸¹ Al-Qaeda cleanly fulfills this requirement because the organization openly promotes a jihadist anti-American ideology and has demonstrated its ability to commit acts of terror against the United States.

The *Purpose* element, however, may additionally serve as a temporal limit that logically expires when the terrorist organization at issue no longer poses a threat of “international terrorism” against the United States.¹⁸² As indicated in America’s 2011 Country Report on Terrorism, many believed that the death of Osama Bin Laden coupled with America’s constant military pressure forced Al-Qaeda on a “path of decline that will be difficult to reverse.”¹⁸³ Consequently, it can be argued that the degradation of Al-Qaeda’s power in recent years has crippled the organization beyond effective operational capacity and thus the AUMF’s self-contained “sunset provision” should be invoked.¹⁸⁴

As Al-Qaeda was the primary culprit responsible for the 9/11 attacks and thus the focus of the American military response. Thus, it is to be expected that the organization, at least for a time, comfortably satis-

178. Cronogue, *supra* note 156, at 378.

179. See generally Newman, *supra* note 126; K. ALAN KRONSTADT & KENNETH KATZMAN, CRS REPORT FOR CONGRESS, ISLAMIST MILITANCY IN THE PAKISTAN-AFGHANISTAN BORDER REGION AND U.S. POLICY (R.L. 34763) (Nov. 21, 2008), available at <http://ipc.state.gov/documents/organization/113202.pdf> (summary); see also Barack Obama, President of the United States, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan>.

180. S.J. Res. 23, § 2(a).

181. Bradley & Goldsmith, *supra* 140, at 2072, 2111 (the methodology of fragmenting the AUMF into elements was adopted from this source).

182. Interview with David Glazier, *supra* note 128.

183. BUREAU OF COUNTERTERRORISM, *supra* note 4, at 5.

184. This is an argument to fully explore in another discussion, but it is worth mentioning here because the inclusion of this “sunset provision” in the AUMF lends additional support to the notion that Congress did not intend the AUMF to authorize a broad and unbound war on terror. For a discussion on this subject, see Daskal & Vladeck, *supra* note 3, at 18-19.

fied the AUMF's three elements.¹⁸⁵ Application of these elements to present day Islamist organizations, however, is not so clear. As the nexus between 9/11 and present day terrorist organizations has diminished, so too have the acceptable targets become less obvious.¹⁸⁶ The terrorist organization Al-Shabaab represents a prime example of this dilemma, and when one attempts to shoehorn Al-Shabaab into AUMF authorization, it becomes immediately apparent that such an application is problematic.

The first major issue generated by this application arises from the *Authorized Adversary* language in the second element of the AUMF. Congress specified a very narrow demographic by using past tense in the statute's plain language to authorize the use of force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."¹⁸⁷ This demographic does not include Al-Shabaab, quite simply, because Al-Shabaab did not exist on September 11, 2001.¹⁸⁸ As demonstrated in Section II of this article, Al-Shabaab emerged from the remnants of the ICU in 2006—five years *after* the 9/11 attacks.¹⁸⁹ Thus Al-Shabaab, as an independent entity, could neither have assisted Al-Qaeda nor participated in the attacks in any meaningful way. For this single reason it could be strongly argued that Al-Shabaab fails to satisfy the *Authorized Adversary* element of the AUMF.

This conclusion, however, is predicated on a literal reading of the *Authorized Adversary* element. A creative advocate of broad AUMF interpretation may attempt to exploit Al-Shabaab's history by arguing that authorization can be derived from previous Somali Islamist organizations.¹⁹⁰ This theory would contend that because Al-Shabaab's roots are interconnected with prior Somali Islamist organizations, and some extremist members of Al-Shabaab were also once members of the ICU and the AIAI, any connection drawn between these preceding Islamist organizations and pre-9/11 Al-Qaeda should be imputed to Al-

185. Newman, *supra* note 126.

186. Cronogue, *supra* note 156, at 378.

187. *Id.*

188. See *supra* text accompanying notes 81-87.

189. See *supra* text accompanying notes 81-87, 98-102.

190. For a similar argument, see James Phillips, *Somalia and al-Qaeda: Implications for the War on Terrorism*, THE HERITAGE FOUNDATION 7 (Apr. 5, 2002), <http://www.heritage.org/research/reports/2002/04/somalia-and-al-qaeda-implications-for-the-war-on-terrorism>.

Shabaab.¹⁹¹ Theoretically, this argument is plausible because such individuals do exist, albeit in very small numbers,¹⁹² and it is well established that Al-Qaeda agents were in contact with Somali Islamists during the 1990's in an effort to expand their operations into the Horn of Africa.¹⁹³

This argument falls short for several reasons. First, Somali Islamists during the 1990's had no known connection to 9/11, and although there were suspicions that financing for the attacks was wired through the Somali Al-Barakaat bank, these suspicions were ultimately proven to be incorrect.¹⁹⁴ Furthermore, as was discussed above, Al-Qaeda's operations in Somalia during this period were unsuccessful.¹⁹⁵ Numerous factors were responsible for this failure, but it was mostly Al-Qaeda's inability to overcome distrust while traversing the logistical challenges inherent in Somalia's clan-based identity and poor infrastructure that was responsible for the failure.¹⁹⁶ Finally, while it is true that Al-Qaeda agents resided in Somalia for the purpose of establishing training camps, it would be a gross overstatement to argue that Somali Islamists "harbored" Al-Qaeda terrorists.¹⁹⁷ In fact, immediately following 9/11, Somali Islamists closed the Al-Qaeda training camps for fear of American military reprisal, and Al-Qaeda agents in the region were forced to flee or go into hiding.¹⁹⁸ Even if one determines that Somali Islamists were technically "harboring" Al-Qaeda agents at the time of 9/11, the Al-Qaeda agents operating in Somalia had no known connection to the 9/11 attacks, and by all accounts, Al-Qaeda's relationship with Somali Islamists was purely superficial and lacked ideological harmony.¹⁹⁹ In addition, it is apparent from the Harmony Documents that Al-Qaeda's decision to commence operations in Somalia was unsolicited.²⁰⁰ There is no indication that Somali Islamists invited or offered a safe haven to Al-Qaeda operatives,²⁰¹ thus, asserting the AUMF's "harboring" language over Al-Shabaab merely because Al-Qaeda operatives were in contact with Somali Islamists prior to 9/11 seems untenable and does not reso-

191. See *supra* text accompanying notes 49-77.

192. Hoehne, *supra* note 14, at 4, 6.

193. See *supra* text accompanying notes 46-48; see also Watts et al., *supra* note 21, at 19.

194. See *supra* text accompanying notes 77-79.

195. See *supra* text accompanying notes 43-50.

196. See *supra* Section II.B.

197. See *supra* Section II.A.

198. Hoehne, *supra* note 14, at 7.

199. Watts et al., *supra* note 21, at 6.

200. *Id.* at 4-6.

201. *Id.* at 5-6.

nate with the established congressional intention.²⁰²

In summation, Al-Shabaab as an independent organization has no connection to 9/11, and any affiliation with Al-Qaeda that may be imputed from the AIAI or the ICU is so tenuous that to claim it falls within the scope of AUMF authorization would be disingenuous. Consequently, it is clear that AUMF authorization cannot be asserted over Al-Shabaab based on the *Authorized Adversary* element.

Applying AUMF authorization to Al-Shabaab under the third element is just as problematic. Under the *Purpose* element, military action is authorized “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons” that satisfy the preceding *Authorized Adversary* element.²⁰³ Thus, the final AUMF hoop requires that the targeted organization pose a continued terrorist threat to American security.

Even if we disregard the prior analysis and instead conclude to the contrary that Al-Shabaab does qualify as an *Authorized Adversary*, American officials have still repeatedly taken the stance that Al-Shabaab does not pose a threat to national security.²⁰⁴ Immediately following Al-Shabaab’s Nairobi mall attack on September 21, 2013, Attorney General Eric Holder asserted that there was no “specific, credible evidence” that Al-Shabaab was planning a terrorist attack on American soil.²⁰⁵ In addition, the associate director of the International Security and Defense Policy Center at RAND Corporation offered testimony before the Committee of Foreign Affairs on October 13, 2013 asserting that “Al-Shabaab does not appear to be plotting attacks against the U.S. homeland.”²⁰⁶ Although these statements suggest that American officials

202. See *supra* text accompanying notes 137-40.

203. Authorization for Use of Military Force, *supra* note 2, § 2(a).

204. Even if these statements are not reflective of America’s true belief about the threat Al-Shabaab presents to America, the result will probably be the same. The *Purpose* element of the AUMF is not operative in isolation and depends on the other two elements being satisfied. Pierre Thomas, *Holder Questions Al Shabab’s Ability to Strike Inside US Homeland*, ABC NEWS (Sept. 26, 2013) <http://abcnews.go.com/US/holder-questions-al-shababs-ability-strike-inside-us/story?id=20388547>.

205. *Id.*

206. Jones, *supra* note 109, at 2. It is worth noting that both of these statements focus on Homeland Security and fail to indicate whether Al-Shabaab poses a threat to American security abroad. Indeed, the RAND testimony expressly indicates that Al-Shabaab may pose such a threat; “as the Westgate Mall attack shows, Al-Shabaab has the capability to conduct high-profile attacks in the region. The United States should be on high alert in East Africa.” *Id.* While the AUMF may be read broadly enough to encompass embassies and other international American institutions, this discussion functions under the assumption that the *Purpose* element is read only to encompass attacks within the United States. The foundation for this assumption seems to stem

are unsettled about Al-Shabaab's recent aggression, it is clear that government officials do not currently believe Al-Shabaab poses a credible threat within America's borders.²⁰⁷ Consequently, it must be concluded that because America does not believe Al-Shabaab threatens "future acts of international terrorism against the United States," Al-Shabaab does not satisfy the *Purpose* element of the AUMF.²⁰⁸

From this analysis, it is clear that Al-Shabaab does not fulfill the requirements for either the *Authorized Adversary* element or the *Purpose* element. Therefore, it does not fall within the scope of AUMF authorization. This is not surprising since Congress intended the language in the original AUMF to be narrowly construed and authorization was meant to apply only to those organizations, such as Al-Qaeda, possessing a nexus to the 9/11 attacks.²⁰⁹ Al-Shabaab's clear failure to satisfy the AUMF's requirements lends strong support to the conclusion that American military strikes against this organization are extralegal.

Before the legal permissibility of military strikes against Al-Shabaab can be conclusively dismissed, however, it is necessary to determine if Al-Shabaab can qualify under the dubious *Associated Forces* label.²¹⁰ As will be demonstrated below, the definition of an *Associated Force* promulgated by the current administration is so ambiguous and all-encompassing that it essentially renders the AUMF's limitations moot.

According to the D.C. Circuit in *Hamliily*, an *Associated Force*, for the purpose of detention authority, is a "co-belligerent . . . fighting in association with one or more belligerent powers."²¹¹ While this definition is unhelpfully vague, the court provides some clarity in note 17: "'Associated Forces' does not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda—there must be an actual association in the current conflict with Al-Qaeda or the Taliban."²¹²

Note 17 in *Hamliily* provides clear guidance regarding the proper application of the *Associated Forces* label. This guidance has been seemingly dismissed by the Obama Administration, which has not only applied the *Associated Forces* label beyond the authority to detain, but

from the provided evidence that Congress intended the AUMF to be read narrowly.

207. *Id.*; see also Jones, note 109, at 2.

208. Authorization for Use of Military Force, *supra* note 2, § 2(a).

209. Bradley & Goldsmith, *supra* note 113640, at 2109.

210. *Hamliily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009).

211. *Id.* at 75.

212. *Id.* at 75 n.17

has also inexplicably redefined the term. Accordingly, an *Associated Force* now “[has] two characteristics: (1) [it is] an organized, armed group that has entered the fight alongside Al-Qaeda, and (2) [it] is a co-belligerent with Al-Qaeda in hostilities against the United States or its coalition partners.”²¹³ A cursory comparison of the *Hamlily* and Obama Administration’s definitions reveal that there is no universal understanding of what does and does not comprise an *Associated Forces*. As one scholar aptly puts it: “what exactly does it mean to be an ‘associated force?’ Are associated forces more closely tied to Al-Qaeda than its ‘allies’ or is this a lower standard? Is there a threshold level of support beyond which we call it ‘substantial?’”²¹⁴ All of these are excellent questions that, if answered, would provide much needed clarity. It does appear, however, that the American government has decided not to broach this subject.²¹⁵

The Obama Administration’s apparent willingness to not only expand application of the *Associated Forces* label to the use of lethal force, but also to fabricate a completely different standard for the term, has generated legitimate concern that the *Associated Forces* label is being used to circumvent the AUMF and justify military and drone strikes against “extra-AUMF” targets.²¹⁶ Al-Shabaab represents a group that illustrates this concern and the subsequent analysis will evaluate whether Al-Shabaab can be considered an *Associated Force*.

In accordance with the Obama Administration’s first requirement, no one disputes that Al-Shabaab is both armed and organized. However, whether or not Al-Shabaab “has entered the fight alongside Al-Qaeda” is questionable.²¹⁷ On the one hand, it is established that Al-Shabaab and preceding Somali Islamist organizations prior to 9/11 did utilize Al-Qaeda’s military and pecuniary assistance to facilitate their own military operations.²¹⁸ In addition, Al-Shabaab vocally supported Al-Qaeda in 2012 when Al-Shabaab’s leader, Mukhtar Abu al-Zubair, stated, “[o]n behalf of the soldiers and the commanders in Al-Shabaab, we pledge allegiance to you. So lead us to the path of jihad and martyrdom that was drawn by our imam, the martyr Osama.”²¹⁹

213. Johnson speech, *supra* note 169.

214. Cronogue, *supra* note 156, at 397.

215. Harper, *supra* note 113.

216. Daskal & Vladeck, *supra* note 3, at 7.

217. Johnson speech, *supra* note 169.

218. See *supra* Section II.

219. CNN Wire Staff, *supra* note 119(it is worth noting here that Pledging allegiance is not equivalent to swearing an Oath of Loyalty.)

Words, however, are not actions. To date, Al-Shabaab has never committed a terrorist attack reflecting Al-Qaeda's western-focused Jihad, nor has it assumed an operationally subservient position to Al-Qaeda command.²²⁰ In fact, Al-Shabaab, like all prior Somali Islamist organizations, has remained autonomous and mostly fixated on reclaiming territory from Ethiopia, destabilizing the Western constructed TFG, and establishing Sharia rule.²²¹ In addition, *Hamlily's* clarification that *Associated Forces* must share a connection greater than a mere abstract philosophy or common purpose with Al-Qaeda supports the argument that words alone are insufficient.²²² As a result, the evidence supporting a conclusion that Al-Shabaab "has entered the fight alongside [Al-] Qaeda" is not wholly dispositive.²²³

The second requirement mandates that the terrorist organization be "a co-belligerent with [Al-]Qaeda in hostilities against the United States or its coalition partners."²²⁴ As previously discussed, there is no "specific, credible evidence" that Al-Shabaab poses a threat within American borders.²²⁵ However, the inclusion of "coalition partners" seemingly represents a vast expansion of the AUMF's *Purpose* element. Under this expansion, not only would drone and military strikes no longer serve the purpose of only preventing "future acts of international terrorism against the United States," but it would also serve to protect any one of the fifty nations participating in the post-9/11 coalition against terrorism.²²⁶ Because some of these "coalition partners" (namely Ethiopia, Kenya, and Eritrea) have suffered the brunt of Al-Shabaab's aggression, it must be conceded that Al-Shabaab most likely satisfies the second *Associated Forces* requirement since the organization is engaged in hostilities against its coalition partners.

220. For a list of Al-Shabaab attacks, see *International Terrorist Symbol Database*, ADL, http://archive.adl.org/terrorism/symbols/al_shabaab.html.

221. *Mapping Militant Organizations: Al Itihad Al Islamiya*, *supra* note 37; *see generally Mapping Militant Organizations: Al-Shabaab*, *supra* note 31.

222. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009).

223. Johnson speech, *supra* note 169.

224. *Id.*

225. *See supra* text accompanying notes 206-208; Pierre Thomas, Mike Levine, Jack Date & Jack Cloherty, *Holder Questions Al Shabab's Ability To Strike Inside US Homeland*, ABC NEWS (Sept. 26 2013) available at <http://abcnews.go.com/US/holder-questions-al-shababs-ability-strike-inside-us/story?id=20388547>.

226. *Coalition Countries*, UNITED STATES CENTRAL COMMAND, <http://www.centcom.mil/en/countries/coalition> (last visited Dec. 15, 2013);

Authorization for Use of Military Force, *supra* note 2; *see also supra* Section II (discussing how Ethiopia has been in conflict with Somali *Islamists* for years, while Al-Shabaab recently attacked a mall in Nairobi Kenya).

While Al-Shabaab's status as an *Associated Force* is debatable, it is readily apparent that the organization could feasibly qualify as an *Associated Force* despite falling completely outside the scope of AUMF authorization. This apparent conflict is deeply concerning because the *Associated Forces* label sits on precarious legal footing and its existence blurs the AUMF's clear parameters.²²⁷

From a practical standpoint, the potential consequences of broad *Associated Forces* application are profound, and it seems impossible to reconcile the addition of "coalition partners" with the AUMF's *Purpose* element. With the addition of *Associated Forces*, application of military force is no longer constrained to those groups that pose a future threat of terrorism only to the United States, and the scope of the conflict has arguably expanded into a global war on terror.²²⁸ When considering this consequence, one cannot help but harken back to President Bush's foreshadowing statement made only two days after the AUMF's ratification: "[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."²²⁹

V. CONCLUSION

Based on the above analysis, it is clear that drone and military strikes against Al-Shabaab are not authorized under the limiting language of the AUMF, yet may nevertheless be permitted under the expansive *Associated Forces* interpretation. This apparent discrepancy is not localized to Al-Shabaab, but rather presents one example of the questionable analysis that flows from these often-conflicting justifications. Additionally problematic is the fact that the *Associated Forces* expansion does not rest on any clear legal footing, yet vastly expands the scope of the AUMF's congressionally intended authorization. The AUMF clearly and intentionally limited the scope of authorization to those sharing a nexus to 9/11, while the *Associated Forces* expansion purports a broad and "unbound" war on terror. This discrepancy produces applications that are both puzzling and contradictory.

227. Daskal & Vladeck, *supra* note 3, at 7.

228. Robert Chesney, *Thoughts on the Brennan Speech: Scope of the AUMF, CCF, JSOC, and Other Issues*, LAWFARE (May 2, 2012, 1:28 PM), <http://www.lawfareblog.com/2012/05/thoughts-on-the-brennan-speech-scope-of-the-aumf-ccf-jsoc-and-other-issues/>; see also Gabor Rona, *Thoughts on Brennan's Speech*, OPINO JURIS, (May 2, 2012, 3:18 AM), <http://opiniojuris.org/2012/05/02/thoughts-on-brennans-speech/>.

229. Bradley & Goldsmith, *supra* note 136, at 2049.

The apparent controversy between the AUMF and the *Associated Forces* label could have been resolved by section 1034 of the National Defense Authorization Act for the 2012 Fiscal Year. If passed, section 1034, Affirmation of Armed Conflict With Al-Qaeda, would have codified *Associated Forces* as a clear expansion to the AUMF and eliminated the “nebulous 9/11 requirement.”²³⁰ Curiously, the Obama Administration threatened to veto the bill, arguing that 1034 “would effectively recharacterize [the conflict’s] scope and . . . risk creating confusion regarding applicable standards.”²³¹ In the face of this presidential pressure, 1034 was removed from the final bill in favor of a restatement of America’s detention authority.²³²

Why President Obama opposed legislation that would provide a clear legal foundation to corroborate the questionable contemporary application of the *Associated Forces* label remains uncertain. Perhaps the reason was politically motivated, stemming from concern that the public eye would perceive 1034 as authorizing a permanent War on Terror. Indeed, support for this theory can be derived from a recent speech President Obama gave before the National Defense University where he asserted his intention “to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.”²³³ However, if the United States plans to continue adding to the patchwork of competing AUMF expansions in order to shoehorn additional terrorist organizations into the umbrella of authorization, is America not artificially extending the life of its original international armed conflict with Al-Qaeda? So long as that international armed conflict endures, are we not “on a perpetual wartime footing?”

As recent events have clearly articulated, the face of terrorism is in flux. Young terrorist organizations—organizations such as Al-Shabaab that possess little or no connection to 9/11—are emerging and employing new recruitment and terror tactics that resonate with the modern age. It is time for the American government to honestly reassess its dat-

230. Cronogue, *supra* note 156, at 396.

231. Chris Anders, *Obama White House Threatens a Veto Over Worldwide War and Detention Provisions*, ACLU BLOG OF RIGHTS (May 24, 2011, 9:03 PM), <https://www.aclu.org/blog/national-security/obama-white-house-threatens-veto-over-worldwide-war-and-detention-provisions>.

232. For the final language of 1034, see National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1034, 125 Stat. 1298 (2011), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>.

233. Obama’s Remarks, *supra* note 1.

ed policy on terrorism because, with each passing year, application of the AUMF becomes more tenuous and the language fades further from relevance. Moreover, relying on the legally ambiguous *Associated Forces* expansion to pick up the slack where the AUMF falls short is a disingenuous solution not befitting our great Nation. Whether the American government decides to deactivate the AUMF and phase out the War on Terror, or pass new legislation that comfortably encompasses Al-Shabaab and other modern day terrorist threats, is a decision to be made through timely debate and the democratic process. Whatever the case, it is undeniable that after twelve years of hard-riden mileage spanning two presidential administrations, the AUMF's utility has run its course.