AN ENEMY BY ANY OTHER NAME: THE NECESSITY OF AN "ASSOCIATED FORCES" STANDARD THAT ACCOUNTS FOR AL QAEDA'S CHANGING NATURE

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"A rose by any other name would smell as sweet."

WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 1.

I. INTRODUCTION

In the decade after the United States began its systematic war against Islamist terrorism in the wake of September 11, 2001, the face of the enemy has changed. After successes against the al Qaeda network degraded that group's ability to wage jihad, other regional Islamist groups have taken center stage in the ongoing global conflict.[1] Instead of orders coming from the hierarchical al Qaeda structure, groups like al Qaeda in the Islamic Maghreb (AQIM) and al Qaeda in the Arabian Peninsula (AQAP) are now prosecuting a decentralized campaign against extreme Islamism's perceived enemies.[2] These new groups are as dangerous, or possibly even more dangerous, than their al Qaeda progenitor, and some believe that these second-generation terrorist groups pose the greatest threat to launch an attack against the United States.[3] Al Qaeda's decentralized reorganization has only increased since the Arab Spring, as al Qaeda's affiliates have rushed in to fill the power vacuum left behind by the toppled regimes.[4] From Yemen to Egypt to Libya, Islamist militants have begun joining new regional al Qaeda franchises in their campaign against the West. The name of the United States' enemy has changed, but its nature and intent remain the same.

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[1] An increasingly large number of regional groups are in various states of coordination with al Qaeda, including the Boko Haram in northern Nigeria, the Salafist Group for Call and Combat in Algeria, al Qaeda in the Islamic Maghreb in Mali, Ansar al Jihad in Egypt, and al Qaeda in Iraq (AQI) in the years following Operation Iraqi Freedom. *See* Robert M. Chesney, *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 195 (2013).

[2] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109-11 (2005).

[3] *Understanding the Homeland Threat Landscape—Considerations for the 112th Congress: Hearing Before the H. Comm. on Homeland Sec.,* 112th Cong. 26 (2011) (testimony of Michael Leiter, Dir., Nat'l Counterterrorism Ctr.), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72212/pdf/CHRG-112hhrg72212.pdf ("[A]l Qaeda in the Arabian Peninsula . . . [is] probably the most significant risk to the U.S. homeland.").

[4] FRED BURTON & SAMUEL M. KATZ, UNDER FIRE: THE UNTOLD STORY OF THE ATTACK IN BENGHAZI 256 (2013) ("[Al Qaeda] was moving its base of operations from Afghanistan and Pakistan, and even from Arabia, to the new and fertile grounds of North Africa. All this coincided with the regional power vacuum that opened up as a result of the Arab Spring. It was a perfect storm of rage, violence, and Islamic fervor.").

On September 21, 2013, the new face of Islamist terrorism made worldwide news when gunmen from the Somali-based terror group al Shabaab[5] attacked the Westgate mall in Nairobi, Kenya.[6] While details about the attack remain vague, between six and fifteen armed al Shabaab members killed sixty-seven people during the four day siege of the upscale African shopping center.[7] The attack marked a pivotal shift for al Shabaab; the group had previously been more focused on local insurgency operations in Somalia.[8] By targeting only non-Muslims at a Western shopping center, al Shabaab followed the example set by AQAP and AQM in attacking American and Western targets.[9]

Domestic law should account for al Qaeda's organizational change in a way that does not limit the ability of the United States to confront its enemies.[10] The Authorization for the Use of Military Force (AUMF), signed on September 18, 2001, gave the president explicit authority to engage and destroy the groups that had perpetrated the attacks on the World Trade Center and the Pentagon.[11]

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[5] *See* Chesney, *supra* note 1, at 192-93 ("Al-Shabaab originated as the youth wing of a coalition of Somali political factions and extremist groups collected under the label the Islamic Courts Union (ICU), which seized control across a wide swath of southern Somalia in 2006. An Ethiopian invasion that same year broke the ICU's power, which helped trigger al-Shabaab's emergence as a fully independent organization . . . al-Shabaab managed to retake much of southern Somalia, mounting a persistent campaign of attacks—including suicide bombings—against Somalia's transitional government in Mogadishu and the African Union peacekeepers that supported it.").

[6] Tom Pettifor, *Nairobi Attack: Kenya Shopping Mall Terror Gang "Helpers" in the Dock on "Aiding Extremist" Charges*, MIRROR (Nov. 11, 2013), http://www.mirror.co.uk/news/world-news/nairobi-attack-kenya-shopping-mall-2766183.

[7] *Nairobi Siege*: *How the Attack Happened*, BBC (Oct. 18, 2013), http://www.bbc.co.uk/news/world-africa-24189116.

[8] Tim Marshall, *Kenya Siege Sees Al Shabaab Widen Its Focus*, SKY NEWS (Sept. 23, 2013), http://news.sky.com/story/1145520/kenya-siege-sees-al-shabaab-widen-its-focus.

[9] *See* Chesney, *supra* note 1, at 165.

[10] This Article focuses on the impact of domestic law on the ability to engage in combat operations and not on the legality of the non-international armed conflict against international terrorism. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006) (finding that the conflict with al Qaeda was a noninternational armed conflict). The legality of kinetic operations in the United States is a two-fold inquiry: (1) it must be legal under international law to attack the target, and (2) the president must have the authority to order the attack under domestic law. The legality under international law of America's fight against international terrorism stems from both United Nations Security Council resolutions and America's inherent right of self-defense under Article 52 of the United Nations Charter. *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) ("[T]he use of force against members of [al Qaeda] is authorized under both international and U.S. law, including both the inherent right of self-defense and the [AUMF]."). This Article, however, focuses on the possibility that domestic law might limit action that would otherwise be permissible under international law.

[11] Pub. L. 107-40, 115 Stat. 224 (2001).

This Article argues that the AUMF, and subsequent legislation updating that law, must be interpreted to account for al Qaeda's constant metamorphosis. While their names may change as they centralize and decentralize, armed Islamist extremists remain the enemy that carried out the September 11, 2001 attacks, and they remain the belligerents in the ongoing War on Terror.[12]

This Article argues that the AUMF authorizes the president to use military force against al Qaeda's "associated forces," and that authorization is critical to America's ability to target an enemy that is undergoing an internal reorganization.[13] The proper scope of "associated forces" has been applied in the detention context, where courts have held that the United States has the authority to detain members of al Qaeda's "cobelligerents," as that term is defined under the Law of Armed Conflict (LOAC). More recently, however, the Obama administration has begun defining "associated force" as a group that meets two characteristics: "(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."[14] The first prong of this definition, however, is problematic because organized armed groups "fight[ing] alongside al Qaeda" already constitute cobelligerents; that is, the first prong in the definition is a subset of the second prong of the definition. Functionally, this limits "associated forces" to a subset of al Qaeda's cobelligerents and could allow cobelligerents who do not conduct joint operations with al Qaeda to avoid targeting by the American military. The two-pronged definition thus artificially allows militant groups to find shelter in a legal fiction that they are not technically part of al Qaeda, even though they are lawful targets under the LOAC.

Part I of this Article argues that the "associated forces" provisions developed in detainee jurisprudence apply to the AUMF's use of force authority. Part II discusses the two current definitions for "associated forces" that are currently being used. Part III argues that an "associated force" is best defined as "cobelligerent" under the LOAC.

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[12] President George W. Bush, Address to the Joint Session of the 107th Congress (Sept. 20, 2001) ("Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.").

[13] In the modern era of irregular war and terrorists who refuse to identify themselves as part of a hostile force, there has been movement away from status-based targeting based on membership in a group. *See* Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1525-33 (2013). Nevertheless, status-based targeting still remains valid internationally.

[14] Jeh Johnson, Remarks at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) [hereinafter Johnson, Remarks at Yale], *available at* http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448; *see also* New York Times v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. Jan. 3, 2013).

II. THE "ASSOCIATED FORCES" LANGUAGE OF THE NATIONAL DEFENSE AUTHORIZATION ACT'S DETENTION PROVISIONS APPLIES TO THE AUMF'S USE OF FORCE AUTHORIZATION

While the president maintains general authority to engage enemies of the United States under his general Article II powers, the conflict against al Qaeda has largely been waged under the authority of the AUMF.[15] The AUMF authorized action against the perpetrators of September 11, 2001:

> 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.[16]

While the AUMF does not explicitly state that force could be used against al Qaeda affiliates, both the Bush and Obama administrations have relied on the AUMF to justify a variety of actions, including the detention of suspected terrorists not in al Qaeda and drone strikes in Yemen.[17]

Congress contextualized the AUMF in 2011, when it passed the National Defense Authorization Act (NDAA).[18] The NDAA included a section entitled "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force" (Affirmation of Authority).[19] The Affirmation of Authority clarified that the president's authority under the AUMF included the right to detain "covered persons," even though the term "detention" did not appear in the AUMF's text.[20] The Affirmation of Authority then defined "covered persons" to include any

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[15] Johnson, Remarks at Yale, *supra* note 14 ("[I]n the conflict against al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by the Congress one week after 9/11.").

[16] Pub. L. 107-40, 115 Stat. 224 (2001).

[17] *See generally* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* www.state.gov/s/l/releases/remarks/139119.htm ("[T]he United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.").

[18] Pub. L. No. 112-81, 125 Stat. 1298 (2011).

[19] *Id.* at § 1021.

[20] *Id.* at § 1021(a).

person "who was a part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[21]

The Affirmation of Authority, even though it ostensibly addresses only the president's right to detain individuals, bears on the proper interpretation of the use of force under the AUMF because the Affirmation of Authority, by its own terms, was merely a clarification of authority that had previously existed: "[n]othing in this section is intended to limit or expand the authority of the president or the scope of the Authorization for Use of Military Force."[22] Indeed, President Obama explicitly stated that section 1021 "breaks no new ground and is unnecessary."[23] Put another way, because the Affirmation of Authority applies to al Qaeda's "associated forces," and the Affirmation of Authority was coextensive with the AUMF, the AUMF applies to al Qaeda's "associated forces." Thus, the AUMF authorizes the use of force against "associated forces."[24]

The applicability of the Affirmation of Authority to the use of force is reflected in the fact that the original version of the Affirmation of Authority mirrored the AUMF and explicitly stated that the United States had the authority to use force against al Qaeda's allies: "the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force."[25] That version of the Affirmation of Authority went on to explain that such an interpretation of the use of force was appropriate because the "current armed conflict" against al Qaeda included its "associated forces."[26] The Senate, however, passed a different version of the bill that instead focused on the detention issue.[27]

The Obama administration has recognized the fact that the use of force has been authorized against "associated forces," even though it has not released an unclassified list of all "associated forces."[28] The starting point for this analysis is

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[21] *Id.* at § 1021(b).

[22] *Id.* at § 1021(d).

[23] *See* Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 201100978 (Dec. 31, 2011).

[24] *See* Hedges v. Obama, 724 F.3d 170, 190 (2d Cir. 2013) ("[Section 1021(b)(2)] is concerned with the organizations responsible for 9/11—al-Qaeda and the Taliban. . . . Section 1021(b)(2) naturally is understood to affirm that the general AUMF authority to use force against these organizations includes the more specific authority to detain those who were part of, or those who substantially supported, these organizations or associated forces.").

[25] H.R. 1540, 112th Cong. § 1034(2) (as reported by H. Comm. On Armed Servs., May 17, 2011).

[26] *Id*.

[27] *See* H.R. 1450, 112th Cong. §1032 (as engrossed by S. Armed Servs. Comm., Dec. 1, 2011).

[28] Koh, *supra* note 17.

the fact that the Obama administration, like the Bush administration before it, believes that "as a matter of international law, the United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces. . . . [I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law."[29] State Department Legal Adviser, Harold Koh, explained that the United States therefore has the authority under both international and domestic law to use force against "associated forces": "all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces . . . comply with all applicable law."[30] The administration's recognition of the scope of the use of force is important because, at least when signing the NDAA, President Obama expressed general reservations about the language in § 1021(b).[31]

The ability to use force against "associated forces" is important because the regional extremist Islamist groups waging an armed conflict against the United States often do not conduct joint operations with al Qaeda. An authorization for the use of force that was limited exclusively to the al Qaeda organization would thus have a glaring Achilles heel: Islamic extremists could rename themselves something other than al Qaeda, and continue in the same armed conflict against the United States, but become immune to action because they would ostensibly be a new organization not named in the AUMF. The inclusion of "associated forces" accords the law with the reality that al Qaeda's armed allies must be subject to targeting.

The ability to target "associated forces" as such, and not simply to target suspected individuals while they are engaging in terrorist activities, is vital to America's ability to dismantle al Qaeda's allies. This type of targeting, known as status-based targeting because it allows a belligerent to target members of an enemy's forces based on their membership, is distinct from conduct-based targeting, which focuses on a potential target's contemporaneous conduct.[32] The subjects of conduct-based targeting are only lawful targets while they are engaging in hostile actions; when those individuals cease their hostile activity, they can no longer be targeted.[33] Both of these targeting methodologies are

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[29] *Id*.; *but see* Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum: Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6, ¶¶ 33, 53 (May 28, 2010) (by Philip Alston) (stating that it was "problematic" for the United States to claim that it is in an armed conflict with al Qaeda, the Taliban, and associated forces "outside the context of the armed conflicts in Afghanistan or Iraq," and that if the United States is not in an armed conflict with al Qaeda, such targeted killings "cannot be legal" under international law).

[30] Koh, *supra* note 17.

[31] *See* Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, *supra* note 23.

[32] *See* Rachel E. Vanlandingham, *Meaingful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 103-04 (2013).

[33] *See* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 705 (2010).

premised on the LOAC principle of distinction, which requires that militaries distinguish belligerents from civilians. Status-based targeting stands for the proposition that certain groups are so involved with belligerent hostilities that mere membership in that group is sufficient to make an individual a target. Conduct-based targeting applies when there is no culpable membership and a belligerent is only distinguishable because of his actions. But these two topics are related:

> status-based targeting today is actually an expanded version of conduct-based targeting . . . : it looks to conduct in connection with a group, presumably over a period of time, to label an individual as a member of an armed group. . . . Once labeled, the member is subject to status-based targeting based on that membership classification.[34]

Identifying and tracking members of al Qaeda's progeny is astoundingly difficult, and mobilizing military assets to engage in kinetic operations against al Qaeda in time-sensitive situations is even more challenging. Status-based targeting makes the fight easier because members of al Qaeda's "associated forces" would not sporadically become immune to targeting, depending on their conduct; rather, once identified, they could be tracked and targeted when militarily feasible. The reality is that "associated forces" are organized enemies of the United States, and they should be targeted as such.

III. "ASSOCIATED FORCES" IS DEFINED IN DETAINEE LITIGATION AS AL QAEDA'S "COBELLIGERENTS"

Given the fact that the United States can use force against "associated forces," the next step in engaging a constantly transforming al Qaeda is determining the identity of al Qaeda's "associated forces." This term is as yet undefined by the Affirmation of Authority and the NDAA.[35] However, two related definitions have been forged to delineate the contours of what constitutes an "associated force": (1) the courts in the D.C. Circuit have defined the term as synonymous with the LOAC concept of a cobelligerent, and (2) the administration has recently begun to use a two-pronged standard that requires an "associated force" to be a cobelligerent *and* "an organized, armed group that has entered the fight alongside al Qaeda."

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[34] *See* Vanlandingham, *supra* note 32, at 120.

[35] *See* Pub. L. No. 112-81, § 1021.

A. The D.C. Circuit's Cobelligerent Standard

The first definition of "associated force" stems from the Guantanamo detainee litigation in the D.C. Circuit. After an extended series of Supreme Court decisions and Congressional actions,[36] the Supreme Court ultimately held that the D.C. Circuit has constitutional jurisdiction over Guantanamo detainees' habeas challenges to their ongoing detention.[37] As a result, the D.C. Circuit has had to grapple with how to define "associated forces" in the detention context, and its decisions shed light on how that term should be interpreted.

Early detainee cases highlighted the absence of a workable standard for determining whether a group was an ally of al Qaeda. For example, in 2008, in *Parhat v. Gates*, the Department of Defense argued in favor of a Combatant Status Review Tribunal (CSRT), finding that the detainee was an enemy combatant because the detainee was a part of the East Turkistan Islamic Movement (ETIM) and the ETIM was "associated" with al Qaeda.[38] The government argued that the ETIM was "associated" with al Qaeda because it was "effectively part of the same organization."[39] The court did not decide on the propriety of that definition, but merely found that the evidence was not sufficient to establish, under any proposed definition, that the ETIM was "associated" with al Qaeda.[40]

The definitional vacuum regarding what was meant by "associated forces" was filled in March 2009, when the Obama administration filed a memorandum (the March 2009 Memo) with the D.C. District Court, as part of the briefing in *Hamlily v. Obama*.[41] In that memorandum, the United States explained that the AUMF's authorization to target "organizations" extended beyond "just al-

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[36] In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court found the federal habeas corpus statute, 28 U.S.C. § 2241 (2000), gave the D.C. Circuit habeas jurisdiction over Guantanamo detainees. Congress subsequently stripped the federal courts of habeas jurisdiction in in the Detainee Treatment Act of 2005 (DTA). *See* Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741-43. The Supreme Court responded in 2006 with *Hamdan v. Rumsfeld*, 548 U.S. 557, 574-84 (2006), finding that the DTA did not retroactively apply to preexisting suits. Congress responded to *Hamdan* with the Military Commissions Act of 2006 (MCA). Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36.

[37] Boumediene v. Bush, 553 U.S. 723, 735-37, 797-99 (2008) (recognizing Constitutional jurisdiction over Guantanamo Bay detainees).

[38] 532 F. 3d 834, 843 (D.C. Cir. 2008). The Department of Defense posited a three-part test for determining whether the petitioner could be detained because of his membership in the ETIM: "1) the petitioner was part of or supporting 'forces'; (2) those forces were associated with al Qaida or the Taliban; and (3) those forces are engaged in hostilities against the United States or its coalition partners." *Id.*

[39] *Id.* at 844 (internal quotations omitted).

[40] *Id.* at 846.

[41] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, in re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

Qaida or the Taliban."[42] As part of the AUMF's authorization "to prevent any future acts of international terrorism against the United States," the March 2009 Memo argued that the United States had the authority to detain individuals who acted as al Qaida's cobelligerents.[43] In short, the administration announced that its domestic authorization for determining an enemy's allies would accord with LOAC's standards for that same determination.

As the seminal case on the "associated forces" standard, *Hamlily v. Obama* adopted the government's position that the phrase "associated forces" was synonymous with "co-belligerents," explaining that "[o]ne only attains co-belligerent status by violating the law of neutrality—i.e., the duty of non-participation and impartiality."[44] Under the LOAC, that test for "cobelligerents" was the standard for determining whether a third party's ally had joined the conflict. The *Hamlily* court drew a parallel to the historical treatment of Vichy French forces in World War II, and how the United States targeted Vichy forces in North Africa, even though Vichy France had not been included in the congressional war declaration or authorization of force.[45] Because Vichy France had a loose alliance with Nazi Germany, operated under German influence, and engaged in several battles against Great Britain, the United States attacked Vichy forces without legal controversy.[46] The *Hamlily* court ultimately clarified that cobelligerent status only extends to those actually engaged in armed conflict, and does not include terrorist groups that simply "share[d] an abstract philosophy or even a common purpose with al Qaeda."[47] The use of cobelligerent jurisprudence in making the "associated forces" determination is now the clear majority rule.[48]

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[42] *Id.* at 7.

[43] *Id*. ("[T]he United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.").

[44] 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009).

[45] *Id*. at 75; *see also* Bradley & Goldsmith, *supra* note 2 (giving greater background on Vichy conflict).

[46] *See* Bradley & Goldsmith, *supra* note 2, at 2112.

[47] 616 F. Supp. 2d at 75 n.17; *see also* Hedges v. Obama, 724 F.3d 170, 187 (2d Cir. 2013) (accepting government position that "individuals who engage in independent journalistic activities or independent public advocacy . . . are not subject to law of war detention" and are not "associated forces").

[48] *See* Khan v. Obama, 655 F.3d 20, 23, 33-34 (D.C. Cir. 2010) (finding that the Hezb-i-Islami Gulbuddin was an "associated force" because it "engaged in hostilities against the United States or its coalition partners"); Al-Bihani v. Obama, 590 F.3d 866, 873-84 (D.C. Cir. 2010) (finding that the 55th Arab Brigade was an "associated force" because it "defended the Taliban against the Northern Alliance's efforts to oust the regime from power"); Anam v. Obama, 653 F. Supp. 2d. 62, 64 (D.D.C. 2009) ("The Court hereby adopts the *Hamlily* opinion."); Ali v. Obama, No. 09-745, 2009 WL 4030864, at *3 (D.D.C. Nov. 19, 2009).

The use of cobelligerent jurisprudence, with its roots in the CSRTs set up after the Supreme Court's ruling in *Hamdi v. Rumsfeld*[49] and a 2005 Harvard Law Review article,[50] accorded international and domestic paradigms that were attempting to do the same thing: determine an enemy's allies. In effect, in order to determine which of al Qaeda's allies are sufficiently associated to warrant detention, the court should look to the law that determined which of al Qaeda's allies are sufficiently associated to warrant the use of force. Indeed, the Supreme Court has held that the power to detain is inextricably linked to the power to use force: "detention of individuals who fought against the United States in Afghanistan . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized [in the AUMF]."[51]

In sum, the courts in the D.C. Circuit have defined "associated forces" in the detention context as cobelligerents. This standard, guided by LOAC principles and endorsed by the executive branch in the March 2009 Memorandum,

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[49] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004) (finding that Guantanamo detainees had a right to challenge their status as enemy combatants). In the wake of the *Hamdi* decision, the Department of Defense set up CSRTs to give detainees the ability to challenge their status. CSRT members were instructed that detention was proper for individuals who were "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States. . . . This includes any person who has committed a belligerent act or has directly supported hostilities in the aid of enemy armed forces." *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def. on the Order Establishing Combatant Status Review Tribunals § a (July 7, 2004); *see also* Sec'y of the Navy, Memorandum on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba Enclosure (1), § B (July 29, 2004). When the CSRTs were replaced by the more robust commissions in the Military Commissions Act of 2006, the commission members were instructed to determine the propriety of detention by again determining whether detainees were "part of the Taliban, al Qaeda, or associated forces." Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600 ("The term 'unlawful enemy combatant' means . . . a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces.)").

[50] *See* Bradley & Goldsmith, *supra* note 2, at 2112-13. Curtis Bradley, a former Counselor on International Law in the Legal Adviser's Office of the Department of State, and Jack Goldsmith, former Special Counsel to the General Counsel of the Department of Defense, argued that LOAC's paradigm for determining when a nation's conduct was sufficient to make it a cobelligerent offered insightful guidance on determining what constituted an "associated force." *Id.* at 2109-12. It is hard to overstate the impact this article has had on the jurisprudence; in addition to having been quoted by the court in *Hamlily*, the article has been cited by two different Courts of Appeal, over 30 appellate briefs, and over 247 law review articles as of November 2013. *See* Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010); al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008).

[51] Boumediene v. Bush, 553 U.S. 723, 733 (2008) (discussing *Hamdi*, 542 U.S. at 513).

sets forth clear guidelines for determining which of al Qaeda's allies' are subject to detention.

B. The Obama Administration's Two-Pronged Definition that Requires Groups to Have "Entered the Fight Alongside al Qaeda"

In late 2012, the Obama administration began using a slightly different definition of "associated forces," which modified the cobelligerent standard used by the courts in the D.C. Circuit. As explained by Department of Defense General Counsel, Jeh Johnson, the administration "defined an 'associated force' as having two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."[52] The government has also begun using this definition in its judicial briefings.[53]

This definition overlays the cobelligerent standard with an extra prong that itself contains two requirements: (1) the force must be an "organized, armed group," and (2) the force must have "entered the fight alongside al Qaeda." The requirement that the "associated force" be an organized group is an appropriate limitation because that bridges the analytical gap between neutrality law's traditional focus on nation-states and al Qaeda's status as a transnational organization; in other words, that requirement limits the application of neutrality law to organized groups and excludes ad hoc clusters of terrorists. The second term, requiring that the force must have "entered the fight alongside al Qaeda," is less clear. As explained more fully in Part IV.B, this term could potentially be problematic depending on how it is interpreted.

IV. THE D.C. CIRCUIT'S COBELLIGERENTS STANDARD FOR "ASSOCIATED FORCES" SHOULD BE USED TO DETERMINE THE SCOPE OF THE USE OF FORCE UNDER THE AUMF

In identifying the scope of the ability to use force under the AUMF, the United States should either abandon the two-pronged standard, or clarify that the term "entered the fight alongside al Qaeda" does not require an "associated force"

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[52] Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., Remarks at the Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012) [hereinafter Johnson, Remarks at Oxford]; Johnson, Remarks at Yale, *supra* note 14. *See also* New York Times v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. Jan. 3, 2013).

[53] *See*, *e.g.*, Brief for the Appellants at 15, Hedges v. Obama, 724 F.3d 170 (No. 12-3644) (2d Cir. Nov. 6, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/11/Hedges-Opening-Brief.FINAL_.FILED_.pdf.

to actually be engaged in joint military operations with members of al Qaeda before they would be subject to the use of force under the AUMF. The fundamental problem with the two-pronged standard is that armed groups fighting alongside al Qaeda constitute a subset of al Qaeda's cobelligerents; the two-pronged standard thus excludes groups that would be recognized as cobelligerents under the LOAC. This Article proceeds by first examining why the D.C. Circuit cobelligerent standard is appropriate, and then analyzes the shortcomings in the two-pronged standard.

A. Cobelligerents is the Appropriate Standard for Determining "Associated Forces"

1. LOAC Traditionally Used the Law of Cobelligerents to Determine Which of an Enemy's Allies Had Functionally Entered the Fight

The jurisprudence on cobelligerents, used to determine when another state has joined an ongoing armed conflict, stems from the law of neutrality.[54] In general terms, neutrality is "the attitude of impartiality adopted by third party States towards belligerents and recognized by belligerents . . . creating rights and duties between the impartial States and the belligerents."[55] While third-party states have the right to neutrality by default when two belligerents begin an armed conflict,[56] a neutral state may lose its neutrality status if it violates its duties towards belligerents.[57]

Neutral states have two primary duties: they must (1) refrain from engaging in armed conflict,[58] and (2) treat each belligerent impartially.[59] These duties require neutral states, inter alia, to refrain from participating in acts of war by the belligerent, supplying war materials to a belligerent, permitting belligerents to use its territory to move troops or munitions, or establishing wartime communication channels.[60] Nonsystematic violations of neutralities duties can

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[54] The laws of neutrality are detailed in two treaties signed in 1907. *See* Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540 [hereinafter Hague Convention V]; Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545 [hereinafter Hague Convention XIII].

[55] *See* 2 L. OPPENHEIM, INTERNATIONAL LAW § 293 (H. Lauterpacht ed., 8th ed. 1952); *but see* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with al-Qaeda*, 47 TEX. INT'L L.J. 75, 90 (2011) (explaining the shortcomings of neutrality law and characterizing it as "undertheorized").

[56] OPPENHEIM, *supra* note 55 § 307.

[57] *Id*. §§ 357-360.

[58] Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT'L L. REV. 83, 92 (1998).

[59] *See* Hague Convention V, *supra* note 54.

[60] Bradley & Goldsmith, *supra* note 2, at 2112-13.

result in reprisals against the offending neutral state,[61] and systematic violations of those duties can result in the loss of neutrality status.

The law of neutrality, codified at the beginning of the twentieth century and predating the United Nations' collective security paradigm, was originally devised for the Concert of Europe and Metternich's shifting alliances. In that world, neutrality served to contain conflicts and allow third-party states to maintain normal trade and diplomatic relations with belligerents.[62] The world has changed since the zenith of realpolitik, but the doctrine remains a custom in international law and stands as an established analytical tool for determining when a state has joined an armed conflict through its actions.[63]

Although the law of neutrality was designed to apply to nation states, the principles in the doctrine also apply to subnational and transnational organizations.[64] Third-party groups can aid in the conduct of an armed conflict in exactly the same way as third-party nations. Specifically, they can jointly attack targets, supply war materials to a belligerent, provide belligerents with refuge and concealment, or establish communication channels to facilitate a belligerent's continued operations. Consequently, just as nation states that choose to actively aid a belligerent in an armed conflict risk becoming cobelligerents in that conflict, organizations that choose to actively aid a belligerent also risk losing the protections of neutrality.

2. The D.C. Circuit Rightly Relied on the Law of Cobelligerents as Guidance for "Associated Forces" Because Both Are Fundamentally Similar Inquiries

In determining the standard for "associated forces," it was wholly appropriate for the president and the courts to seek guidance from the LOAC principle of cobelligerence because, as Department of Defense General Counsel

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[61] *Id.* at 2112 n.292; U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE para. 520 (1956).

[62] *See* Hague Convention V, *supra* note 54, art. 9.

[63] *See* Tess Bridgeman, *The Law of Neutrality and the Conflict with al Qaeda*, 85 N.Y.U. L. REV. 1186, 1208-10 (2010) (arguing that the law of neutrality is customary international law even in light of the United Nations Charter's emphasis on collective security).

[64] *Id*. at 1213-14 (applying the law of neutrality to al Qaeda); Bradley & Goldsmith, *supra* note 2, at 2113 (same); *contra* Pardiss Kebriaei, *The Distance Between Principle and Practice in the Obama Administration's Targeted Killing Program: A Response to Jeh Johnson*, 31 YALE L. & POL'Y REV. 151, 162-63 (2012) ("While the law of neutrality has been invoked in certain situations of noninternational armed conflict involving nonstate groups, it became appropriate in such contexts only after states recognized such groups as legitimate cobelligerents, with the same rights and privileges as the opposing state's armed forces. . . . Applying the concept to irregular terrorist groups as the Administration does here . . . finds no support in state practice or opinio juris.").

Jeh Johnson wrote, "in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles."[65] The established legal principle for determining which nations have entered the fight with an enemy is the law of neutrality, and it is to that body of law that the March 2009 Memorandum turned when defining the contours of "associated forces." As an initial note, the executive branch is wholly within its constitutional authority to define "associated forces" using LOAC principles.[66] In the AUMF and the Affirmation of Authority, Congress authorized the president to use force against al Qaeda's "associated forces" without defining that term; as part of his execution of that authority, the president necessarily had to define the term.[67] The decision to rely on the law regarding cobelligerents was the correct choice for several reasons.

First, there is inherent merit in building upon established legal principle. Indeed, the common law is predicated on the idea of relying upon, and analogizing to, previous legal principles. While the ongoing Non-International Armed Conflict (NIAC)[68] with al Qaeda presents a number of novel issues that require innovative solutions, the reality is that parallels exist between this NIAC and previous armed conflicts. Integrating issues in the conflict with al Qaeda with established LOAC principles, while ensuring that those principles are updated to meet the novel aspects of the ongoing NIAC, bestows credibility and reliability on subsequent policy.[69]

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[65] Johnson, Remarks at Oxford, *supra* note 52 (emphasis added). The Court of Appeals for the D.C. Circuit has been critical of using LOAC principles to interpret domestic law and would only look to the LOAC if those principles had been incorporated via domestic law or self-executing treaty. *See*, *e.g.*, Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) ("To sum up where we are so far: International-law principles are not automatically part of domestic U.S. law enforceable in federal courts. Congress and the president may incorporate international-law principles into domestic U.S. law via a statute (or binding executive regulation) or a self-executing treaty; and when they do so, federal courts will afford that statute or self-executing treaty the full respect ordinarily due to federal statutes.").

[66] *See* Loving v. U.S., 517 U.S. 748, 759 (1996) (finding that the Congressional delegation of authority in the Uniform Code of Military Justice allowed him to prescribe aggravating factors in death penalty cases); Zemel v. Rusk, 381 U.S. 1, 16-18 (1965) (finding that the president has wide latitude in interpreting delegations of power in the foreign policy realm "because of the changeable and explosive nature of contemporary international relations. . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas"); Haig v. Agee, 453 U.S. 290, 291 (1981).

[67] *See* Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (holding that the president could suspend private claims against Iran even though there was no federal statute conferring this authority because, inter alia, the Executive had historically exercised that power and Congress had not stopped it).

[68] The term NIAC is used by the Geneva Conventions to refer to armed conflicts that occur between non-nation state actors.

[69] *See* Johnson, Remarks at Yale, *supra* note 14 (discussing the importance of applying established legal principles to new situations).

Second, the domestic authorization to use force against an enemy of the United States is inherently a hybrid issue colored by both domestic and international law. The Supreme Court has repeatedly looked to LOAC principles when deciding the contours of lawful presidential action.[70] For example, the Court applied the LOAC to the AUMF to find that the president has the authority to detain members of al Qaeda caught in Afghanistan: "based on longstanding law-of-war principles . . . [the AUMF] include[s] the authority to detain for the duration of the relevant conflict."[71] In deciding to define "associated force" in terms of the LOAC, the March 2009 Memorandum recognized that the standard would face both domestic and international scrutiny, and defined "associated forces" in a way that would comport with both bodies of law.

Third, from a policy perspective, the use of cobelligerent standards effectuates the AUMF's goal of authorizing force against non-state actors: the use of force was authorized against "those nations, *organizations*, or persons" responsible for the September 11, 2001 attacks.[72] Critical to the propriety of the cobelligerent standard is its dynamic nature. That is because the standard focuses on an organization's conduct, and it can apply to the changing face of international extremism. As explained by Curtis Bradley and Jack Goldsmith, new terrorist organizations can fall under the AUMF's use of force provisions in the same way that new terrorist recruits can fall under the AUMF if they join al Qaeda:

> Just as an individual can become part of a covered "organization" by joining it after the September 11 attacks, however, so too can a group of individuals. While a terrorist organization that did not harbor al Qaeda or aid it in the September 11 attacks is not, merely by virtue of its status as a terrorist organization, covered by the AUMF, a terrorist organization that joins al Qaeda in its conflict with the United States, even after September 11, can be viewed as part of the "organization" against which Congress authorized force. This conclusion is consistent . . . with Congress's definitions of "terrorist organization" in other statutes, all of which conceptualize terrorist organizations in broad, functional terms.[73]

Only by defining "associated forces" with a functional standard including all of al Qaeda's allies, those extant in 2001 and those that will join the fight in the future,

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[70] *See*, *e.g.*, *ex parte* Quirin, 317 U.S. 1, 27-38 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war . . . .").

[71] *Hamdi*, 542 U.S. at 519; *see also* Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005) (applying LOAC principles to the detainee context).

[72] Pub. L. 107-40, 115 Stat. 224 (2001) (emphasis added).

[73] Bradley & Goldsmith, *supra* note 2, at 2111-13.

can the Executive Branch effectuate the AUMF's mandate "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[74]

In short, the cobelligerent standard for "associated forces" embodied in the March 2009 Memorandum, and endorsed by the courts in the D.C. Circuit, should be applied to the AUMF's use of force provisions as a matter of both law and policy. The standard is expansive enough to authorize force against America's enemies, and is sufficiently grounded in LOAC principles to warrant deference.

B. The Two-Pronged "Associated Forces" Standard Is Potentially Flawed Because the "Fighting Alongside" Requirement Could Be Read to Exclude Some al Qaeda Cobelligerents

The competing definition of "associated force" builds upon cobelligerent law, but also requires that the force at issue be "an organized, armed group that has entered the fight alongside al Qaeda." As already stated, this prong requires that an "associated force" be both (1) an "organized, armed group" and (2) one that "has entered the fight alongside al Qaeda."[75]

The first component, which requires the "associated force" to be an "organized, armed group," is wholly appropriate to clarify that the "associated force" must meet the criteria for status-based targeting. The underlying assumption of status-based targeting is based on agency theory that ties lower-level members to the leaders and central aims of the organization.[76] By subordinating one's will to the organization's leaders, individuals become part of the overarching violent mission of the organization—i.e., membership is indicative of a desire and capacity to fight.[77] This type of agency and hierarchy requires an organized group and is not formed by ad hoc groupings of individuals who spontaneously act toward a common goal. Thus, the "organized, armed group" language is appropriate because it clarifies that "associated forces" should be the subject of status-based targeting.

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[74] 115 Stat. at 224 (emphasis added).

[75] Johnson, Remarks at Yale, *supra* note 14.

[76] *See* Vanlandingham, *supra* note 34, at 108 ("In such a context, the primary animating assumption behind the use of status as a substitute for conduct stems from state armies' agency relationships among members. It is not only the belligerent's potential or actual fighting function which drives a belligerent's targetability under the law of armed conflict; it is the ability to be commanded by his superiors which separates him from civilians and therefore allows status-based targeting.").

[77] *Id.*; *see also* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 1739 (Yves Sandoz et al. eds., 1987) ("The subordination of the person concerned to a force organized in accordance with the provisions of the Protocol is a fundamental and unconditional requirement of the status of combatant.").

However, the second component of the Obama administration's recent two-pronged standard, which requires that the force has "entered the fight alongside al Qaeda," is problematic, because the term, if read literally, could be interpreted to limit "associated forces" to those groups that have engaged in joint military attacks alongside al Qaeda fighters. Groups that have engaged in joint operations with al Qaeda are clearly cobelligerents, and therefore are already encompassed by the cobelligerent prong of the standard. Thus, the "fight alongside al Qaeda" phrase adds nothing to the standard, but could be read to limit "associated forces" to include only those groups that have engaged in joint kinetic operations with al Qaeda. This could potentially exclude groups that supply al Qaeda with war materials, give al Qaeda shelter and hide their movements, help al Qaeda transport ammunitions, or facilitate al Qaeda's wartime communications. Such a narrow interpretation of the term "associated forces" would endanger the United States and undercut the Congressional authorization in the AUMF.

The Fourth Circuit's plurality opinion in *al-Marri v. Pucciarelli* illustrates how overly-literal interpretations of "associated forces" can result in dangerous consequences for American foreign policy.[78] There, the plaintiff trained at an al Qaeda terrorist training camp in Afghanistan sometime between 1996 and 1998; met both Osama Bin Laden and Khalid Shaykh Muhammed in summer 2001; volunteered for a "martyr mission" on behalf of al Qaeda; followed the order to enter the United States sometime before September 11, 2001 to serve as a "sleeper agent" to facilitate terrorist activities and explore disrupting this country's financial system through computer hacking; met with terrorist financier Mustafa Ahmed al Hawsawi in the summer of 2001; received money from al Hawsawi to buy a laptop; gathered technical information about poisonous chemicals on that laptop; undertook efforts to obtain false identification, credit cards, stolen credit card numbers, and banking information; communicated with known terrorists, including Khalid Shaykh Muhammed and al Hawsawi by phone and email; and saved information about jihad, the September 11 attacks, and Bin Laden on his laptop computer.[79] Despite these extensive contacts with al Qaeda, four members of the Fourth Circuit argued that al Marri was not subject to detention under the AUMF because he was:

> not alleged to have been part of a Taliban unit, *not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation*, not alleged to have been on the battlefield during the war in Afghanistan, not alleged to have even been in Afghanistan during the armed conflict there, and not alleged to have engaged in combat with United States forces anywhere in the world.[80]

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78 534 F.3d 213 (4th Cir. 2008).

79 *Id.* at 220.

80 *Id.* at 231 (emphasis added).

While the Fourth Circuit decision was eventually vacated as moot after the Obama administration indicted al Marri in federal court,[81] the opinion's reasoning could be applied in the "associated forces" context under the two-pronged standard if the "having entered the fight alongside al Qaeda" language was read literally. The four judges in *al-Marri* held that the AUMF did not apply because, inter alia, the detainee had never "stood alongside the Taliban."[82] If an individual like al Marri could follow orders from al Qaeda but not be subject to the AUMF because he had not "stood alongside the Taliban," then organizations that followed al Qaeda's orders would similarly not be subject to the AUMF if they had not "entered the fight alongside al Qaeda." This would mean the AUMF did not authorize the use of force against groups that volunteered members for "martyr missions" with orders to enter the United States, groups that communicated with al Qaeda about poisonous chemicals, and groups that prepared to electronically crash America's financial system; and they would all be immune from the use of force provisions in the AUMF even though they had clearly forfeited their immunity as neutral entities.[83]

The two-pronged standard, if read to limit "associated forces" only to those groups that fought "alongside" al Qaeda combatants, would create a perverse incentive structure for al Qaeda belligerents. If it were to organize subsidiaries along functional lines, then al Qaeda could create a logistics corps, an information technologies corps, a chemical sciences corps, and an aviation wing that would all be immune to targeting under the AUMF because their members would not have fought "alongside" al Qaeda combatants. This kind of arbitrary legal fiction could not have been Congress' intent, and it cannot be the true intent of the AUMF.

The "fought alongside al Qaeda" language must either be rephrased,[84] or the Obama administration should issue guidance clarifying that the "associated forces" standard encompasses all of al Qaeda's cobelligerents. The extra prong needlessly deviates from the LOAC guidance on how to identify when an enemy's ally joins an armed conflict, and its implications pose real dangers to America's ability to adapt to an ever-changing al Qaeda.

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[81] Al-Marri v. Spagone, 555 U.S. 1220 (2009). The Supreme Court had granted certiorari to hear the case before it had been vacated. *See* Al-Marri v. Pucciarelli, 555 U.S. 1066 (2008).

[82] 534 F.3d at 231.

[83] *See id.* at 220.

[84] Indeed, some scholars have already started interpreting the two-pronged standard in a way that reads the "organized, armed group that has entered the fight alongside al Qaeda" prong as an organizational constraint only. John Odle, *Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists*, 27 EMORY INT'L L. REV 603, 649-50 (2013) ("Under the definition given by [Secretary of Defense Jeh] Johnson, an 'associated force' to Al Qaeda must be an organized armed group that is a co-belligerent with Al Qaeda against the United States."). If the two-pronged test is interpreted in this way, then the standard functionally collapses into the D.C. Circuit's cobelligerent standard.

V. CONCLUSION: THE UNITED STATES CAN AND SHOULD USE FORCE AGAINST AL SHABAAB AND AL QAEDA'S OTHER "ASSOCIATED FORCES"

The armed conflict against al Qaeda and its allies continues. The conflict began in the 1990s,[85] intensified after September 11, 2001, and will continue for the foreseeable future. During this conflict, the face of the United States' enemy has changed, as al Qaeda adapted to America's relentless military campaign. Al Qaeda's heirs, from al Shabaab to AQAP, have taken up the torch of extreme Islamist warfare against the West. It is incumbent upon the United States to defend itself against this threat. Under the AUMF and the Affirmation of Authority, the United States has the authority to attack and destroy al Qaeda's "associated forces." By including al Qaeda's cobelligerents within the scope of that phrase, the United States can target those organizations that have chosen to support al Qaeda in its war.

Al Shabaab's brutal and public attack at the Nairobi's Westgate Mall vividly confirmed that the group is a cobelligerent, and by extension an "associated force," of al Qaeda.[86] While it began as a local militant group focused on securing power in Somalia,[87] al Shabaab's recent actions against Americans and Westerners have violated the central tenets of neutrality in the conflict between the United States and al Qaeda.[88] In addition to these functional breaches of neutrality, al Shabaab is increasingly developing a *de jure* relationship with al Qaeda. For example, key members of al Qaeda have taken positions in al

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[85] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 20-21, 459 n.123 (2004) (stating that, in multiple interviews with members of the Clinton administration, the decision to kill Osama bin Laden did not violate the assassination ban contained in Executive Order 12333 because it was an act of self-defense).

[86] The investigation into the connections between al Shabaab and al Qaeda dates back at least until July 12, 2010, when a pair of al Shabaab suicide bombers killed seventy-four people watching a World Cup match on television. *See Islamic militant group al-Shabab claims Uganda Bombing Attacks*, WASH. POST (July 12, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071200476.html. The attack likely targeted soccer fans because al Shabaab has described the sport as a Western "satanic act" that is meant to corrupt Muslims. *Id.*

[87] *See* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PENN. L. REV. 1165, 1197 (2013).

[88] The fact that al Shabaab targeted American allies is sufficient to trigger a loss of neutrality. Attacking America's cobelligerents is sufficient to trigger cobelligerent status; for example, the American decision to attack Vichy French forces during World War II was precipitated by Vichy forces' attacks on the British military. *See* Bradley & Goldsmith, *supra* note 2, at 2113.

Shabaab, and al Qaeda leader Ayman al Zawahiri has issued a video welcoming al Shabaab into the al Qaeda network.[89]

As an "associated force," al Shabaab is subject to the use of American military force and its members are subject to status-based targeting. Just as the law of neutrality historically protected neutral states choosing not to participate in hostilities while making clear that those states violating neutrality were part of the conflict, the law of neutrality now protects neutral organizations, while still holding that belligerent organizations are part of the conflict.[90] Al Shabaab and al Qaeda's other progeny cannot continue al Qaeda's fight against the United States by merely hiding behind organizational differences or by simply changing their names. The incentive structure must be clear and unequivocal. Islamist extremists should not be able to avoid the United States military by changing the name of the group so as to put themselves outside of the AUMF's reach; rather, the only way potential combatants should be able to avoid military targeting is by refusing to join the belligerent forces taking part in the armed conflict between al Qaeda and the United States.

To draw from Shakespeare, al Qaeda, by any other name, would still be an enemy of the United States. The AUMF and the Affirmation of Authority rightly extend the use of force to al Qaeda's "associated forces," and only by defining that term to encompass all of al Qaeda's cobelligerents can the United States ever hope to realize the AUMF's ultimate goal of "deter[ring] and prevent[ing] acts of international terrorism against the United States."[91] The success of America's conflict with al Qaeda will depend in no small measure on the law's ability to remain relevant to the reality of that conflict.

89 Chesney, *supra* note 1.

90 *See* Bradley & Goldsmith, *supra* note 2, at 2111-13.

91 Pub. L. 107-40, 115 Stat. 224 (2001).