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FUTURE OF THE AUMF: LESSONS FROM ISRAEL'S SUPREME COURT

EMILY SINGER HURVITZ¹

“Judges in modern democracies should protect democracy both from terrorism and from the means the state wishes to use to fight terrorism.”²

INTRODUCTION

Following the September 11, 2001 terrorist attacks, Congress enacted the Authorization for Use of Military Force (AUMF) to give the President power to use military force specifically against the people and organizations connected to the terrorist attacks: al-Qaeda and the Taliban.³ Some would argue that Congress's goals in enacting the AUMF have been met—al-Qaeda has been reduced to a far weaker threat than it once was, the Taliban has been removed from power, and the war in Afghanistan is winding down.⁴ But in the twelve years since the September 11 attacks, the threats against the United States have evolved and it is widely agreed upon that the AUMF no longer adequately addresses these threats.⁵ Moving forward, these threats will continue to have fewer connections to the September 11 terrorist attacks and the law passed in their aftermath.⁶ In other words, the AUMF will soon be obsolete.⁷

The U.S. Congress and national security experts are currently engaged in a debate about what to do with the AUMF.⁸ Congress's decision about the AUMF could have far-reaching effects for separation of powers in the U.S. government.⁹ The U.S. Constitution establishes strong checks

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2 Aharon Barak, *Human Rights in Times of Terror—A Judicial Point of View*, 28 LEGAL STUD. 493, 493 (2008).

3 Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J., 115, 115 (2014).

4 *Id.* at 116.

5 *Id.* at 117 (noting consensus on the fact that those who threaten the country the most are not the same groups targeted in the AUMF).

6 *See id.* at 115–16 (relaying that the legal debate over the use of the AUMF has shifted to a discussion of groups who pose a threat to the country but are not connected to the September 11 attacks).

7 *See id.* at 116 (explaining that the current terrorist threats no longer fit into the definition of those with whom the United States was engaged in an armed conflict in September 2001).

8 *See* ROBERT CHESNEY, JACK GOLDSMITH, MATTHEW C. WAXMAN, & BENJAMIN WITTES, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 2 (2013), available at <http://www.scribd.com/doc/127191153/A-Statutory-Framework-for-Next-Generation-Terrorist-Threats> (acknowledging that this issue will require a resolution within the short or medium term).

9 *See* Daskal & Vladeck, *supra* note 3, at 115–16 (arguing that any future use-of-force authority should be authorized by Congress only after intense deliberation); CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra*, at 8 (noting that a new authorization for presidential use of force against evolving threats will enhance legitimacy for presidential force). *See*

and balances on each branch's power.¹⁰ If Congress extends the AUMF to include all new terrorist threats, it will effectively relinquish its power to authorize the use of military force against new terrorist threats to the executive branch.¹¹ If Congress repeals the AUMF, the executive branch will have to confer with Congress to obtain statutory authority to use military force against new terrorist threats.¹² If Congress does nothing, the executive branch may try to stretch the current AUMF to justify its use of military force against terrorist threats that are not explicitly covered by the law, thus resting its action on unsound legal justification.¹³

A comparative law approach is beneficial for understanding how counterterrorism decisions have affected the security of other countries.¹⁴ When it comes to national security and terrorism, Israel has extensive experience and has pioneered almost every counterterrorism technique used by the United States today.¹⁵ Israel's impressive record of counterterrorism successes includes maintaining an active society, despite perpetual violence, and shutting down several terrorist groups while deterring others.¹⁶ Israel sustains its notable counterterrorism reputation while perpetuating its strong separation of powers and protection of individual rights.¹⁷

With the coming end of U.S. combat operations in Afghanistan and the weakening of al-Qaeda, the AUMF is approaching a point when it will no longer adequately address the current threats to U.S. national security. This article argues that because the U.S. no longer faces the same threat that the AUMF was created to address, Congress should repeal the AUMF with the cessation of U.S. combat operations in Afghanistan. This action would restore a balanced separation of powers whereby Congress decides when the United States can use armed force against new terrorist threats. Using Israel as a model, Congress can ensure that the United States effectively fights terrorism while protecting individual rights by utilizing strong checks and balances.

generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (outlining three levels of legitimacy for presidential decisions based on congressional support for the decision, with presidential power being most legitimate when it is supported by Congress).

10 U.S. CONST. art. I, § 8, cl. 11 (providing Congress with the power to declare war); *id.* art. II, § 1, cl. 8 (establishing the President's duty to protect the Constitution); *id.* art. II, § 2, cl. 1 (identifying the President as the Commander in Chief of the armed forces).

11 See CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 7 (observing that allowing the President to have indefinite military powers against terrorist threats will not be approved by all).

12 See Daskal & Vladeck, *supra* note 3, at 125 (emphasizing that the Constitution delegates the authority to declare war to Congress and not to the executive branch).

13 See *id.* at 123–26 (clarifying that the AUMF has yet to be used in any circumstances where it is not legally sound but explaining that this is a possibility).

14 See DANIEL BYMAN, A HIGH PRICE: THE TRIUMPHS AND FAILURES OF ISRAELI COUNTERTERRORISM 3 (2011) (noting that all countries combating terrorism can learn from Israel's successes and failures).

15 *Id.* at 2–3 (discussing the breadth of Israel's experience with terrorism including plane hijackings, suicide bombings, state-sponsored terrorism, and terrorism carried out by individuals).

16 *Id.* at 3–4.

17 See Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security*, 12 WASH. U. GLOBAL STUD. L. REV. 95, 96–97 (2013) (discussing Israel's strong judicial review and noting that its strength increases the Israeli Supreme Court's ability to protect individual rights); SUZIE NAVOT, CONSTITUTIONAL LAW OF ISRAEL 68–69 (2007) (explaining that the separation of powers in Israel is not viewed as establishing walls between the branches of government but rather as creating supervisory connections between them).

Part I of this article provides background on the AUMF, the U.S. constitutional separation of powers, and the Israeli system. Part II compares the abilities of the U.S. and Israeli courts to protect individual rights and will argue that limitations imposed upon U.S. courts to defend individual rights in national security cases since September 11 have left the United States with an unbalanced separation of powers. The section also argues that the most effective way to defend individual rights and regain a balanced separation of powers is for Congress to play a larger role in ensuring the protection of individual rights, starting with repealing the AUMF and not allowing the executive branch to have an unfettered war power. This article concludes by reiterating the recommendation to Congress to repeal the AUMF with the cessation of U.S. combat operations in Afghanistan and highlights the benefit of using a comparative law approach when analyzing issues of national security.

I. BACKGROUND

A. AUMF Background

On September 18, 2001, President George W. Bush signed the AUMF into law, authorizing the President:

[T]o 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.¹⁸

The language of the AUMF provides the President with authorization to use force only against those who perpetrated the September 11, 2001 terrorist attacks or who were connected to the attacks.¹⁹ Under the AUMF, the United States invaded Afghanistan, launching a war against al-Qaeda and the Taliban.²⁰ The AUMF authorized the use of force against the Taliban because the group provided safe harbor to al-Qaeda.²¹ Since its creation, the AUMF has not been updated and remains the central legal authority for using military force against al-Qaeda and the Taliban.²²

The 2012 National Defense Authorization Act (NDAA) authorized military spending for the

18 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

19 See *id.* (refraining from authorizing the use of force against all terrorist threats to the United States).

20 See Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications for the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 57 (2012) (noting that the AUMF has also been used as justification for the use of armed force outside of Afghanistan).

21 See CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 3 (explaining that under the language of the AUMF, providing safe harbor to the perpetrators of the September 11 attacks constituted being targeted with armed force in Afghanistan despite the fact that al-Qaeda has since relocated, mostly to Pakistan).

22 Daskal & Vladeck, *supra* note 3, at 116.

fiscal year of 2012.²³ The 2012 NDAA spells out detention authority more clearly than the AUMF,²⁴ codifying authority that President Barack Obama had already claimed and that the D.C. Circuit had already affirmed.²⁵ The 2012 NDAA says that the U.S. government can detain anyone who played a role in the September 11 attacks or who provided safe haven to those who committed the attacks.²⁶ It goes on to say that anyone “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” can also be detained.²⁷ The law also allows for detention without trial until the end of the armed conflict authorized by the AUMF.²⁸ The 2012 NDAA is significant because it illustrates that Congress approves of and endorses the detention authority claimed by the Obama administration and affirmed by the courts.²⁹

1. Current Status of the Law

The AUMF’s grant of power enabled the U.S. military to accomplish most of its goals.³⁰ al-Qaeda no longer poses the same threat that it did when the AUMF was enacted³¹ because the United States has successfully killed or captured most of the group’s leaders.³² The Taliban has been removed from power.³³ The U.S. government has plans to remove all troops from Afghanistan by the end of 2014.³⁴ Despite the successes of the AUMF, new threats have emerged, many of which are probably

23 Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE BLOG (Dec. 19, 2011, 3:31 PM), <http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/#more-4355>.

24 Steven D. Schwinn, *The National Defense Authorization Act*, CONST. L. PROFESSOR BLOG (Dec. 20, 2011), <http://lawprofessors.typepad.com/conlaw/2011/12/national-defense-authorization-act.html>; see Glenn Greenwald, *Three Myths About the Detention Bill*, SALON (Dec. 16, 2011, 6:56 AM), http://www.salon.com/2011/12/16/three_myths_about_the_detention_bill/singleton/ (stating that the NDAA codifies indefinite detention, widens the AUMF’s scope of the “war on terror,” including who can be targeted, and applies to U.S. citizens).

25 Schwinn, *supra* note 24; see Wittes & Chesney, *NDAA FAQ: A Guide for the Perplexed*, *supra* note 23 (explaining that the detention authority outlined in the 2012 NDAA is almost identical to the President’s prior claim of detention authority, which was challenged in the D.C. Circuit and affirmed in broader language than the administration sought).

26 National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(1), 125 Stat. 1298, 1562 (2011).

27 *Id.* § 1021(b)(2).

28 *Id.* § 1021(c)(1).

29 Schwinn, *supra* note 24.

30 Daskal & Vladeck, *supra* note 3, at 116.

31 President Barack Obama, Remarks by the President 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> (noting that al-Qaeda has not carried out a successful terrorist attack in the United States since September 11, 2001).

32 CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 3.

33 Daskal & Vladeck, *supra* note 3, at 116. Despite the fact that the Taliban has been removed from power, the group maintains a presence in Afghanistan and Pakistan and still causes unrest in the region. CYRUS HODES & MARK SEDRA, *THE SEARCH FOR SECURITY IN POST-TALIBAN AFGHANISTAN* 26 (2013) (indicating that much of the Taliban leadership remains); Theo Farrell & Antonio Giustozzi, *The Taliban at War: Inside the Helmand Insurgency, 2004–2012*, 89 INT’L AFF. 845, 859 (2013) (describing elements of the Taliban command structure in the province of Helmand, Afghanistan as of 2012).

34 See President Barack Obama, *supra* note 31 (adding that the United States will work with Afghanistan’s government to ensure that counterterrorism efforts in the country continue).

not covered by the AUMF.³⁵ Concern is spreading among U.S. officials and government lawyers that the AUMF is being stretched to its legal breaking point and that the law cannot justify armed conflict against new terrorist groups.³⁶

Though the AUMF authorizes broad powers for the President to use military force against those connected to the September 11 attacks, the scope of the law actually illustrates a compromise between Congress and the Bush Administration.³⁷ Congress refused to declare a general “war on terrorism,” instead tailoring the authorization for force to only be used against those with a direct link to the September 11 attacks.³⁸ The Obama Administration’s interpretation that force could be used against “associated forces” of those who were directly connected to the September 11 attacks widened the scope of the AUMF.³⁹ Though there is no official definition of “associated forces,” Jeh Johnson, U.S. Secretary of Homeland Security, suggested that to be defined as “associated forces” a group must be: “(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.”⁴⁰ Some suggested that the concept of “associated forces” was open-ended, prompting efforts to provide a more narrow definition.⁴¹

Current terrorist threats to the United States may not fall under the plain language of the AUMF or the extended definition of “associated forces.”⁴² Throughout the Middle East and North Africa, emerging groups support al-Qaeda’s goals but have little connection to al-Qaeda’s collapsing leadership in Afghanistan and Pakistan.⁴³ The al-Nusra Front in Syria⁴⁴ and Ansar al-Sharia in Libya⁴⁵

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

36 Greg Miller & Karen DeYoung, *Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots*, WASH. POST, Mar. 7, 2013, available at http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-Qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394_story.html?hpid=z1.

37 Daskal & Vladeck, *supra* note 3, at 115.

38 *Id.* at 116.

39 CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 1; see *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.D.C. 2010) (finding that al-Bihani was lawfully detained because the definition of a detainable person included associated forces of al-Qaeda or the Taliban); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011) (stating that the law covers anyone “who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces”).

40 Honorable Jeh Charles Johnson, General Counsel, U.S. Dep’t of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Dean’s Lecture at Yale Law School (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/> (emphasizing that more than an alignment with al-Qaeda’s agenda or ideology is required for the United States to have statutory authorization to use military force against a group).

41 *Id.*

42 See Miller & DeYoung, *supra* note 36 (relaying that U.S. government officials are now considering if the AUMF can be interpreted to cover “associates of associates”).

43 *Id.*

44 See Ghaith Abdul-Ahad, *Syria’s al-Nusra Front – Ruthless, Organised and Taking Control*, GUARDIAN (July 10, 2013), <http://www.theguardian.com/world/2013/jul/10/syria-al-nusra-front-jihadi> (describing the group’s strained relationship with al-Qaeda despite its dedication to jihad and the establishment of an Islamic state in Syria).

45 See Devlin Barrett, *U.S. Files Charges in Benghazi Attack*, WALL ST. J. (Aug. 6, 2013), <http://online.wsj.com/article/SB10001424127887324653004578652351161838238.html> (reporting that the U.S. Department of Justice has filed

are two groups that may fall into this category.⁴⁶ The AUMF may not provide the legal authority to preemptively attack these or other groups, such as al-Qaeda in the Islamic Maghreb, al-Shabaab, a Somalia-based militant Islamic group, and radicalized individuals such as the Tsarnaev brothers who allegedly committed the Boston Marathon bombing in 2013.⁴⁷ It is widely agreed upon that the current situation is not sustainable and that a change is necessary.⁴⁸ The debate centers on what form that change will take.

2. Potential Future Options

There are three basic options for what Congress can do with the AUMF: it can extend the authorization for use of military force against new terrorist threats,⁴⁹ limit the current authorization,⁵⁰ or leave the AUMF as it is without extending or limiting it.⁵¹ National security experts have debated all sides of this issue, but so far, the only proposals in Congress have aimed to limit or terminate the AUMF,⁵² similar to President Obama's pledge.⁵³

To expand authorization for use of military force against new terrorist threats, Congress would have to enact a new AUMF to cover all new terrorist groups that the United States wants to engage.⁵⁴ One proposal for a new AUMF explains that Congress could establish "general statutory criteria for presidential use of force against new terrorist threats but require[] the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force."⁵⁵ The proposal explains that the process of adding new terrorist groups to

criminal charges against the leader of Ansar al-Sharia, Libya's Islamist militia, in the attack on the U.S. Consulate in Benghazi that killed the U.S. Ambassador to Libya and three other Americans). Though Ansar al-Sharia and al-Qaeda have been linked, it is unclear if al-Qaeda had any role in the attack on the U.S. consulate. *Id.*

46 Miller & DeYoung, *supra* note 36 (describing how both the al-Nusra Front and Ansar al-Sharia are not directly controlled by al-Qaeda but do have some connections to the perpetrators of the September 11 attacks).

47 *See id.* (explaining that before U.S. officials will target a person or a group, they must ensure that the target is "AUMF-able" and if there is no legal authority to use military force, they reportedly will not).

48 President Barack Obama, *supra* note 31 (stating that the President will engage Congress about the future of the AUMF and how the country can maintain its national security and combat terrorism without remaining in a wartime status).

49 *See, e.g.*, CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 10–12 (outlining a proposal for an extended AUMF whereby Congress delegates power to the President to use military force against new terrorist threats).

50 *See, e.g.*, Daskal & Vladeck, *supra* note 3, at 142–46 (arguing that an extended AUMF is unnecessary and detrimental to U.S. national security and proposing options for limiting the AUMF by repealing the law or adding a sunset provision).

51 *See id.* at 141–42 (describing the option that Congress has to leave the AUMF as it is while suggesting more transparent use of the law).

52 *See* Michael McAuliff, *House Votes to Continue Endless War Authorized in 2001 AUMF*, HUFFINGTON POST (July 24, 2013), http://www.huffingtonpost.com/2013/07/24/aumf-endless-war_n_3647864.html (reporting on the failure of Representative Adam Schiff's amendment to the annual military spending bill, to ban all spending on military operations authorized by the AUMF after December 31, 2014).

53 *See* President Barack Obama, *supra* note 31 (stating that President Obama's goal is to work with Congress to refine and eventually repeal the AUMF and that President Obama will not sign any law expanding the AUMF).

54 *See* CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 8.

55 *Id.* at 10 (emphasizing the transparency of the identification and listing process).

the authorization for military force could follow a model similar to the process by which the U.S. Department of State designates Foreign Terrorist Organizations.⁵⁶ The arguments for this type of proposal are that a new AUMF will give the President the flexibility needed to cope with evolving threats, while the process by which new terrorist groups are identified and included under the law will put a restraint on presidential power.⁵⁷ A highly regulated process of including new terrorist threats could be administered in a more transparent fashion than is used to determine which groups fall under the current AUMF.⁵⁸ Some have argued that this type of statutory authorization, whereby Congress gives the President the power to decide which groups can be targeted with military force but requires that the process of listing and which groups are listed is public and transparent, is superior to the current system.⁵⁹ Though this proposal does address problems within the current AUMF—by providing authorization for the President to use military force against new terrorist threats and increasing the transparency by which terrorist groups are targeted—there is some criticism of the proposal.⁶⁰

An alternative to expanding the authorization for use of military force against new terrorist threats is to limit the authorization. The most prominent proposal for limiting the AUMF is to repeal it.⁶¹ If Congress repeals the AUMF, the United States would instead rely on law enforcement,⁶² intelligence gathering,⁶³ international law,⁶⁴ and the President's powers of self-defense⁶⁵ to combat

56 *Id.* (explaining that under the U.S. Department of State's system, a group is designated as a terrorist organization after Congress is notified, which triggers the statute to go into effect for the group and its members).

57 *See id.*

58 *See id.*; *see, e.g.*, Cora Currier, *Pentagon: Who We're at War with is Classified*, HUFFINGTON POST (July 26, 2013), http://www.huffingtonpost.com/2013/07/26/pentagon-war-classified_n_3659353.html (describing the U.S. Department of Defense's refusal to publicize which groups it considers "associated forces" under the AUMF for national security reasons).

59 *See* Daskal & Vladeck, *supra* note 3, at 126 (conveying public fear that under the current authorization, the government will target whichever groups it wants regardless of the scope of the AUMF).

60 *See id.* at 127–28, 140–41 (arguing that an expanded authorization for use of military force is not in the interest of U.S. national security and may actually weaken it, a problem that is exemplified by the recent hesitation from U.S. allies in providing intelligence to the U.S. for fear that it will be used for drone strikes).

61 *See id.* at 142–46 (proposing the options of repealing the AUMF or adding a sunset provision to the AUMF that will end the law on a specific date or with the occurrence of a specific event). Though repealing the AUMF and adding a sunset provision to the AUMF are separate options requiring distinct actions, the results and the enforcement mechanisms the United States will be left with from each option are the same; the remainder of this article will treat the repeal and sunset options as one, unless specifically stated otherwise.

62 *See, e.g.*, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, Remarks at a Security Council Briefing on Counterterrorism (Mar. 13, 2013), *available at* <http://usun.state.gov/briefing/statements/209314.htm> (citing U.S. training of 2,320 law enforcement officials in eighteen African countries as a method of capacity building for counterterrorism activities).

63 *See* Richard J. Hughbank & Don Githens, *Intelligence and Its Role in Protecting Against Terrorism*, 3 J. OF STRATEGIC SECURITY 31, 31 (2010) (detailing the process of intelligence gathering and arguing that "while intelligence alone cannot stop the next terrorist attack, it is the critical first step in identifying and possibly preventing one").

64 *See, e.g.*, Mohamed R. Hassanien, *International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective*, 36 DENV. J. INT'L L. & POL'Y 221, 222 (2008) (arguing that strengthening international law, free trade, and economic development, while engaging with the Muslim world, may be more effective than military operations in fighting terrorism in the Middle East).

65 *See* *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of

new terrorist threats.⁶⁶ Naturally, if a specific terrorist group poses a significant threat, Congress has the ability to authorize the use of force against the group, just as it did with the AUMF.⁶⁷

Proposals to repeal the AUMF stem from a national security perspective that, in the words of Secretary Jeh Johnson, war should “be regarded as a finite, extraordinary and unnatural state of affairs” and peace should be “the norm toward which the human race continually strives.”⁶⁸ By repealing the AUMF and limiting the authorization to use military force against new terrorist threats, Congress can solve the problem of the AUMF being stretched beyond its legal limits⁶⁹ while removing the United States from a wartime footing.⁷⁰ Those who subscribe to Secretary Jeh Johnson’s view of war argue that an extended AUMF is not necessary to defend the country because under both the U.S. Constitution and international law, the President has the power to defend the country from attack.⁷¹ It can also be argued that repealing the AUMF is consistent with congressional sentiment at the time the law was enacted,⁷² judicial interpretation,⁷³ and the President’s intentions.⁷⁴ Despite the fact that there is support for repealing the AUMF,⁷⁵ efforts to do so have failed.⁷⁶ In June

a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

66 See Daskal & Vladeck, *supra* note 3, at 118–19 (explaining that the other options for dealing with new terrorist threats to the United States are more strategically beneficial to the country than generally expanding the authorization for the use of military force).

67 *Id.* at 138. For example, if Congress repeals the AUMF, it may choose to specifically authorize the use of force against al-Qaeda in the Arabian Peninsula (AQAP), if that is found to be the best step in protecting U.S. national security interests. See *id.* at 142–46.

68 Honorable Jeh Charles Johnson, General Counsel, U.S. Dep’t of Def., *The Conflict Against al Qaeda and its Affiliates: How Will It End?*, Speech Before the Oxford Union (Nov. 30, 2012), *available at* <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

69 See Sunset to the Authorization for Use of Military Force Act, H.R. 2324, 113th Cong. § 2 ¶¶ 12–13 (2013) (encouraging the President to work with Congress following the repeal of the AUMF to determine how the United States will legally face new terrorist threats).

70 President Barack Obama, *supra* note 31 (outlining President Obama’s view that all wars must eventually end).

71 See U.S. CONST. art. II, § 2, cl. 1; U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”). *But see* Miller & DeYoung, *supra* note 36 (reporting that President Obama has been reluctant to use his constitutional power of self-defense as justification for military force out of fear that circumventing Congress could open him up to criticism that he is abusing executive power).

72 See Daskal & Vladeck, *supra* note 3, at 115–16 (noting the care taken by Congress to keep the scope of the authorization narrow by not declaring a general “war on terrorism,” only authorizing use of force against those who were connected to the September 11 attacks, and limiting the purpose of the AUMF to preventing those specific terrorists from attacking the United States again); *see also* H.R. 2324, § 2 ¶ 10 (“Congress never intended and did not authorize a perpetual war.”).

73 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–22 (2004) (plurality opinion) (holding that the AUMF did grant the authority to detain for the length of the conflict but warning that if the practical circumstances of the war were to change, and the United States was no longer engaged in active combat in Afghanistan, then this might not be the case).

74 President Barack Obama, *supra* note 31 (stating that President Obama looks forward to repealing the AUMF’s mandate).

75 See *supra* notes 72–74 and accompanying text.

76 See McAuliff, *supra* note 52 (recounting that those opposed to repealing the AUMF said that sixteen months was not long enough for Congress to decide on post-AUMF issues, while a supporter of the repeal argued that sixteen months

2013, Representative Adam Schiff proposed a bill that would have repealed the AUMF on December 31, 2014 and in July 2013,⁷⁷ he proposed an amendment to the annual military spending bill to end funding for any AUMF authorized operations after December 31, 2014.⁷⁸ The bill was not called for a vote,⁷⁹ and the amendment failed with 185 votes for it and 236 votes against it.⁸⁰ Representative Schiff's July 2013 amendment came closer to repealing the AUMF than the efforts of Representative Barbara Lee, the only Representative not to vote for the AUMF in September 2001, who has initiated prior legislation to repeal the law with none being called for a vote.⁸¹

In addition to choosing to extend or limit the AUMF, Congress also has the option to leave the AUMF as it is and to continue using it to authorize U.S. counterterrorism policies against al-Qaeda, the Taliban, and their associated forces.⁸² This option is the default until Congress takes action, but it leaves the government in a precarious situation, where it may be tempted to stretch the AUMF to justify using military force against new terrorist threats that do not clearly fall under the law's mandate.⁸³ It is widely agreed, on both sides of the political spectrum, that the current AUMF cannot be used to justify armed conflict against new terrorist threats that do not legally fit under the law.⁸⁴

B. U.S. Constitutional Separation of War Powers and the Role of the Courts in Judicial Review

Under the Constitution, both the President and Congress have the responsibility for the country's national security.⁸⁵ However, the Constitution separates the President and Congress's

is plenty of time and that Congress has a "constitutional responsibility" to address the outdated war authorization); Andrew Rosenthal, *In Praise of Hopeless Causes*, N.Y. TIMES (July 23, 2013, 12:37 PM), <http://takingnote.blogs.nytimes.com/2013/07/23/in-praise-of-hopeless-causes/> (noting sentiments among some right-wing members of Congress that the United States should indefinitely be kept on a war footing).

77 H.R. 2324.

78 Amendment to H.R. 2397, As Reported Offered by Mr. Schiff of California, 113th Cong. (2013).

79 Rosenthal, *supra* note 76.

80 McAuliff, *supra* note 52.

81 Tal Kopan, *Schiff to Intro Bill Ending War on Terror Authorization*, POLITICO (June 10, 2013, 10:01 AM), <http://www.politico.com/blogs/under-the-radar/2013/06/schiff-to-intro-bill-ending-war-on-terror-authorization-165779.html>; Barbara Lee, *Barbara Lee: AUMF Was Wrong in 2001, and It's Wrong Now*, U.S. NEWS (June 14, 2013), <http://www.usnews.com/debate-club/should-the-authorization-for-use-of-military-force-be-repealed/barbara-lee-aumf-was-wrong-in-2001-and-its-wrong-now> ("I was the only member of Congress to vote against the [AUMF].").

82 See Daskal & Vladeck, *supra* note 3, at 141 (presenting the option of leaving the AUMF as it is and use law enforcement, intelligence, and the President's Article II powers to combat new terrorist threats).

83 See CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 4 (describing the complex chain of associations required to connect new terrorist threats to the AUMF and noting the debate that will certainly sprout from this complexity).

84 See Gary Feuerberg, *Revise Sweeping Post 9/11 Powers: Experts*, EPOCH TIMES (July 15, 2013, 8:07 AM), <http://www.theepochtimes.com/n3/177990-revise-sweeping-presidential-military-powers-say-experts/> (reporting on dissatisfaction with continued use of the current AUMF from Republican Senator Bob Corker, who said that Congress taking back its power is not a partisan issue, and from former Democratic Representative Jane Harman, who emphasized that no one who voted for the AUMF in 2001 could have imagined how it would be used today).

85 See U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

respective powers.⁸⁶ Congress has the power to declare and fund war,⁸⁷ but the President is Commander in Chief of the armed forces.⁸⁸ In recent history, Presidents have avoided seeking congressional declarations of war by portraying their use of armed force as less than an act of war and using their authority as Commander in Chief.⁸⁹ The conversation over what situation requires a congressional declaration of “war” has become mostly academic since Congress has repeatedly enacted legislation, like the AUMF, authorizing the President to use military force to address threats to the nation.⁹⁰ Franklin D. Roosevelt was the last President who asked Congress to declare war in 1941⁹¹ and scholars believe that presidents have exhibited increased power to wage wars since the end of World War II.⁹²

The courts generally avoid having to decide cases delineating war powers between Congress and the President, reasoning that neither side in a war powers case can have standing because the President and Congress do not face personal injury when the other branch usurps their power.⁹³ The refusal to get involved in issues between Congress and the President has shifted the balance of war-making powers.⁹⁴ Instead of the President carrying the burden of persuading Congress to declare war, the burden rests on Congress to stop the President from acting, which can only be done with a bill commanding the President not to act.⁹⁵ Courts have cited the standing and political question

86 U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

87 U.S. CONST. art. I, § 8, cl. 11–12.

88 *Id.* art. II, § 2, cl. 1.

89 See Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping With Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 460–61 (2005) (observing that President Truman in Korea, Presidents Johnson and Nixon in Vietnam, the first President Bush in Iraq, and President Clinton in Eastern Europe all sent troops without congressional consent, instead invoking their role as Commander in Chief, with the responsibility to execute the laws of the country, and the demand for swift action in justifying their use of force).

90 *Id.* at 461; *see, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note) (2001) (authorizing the use of armed force against the perpetrators of the September 11 attacks); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (authorizing the use of armed force in Iraq in 2002); Authorization for Use of Military Force Against Iraq Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3 (1991) (authorizing the use of armed force in Iraq in 1991).

91 Block, *supra* note 89, at 460.

92 Robert McMahon, *Balance of War Powers: The U.S. President and Congress*, COUNCIL ON FOREIGN REL. (Sept. 1, 2013), <http://www.cfr.org/united-states/balance-war-powers-us-president-congress/p13092> (noting that even though the Constitution purposefully divided the war powers in an effort to require the President and Congress to work together, in practice the war powers lean towards the President).

93 See James M. Lindsay, *Is Operation Odyssey Dawn Constitutional? Part V*, COUNCIL ON FOREIGN REL. (Apr. 5, 2011), <http://blogs.cfr.org/lindsay/2011/04/05/is-operation-odyssey-dawn-constitutional-part-v/> (citing ripeness and the political question doctrine as additional issues in hearing cases between Congress and the President); *see also* Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (affirming that members of Congress suing President Clinton for taking military action in Serbia without congressional consent did not have standing), *cert denied*, 531 U.S. 815 (2000).

94 See Lindsay, *supra* note 93 (explaining that more power has shifted to the President).

95 *Id.* (noting that a bill commanding the President not to act could be vetoed by the President as long as she has the support of thirty-four senators, meaning the President can take action even if 501 members of Congress oppose the action); *see also* Dellums v. Bush, 752 F. Supp. 1141, 1150–51 (D.D.C. 1990) (holding that the case against President Bush was not ripe because Congress had not voted against going to war in Iraq and requiring that the petitioners represent a majority of Congress, “the body that under the Constitution is the only one competent to declare war, and

doctrines as reasons for not deciding war powers cases.⁹⁶

Justiciability doctrines allow the courts to avoid reaching the merits of cases for several reasons. The U.S. Supreme Court has held that under the case or controversy requirement of Article III of the Constitution,⁹⁷ the doctrine of constitutional standing requires that a plaintiff allege personal injury that can be connected to the defendant's conduct and can be rectified with the requested relief.⁹⁸ The Supreme Court has identified the political question doctrine as a tool to maintain separation of powers.⁹⁹ It applies if a case involves an issue that has been constitutionally promised to another branch of the government or if there is a "lack of judicially discoverable and manageable standards for resolving it."¹⁰⁰ The Supreme Court identified several reasons why a case may be considered non-justiciable under the doctrine.¹⁰¹ The definition can include a wide variety of cases.¹⁰² The doctrine is so foundational in U.S. law that it was even addressed in *Marbury v. Madison*¹⁰³ where the Supreme Court held that "[q]uestions, in their nature political, or which are, by the [C]onstitution and laws, submitted to the executive, can never be made in this court."¹⁰⁴

The state secrets doctrine is an evidentiary privilege that can only be used by a head of an executive branch agency that works with state secrets.¹⁰⁵ The privilege is used to protect information that could jeopardize national security if used in a public proceeding.¹⁰⁶ Courts have applied the state secrets doctrine in two ways, using the *Totten* bar¹⁰⁷ and the *Reynolds* privilege.¹⁰⁸ The *Totten* bar does not allow a court to hear a case based on state secrets¹⁰⁹ whereas the *Reynolds* privilege is an evidentiary privilege that allows a court to hear a case but privileged evidence to be withheld, which may cause the case to be dismissed.¹¹⁰

therefore also the one with the ability to seek an order from the courts to prevent anyone else, i.e., the Executive, from in effect declaring war").

96 See Lindsay, *supra* note 93 (noting the practical motives of the courts' avoidance of war powers cases: limiting the caseload they must hear and avoiding being used to make politically unpopular decisions that Congress and the President should make).

97 U.S. CONST. art. III, § 2, cl. 1.

98 *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

99 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

100 *Id.*

101 *Id.* (including the fact that deciding a case may cause a court to unduly question a political decision or a coordinate branch of government, or cause potentially embarrassing contradictory views on the same issue from different branches of government).

102 *Id.*

103 5 U.S. (1 Cranch) 137 (1803).

104 *Id.* at 170.

105 Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1935–36 (2007).

106 *Id.*

107 See *Totten v. United States*, 92 U.S. 105, 106–07 (1875) (holding that an action could not be brought against the government for breach of contract for secret services rendered during a war).

108 See *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (holding that even under the most compelling circumstances, the government can exercise its state secrets privilege and withhold evidence if the court is convinced that there are military secrets at stake).

109 *Totten*, 92 U.S. at 107.

110 *Reynolds*, 345 U.S. at 6–7, 8–10; see Frost, *supra* note 105, at 1937 (explaining that once the court decides that

When the courts have ruled on war powers cases, they have generally upheld the President's power to wage war. *The Prize Cases*¹¹¹ affirmed the President's power to use military force in defense of the country.¹¹² In these Civil War cases, President Lincoln blockaded the South and impounded ships that violated the blockade without a formal declaration of war against the South.¹¹³ The question before the Supreme Court was whether President Lincoln had the authority to institute the blockade before Congress made a declaration of war.¹¹⁴ The Court held that because the South attacked the United States, the President had the authority to use military force without waiting for a declaration of war by Congress.¹¹⁵ Though the courts do not often take on war powers cases, *The Prize Cases* remain a stark reminder of the President's authority as Commander in Chief.¹¹⁶

Despite Supreme Court support for presidential power to authorize military force in *The Prize Cases*, congressional discomfort with increasing presidential war powers has grown. An important example of Congress clashing with the President over the use of military force without a declaration of war occurred in 1973, when Congress enacted the War Powers Resolution over the veto of President Nixon.¹¹⁷ The Resolution states that the President cannot send troops into armed conflict without "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."¹¹⁸ The War Powers Resolution was enacted with the goal of ensuring better coordination between the President and Congress on the use of military force¹¹⁹ but, since the law's passage, many Presidents have expressed the belief that it is an unconstitutional interference with the President's role as Commander in Chief.¹²⁰ Under the War Powers Resolution, the AUMF constitutes "specific statutory authorization" for the use of military force.¹²¹ Despite the appearance that Congress and the President were working together with the passage of the AUMF, President Bush signed the AUMF into law while confirming his "constitutional authority to use force" without the AUMF.¹²²

the government can withhold privileged evidence, a plaintiff must prove the elements of her claim without the privileged evidence or the case will be dismissed).

111 67 U.S. (2 Black) 635 (1863).

112 *Id.* at 668.

113 *Id.* at 640–41.

114 *Id.* at 643–44.

115 *Id.* at 669–71.

116 See Block, *supra* note 89, at 478–81 (noting that there has been no Supreme Court case ruling on the merits of the Judiciary's role in war powers cases).

117 See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., IB81050, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 1 (2003), available at <http://fpc.state.gov/documents/organization/19134.pdf> (highlighting congressional concern following the Korean and Vietnam wars over decreasing authority for deciding when the country would go to war).

118 War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (2006)).

119 See McMahan, *supra* note 92.

120 GRIMMETT, *supra* note 117, at 2.

121 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note); War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548, 1541(c) (2011)).

122 President George W. Bush, Statement by the President, President Signs Authorization for Use of Military Force

In addition to using caution in addressing war powers cases between Congress and the President, U.S. courts are also wary of deciding national security cases in general.¹²³ The courts often avoid hearing national security cases by finding that they are not justiciable.¹²⁴ For example, the case of Anwar al-Aulaqi is a relatively recent U.S. national security case where the court used the political question and standing doctrines to dismiss a case.¹²⁵ al-Aulaqi's father, Nasser al-Aulaki, filed a case arguing that the U.S. government was unlawfully targeting his son as a suspected terrorist.¹²⁶ Nasser al-Aulaki reasoned that the targeting of a U.S. citizen outside of armed conflict or a situation presenting an imminent threat, where there are other non-lethal means for ending the threat, violates the Fourth and Fifth Amendment rights.¹²⁷ The district court dismissed the case using both the standing and political question doctrines.¹²⁸ Al Aulaki's case presents an example of a novel legal issue emerging in the post-September 11 world of national security that the courts have refused to address on the merits.¹²⁹ New national security questions continue to arise. For example, the American Civil Liberties Union (ACLU) recently filed a lawsuit challenging the constitutionality of the National Security Agency's (NSA) wide scale collection of Americans' phone records.¹³⁰

Bill (Sept. 18, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html> (keeping with the tradition of presidents rejecting the constitutionality of the War Power's Resolution).

123 Rick Pildes, *Does Judicial Review of National Security Policies Constrain or Enable the Government?*, LAWFARE BLOG (Aug. 5, 2013, 1:48 PM), <http://www.lawfareblog.com/2013/08/does-judicial-review-of-national-security-policies-constrain-or-enable-the-government/> (pointing to the requirement that courts only decide "cases and controversies" and the government's resistance to judicial review of constitutional challenges in the national security realm and as two looming issues in cases of national security).

124 *See infra* notes 213, 227, 246.

125 *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 51–52 (D.D.C. 2010) (explaining that al-Aulaqi, a dual citizen of the U.S. and Yemen, was allegedly targeted based on evidence that he had a role in AQAP and was supporting acts of terrorism). Following this case, Anwar al-Aulaqi was killed by a U.S. drone strike in Yemen on September 30, 2011, and his father filed a case against various U.S. officials for their roles in the drone strikes that killed his son. *Al-Aulaqi v. Panetta*, No. 12-1192, slip op. at 1 (D.D.C. Apr. 4, 2014). The court held that the political question doctrine did not preclude review of the case and that al-Aulaqi stated a claim that U.S. officials had violated his son's due process rights. *Id.* at 27. However, the court found that there was "no available remedy under U.S. law for this claim." *Id.* The court noted that allowing for a remedy in this case "would require the [c]ourt to examine national security policy and the military chain of command as well as operational combat decisions regarding the designation of targets and how best to counter threats to the United States" and would hurt the ability of U.S. officials to defend the nation. *Id.* at 36.

126 *Al-Aulaqi*, 727 F. Supp. 2d at 8.

127 *Id.* at 15.

128 *Id.* at 35, 52.

129 *See, e.g.*, Pildes, *supra* note 123 (observing that the courts have not addressed the circumstances that make targeted killings legal, questions remain about the correct procedures for military commissions, and courts have been silent about the scope of the government's surveillance programs); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 15 (D.D.C. 2010) (dismissing a case about the targeting of a U.S. citizen using the standing and political question doctrines).

130 *ACLU v. Clapper—Challenge to NSA Mass Call-Tracking Program*, ACLU, <http://www.aclu.org/national-security/aclu-v-clapper-challenge-nsa-mass-phone-call-tracking> (last visited Apr. 17, 2014) (explaining that the ACLU's complaint argues that the NSA program, which is justified by the Patriot Act's Section 215, violates the Fourth Amendment right of privacy and the First Amendment rights of free speech and association). The ACLU does not think that standing will be a problem for the organization in this case, as it was in *Clapper*, because the order from the Foreign Intelligence Surveillance Court to Verizon Business Network Services shows that the NSA is collecting the telephone records of all Verizon Business customers, which includes the ACLU. *Id.*

The refusal of U.S. courts to hear national security cases has implications for access to justice. The concept of having a “day in court” is central to the justice system in the United States¹³¹ but the refusal of courts to hear most national security cases violates that right. By employing strict justiciability doctrines such as the standing, political question, and state secrets doctrines, U.S. courts are not providing people with their day in court and are not protecting individual and human rights.

C. Israel Background

1. System of Government

Israel became independent in 1948¹³² and established a parliamentary democracy¹³³ that consists of a judiciary, a parliament or legislative body, and an executive within the parliament.¹³⁴ Israel has a President, whose duties are mostly ceremonial and formal,¹³⁵ and a Prime Minister, who must be a member of the parliament.¹³⁶ Israel’s Knesset is its legislative body and its court system makes up the judicial branch, with the Supreme Court as the highest court.¹³⁷ The Israeli government system is based on the principle of separation of powers, whereby the Prime Minister creates a coalition government and presents it to the Knesset for approval¹³⁸ with the independence of the judiciary guaranteed by law.¹³⁹ It is only by virtue of the Knesset’s confidence that the Prime Minister and the rest of the executive branch remain in office because a vote of no confidence in the Knesset destroys the executive coalition and requires the President to choose a new Member of Knesset, other than the Prime Minister, to form a new coalition government.¹⁴⁰ Once a coalition government forms, it is charged with executing the laws of the Knesset.¹⁴¹ The main restriction on the legislative power of the Knesset comes from the Basic Laws, Israel’s foundational laws.¹⁴² The Knesset also supervises the activities of the executive through legislation.¹⁴³

The Supreme Court of Israel enjoys extensive public trust and prestige, playing a central role in the development of legal norms.¹⁴⁴ Despite public trust in the judiciary, judicial review of Knesset legislation can be controversial because there is strong disagreement on fundamental elements of

131 See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (confirming that every person deserves her day in court).

132 NAVOR, *supra* note 17, at 19.

133 *Id.* at 21.

134 *Id.* at 31.

135 *Id.* at 91.

136 *Id.* at 125.

137 *Id.* at 137.

138 *Id.* at 117, 125.

139 *Id.* at 137.

140 Basic Law: The Government §§ 3, 28 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm (noting that an expression of no confidence in the executive must be adopted by a majority of the Knesset members).

141 NAVOR, *supra* note 17, at 125.

142 *Id.* at 98 (explaining that if the Knesset passes a law that violates one of the Basic Laws, there will be judicial review of the law).

143 *Id.* at 118 (detailing that it is the Knesset that decides on the content of legislation)

144 *Id.* at 137.

Israeli society such as the role of religion in the government and the Jewish identity of the state.¹⁴⁵ Israel does not have a formal constitution, so judicial review is not constitutionally based; instead the Supreme Court's case law and the Basic Laws provide the base for judicial review.¹⁴⁶

2. *The Israeli Constitution*

In 1948, with the establishment of the state, Israel passed the Law and Administration Ordinance,¹⁴⁷ which asserted that pre-state laws would remain in force as long as they did not contradict the Proclamation of the Establishment of the State of Israel or would not conflict with the Knesset's future laws.¹⁴⁸ Due to this ordinance, the Israeli legal system contains elements of Ottoman law, which was in force in the territory until 1917, British Mandate laws, which incorporated a large body of English common law, elements of Jewish religious law, and some aspects of other systems.¹⁴⁹ Despite the elements maintained from the pre-state period, Israel's independent statutory and case law has been developing since 1948 and constitutes the bulk of law within the state.¹⁵⁰

After Israel gained independence, the Knesset enacted a series of Basic Laws, relating to all aspects of life, which were created with the intention that eventually they would be brought together to form Israel's Constitution.¹⁵¹ Today, Israel still does not have a complete, written constitution; however, the Basic Laws serve a similar purpose,¹⁵² and efforts still exist to combine the Basic Laws into a constitution.¹⁵³ The Basic Laws outline the fundamental features of the government by

145 *Id.* at 156.

146 *Id.* (noting that Israel's lack of a constitution makes its judicial review different from other Western democracies because the review is not based on a stable document that has special procedures for amending it). Israel's judicial review was established by the 1995 decision *United Mizrachi Bank, Ltd. v. Migdal Cooperative Village*, where eight out of nine Justices recognized the ability of the Court to invalidate a law that was inconsistent with a Basic Law. CA 6821/93, 49(4) PD 221 [1995] (Isr.), available at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

147 Law and Administration Ordinance, 5708-1948, No. 1 § 11 (1948) (Isr.).

148 NAVOT, *supra* note 17, at 21 (indicating that the existing Ottoman and British Mandatory Law would be preserved "subject to the changes necessitated by the need to adjust the law to the establishment of the new state and its authorities").

149 *Id.* at 21–22.

150 *Id.* at 57–58.

151 *Id.* at 35–38.

152 *Id.* at 40–48 (describing the "constitutional revolution" that occurred with the *United Mizrachi Bank, Ltd.* judgment and the change in Israeli constitutional conception since then that the Basic Laws are supreme to other laws).

153 See, e.g., *Minister Livni: Time to Establish a Constitution*, ARUTZ SHEVA: ISR. NAT'L NEWS (Jun 12, 2013, 1:45 PM), <http://www.israelnationalnews.com/News/Flash.aspx/270204#.UccQDfaG2LM> (describing recent efforts to revitalize the process of drafting a written constitution).

describing the roles of the President,¹⁵⁴ the Knesset,¹⁵⁵ the executive branch,¹⁵⁶ the judiciary system,¹⁵⁷ and the military.¹⁵⁸ The Basic Laws also protect human dignity and liberty.¹⁵⁹

3. Israel's Supreme Court

Judicial authority is provided by the Basic Law on the Judiciary, which gives Israel's courts general judicial authority in criminal, civil, and administrative matters.¹⁶⁰ Judges are appointed by the President, upon recommendation of a nomination committee comprised of Supreme Court Justices, members of the bar, and public figures.¹⁶¹ Appointments are permanent but judges must retire at age seventy.¹⁶²

Israel's Supreme Court has appellate jurisdiction nationwide, the right to hear issues and grant relief when necessary to serve justice, and the authority to release people who are illegally detained or imprisoned.¹⁶³ In addition to appellate jurisdiction, Israel's Supreme Court also has original jurisdiction as a High Court of Justice and hears petitions against any government body or agent.¹⁶⁴ Therefore, the Israeli Supreme Court can serve as both the court of first instance and the court of last instance.¹⁶⁵ Israel's Supreme Court Justices have personal independence¹⁶⁶ and substantive independence,¹⁶⁷ exemplified in the process by which they are appointed, the term of office, the conditions of service, and that in discharging their duties, Justices are subject only to

154 Basic Law: The President of the State (1964) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic12_eng.htm (outlining how the President should be elected, what her functions and powers are, what kind of immunity she has, etc.).

155 Basic Law: The Knesset (1958) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm (including parameters for where the Knesset should be located, what kind of electoral system it should employ, and who cannot be elected to the Knesset).

156 Basic Law: The Government (2001) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm (describing who is eligible to be a minister in the executive branch and what the responsibilities of the ministers are).

157 Basic Law: The Judiciary (1984) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm (recognizing judicial independence and describing the process by which judges are appointed).

158 Basic Law: The Military (1976) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic11_eng.htm (explaining that the duty of the military will be prescribed by law and that the military is subject to the civil authority of the executive branch).

159 Basic Law: Human Dignity and Liberty (1992) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (protecting "life, body and dignity").

160 Basic Law: The Judiciary (1984) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

161 *Id.*

162 *Id.*; Malvina Halberstam, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, 31 CARDOZO L. REV. 2393, 2399 (2010) (statement of Professor Daniel Friedman, Former Israeli Minister of Justice).

163 Basic Law: The Judiciary (1984) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

164 NAVOT, *supra* note 17, at 140–141.

165 *Id.* at 139.

166 *Id.* at 148 (clarifying that the personal independence of Israeli judges means that their conditions are not supervised by the executive branch and the Knesset guarantees their permanent appointment until the age of seventy).

167 *Id.* (describing a judge's substantive independence as the fact that a judge does not receive orders from anyone and a judge is immune from criminal liability for any act performed in her judicial role).

substantive law, not to any other authority or person.¹⁶⁸

Israel's courts have developed a strong system of judicial review, despite the country not having a written constitution.¹⁶⁹ Those who support Israel's judicial review identify the source of the doctrine as two of Israel's Basic Laws enacted in 1992, the Basic Laws on Human Dignity and Liberty and Freedom of Occupation, which guarantee the protection of human rights.¹⁷⁰ One way that Israel's courts maintain strong judicial review is by using more flexible justiciability doctrines than those adopted by U.S. courts.¹⁷¹ For example, the Israeli Supreme Court rejects the political question doctrine on the grounds that it is inconsistent with the judicial role, therefore, the Israeli Supreme Court decides cases that would be precluded by the political question doctrine in other systems.¹⁷² It decides claims by inhabitants of the West Bank including cases challenging the legality of West Bank settlements,¹⁷³ cases challenging the legality of the separation barrier that Israel is building around the West Bank,¹⁷⁴ cases challenging the policy of targeted killing,¹⁷⁵ cases considering the rights of inhabitants in the blockaded territory of Gaza to basic necessities during combat activities,¹⁷⁶ and cases determining the rights of local inhabitants when terrorists are arrested.¹⁷⁷

Standing is another justiciability doctrine that the Israeli Supreme Court interprets liberally.

168 *Id.*

169 Halberstam, *supra* note 162, at 2431 (statement of Professor Shlomo Slonim, Professor at Hebrew Univ. of Jerusalem) (noting that judicial review, though an American invention, has been adopted by democracies throughout the world).

170 *Id.* (explaining that supporters view the Basic Laws as guaranteeing the right to have government action deemed unconstitutional if it violates individual rights, while critics view Israel's judicial review as giving too much power to the judiciary and seek to narrow it); Basic Law: Human Dignity and Liberty (1992) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (guaranteeing that "there shall be no violation of the life, body or dignity of any person"); Basic Law: Freedom of Occupation (1994) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm (guaranteeing the right to "engage in any occupation, profession or trade").

171 Kaufman, *supra* note 17, at 96–97.

172 *See id.* at 103 (differentiating between normative and institutional justiciability: normative meaning if there are legal means to decide the case and institutional referring to if it is advantageous for the court to decide the case).

173 *See, e.g.*, HCJ 606/78 Awib v. Minister of Def. PD 33(2) 113, 124 [1979] (Isr.) (holding that when a person has been deprived of her property, the case must be justiciable).

174 *See, e.g.*, HCJ 7957/04 Mara'abe v. Prime Minister of Israel (2) IsrLR 106, ¶ 116 [2005] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf (sanctioning the construction of the separation barrier inside the West Bank but striking down the route of the barrier in view of the existence of an alternative route, which required less injury to the Palestinian residents of the area in question).

175 *See, e.g.*, HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. (2) IsrLR 459, ¶ 61 [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (finding that targeted killings are legal under customary international law, on a case-by-case basis).

176 *See, e.g.*, HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 58(5) PD 385, ¶ 38 [2004] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf (denying the petition requesting relief during combat activities because most of the issues that the petition referred to were resolved during the days that the case was heard).

177 *See, e.g.*, HCJ 3799/02 Adalah Legal Ctr. for Arab Minority Rights in Israel v. IDF Cent. Commander (2) IsrLR 206, ¶ 25 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/990/037/A32/02037990.a32.pdf (holding that it is illegal for Israeli military personnel to put Palestinian civilians in harm's way when they are on their way to arrest someone).

Israel recognizes “public petitioner” standing in cases that involve issues of public importance and this loosening of the standing requirement has been characterized as essentially abolishing standing.¹⁷⁸ In a case questioning the legality of detention orders, the Israeli Supreme Court explained that not only can the family of a detainee bring a case to the Court, but any individual or organization concerned with the situation of a detainee can also bring a case.¹⁷⁹

The state secrets doctrine is another justiciability doctrine that the Israeli Supreme Court utilizes less often than other courts. Israel does not apply a standardized doctrine but uses two questions to analyze state secret claims: whether the case is justiciable, and then, assuming that it is, how can potentially sensitive evidence that relates to national security matters be evaluated.¹⁸⁰ Most of the claims are found to be justiciable.¹⁸¹ Israeli courts refuse to use the state secrets doctrine when human rights violations are involved, because the courts have held that any case alleging a violation of human rights is justiciable.¹⁸²

In addition to its relaxed justiciability doctrines, the Israeli Supreme Court also has procedural elements built in to increase the use of judicial review. The Israeli Supreme Court does show deference to other agencies, such as the military.¹⁸³ But the level of deference to the military has lessened, likely because of the prolonged nature of Israel’s conflict with the Palestinians or because of the increase in human rights discourse within the Israeli legal system.¹⁸⁴

D. Comparative Background

The protection of individual and human rights in Israel has developed almost exclusively by way of the judiciary.¹⁸⁵ Without a written constitution, Israel’s early judges were functioning against the backdrop of an environment that was hostile to human rights law.¹⁸⁶ Alternatively,

178 Kaufman, *supra* note 17, at 108.

179 HCJ 3239/02 Marab v. IDF Commander in the West Bank slip op. 46, ¶ 46 [July 28, 2002] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf (noting that several petitioners in this case are human rights organizations and that the issue of standing did not come up in the proceedings).

180 Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 244 (2009).

181 *Id.*

182 *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture v. Gov’t of Israel, (2) IsrLR 459, 508–09 ¶ 50 [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf (holding that no justiciability doctrine can prevent examination of a question regarding the most basic human right: the right to life).

183 Kaufman, *supra* note 17, at 114.

184 Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 LAW & SOC. INQUIRY 919, 919 (2010) (arguing that diminished deference to the military stems from the continuation of the conflict including the increase in the number of petitions filed by the civilian population).

185 Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 605 (1994) (noting that it is an unusual situation to have a country with most of its individual rights protected by judge-made law).

186 *See id.* at 606–07 (explaining that there was a lack of any affirmative human rights protections in early Israeli law, which stemmed from British mandatory law along with ideologies adopted from Jewish law and socialism). Additionally, the political climate of Israel’s early years was not sympathetic to the protection of individual or human rights because Israel confronted hostilities from its Arab neighbors and defending the country was the highest priority. *Id.*

with its written Constitution, the U.S. Supreme Court has been tasked with enforcing the Constitution by way of judicial review.¹⁸⁷ Since *Marbury v. Madison*, when the Supreme Court first declared an act of Congress unconstitutional, judicial review of the constitutionality of laws has been considered “the very essence of judicial duty” in the United States.¹⁸⁸

Despite the absence of a written constitution or bill of rights, the Israeli Supreme Court took significant steps early on to protect individual rights.¹⁸⁹ Israeli Justices had to adjudicate into law the kinds of protections that were foundational to U.S. democracy, such as the First Amendment’s protection for freedom of speech.¹⁹⁰ For example, in a revolutionary 1953 judgment, the Israeli Supreme Court incorporated the freedom of speech into Israeli law when it held that for legislation to infringe on freedom of speech, the Court must determine that the speech meets a threshold of endangering the public peace.¹⁹¹ Though Israel had no laws protecting freedom of speech, the Supreme Court determined that because Israel was a democracy, the Court could use the principles of freedom of speech from the U.S. model.¹⁹² The Israeli Supreme Court continued incorporating protections based on the U.S. Constitution, such as protecting the freedom of assembly and using the freedom of speech to overcome censorship laws.¹⁹³ The Israeli Supreme Court also held that Israel’s founding document, the Declaration of the Establishment of the State of Israel, though not legally binding, was another source of persuasive authority for the incorporation of individual rights into Israeli law because it outlined the establishing principles of the state, which protected equality and personal freedoms.¹⁹⁴ The Israeli Supreme Court used its judicial role to establish the individual

187 *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (noting that it is the Court’s duty to decide which laws govern which cases).

188 *Id.* at 178.

189 See Goldstein, *supra* note 185, at 609–11 (exemplifying that early Israeli Supreme Court decisions established that an individual is free to do what she wants as long as the legislature has not specifically restricted her activity, which meant that ambiguous laws would be interpreted in favor of individual liberty and not against it); see also HCJ 7/48 Al-Karbuteli v. Minister of Def., 2(1) PD 5, 15 [1949] (Isr.) (holding that the government is subject to the rule of law just like the citizens of the state in this case on administrative detentions, which was decided when Israel was in a precarious security situation). Some scholars are wary of overemphasizing the Supreme Court’s protection of human rights in the early years of statehood and emphasize that the Court’s strong judicial activism emerged in later years. See, e.g., ASSAF MEYDANI, *THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS* 2–3 (2011) (noting that in the early years of the state, the Israeli Supreme Court limited citizens’ ability to appeal from governmental decisions).

190 Goldstein, *supra* note 185, at 611; see also U.S. CONST. amend. I.

191 See HCJ 73/53 Kol Ha’am Co. v. Minister of the Interior, 7 PD 871 [1953] (Isr.) (holding that the Israeli Communist newspaper *Kol Ha’am* (Voice of the People) could not be suspended for criticizing the Israeli government for a decision the government did not actually make).

192 Goldstein, *supra* note 185, at 611–12.

193 See Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1, 25–26 (1992) (elaborating on the fact that the development of this field of law was only possible because the Court embraced a wider role of promulgating the national values of freedom and equality instead of just interpreting existing laws); see also HCJ 14/86 Laor v. Pub. Bd. for Censorship of Plays and Films, 41(1) PD 421, 441 [1989] (Isr.) (holding that freedom of expression cannot be infringed upon simply because of offended feelings in this censorship case).

194 Goldstein, *supra* note 185, at 612–13; see also THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL para. 3 (Isr. 1948) (enumerating that the country “will be based on freedom, justice and peace” and that “it will ensure

rights protections that U.S. citizens enjoyed from the establishment of the United States.¹⁹⁵ This history has caused the Israeli Supreme Court to exhibit particular dedication to maintaining the protections it has established.¹⁹⁶

II. CONGRESS SHOULD REPEAL THE AUMF WHEN COMBAT OPERATIONS IN AFGHANISTAN CEASE
BECAUSE, AS DEMONSTRATED BY ISRAEL'S STRONG JUDICIAL REVIEW PROCEDURES, IT IS POSSIBLE
FOR A COUNTRY TO REMAIN SECURE WHILE PROTECTING INDIVIDUAL RIGHTS BY UTILIZING STRONG
CHECKS AND BALANCES

The AUMF was enacted to address a specific problem, targeting only the terrorist organizations that perpetrated the September 11 attacks and anyone who assisted them.¹⁹⁷ With the approaching end to U.S. combat operations in Afghanistan, the AUMF will not provide the same level of authority that it has provided since its enactment.¹⁹⁸ Congress has three options for what to do with the AUMF: extend it, repeal it, or leave it the way it is.¹⁹⁹ There are several reasons why an expanded AUMF is not in the interest of U.S. national security, and the continued existence of the AUMF, following the cessation of U.S. combat operations in Afghanistan, puts the U.S. government at risk of trying to justify its activities against new terrorist threats with a law that cannot legally justify those activities.²⁰⁰

The war powers were intentionally split between Congress and the President, and it is Congress's constitutional duty to play a role in U.S. national security.²⁰¹ Though Congress will exercise some role in national security issues whether it repeals or expands the AUMF, by repealing the AUMF, Congress ensures its place in any future decisions to authorize force against new terrorist threats.²⁰² This will constitute a more robust role for Congress in national security issues than if it expands executive power under the current AUMF.²⁰³ A comparative law approach, using Israel as a model, illustrates that a country can fight terrorism successfully while maintaining separation of

complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture”).

195 Goldstein, *supra* note 185, at 605, 611.

196 See Segal, *supra* note 193, at 3 (recognizing that the Israeli Supreme Court has essentially developed the protections that are inherent in a written bill of rights, which Israel does not actually have).

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

198 See President Barack Obama, *supra* note 31 (describing plans to bring the troops home from Afghanistan and to end the armed conflict by eventually repealing the AUMF).

199 See *supra* notes 49-51 and accompanying text.

200 See Miller & DeYoung, *supra* note 36 (reporting that the administration is weighing how far the law can be stretched).

201 U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1; see also McMahon, *supra* note 92 (emphasizing the goal of shared responsibility in the division of war powers between the President and Congress).

202 See Editorial, *Repeal the Military Force Law*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/repeal-the-authorization-for-use-of-military-force-law.html> (arguing that amending the AUMF instead of repealing it would only serve to continue the idea of a perpetual armed conflict).

203 See, e.g., Sunset to the Authorization for Use of Military Force Act, H.R. 2324, 113th Cong. § 2 ¶¶ 13 (2013) (emphasizing the role that Congress will play in authorizing any use of force following repeal of the AUMF).

powers and protecting individual and human rights.²⁰⁴

A. Israel's Strong Judicial Review Enables The Country to Develop Bright Line National Security Laws More Efficiently Than the United States While Protecting Individual Rights

While the U.S. courts have been slow and oftentimes unwilling to take on national security cases,²⁰⁵ Israel's courts have vigorously performed their duty of judicial review.²⁰⁶ The benefit of Israel's strong judicial review is that its courts issue decisions on novel national security issues, establishing clarity for the government, the military, and the public.²⁰⁷ Another benefit of judicial review is that it can provide legitimacy to government actions, which can look like government overreach without review by the courts.²⁰⁸

1. Israel's Use of Flexible Justiciability Doctrines Provides for Stronger Judicial Review on National Security Issues Than That of the United States, In Turn Ensuring for Better Protections of Individual Rights

The different use of justiciability doctrines between the U.S. and Israeli courts leads to a wide gap in ability to decide cases on issues of national security where individual rights are at stake.²⁰⁹ The Israeli Supreme Court has virtually eliminated the use of procedural constraints on deciding issues related to the other branches of government,²¹⁰ whereas the U.S. courts continue to rely heavily on these types of constraints.²¹¹ The use of the standing, political question, and state secrets doctrines exemplify the difference in the courts' abilities to address national security issues and provide people with their day in court.²¹²

i. Standing Doctrine

The standing doctrine is particularly problematic in national security cases in the United

204 See BYMAN, *supra* note 14, at 3 (noting that Israel's lessons are particularly relevant in this age of global terrorism); see also *supra* note 17 and accompanying text.

205 See *infra* notes 213, 227, 246 (exemplifying U.S. courts' refusal to decide national security cases on the merits).

206 Kaufman, *supra* note 17, at 96 (describing the ways in which Israeli courts hear cases that U.S. courts likely would not hear).

207 Pildes, *supra* note 123 (highlighting the process by which government transparency is strengthened with clarity on national security issues).

208 *Id.*

209 Kaufman, *supra* note 17, at 96 (highlighting the areas where the two courts differ but acknowledging that there are important similarities between the courts, notably that during times of crisis, both courts tend to cautiously maintain the status quo).

210 Goldstein, *supra* note 185, at 613 (noting that the one exception to the Court's extensive judicial review is review of the "primary legislation" or the Basic Laws).

211 See Kaufman, *supra* note 17, at 96.

212 See *id.*

States, preventing many cases from reaching the merits.²¹³ For example, in *Clapper v. Amnesty International*, several organizations challenged the Foreign Intelligence Surveillance Act (FISA) Amendments of 2008.²¹⁴ The FISA Amendments revised the procedures for authorizing certain foreign intelligence collection, allowing the government to perform surveillance targeting non-U.S. citizens abroad.²¹⁵ The organizations challenged the FISA Amendments as facially unconstitutional, arguing that their work required participation in sensitive international communications with non-U.S. citizens who were likely to be under surveillance and that they were suffering injuries by having to use costly methods to protect the confidence of their communications.²¹⁶ The Supreme Court found that the petitioners did not have standing and stated that the organizations “cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.”²¹⁷

Unlike in U.S. courts, Israel’s reluctance to rely on the standing doctrine has allowed important national security cases to be heard. In its early decades, the Israeli Supreme Court applied a similar standing doctrine to that of the United States.²¹⁸ Eventually, the standing requirement was abolished for cases where the Israeli Supreme Court sits as the High Court of Justice.²¹⁹ The standing requirement was eliminated to allow the public to have improved access to the Court and so that Palestinians from the West Bank could also access the Court.²²⁰ Today, without the need for standing, any person or organization can file a petition directly to the High Court of Justice, even if they were not personally affected by the injustice.²²¹ For example, most Israeli cases challenging military activities in the West Bank are brought by non-governmental organizations (NGOs).²²² Israel’s flexible standing doctrine allows citizens to challenge injustice within national security programs more easily than in the United States, which creates a superior system from the perspective of protecting individual and human rights.²²³ The Israeli Supreme Court has defended its relaxed standing requirement by saying that closing the door to a petitioner who has not been injured but

213 See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1155 (2013) (holding that the petitioners did not have standing in their case alleging injury from increased government surveillance); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 35 (D.D.C. 2010) (holding that the plaintiff did not have standing in his case alleging that the government was unlawfully targeting his son as a threat to national security).

214 133 S. Ct. at 1142–43.

215 *Id.* at 1140.

216 *Id.*

217 *Id.* at 1141.

218 See Halberstam, *supra* note 162, at 2432 (statement by Professor Shlomo Slonim) (providing that in 1971 the Israeli Supreme Court held that a plaintiff had no standing if she could not show why she was injured more than anyone else); *id.* at 2413 (statement by Justice Elyakim Rubinstein) (sharing that when Justice Rubinstein was in law school, he learned that he had to show standing to bring a case to the High Court of Justice).

219 *Id.* at 2433 (noting that for decades, the flexible standing doctrine was used sparingly until Justice Aharon Barak joined the Israeli Supreme Court and subsequently became President of the Court in 1995).

220 *Id.* at 2413).

221 *Id.* at 2422 (criticizing the Israeli Supreme Court’s allowing political advocacy non-governmental organizations to file petitions in the High Court of Justice).

222 Kaufman, *supra* note 17, at 108.

223 See *id.* at 107–08 (highlighting the belief of former Israeli Supreme Court Justice Aharon Barak that different rules of standing stem from different philosophies on the role of the judge in a democracy).

who is sounding the alarm on unlawful government actions would damage the rule of law.²²⁴ The United States is founded on citizens having the right to access justice²²⁵ but a strict standing doctrine keeps that justice out of reach for many.²²⁶

ii. Political Question Doctrine

U.S. courts have used the political question doctrine extensively to avoid deciding recent national security cases on the merits.²²⁷ As discussed above, the case of Anwar al-Aulaqi is an example of a U.S. court dismissing a national security case based on the political question and standing doctrines.²²⁸ The court compared the case to a case from the U.S. Court of Appeals for the D.C. Circuit, where the D.C. Circuit forbade discussing the merits of a President's decision to attack a foreign target.²²⁹ The court in al-Aulaqi's case also stated that there are no "judicially manageable standards" that courts can use to decide what kind of national security threat a specific person presents.²³⁰ The court went on to cite another D.C. Circuit holding, which said that the question of if a terrorist organization threatens U.S. national security is not justiciable.²³¹ The result of the court's decision to use the political question doctrine in al-Aulaqi's case effectively shields the significant national security issue of targeting a U.S. citizen from judicial review.²³²

Conversely, as explained above, the Israeli Supreme Court rejects the political question doctrine on the grounds that it is inconsistent with the judicial role.²³³ In *Mara'abe v. Prime Minister of Israel*,²³⁴ Justice Aharon Barak explained that though the Court does not substitute its discretion

224 See HCJ 910/86 Ressler v. Minister of Def., 42(2) PD 441, ¶ 22 [1988] (Isr.) ("Access to the courts is the cornerstone of the rule of law.")

225 See U.S. CONST. amend. I (protecting the right to "petition the Government for a redress of grievances").

226 See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 140–41 (3d ed. 2006) (noting the widespread use of the standing doctrine in surveillance cases and the resulting inability of petitioners to obtain redress).

227 See *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008) (holding that the political question doctrine barred claims brought against CIA employees in their personal capacities); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (holding that the political question doctrine barred a soldier's parents from bringing a wrongful death case); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 846 (D.C. Cir. 2010) (holding that the political question doctrine barred judicial review of the President's decision to destroy a Sudanese pharmaceutical plant).

228 *A- Aulaqi v. Obama*, 727 F. Supp. 2d 1, 35, 52 (D.D.C. 2010).

229 *Id.* at 47; see *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 846 (D.C. Cir. 2010) (finding that it would be too difficult for courts to find out the process by which intelligence is evaluated to decide if military force is needed to prevent a terrorist attack).

230 *Al-Aulaqi*, 727 F. Supp. 2d at 47.

231 *Id.* (concluding that because courts cannot determine if a particular group threatens national security they also cannot determine if a particular individual threatens national security); see *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (denying the organization's petition for judicial review of its designation as a "foreign terrorist organization" by the U.S. Secretary of State).

232 See *Al-Aulaqi*, 727 F. Supp. 2d at 52 (recognizing the "unsettling" character of the decision by the court that the President can kill a U.S. citizen abroad and the act cannot be judicially reviewed).

233 Kaufman, *supra* note 17, at 103.

234 HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* (2) IsrLR 106, ¶ 31 [2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf.

for the military commander's discretion, the Court does not retreat from a case because of political or military issues.²³⁵ Justice Barak further stated that if the actions of a military commander violate human rights, then those actions are justiciable and the Court's door is open.²³⁶ In Israel, "security considerations" or "military necessity" do not constitute magic words in the sense that using them does not mean the Court will automatically dismiss a case.²³⁷

The sharp contrast in use of justiciability doctrines between U.S. and Israeli courts is evident when comparing the cases of *al-Aulaqi v. Obama*²³⁸ and *Public Committee Against Torture v. Government of Israel*.²³⁹ Both cases involve the legality of targeted killings, though *al-Aulaqi* specifically relates to the targeting of a U.S. citizen while *Public Committee Against Torture* discusses targeted killings in general.²⁴⁰ In *Public Committee Against Torture*, the Israeli government argued that the case was not justiciable because it related to operational activities from the battlefield and that "judicial restraint" necessitated the court staying off the battlefield.²⁴¹ In rejecting the government's assertion, the Israeli Supreme Court listed four restraints on non-justiciability doctrines: when the doctrine would prevent analysis of a violation of human rights, when the issue is mostly a legal issue and not a policy issue, when the issue would be justiciable in an international court, and when a case involves an investigation of military operations that have concluded.²⁴² The Israeli approach puts individual rights before those of the military and political bodies in ensuring that arguments over the most basic rights see the courtroom.²⁴³ As the court noted in *al-Aulaqi*, it is unsettling that the right to life does not warrant its own day in court,²⁴⁴ but the issue is more than unsettling because the right to life is a human right, recognized by U.S. domestic and international law.²⁴⁵

235 *Id.*

236 *Id.*

237 *Id.*; see H CJ 7015/02 Ajuri v. The Commander of IDF Forces in the West Bank, 56(6) PD 352, 375 ¶ 30 [2002] (Isr.), available at http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.pdf (stating that using the phrase "security of the State" does not automatically prevent judicial review).

238 727 F. Supp. 2d 1 (D.D.C. 2010).

239 H CJ 769/02, (2) IsrLR 459, ¶ 50 [2006] (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf.

240 727 F. Supp. 2d at 8; H CJ 769/02, (2) IsrLR ¶ 50 (explaining that petitioners argued that the Israeli government's use of targeted killings violated international law).

241 H CJ 769/02, (2) IsrLR at 507 ¶ 47.

242 *Id.* at 508–11 ¶¶ 50–51, 53–54 (emphasizing that the military operation addressed in this case—targeted killing—may violate the right to life and that any "doctrine of institutional justiciability cannot prevent the examination of this question").

243 *Id.* at 508–09 ¶ 50 (explaining that the violation of basic rights, such as violating property rights, must be reviewed despite military or political implications of the review).

244 See *supra* note 232 and accompanying text.

245 See U.S. CONST. amend. V (protecting the right not to be deprived of life without due process of law); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (describing the right to life as an "unalienable right"); International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) (guaranteeing that everyone has the "inherent right to life" and that this right must "be protected by law"); Universal Declaration of Human Rights, art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (guaranteeing "the right to life, liberty and security of person"). Though the Universal Declaration of Human Rights is not binding, it was adopted by the United Nations General Assembly and many of its protections are incorporated into customary international law, which is binding on all states. Hurst Hannum, *The Status*

Strict justiciability doctrines put U.S. courts in a position where they will not hear national security cases on basic human rights issues. When it comes to the protection of individual and human rights, Israel's courts surpass those of the United States by ensuring that these kinds of cases see a courtroom.

iii. State Secrets Doctrine

Since September 11, 2001, the state secrets doctrine has been invoked several times in U.S. courts and has prevented cases from challenging anti-terrorism tactics.²⁴⁶ For example, several cases on torture and extraordinary rendition have been dismissed because of the doctrine.²⁴⁷ Contrary to the employment of the state secrets doctrine in U.S. courts, in Israel, the state secrets doctrine cannot be used when violations of human rights are alleged because any case alleging a violation of human rights is justiciable.²⁴⁸

In recent history, the Israeli Supreme Court has taken an activist role in protecting individual and human rights by challenging the use of "security interests" by the government as justification for policies that violate rights.²⁴⁹ Use of the state secrets doctrine in post-September 11 national security cases in U.S. courts has had the effect of shielding executive actions from judicial review and from congressional and public oversight.²⁵⁰ Though many of the state secrets cases have been decided by lower courts, the fact that the Supreme Court has repeatedly denied certiorari on cases that are dismissed based on the state secrets doctrine shows an intentional refusal to hold the government accountable for its activities that violate individual rights and a refusal to establish clarity on when the government can assert the privilege.²⁵¹ Israeli courts are better equipped to protect individual and human rights in national security cases than U.S. courts because they will hear cases despite the government's efforts to use the state secrets doctrine.

of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).

246 Kaufman, *supra* note 17, at 110; *see, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073–74 (9th Cir. 2010) (dismissing the case of foreign nationals who alleged a company's participation in their extraordinary rendition and torture by the U.S. government because of the state secrets doctrine); El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007) (dismissing the case of a foreign national against U.S. government officials for his alleged extraordinary rendition and torture by the U.S. government because the case could not be litigated without exposing state secrets); Arar v. Ashcroft, 585 F.3d 559, 574–77 (2d Cir. 2009) (discussing the state secrets doctrine, saying that the case would probably be decided on issues of national security and that the executive branch has reasons to keep the case out of public view, but not deciding the state secrets issue because the case was dismissed for other reasons).

247 *Supra* cases cited in note 246.

248 HCJ 769/02 The Pub. Comm. Against Torture in Israel v. Gov't of Israel (2) IsrLR 459, ¶ 61 [2006] (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

249 Goldstein, *supra* note 185, at 613 (describing the Israeli Supreme Court's willingness to challenge the factual and legal validity of the government's use of security concerns as grounds for restricting cases on human rights abuses).

250 *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1269–70 (2007) (explaining that the state secrets doctrine may prevent courts from weighing in on the constitutional issue of how far the executive branch can stretch laws in the post-September 11 armed conflict).

251 *See* Setty, *supra* note 180, at 215 (noting the lack of clarity surrounding the doctrine and what procedure courts should use to evaluate it).

2. *Procedural Elements Contribute to Israel's Superior Ability Over the United States to Provide Judicial Review of National Security Cases and To Protect Individual Rights In Those Cases*

The procedures of the Israeli Supreme Court further exemplify how Israeli courts are able to protect individual rights in national security situations. In addition to maintaining appellate jurisdiction over Israel's courts, the Israeli Supreme Court also has jurisdiction as a court of first instance, serving as the High Court of Justice on administrative and constitutional issues.²⁵² The Israeli Supreme Court's ability to directly hear cases challenging governmental action has enabled the Court to establish and apply the protection of rights more effectively.²⁵³ Though the U.S. Supreme Court has decided important national security cases since September 11,²⁵⁴ there is an inherent difference in the way that the Israeli and U.S. courts view their responsibilities in society, which affects their willingness to play a role in the national security of their countries.²⁵⁵ The role that each Court plays in its society affects its ability to protect individual and human rights; with Israel's courts opening themselves up to anyone who claims an injustice has been committed by the government²⁵⁶ and U.S. courts closing themselves off.²⁵⁷

Another example of the Israeli courts' superior ability to defend individual rights in national security cases is that when Israel's Supreme Court decides that it will not hear a case, it must provide an explanation, as opposed to the U.S. Supreme Court, which can simply deny certiorari without further explanation.²⁵⁸ The fact that the Israeli Supreme Court must explain why it will not hear a case creates transparency and fosters more understanding and trust between the Court and the public. When the U.S. Supreme Court denies certiorari, the petitioners do not know why, which

252 Goldstein, *supra* note 185, at 608 (observing that as the High Court of Justice, the Israeli Supreme Court has created, implemented, and enforced the protection of individual and human rights).

253 *Id.* (emphasizing the importance of the Israeli Supreme Court's role in deciding major political and social issues while the topics are "live" and noting that the consolidation of human rights law development into one court benefited the process).

254 *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 724 (2008) (holding that Guantanamo Bay detainees had a right to the writ of habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 560 (2006) (holding that the military commission convened to try the defendant lacked the power to proceed because its structure and procedures violated the Uniform Code of Military Justice and the Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466, 466 (2004) (holding that U.S. courts have jurisdiction to hear cases brought by non-citizens being detained at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (holding that a U.S. citizen being held as an enemy combatant had a right to contest the factual basis for his detention).

255 *See* Gabriella Blum, *Judicial Review of Counterterrorism Operations*, JUSTICE, Spring 2010, at 19, available at http://www.intjewishlawyers.org/main/files/Justice_all11_3b-final.pdf (explaining that the Israeli Supreme Court takes on a wider role than being a "hall of justice" because it acts as an educator of the broader society, an "alternative moral leadership" to the government, and as the "last line of defense" from international criticism; legitimizing state action with its approval).

256 Halberstam, *supra* note 162, at 2414 (statements by Professor Malvina Halberstam & Justice Elyakim Rubinstein); *see, e.g., supra* note 179 and accompanying text.

257 *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (U.S. 2013) (holding that the petitioners did not have standing because they did not establish that their injury was caused by the government's surveillance program); *see supra* note 205 and accompanying text.

258 Halberstam, *supra* note 162, at 2412 (statement by Justice Elyakim Rubinstein) (noting that the explanation for why the court would not hear the case does not set a precedent even if lawyers look to it as though it does).

can add to the lack of clarity on national security issues. Additionally, Israel's Supreme Court will hear human rights cases on an emergency basis with some cases being heard as early as the day they are received by the Court.²⁵⁹ This emergency procedure provides for unparalleled protection of individual and human rights.

The Israeli Supreme Court is also strengthened by its ability to hear cases on ongoing military conflicts. For example, during the Israeli military operation in Gaza from December 2008 to January 2009, the Israeli Supreme Court heard a petition on the negative effects of military operations on medical care in Gaza and another on military operations disrupting electricity, which prevented hospitals, clinics, and the water and sewage systems from functioning properly.²⁶⁰ There was a discourse in the courtroom between the government and the Court about the government's behavior and whether it should be altered.²⁶¹ Though the petitions were denied,²⁶² the fact that the Court heard the petitioners, in the midst of military operations, says much about the dedication of the Israeli Supreme Court to protecting individual rights.²⁶³ The U.S. Supreme Court expressed its views on judicial intervention during ongoing conflict in the 1950 case *Johnson v. Eisentrager*,²⁶⁴ which stated that hearing cases during active military operations would hinder the U.S. war effort and comfort our enemies.²⁶⁵ Even dissenting Justice Hugo Black stated:

It has always been recognized that actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations. Our Constitution is not so impractical or inflexible that it unduly restricts such necessary independence. It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefield. Active fighting forces must be free to fight while hostilities are in progress.²⁶⁶

259 *Id.* at 2413 (describing how, Justice Rubinstein could be called in the morning to hear a case on a human rights issue that afternoon).

260 *Id.* at 2414–15 (explaining that though the cases are assigned randomly, he heard all petitions about the military operation in Gaza); see HCJ 201/09 Physicians for Human Rights v. Prime Minister of Isr., IsrLR 1 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf; HCJ 248/09 Gisha Legal Centre for Freedom of Movement v. Minister of Def., IsrLR 1 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

261 Halberstam, *supra* note 162, at 2414–15 (statement by Justice Elyakim Rubinstein); HCJ 201/09 *Physicians for Human Rights*, IsrLR 1 ¶ 11 (showing that the Court responded to the government's argument that the cases were not justiciable by saying that "the combat operations of the [military] do not take place in a normative vacuum.").

262 *Id.* ¶ 29; HCJ 248/09 *Gisha Legal Centre for Freedom of Movement*, IsrLR 1 ¶ 29.

263 See, e.g., HCJ 4764/04 Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip [2004] IsrSC 58(5) 385 (explaining that the petition was heard in a compressed timeframe because it was filed during combat and requested relief in a variety of areas including: the supply of water, food, electricity, medical supplies and other areas).

264 339 U.S. 763 (1950).

265 *Id.* at 779.

266 *Id.* at 796 (Black, J., dissenting).

U.S. court decisions on current national security issues, such as the Guantanamo cases,²⁶⁷ have not altered the traditional choice of U.S. courts not to intervene with military operations in an active war theater.²⁶⁸ Some agree with the Supreme Court's decision in *Johnson v. Eisentrager*, that any kind of judicial review during ongoing military operations will have a negative impact on the war effort.²⁶⁹ But in Israel, the Supreme Court's insistence on putting individual and human rights above the executive's desire to engage in unfettered military activities has not negatively affected the security situation.²⁷⁰ The Israeli Supreme Court's ability and willingness to hear cases brought against the military ensures that the executive is considering the individual rights perspective when making military decisions.²⁷¹ This process ultimately keeps the country's activities on legal footing and maintains their legitimacy.

Despite the ability of the Israeli Supreme Court to hear many cases on individual and human rights, not everyone agrees that this is preferred to a more restrictive system.²⁷² Some think that the Israeli Supreme Court should be more restrictive, arguing that it receives so many cases that it cannot properly decide all of them.²⁷³ A Justice tells a fictional story where a citizen reads the newspaper, learns of something that she does not agree with, and goes to file a petition, writing the document on the way to the Court.²⁷⁴ The Justice said that the court regularly receives petitions with facts based solely on media coverage and that the current system encourages the public to participate in this way since no fines are imposed on those who submit unfounded petitions in the public interest.²⁷⁵ For the petitioner, the situation is ideal because, even if the petition is dismissed, the issue still gets some publicity.²⁷⁶ If the petition lacks sufficient basis for a claim, the Court may still contact the government to discuss the issue, which leads some to conclude that the judiciary is interfering with the executive, upsetting the checks and balances of the system.²⁷⁷ It can be debated if the procedures of the Israeli Supreme Court allow it to hear too many cases, but the procedures do strengthen the

267 See *Id.* (holding that the Guantanamo detainees have the constitutional right to habeas corpus).

268 See Blum, *supra* note 255, at 1918 (commenting that the U.S. Supreme Court would not have interfered in the military strategy of U.S. forces in Iraq or Afghanistan).

269 *Johnson*, 339 U.S. at 779; see, e.g., Al-Maqaleh v. Gates, 605 F.3d 84, 96–98 (2010) (describing how the petitioners' physical positions as detainees at Bagram Air Force Base, within the active "theater of war" of Afghanistan, precluded the district court from having jurisdiction over their petitions for habeas corpus for the same reasons outlined in *Johnson*).

270 See Blum, *supra* note 255, at 21 (explaining that judicial review of national security policies has not weakened government ability to effectively fight terror in Israel or in the United States and highlighting that there is no proof that unlawful counterterrorism measures such as illegal interrogations, detentions, or targeting improve national security); BYMAN, *supra* note 14, at 375–78 (confirming Israel's success in counterterrorism activity and highlighting that the mistakes Israel does make in the national security realm are caused by elements that are far removed from the Court's judicial review of ongoing military activities).

271 See Blum, *supra* note 255, at 19 (noting that when developing a counterterrorism strategy, the Israeli government considers the high probability that the Supreme Court will review it).

272 Halberstam, *supra* note 162, at 2415–16 (statement by Professor Daniel Friedman).

273 *Id.* at 2416.

274 *Id.*

275 *Id.*

276 *Id.*

277 *Id.* at 2416–17.

Court's ability to hear cases on national security issues and to protect individual rights in those cases.

B. In the Absence of Strong Judicial Review of National Security Policies, the U.S. Congress Should Check Executive Power by Repealing the AUMF

For the past twelve years, the AUMF has been used to justify a wide range of military activities, but the changing nature of the threat is quickly rendering the AUMF obsolete.²⁷⁸ Congress did not intend for the AUMF to authorize a perpetual war; the law was tailored to target those responsible for the terrorist attacks of September 11, 2001 and anyone who assisted those terrorists.²⁷⁹ With the destruction of al-Qaeda's core and the United States withdrawing from Afghanistan, the day will soon arrive when the U.S. government will be hard-pressed to justify the use of military force against new terrorist threats under the AUMF.²⁸⁰ Of the three options available to Congress for what to do with the AUMF, the ramifications of each demonstrate that to maintain separation of powers, Congress should repeal the AUMF when combat operations in Afghanistan cease.²⁸¹

Leaving the AUMF as it is following the U.S. withdrawal of troops from Afghanistan is another option for Congress. This option raises the issue of what it means to remain in an armed conflict against the Taliban, al-Qaeda, and their associated forces when there is no longer a "hot" battlefield with boots on the ground.²⁸² The major problem with this option is that, as long as the current AUMF remains, the U.S. government will be tempted to stretch the law to cover the use of force against new terrorist threats, putting the country in the precarious situation of taking action without sound legal justification for the action.²⁸³ It is widely agreed that the status quo cannot last

278 See Daskal & Vladeck, *supra* note 3, at 116 (reasoning that the day is approaching when the United States will not be involved in an armed conflict with the terrorist organizations involved in the September 11 attacks).

279 See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS 22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2-3 (2007) (providing legislative history that explains how following the September 11 attacks, the White House suggested language that would have given the President open-ended authority to use force against any terrorist threat to the United States and how the final version of the legislation did not include that language because of congressional opposition).

280 See Miller & DeYoung, *supra* note 36 (highlighting the concern of lawyers in the Obama Administration that the law is being stretched too far).

281 See Andrew Cohen, *The Case for Congress Ending Its Authorization of the War on Terror*, ATLANTIC (June 10, 2013), <http://www.theatlantic.com/politics/archive/2013/06/the-case-for-congress-ending-its-authorization-of-the-war-on-terror/276699/> (utilizing an interview with Representative Adam Schiff, about his proposed bill to sunset the AUMF, to reiterate that Congress did not intend to authorize a perpetual war and to note that congressional refusal to take action on the AUMF is an abandonment of congressional duty).

282 See Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165, 1169-70 (2013) (describing the debate between the United States, arguing that it is in an armed conflict with the September 11 terrorists and their associated forces wherever they may be, and European allies, arguing that the United States is in an armed conflict but can only use military force in specific areas). There is a widely held understanding that there is a distinction between the "hot" battlefield and everywhere else, and that outside of "hot" battlefields the use of military force should be restricted and alternative means, such as law enforcement, should be used instead. *Id.* at 1202-03, 1217-18.

283 See Miller & DeYoung, *supra* note 36 (explaining that the government is already facing this problem as it is exploring ways to attack terrorists who had no connection to the September 11, 2001 attacks).

and that a change is necessary from the current AUMF.²⁸⁴

Expanding the AUMF will not necessarily improve the national security situation of the country but it will create an unbalanced separation of war powers by increasing executive power and it may hurt U.S. counterterrorism strategy in the long run.²⁸⁵ Law enforcement tools combined with the President's self-defense powers should be the first resort for dealing with new terrorist threats.²⁸⁶ President Obama has not asked Congress for an extended AUMF.²⁸⁷ On the contrary, he has indicated that he will oppose any expansion of the AUMF.²⁸⁸ The expanded use of military force against a continually growing list of terrorist groups may actually undermine U.S. national security.²⁸⁹ Days before Farea al-Muslimi, a journalist from Wessab, Yemen, testified before a U.S. Senate Judiciary Committee subcommittee, a drone strike in his village incited fear and anger toward the United States.²⁹⁰ al-Muslimi warned that terrorist groups, such as the al-Qaeda in the Arabian Peninsula (AQAP), are strengthened locally by drone strikes and targeted killings.²⁹¹ At the same time, U.S. security is weakened because AQAP recruits by means of the Yemeni people believing that the United States is at war with them, a belief that is aided by U.S. drone strikes that kill innocent people or damage property.²⁹² U.S. military activities have caused U.S. allies to fear for prosecution after assisting the United States with intelligence gathering, such as in a case brought against British officials for providing intelligence that led to a U.S. drone strike.²⁹³ Even within the United States,

284 See CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 2 (“[T]he AUMF’s usefulness is running out . . . and will demand attention in the medium term if not the short term.”); Daskal & Vladeck, *supra* note 3, at 142–46 (supporting options for the next steps from the current AUMF). Professors Daskal and Vladeck note three possibilities for modifying the AUMF: (1) making the AUMF more transparent, (2) tying a sunset provision to the United States withdrawal from Afghanistan, and (3) repealing and replacing the AUMF with an al-Qaeda in the Arabian Peninsula specific statute. Daskal & Vladeck, *supra* note 3, at 142–46.

285 Daskal & Vladeck, *supra* note 3, at 127–28. The proposals for an open-ended AUMF should be rejected because it is not clear that the threat posed by new groups “justify a new declaration of armed conflict.” *Id.* at 127. Law enforcement tools are highly effective at “detering, incapacitating, and gathering intelligence from terrorists” and current legal standards, such as the President’s self-defense powers, can adequately address threats that are beyond the means of law enforcement. *Id.* If a serious threat emerges, Congress can authorize the use of military force; using force as a first resort could be detrimental to American national security. *Id.* at 127–28.

286 *Id.*

287 See President Barack Obama, *supra* note 31 (“I will not sign laws designed to expand [the AUMF] mandate further.”).

288 *Id.* (“I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal the AUMF’s mandate.”).

289 Daskal & Vladeck, *supra* note 3, at 128.

290 *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killings: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Human Rights*, 113th Cong. 2–4 (2013) (statement of Farea al-Muslimi), available at <http://www.judiciary.senate.gov/download/testimony-of-al-muslimi-pdf> (explaining that if the United States had built a school or a hospital in his village, it would have changed people’s lives and served counterterrorism goals, but instead the U.S. drone strike accomplished what extremists had been unable to do: instill distrust and hatred toward the United States in the village).

291 *Id.* at 5 (testifying that the deaths of innocent people by drones destabilize Yemen and create an environment where terrorists benefit).

292 *Id.*

293 Ravi Somaiya, *Drone Strike Prompts Suits, Raising Fears for U.S. Allies*, N.Y. TIMES (Jan. 30, 2013), <http://www.nytimes.com/2013/01/31/world/drone-strike-lawsuit-raises-concerns-on-intelligence-sharing.html> (reporting on the issue

some military experts are coming out against expanded military force. For example, General James E. Cartwright, former Vice Chairman of the Joint Chiefs of Staff, recently expressed concern that U.S. military campaigns could undermine long-term efforts in the fight against extremism.²⁹⁴ As the U.S. Army Field Manual on counterinsurgency explains, “killing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.”²⁹⁵ Expanding the AUMF will upset the balanced separation of war powers and the effectiveness of expanded military force in defending U.S. national security is uncertain.²⁹⁶

Separation of powers is a necessary element of democracy.²⁹⁷ The use of strict justiciability doctrines by U.S. courts reduces their ability to protect individual rights and provide a valid check on executive power.²⁹⁸ With the unwillingness of U.S. courts to protect individual and human rights when it comes to national security issues, the executive has acquired unbalanced power on these issues.²⁹⁹ To balance the executive’s expanded power in national security, the U.S. Congress should engage the executive as much as possible on national security matters.³⁰⁰ Looking at Israel’s court system, Congress can see that playing an active role in national security issues strengthens the separation of powers and protects individual and human rights.³⁰¹ Repealing the AUMF will reinstate

of European officials being held legally liable for sharing intelligence to support U.S. activities that may be illegal in the officials’ own countries and exploring how the issue might affect intelligence sharing).

294 Mark Mazzetti & Scott Shane, *As New Drone Policy is Weighed, Few Practical Effects Are Seen*, N.Y. TIMES (Mar. 21, 2013), http://www.nytimes.com/2013/03/22/us/influential-ex-aide-to-obama-voices-concern-on-drone-strikes.html?pagewanted=all&_r=0 (quoting General Cartwright, who is retired from the military, as saying “[i]f you’re trying to kill your way to a solution, no matter how precise you are, you’re going to upset people even if they’re not targeted”).

295 U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 3-24: COUNTERINSURGENCY ¶ 1-128 (2006).

296 See CTR. FOR CIVILIANS IN CONFLICT & COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC, *THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS* 22–23 (2012), available at <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf> (describing several examples of U.S. military force actually hurting U.S. security interests).

297 See HCJ 3267/97 Rubinstein v. Minister of Def. 52(5) PD 481, 512 ¶ 23 [1999] (Isr.), available at http://elyon1.court.gov.il/files_eng/97/670/032/A11/97032670.a11.pdf (“Separation of powers is not a value in its own right, nor is it intended to ensure efficiency. The aim of the separation of powers is to increase freedom and prevent the concentration of power in one sovereign authority in a manner liable to violate individual freedom.”); see also *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The purpose [of separation of powers] was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”).

298 See Kaufman, *supra* note 17, at 96–97 (explaining that the U.S. courts’ strict justiciability doctrines may be allowing illegal policies to go unchecked).

299 See e.g., Chesney, *State Secrets and the Limits of National Security Litigation*, *supra* note 250, at 1269 (characterizing the use of the state secrets doctrine as limiting checks on the executive, as the “courts ought not to interfere with wartime measures undertaken by the president”).

300 See President Barack Obama, *supra* note 31 (noting the President’s willingness to interact with Congress on national security issues, such as on oversight of drone strikes, protecting diplomatic compounds, and on refining or repealing the AUMF).

301 See Kaufman, *supra* note 17, at 153–54 (providing several potential reasons for the differences in the U.S. and Israeli courts’ use of judicial review of national security issues); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (recognizing that despite the power granted to the President during armed conflicts, the Constitution requires the involvement of all three branches of government when the rights of the individual are at risk).

a balanced separation of powers, ensuring that the executive will establish a dialogue with Congress before using military force on any new terrorist threats.³⁰²

If Congress chooses to extend the AUMF it will be allowing the United States to remain in an indefinite state of armed conflict.³⁰³ The AUMF provided statutory authorization for the use of force against specific groups and if the executive branch decides that there is a need for authorization against a group that is not covered by the AUMF then it should engage Congress in a discussion about a new authorization; this is the process that the U.S. Constitution provides for.³⁰⁴ Because Congress has the power to authorize specific military actions on a case-by-case basis, there is no need for an open-ended authorization following the AUMF.³⁰⁵ From a perspective of protecting individual and human rights, the most responsible step Congress can take is to repeal the AUMF.

If Congress repeals the AUMF with the cessation of combat operations in Afghanistan, it will retain its power to check the executive branch on any future requests for authorization to use military force against a new terrorist threat.³⁰⁶ Instead of providing an open-ended authorization for war, Congress will require the executive branch to open any deliberations on future military operations to the discretion of Congress. The framers' intention for the U.S. government was to maintain a balanced separation of powers, with Congress playing a pivotal role in any decision to use military force.³⁰⁷ Repealing the AUMF following the withdrawal of troops from Afghanistan returns the separation of power to its constitutional equilibrium.

CONCLUSION

Congress should reestablish the constitutional balance of power by repealing the AUMF upon the cessation of U.S. combat operations in Afghanistan. The AUMF was not meant to authorize a general "war on terror" and the removal of troops from Afghanistan is a logical end for the law. To continue defending the United States from terrorism, the executive branch can utilize

302 See President Barack Obama, *supra* note 31 (expressing the President's desire to eventually repeal the AUMF and his refusal to expand the AUMF).

303 See *id.* (stressing that the President is in favor of repealing the AUMF and getting the United States off of a wartime footing).

304 See Daskal & Vladeck, *supra* note 3, at 138 (noting that there are no examples of congressional failure to provide a necessary authorization for use of military force).

305 See *id.* (highlighting that a congressional decision to delegate the power to authorize the use of military force to the President disregards the constitutional separation of powers).

306 Compare *Hamdi*, 542 U.S. at 536 (rejecting the government's argument that the threat to military operations outweighs a citizen's right to be heard in Court and stating that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake"), with CHESNEY ET AL., A STATUTORY FRAMEWORK, *supra* note 8, at 11 ("A more serious challenge is that the listing approach will appear to codify permanent war, and to diminish the degree of congressional involvement and inter-branch deliberation.").

307 See generally Letter from Constitutional Scholars to Members of Cong. (Jan. 17, 2007), available at <http://www.acslaw.org/photos/scholars%20letter%201.17.pdf> (describing, to the members of Congress, the extent of their constitutional war powers regarding President Bush's 2007 troop surge in Iraq, stating that Congress has "substantial power to define the scope and nature of a military conflict that it has authorized, even when these definitions may limit the operations of troops on the ground").

U.S. law enforcement, international law, its Article II powers, and if a new threat poses the same kind of risk that al-Qaeda and the Taliban did on September 11, 2001, Congress can issue a new authorization to use military force after a dialogue with the executive.

Using a comparative law approach allows Congress to see that Israel, a country facing continuous threats to its national security, is able to defend itself from terrorism while maintaining strong checks and balances and protecting individual and human rights. From a comparison of the Israeli and U.S. courts, Congress can see that for a country to be secure, it is not necessary to allow the executive branch to have unfettered control of national security policy. Congress should check the executive, restore the constitutional separation of powers, and protect individual rights by repealing the AUMF.