

COMMENT

Disaggregating Legal Strategies in the War on Terror

Since the September 11th attacks, Al Qaeda has pursued a global insurgency campaign against the United States and its allies by exploiting the grievances of local guerilla groups against their home countries. In response to this global insurgency, many commentators have argued that a “disaggregation” strategy is necessary to break the ties between local insurgent groups and the globalized ideology of Al Qaeda. American counterterrorism policies have been shifting to a disaggregation approach against this global insurgency, but our legal strategies remain focused on tying local and regional extremist organizations to high-level Al Qaeda leadership.

This Comment argues that current legal strategies will prove counterproductive if they aggregate terrorist threats. The prosecution of terrorist suspects based on the material support statute and the legal basis for the use of military force against groups “associated” with Al Qaeda are two such aggregating strategies. Instead, this Comment recommends adopting disaggregation as a framework for the U.S. legal strategy against the Al Qaeda global insurgency. A disaggregated strategy could take many forms, but this Comment recommends that the U.S. government (1) seek to detain suspected terrorists in the country where they are captured rather than in centralized facilities; (2) decouple criminal terrorism prosecutions from the State Department’s Foreign Terrorist Organization list; and (3) adopt a new “use of force” statute to supplement the 2001 Authorization for Use of Military Force (AUMF).¹

1. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

I. DISAGGREGATED TERRORIST NETWORKS AND COUNTERINSURGENCY STRATEGY

Al Qaeda's operational model for the September 11th attacks—train a cadre of operatives, send them to infiltrate a Western country, and then direct them to carry out a large-scale attack—has been replaced by a decentralized “global insurgency” model.² This global insurgency seeks out insurgents with grievances against their local government and attempts to aggregate them into a larger ideological campaign against the United States and its Western allies.³ Technological developments of the postmodern world—the low costs of acquiring weapons and explosives, the ability of isolated aggrieved individuals to organize via the Internet, and low organizational barriers to entry—have enabled these small local actors to create outsized threats against hierarchically organized states.⁴ The “small niche providers of violence” sometimes compete with each other, but “at the same time they are willing to work together to fight the United States by building a market that advances the fortunes of all.”⁵ Al Qaeda therefore seeks to find and exploit local grievances to integrate local groups into its broader Islamist ideology at minimal cost.⁶

In order to fight this new globalized insurgency, many counterterrorism experts have suggested that the United States and its allies pursue a strategy of

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2. DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA* 12 (2009). Kilcullen argues that Al Qaeda uses “the same standard four tactics (provocation, intimidation, protraction, and exhaustion) used by all insurgents in history” on a global scale against the United States and its allies. *Id.*
 3. See, e.g., David J. Kilcullen, *Countering Global Insurgency*, 28 *J. STRATEGIC STUD.* 597, 600 (2005); see also Don Ressler, *Al-Qa'ida's Pakistan Strategy*, CTC SENTINEL (Combating Terrorism Ctr., West Point, N.Y.), June 2009, at 2, available at <http://www.ctc.usma.edu/wp-content/uploads/2010/06/Vol2Iss6-Art1.pdf> (“Al-Qa'ida's conflation of the near and far enemy target sets is an attempt to re-frame the jihad in Pakistan as one that is both local and global.”).
 4. JOHN ROBB, *BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION* 74-75 (2007).
 5. *Id.* at 74; see also PHILIP BOBBITT, *TERROR AND CONSENT* 65-66 (2008) (comparing Al Qaeda to a venture capital firm that provides funding, resources, and advice to local Islamist groups).
 6. See MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY* 44-50 (2008) (describing a bottom-up model of terrorism and the success of “Al Qaeda Central” in exploiting local grievances). *But cf.* Bruce Hoffman, *The Myth of Grassroots Terrorism*, *FOREIGN AFF.*, May/June 2008, at 133, 138 (arguing that Al Qaeda's top leaders remain the most dangerous threat to U.S. interests).

“disaggregation.”⁷ If Al Qaeda’s strategy succeeds by aggregating local insurgents into a global movement, the United States should attempt to break down the ties between local guerillas and global players like Al Qaeda. Disaggregation results in “a series of disparate local conflicts that can be addressed at the regional or national level without interference from global enemies.”⁸ The concept of a “Global War on Terror” may have been useful after the September 11th attacks, but as a counterinsurgency strategy today, it is ineffective. Lumping together groups that practice terrorism is not only unhelpful, but actively plays into the hands of Al Qaeda as it attempts to unify local groups under a global insurgency campaign. Disaggregation, on the other hand, requires America to “separate [adversaries] from each other, turn them where possible against each other, and deal with those who need to be dealt with in sequence rather than simultaneously.”⁹ Disaggregation was a key element of the successful U.S. “surge” in Iraq in 2006-2007¹⁰ and has become an increasingly important part of U.S. counterterrorism policy.¹¹

II. CURRENT LEGAL TACTICS CREATING AGGREGATION

A successful counterinsurgency strategy against Al Qaeda must also encompass legal tactics. A number of factors—the desire of prosecutors to charge as many terrorism suspects as possible, the political popularity of aggressive military targeting, and the need to classify the fight against Al Qaeda as a non-international armed conflict¹² among them—drive American

7. See, e.g., KILCULLEN, *supra* note 2; Thomas Rid & Marc Hecker, *The Terror Fringe*, POL’Y REV. Dec. 2009–Jan. 2010, available at <http://www.hoover.org/publications/policy-review/article/5619>; Matthew Kowalski, *Global Insurgency or Global Confrontation? Counterinsurgency Doctrine and the “Long” War on Terrorism*, 24 DEF. & SECURITY ANALYSIS 65, 68 (2008).

8. Kilcullen, *supra* note 3, at 609.

9. KILCULLEN, *supra* note 2, at 285.

10. See, e.g., THOMAS E. RICKS, *THE GAMBLE: GENERAL PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ* 59-72 (2d ed. 2010).

11. See *National Strategy for Counterterrorism*, WHITE HOUSE 9 (June 28, 2011), http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

12. The Supreme Court already determined the conflict between the United States and Al Qaeda is a non-international armed conflict (NIAC) in *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006), but under international law, a NIAC exists when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Emphasizing the organizational ties between local insurgent

counterterrorism legal tactics toward aggregation. In this respect, the government's legal tactics may work at cross-purposes with larger U.S. counterterrorism strategy.

A. Aggregation in Terrorism Prosecutions

The prosecution of terrorism suspects in civilian courts is predicated on tying individual suspects into a larger Al Qaeda network. For instance, federal prosecutors have filed criminal charges against Hakimullah Mehsud, one of the leaders of the Pakistani Taliban,¹³ and against low-ranking members of the Somali militant group Al Shabaab based on their connections to Al Qaeda.¹⁴ In charging Mehsud, Al Shabaab, and even domestic terrorist groups based on their ties to Al Qaeda, prosecutors may have inadvertently played into Al Qaeda's hands by explicitly aggregating these local groups' grievances with the larger global insurgency. On the other hand, prosecutions like the recent indictment of Ahmed Abdulkadir Warsame, a member of Al Shabaab who served as a liaison between the Somali group and Al Qaeda of the Arabian Peninsula, help disrupt the ties between local and global organizations.¹⁵

In part, criminal prosecutors' reliance on connecting individual suspects with membership in a larger terrorist organization is based on their experience combating organized crime. Among its many provisions, the USA PATRIOT Act of 2001 amended the Racketeering Influenced and Corrupt Organizations (RICO) Act of 1970 to include terrorism in its definition of "racketeering

groups and Al Qaeda thus strengthens the U.S. argument that a NIAC exists, thereby allowing the United States to use military force against terrorist groups. *Cf.* Joint Defense Motion To Dismiss at 2, *United States v. Mohammad* (Military Comm'n Guantanamo Bay Nov. 3, 2008), available at <http://www.defense.gov/news/D-061%20Defense%20MTD%20for%20Lack%20of%20Jurisdiction%20%28absence%20of%20armed%20conflict%29.pdf> (arguing that the military commission lacks jurisdiction to try Mohammad because the alleged offenses did not take place within an armed conflict).

13. Criminal Complaint, *United States v. Mehsud*, No. 1:10-mj-00457-RCL (D.D.C. Aug. 20, 2010), available at http://www.investigativeproject.org/documents/case_docs/1369.pdf.
14. *See, e.g.*, Indictment, *United States v. Mostafa*, No. 09-CR-3726 (S.D. Cal. Oct. 9, 2009), available at <http://jnslp.files.wordpress.com/2010/08/mostafa-indict.pdf>; Superseding Indictment, *United States v. Hammami*, No. 07-00384 (S.D. Ala. Sept. 24, 2009), available at <http://www.haguejusticeportal.net/Docs/NLP/US/HammamIndictment.pdf>; Indictment, *United States v. Ali*, No. CR 10-187 PJS/FLN (D. Minn. July 19, 2009), available at http://www.investigativeproject.org/documents/case_docs/1355.pdf. Each indictment charges U.S. citizens with providing material support to the Somali Al Shabaab group.
15. *See* Indictment, *United States v. Warsame*, No. 11 CRIM 559 (S.D.N.Y. June 30, 2011), available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Warsame-Indictment.pdf>.

activity.”¹⁶ Under RICO, an individual can be convicted for mere membership in an organization that commits two or more predicate criminal acts, which, in addition to terrorism, include money laundering, illegal firearms possession, and other crimes. The RICO Act makes the prosecution of suspected terrorists significantly easier by creating culpability for low-level individuals, but it also forces the government to connect local insurgents with the global Al Qaeda organization, subtly aggregating the two.

Furthermore, the RICO model of prosecution may not be as effective against “open source jihad” terrorists as it is against organized crime. Traditionally, prosecutors indict low-level members of criminal organizations not because foot soldiers are important—on the contrary, they generally have few specialized skills and are easy to replace—but because they can turn state’s evidence against the organization’s higher-ups.¹⁷ RICO prosecution, however, assumes a hierarchical organization in which underlings receive orders from their superiors. But Al Qaeda now relies on decentralized networks of operatives who may not be aware of each other or the organization’s leadership¹⁸ and are thus not capable of aiding future prosecutions.

The material support to terrorism statute, which criminalizes knowingly providing material support or resources to any organization designated as a “terrorist organization,”¹⁹ has been federal prosecutors’ other chief tool against terrorism suspects since 2001.²⁰ Providing material support to terrorists has been prohibited since 1994,²¹ but prosecutors have increasingly turned to the material support statute since the September 11th attacks,²² and in 2001 and

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16. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 813, 115 Stat. 272, 382 (codified at 18 U.S.C. § 1961(1)(G) (2006)).
 17. See, e.g., HOWARD BLUM, *GANGLAND: HOW THE FBI BROKE THE MOB* (1993) (describing how the FBI was able to arrest famous mafia boss John Gotti when one of his underbosses turned state’s evidence against him).
 18. See, e.g., *Statement for the Record, S. Homeland Sec. and Gov’t Affairs Comm., Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland*, 111th Cong. 3 (2010) (statement of Michael Leiter, Dir., Nat’l Counterterrorism Ctr.) (noting that groups plotting against the U.S. “may not receive training, direction, or support from al-Qa’ida senior leaders”).
 19. 18 U.S.C. § 2339A-B (2006).
 20. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 19-20 (2005).
 21. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022 (codified as amended at 18 U.S.C. § 2339A (2006)).
 22. The material support statute was used only six times prior to 2001, but ninety-two times between 2002 and 2005. Chesney, *supra* note 20, at 19-20.

2004, Congress made the statute extraterritorial in reach.²³ Furthermore, since material support is itself a substantive crime, individuals can also be charged with conspiracy to provide material support, extending criminal liability to virtually any member of a foreign terrorist organization.²⁴

In June 2010, the Supreme Court rejected a legal challenge to the statute in *Holder v. Humanitarian Law Project*, finding that the law did not violate the First Amendment when it restricted individuals' ability to support the lawful, nonviolent activities of designated foreign terrorist organizations—even those without a connection to Al Qaeda, such as the Kurdistan Workers' Party or the Tamil Tigers.²⁵ As a result, it is difficult to imagine any activity a member of a foreign terrorist organization could engage in that would not violate the material support statute.²⁶

As a practical matter, the material support statute also shares the RICO Act's aggregation flaw. Many of the local insurgent groups that Al Qaeda aims to aggregate into its global insurgency—including those without a history of attacking U.S. interests, like Balochi resistance groups in Pakistan and Iran—are included on the State Department's list of foreign terrorist organizations.²⁷ Any form of support given to these organizations, even by non-U.S. citizens outside of the country, thus violates the statute. An Al Qaeda financier captured in Brooklyn can be charged, and possibly sentenced, identically to a man who sends funds to an organization attempting to establish an independent Sikh state in India.²⁸ When used against members of regional or

23. USA PATRIOT Act, Pub. L. No. 107-56, § 805(a)(1)(A), 115 Stat. 272, 377 (2001) (codified at 18 U.S.C. § 2339A (2006)) (making "material support" for terrorist acts an extraterritorial crime); Material Support to Terrorism Prohibition Enhancement Act of 2004, Pub. L. No. 108-458, § 6602, 118 Stat. 3761, 3761-62 (codified at 18 U.S.C. § 2339D (2006)).

24. Under the common law of conspiracy, conspirators can be found guilty even if they do not know the identities of their coconspirators. See *United States v. Monroe*, 73 F.3d 129 (7th Cir. 1995), *aff'd* 124 F.3d 206 (7th Cir. 1997).

25. 130 S. Ct. 2705 (2010).

26. See *id.* at 2725 ("Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.").

27. Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited May 19, 2011).

28. Compare Superseding Indictment, *United States v. El-Hanafi*, No. S4 10 Cr. 162 (S.D.N.Y. Sept. 14, 2010), available at <http://jnslp.files.wordpress.com/2010/09/el-hanafi-and-hasanoff-s4-indictment.pdf> (charging a U.S. citizen with providing and conspiring to provide material support to Al Qaeda), with *United States v. Awan*, No. CR-06-0154, 2007 WL 2071748 (E.D.N.Y. July 17, 2007) (sentencing a Canadian citizen to fourteen years in prison for sending money to the Khalistan Commando Force).

local insurgencies, the material support statute conflates membership in any foreign terrorist organization with complicity in Al Qaeda's goals.

B. Aggregation in Legal Authorizations for Military Force

Not only does the law enforcement approach to counterterrorism rely on an aggregation framework, but so too does the military legal model for fighting terrorism. The U.S. government's targeted killing and detention policies for suspected terrorists rely on the legal authority granted by the 2001 AUMF, which was explicitly tied to "nations, organizations, or persons" involved in the September 11th attacks.²⁹ The President has the power to use military force outside of congressional authorization,³⁰ but the Obama Administration is relying on the AUMF alone as authorization for strikes against suspected terrorists in Pakistan.³¹

As with criminal prosecutions, military actions have not been limited to Al Qaeda members. Rather, Predator drone strikes in Pakistan and Afghanistan have targeted members of the Pakistani Taliban (including Hakimullah Mehsud),³² the Islamic Movement of Uzbekistan,³³ the East Turkistan Islamic Movement,³⁴ the Philippines-based Abu Sayyaf Group,³⁵ and Afghan warlords who, while formally unaffiliated with the Taliban or Al Qaeda, oppose the

29. Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C § 1541 (2006)).

30. See, e.g., Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Att'y Gen. Eric Holder, Auth. To Use Military Force in Libya 6 (Apr. 1, 2011) [hereinafter Krass Memorandum], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> ("[T]he President has the power to commit United States troops abroad,' as well as to 'take military action,' 'for the purpose of protecting important national interests,' even without specific prior authorization from Congress." (quoting Auth. To Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6, 6 (1992))).

31. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the American Society of International Law Annual Meeting: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

32. Zahid Hussain, *Pakistan Believes Taliban Chief Is Dead*, WALL ST. J., Feb. 11, 2010, <http://online.wsj.com/article/SB10001424052748703455804575057141141688332.html>.

33. Ben Arnoldy, *Pakistan Army Against Taliban: What Are the Waziristan Goals?*, CHRISTIAN SCI. MONITOR, Oct. 27, 2009, <http://www.csmonitor.com/World/Asia-South-Central/2009/1027/p06s01-wosc.html>.

34. Bill Roggio, *US Airstrike Killed 15 Turkistan Islamic Party Fighters in Afghanistan*, LONG WAR J., Jan. 23, 2010, http://www.longwarjournal.org/archives/2010/01/us_airstrike_killed_1.php.

35. Bill Roggio, *Wanted Abu Sayyaf Operative Reported Killed in North Waziristan*, LONG WAR J., Jan. 21, 2010, http://www.longwarjournal.org/archives/2010/01/wanted_abu_sayyaf_op.php.

Karzai government.³⁶ Many of these groups would qualify as “cobelligerents” of Al Qaeda,³⁷ in that they have planned or carried out attacks against American targets, but their ambitions are local or regional rather than global.

The Pakistani Taliban, or TTP, is perhaps the best example of a group formed to oppose a local government, but then aggregated by the United States into the Global War on Terror. The TTP was formed in 2007 with the goal of overthrowing the Pakistani government³⁸ and did not carry out an attack against an American target until December 2009³⁹ when it sent a suicide bomber to attack a U.S. base in Afghanistan.⁴⁰ American drone strikes, however, targeted the TTP’s leader, Baitullah Mehsud, as early as June 2008.⁴¹ Of course, American intelligence officials may have possessed classified information about the TTP’s intentions well in advance of the December 2009 attack, but a successful disaggregation strategy would suggest attempting to separate local insurgents from Al Qaeda before using force.

In order to target local insurgents under the auspices of the AUMF, the U.S. government must adopt an expansive reading of the AUMF that considers any Islamist insurgent group to be as dangerous as Al Qaeda.⁴² In litigation surrounding the Uighur detainees at Guantánamo Bay, for instance, the government argued that the East Turkistan Islamic Movement—a group

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36. See Walter Pincus & Thomas E. Ricks, *CIA Fails in Bid To Kill Afghan Rebel with a Missile*, WASH. POST, May 10, 2002, <http://www.washingtonpost.com/wp-dyn/articles/A62842-2002May9.html> (describing a U.S. predator drone strike against Gulbuddin Hekmatyar, leader of the Hezb-e Islami group). Hekmatyar has been involved in U.S.-backed peace negotiations with the Afghan government. See Carlotta Gall, *Insurgent Faction Presents Afghan Peace Plan*, N.Y. TIMES, Mar. 23, 2010, <http://www.nytimes.com/2010/03/24/world/asia/24afghan.html>.
37. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2110 (2005) (“[A] terrorist organization that joins al Qaeda in its conflict with the United States, even after September 11, can be viewed as part of the ‘organization’ against which Congress authorized force.”).
38. See Greg Bruno & Jayshree Bajoria, *Interview with Brian Fishman: Jihadists and Times Square*, COUNCIL ON FOREIGN RELATIONS (May 6, 2010), <http://www.cfr.org/pakistan/jihadists-times-square/p22058>.
39. See M. Ilyas Khan, “CIA Bomber” Video Indicates Taliban’s Reach, BBC NEWS (Jan. 9, 2010), <http://news.bbc.co.uk/2/hi/8450102.stm>.
40. See Jane Perlez & Pir Zubair Shah, *Pakistani Taliban Leader Is Reported Dead*, N.Y. TIMES, Jan. 31, 2010, <http://www.nytimes.com/2010/02/01/world/asia/01pstan.html>.
41. See 2008: *The Year of the Drone*, NEW AM. FOUND., <http://counterterrorism.newamerica.net/drones/2008> (last visited June 18, 2011).
42. See John B. Bellinger III, *A Counterterrorism Law in Need of Updating*, WASH. POST, Nov. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>.

dedicated to fighting for Uighur self-determination in China—was “effectively ‘part of the same organization’”⁴³ as Al Qaeda, so it could “fit them in the AUMF.”⁴⁴ In other words, the current legal basis for the U.S. uses of force frequently causes the government to aggregate local insurgents with global players, despite counterinsurgency strategy’s recommendation to the contrary.

III. MOVING TO A DISAGGREGATED LEGAL STRATEGY

Previous academic works have applied the principles of counterinsurgency to the laws of war⁴⁵ and recognized that disaggregation can play a role in determining when conflicts with terrorists end.⁴⁶ But scholars have not yet built a legal strategy for pursuing the disaggregation of local insurgents. If, as counterinsurgency theory suggests, defeating Al Qaeda requires separating local grievances from global ideology,⁴⁷ our legal strategies should treat Al Qaeda and other organizations with global goals differently from local insurgents with limited goals. A disaggregated legal strategy would require rethinking the ways the United States fights terrorism. To illustrate what form this strategy might take, this Comment proposes three specific policy changes to move the United States closer to a disaggregated legal strategy.

First, whenever possible, the United States should detain suspected terrorists in the state where they are captured, rather than at one central facility like Guantánamo Bay or the Parwan Detention Facility. There will inevitably be some terrorists—for instance, those from Yemen or other unstable countries—who for security reasons cannot be held where they are captured.⁴⁸ In these instances, it might be worth the risk of aggregating terrorist threats in

43. *Parhat v. Gates*, 532 F.3d 834, 844 (D.C. Cir. 2008) (citation omitted).

44. *Id.* at 844 n.4 (citation omitted). The Obama Administration claims the ability to detain persons who are part of forces “associated” with Al Qaeda, but it has explicitly avoided defining the “precise characteristics of ‘associated forces’” sufficient to authorize detention. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009).

45. See, e.g., Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429 (2010).

46. See Adam Klein, Note, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1897 (2010).

47. See Kilcullen, *supra* note 3, at 609.

48. See, e.g., William Glaberson & Robert F. Worth, *Yemen Dispute Slows Closing of Guantanamo*, N.Y. TIMES, Apr. 23, 2009, <http://www.nytimes.com/2009/04/24/world/middleeast/24yemen.html>.

order to reduce the chances of dangerous terrorists escaping from custody. Nevertheless, since “efforts to kill or capture insurgent leaders” can “generat[e] grievances and caus[e] disparate groups to coalesce,”⁴⁹ the capture and detention of insurgent leaders should be viewed as an event that has the potential to transfer local grievances across geographic boundaries. By contrast, detaining and prosecuting insurgents in the territory where they are captured, and in dispersed, smaller prisons, means local insurgents will find it more difficult to connect their causes to a global insurgency.⁵⁰ Detaining suspected terrorists in their home countries would also allow the government to avoid the question of whether habeas corpus rights extend to U.S. detention centers outside of American borders.⁵¹

A disaggregated legal approach also suggests revising the legal framework for domestic prosecution of suspected terrorists. Although the RICO Act and material support statute provide prosecutors the wide-ranging authority that they need to halt incipient plots, their broad sweep can also cause them to conflate support for local groups with participation in a global insurgency. This problem could potentially be avoided by decoupling the State Department’s foreign terrorist organization designations—a list often drafted to advance U.S. relations with states facing local insurgencies⁵²—from domestic criminal prosecutions.

As the law currently stands, providing material support for any designated foreign terrorist organization is a crime, no matter how likely the group is to launch an attack on U.S. interests.⁵³ Aggressive prosecution of those who send money or materiel to Al Qaeda is essential, but law enforcement officials should not treat groups that are unaffiliated with Al Qaeda identically to those that are. Instead of relying on the State Department’s Foreign Terrorist

49. DAVID KILCULLEN, COUNTERINSURGENCY 221 (2010).

50. See Sitaraman, *supra* note 45, at 1818 (“Detaining and prosecuting insurgents in the territory in which they were captured decentralizes the grievances . . . and limits their ability to link to the global insurgency.”); cf. Katherine Seifert, *Can Jihadis Be Rehabilitated?*, MIDDLE E.Q., Spring 2010, at 21 (describing efforts to deradicalize terrorists in centralized prison facilities).

51. The D.C. Circuit has found that habeas rights do not extend to detainees held at the Parwan Detention Facility in Afghanistan, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), but the Supreme Court has yet to rule on the question.

52. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010) (“A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations.” (quoting Joint Appendix at 137 ¶ 16, *Holder* (Nos. 08-1498 & 09-89) (affidavit of Kenneth R. McCune, Assoc. Coordinator for Counterterrorism, U.S. Dep’t of State))).

53. See Office of the Coordinator for Counterterrorism, *supra* note 27.

Organization list, the material support statute could criminalize support only for organizations that could be targeted with military force. Whether under the AUMF or the new use of force statute proposed below, that definition would include Al Qaeda and its “associated forces,”⁵⁴ but not groups with grievances only against their local governments.

Lastly, disaggregation implies that the AUMF may be a clumsy legal tool in authorizing military force against terrorist organizations. Although the open-ended AUMF does not contain any time limits on the use of force,⁵⁵ requiring U.S. forces to justify strikes on the basis of the target’s connection to the September 11th attacks or cobelligerency with Al Qaeda risks being simultaneously too narrow and too broad for an effective counterinsurgency strategy. The AUMF may be too narrow because all but the most expansive readings of the statute’s text do not grant authority to use force against local insurgents who have not linked themselves to Al Qaeda or the Taliban, yet too broad because once a local group is targeted, it becomes legally indistinguishable from Al Qaeda.

Rather than continuing to rely on the AUMF, the Obama Administration could ask for new legislation from Congress to authorize the use of force against any terrorist entities that attack or threaten U.S. security interests.⁵⁶ Great care would be required in drafting a new statute, but eliminating the AUMF’s nexus to the September 11th attacks would give the executive the flexibility to use force against threats that could not have been foreseen a decade ago.⁵⁷ At the same time, insisting that the targeted groups pose a threat

54. This change would require a clear definition of “associated forces,” a term that both the courts and the Obama Administration have avoided defining. *See, e.g.,* *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (“[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is ‘part of’ al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach”); Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009) (avoiding, in the brief filed by the government, any definition of the characteristics of “associated forces”); *cf. Khan v. Obama*, No. 10-5306, 2011 WL 3890843, at *11-12 (D.C. Cir. Sept. 6, 2011) (affirming the district court’s finding that *Hezb-e Islami Gulbuddin* was an associated force of Al Qaeda in Afghanistan in 2002).

55. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)). *But cf.* Bruce Ackerman & Oona A. Hathaway, *What Will Congress Do About Afghanistan?*, SLATE, Dec. 9, 2009, <http://www.slate.com/id/2237884> (arguing that Congress should adopt a new use of force statute for the Afghan war with explicit time limits).

56. *See* Bellinger, *supra* note 42.

57. Even if a new use of force statute were enacted, the President would still retain his Article II powers to use force. *See, e.g.,* Krass Memorandum, *supra* note 30. *But*, in the detention

to U.S. security—perhaps by requiring the executive branch to make formal findings to Congress—would reduce the chance that America unwittingly aggregates local guerillas with Al Qaeda’s global insurgency. The proposed National Defense Authorization Act for Fiscal Year 2012 contains one such possible refashioning of the authorization for use of force.⁵⁸ Section 1034 of the Authorization Act, which passed the House on May 26, 2011, affirms that “the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces” pursuant to the AUMF, and further specifies that

- (3) the current armed conflict includes nations, organizations, and persons who—
 - (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
 - (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A)⁵⁹

The Obama Administration has stated that it “strongly objects” to section 1034 because it “would effectively recharacterize [the conflict’s] scope and would risk creating confusion regarding applicable standards,”⁶⁰ going so far as to declare that “if the final bill presented to the President includes these provisions . . . the President’s senior advisors would recommend a veto.”⁶¹

Although the Obama Administration may be correct that section 1034 would recharacterize the scope of the War on Terror, that recharacterization would be a helpful move toward disaggregation. Not only would section 1034 decouple uses of force from the September 11th attacks, but it would also require that targeted groups be “substantially supporting” Al Qaeda, the Taliban, or associated forces.⁶² This proposed language would permit U.S.

context at least, the Obama Administration has declined to rely on inherent Article II authority, making a new statute desirable. See Koh, *supra* note 31.

58. See H.R. 1540, 112th Cong. (as passed by House, May 26, 2011).

59. *Id.* § 1034(3).

60. *Statement of Administration Policy: H.R. 1540—National Defense Authorization Act for FY 2012*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT 1-2, available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf.

61. *Id.* at 3. The Administration’s veto threat was also prompted by other provisions of the bill, including those regarding prosecutions of detainees. It is therefore less clear whether section 1034 alone would prompt a presidential veto.

62. H.R. 1540 § 1034(3).

targeting of groups that are directly tied to Al Qaeda and the Taliban, but only associated forces that are “engaged in hostilities against the United States or its coalition partners.”⁶³ Section 1034 thus distinguishes between groups like the Haqqani Network that have already joined Al Qaeda to fight against the United States and groups that are sympathetic to Al Qaeda but have not yet engaged in hostilities. Section 1034 explicitly authorizes the use of force against the former but implicitly disallows it against the latter.

On the other hand, the inclusion of “coalition partners” in section 1034 is potentially problematic for a disaggregation theory unless the executive branch construes the definition of “coalition partner” narrowly. Insurgent groups that target only local governments would be engaged in hostilities against “coalition partners,” and therefore no different from groups targeting the United States directly. For example, section 1034 would have authorized military force against a group like the Pakistani Taliban, which was not directly engaged against the United States, but was fighting Pakistan, a coalition partner.⁶⁴ Unless the executive branch defines “coalition partner” narrowly to include only countries whose interests are aligned directly with the United States, such as fellow members of the International Security Assistance Force (ISAF) in Afghanistan, section 1034 risks aggregating local insurgents with global threats.

CONCLUSION

Al Qaeda’s global insurgency not only requires different counterterrorism policies, but also a different legal framework. The wide-ranging authority and discretion granted to prosecutors through the RICO Act and the material support to terrorism statutes, and to the military through the AUMF, risk inadvertently furthering Al Qaeda’s goals by aggregating local guerilla groups with a global insurgency. Counterintuitively, legal policies that are effective in securing convictions and targeting suspected terrorists may not promote America’s long-term interests. An additional difficulty is that the rhetoric of aggregation is politically favorable for both U.S. elected officials, given the ongoing political salience of September 11th, and for Al Qaeda and local

63. *Id.*; see also JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R41920, DETAINEE PROVISIONS IN THE NATIONAL DEFENSE AUTHORIZATION BILLS 13 (2011), available at <http://www.fas.org/sgp/crs/natsec/R41920.pdf> (“[T]he requirement that those entities described in subparagraph 3(B) [of section 1034] engage in or support hostilities seems to require a nexus to armed hostilities, rather than mere support to an entity described in subparagraph 3(A).”).

64. See *supra* notes 38-41 and accompanying text.

insurgents, who can raise their respective profiles by associating together. Nevertheless, U.S. legal strategies should attempt to separate local insurgents by treating them differently from global players like Al Qaeda. Doing so requires revisiting our detention policies, our domestic criminal laws, and the legal justification for the U.S. military's use of force overseas.

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