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Benjamin Wittes

Senior Fellow at the Brookings Institution

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"Is Al Qaeda Winning: Grading the Administration's Counterterrorism Policy"

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Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. He co-founded and is the editor-in-chief of Lawfare.

Thank you, Chairman Poe, Ranking Member Sherman, and members of the subcommittee for inviting me to present my views on the future of the Authorization for the Use of Military Force (AUMF)[1] and intelligence collection under Section 702 of the FISA Amendments Acts (FAA).[2] I am a Senior Fellow in Governance Studies at the Brookings Institution. I co-founded and am Editor in Chief of *Lawfare*, a website devoted to sober and serious discussion of "Hard National Security Choices." I am the author or editor of several books on subjects related to law and national security: *Detention and Denial: The Case for Candor After Guantánamo* (2011), *Law and the Long War: The Future of Justice in the Age of Terror* (2008), and *Legislating the War on Terror: An Agenda for Reform* (2009). I have written extensively both on the AUMF and on NSA collection under various provisions of the Foreign Intelligence Surveillance Act (FISA).[3] The views I am expressing here are my own.

The topics of the vitality and adequacy of the AUMF for the conflict the United States is currently fighting and the NSA surveillance programs that have, of late, dominated news headlines may seem largely unconnected. The AUMF and the FAA, after all, are profoundly different legal authorities, passed at different times, and with different fundamental purposes—one to authorize the conflict with Al Qaeda and the Taliban in response to the September 11 attacks, the other to gather foreign intelligence both inside and outside of the context of that armed conflict.

Yet in considering the question of the state of the U.S. confrontation with Al Qaeda, there is something to be said for considering these questions in conjunction with one another. These are, after all, two of the most important legal instruments in the struggle this committee is endeavoring to assess. One is the key legal authority for virtually every military action the United States undertakes in its military battle against Al Qaeda, its offshoots, and its affiliates. The other is the single most important legal authority the intelligence community has for collecting intelligence against the Al Qaeda target—not to mention other foreign targets of great national security significance. This intelligence is key to arrests and the thwarting of terrorist plots against the United States and its allies. It is also key to accurate and precise targeting judgments in lethal force operations.

[1] Pub. L. 107-40, 115 Stat. 224.
[2] FISA Amendments Act of 2008, Pub. L. 110-261, 112 Stat. 2436 (codified as amended at 50 U.S.C. § 1881(a) (2012)).
[3] Pub. L. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 *et seq.* (2012)).

What's more, both laws, for very different reasons, are under considerable stress right now. President Obama has announced that he wants to end the AUMF conflict, raising profound questions both about the plausibility and timeframe of that objective and about what legal instrument—if any—will replace the AUMF. Meanwhile, serial leaks have generated enormous political anxiety about NSA programs and persistent calls for reform in the press, in the general public, among allies, and in this body. Section 702 will sunset in 2017 absent action by Congress to renew this important collection authority.[4] So major pillars of the legal architecture of America's conflict with Al Qaeda have been placed—in different ways and for very different reasons—on the table. This body thus cannot avoid the question of how much, if at all, it wants to alter the most fundamental architecture of the conflict.

In my view, as I will lay out, the critical task facing the Congress is different with respect to these two laws. With respect to the AUMF, the Congress should legislate to clearly authorize, and establish proper oversight of, the conflict the United States is likely to continue fighting after its withdrawal from Afghanistan. With respect to Section 702, the task is simpler: to maintain the intelligence community's capacity to support both the broad national security objectives of the United States and the conflict's prosecution under whatever legal authorities may succeed the AUMF.

The Adequacy and Relevance of the AUMF

On May 23, 2013, President Obama, speaking at the National Defense University, said:

> The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core Al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.
>
> *So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will*

[4] *See* Edward C. Liu, Congressional Research Service, Reauthorization of the FISA Amendments Act 1 (2013).

> *not sign laws designed to expand this mandate further.* Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands (emphasis added).[5]

I am sympathetic to the objective the President articulated, and who would not be? The idea of endless war is repugnant. And the current conflict's end is tantalizing and in some respects within grasp. The modalities of the conflict with Al Qaeda are shifting in important ways—away from U.S. combat operations and towards support for allied governments in their own confrontations with local extremist movements. And the president always retains the power to use force on his own authority when necessary to protect the nation against imminent attack. President Obama has already limited drone strikes to situations of imminent threat and in which capture of the target is not a feasible option, situations that would generally satisfy both the international law and domestic constitutional law requirements for the use of force during peacetime. So the AUMF arguably plays less of a role today than it did even in the relatively recent past.[6] That will grow more true once U.S. combat forces are no longer in Afghanistan.

Moreover, most analysts—whether they favor repeal of the AUMF or some form of reauthorization or refinement of it—agree that the current AUMF is badly out of date. Tied to the September 11 attacks, it no longer describes well the conflict the United States is currently pursuing, a conflict that includes groups that had nothing to do with 9/11 in parts of the world quite remote from those places where the core of the AUMF conflict has taken place. While I believe the administration's reading of the law, which has allowed it to reach such targets where they lurk, is a reasonable one, it is not obvious when one reads the text of a law authorizing force against groups responsible for 9/11 how it authorizes force against groups in Yemen that did not exist in 2001. What's more, the administration's reading of the law has stopped short of reaching some potentially important targets against which a reasonable Congress might wish it to wield a freer hand—targets, for example, in Somalia and Mali. In short, the AUMF describes rather badly the conflict that the United States is currently fighting, and that problem is likely to get far worse in the coming years.

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[5] *See* 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.

[6] *See, e.g.*, Chapter 3 of Kenneth Anderson and Benjamin Wittes, Speaking the Law: The Obama Administration's Addresses on National Security Law (2013), *available at* http://www.lawfareblog.com/speaking-the-law-the-obama-administrations-addresses-on-national-security-law/; Robert Chesney, *Postwar*, Harv. Nat. Sec. J. (forthcoming, 2014) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332228).

There are at least three reasons to believe that the answer to the AUMF's problems is not either its repeal or to declare the end of hostilities under it. The first and most obvious is that Congress may wish to continue to authorize military force against foreign terrorist groups which actively threaten the United States. The world remains a dangerous place and Al Qaeda has metastasized. If one believes, as I do, that military force should still play a role in the American confrontation with Al Qaeda's many successor groups, it makes sense for this body to define the authorized parameters of that military force. Unless one believes that the result of ending the AUMF conflict will be the near-exclusive reliance on law enforcement authorities and that this is desirable, the realistic alternative to a new AUMF is the excessive reliance on the inherent Article II powers of the president as Commander in Chief to use force to defend the nation. I confess that I cannot see how this is an attractive alternative. American counterterrorism is at its strongest when the Congress and the administration are on the same page as to the authorities the country means to deploy against the enemy. This is no time, in my view, to return to the days of counterterrorism based on unilateral exertions of executive authority. I fear this is what would happen if the AUMF were allowed to lapse.

Second, in the absence of the AUMF, what is now policy with respect to only conducting drone strikes in circumstances of imminent threat where capture is not feasible would become law. This would, I worry, put enormous pressure on the concepts of imminence and feasibility of capture, as operators faced circumstances in which they could not conclude in good faith that the threats posed by significant targets rose to the threshold of imminence or in which they concluded that capture was, indeed, feasible but only by risking the lives of US troops. The administration has already faced criticism for stretching the meaning of terms like imminence and feasibility. How much more elastic would they prove to be if they became not merely policy but actual targeting law?

Finally, the repeal of the AUMF would require the release of a group of detainees the administration has been unable to bring to trial yet regards as too dangerous to set free. Some of these individuals are major terrorist leaders. The AUMF provides the only current legal basis for their detentions. It is impossible to contemplate a repeal of the AUMF without a clear plan for the disposition of these cases. No such plan has ever materialized, at least not in public.

For all of these reasons, the better approach is to take the President up on his suggestion of working with Congress "to refine" and to modernize the

AUMF, to rewrite it to describe the conflict the United States is actually fighting today and will likely be fighting for some time to come, rather than the conflict we imagined in the days following 9/11 we would be fighting. A number of suggestions for refinements to the AUMF have emerged over the past year, proposals which take very different approaches to the problem.

One that I coauthored sought to authorize the executive branch to use force against groups it designated as posing an imminent threat to the United States and proposed a series of accountability mechanisms so that Congress is kept informed of the executive's view of the scope of the authorization's coverage. It also proposed the sunsetting both of designations under the law and the law itself at statutorily designated intervals to prevent the authorization from morphing into an authorization for endless war.[7] The idea is not only to create a more nimble instrument that stays current as an adaptable, ever-changing enemy continues to shift but also to create a more accountable instrument that ensures appropriate interbranch cooperation in defining the contours of the conflict.

Defending Intelligence Law

As I said at the outset of this statement, the question of intelligence collection under Section 702 of the FAA may seem connected to the AUMF's future in only the most distant fashion. In fact, the connection between intelligence collection authorities and the underlying regime authorizing the conflict itself is a critical one. Good intelligence is key to any armed conflict and good technical intelligence is a huge U.S. strength in the fight against Al Qaeda. Yet ironically, the more one attempts to narrow the conflict, the more important technical intelligence becomes. The fewer boots on the ground we have in Afghanistan, for example, the greater our reliance will become on technical collection. The more we rely on drone strikes, rather than large troop movements, in areas where we lack large human networks, the more we rely on technical intelligence. Particularly if one imagines staying on offense against a metastasizing Al Qaeda in the context of a withdrawal from Afghanistan and a narrowing—or a formal end—of the AUMF conflict, the burden on technical intelligence collection to keep us in the game will be huge even ignoring the many other foreign intelligence and national security interests Section 702 surveillance supports.

[7] *See* Robert Chesney, et al., A Statutory Framework for Next-Generation Terrorist Threats (2013), *available at* http://www.lawfareblog.com/2013/02/a-statutory-framework-for-next-generation-threats/.

Section 702 is a complicated statute, and it is only one part of a far more complicated, larger statutory arrangement. But broadly speaking, it permits the NSA to acquire without an individualized warrant the communications of non-US persons reasonably believed to be overseas when those communications are transiting the United States or stored in the United States. Under these circumstances, the NSA can order production of such communications from telecommunications carriers and internet companies under broad programmatic orders issued by the Foreign Intelligence Surveillance Court (FISC), which reviews both targeting and minimization procedures under which the collection then takes place. Oversight is thick, both within the executive branch, and in reporting requirements to the congressional intelligence committees.

Make no mistake: Section 702 is a very big deal in America's counterterrorism arsenal. It is far more important than the much debated bulk metadata program, which involves a few hundred queries a year. Section 702 collection, by contrast, is vast, a hugely significant component not only of contemporary counterterrorism but of foreign intelligence collection more generally. In 2012, the Senate Select Committee on Intelligence wrote that "[T]he authorities provided [under section 702] have greatly increased the government's ability to collect information and act quickly against important foreign intelligence targets. . . . [The] failure to reauthorize [section 702] would 'result in a loss of significant intelligence and impede the ability of the Intelligence Community to respond quickly to new threats and intelligence opportunities.'"[8] The President's Review Group on Intelligence and Communications Technologies, after quoting this language, wrote that "Our own review is not inconsistent with this assessment. . . . [W]e are persuaded that section 702 does in fact play an important role in the nation's effort to prevent terrorist attacks across the globe."[9] The *Washington Post* has reported that 702 was in 2012 the single most prolific contributor to the President's Daily Brief.[10]

Yet we have seen enormous anxiety about Section 702 collection, along with its close cousin, collection overseas against non-US person targets under

[8] Senate Select Committee on Intelligence, Report on FAA Sunsets Extension Act of 2012, 112th Congress, 2d Session (June 7, 2012).
[9] President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World 145 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.
[10] Robert O'Harrow , Jr., et al., *U.S., Company Officials: Internet Surveillance Does Not Indiscriminately Mine Data*, Jun. 8, 2013, Wash. Post, *available at* http://www.washingtonpost.com/world/national-security/us-company-officials-internet-surveillance-does-not-indiscriminately-mine-data/2013/06/08/5b3bb234-d07d-11e2-9f1a-1a7cdee20287_story.html.

Executive Order 12333. Sometimes, these anxieties have been rooted in the supposed effects of this collection on U.S. persons.[11] Sometimes, however, the complaints have stemmed from broader concerns about infringement of privacy worldwide. Europeans have expressed shock, for example, that a U.S. spy agency would presume to collect against an allied foreign leader like German Chancellor Angela Merkel[12]—surveillance that now seems forward-thinking and reasonable given later reports that Merkel has been on the phone frequently during the Crimea crisis with Vladimir Putin.[13] Major news organizations have considered it front-page news that NSA has pursued intelligence targets on online gaming platforms and smartphone apps,[14] that NSA has collected contact lists in large numbers around the world,[15] even that foreign countries *spy on one another*, collect attorney-client communications involving U.S. lawyers along the way, and may share that material with NSA subject to U.S. law and minimization requirements.[16] Whether one considers these stories important journalism or reckless blowing of valuable surveillance activities, they both reflect and further stoke a deep concern about the scope of U.S. surveillance practices. And that concern is creating inexorable pressures for reforms we may regret in the counterterrorism space.

The legal regime here is one that this body knowingly and deliberatively created in an iterative set of interactions with the intelligence community

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[11] Barton Gellman, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, Aug. 15, 2013, Wash. Post, *available at* http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html.

[12] Laura Poitras et al., *"A" for Angela: GCHQ and NSA Targeted Private German Companies and Merkel*, Mar. 29, 2014, Der Spiegel, *available at* http://www.spiegel.de/international/germany/gchq-and-nsa-targeted-private-german-companies-a-961444.html.

[13] Alison Smale, U*kraine Crisis Limits Merkel's Rapport with Putin*, Mar. 12, 2014, N.Y. Times, *available at* http://www.nytimes.com/2014/03/13/world/europe/on-ukraine-merkel-finds-limits-of-her-rapport-with-putin.html?_r=1.

[14] *See, e.g.,* James Ball, *Angry Birds and "Leaky" Phone Apps Targeted by NSA and GCHQ for User Data*, Jan. 28, 2014, The Guardian, *available at* http://www.theguardian.com/world/2014/jan/27/nsa-gchq-smartphone-app-angry-birds-personal-data; Mark Mazetti and Justin Elliott, *Spies Infiltrate a Fantasy Realm of Online Games*, Dec. 9, 2013, N.Y. Times, *available at* http://www.nytimes.com/2013/12/10/world/spies-dragnet-reaches-a-playing-field-of-elves-and-trolls.html.

[15] Barton Gellman and Ashkan Soltani, *NSA Collects Millions of Email Contacts Globally*, Oct. 14, 2013, Wash. Post, *available at* http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html?hpid=z1.

[16] James Risen and Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, Feb. 15, 2014, N.Y. Times, *available at* http://www.nytimes.com/2014/02/16/us/eavesdropping-ensnared-american-law-firm.html.

and the courts. It requires no apology. Rather, it requires an active defense. And while there are certainly areas in which the regime could benefit from reform, the big risk here is that overreaction and panic in the face of exposure will lead to a burdening of the core signals intelligence capacity of the United States with legal processes designed to protect civil liberties domestically. This could happen either because reform efforts go too far or because Congress fails to reauthorize 702 and thus applies the terms of core FISA—which require an individualized warrant based on probable cause—to a wide swath of overseas collection.

Broadly then, the legislative task with respect to Section 702 is something of the opposite of the task with respect to the AUMF. To the extent that members of this committee continue to believe, as I do, in the essential integrity and value of the existing legal authorities for intelligence collection and oversight, the task in the current political environment is to defend that architecture—publicly and energetically—rather than to race to correct imagined deficiencies, or even real structural deficiencies that, however real they may be, bear little relation to the outcomes that disquiet us.

Conclusion

To tie these threads together, then, circumstances are forcing us to revisit two of the most basic statutory engines of modern American counterterrorism. In the case of one of those engines, the AUMF, our political system is insufficiently willing to take on the project. In the case of the other, our basic intelligence authorities, we risk diving in with excessive zeal and insufficient care. In both cases, the decisions we will make over the next few months and years will fatefully shape the future of this country's confrontation with Al Qaeda and its successor organizations. In neither are we obviously proceeding in the right direction.

Governance Studies
The Brookings Institution
1775 Massachusetts Ave., NW
Washington, DC 20036
Tel: 202.797.6090
Fax: 202.797.6144
www.brookings.edu/governance.aspx

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