

NOTE

The Critical Nature of Sunset Provisions in National Security Legislation

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INTRODUCTION

In the wake of the recent reauthorization of Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA),¹ the role of temporary legislation in the national security sphere is once again at issue. Revelations of misuse of the surveillance authority by individuals within the Federal Bureau of Investigation (FBI) raised widespread alarm and inspired calls to revoke the authority entirely.² In December 2023, the authority expired and was renewed through April 2024—and after a nail-biting four months, it was renewed once again in the early hours of the morning after it expired.³ These events remind us that national security authorities have a special tendency to expand and become entrenched within the Executive Branch. However, they also remind us of the benefits of periodically coming together to vigorously debate the value and role of such authorities, review them, and revise them as necessary to reflect the interests of the people.

Part I of this Note will explain the power imbalance created by national security legislation as a result of extreme judicial deference, congressional timidity, executive power-guarding, and lack of transparency. Part II will demonstrate how the inclusion of a sunset provision in a grant of national security authority to the President helps solve this power imbalance. By exchanging the presumption of continuance for one of discontinuance, a sunset provision leverages congressional inaction in favor of repealing the authority. This puts the burden of justifying the continued existence of the authority where it should be—on the Executive—and the power to revoke it where it should be—with a simple majority of Congress. This mitigates the tendency of Congress to avoid difficult political questions and the tendency of presidents to power-guard in the national security sphere. Moreover, it improves transparency and accountability in the Executive Branch by forcing the Executive to participate in a national deliberative process over the ongoing utility of national security tools.

Part III will then analyze three case studies demonstrating these principles. An examination of the 2001 and 2002 Authorizations for the Use of Military Force (AUMFs) reveals that, in practice, failure to include a sunset provision enables congressional avoidance and presidential power-guarding. An analysis of the reauthorization process for FISA Section 702 demonstrates that a sunset provision ensures a robust public debate over the merits of an authority that includes the transparent, genuine, and meaningful participation of the Executive Branch.

Part IV will respond to some counterarguments. Although there is the potential for congressional dysfunction as a result of a sunset provision, this risk merely

1. See FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 702, 403(b), 122 Stat. 2436, 2438, 2474 (codified as amended at 50 U.S.C. § 1881); Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, § 19(a), 138 Stat. 862, 891 (2024).

2. See Juhi Doshi, *What Is Section 702? Congress Is Debating the Controversial Surveillance Power*, NBC NEWS (July 31, 2023, 1:14 PM), <https://www.nbcnews.com/politics/congress/section-702-foreign-intelligence-surveillance-act-congress-what-know-rcna96259> [<https://perma.cc/U6RD-F9YQ>].

3. See National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 7902, 137 Stat. 136, 1108 (2023); Reforming Intelligence and Securing America Act § 19(a); Preston Marquis, *FISA Section 702 Reauthorized for Two Years*, LAWFARE (Apr. 30, 2024, 8:01 AM), <https://www.lawfaremedia.org/article/fisa-section-702-reauthorized-for-two-years> [<https://perma.cc/JU5Y-TZXK>].

reflects the institutional risks of democracy and is outweighed by the power-balancing and deliberative benefits. Further, concerns that temporary legislation enables legislative overreach are unwarranted because they assign a causal relationship where only a correlation exists. This Note concludes that Congress should include sunset provisions in national security authorities to allow for the meaningful periodic reconsideration of the optimal balance of security and liberty by all stakeholders.

I. THE PROBLEM: NATIONAL SECURITY AUTHORITIES CREATE AN IMBALANCE OF POWER IN FAVOR OF THE EXECUTIVE, UNDERMINING DEMOCRATIC NORMS AND HARMING NATIONAL SECURITY

The distribution of powers among the three branches of government was designed to achieve an optimal balance between liberty and security.⁴ However, the mechanisms dividing power among the three branches don't always function to achieve this balance. National security authorities, in particular, have an unusual tendency toward entrenchment and expansion in the Executive. This is primarily because of the interaction of four conditions: extreme judicial deference to the Executive on issues of national security; increasing unwillingness by members of Congress to be seen as risktakers in the area of national security legislation; the tendency of presidents to read national security authorities more expansively and to protect them jealously; and a lack of transparency on how those authorities are being used.⁵ While a normal balance of powers allows Congress to grant or revoke statutory authority, the Executive to execute that authority, and the Judiciary to review both the authority itself and the Executive's execution of it,⁶ these four conditions disrupt that balance in the context of national security authorities.

The Judiciary has invoked a number of jurisdictional doctrines to refrain from rendering substantive decisions on national security. In issues involving a degree of executive discretion, such as the decision to engage in a particular military strike, federal courts have typically held that the political question doctrine bars their review.⁷ In other cases, the courts have found that those harmed by national

4. See, e.g., 2 THE FEDERALIST NO. 47, at 1–2 (James Madison) (1802) (“The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

5. See *infra* notes 7–21 and accompanying text (discussing the interaction of judicial deference, congressional timidity, executive power-guarding, and lack of transparency in the national security sphere).

6. See U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, §§ 1–2.

7. See, e.g., *bin Ali Jaber v. United States*, 861 F.3d 241, 247 (D.C. Cir. 2017) (“The complex[,] subtle, and professional decisions as to the . . . control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.” (alteration in original) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973))).

security authorities lack standing to bring a claim.⁸ Although the federal courts have weighed in on issues such as the detention of American citizens as “enemy combatants,”⁹ they have only done so because “the Constitution specifically contemplates a judicial role” for habeas corpus claims.¹⁰ Broadly, the Judiciary has abdicated its oversight role when it comes to issues of national security.¹¹

Compounding the problem, since the 2002 war in Iraq, Congress has been increasingly unwilling to take a stance—any stance—on a national security issue of importance for fear of the political consequences.¹² This congressional avoidance ultimately harms national security by depriving the President of well-tailored authorities to address developing national security circumstances. This has been particularly clear in Congress’s inability to revoke, replace, or revise the existing Authorizations for Use of Military Force (AUMFs) to accurately address the current threats facing our country.¹³ Congress has also failed to authorize necessary executive action—such as the Obama Administration’s air campaign in Libya, where it became clear that even though members agreed with the President’s actions, they were unwilling to authorize the campaign for fear of being seen to agree with a foreign policy decision of the President.¹⁴

Where Congress has been able to muster a majority on national security legislation, if that legislation involves any limitation on presidential power, Congress has been unable to overcome the inevitable presidential veto which follows.¹⁵

8. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 422 (2013).

9. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 516 (2004).

10. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 49 (D.D.C. 2010) (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 848 (D.C. Cir. 2010)); *id.* at 8, 19, 35, 49 (declining, on standing and political question grounds, to take up the issue of an alleged plan for targeted killing of a U.S. citizen and distinguishing the Supreme Court’s decision in *Hamdi*, 542 U.S. 507, on the grounds that the Constitution specifically contemplates a role for the judiciary in resolving the habeas issue raised in *Hamdi*).

11. See *bin Ali Jaber*, 861 F.3d at 250 (Brown, J., concurring) (“[T]he political question doctrine insures that effective supervision of this wondrous new warfare will not be provided by U.S. courts.”); see also Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 117–18 (2017) (discussing the exceptional power of the state secrets privilege); Aaron X. Sobel, Michael Sullivan & Oona A. Hathaway, *Recovering a Role for the Courts in Decisions to Wage War: How Congress Can Overcome the Political Question Doctrine (Some of the Time)*, JUST SEC. (June 12, 2023), <https://www.justsecurity.org/86880/recovering-a-role-for-the-courts-in-decisions-to-wage-war-how-congress-can-overcome-the-political-question-doctrine-some-of-the-time> [https://perma.cc/SH3W-9SA6].

12. See *infra* notes 13–14, 77–78, and accompanying text.

13. See *infra* Section III.A.

14. See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 636–37, 641–42 (2015) (describing how senior congressional leadership, including John Boehner, broadly agreed with the air campaign in Libya in private but publicly challenged it and refused to take up legislation to explicitly authorize it).

15. See, e.g., George W. Bush, *Statement of Administration Policy: S. 1042 - National Defense Authorization Act for Fiscal Year 2006*, AM. PRESIDENCY PROJECT (July 21, 2005), <https://www.presidency.ucsb.edu/documents/statement-administration-policy-s-1042-national-defense-authorization-act-for-fiscal-year> [https://perma.cc/M3TS-KGUX] (noting that the Bush Administration intended to veto any bill that would revoke or limit a national security authority: “If legislation is presented that would restrict the President’s authority to protect Americans effectively from terrorist attack and bring terrorists to justice, the President’s senior advisers would recommend that he veto the bill.”). As an additional example, a joint

Since the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*, the only way that Congress is able to revoke an authority that the President wishes to keep is by a bicameral vote with a two-thirds majority.¹⁶ As one scholar has put it:

The combination of [judicial] deference and the veto is especially insidious—it means that a President can interpret a vague statute to give himself additional powers, receive deference in that interpretation from courts, and then lock that decision into place by brandishing the veto. This ratchet-and-lock scheme makes it almost impossible to rein in executive power.¹⁷

Furthermore, with few exceptions, presidents have continued to interpret national security authorities expansively and limitations on those authorities narrowly.¹⁸ That presidents have, at times, been pushed into these expansive interpretations of national security authorities by Congress's failure to act on an issue only highlights the problematic interaction of these conditions.¹⁹

Finally, the particular secrecy of national security issues, and the unusual need to protect sensitive information related to its methods, interferes with the normal presumption that when considering legislation, Congress is able to collect all of the information it needs to make a decision that balances the liberty costs against the security benefits and adopts an ideal balance between the two.²⁰ This lack of transparency limits Congress's ability to craft effective national security

resolution to direct the removal of United States Armed Forces from hostilities against the Islamic Republic of Iran that have not been authorized by Congress was vetoed on May 6, 2020, by President Trump. See S.J. Res. 68, 116th Cong. (2020); Donald J. Trump, *Presidential Veto Message to the Senate for S.J. Res. 68*, WHITE HOUSE (May 6, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/presidential-veto-message-senate-s-j-res-68/> [<https://perma.cc/7D7M-YGA5>].

16. See 462 U.S. 919, 957–59 (1983) (striking down the “congressional veto” and holding that Congress may not revoke authority granted by statute by any measure other than bicameral legislation which is presented to and signed by the President); see also Morton H. Halperin, *Take Back: How Congress Can Reclaim Its Power*, JUST SEC. (June 10, 2019), <https://www.justsecurity.org/64451/take-back-how-congress-can-reclaim-its-power/> [<https://perma.cc/PET3-CVRS>] (noting that presidents have almost always opposed legislation that limits presidential power, even if they agree with the substance of the legislation).

17. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2321 (2006).

18. See Halperin, *supra* note 16.

19. See Jennifer Daskal, *Democracy's Failure*, JUST SEC. (Sept. 11, 2014), <https://www.justsecurity.org/14820/democracys-failure/> [<https://perma.cc/9C8N-9663>] (arguing that Obama's interpretation of the 2001 AUMF as applied to the Islamic State of Iraq and Syria (ISIS) was an interpretation of last resort, caused by Congress's unwillingness to revise the original authorization or consider a new one that would authorize action against ISIS).

20. See Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 515–17 (2007) (quoting THE FEDERALIST NO. 84, at 516–17 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (discussing the Constitution's presumption of open flow of information between branches of government); Heidi Kitrosser, “Macro-Transparency” as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1173–75, 1201–02 (2007).

legislation.²¹ The interaction of these conditions—judicial deference, congressional avoidance, executive power-protecting, and lack of transparency—makes for a unique and perplexing system of problems inhibiting the normal function of the separation of powers.

II. WHY SUNSET PROVISIONS EFFECTIVELY REBALANCE THE POWER BETWEEN THE EXECUTIVE AND CONGRESS

Sunset provisions can be employed to disrupt some of the above conditions and achieve a more even distribution of power between the Executive and Congress, and ultimately a better balance between liberty and security. Though a sunset provision does not address extreme judicial deference, it diminishes congressional timidity by forcing Congress to take up the legislation at a future date.²² It mitigates veto-brandishing by allowing a simple majority of Congress to revoke an authority or even to revise it. Moreover, sunset provisions benefit national security by enabling periodic tailoring of authorities to better address global threats that develop over time. Further, it incentivizes transparency in the Executive Branch by placing the burden to justify the continued existence of the authority on that branch.

The operation of a sunset provision is simple: It exchanges a presumption of continuance for one of discontinuance. Permanent legislation, without interference from the Judiciary or an affirmative vote of Congress to revoke it, remains in legal force.²³ This is a presumption of continuance. In contrast, sunsetting legislation “ceases to have effect unless it is reauthorized” by Congress before a predetermined date.²⁴ This is a presumption of discontinuance. By exchanging the one for the other, a sunset provision leverages the congressional (and, indeed, the human) tendency toward inaction over action in favor of revoking the authority.

Although this does not cause the Judiciary to become more active in overseeing national security matters, it disrupts the three other conditions causing the uneven distribution of power discussed in Part I. First, by exchanging the presumption of continuance for one of discontinuance, a sunset provision forces Congress to reconsider the legislation even if doing so is politically

21. See John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442, 458–59 (2010); see also Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 266–78 (2007) (discussing the informational benefits of temporary legislation); Katyal, *supra* note 17, at 2341–42 (lauding the benefits of requirements to report to Congress).

22. Tess Bridgeman, *In Support of Sunsets: Easy Yes Votes on AUMF Reform*, JUST SEC. (July 13, 2022), <https://www.justsecurity.org/82312/in-support-of-sunsets-easy-yes-votes-on-aumf-reform> [<https://perma.cc/5GFS-3AWP>] (“By shifting the default away from forever authorizations, [a sunset clause] ensures that the peoples’ representatives affirmatively debate and decide whether the United States should be at war, and against whom, as the Constitution intended.”).

23. Finn, *supra* note 21, at 449 (“With permanent legislation, the default rule favors the status quo (the legislation remains in place unless the legislature chooses to act).”).

24. Eric J. Gouvin, *Are There Any Checks and Balances on the Government’s Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 TEMP. POL. & C.R. L. REV. 517, 540 & n.126 (2005).

unpopular²⁵—it makes *not doing anything* an affirmative decision. This mitigates the problem of Congress’s growing timidity.

Second, the sunset provision allows a simple majority of Congress to decide to revoke the legislation’s authority,²⁶ diminishing the power of the Executive.²⁷ In the case of permanent legislation, if Congress wishes to revoke that power, it must do so by passing new legislation—legislation that the President will almost certainly veto because it diminishes the power of their office.²⁸ Thus, a two-thirds majority of Congress would typically be needed, for instance, to revoke an authorization to use military force.²⁹ But in the case of sunseting legislation, the President has no veto power to stop the authority from being taken away because that is the presumption that will result from no action at all. As a practical matter, this allows a simple majority of Congress to revoke the authority, since all that is necessary to make the authority go away is for Congress to do nothing.³⁰ This rebalancing of the power between the Executive and Legislative Branches disrupts the veto-brandishing problem.

And the presumption exchange does even more. Even in the face of presidential opposition, the presumption exchange allows a simple majority of Congress not just to repeal an authorization but to amend it substantively. Let’s assume, for instance, that the 2001 Authorization for Use of Military Force (AUMF) had

25. See Finn, *supra* note 21, at 454–56 (discussing the effect of distributing legislative power across time).

26. See *infra* note 30.

27. See Finn, *supra* note 21, at 448–49.

28. See Halperin, *supra* note 16; Trump, *supra* note 15; Bush, *supra* note 15.

29. See U.S. CONST. art. I, § 7, cl. 2. The fact that a presidential veto is virtually guaranteed when passing a bill to revoke executive authority creates a situation where a supermajority is the normal requirement, not a special one. This situation was considered to be repugnant by the Framers of the Constitution. See 2 THE FEDERALIST NO. 58, *supra* note 4, at 77 (James Madison) (responding to the suggestion of a requirement beyond simple majority for normal legislation, and noting: “[T]he fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority.”); 1 THE FEDERALIST NO. 22, at 142 (Alexander Hamilton) (1802) (“To give a minority a negative upon the majority, which is always the case, where more than a majority is requisite to a decision, is, in its tendency, to subject the sense of the greater number to that of the lesser.”). In fact, Alexander Hamilton considered and specifically rejected the idea of requiring a supermajority to end a war. *Id.* at 144 (imagining that in a situation where it was in the best interests of the United States to withdraw from a war, it would be “much easier” to “tie up the hands of government from making peace, where two thirds of all the votes were requisite to that object, than where a simple majority would suffice”).

30. In fact, a simple majority is not even needed—a minority of Congress can decide to revoke the authority. See U.S. CONST. art I, § 7, cl. 3. If exactly half of the House (a quarter of Congress’s power) opposes renewing the legislation, regardless of whether it passes the Senate, the legislation will not be renewed. See *id.* And taking into account the Senate filibuster, an even smaller proportion of Congress—forty Senators—could revoke the authority, provided it was being considered as regular legislation and not as a yearly appropriation done through budget reconciliation. See *About Filibusters and Cloture*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> [<https://perma.cc/C62Y-TTT2>] (sixty votes are needed to break a filibuster) (last visited Mar. 3, 2025); *Budget Reconciliation, Simplified*, BIPARTISAN POL’Y CTR. (Aug. 28, 2024), <https://bipartisanpolicy.org/explainer/budget-reconciliation-simplified/>. That such a small minority of Congress is given the power in this situation could be somewhat problematic, given the growing issue of gridlock. I address this issue more in Section IV.A.

included a sunset provision, and at its expiry a majority of Congress wished to reauthorize it with additional restricting language that it could not be used to justify any military action within the country of Iran.³¹ In this hypothetical, the President is presented with only two options: (1) keep the authority of the 2001 AUMF but accept the restriction placed on that authority by Congress, or (2) veto the entire bill and lose the entirety of the AUMF. A rational President who wishes to retain the original authority granted is thus forced to accept new restrictions on the authority, which they cannot selectively veto out of the bill.³² In this way, by exchanging the presumption of continuance for one of discontinuance, a sunset provision neutralizes the threat of a presidential veto over substantive changes to an authorization.

Lastly, the presumption exchange also has positive effects on transparency and power-guarding in the Executive Branch. When legislation is passed with an expiration date, the President is put on notice that at a definite point in the future, they will need to convince (at least) a majority of Congress that the authority's benefits to security outweigh its costs to liberty.³³ The fear that abusing authority may result in its revocation should incentivize the Executive to interpret the authority narrowly and to apply it responsibly. It should also incentivize the Executive to be transparent about its use of the authority and to participate meaningfully in the deliberative process with Congress. Thus, the sunset provision should also mitigate the problems of lack of transparency and expansive interpretation of national security authorities by the Executive.

III. ANALYSIS OF CASE STUDIES

But how do these hypothetical effects operate in reality? Using the 2001 and 2002 Authorizations for the Use of Military Force (AUMFs), this Note will demonstrate how the absence of a sunset provision enabled congressional avoidance and executive power-guarding to the detriment of the country. It will further demonstrate that the inclusion of a sunset provision in these authorities would have mitigated those problems, resulting in AUMFs that better reflect the global threat-scape today.

Next, the Note will demonstrate how the inclusion of a recurring sunset in Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA)³⁴ leveraged the mechanism of the presumption exchange to disrupt the problematic conditions of congressional avoidance and executive power-guarding and veto-brandishing. It will show how this has resulted in improved transparency, and it will argue that the reauthorization process ultimately resulted in an improved

31. This hypothetical is not entirely fictional—a similar bill was passed by Congress in 2020 but vetoed by President Trump. *See supra* note 15.

32. *See Clinton v. City of New York*, 524 U.S. 417, 445–47 (1998) (holding the line item veto unconstitutional).

33. *See* U.S. CONST. art. I, §§ 5, 7.

34. FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 702, 403(b), 122 Stat. 2436, 2438, 2474 (codified as amended at 50 U.S.C. § 1881).

statute that reflects the deliberative judgment of the most important stakeholders in determining the optimal balance of security and liberty.

A. MANY OF THE PROBLEMS WITH THE 2001 AND 2002 AUMFS COULD HAVE BEEN MITIGATED BY INCLUDING SUNSET PROVISIONS

The sagas of the 2001³⁵ and 2002³⁶ AUMFs demonstrate the need for sunset provisions in legislative grants of national security power to the President. In particular, the history of these authorizations and their continued use demonstrates that a temporal limit on a power is far more potent than limitations on the object or purpose of the power, which can be stretched through expansive interpretation over time. Had these pieces of legislation included sunset provisions, the President would not have been able to interpret them so far beyond their purpose and brandish the veto to render Congress impotent on the subject. Furthermore, Congress would not have been able to avoid addressing the national security gaps that emerged in these authorizations as global threats changed over time, such as the emergence of the Islamic State of Iraq and Syria (ISIS).³⁷

Pursuant to Congress's constitutional power to declare war,³⁸ the President is generally required to seek explicit authorization from Congress in the form of legislation before engaging the military in hostilities.³⁹ The President has obtained such authorization twice in the twenty-first century. First, in response to the September 11, 2001, terrorist attacks, President George W. Bush sought authorization from Congress to engage the military in hostilities against all global terrorists threatening the United States.⁴⁰ The 2001 AUMF provided slightly narrower authorization than what Bush sought, although it has arguably been used to justify exactly that. Second, in 2002 Congress authorized the war in Iraq.⁴¹ Both AUMFs have been used to justify the use of military force far beyond what Congress contemplated as their original purpose.

1. Problems with the 2001 AUMF

The 2001 AUMF lacked a sunset provision, and the failure to include one has led to the ongoing expansion of the original authority, such that it has been applied in situations it clearly was not intended for. The record suggests that Congress did not consider a sunset provision in the 2001 AUMF, apparently because Congress believed that the limitations it had placed on the scope of the

35. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

36. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

37. ISIS is also referred to as ISIL, Daesh, and IS. Faisal Irshaid, *Isis, Isil, IS or Daesh? One Group, Many Names*, BBC NEWS (Dec. 2, 2015), <https://www.bbc.com/news/world-middle-east-27994277> [<https://perma.cc/N25M-QQRM>]. For consistency, this Note will use the term ISIS.

38. U.S. CONST. art I, § 8, cl. 11.

39. See War Powers Resolution, 50 U.S.C. § 1541(c).

40. RICHARD F. GRIMMETT, CONG. RSCH. SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY, at CRS-2 (2006).

41. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501.

authorization were sufficient and that it could revisit the authorization at any point in the future.⁴² As it turned out, neither of these assumptions was warranted.

The scope of the 2001 AUMF was intended to be limited. The language itself authorizes force targeted “against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the [9/11 attacks], or harbored such organizations or persons.”⁴³ The authorized purpose is only “to prevent any future acts of international terrorism against the United States by such [targets].”⁴⁴ Congress considered a broader authorization proposed by President Bush—which would have authorized, in addition to the above, the use of force to “deter and pre-empt any future acts of terrorism or aggression against the United States”—but rejected this in favor of an authorization intended to be limited just to the people and organizations responsible for the 9/11 attacks.⁴⁵ These limits on the object and purpose of the authority were seen as sufficient to keep the Executive in check.⁴⁶ Legislators were also comforted by the notion that they could revoke the authorization or revise it in the future if needed.⁴⁷

Representative Lee, the sole vote in the House against the Authorization,⁴⁸ cautioned that “we must be careful not to embark on an open-ended war with neither an exit strategy nor a focused target.”⁴⁹ Her warning turned out to be quite prescient. The 2001 AUMF has since been invoked nearly forty times to justify the use of force against groups in Niger, Cameroon, Somalia, Djibouti, Yemen, Libya, Lebanon, and more.⁵⁰ Presidents Bush, Obama, and Trump have read into the AUMF the authority to take action against any “associated forces” of Al Qaeda, including Al Qaeda in the Arabian Peninsula (AQAP), Al Shabaab, and

42. See *infra* notes 46–47 and accompanying text.

43. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

44. *Id.*

45. GRIMMETT, *supra* note 40, at CRS-2–3, 6.

46. See 147 CONG. REC. 17135–36 (2001) (statement of Rep. Schakowsky) (“This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity. It is not a carte blanche for the use of force.”); *id.* at 17144 (statement of Rep. Udall) (“[The authorization] is broad, but it is not unlimited. It covers the culpable but it is not aimed at anyone else.”); *id.* at 17149 (statement of Rep. Watson) (“[T]he resolution is not a carte blanche endorsement for the use of force against any suspected terrorist group anywhere in the world, but is more narrowly crafted to endorse all necessary and appropriate use of force against nations, organizations, and persons that participated in the attacks that occurred on September 11.”). In many cases, congresspeople called for even fewer limits. See, e.g., *id.* at 17127 (statement of Rep. Smith) (“This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday. This is a significant restraint on the President’s ability to root out terrorism wherever it may be found.”).

47. See, e.g., *id.* at 17153–54 (statement of Rep. Conyers) (“[T]his resolution does not give the President perpetual authority to use military force. . . . Should Congress later determine that the President needs more or less authority than he has been given, we will act accordingly.”).

48. *Id.* at 17156.

49. *Id.* at 17145 (statement of Rep. Lee).

50. See MATTHEW WEED, CONG. RSCH. SERV., MEMORANDUM: PRESIDENTIAL REFERENCES TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS 3, 33, 35, 36 (2018), <https://sgp.fas.org/crs/natsec/pres-aumf.pdf> [<https://perma.cc/V5LW-W777>].

ISIS.⁵¹ A large consensus of scholars agreed that the 2001 AUMF did not authorize the military campaign against ISIS,⁵² despite the Presidents' claims to the contrary.⁵³ And despite generally widespread support for the campaign against global terrorist groups, and in particular ISIS, Congress has repeatedly failed to revise the 2001 AUMF so that it clearly applies to such groups.⁵⁴

It is now clear that Congress's belief in the sufficiency of object and purpose limitations in the 2001 AUMF was optimistic. In 2014, eight prominent national security lawyers wrote guidelines for what a new counter-terror AUMF should look like.⁵⁵ Inclusion of a sunset provision was one of six guiding principles identified by the scholars.⁵⁶ The absence of such a provision in the 2001 AUMF, the scholars argued, "has resulted in that statute being construed to provide authority for uses of force far removed in both time and location from anything that members of Congress anticipated thirteen years ago."⁵⁷ Many members of Congress have recognized the mistake of not including sunsets in the 2001 and 2002 AUMFs, and members on both sides of the aisle, as well as legal scholars, have stressed the importance of including one in any future authorization.⁵⁸

51. See *id.* at 33, 36, 40; see also Marty Lederman, "Associated Forces" Has a Legal Meaning . . . But It's Not "Every Group That Calls Itself al Qaeda," JUST SEC. (Feb. 4, 2014), <https://www.justsecurity.org/6756/associated-forces-has-legal-meaning-not-every-group-calls-al-qaeda> [<https://perma.cc/4ZXN-5NZZ>].

52. See, e.g., Patricia Stottlemeyer, *Doe v. Mattis: Is the War on ISIS Legal?*, JUST SEC. (Feb. 23, 2018), <https://www.justsecurity.org/52896/doe-v-mattis-war-isis-legal> [<https://perma.cc/J94X-BHL6>]; Benjamin Wittes, *Not Asking the Girl to Dance*, LAWFARE (Sept. 10, 2014, 9:41 PM), <https://www.lawfaremedia.org/article/not-asking-girl-dance> [<https://perma.cc/J7QC-K5NE>] (arguing the interpretation of the 2001 AUMF as covering ISIS "is not a stable or sustainable reading of the law, absent some dramatic, non-public intelligence about the ISIS-Al Qaeda relationship"); Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014, 7:41 AM), <https://time.com/3326689/obama-isis-war-powers-bush> [<https://perma.cc/5QHX-T26W>] (describing Obama's interpretation of the AUMF as "at bottom, presidential unilateralism masquerading as implausible statutory interpretation"); Ryan Goodman, *The President Has No Congressional Authorization to Use Force Against ISIS in Iraq*, JUST SEC. (June 19, 2014), <https://www.justsecurity.org/11873/president-congressional-authorization-force-isis-iraq> [<https://perma.cc/FJ7C-76K2>] ("[W]e all seem to agree that the 2001 authorization for September 11th does not give the President authority to send the US military to fight ISIS.").

53. See Office of the Press Secretary, *Remarks by the President at the National Defense University*, WHITE HOUSE (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<https://perma.cc/Z25U-YS52>] (invoking the 2001 AUMF as authority for the campaign against "Al Qaeda's affiliates").

54. See Daskal, *supra* note 19.

55. ROSA BROOKS, SARAH H. CLEVELAND, JENNIFER DASKAL, WALTER DELLINGER, RYAN GOODMAN, HAROLD HONGJU KOH, MARTY LEDERMAN & STEPHEN I. VLADECK, *PRINCIPLES TO GUIDE CONGRESSIONAL AUTHORIZATION OF THE CONTINUED USE OF FORCE AGAINST ISIL* (2014), <https://www.justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf> [<https://perma.cc/ZR6C-UH34>].

56. *Id.* at 2. The guiding principles were: (1) the new AUMF should be ISIL-specific and mission-specific; (2) it should include geographic limits; (3) it should include a sunset clause; (4) it should include a repeal of the 2002 AUMF and should add a sunset to the existing 2001 AUMF, (5) it should limit the scope of the severity of force consistent with international law; and (6) it should require greater transparency and oversight. *Id.* at 1–3.

57. *Id.* at 2.

58. See *id.* at 2; Brian Finucane, *Key Takeaways from September 28 House Foreign Affairs Committee Hearing on AUMF Reform*, JUST SEC. (Oct. 4, 2023), <https://www.justsecurity.org/89148/>

2. Problems with the 2002 AUMF

The 2002 AUMF similarly included no sunset provision.⁵⁹ Like the 2001 Authorization, it limited the use of military force to specific purposes, namely all force “necessary and appropriate in order to . . . (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”⁶⁰ These purpose-based limitations were equally ineffective in preventing expansive presidential interpretation, and Congress’s attempts to address the problem were equally vain. By 2014, the Executive was no longer relying on the 2002 AUMF as a primary authority justifying ongoing military action; however, it saw the authority as providing a secondary, alternative legal basis for actions against ISIS in Iraq.⁶¹ By 2019, the authorization had “lain dormant” for some time, during which at least one scholar called for its repeal, noting the specific risk that President Trump might invoke it as authority for military action against Iran.⁶²

As President Trump’s rhetoric on Iran became more aggressive, there was growing concern in Congress that the Administration might invoke existing AUMFs as justification to attack Iran.⁶³ In early 2020, the Trump Administration did just that, referring to the 2002 AUMF as the domestic-law justification for the airstrike on Iranian General Qassem Soleimani.⁶⁴ Although the justification was later ratified by a memorandum issued by the Department of Justice’s Office of Legal Counsel,⁶⁵ it was roundly criticized by legal scholars⁶⁶ and resulted in a

key-takeaways-from-september-28-house-foreign-affairs-committee-hearing-on-aumf-reform [https://perma.cc/NV7U-N4T9]; Bridgeman, *supra* note 22.

59. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501.

60. *Id.* § 3(a).

61. See Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N. Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>.

62. See Tess Bridgeman, *Now Is the Time to Repeal the 2002 AUMF: Four Reasons to Repeal the 2002 AUMF in the FY20 NDAA*, JUST SEC. (July 11, 2019), <https://www.justsecurity.org/64885/now-is-the-time-to-repeal-the-2002-aumf> [https://perma.cc/Y3VC-HT6H].

63. See Nahal Toosi, *Rand Paul to Pompeo: You Do Not Have ‘Permission’ for War with Iran*, POLITICO (Apr. 10, 2019, 12:36 PM), <https://www.politico.com/story/2019/04/10/pompeo-rand-paul-iran-war-1266526> [https://perma.cc/64J9-SCTF]; Heather Brandon-Smith, *New Legislation Offers Opportunity to Address 2001 Authorization for Use of Force, Amid Fears of War with Iran*, JUST SEC. (May 21, 2019), <https://www.justsecurity.org/64193/new-legislation-offers-opportunity-to-address-2001-authorization-for-use-of-force-amid-fears-of-war-with-iran> [https://perma.cc/ASS5-BBR2].

64. Elliot Setzer, *White House Releases Report Justifying Soleimani Strike*, LAWFARE (Feb. 14, 2020, 12:17 PM), <https://www.lawfaremedia.org/article/white-house-releases-report-justifying-soleimani-strike> [https://perma.cc/9UN3-M228].

65. OFF. OF LEGAL COUNS., U.S. DEP’T OF JUST., MEMORANDUM FOR JOHN A. EISENBERG, LEGAL ADVISOR TO THE NATIONAL SECURITY COUNCIL 20 (2020), https://www.justice.gov/d9/2023-04/2020-03-10_soleimani_airstrike_redacted_2021.pdf [https://perma.cc/RL7U-BAEC].

66. See Tess Bridgeman, *The Soleimani Strike and War Powers*, JUST SEC. (Jan. 6, 2020), <https://www.justsecurity.org/67921/the-soleimani-strike-and-war-powers> [https://perma.cc/TXP5-BGLC]; Ryan Goodman & Steve Vladeck, *Why the 2002 AUMF Does Not Apply to Iran*, JUST SEC. (Jan. 9, 2020), <https://www.justsecurity.org/67993/why-the-2002-aumf-does-not-apply-to-iran> [https://perma.cc/TD75-PSGQ].

rare presentment by Congress in 2020 of legislation limiting the President's ability to invoke existing AUMFs against Iran.⁶⁷ However, President Trump promptly vetoed the bill, and Congress was unable to muster the two-thirds majority needed to pass the bill over his objection.⁶⁸ A bill to repeal the 2002 AUMF failed again in 2021, despite President Biden's overt support of the measure,⁶⁹ because although it was passed in the House, the Senate failed to vote on it.⁷⁰ Ongoing discussions regarding repealing the 2002 AUMF still center around the Soleimani strike.⁷¹ It is unclear if skyrocketing tensions with Iran over the attacks in the Red Sea perpetrated by the Iran-funded Houthi rebels in Yemen and the attacks on U.S. forces by Iran-backed militias in Iraq and Syria will derail the effort to repeal the 2002 AUMF.⁷²

3. Inclusion of sunset provisions would almost certainly have resulted in a narrower, more accurate counterterrorism AUMF over time and in the elimination of the potential for future abuse of the 2002 AUMF

While it is difficult to know exactly how history would have played out if the 2001 and 2002 AUMFs had included sunset provisions, it's clear that the presumption exchange would have significantly changed the political incentives and power dynamics in a positive way. This Section argues that the inclusion of a sunset provision in these authorities would have resulted in a narrower counterterrorism AUMF that more accurately addresses the modern global terrorism landscape and in an Iraq AUMF that would have disappeared entirely, or been

67. S.J. Res. 68, 116th Cong. § 2 (2020).

68. See Trump, *supra* note 15; S.J. Res. 68 - A Joint Resolution to Direct the Removal of United States Armed Forces from Hostilities Against the Islamic Republic of Iran That Have Not Been Authorized by Congress, CONGRESS.GOV [hereinafter S.J. Res. 68 - A Joint Resolution], <https://www.congress.gov/bills/116th-congress/senate-joint-resolution/68/amendments> [https://perma.cc/8DNU-CU7X] (last visited Mar. 1, 2025).

69. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 256 — REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf> [https://perma.cc/2UL6-PPDD].

70. See H.R. 256, 117th Cong. § 1 (2021); H.R. 256 - To Repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002, CONGRESS.GOV [hereinafter H.R. 256 - To Repeal], <https://www.congress.gov/bills/117th-congress/house-bill/256/actions> [https://perma.cc/J5RK-JQM6] (last visited Mar. 1, 2025).

71. Aaron Blake, *Congress Authorized War in Iraq. Its Repeal Debate Focuses on Iran*, WASH. POST (Mar. 28, 2023, 7:08 PM), <https://www.washingtonpost.com/politics/2023/03/28/congress-authorized-war-iraq-its-repeal-debate-is-largely-about-iran/>.

72. See Christian Edwards, *Who Are the Houthis And Why Are They Attacking Ships in the Red Sea?*, CNN (Feb. 4, 2024, 7:10 AM), <https://www.cnn.com/2023/12/19/middleeast/red-sea-crisis-explainer-houthi-yemen-israel-intl/index.html> [https://perma.cc/ZX9E-AXRU]; C. Todd Lopez, *3 U.S. Service Members Killed, Others Injured in Jordan Following Drone Attack*, U.S. DEP'T DEF.: NEWS (Jan. 29, 2024), <https://www.defense.gov/News/News-Stories/Article/Article/3659809/3-us-service-members-killed-others-injured-in-jordan-following-drone-attack> [https://perma.cc/22UD-AT89]; see also Scott R. Anderson & Matt Gluck, *Law and the Biden Administration's Response to the Attack in Jordan*, LAWFARE (Jan. 31, 2024, 7:44 PM), <https://www.lawfaremedia.org/article/law-and-the-biden-administration-s-response-to-the-attack-in-jordan> [https://perma.cc/M7BV-U362] (noting that the White House recently cited a flexible interpretation of the War Powers Resolution and a legal theory that the 2001 and 2002 AUMFs authorize "ancillary self-defense").

significantly revised so as to clearly not allow strikes aimed at Iran. The expiration of these authorities would have forced Congress to take them up or let them expire, eliminating the problem of congressional timidity, and would have allowed a simple majority of Congress to revise them to apply more accurately to the changing threats in global terrorism and the Middle East.

By 2014, the threat landscape in post-bin Laden global terror management was markedly different than when the 2001 AUMF was passed. Through the early 2000s, the intelligence community considered the largest threat to United States national security to be Al Qaeda.⁷³ By January of 2014, the threat from Al Qaeda was considered to be significantly reduced, while the threat from other global Islamic extremists, some affiliated with Al Qaeda and some not, was growing.⁷⁴ In the fall of that year, the United States began conducting air strikes on ISIS targets in Iraq and Syria.⁷⁵ By that time, Congress had been discussing revisiting the 9/11 authorization for more than a year to revise it to address groups such as ISIS.⁷⁶ But in the end, Senate Majority Leader Harry Reid and Speaker John Boehner decided not to proceed with authorizing the war on ISIS or revisiting the 2001 AUMF.⁷⁷ This isn't terribly surprising; if the campaign against ISIS went wrong in some way, there was serious political risk in having authorized it explicitly and in having endorsed a President whose agenda party leadership had pledged to stop at all costs.⁷⁸ In the end, President Obama proceeded with the campaign against ISIS by relying on the existing AUMF for authorization.⁷⁹ This gave Congress the best of both worlds—it could reap the political benefits of a popular campaign against ISIS while not shouldering much, if any, of the political risk.

This is precisely the kind of congressional timidity that a sunset provision can eliminate. Imagine that the 2001 AUMF had been sunseting in 2014 and that Congress was aware that public support for an air campaign against ISIS was strong.⁸⁰ The 2001 AUMF was the primary domestic-law justification for all of

73. See JOHN D. NEGROPONTE, ANNUAL THREAT ASSESSMENT OF THE DIRECTOR OF NATIONAL INTELLIGENCE FOR THE SENATE SELECT COMMITTEE ON INTELLIGENCE 3 (2006) [<https://perma.cc/NRC6-CQC5>].

74. See JAMES R. CLAPPER, STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 4 (2014) [<https://perma.cc/Y8KZ-3QEX>].

75. See Cameron Glenn, *Timeline: US Policy on ISIS*, WILSON CTR. (Apr. 27, 2016), <https://www.wilsoncenter.org/article/timeline-us-policy-isis> [<https://perma.cc/9KKB-AMXF>].

76. See John Bresnahan, *Senators Start 9/11 Resolution Talks*, POLITICO (May 7, 2013, 5:04 AM), <https://www.politico.com/story/2013/05/senators-discuss-revising-911-resolution-090989> [<https://perma.cc/QXG2-LU4T>].

77. See Jake Sherman & John Bresnahan, *Hill Leaders Duck ISIL*, POLITICO (Sept. 9, 2014, 12:28 AM), <https://www.politico.com/story/2014/09/congress-isil-110727> [<https://perma.cc/U3LA-J28D>].

78. Andy Barr, *The GOP's No-Compromise Pledge*, POLITICO (Oct. 28, 2010, 8:09 AM), <https://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311> [<https://perma.cc/U7Z8-PAVX>].

79. Savage, *supra* note 61.

80. See *Support for U.S. Airstrikes in Iraq: Concern About Getting Too Involved*, PEW RSCH. CTR. (Aug. 18, 2014), <https://www.pewresearch.org/politics/2014/08/18/support-for-u-s-airstrikes-in-iraq-concern-about-getting-too-involved> [<https://perma.cc/CG89-6X75>]. In fact, public support was stronger among Republicans than it was among Democrats. *Id.* A year later, support was even stronger, and most

the United States' continued actions against Al Qaeda and its affiliates.⁸¹ In such a situation, Congress's choice to do nothing would result in the entire AUMF disappearing, de-authorizing any military action against ISIS or Al Qaeda affiliates. With public concern about ISIS-planned and ISIS-inspired attacks in the West,⁸² not to mention the entirety of the United States' presence in Afghanistan and ongoing actions against Al Qaeda resting on the same AUMF,⁸³ such a choice may have been politically disastrous.

In this case, the presumption shift of a sunset provision changes the political calculus for Congress in a way that favors revision of the authority. It does so by altering the outcome of Congressional *inaction*. In a continuing authority, inaction results in the ongoing existence of the authority, allowing Congress to pass responsibility to the Executive. In a sunset authority, inaction results in the authority disappearing. Faced with an expiring AUMF upon which so much rested, the political force would have been overpoweringly in favor of reauthorization. Even more, the reauthorization would have presented Congress with the opportunity to substantively revise the AUMF, passing it in a new form. And given the widespread concern that the 2001 AUMF no longer fit the contemporary global-terrorism landscape,⁸⁴ Congress would have faced significant pressure to reform the AUMF rather than simply reauthorize it in the same form. In this way, the sunset provision would have eliminated congressional timidity and replaced it with effective ongoing maintenance of important and applicable national security legislation.

The inclusion of a sunset provision in the 2002 AUMF would have had similarly positive results. Congress has voted multiple times on the issue of repealing or limiting the 2002 AUMF, with no result.⁸⁵ But if members of Congress had taken identical actions with the only difference being that the AUMF was sunset-ting, the results of these votes would have been drastically different.

Consider first Senate Joint Resolution 68 in 2020, which was intended to clarify that the 2002 AUMF does not authorize the use of force against Iran.⁸⁶ Before being vetoed, the resolution passed the Senate by a vote of fifty-five for to forty-five against, and the House 227 to 186.⁸⁷ These margins are comfortably beyond

Republicans favored use of ground troops against ISIS. *A Year Later, U.S. Campaign Against ISIS Garners Support, Raises Concerns*, PEW RSCH. CTR. (July 22, 2015), <https://www.pewresearch.org/politics/2015/07/22/a-year-later-u-s-campaign-against-isis-garners-support-raises-concerns> [https://perma.cc/F2FB-D8TE].

81. See Stephen W. Preston, Speech at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015), <https://www.defense.gov/News/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/> [https://perma.cc/2PUR-WCYY].

82. See *supra* note 80 and accompanying text.

83. See Preston, *supra* note 81.

84. See Daskal, *supra* note 19.

85. See H.R. 256, 117th Cong. § 1 (2021); *H.R.256 - To Repeal*, *supra* note 70; S.J. Res. 68, 116th Cong. § 1 (2020); *S.J.Res.68 - A Joint Resolution*, *supra* note 68.

86. See S.J. Res. 68 § 1.

87. *S.J.Res. 68 (116th): A Joint Resolution to Direct the Removal of United States Armed Forces from Hostilities Against the Islamic Republic of Iran That Have Not Been Authorized by Congress*,

those that would be needed to allow sunset legislation to expire, and, had it expired, the President would have been powerless to veto it back into existence.⁸⁸ This means that had the situation been one where the 2002 AUMF was sunset-ting, and Congress decided to renew it in a new form that made it clear it did not apply to Iran, the President would have been faced with the choice either to have the authorization disappear entirely or accept the limitation Congress placed on it.

Consider next House Bill 256, the bipartisan attempt to repeal the 2002 AUMF altogether in 2021, supported by President Biden.⁸⁹ The resolution passed the House 268 to 161 (reflecting a majority for repealing), and the Senate declined to vote on it.⁹⁰ Assume now that the AUMF was sunset-ting at the end of year 2021. Imagine the House votes on the reauthorization: 161 support reauthorizing it and 268 vote against (reflecting a majority for repealing). This means that regardless of the actions of the Senate or the President, the AUMF would expire at the end of the year. The sunset means that the exact same votes cast for each position yield the opposite result. The Senate's inability to decide on the legislation in this situation would have the result of repealing the authorization. The President would have no power to veto the AUMF back into existence.

Because of the power-shifting and incentive-shifting benefits of sunset provisions, had the 2001 and 2002 AUMFs included such provisions, most likely a narrower counterterrorism AUMF that more accurately applied to the current global threat-scape would now exist. It also seems likely that the 2002 AUMF would no longer exist in any form or would have significant limitations on its applicability to Iran.

B. THE RECURRING REAUTHORIZATION REQUIREMENTS OF FISA SECTION 702
DEMONSTRATE THE DELIBERATIVE BENEFITS OF SUNSET PROVISIONS IN NATIONAL
SECURITY LEGISLATION

The reauthorizations of Section 702 of FISA over the past decade provide a useful window through which to view the benefits and drawbacks of sunset provisions in national security legislation. In particular, they demonstrate that sunset provisions provide transparency and deliberative benefits that otherwise would not be achieved.

Section 702 of FISA, which has included a sunset provision in every version passed by Congress, is a surveillance tool that authorizes the United States government to collect the communications of foreigners overseas without individualized suspicion and with regard to certain categories of intelligence information.⁹¹

GOVTRACK, <https://www.govtrack.us/congress/bills/116/sjres68> [<https://perma.cc/EK3R-JY2P>] (last visited Mar. 1, 2025).

88. See *supra* Part II; *supra* note 30.

89. H.R. 256 § 1; OFF. OF MGMT. & BUDGET, *supra* note 69.

90. See *H.R. 256 (117th): To Repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002*, GOVTRACK (June 17, 2021, 11:27 AM), <https://www.govtrack.us/congress/votes/117-2021/h172> [<https://perma.cc/PZA6-B2UY>]; *H.R.256 - To Repeal*, *supra* note 70.

91. See FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 702, 403(b), 122 Stat. 2436, 2438, 2474 (codified as amended at 50 U.S.C. § 1881); FISA Amendments Act Reauthorization Act of 2012,

It requires the Attorney General and the Director of National Intelligence to certify the existence of emergency circumstances such that without authority to collect communications, important national security intelligence might be lost.⁹² Its use has resulted in major intelligence successes, including the prevention of serious attacks by foreign cyberthreats.⁹³ However, it has been criticized for allowing the incidental collection of the communications of U.S. persons who are a party to communications with foreigners overseas.⁹⁴ More recently, the ability of the Federal Bureau of Investigation (FBI) to search the collected information for evidence of terrorism and crime has come under scrutiny following the revelation of errors and abuses by individuals within the FBI.⁹⁵ The provision most recently sunsetted on April 19, 2024, and was reauthorized in the early hours of the following morning.⁹⁶

The FISA Amendments Act of 2008, by which Section 702 was born, included a sunset provision when it was passed, as did each of its reauthorizations in 2012 and 2017.⁹⁷ In 2012, the provision was reauthorized without major revision, but, in 2017, revisions were made to increase protections for the privacy of U.S. persons⁹⁸ as a response to, among other things, revelations of compliance issues in National Security Agency (NSA) surveillance programs.⁹⁹ The 2017 reauthorization passed the House by 256 to 164 (a 61% majority) and the Senate by 65 to 34 (a 66% majority).¹⁰⁰ Notably, this falls slightly short of what would have been needed to overcome a presidential veto had the Act not been expiring and Congress wished simply to add the amendments by separate bill.¹⁰¹ The same is

Pub. L. No. 112-238, § 2, 126 Stat. 1631, 1631; FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, § 201, 132 Stat. 3, 19 (2018). A useful infographic explaining the authority can be found here: OFF. OF THE DIR. OF NAT'L INTEL., SECTION 702 OVERVIEW, <https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf> [<https://perma.cc/GM38-M2F7>].

92. 50 U.S.C. § 1881a(c)(2).

93. See CHRISTOPHER A. WRAY, FBI, REDACTED SECTION 702 DIRECTOR WRAY SENATE LETTER 1, 4 (2023), <https://www.fbi.gov/file-repository/redacted-section-702-director-wray-senate-letter-072123.pdf/view> [<https://perma.cc/NR7P-W5CW>].

94. Doshi, *supra* note 2.

95. See *id.*

96. See National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 7902, 137 Stat. 136, 1108 (2023); Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, § 19(a), 138 Stat. 862, 891 (2024); Marquis, *supra* note 3.

97. See *supra* note 91 and accompanying text. Although the last reauthorization actually happened in January of 2018, it is still referred to as the 2017 Reauthorization.

98. Compare FISA Amendments Act of 2008, and FISA Amendments Act Reauthorization Act of 2012, with FISA Amendments Reauthorization Act of 2017 (adding required querying procedures and reporting requirements to enhance privacy protections).

99. See Charlie Savage, *N.S.A. Halts Collection of Americans' Emails About Foreign Targets*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/us/politics/nsa-surveillance-terrorism-privacy.html>; Emma Kohse, *Summary: The FISA Amendments Reauthorization Act of 2017*, LAWFARE (Jan. 18, 2018, 4:29 PM), <https://www.lawfaremedia.org/article/summary-fisa-amendments-reauthorization-act-2017> [<https://perma.cc/NK7E-MM7D>].

100. S. 139: *Rapid DNA Act of 2017*, GOVTRACK (Jan. 11, 2018, 11:39 AM), <https://www.govtrack.us/congress/votes/115-2018/h16> [<https://perma.cc/7Q4F-329J>]; S. 139: *FISA Amendments Reauthorization Act of 2017*, GOVTRACK (Jan. 18, 2018, 12:18 PM), <https://www.govtrack.us/congress/votes/115-2018/s12> [<https://perma.cc/4EW2-KVQ9>].

101. See U.S. CONST. art. I, § 7, cl. 2.

true of the most recent reauthorization of Section 702 in April 2024,¹⁰² which passed the House by 273 to 147 (65% in favor of renewal and amendment)¹⁰³ and the Senate by 60 to 34 (64% in favor of renewal and amendment).¹⁰⁴ Assuming the President would have vetoed the new restrictions had they been passed as a standalone bill, this suggests that the amendments improving privacy protections might not have been enacted had they been proposed in a non-renewal setting. The timing of the revisions at the end of 2017,¹⁰⁵ more than four years after Edward Snowden's 2013 leaks,¹⁰⁶ is also highly suggestive of the fact that the sunset provision forced Congress to take up the issue at that time and enabled Congress to effect revisions without worrying about a presidential veto.

Moreover, the 2017 and 2024 reauthorizations exemplify the “deliberative benefits” of sunset provisions.¹⁰⁷ Beyond forcing Congress to periodically reconsider the merits of an authority, a sunset provision reinforces periodic public debate over the balance of security and liberty.¹⁰⁸ Critically, the presumption exchange forces the Executive to participate in that conversation meaningfully, in a way it probably otherwise would not.¹⁰⁹

In chicken-or-the-egg fashion, it is difficult to say whether the existence of a sunset provision initiates this deliberative process or simply facilitates it. Regardless, the fact that legislation will be expiring clearly fuels democratic deliberation over its legitimacy. In the more prominent examples from the twenty-first century, public debate over the merits of a surveillance authority has been initiated not by the mere existence of an impending sunset but rather by a leak,¹¹⁰ internal investigation,¹¹¹ or revelation of abuse.¹¹² However, the fact that

102. Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, 138 Stat. 862 (2024).

103. *House Vote #119 in 2024 (118th Congress): H.R. 7888: Reforming Intelligence and Securing America Act*, GOVTRACK (Apr. 12, 2024, 12:57 PM), <https://www.govtrack.us/congress/votes/118-2024/h119> [https://perma.cc/7QKN-LS92].

104. *Senate Vote #150 in 2024 (118th Congress): H.R. 7888: Reforming Intelligence and Securing America Act*, GOVTRACK (Apr. 19, 2024, 11:45 PM), <https://www.govtrack.us/congress/votes/118-2024/s150> [https://perma.cc/RJ4Y-J9PM].

105. See FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (2018).

106. See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [https://perma.cc/8U3H-D79R]; *Edward Snowden: Leaks That Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), <https://www.bbc.com/news/world-us-canada-23123964> [https://perma.cc/7MWD-HCBA].

107. Gersen, *supra* note 21, at 251; Finn, *supra* note 21, at 449, 458.

108. See Finn, *supra* note 21, at 456–58.

109. See *id.* at 469.

110. For instance, Edward Snowden's leak regarding the NSA's bulk collection program. The provision of Section 215 of the Patriot Act upon which the NSA based this program was allowed to sunset in 2015 following a robust public debate over the authority. See Müge Fazlioglu, *The Snowden Disclosures, 10 Years On*, IAPP (June 28, 2023), <https://iapp.org/news/a/the-snowden-disclosures-10-years-on> [https://perma.cc/HS9P-TC6A].

111. See Charlie Savage & Adam Goldman, *Withering Criticism of F.B.I. as Watchdog Presents Russia Inquiry Findings*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/us/politics/ig-horowitz-report-hearing.html>.

112. For instance, *The New York Times* reported on Bush's executive authorization of the NSA to spy on people inside the United States outside of what FISA authorized. James Risen & Eric Lichtblau, *Bush*

a surveillance authority will be under consideration for renewal in the near future adds credibility to calls to revise or revoke it. Thus, shortly after publication of the Inspector General's report on the Crossfire Hurricane Investigation, which revealed serious errors in the FBI's applications under FISA,¹¹³ calls to repeal FISA entirely were met with serious response by national security law scholars where they may not otherwise have been.¹¹⁴

Regardless of what initiates public debate over a national security authority, it is clear that the impending sunset of an authority greatly increases the intensity and seriousness of that debate. Prior to April 2024, Section 702 was due to sunset on December 31, 2023.¹¹⁵ A search of the archives of *Lawfare*, one of the primary fora for scholarly debate over national security legal issues,¹¹⁶ reveals that in 2018, "Section 702" featured in the title of only five *Lawfare* articles, all of which discuss the reauthorization that had occurred in January that year.¹¹⁷ In 2023, it featured in twenty-seven.¹¹⁸ A functional democracy requires the robust participation of the public in policy debates, and sunset provisions, if nothing else, fuel such debates by adding urgency.

Perhaps more importantly, an impending sunset incentivizes the Executive to participate meaningfully in the deliberative process with the public and with

Lets U.S. Spy on Callers Without Courts, N.Y. TIMES (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

113. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION, at xiii (2019), <https://www.justice.gov/storage/120919-examination.pdf> [<https://perma.cc/LEP5-NLN7>].

114. See, e.g., George Croner, *A Response to "End the FISA": Why It's a Good Law and Sound Policy*, JUST SEC. (Mar. 13, 2020), <https://www.justsecurity.org/69175/a-response-to-end-the-fisa-why-its-a-good-law-and-sound-policy> [<https://perma.cc/AY7B-G8JW>].

115. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 7902, 137 Stat. 136, 1108 (2023).

116. See *About Lawfare*, LAWFARE, <https://www.lawfaremedia.org/about/about-lawfare> [<https://perma.cc/EV9J-E7XD>] (last visited Mar. 3, 2025).

117. See Search for "section 702," LAWFARE, https://www.lawfaremedia.org/search-results?prod_search-index%5Bquery%5D=section%20702&prod_search-index%5Brange%5D%5BpubDate%5D=1514764800%3A1546214400 (last visited Mar. 3, 2025); Stewart Baker, *The Cyberlaw Podcast: Untold Stories of Section 702 Reauthorization*, LAWFARE (Jan. 23, 2018, 8:23 AM), <https://www.lawfaremedia.org/article/cyberlaw-podcast-untold-stories-section-702-reauthorization> [<https://perma.cc/DWT2-NPJ5>]; Robert Chesney & Steve Vladeck, *The National Security Law Podcast: The Deepest Dive: Surveillance, Section 702 and Section 215*, LAWFARE (Nov. 7, 2018, 11:55 AM), <https://www.lawfaremedia.org/article/national-security-law-podcast-deepest-dive-surveillance-section-702-and-section-215> [<https://perma.cc/NR9K-N2W3>]; Elizabeth Goitein & Robert S. Litt, *A Way Forward on Section 702 Queries*, LAWFARE (Feb. 20, 2018, 12:30 PM), <https://www.lawfaremedia.org/article/way-forward-section-702-queries> [<https://perma.cc/U8N5-37AF>]; Jack Goldsmith & Susan Hennessey, *The Merits of Supporting 702 Reauthorization (Despite Worries About Trump and the Rule of Law)*, LAWFARE (Jan. 18, 2018, 9:20 AM), <https://www.lawfaremedia.org/article/merits-supporting-702-reauthorization-despite-worries-about-trump-and-rule-law> [<https://perma.cc/A7AZ-BWYJ>]; Sarah Tate Chambers, Matthew Kahn & Chinmayi Sharma, *FISA Section 702 Reauthorization Resource Page*, LAWFARE (Jan. 9, 2018, 1:30 PM), <https://www.lawfaremedia.org/article/fisa-section-702-reauthorization-resource-page> [<https://perma.cc/FNB2-EWHG>].

118. Search for "section 702," LAWFARE, https://www.lawfaremedia.org/search-results?prod_search-index%5Bquery%5D=section%20702&prod_search-index%5Brange%5D%5BpubDate%5D=1672531200%3A1703980800 (last visited Mar. 3, 2025).

Congress.¹¹⁹ Statements of Executive Branch officials from 2023 and early 2024 make clear that the Executive was concerned by Congress's reconsideration of Section 702 and took that reconsideration seriously.¹²⁰ As a result, the government made more information available to Congress and to the public about its use of Section 702—including how it is used, what benefits have been derived from the authority, and how often mistakes are made by the government in executing the authority¹²¹—than ever before. In an attempt to justify the continued existence of 702 as a tool, the government declassified an unprecedented number of documents, including Foreign Intelligence Surveillance Court (FISC) opinions, internal standards and policies, and Executive Branch assessments of querying practices.¹²² The public and Congress now have access to thorough and revealing oversight reports conducted by the Privacy and Civil Liberties Oversight Board¹²³ and by the President's Intelligence Advisory Board and Intelligence Oversight Board.¹²⁴

Such vigorous participation of the Executive in democratic deliberation in the national security sphere is highly unusual¹²⁵ and was made possible only by the presumption exchange effectuated by the sunset provision in Section 702. If the only mechanism to revise or revoke Section 702 was by passing a veto-proof bill, the onus would not have lain on the Executive Branch to justify the continued existence of the tool, but rather on Congress to justify—by a supermajority—the revision or revocation of it. Moreover, the conversation about whether Section 702 should continue to exist in its current form may not even have arisen, or at least not in such a serious way, in the absence of a sunset provision.

119. See Finn, *supra* note 21, at 458, 469.

120. See, e.g., *Statement by National Security Advisor Jake Sullivan on the Biden-Harris Administration's Support for the Reauthorization of Vital Intelligence Collection Authorities*, WHITE HOUSE (Feb. 28, 2023) [<https://perma.cc/GWB9-2EE5>]; MERRICK B. GARLAND & AVRIL D. HAINES, U.S. DEP'T OF JUST., JOINT LETTER FROM ATTORNEY GENERAL GARLAND AND DIRECTOR OF NATIONAL INTELLIGENCE HAINES TO CONGRESSIONAL LEADERSHIP REGARDING REAUTHORIZATION OF TITLE VII OF FISA (2023), <https://s3.documentcloud.org/documents/23692331/garland-haines-fisa702-letter.pdf> [<https://perma.cc/69TD-7TDY>]; Matthew Olsen & Joshua Geltzer, *Reauthorizing Section 702 of the Foreign Intelligence Surveillance Act Is a National Security Imperative*, HILL (Aug. 16, 2023, 3:00 PM), <https://thehill.com/opinion/congress-blog/4154631-reauthorizing-section-702-of-the-foreign-intelligence-surveillance-act-is-a-national-security-imperative> [<https://perma.cc/9PXJ-W8LG>]; WRAY, *supra* note 93, at 1.

121. See, e.g., WRAY, *supra* note 93, at 1–4 (detailing the FBI's reform efforts to comply with restrictions on conducting U.S. person queries of 702-acquired data).

122. See *id.* at 1 n.1; *Release of Documents Related to the 2023 FISA Section 702 Certifications*, INTEL.GOV (July 21, 2023), <https://www.intel.gov/ic-on-the-record-database/results/1307-release-of-documents-related-to-the-2023-fisa-section-702-certifications> [<https://perma.cc/848K-VW XF>].

123. THE PRIV. & C.L. OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2023) [hereinafter PCLOB REPORT], [https://documents.pclob.gov/prod/Documents/OversightReport/054417e4-9d20-427a-9850-862a6f29ac42/2023%20PCLOB%20702%20Report%20\(002\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/054417e4-9d20-427a-9850-862a6f29ac42/2023%20PCLOB%20702%20Report%20(002).pdf) [<https://perma.cc/N6HL-YLSP>].

124. PRESIDENT'S INTEL. ADVISORY BD. (PIAB) & INTEL. OVERSIGHT BD. (IOB), REVIEW OF FISA SECTION 702 AND RECOMMENDATIONS FOR REAUTHORIZATION (2023) [hereinafter PIAB & IOB REPORT] [<https://perma.cc/PVA7-LF86>].

125. See *supra* notes 20–21 and accompanying text; *supra* Part II.

In this way, the recent reconsiderations of Section 702 demonstrate how the presumption exchange disrupts the congressional timidity, executive veto-brandishing, and lack of transparency that typify national security authorities. In 2017, this resulted in the inclusion by Congress of more protections for the privacy of U.S. citizens.¹²⁶ The April 2024 reauthorization included the additional privacy protections of a requirement of supervisor or attorney approval for queries of U.S. person identifiers by the FBI,¹²⁷ a prohibition of political-appointee involvement in the query-approval process,¹²⁸ mandatory audits of U.S. person queries,¹²⁹ mandatory training requirements,¹³⁰ a requirement of a prior written justification for U.S. person queries,¹³¹ a requirement to notify Congress of certain queries conducted,¹³² an elimination of nearly all non-national-security criminal queries by the FBI,¹³³ and more. Although civil liberties advocates had long sought even stronger protections, such as a warrant requirement for U.S. person queries,¹³⁴ such a provision was opposed by the government and by national security advocates as dangerously disruptive of critical surveillance efforts.¹³⁵ The resulting bill reflects a compromise that is the result of robust, meaningful debate by the most important stakeholders—a result that could not have been reached without the inclusion of the sunset provision.

IV. OBJECTIONS TO SUNSET PROVISIONS AS A SOLUTION

While the benefits of sunset provisions in national security authorities are significant, there are some problems that must be accounted for. First, while a sunset leverages benefits out of congressional gridlock, those benefits assume that Congress, while unable to summon a veto-proof supermajority, can at least muster a simple majority to reauthorize an expiring law when warranted. This concern, however, simply reflects the necessary bargain underlying all democracies: majority rule. Secondly, there's a concern that Congress might go further to

126. See *supra* note 98 and accompanying text.

127. Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, § 2(a)(3)(A), 138 Stat. 862, 862 (2024).

128. *Id.* § 2(b)(vi), 138 Stat. at 863.

129. *Id.* § 2(c), 138 Stat. at 863.

130. *Id.* § 2(d)(D)(i), 138 Stat. at 863–64.

131. *Id.* § 2(d)(D)(iii), 138 Stat. at 864.

132. *Id.* § 2(e), 138 Stat. at 865.

133. *Id.* § 3(a)(2), 138 Stat. at 866–67.

134. Geoffrey Stone & Michael Morell, Opinion, *The One Change We Need to Surveillance Law*, WASH. POST (Oct. 9, 2017, 10:46 AM), https://www.washingtonpost.com/opinions/the-one-change-we-need-to-surveillance-law/2017/10/09/53a40df0-a9ea-11e7-850e-2bdd1236be5d_story.html.

135. See, e.g., Glenn S. Gerstell, *Why a Warrant Requirement for 702 Searches Will Do More Harm Than Good*, LAWFARE (Feb. 12, 2024, 9:10 AM), <https://www.lawfaremedia.org/article/why-a-warrant-requirement-for-702-searches-will-do-more-harm-than-good> [https://perma.cc/6NSB-KG37]; *Warrant Requirement for FBI's Section 702 Queries Would Impede Investigations, Endanger National Security, Director Says*, FBI NEWS (Apr. 9, 2024), <https://www.fbi.gov/news/stories/warrant-requirement-for-fbi-s-section-702-queries-would-impede-investigations-endanger-national-security-director-says> [https://perma.cc/PJ9T-D3CW].

inhibit civil liberties when they know that an authority is only temporary. This concern reflects a misunderstanding of legislative overreach in the national security sphere; it is not the temporary nature of provisions that causes overreach, as is made clear by the fact that legislative overreach in national security occurs just as frequently in permanent legislation.

A. UNDERESTIMATING THE DYSFUNCTION OF CONGRESS

The success of a sunset provision assumes that, although a veto-proof majority may be out of reach for Congress in most situations, a simple majority is generally within reach. There are some reasons to think that this may not be true. Yearly appropriations done through budget reconciliation are similar to sunset bills because they require periodic reauthorization and require only a simple majority of Congress to pass.¹³⁶ Yet, somewhat regularly, Congress is unable to reach even the low bar of a simple majority on appropriations matters, resulting in a temporary shutdown of the government.¹³⁷ Should such a “shutdown” of a critical national security authority happen, even temporarily, the results could be far more serious than the closing of our national parks. The government relies on surveillance authorities to, among other things, stop terrorist attacks like 9/11 from happening, and there is good reason to believe that real attacks have been averted by the use of these authorities.¹³⁸

But the risk of legislative dysfunction is inherent to democracy. True, the benefits of a sunset provision can only be achieved if at least a simple majority in Congress can agree on revisions or reauthorization when the time comes.¹³⁹ However, the idea that policy should be supported by a simple majority of our elected representatives is not so controversial—in fact, it’s the judgment underlying the very inception of our democracy.¹⁴⁰

That majority rule was intended to be enshrined in the Constitution is evident from the writings of its Framers.¹⁴¹ Difficulty in reaching a majority decision was considered by the Framers to be not just an acceptable side effect of democracy but an essential guard against abuse.¹⁴² By dividing the government into

136. See CONG. RSCH. SERV., *THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW* 1 (2023), <https://crsreports.congress.gov/product/pdf/R/R47106> [<https://perma.cc/S3JW-JR6Z>]; *Budget Reconciliation, Simplified*, *supra* note 30.

137. Olafimihan Oshin, *Here’s How Many Times the Federal Government Has Shut Down*, HILL (Sept. 24, 2023, 11:46 PM), <https://thehill.com/homenews/administration/4221150-heres-how-many-times-the-federal-government-has-shut-down/>.

138. See Olsen & Geltzer, *supra* note 120; PCLOB REPORT, *supra* note 123, at 158; PIAB & IOB REPORT, *supra* note 124, at 1.

139. See *supra* Part II; *supra* note 30.

140. See 1 THE FEDERALIST NO. 10, *supra* note 29, at 59 (James Madison).

141. See *id.* (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote.”); 1 THE FEDERALIST NO. 22, *supra* note 29, at 141 (Alexander Hamilton) (arguing that a system where states, not people, are given equal voting power in the legislature “contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail”).

142. See 2 THE FEDERALIST NO. 62, *supra* note 4, at 98 (James Madison) (“Another advantage accruing from this ingredient in the constitution of the senate is, the additional impediment it must prove

branches, and dividing the Legislative Branch within itself, the Constitution was intended to make reaching a binding majority decision difficult, thereby ensuring that any legislation passed was for the good of all people.¹⁴³ In this way, the Framers considered congressional gridlock a feature, not a bug, of the system. In the context of national security legislation, which can start and end wars or authorize widespread surveillance programs, these principles are all the more important. We certainly should not ask any less of our national security legislation than we do of other laws.

Nonetheless, the possibility of congressional dysfunction should be considered when determining on what date a national security authority will sunset in relation to political cycles and how frequently it should require reauthorization.¹⁴⁴ Should sunsets be scheduled during election years to maximize the political pressure toward achieving a publicly supported outcome? Or, alternatively, should they be scheduled as far from elections as possible so as to minimize political considerations and maximize careful deliberation? One scholar notes that the power distribution of sunset provisions is not just from the Executive back to Congress, but also across time within Congress—taking power from a future Congress by determining what legislation will be on its agenda and passing responsibility to the future Congress to decide the issue again.¹⁴⁵ A comprehensive analysis of how frequently, and at what points in the political cycle, national security legislation should be slated to sunset is warranted to test the boundaries of this theory in the national security context. Such an analysis is, however, outside the purview of this Note. Although there is the potential for congressional dysfunction as a result of including a sunset provision, this risk merely reflects the institutional risk of democracy and is outweighed by the power-balancing and deliberative benefits discussed above.

B. CHANGING THE QUESTION

Some scholars have argued that, at least in the context of counterterrorism legislation, Congress may grant more power to the Executive when it knows that the power is temporary.¹⁴⁶ Under this view, the sunset provision is not a safeguard against overreach—it actually enables it by changing the question for legislators

against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the states. It must be acknowledged that this complicated check on legislation may, in some instances, be injurious as well as beneficial . . .”).

143. See 2 THE FEDERALIST NO. 51, *supra* note 4, at 31 (James Madison) (“In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice and the general good . . .”).

144. See Finn, *supra* note 21, at 492–95 (discussing political variables in counterterrorism sunsets); Gersen, *supra* note 21, at 279–85 (discussing distributing power forward in time to a future legislature as an example of the political implications of the distributive effect that a sunset provision has across time).

145. See Gersen, *supra* note 21, at 281–82.

146. See Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L. REV. 1777, 1813–16 (2013).

from, “What is the best long-term balance between security and liberty?” to, “How do we design a short-term fix for this security risk?”

This approach to understanding sunsets is misleading, however, because it assigns a causal relationship between sunsets and overreach on evidence of mere correlation, and it fails to consider the simpler explanation of the relationship between catastrophic security events and an overreaction thereto. In other words, in response to catastrophic security events, Congress will inevitably pass legislation empowering the Executive to deal with the newly discovered security risks. Often this is an overreaction that goes too far in prioritizing security over liberty.¹⁴⁷ Sometimes, such legislation includes a sunset provision¹⁴⁸—but the conclusion that the sunset provision *causes* the overreach overlooks the far simpler explanation that Congress is recognizing the possibility that it might be overreacting and including a sunset provision to mitigate that risk.

Even when Congress does not include a sunset provision, it still tends to overreact in such circumstances by passing legislation that has been proven to be flawed, indicating that this simpler explanation is the correct one. For instance, in the immediate post-9/11 environment, the 2001 Authorization for the Use of Military Force (AUMF) was passed as permanent legislation.¹⁴⁹ Similarly, the 2002 AUMF included no sunset provision.¹⁵⁰ Both have presented significant problems and have been extremely difficult to revise without sunset clauses.¹⁵¹ This makes clear that it is not the temporary nature of a provision that determines whether it will be an overreaction, but rather that Congress simply tends to overreact to national security catastrophes, regardless of the temporary or permanent nature of that overreaction. The AUMFs demonstrate that the inclusion of a sunset clause is not required to enable the passage of poorly designed legislation—rather, as demonstrated above, such a sunset would have allowed for the periodic tailoring of the authorities to address design flaws. Rather than sunset clauses enabling overreach, they allow for the opportunity to reel in overreach.

CONCLUSION

These case studies reveal that the benefits of including sunset provisions in national security legislation are considerable. The 2017 amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA) that increased privacy protections for U.S. citizens demonstrate that sunset provisions allow for substantive reconsideration of the balance between security and liberty. The recent reauthorization of Section 702 shows that substantial deliberative benefits are obtained

147. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN THE AGE OF TERRORISM 2* (2006) (discussing the tendency of Congress to panic and enact repressive legislation in response to terror attacks).

148. See, e.g., FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 702, 403(b), 122 Stat. 2436, 2438, 2474 (codified as amended at 50 U.S.C. § 1881).

149. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

150. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; BROOKS ET AL., *supra* note 55, at 2.

151. See *supra* Section III.A.

when the Executive Branch is forced to justify the continued existence of a national security tool. And if the 2001 and 2002 Authorizations for the Use of Military Force (AUMFs) had included sunset provisions, we would most likely be living in a world with a single, tailored counterterrorism AUMF that better reflected the realities of the current global terrorism threat.

In a world where congressional gridlock is the norm, Congress should be aware of the outcome that will result from inaction. In the case of national security authorities, Congress should include sunset provisions at reasonable intervals to leverage inaction in favor of repeal. This is the best way to preserve the traditional balance of powers, allow for meaningful democratic deliberation on how to best balance security and liberty, and tailor national security authorities to meet contemporary threats over time.