

Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL

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I. INTRODUCTION

At the beginning of 2014, a terrorist organization known as the Islamic State of Iraq and Syria (“ISIL”)¹ began taking control

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of large swaths of land in Iraq and Syria, including major Iraqi cities such as Fallujah and Mosul.² The rapid loss of control in the area was particularly embarrassing for the United States, as it had recently withdrawn troops from Iraq after nearly a decade in the country.³ Heavy fighting between the Iraqi Security Forces and ISIL left Iraq ravaged, with over 33,000 civilian casualties in 2014.⁴ In May 2014, the Department of State officially designated ISIL as a terrorist organization, signifying the United States Gov-

rine Corps, the Department of Defense, or the United States Government. I would like to thank Major General Albert C. Harvey, USMCR (ret.), Professor David Romantz, Kevin T. Brown, and Jake Strawn for their invaluable insight and assistance with this Note.

1. Other aliases listed are: “the Islamic State of Iraq and al-Sham (ISIS), the Islamic State of Iraq and Syria (ISIS), ad-Dawla al-Islamiyya fi al-’Iraq wa-sh-Sham, Daesh, Dawla al Islamiya, and Al-Furqan Establishment for Media Production.” *Terrorist Designations of Groups Operating in Syria*, U.S. DEP’T OF STATE (May 14, 2014), <http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm>. Subsequent to this press release by the Department of State, ISIL changed its own name to the “Islamic State.” Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State With ‘Restoration of Caliphate’ in Middle East*, THE INDEP. (June 30, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-albaghdadi-as-emir-removing-iraq-and-syria-from-its-name-9571374.html>. This Note will use the original moniker designated by the U.S. Department of State.

2. *Analyzing the ISIS Timeline: The Rise of the Islamic State (ISIL/ISIS)*, NTREPID, <http://www.ntrepidcorp.com/timestream/isis/> (last visited Oct. 7, 2015).

3. See Press Release, Office of the Press Sec’y, *Remarks by the President at the United States Military Academy Commencement Ceremony*, THE WHITE HOUSE (May 28, 2014, 10:22 AM), <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> (“We have removed our troops from Iraq.”). The announcement of full troop withdrawal was less than three weeks before sending 275 service members back to Iraq. Press Release, Office of the Press Sec’y, *Text of a Letter From the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, THE WHITE HOUSE (June 16, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/16/text-letter-president-speaker-house-representatives-and-president-pro-te> (stating that 275 military personnel were being sent to Iraq for “support and security”).

4. HUMAN RIGHTS OFFICE, UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 11 SEPTEMBER – 10 DECEMBER 2014, at i (2014), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_11Sep-10Dec2014_EN.pdf.

ernment's first official acknowledgement of ISIL and the severity of the situation.⁵ On August 8, 2014, President Barack Obama ordered the first of many airstrikes targeting ISIL in Iraq, an action known as "Operation Inherent Resolve,"⁶ the first active hostility the United States took against the newly designated terrorist group.⁷ Prior to beginning the airstrikes, President Obama did not seek any type of congressional authorization. In support of his engagement of the United States in armed conflict against ISIL, President Obama cited legal authority pursuant to constitutional and statutory authority as the Commander in Chief.⁸ While the White House was not initially specific as to the particular statutory justification for the strikes on ISIL, it eventually stated the statuto-

5. See *Terrorist Designations of Groups Operating in Syria*, U.S. DEP'T OF STATE (May 14, 2014), <http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm> (designating the primary name and label for the "Foreign Terrorist Organization").

6. *Iraq and Syria Operations Against ISIL Designated as Operation Inherent Resolve*, U.S. CENT. COMMAND (Oct. 15, 2014), <http://www.centcom.mil/en/news/articles/iraq-and-syria-ops-against-isil-designated-as-operation-inherent-resolve> (officially naming the military operation against ISIL as "Operation INHERENT RESOLVE").

7. Press Release, Office of the Press Sec'y, *Letter from the President—War Powers Resolution Regarding Iraq*, THE WHITE HOUSE (Aug. 8, 2014), <http://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq> [hereinafter August Press Release].

8. Press Release, Office of the Press Sec'y, *Letter from the President—War Powers Resolution Regarding Iraq*, THE WHITE HOUSE (Sept. 23, 2014) <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq> [hereinafter September Press Release]. There is a school of thought that, under the Commander in Chief and/or Vesting Clauses of the Constitution, no restriction can be placed on the President's ability to make and carry out war. See U.S. CONST. art. II, § 1, cl. 1 ("The executive power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . ."). These arguments are outside of the scope of this Note, but this Note takes the approach that this reading of the Constitution would make Congress' constitutional right to declare war meaningless, and therefore, the President must have congressional approval prior to entering armed conflict. Despite other positions on the President's inherent constitutional powers, it is undisputed that a Congressional authorization to use military force increases the power and legitimacy of a military operation. See *infra* Section II.B.

ry authority was under both the 9/11 and 2002 Authorizations to Use Military Force (“AUMF”).⁹

The 9/11 AUMF was enacted in response to the September 11, 2001 terrorist attacks on the United States.¹⁰ It authorizes military action against “those nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations.”¹¹ While the 9/11 AUMF can perhaps be stretched into authorizing the strikes against ISIL based on a tenuous link to the 9/11 attacks, this was likely not the intent of Congress when it passed the 9/11 AUMF. Congress intended to pursue those who were responsible for the September 11, 2001 attacks and prevent them from attacking U.S. soil again.¹² Fourteen years later, this authorization should not be cited for authorization to enter into a new, large-scale conflict against a group that is not directly linked to the September 11, 2001 attacks. Although the actions of ISIL

9. September Press Release, *supra* note 8. The 2002 AUMF authorized use of military force “against the continuing threat posed by Iraq” and was used as the legal justification to invade Iraq in 2003. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-234, 116 Stat. 1498. The application of the 2002 AUMF is outside the scope of this Note, but it largely revolves around Iraq as a state actor and the possession of “weapons of mass destruction.” *Id.*; see also Zeke J. Miller, *White House: Iraq War Vote Obama Opposed Could Be Used for ISIS Strikes*, TIME (Sept. 13, 2014), <http://time.com/3362683/obama-isis-iraq-syria-war-aumf/> (“[T]he 2002 law would provide additional legal underpinning to strikes in Iraq—and even Syria—as scholars question the applicability of the 2001 authorization to ISIS . . .”). Months before the initial strikes against ISIL, the National Security Advisor, Susan E. Rice, wrote to the Speaker of the House of Representatives, stating, “[T]he [2002] Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal.” Letter from Susan E. Rice, Assistant to the President for National Security Affairs, to the Honorable John A. Boehner, Speaker of the House of Representatives, U.S. HOUSE OF REPRESENTATIVES (Jul. 25, 2014), http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3 [hereinafter Letter from Susan E. Rice].

10. See *infra* Part III.

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

12. See *infra* note 65 and accompanying text.

are atrocious,¹³ the Constitution mandates positive actions on behalf of Congress and the nation deserves a debate and clear authorizations to engage in armed conflict.¹⁴ Allowing the President to enter a large-scale armed conflict without the consent of Congress is dangerous, because it avoids the checks and balances prescribed by the Constitution.

In addition to the constitutional problems raised by the pursuit of this operation without actual authorization, it is important to formally authorize the fight against ISIL because of the anticipated duration and costs of the operation. In human costs, as of July 28, 2015, eight United States service members have been killed in support of Operation Inherent Resolve.¹⁵ In financial costs, as of November 3, 2015, the operation has cost the United States at least \$4.75 billion and is expected to continue to cost between \$2.4 and 3.8 billion per year.¹⁶ Operation Inherent Resolve is expected to last for several years.¹⁷ As of September 2015, there have been

13. See, e.g., Stephanie Nebehay, *Islamic State Commanders Liable for Mass War Crimes: U.N.*, REUTERS (Nov. 14, 2014), <http://www.reuters.com/article/2014/11/14/us-mideast-crisis-un-warcrimes-idUSKCN0IY1CV20141114?feedType=RSS&feedName=worldNews>.

14. See *infra* Section II.A.

15. HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, A GUIDE TO U.S. MILITARY CASUALTY STATISTICS: OPERATION FREEDOM'S SENTINEL, OPERATION INHERENT RESOLVE, OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 1 (2015), <http://fas.org/sgp/crs/natsec/RS22452.pdf> (detailing the number of casualties reported by the Department of Defense for named operations); *DoD Identifies Army Casualty*, U.S. DEP'T OF DEF. (Oct. 23, 2015), <http://www.defense.gov/News/News-Releases/News-Release-View/Article/625690/dod-identifies-army-casualty> (stating that Army Special Operations Master Sergeant Joshua L. Wheeler was killed by small-arms fire in Iraq).

16. *Operation Inherent Resolve: Targeted Operations Against ISIL Terrorists*, U.S. DEP'T OF DEF., http://www.defense.gov/home/features/2014/0814_iraq/ (last visited Nov. 3, 2015); Bendery, *infra* note 106; Todd Harrison, John Stillion, Eric Lindsey & Jacob Kohn, *Estimating the Cost of Operations against ISIL*, CENTER FOR STRATEGIC AND BUDGETARY ASSESSMENTS (Sept. 29, 2014), <http://www.csbaonline.org/publications/2014/09/estimating-the-cost-of-operations-against-isil/>.

17. *Opening Statement Before the S. Comm. on Foreign Relations*, 113th Cong. (Dec. 9, 2014) (statement of Hon. John F. Kerry, Secretary of State), <http://www.foreign.senate.gov/imo/media/doc/Secretary%20Kerry%20-%20Testimony.pdf> ("It will be years, not months, before [ISIL] is defeated.").

over 23,000 military flights over Iraq and Syria, with over 24,000 munitions deployed.¹⁸ This is not a small-scale contingency operation, but one that has already had a large impact on the United States and the rest of the world.

Congress should repeal the 9/11 AUMF and pass a new AUMF to authorize the President to engage the U.S. military into this conflict. The President should not be allowed to use the 9/11 AUMF as a justification to enter into a new long-term conflict without congressional action. Likewise, and probably more importantly, Congress should not shirk its responsibilities and sit idly by as the President takes unilateral military action without the proper authorization. This is setting a dangerous precedent for the unilateral commitment of the armed forces and is acceding constitutional powers to the executive branch that are explicitly reserved for the Congress.

This Note advocates for a new AUMF that allows for the targeting of ISIL because the use of outdated and contentious legal authority to engage in major combat operations unrelated to the September 11, 2001 attacks is inappropriate and skirts the checks and balances required by the Constitution. Part II of this Note delves into a historical background of presidential powers in the context of national security. It discusses a brief history of the War Powers Resolution¹⁹ and its importance in the legality of current armed conflict. It also briefly reviews and analyzes Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*,²⁰ and the state of the President's power in conjunction with Congress as the conflict with ISIL evolved. Part III ana-

18. *Combined Forces Air Component Commander 2010–2015 Airpower Statistics*, U.S. DEP'T OF DEF. (May 31, 2015), http://www.defense.gov/Portals/1/features/2014/0814_iraq/docs/September_30_2015.pdf (showing the number of flights flown and weapons deployed in support of Operation Inherent Resolve). For an interesting graphic that displays an interactive map with a timeline that shows the increase in frequency and location of coalition airstrikes against ISIL targets for the first few months of the operation, see *How the Air Campaign Against ISIS Grew*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/12/31/world/middleeast/isis-airstrikes-map.html> (last visited Oct. 7, 2015).

19. 50 U.S.C. §§ 1541–1548 (2013).

20. 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

lyzes the 9/11 AUMF,²¹ including its text, legislative history, and application to armed conflict with ISIL. This part highlights some of the major issues with applying antiquated legal authority to a new and significant threat and will suggest why Congress did not take more action to either approve or disapprove of the President's unilateral actions. Part IV outlines specific proposals for a new AUMF, including requirements for target identification, constraints, and a revision of both the 9/11 AUMF and 2002 AUMF. This part provides recommendations that will be useful to the legislature in drafting a new AUMF with regard to ISIL but will likewise be useful as a reference to any future AUMF.

II. HISTORICAL BACKGROUND

The United States Constitution explicitly gives Congress—and solely Congress—the ability to declare war.²² The President of the United States is instrumental in the conduct of war as the Commander in Chief of the armed forces,²³ but does not have the unilateral ability to commit the military into armed conflict except under exigent circumstances.²⁴ Even under exigent circumstances, the President has limited authority to conduct war and must meet strict statutory guidelines set forth by Congress.²⁵ The Founding

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

22. U.S. CONST. art. I, § 8, cl. 11 (stating that Congress shall have power “[t]o declare War”). There is some debate as to what exactly the power “[t]o declare War” means. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002). Congress also has the ability to control war through their appropriations power, known as “the power of the purse.” See generally WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994) (discussing when and how Congress can control the actions of the Executive through the funding, or non-funding, of any National Security matter).

23. U.S. CONST. art II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”). *Contra* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 252–56 (1996) (arguing that a broad reading of the Commander in Chief clause would give the President all powers not solely conferred to Congress).

24. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548; see *infra* Section II.A.

25. See 50 U.S.C. §§ 1541–1548; see also *infra* Section II.A.

Fathers were very deliberate about the division of these powers because they realized the imperative need for the checks and balances provided by this structure to promote debate and prevent tyranny.²⁶

A. *War Powers Resolution*

The intricacies of the War Powers Resolution are outside the scope of this Note, but a brief discussion is necessary for a general understanding of the necessity of AUMFs.²⁷ The War Powers Resolution requires the President to have congressional authorization to conduct armed conflict, and AUMFs are the statutory means by which Congress makes this authorization.²⁸

1. Enactment of the War Powers Resolution

The War Powers Resolution has been controversial since its inception. It was enacted in 1973, despite President Nixon's veto,²⁹ in order to specifically frame via statute the instances when the President can introduce the United States military into armed conflict without prior approval by Congress.³⁰ In his veto, President Nixon stated that the War Powers Resolution was "clearly

26. See Yoo, *supra* note 23, at 174 (explaining that while presidential initiative in war could have been encouraged by the Framers of the Constitution, Congress possesses the "ultimate check on executive actions").

27. For a more detailed account of the War Powers Resolution, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) and Bradley Larschan, *The War Powers Resolution: Conflict- ing Constitutional Powers, the War Powers and U.S. Foreign Policy*, 16 DENV. J. INT'L L. & POL'Y 33 (1987).

28. See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 5 (2014), <https://www.fas.org/sgp/crs/natsec/RL31133.pdf>.

29. *Id.* at 26. For one perspective as to how Congress was able to override the President's veto, see Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE W. RES. J. INT'L L. 173, 179–80 (2012).

30. See 50 U.S.C. § 1541(c). Presidential authority to introduce the armed forces into hostilities is limited to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." *Id.*

unconstitutional” and “undermin[ed] our foreign policy.”³¹ Every one of President Nixon’s successors also found the War Powers Resolution to be unconstitutional.³² This is because some, including President Nixon, argue that the President has the unilateral ability to engage in military conflict without the prior authorization of Congress based on the Commander-in-Chief clause in the U.S. Constitution.³³ The Commander in Chief clause states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.”³⁴ A broad reading of this clause could lead one to conclude that the President has the unilateral ability to commit military forces into armed conflict. This conclusion is outside of the scope of this Note, and while the War Powers Resolution remains controversial, it is still the law today.³⁵

2. Requirements of the War Powers Resolution

The War Powers Resolution sets several restrictions and requirements on the executive branch to maintain a check on the President’s powers. Arguably the most important restriction set by the War Powers Resolution is the automatic termination of use of the armed forces within sixty days of their introduction into hostilities unless there is *specific* congressional approval.³⁶ This allows

31. *Richard Nixon: Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=4021> (last visited Oct. 11, 2014). In his letter addressed to the House of Representatives, President Nixon was “deeply disturbed by the practical consequences of [the] resolution,” and he predicted far-reaching consequences to the United States’ foreign policy. *Id.*

32. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 6 (2010), <https://www.fas.org/sgp/crs/natsec/R41199.pdf>.

33. *Id.* at 6–7.

34. U.S. CONST. art. II, § 2, cl. 1.

35. See Newton, *supra* note 29, at 173; Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*, 45 CASE W. RES. J. INT’L L. 109 (2012); see also September Press Release, *supra* note 8.

36. See 50 U.S.C. § 1544(b) (2013).

Within sixty calendar days after a report is submitted . . . the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a *specific* authorization for such use of

the President the limited ability to introduce forces in exigent circumstances in defense of the nation without congressional approval,³⁷ but if the President has not obtained congressional approval after sixty days, this use of the armed forces is automatically terminated.³⁸ If Congress does not specifically approve of the operation, the President is required to end hostilities within thirty days of the automatic termination.³⁹ Overall, the President can engage troops in armed conflict for ninety days before the conflict is declared in violation of the War Powers Resolution.⁴⁰

Regarding armed conflict with ISIL, the United States entered into hostilities by the use of airstrikes that were conducted beginning on August 8, 2014.⁴¹ The ninety-day mark, by which the President was required to end hostilities and withdraw troops without specific congressional approval, was November 6, 2014.⁴² The passage of this deadline raised the question of whether President Obama's use of Armed Forces was legal because there was no *specific* congressional authorization given for armed conflict with ISIL.⁴³ If there was no legitimate congressional authorization, then the President violated the War Powers Resolution and avoided the system of checks and balances on which the government rests.

United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.

Id. (emphasis added). Other requirements include regular consultation with Congress and periodic reports when Armed Forces are committed into hostilities. *Id.* at §§ 1542–1543.

37. *Id.* § 1541(c).

38. *Id.* § 1544(b). The War Powers Resolution created procedures that expedited the process for Congress to declare war or authorize the use of military force in order to allow compliance with the sixty-day requirements. ELSEA & WEED, *supra* note 28, at 77–80.

39. 50 U.S.C. § 1544(b).

40. *Id.*; see also THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 33–34 (2005), http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf (arguing that the ninety-day time limit gives both the President and Congress a “free pass” to enter into armed conflict).

41. August Press Release, *supra* note 7.

42. See Sen. Rand Paul, *Obama's ISIS War is Illegal*, DAILY BEAST (Nov. 10, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/11/10/obama-s-isis-war-is-illegal.html>.

43. *Id.*

3. Enforcement of the War Powers Resolution

As previously mentioned, the War Powers Resolution has always been controversial, and several Presidents have been challenged regarding their alleged violations of the War Powers Resolution.⁴⁴ Some Presidents have claimed the inherent constitutional power to introduce military forces into armed conflict and subsequently exercised their claimed authority.⁴⁵ While speaking at the Texas State Republican Convention in Dallas, Texas, President George H. W. Bush defiantly stated, “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.”⁴⁶ On several occasions, individual citizens, and even Congresspersons, have taken these national security issues to the courts to question the unilateral authority of the Commander in Chief and enforce the War Powers Resolution. However, courts have avoided the issue and considered it non-justiciable for three reasons: political question,⁴⁷ lack of standing,⁴⁸ and ripeness.⁴⁹ This lack of remedy available through Article III courts highlights the necessity for Congress to take a stand on the President’s actions and demand the constitutionally required

44. See *infra* notes 47–49 and accompanying text.

45. See *supra* notes 31–35 and accompanying text.

46. *George Bush: Remarks at the Texas State Republican Convention in Dallas, Texas*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=21125> (last visited Oct. 10, 2015). President George H. W. Bush also told his then-Deputy National Security Advisor Robert Gates, “[i]f I don’t get the votes’ in Congress for war . . . ‘I’m going to do it anyway. And if I get impeached, then so be it.’” Jon Meacham, *The Hidden Hard-line Side of George H. W. Bush*, POLITICO (Nov. 12, 2015), <http://www.politico.com/magazine/story/2015/11/jon-meacham-book-george-h-w-bush-213347>.

47. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (“[Courts] have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.”).

48. See *Campbell v. Clinton*, 203 F.3d 19, 23–24 (D.C. Cir. 2000) (holding that the thirty-one Congressmen who filed suit seeking a declaration that the President’s use of military forces was illegal had no standing).

49. See *Dellums v. Bush*, 752 F. Supp. 1141, 1143 n. 1, 1151 (D.C. Cir. 1990) (holding that the fifty-four Congressmen who sued regarding the legality of the unilateral introduction of forces constituted a minority of Congress, and thus, the issue was not ripe because Congress as a whole had not spoken on the issue).

checks and balances because there is no other way to check the President's powers. When determining whether the President has the actual authority to take military action in a national security situation, or whether Congress has already granted that authority, courts look to a tripartite scheme. This scheme categorizes the President's power into one of three levels based upon differing levels of congressional support.

B. Justice Jackson's Concurrence in the Steel Seizure case

In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, Justice Robert Jackson set up a three-level tiered hierarchy assessment to determine how much power the President has in any given national security issue.⁵⁰ Although it was just a concurrence, Justice Jackson's concurring opinion has been subsequently cited by the Court on multiple occasions and treated as if it were law.⁵¹ Justice Jackson's opinion is now the standard scheme by which national security issues are judged.⁵²

The first tier of executive power rests upon full support from Congress and gives the President the most power possible because "it includes all that [the President] possesses in his own right plus all that Congress can delegate."⁵³ The second tier is achieved "[w]hen the President acts in absence of either a congres-

50. 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

51. *Medellin v. Texas*, 552 U.S. 491, 494 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of national security law]."); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). Justice Jackson's analysis "brings together as much combination of analysis and common sense as there is" in the area of national security law. *Id.* Reportedly, in the fifty cases to use Justice Jackson's framework, every case in this category was found to be constitutional. See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 311 (2010). Interestingly, Chief Justice Rehnquist, who authored the opinion in *Dames & Moore v. Regan*, was Justice Jackson's law clerk at the time the *Steel Seizure* opinion was written. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 169 (new ed. 2001).

52. See Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1107 (2006) ("As the nation debates the Constitution's limits on executive action in the global war on terror, Justice Jackson's opinion has grown ubiquitous in legal discourse.").

53. *Steel Seizure*, 343 U.S. at 635.

sional grant or denial of authority[.]”⁵⁴ In this case, the President “can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁵⁵ The main difference between the first and second tiers is that, in the second tier, if the President acts outside his existing scope of authority, the President may or may not be acting legally. Finally, in the third tier, Congress expressly or impliedly disapproves the presidential action, and claims of presidential power “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”⁵⁶ In this tier, the President is at his weakest as far as legal authority; he may only rely on his inherent constitutional authority because Congress could simply amend or repeal any current statute on which he relies upon.

In a public address to the nation about a month after authorizing strikes against ISIL, President Obama stated that he “believe[s] we are strongest as a nation when the President and Congress work together.”⁵⁷ This belief is consistent with the first tier of support, where Congress has explicitly authorized action. In the case of ISIL, the President is in the second tier because there has been no explicit and specific authorization of his use of force by Congress. In the event that Congress does pass a new AUMF, the President will be in the first tier, in his most powerful position. In the event that Congress does not pass an additional AUMF and speaks against further action against ISIL, the President will be in the third tier and will be very limited in his ability to legally continue military action against ISIL. In the meantime, the pursuit of armed conflict against ISIL is on shaky legal ground due to a lack of action on the part of Congress and the President’s reliance on the 9/11 AUMF.

54. *Id.* at 637.

55. *Id.*

56. *Id.* at 638.

57. Press Release, Office of the Press Sec’y, *Statement by the President on ISIL*, THE WHITE HOUSE (Sept. 10, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

III. THE 9/11 AUMF

The 9/11 AUMF⁵⁸ is presumably the authorization used by the Obama administration as its justification to authorize the armed conflict against ISIL.⁵⁹ It is difficult to determine exactly whether the 9/11 AUMF authorizes the strikes against ISIL because of the ambiguity written into the statute and its scant legislative history.⁶⁰

This statute gives the President the *sole unharnessed power* to determine *who* to attack, *what* to attack, and *how* to attack, as long as there is some tenable link to the September 11, 2001 terrorist attacks.⁶¹ Per the language itself, the President alone has this authority; Congress has no authority to check the massive amount of power given to the President by Congress in the 9/11 AUMF.⁶² Because this AUMF is exclusively tied to the September 11, 2001 attacks, its application to subsequent terrorist groups has become increasingly tenuous. The specific requirement of those responsible for the September 11, 2001 attacks also makes the 9/11 AUMF difficult to discern because relationships between terrorists and their organizations are generally not well documented. What qualifies as having “aided the terrorist attacks that occurred on Sep-

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

59. September Press Release, *supra* note 8 (mentioning both the 9/11 and 2002 AUMFs as justification). However, the draft AUMF that President Obama sent to Congress on February 11, 2015, recommends repealing the 2002 AUMF, implying that it is not being used and is not necessary. See Joint Resolution, THE WHITE HOUSE (Feb. 11, 2015) [hereinafter Obama Proposed Resolution], http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf; Press Release, Office of the Press Sec’y, *Letter from the President—Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant*, THE WHITE HOUSE (Feb. 11, 2015), <http://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [hereinafter 2015 Press Release]; see also *infra* note 130.

60. For a detailed analysis highlighting some of the ambiguities and problems with determining who and what exactly is authorized as a target under the 9/11 AUMF, see Graham Cronogue, Note, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT’L L. 377, 379–86 (2012).

61. See Authorization for Use of Military Force, 115 Stat. 224.

62. See generally *id.* (stating that the President has the power to determine who to target under the authorization of the 9/11 AUMF).

tember 11, 2001”⁶³ or of having “harbored such organizations or persons”⁶⁴ is a matter of interpretation and can be modified to fit the purposes of the administration.

A. History of the 9/11 AUMF

On September 11, 2001, terrorists hijacked four commercial airplanes and crashed two into the World Trade Center buildings, one into the Pentagon, and the fourth into a field in Pennsylvania, killing nearly 3,000 civilians.⁶⁵ The very next day, President George W. Bush asserted that the United States would use “all of our resources to conquer this enemy” who carried out these “acts of war.”⁶⁶ On the same day the President spoke, the leaders of the House and Senate met and agreed to bypass the formal legislative review process to expedite legislation in response to the terrorist attacks.⁶⁷ On September 14, merely two days later, the Senate passed the joint resolution with a vote of 98-0 and the House passed it with a vote of 420-1.⁶⁸ Due to the expedited nature and sense of urgency for enacting this legislation, the legislative history is relatively scant compared to the amount of power it purports to grant the President. President Bush signed the joint resolution, short titled “Authorization for Use of Military Force,” (“9/11 AUMF”) on September 18, 2001, just seven days after the attack.⁶⁹ The 9/11 AUMF states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such

63. *Id.*

64. *Id.*

65. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 1 (2007), <https://www.fas.org/sgp/crs/natsec/RS22357.pdf>.

66. *Id.* (citation omitted).

67. *See id.* at 2. For more details on the congressional procedures used in conjunction with declarations of war or Authorizations for Use of Military Force, see ELSEA & WEED, *supra* note 28, at 77–80.

68. GRIMMETT, *supra* note 65, at 3.

69. *Id.*

organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷⁰

This grant of power is extremely broad, with very few restrictions.⁷¹ Per the statutory language, the only restriction is that targets of the 9/11 AUMF must be linked to the terrorist attacks that occurred on September 11, 2001.⁷² The 9/11 AUMF has been used globally to target terrorists since its enactment, and is the primary legal authorization for the U.S. military operations in Afghanistan.⁷³

The White House initially proposed language for an AUMF on September 12, 2001, but Congress rejected the language as overreaching.⁷⁴ The White House's proposal would have granted

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

71. See discussion *infra* Section III.B.

72. There has been some litigation as to the scope of the 9/11 AUMF, but all of that litigation has revolved around the authority to detain enemy combatants, which is outside the scope of this Note. See generally *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that the 9/11 AUMF does not prevent a detainee's right to habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 559 (2006) (holding that the 9/11 AUMF does not override Congress' specific authorization of military commissions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (holding that the United States has the authority under the 9/11 AUMF to detain individuals who fought against the United States as vaguely identified in the AUMF's language, but failing to define the scope of the AUMF).

73. See MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS IN BRIEF 13 (2015), <https://www.fas.org/sgp/crs/natsec/R43760.pdf>.

74. See GRIMMETT, *supra* note 65, at 3–4; David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002). When signing the bill, President Bush stated that “[o]ur whole Nation is unalterably committed to a direct, forceful, and comprehensive response to these terrorist attacks and the scourge of terrorism directed against the United States and its interests.” Press Release, Office of the Press Sec’y, *President Signs Authorization for Use of Military Force Bill*, THE WHITE HOUSE

the President even more power, including the power “to deter and pre-empt any future acts of terrorism or aggression against the United States.”⁷⁵ By not allowing the White House’s suggested language, Congress restricted its authorization of force to only those organizations that were involved in the September 11, 2001 attacks and their associated forces.⁷⁶ At the time, necessity dictated quick legislation. Congress acted swiftly in order to authorize the use of military force in order to show the world that the United States would not allow these types of attacks. While this hasty legislation was necessary at the time of enactment, the lack of deliberations and consideration have led to an over grant of unchecked power to the President.

B. Scope and Limitations of the 9/11 AUMF

As a result of the quickly enacted legislation, several key components to an AUMF were left out of the 9/11 AUMF. Importantly, the 9/11 AUMF does not have a sunset provision,⁷⁷ or any actual target constraints other than a required link to the September 11, 2001 attacks. Under the Obama Administration’s interpretation and application of the 9/11 AUMF, the tenuous link to the September 11, 2001 attacks could allow the 9/11 AUMF to be applied indefinitely.⁷⁸ There is also no requirement that any indi-

(Sept. 18, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html>.

75. Abramowitz, *supra* note 74; *see also* GRIMMETT, *supra* note 65, at 2–3 (stating that the proposed language “would have granted the President open-ended authority to act against all terrorism and terrorists or potential aggressors against the United States anywhere” and not merely “the authority to act against the terrorists involved in the September 11, 2001 attacks, and those nations, organizations and persons who had aided or harbored the terrorists.”).

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

77. A “sunset law” can be inserted into a law so the law expires at a specified time or interval, unless it is renewed. *Sunset Law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

78. *Contra* Beau D. Barnes, *Reauthorizing the “War on Terror”: The Legal and Policy Implications of the AUMF’s Coming Obsolescence*, 211 MIL. L. REV. 57, 71 (2012) (“[I]t is nearly impossible for the AUMF to last forever.”); Cronogue, *supra* note 60, at 385 (“[T]he AUMF should not last any longer than it takes to destroy, imprison, or force the surrender of all ‘nations, organizations or persons’ who have a sufficient tie to 9/11.”).

viduals targeted under the 9/11 AUMF have any connection to the September 11, 2001 attacks; they only need to belong to an organization that once had a connection to the attacks.⁷⁹ This means the President can theoretically use the 9/11 AUMF forever and allows the President to skirt constitutional requirements and avoid the integrated system of checks and balances.

The only member of Congress—out of 519 members—who voted against the 9/11 AUMF did so because she was concerned that it authorized military force as “a blank check . . . anywhere, in any country . . . and without time limit.”⁸⁰ This fear has come to fruition; President Obama is stretching the 9/11 AUMF to justify his actions against ISIL. The only member of Congress to raise the issue of the duration of the authorization during deliberations was then-Chairman of the Senate Foreign Relations Committee, then-Senator Joe Biden, who explicitly rejected a time limit for the authorization.⁸¹ This open-ended authorization, combined with ambiguous statutory language and the unilateral determination by the President as to who can be targeted by the authorization, is a recipe for unharnessed power to engage in armed conflict.

The geographical scope of the 9/11 AUMF is another open-ended authorization because it is not limited within the text of the statute itself.⁸² The statutory language does not specifically limit the application of the 9/11 AUMF to locations abroad; that limitation may only be inferred through the statute’s reference to the

79. There are already ISIL fighters who were not even born near September 11, 2001. Harriet Alexander, ‘*Our Youngest Martyr Yet*’—*Isil Boasts About Death of 10-Year-Old*, TELEGRAPH (Oct. 09, 2014, 5:09 PM), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11151906/Our-youngest-martyr-yet-Isil-boasts-about-death-of-10-year-old.html> (reporting that ISIL is proud of a child soldier who was killed in action); HUMAN RIGHTS OFFICE, UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, *supra* note 4, at 17–18 (reporting that children as young as fourteen are undergoing military training by ISIL).

80. Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. GATE (Sept. 23, 2001, 4:00 AM), <http://www.sfgate.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php>; see GRIMMETT, *supra* note 65, at 3.

81. 147 CONG. REC. S9422–23 (daily ed. Sept. 14, 2001).

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

War Powers Resolution, which only applies abroad.⁸³ Several members of Congress noted during deliberations that the application of the 9/11 AUMF was limited to use of force abroad.⁸⁴ Without the specific geographic limitation in the statute, because the President is not following other aspects of the War Powers Resolution, he may not be restricted from using the 9/11 AUMF domestically. While this may be a stretch, it is likely that the public will never know if the 9/11 AUMF is ever used domestically due to national security restrictions.

C. Issues with Applying the 9/11 AUMF to ISIL

In May 2013, in a speech to the National Defense University, President Obama stated that he wanted to repeal the very same AUMF that his administration had been citing for authority to pursue armed conflict with ISIL.⁸⁵ Since that speech, President Obama and his senior staff have changed their interpretation of the

83. Abramowitz, *supra* note 74, at 75 (“While inserting [the word ‘abroad’] was suggested during staff discussions, it was arguably unnecessary in light of the references in section 2(b) of the joint resolution to the War Powers Resolution . . . which generally deals with introducing U.S. forces abroad.”). However, the preamble to the 9/11 AUMF does mention self-defense “both at home and abroad.” Authorization for Use of Military Force, 115 Stat. 224.

84. *See, e.g.*, 147 CONG. REC. S9423 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph R. Biden, Jr.) (“[I]t should go without saying, however, that the resolution is directed only at using force abroad to combat acts of international terrorism”); 147 CONG. REC. H5639 (daily ed. Sept. 14, 2001) (statement of Rep. Tom Lantos) (“[The 9/11 AUMF] empowers the President to bring to bear the full force of American power *abroad*.”) (emphasis added).

85. Press Release, Office of the Press Sec’y, Fact Sheet: The President’s May 23 Speech on Counterterrorism, THE WHITE HOUSE (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism> [hereinafter The President’s Speech on Counterterrorism]. The irony of citing an authorization that the President had called for a repeal on as a legal justification was not lost. *See* Press Release, Office of the Press Sec’y, *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Sept. 11, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014> [hereinafter *Press Briefing*]. A question posed to the Press Secretary was, “And if I could just ask finally whether you see any irony in using as your legal justification for these airstrikes an authorization for military force that the President himself has called for repeal of.” *Id.*

9/11 AUMF on multiple occasions.⁸⁶ These changes in interpretation further question the legitimacy of the use of the 9/11 AUMF and our nation's ability to prosecute war and support our service members.⁸⁷ While the background for the changes in the President's interpretation are not clear, the increased scope of authority interpreted from the same 9/11 AUMF indicates an attempt to stretch the AUMF's authority in order to keep operations, like the one against ISIL, legal.

Under the Presidential Policy Guidance that President Obama signed on May 22, 2013, in order to use lethal force in counterterrorism operations abroad, there must be a sufficient legal basis.⁸⁸ For the legal authority of the 9/11 AUMF to apply against ISIL, the President must establish a connection between ISIL and forces that "aided the terrorist attacks that occurred on September 11, 2001" to keep in line with the statute's authorization.⁸⁹ This application begs the question of how closely linked an individual or organization has to be to the September 11, 2001 attacks to be targeted under the scope of the 9/11 AUMF. Unfortunately, the statutory language and legislative history of the 9/11 AUMF do not provide the answer to what is considered an associated force. The relationship of ISIL to al Qaeda⁹⁰ is not official or extremely clear.

86. See William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J. L. & PUB. POL'Y 509, 523-31 (2015).

87. *Id.* at 523.

88. THE WHITE HOUSE, U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013), http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf; The President's Speech on Counterterrorism, *supra* note 85.

89. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). For an argument that strongly opposes any suggested legitimate link between al Qaeda and ISIL, see Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014 9:04 AM), <http://justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure>.

90. Al Qaeda was quickly determined to be responsible for the attacks on September 11, 2001. See Michael J. Morell, *11 September 2001: With the President*, STUD. IN INTELLIGENCE, Sept. 2006, at 23, 30, http://www.foia.cia.gov/sites/default/files/DOC_0001407035.pdf (reporting that the President's CIA

ISIL at least *had* some connections previously with al Qaeda, and officials with the Obama Administration have stated that the 9/11 AUMF applies to ISIL based on that relationship.⁹¹ However, the relationship between the organizations seems to have ended with al Qaeda shunning the actions of ISIL,⁹² but the authorization is not clear as to the effect of that split. Al Qaeda's General Command stated that "ISIS 'is not a branch of the al-Qaeda group . . . does not have an organizational relationship with it and [al-Qaeda] is not the group responsible for their actions.'" ⁹³ The Obama Administration explains that the split of al Qaeda and ISIL has no effect on its ability to target ISIL because a previous long relationship existed between the two organizations, there are continued ties between the organizations' fighters, and there are similar tactics and goals amongst the organizations.⁹⁴ However, the link between these organizations is not clear, and will likely never be clear because by their very natures as terrorist organizations, they are secretive. It would not be difficult to exaggerate a link between the organizations if that relationship would assist one's purposes.⁹⁵

briefing briefed the President aboard Air Force One within hours of the attacks that al Qaeda and Osama bin Laden were likely responsible for the attacks), Press Release, Office of the Press Sec'y, *Address to a Joint Session of Congress and the American People*, THE WHITE HOUSE (Sept. 20, 2001 9:00 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (statement of President George W. Bush).

91. Miller, *supra* note 9. For a detailed timeline on the origins of ISIL, see NTREPID, *supra* note 2.

92. Liz Sly, *Al-Qaeda Disavows Any Ties With Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST (Feb. 3, 2014), http://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html.

93. *Id.* (alterations in original).

94. *Press Briefing*, *supra* note 85. However, not everyone believes that the Obama Administration is being straightforward regarding the link between al Qaeda and other terrorist groups. Khorasan is also a newly designated terrorist group in Iraq that has alleged links to al Qaeda as well. *See infra* note 95.

95. *See generally* Anna Mulrine, *Is Khorasan a Real Threat—or a Way to Avoid a Vote on US Military Action?*, CHRISTIAN SCI. MONITOR (Sept. 29, 2014), <http://www.csmonitor.com/USA/Military/2014/0929/Is-Khorasan-a-real-threat-or-a-way-to-avoid-a-vote-on-US-military-action-video?cmpid=TW> (suggesting that the Obama Administration may have created a tenuous link between a newly designated terrorist group and al Qaeda as well as exaggerated the im-

This highlights the difficulty of relying on a broadly written and ambiguous statute to justify a large-scale armed conflict.⁹⁶

Even if the link to al Qaeda could be established, the United States should not wish to enter into a long-term armed conflict based on shaky ties to al Qaeda. The deployment of our armed forces into conflict should be done after serious debate and not merely based on the unilateral decisions of the executive branch. If Congress does in fact approve of and support the President's actions, Congress should have enacted legislation to keep in line of their constitutional responsibilities.

D. Why Has Congress Not Authorized the Use of Military Force Against ISIL?

The United States Constitution explicitly entrusts the power to declare war solely in the Congress.⁹⁷ Historically, the President asks Congress to declare war or authorize the deployment of the military prior to introducing the military into armed conflict.⁹⁸ Congressman John Boehner, while the Speaker of the House of Representatives, stated that Congress will vote on a new AUMF when the President asks for one, but the President did not do so prior to the sixty days required by War Powers Resolution.⁹⁹ The President has asserted the authority to conduct the strikes against ISIL, but has also “welcome[d] congressional support for this ef-

minence of action against the group in order to continue airstrikes without enacting legislation).

96. See Jack Goldsmith, *The Legal Consequences of Islamic State + Al Qaeda Cooperation, and Implications for AUMF Reform*, LAWFARE (Nov. 14, 2014, 10:20 AM), <http://www.lawfareblog.com/2014/11/the-legal-consequences-of-islamic-state-al-qaeda-cooperation-and-implications-for-aumf-reform/>.

97. U.S. CONST. art. I, § 8, cl. 11 (“[The Congress shall have power] To declare War . . .”).

98. ELSEA & WEED, *supra* note 28, at 1, 5 (stating that prior to all eleven declarations of war and most of the AUMFs, the President formally requested the authorization from Congress).

99. Jack Goldsmith, *History Suggests that Congress Will Only Authorize Force Against the Islamic State if the President Proposes and Pushes for an Authorization (or Screws Up Unilateral Force Badly)*, LAWFARE (Oct. 7, 2014, 8:30 AM), <http://www.lawfareblog.com/2014/10/history-suggests-that-congress-will-only-authorize-force-against-the-islamic-state-if-the-president-proposes-and-pushes-for-an-authorization-or-screws-up-unilateral-force-badly/>; Paul, *supra* note 42.

fort in order to show the world that Americans are united in confronting this danger.”¹⁰⁰ Some in Congress also believe that the President has the ability to target ISIL based on the 9/11 AUMF, but others do not.¹⁰¹ This highlights the need for rigorous debate on both sides of this argument to ensure that our military operations remain both legal and supported by the citizens of the United States through their elected representation.

Critics have argued that Congress should have taken initiative in drafting and authorizing a new AUMF, and by not doing so, abdicated one of its most sacred responsibilities.¹⁰² By not addressing this issue as a Congress, Congress is arguably implicitly authorizing the President to conduct these airstrikes under the authority of the 9/11 AUMF. Implicit authorization for armed conflict is not sufficient. While Congress as a whole did not take action to authorize the airstrikes within the first sixty days, several members of Congress did take action and there were at least seven proposed “ISIL AUMFs” in some form of legislation within the first sixty days after beginning airstrikes.¹⁰³ Each of these bills

100. *Statement by the President on ISIL*, *supra* note 57.

101. Jake Miller, *John Boehner “Happy” to Have Congress Vote on Anti-ISIS Mission*, CBS NEWS (Sept. 28, 2014, 5:53 PM), <http://www.cbsnews.com/news/john-boehner-happy-to-have-congress-vote-on-anti-isis-mission>; Paul, *supra* note 42.

102. Jeremy Diamond, *McCain: ISIS’ Rise Like ‘Watching a Train Wreck’*, CNN (Sept. 29, 2014, 12:21 PM), <http://newday.blogs.cnn.com/2014/09/29/mccain-isis-rise-like-watching-a-train-wreck> (reporting that the chairman of the House Foreign Affairs Committee “criticized the President for his ‘political failure’” and calling the President to lead a strategy to root out ISIL); Oliver Knox, *How to Force Congress to Vote on Obama’s War Against the Islamic State*, YAHOO NEWS (Oct. 03, 2014, 4:58 AM), http://news.yahoo.com/a-call-to-congress-to-vote-on-obama-s-is-war-205104044.html?soc_src=mediacontentsharebuttons (interviewing retired Rep. Tom Campbell, who sued President Clinton regarding airstrikes in Serbia, Rep. Campbell states that refusing to take a stand on support for military action against ISIL “is Congress running way [sic] from its responsibility”); Diedre Walsh, *Boehner Might Bring Congress Back for Syria Debate After All*, CNN (Sept. 30, 2014, 8:57 AM), <http://www.cnn.com/2014/09/29/politics/john-boehner-mixed-messages/> (quoting House Democratic Leader Nancy Pelosi) (“Since when do we sit around waiting, using the excuse he didn’t ask? No, if you want to have an authorization that has any constraints on the President, you don’t wait for him to write it.”).

103. H.R.J. Res. 128, 113th Cong. (2014) (as introduced to the House, Sept. 19, 2014, by Rep. John Larsen); S.J. Res. 44, 113th Cong. (2014) (as in-

stalled in committee with minimal consideration until after the 113th Congress concluded its term.¹⁰⁴

Only one piece of legislation made it through the committee process before the end of the congressional term. It was a proposed AUMF drafted by Senator Robert Menendez, the Chairman of the Senate Foreign Relations Committee for the 113th Congress.¹⁰⁵ The bill was seen largely as a political gesture, as it was introduced immediately before the end of the congressional term where it would have been unlikely to have any effect because of the impending break in between sessions.¹⁰⁶ Senator Bob Corker, at the time the ranking member of the Senate Foreign Relations Committee, stated that the bill was “going nowhere.”¹⁰⁷ Senator Corker, who took over as the Chairman of the Senate Foreign Relations Committee for the 114th Congress, has also stated that he will not support Senator Menendez’s proposed AUMF because of a lack of support and input from the Obama Administration.¹⁰⁸ Senator Corker stated that the executive branch needs to set guide-

troduced to the Senate, Sept. 17, 2014, by Sen. Tim Kaine); H.R.J. Res. 125, 113th Cong. (2014) (as introduced to the House, Sept. 16, 2014, by Rep. Adam Schiff); H.R. 5415, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Frank Wolf); S.J. Res. 42, 113th Cong. (2014) (as introduced to the Senate on Sept. 8, 2014, by Sen. Bill Nelson); S.J. Res. 43, 113th Cong. (2014) (as introduced to the Senate, Sept. 8, 2014, by Sen. James Inhofe); H.R.J. Res. 123, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Darrell Issa).

104. See WEED, *supra* note 73, at 4.

105. S.J. Res. 47, 113th Cong. (2014) (as introduced to the Senate, Dec. 13, 2014, by Sen. Robert Menendez); *Senate Foreign Relations Committee Passes Authorization for Use of Military Force Against ISIL*, U.S. SENATE COMMITTEE ON FOREIGN REL. (Dec. 11, 2014), <http://www.foreign.senate.gov/press/chair/release/senate-foreign-relations-committee-passes-authorization-for-use-of-military-force-against-isil>. Senator Menendez’s bill had no subsequent action after introduction to the Senate. S.J. Res. 47, 113th Cong. (2014).

106. Jennifer Bendery, *Senate Committee Votes to Authorize War Against Islamic State*, HUFFINGTON POST (Dec. 11, 2014, 2:14 PM), http://www.huffingtonpost.com/2014/12/11/war-authorization-islamic-state-isil_n_6308114.html.

107. *Corker Statement on Committee Consideration of Authorization for the Use of Military Force Against ISIS*, U.S. SENATE COMMITTEE ON FOREIGN REL. (Dec. 11, 2014), <http://www.foreign.senate.gov/press/ranking/release/corker-statement-on-committee-consideration-of-authorization-for-the-use-of-military-force-against-isis>.

108. Bendery, *supra* note 106.

lines and strategy for success of the mission before Congress acts.¹⁰⁹

It is also speculated that Congress shirked its responsibilities to authorize the use of military force for political reasons.¹¹⁰ The midterm elections for Congress occurred on November 4, 2014,¹¹¹ merely two days before the President was required to cease military operations targeting ISIL¹¹² pursuant to the War Powers Resolution's automatic expiration.¹¹³ It has been suggested that Congress was hesitant to engage in a debate over a hot topic immediately prior to the election.¹¹⁴ Congress was not in session immediately prior to the election in order to campaign, but Congress could have convened for a vote if necessary.¹¹⁵

The day after the 2014 congressional midterm elections, President Obama publically stated that he would ask Congress for a new AUMF for use against ISIL.¹¹⁶ President Obama wants a new AUMF for ISIL because “[t]he world needs to know we are united behind this effort, and the men and women of our military deserve our clear and unified support.”¹¹⁷ However, Speaker Boehner stated that he would not ask Congress to vote on action against ISIL until the new Congress was seated in the new term.¹¹⁸

109. *See id.*

110. Walsh, *supra* note 102 (quoting Senator John McCain). Senator McCain characterized delaying the debate on an authorization for military action against ISIL as “an act of cowardice on the part of Congress . . . [t]hey didn’t want to vote before the election.” *Id.*

111. *See* Steven Collinson, *Republicans Seize Senate, Gaining Full Control of Congress*, CNN (Nov. 5, 2014, 10:43 AM), <http://www.cnn.com/2014/11/04/politics/election-day-story/index.html>.

112. Paul, *supra* note 42 (stating that the ninety day mark to automatically cease military operations was November 6, 2014).

113. 50 U.S.C. § 1544(b) (2013).

114. *See supra* note 110.

115. Miller, *supra* note 101.

116. Press Release, Office of the Press Sec’y, *Remarks by the President in a Press Conference*, THE WHITE HOUSE (Nov. 5, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference>.

117. *Id.*

118. Carl Hulse, *Today in Politics: Boehner Says New Congress Should Debate Military Action*, N.Y. TIMES (Sept. 25, 2014, 7:06 AM), http://www.nytimes.com/politics/first-draft/2014/09/25/?entry=685&_r=0 (quoting then-Speaker Boehner) (“I would suggest to you that early next year, assum-

Speaker Boehner stated that a lame duck Congress was the wrong entity to enact such an important piece of legislation and preferred to take action once the new Congress was seated.¹¹⁹

The next major address by the White House regarding an ISIL AUMF was at the 2015 State of the Union. During the President's State of the Union address on January 20, 2015, President Obama either acknowledged the requirement for an ISIL AUMF, or perhaps had a Freudian slip.¹²⁰ In the transcript of the State of the Union address, President Obama briefly calls on the Congress to create a new ISIL AUMF and then moves on to a new subject.¹²¹ As the President delivered the speech, however, he added the line "[w]e need that authority," when discussing the requested ISIL AUMF.¹²² While this went largely unnoticed, it may have been a sign that the President believes the ISIL AUMF is necessary, and not merely an act of good faith by the President to let Congress get on board with President Obama's plan as he has suggested.

Following up on his State of the Union address, on February 11, 2015, President Obama sent a draft ISIL AUMF to Congress.¹²³ In this draft ISIL AUMF, the President proposed a three-year sunset provision, the authority for limited ground operations, and a reporting requirement to Congress.¹²⁴ However, there was no provision for a repeal of the 9/11 AUMF, which the President specifically noted in his transmittal letter.¹²⁵ Instead, the President stated that his newly proposed ISIL AUMF could serve as "model" for how the President and Congress can "work together to tailor

ing that we continue in this effort, there may be that discussion and there may be that request [for an AUMF] from the president[.]").

119. *Id.*

120. *Retroactively Authorizing War*, N.Y. TIMES (Jan. 31, 2015), <http://www.nytimes.com/2015/02/01/opinion/sunday/retroactively-authorizing-war.html>; see President Barack Obama, State of the Union Address (Jan. 20, 2015), <http://www.whitehouse.gov/sotu> (at 36:58).

121. *State of the Union 2015: Full Transcript*, CNN (Jan. 20, 2015, 9:08 PM), <http://www.cnn.com/2015/01/20/politics/state-of-the-union-2015-transcript-full-text/>.

122. *Retroactively Authorizing War*, *supra* note 120 (quoting State of the Union Address, *supra* note 120).

123. 2015 Press Release, *supra* note 59.

124. Obama Proposed Resolution, *supra* note 59.

125. 2015 Press Release, *supra* note 59.

the authorities granted by the [9/11] AUMF.”¹²⁶ Further, the President stated that he “remain[s] committed to working with the Congress and the American people to refine, and ultimately repeal, the [9/11] AUMF.”¹²⁷ It is clear that this is not a priority for the Obama Administration since it took so long to put forth a bill and there has been little action on its behalf to prod Congress to do Congress’ job. This was a wise move by the Obama Administration, however, because it shows the American people that it has done its duty to propose legislation and that Congress failed to follow up. Additionally, President Obama does not have any real incentive to give up his unharnessed power that he claims from the 9/11 AUMF. It is the responsibility of Congress to maintain its constitutional powers and define the scope of legislation. If Congress is not going to do so, the President is smart to maintain the current status quo.

Despite calls for the President to act and propose a new ISIL AUMF, Congress has done nothing with the President’s proposal.¹²⁸ Perhaps it is because Congress realizes the futility of passing a new AUMF while leaving the 9/11 AUMF in place.¹²⁹ There is no reason to pass a new AUMF for ISIL and leave the 9/11 AUMF in place. If the President wanted to exceed the ISIL AUMF’s mandates, he could merely fall back on the 9/11 AUMF at any time. There are also politically charged speculations that potential presidential contenders in 2016 do not want to commit to a position on ISIL before the primaries.¹³⁰ Potential presidential

126. *Id.*

127. *Id.*

128. Karen DeYoung, *Debate Over War Authorization in Congress Fades with Little Result*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/world/national-security/debate-over-war-authorization-in-congress-fades-with-little-result/2015/04/30/ee4b961a-ef62-11e4-8abc-d6aa3bad79dd_story.html.

129. Benjamin Wittes, *The Consequences of Congressional Inaction on the AUMF*, LAWFARE BLOG (Apr. 8, 2015, 9:56 AM), <http://www.lawfareblog.com/consequences-congressional-inaction-aumf> (“In effect, President Obama told Congress to go through the motions of passing a resolution if it wished but to do so understanding that its actions wouldn’t matter.”).

130. Peter Beinart, *Why Won’t the GOP Declare War on ISIS?*, THE ATLANTIC (May 28, 2015), <http://www.theatlantic.com/politics/archive/2015/05/congress-aumf-isis-war/394268>.

contenders do not want to engage in heated debates over national security regarding their hopeful future powers.

IV. AN ARGUMENT AND PROPOSAL FOR A NEW AUMF

A new AUMF specifically authorizing military action against ISIL (“ISIL AUMF”) should be enacted by Congress. A new ISIL AUMF must balance flexibility for the President with reasonable constraints on his ability to conduct an endless war. Several of the requirements and constraints that should be included have already been listed in the various proposed AUMFs in Congress,¹³¹ but none include all of the provisions that should be included in the final ISIL AUMF. Below is a non-exclusive list of clauses and considerations that should be included in the new ISIL AUMF in order to avoid the same problems as previous authorizations.

In addition to enacting a new ISIL AUMF, Congress should repeal the 9/11 AUMF. If the 9/11 AUMF is not repealed, it will render the ISIL AUMF meaningless because the President will still be able to unilaterally determine that a group or individual has some nexus to the September 11, 2001 attacks and use that as the authorization for a military attack if the ISIL AUMF did not work for a particular target. The 9/11 AUMF could serve as a backup for any questionable targets not supported by the ISIL AUMF, so there would never be any new restraint on the President’s powers. Since the purpose of the 9/11 AUMF—to enable military operations against those responsible for the September 11, 2001 attacks—has largely been accomplished, its repeal would not be counter to congressional intent.¹³²

131. For a detailed list of the requirements and constraints in the AUMFs proposed by the 113th Congress, see WEED, *supra* note 73, at 10–17. See also S.J. Res. 47, 113th Cong. (2014) (as introduced to the Senate, Dec. 13, 2014, by Sen. Robert Menendez).

132. Press Release, Office of the Press Sec’y, *Statement by the President on the End of the Combat Mission in Afghanistan*, THE WHITE HOUSE (Dec. 28, 2014), <http://www.whitehouse.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan>. President Obama declared that the combat mission in Afghanistan is over and claiming successes of “devastating the core al Qaeda leadership, delivering justice to Osama bin Laden, disrupting terrorist plots and saving countless American lives.” *Id.*; see also Barnes, *supra* note 78,

The repeal of the 9/11 AUMF should occur via a sunset provision that requires the executive branch to cease any operations that are currently authorized under the 9/11 AUMF. If there are still any ongoing operations using the 9/11 AUMF as authorization, the executive branch should seek independent authorization for it, and if it has merit, should receive authorization without a problem. If the sunset provision occurs before President Obama leaves office, this will ensure that the new administration starts with a clean slate and without the unnecessary authorizations¹³³ still on the table.

A. Purpose of the ISIL AUMF

The purpose section is one of the most important sections of an AUMF because it defines the intent of the authorization itself and will serve as guidance to any further questions and interpretations that need to be made based off of the AUMF. The purpose should revolve around the defense of the national security of the United States and its allies, but should not get too specific so that it maintains some flexibility. The purpose needs to be more straightforward than the 9/11 AUMF so as to not be abused in the future.

The ISIL AUMF should include a strong recommendation that the actions taken by the United States be in conjunction with those of a broader coalition of governments.¹³⁴ This will ensure that the United States is not the only nation that is invested in the security and stability of the region. Although the United States should not rest its national security on the actions of a coalition, it is very important to have buy-in on this operation from our allies—particularly those within the region.¹³⁵

at 71 (stating it is “nearly impossible” for the 9/11 AUMF to lack a temporal limit because of its nexus to the September 11, 2001 attacks).

133. While this Note did not cover the 2002 AUMF, the ISIL AUMF must also contain a clause immediately repealing the 2002 AUMF. *See, e.g.*, Letter from Susan E. Rice, *supra* note 9 (“[T]he [2002] Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal.”).

134. This was similarly proposed in three of the draft ISIL AUMF proposals. WEED, *supra* note 73, at 7.

135. ABCA ARMIES PROGRAM, COALITION OPERATIONS HANDBOOK IX (4th ed. 2008), <http://usacac.army.mil/cac2/AIWFC/COIN/repository/COH.pdf> (“Another reason nations conduct coalition operations is that rarely can one nation go it alone either politically or militarily. . . . This blending of capabilities

In addition to the actual purpose of the authorization, the AUMF should declare consistency with the War Powers Resolution to show recognition of Congress' authority to declare war. It is included in all eight of the ISIL AUMFs proposed by the 113th Congress.¹³⁶ This can be done in a boilerplate fashion, but it goes to show that the President acknowledges Congress' power in this area.

B. Scope and Limitations of the ISIL AUMF

It is very important for Congress to specify whom it is authorizing the executive to target through the ISIL AUMF because an open-ended authorization will result in another 9/11 AUMF. The best way to ensure that the President is upholding Congress' intent of the authorization is to be specific in the language of the statute. The ISIL AUMF should list "ISIL" as the main target for the AUMF. While an authorization listing ISIL will solve the immediate problem, the authorization becomes more difficult if/when ISIL splinters off into subsequent organizations. When the coalition against ISIL is inevitably successful in dismantling and dispersing ISIL, the remainder of the organization will likely create different organizations with similar goals. The ISIL AUMF should also state that "subsequent organizations" to ISIL may be targeted as well, however, there should be a procedure in place to quickly authorize force on each of these subsequent organizations.

The determination of "subsequent organizations" or "associated forces" is difficult because terrorist organizations operate under a shroud of secrecy. The 9/11 AUMF has oversight problems because it gives the President the sole ability to determine

and political legitimacy makes possible certain operations that a single nation could not or would not conduct unilaterally.").

136. S.J. Res. 47, 113th Cong. (2014) (as introduced to the Senate, Dec. 13, 2014, by Sen. Robert Menendez); H.R.J. Res. 128, 113th Cong. (2014) (as introduced to the House, Sept. 19, 2014, by Rep. John Larsen); S.J. Res. 44, 113th Cong. (2014) (as introduced to the Senate, Sept. 17, 2014, by Sen. Tim Kaine); H.R.J. Res. 125, 113th Cong. (2014) (as introduced to the House, Sept. 16, 2014, by Rep. Adam Schiff); H.R. 5415, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Frank Wolf); S.J. Res. 42, 113th Cong. (2014) (as introduced to the Senate on Sept. 8, 2014, by Sen. Bill Nelson); S.J. Res. 43, 113th Cong. (2014) (as introduced to the Senate, Sept. 8, 2014, by Sen. James Inhofe); H.R.J. Res. 123, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Darrell Issa).

whom he can target under the authorization.¹³⁷ This leaves Congress in the dark about who is being targeted and gives the President a blank slate to target whomever he can loosely tie to the September 11, 2001 attacks. Congress has no real ability to control whom the President targets because there is not a requirement in the 9/11 AUMF for the President to consult Congress before he targets groups or individuals under the authorization.¹³⁸ Congress' only recourse subsequent to military actions under the 9/11 AUMF is to alter the authorization or impeach the President. To avoid this problem in the ISIL AUMF, Congress should put in a requirement that any subsequent forces to be targeted under authorization of the ISIL AUMF must be approved by Congress. This procedure could be expedited in a particular committee so there is minimal loss of efficiency.¹³⁹ The committee would develop specific, non-public,¹⁴⁰ standards for target approval, and the executive branch would need to meet the criteria to be approved.¹⁴¹

It is in the best interest of the United States to eradicate ISIL and associated forces from the effected region, which means it is worth the full commitment of the United States Armed Forces. This means that Congress should not restrict the type of forces that could be employed by military commanders to accomplish their mission. When politicians decide that armed conflict is the answer, it should be up to military commanders to fight the fight. Several of the proposed ISIL AUMFs limit the deployment of

137. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“[T]he President is authorized to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks . . .”) (emphasis added).

138. *Id.*

139. It is not unusual to expedite issues of importance to Congress. The War Powers Resolution created an exception that expedited procedures for Congress to declare war or authorize the use of military force. ELSEA & WEED, *supra* note 28, at 77–80.

140. It is important that there are specific standards, but it is equally important that the standards are not made public. If the standards are made public, terrorist organizations around the world will know what to do and not to do to be safe under the AUMF's targeting scheme.

141. One example of a standard that could be implemented is that the individual or group to be targeted must have a similar purpose as ISIL, as best determined by intelligence officials, and agreed upon by the coalition at the time.

ground combat forces.¹⁴² Some of the proposed AUMFs make distinction between “in a combat role” and “direct combat operations,”¹⁴³ but this distinction is not realistic and inhibits military progress. These limitations would allow ground troops to deploy in limited advisor and targeting roles, but not in an effort to engage the enemy. The result of a limited ground combat authorization would likely be that the rules of engagement would be overly restrictive and put ground troops in unnecessary danger.¹⁴⁴ Including these limitations in an AUMF is in an effort to prevent the United States from getting engaged in another large-scale conflict with a high number of casualties. However, this significantly inhibits military commanders and potential progress.¹⁴⁵ Allowing a small amount of ground forces in key areas can set up our coalition partners to engage in the bulk of ground combat.¹⁴⁶

The President initially stated that he would not use ground troops against ISIL, but some of his senior military commanders

142. H.R.J. Res. 128, 113th Cong. (2014) (as introduced to the House, Sept. 19, 2014, by Rep. John Larsen); S.J. Res. 44, 113th Cong. (2014) (as introduced to the Senate, Sept. 17, 2014, by Sen. Tim Kaine); H.R.J. Res. 125, 113th Cong. (2014) (as introduced to the House, Sept. 16, 2014, by Rep. Adam Schiff); S.J. Res. 42, 113th Cong. (2014) (as introduced to the Senate on Sept. 8, 2014, by Sen. Bill Nelson).

143. WEED, *supra* note 73, at 13.

144. See, e.g., Missy Ryan & Erin Cunningham, *U.S. Advisers in Iraq Stay Out of Combat but See Fighting Edging Closer*, WASH. POST (Jan. 1, 2015), http://www.washingtonpost.com/world/national-security/us-advisers-in-iraq-stay-out-of-combat-but-see-fight-edge-nearer/2015/01/01/6da57c3a-9038-11e4-ba53-a477d66580ed_story.html (reporting that U.S. service members stationed in Iraq in advisory roles have been subject to repeated artillery and rocket fire on the bases where they live).

145. See Jordain Carney, *McKeon: AUMF That Bans Ground Troops ‘DOA’*, NAT’L J. (Nov. 13, 2014), <http://www.nationaljournal.com/defense/mc-keon-aumf-that-bans-u-s-ground-troops-doa-20141113>.

146. Paul Szoldra, *Legendary Marine General James Mattis: To Fight ISIS, ‘Boots On The Ground’ Needs to Be an Option*, BUS. INSIDER (Sept. 18, 2014, 11:36 AM), <http://www.businessinsider.com/mattis-testimony-isis-2014-9>. Additionally, the United States should not provide comfort to ISIL by informing them that they will not encounter any U.S. ground forces. *Id.* (quoting General James Mattis) (“Whichever strategy is chosen, we should be reticent in telling our adversaries in advance . . . which of our capabilities we will not employ. . . . [W]e may not wish to reassure our enemies in advance that they will not see American ‘boots on the ground’ . . .”).

appear to have a different opinion on the issue.¹⁴⁷ In the President's draft ISIL AUMF, he proposes limiting ground troops from "enduring offensive ground combat operations."¹⁴⁸ The list of examples in which the President wishes to employ ground troops are "rescue operations," "the use of special operations forces to take military action against ISIL leadership," and "intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces."¹⁴⁹ The scope of operations limitations in the President's draft ISIL AUMF is a way to keep the United States from getting into another major ground conflict. It is a good middle-ground solution to the use or limitation of ground forces, because it provides for their use in important situations, but limits their overuse.

In addition to the lack of restrictions on ground troops, no geographical limitation should be placed on the ISIL AUMF other than to explicitly state that these actions must be carried out "abroad." Two of the proposed ISIL AUMFs have listed geographical limitations of Iraq and Syria.¹⁵⁰ Placing geographical limitations puts ISIL on notice of safe havens and allows the enemy to operate and control border regions and use the border as a defense. It is not possible to predict where ISIL will go when confronted with superior force, so the best option is to leave the President's and military's options open.

C. Reports to Congress

Due to the continuously shifting nature of military operations, Congress should be kept up to date by means of regular re-

147. See Helene Cooper, David D. Kirkpatrick and Rick Gladstone, *Top U.S. General Says He's Open to Using Ground Troops to Retake Mosul*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/us/top-us-general-says-hes-open-to-using-ground-troops-in-iraq.html?ref=world&_r=0; *Statement by the President on ISIL*, *supra* note 57 ("[The fight against ISIL] will not involve American combat troops fighting on foreign soil."). The Department of Defense has subsequently admitted to employing ground troops in both Iraq and Syria. *Department of Defense Background Briefing on Enhancing Counter-ISIL Operations*, U.S. DEP'T OF DEF. (Oct. 30, 2015) (noting that special operations forces are "continuing raids and joint operations in both Iraq and Syria").

148. Obama Proposed Resolution, *supra* note 59, at 2.

149. 2015 Press Release, *supra* note 59.

150. See Obama Proposed Resolution, *supra* note 59.

ports on the progress and actions taken by the executive branch. These reports should come every sixty days throughout the duration of the authorization. The reports should include, at a minimum, the requirements required by Congressman Issa's proposed ISIL AUMF: "status of all actions taken;" "description of all proposed actions;" "status of engagement of allies of the United States and international coalitions in combating" ISIL; and "estimated budgetary effects of actions proposed."¹⁵¹ The description of all proposed actions is a way for Congress to understand the executive branch's strategy going forward in the region. In addition to these requirements, the executive branch should also be required to submit a report identifying any other ISIL associated forces or other groups that the executive branch wishes to engage under the authorization of the ISIL AUMF. These requirements will ensure that Congress has a thorough understanding of what is taking place with regards to military action in the region and are in accordance with the constitutional division of powers in the United States.

D. Sunset Provision

Lastly, the ISIL AUMF should contain a sunset provision that ends the authorization three years from the date of enactment, unless reauthorized by Congress. A sunset provision gives the President, diplomats, and the military enough time to make an honest assessment and effort at achieving the purpose of the authorization without committing to a long-term conflict. If it becomes clear that the purpose of the AUMF cannot be met within the three-year authorization, Congress can reauthorize it as necessary. The purpose behind this limited amount of time is so that the United States does not get entrenched in another long-term conflict, such as Iraq and Afghanistan. The 9/11 AUMF lacks a sunset provision and has been stretched into a de-facto long-term authorization to fight global terrorism. A sunset provision sends the signal to regional allies in the Middle East that the United States intends to conclusively limit its presence in the region.

151. H.R.J. Res. 123, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Darrell Issa).

V. CONCLUSION

Congress is solely responsible for authorizing and declaring war¹⁵² and should execute its constitutional responsibilities. Congress should not be allowed to shirk its responsibility based on political considerations while the members of the United States Armed Forces are held in limbo as the military situation in the region deteriorates. It is important for the country, particularly its armed forces, to know where the government stands on any particular armed conflict.¹⁵³ By Congress allowing the President to use an outdated authorization, Congress conceded some of its own constitutional responsibilities and did subsequent Congress' a disservice, as future administrations will use this as precedent. A new ISIL AUMF should include a specific scope and limitations provision as well as a sunset provision. A specific ISIL AUMF should be a high priority for both Congress and the President and should be vigorously debated to ensure the mistakes made in previous authorizations are not repeated.

152. U.S. CONST. art. I, § 8, cl. 11. (stating Congress shall have the power “[t]o declare War”).

153. See generally John T. Bennett, *Hagel: ‘I Don’t Know’ When White House Will Seek AUMF for Islamic State*, DEFENSENEWS (Nov. 13, 2014, 7:32 PM), <http://www.defensenews.com/article/20141113/CONGRESSWATCH/311130033/Hagel-Don-t-Know-When-White-House-Will-Seek-AUMF-Islamic-State> (stating that the Secretary of Defense for the first few months of the ISIL strikes, Secretary Chuck Hagel, does not know when the President is going to seek a new AUMF).