



Navigating an AUMF for the Islamic State: Toward a High-Standard Authorization

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This August, the United States began airstrikes against the Islamic State, so far striking over 150 targets across Iraq for the purposes of protecting American personnel and allowing the provision of humanitarian relief. In early September, President Obama announced these were the opening actions of a sustained conflict against the Islamic State in both Iraq and Syria to degrade and ultimately destroy the organization.¹ The White House maintains that it already possesses the legal authority for armed conflict against the Islamic State under the 2001 and 2002 Authorizations for Use of Military Force (AUMF). This view is mistaken, and has received a critical reception from legal experts and members of Congress, some of whom have called for a new AUMF. In the past week, several new authorizations have already been proposed.

If Congress is to authorize the armed conflict, lawmakers should use this opportunity to construct a narrow AUMF for the sole purpose of countering the Islamic State that would set a high standard in terms of scope and duration for authorizations against terrorist organizations in the future. Constructing such a high-standard AUMF is crucial to preventing a new era of legal problems and uncertainty in executing major counterterrorism operations, like those that have plagued the 2001 AUMF over the past decade with respect to al-Qaeda.

In navigating an Islamic State AUMF, Congress should pursue two tasks. First, Congress should ensure that the Administration meets its burden of justifying an escalation of conflict and demonstrates the soundness of its developing, but incomplete, strategy. This means the Administration should adequately fill in the gaps of its strategy as articulated thus far,

including: clarifying its objective of destroying the Islamic State; ensuring the Iraqi government can govern inclusively to ensure its legitimacy vis-à-vis minorities; clarifying that moderate elements in Syria can be made capable and willing to counter the Islamic State; and outlining how legitimate political authority can be extended over territory presently held by the Islamic State in Syria. Without answering at least these questions, the reasonable prospects of success for U.S. efforts are in question.

Second, if the Administration can meet its burden, any AUMF against the Islamic State should be constructed to take into account American interests relevant to the appropriate scope of the conflict. This would mean constructing an AUMF to include precise objectives, specific limits on the use of force, and regular reporting requirements. Such a high-standard approach is especially appropriate given the likelihood that the campaign against the Islamic State will continue into the tenure of the next president. Key limitations can help ensure Congress and the American people retain a strong check on the next president's war policy so that he or she does not enter office free to fundamentally change the nature or scope of the conflict.

Specifically, a high-standard Islamic State AUMF would include:

1. Realistic, achievable objectives, including: preventing Islamic State attacks against the United States; protecting the sovereignty of American partners against the Islamic State; and destroying the capacity of the Islamic State to control populated areas.
2. Limiting the authorization to be specifically directed against the Islamic State and to not include the authority to attack associated forces outside of Iraq and Syria.
3. A sunset clause that expires or forces the renewal of the authorization after 12 months to ensure continued reassessment of the conflict.
4. A prohibition on the deployment of regular ground forces.
5. Robust reporting requirements, including on metrics of success, campaign progress, risks of blowback, the political performance of American partners, and civilian casualties caused by the United States.
6. Assurances of the applicability of human rights laws to U.S. assistance to foreign partners in the conflict, especially the Leahy Law.

The Need for Congressional Authorization

At least 21 members of Congress have called for a vote on a new AUMF for the Islamic State.² While no Office of Legal Counsel memo on the Administration's legal reasoning for its authorities to escalate its military campaign has been made public,³ recent statements appear to indicate the Administration tacitly accepts that it requires congressionally granted authority, although it believes Congress already has given that authority under the 2001 and 2002 AUMFs. For example, the White House, State Department, and Department of Defense have asserted the United States is at war with the Islamic State in the same fashion it is at war with al-Qaeda, a conflict authorized by Congress.⁴ Indeed, some senior officials' legal rationales also appear to assume that authority granted by Congress is important for a campaign against the Islamic State, saying the United States can "continue these operations beyond 60 days consistent with the War Powers Resolution because the operations are already authorized by statute," referring to the 2001 and 2002 authorizations.⁵

However, despite the Administration's claims, neither the 2001 nor the 2002 AUMF authorize the kind of sustained military campaign that is being proposed. Therefore, additional congressional authorization would be appropriate in order for the conflict to be conducted clearly under the rule of law. Beyond upholding the rule of law, having proper legal authorities in place is significant for strategic success. Appropriate congressional authorization can provide legitimacy to support the continued political will for sustaining military operations against the Islamic State. Failure to obtain congressional authorization could result in a weaker political base for the kind of longer-term conflict that the Administration envisions, which it anticipates "may take three years," stretching into the tenure of the next president.⁶

2001 AUMF

The Administration has claimed that the 2001 Authorization for Use of Military Force contains the authority to attack the Islamic State. While no memo from the Office of Legal Counsel has been made available, comments from senior officials seem to advance two arguments to include the Islamic State under the 2001 AUMF.⁷ Both are unsound.

First, the White House has argued that the Islamic State is covered by the 2001 AUMF by virtue of its "longstanding relationship" with al-Qaeda.⁸ This would appear to consider the

Islamic State as an associated force of core al-Qaeda, a particular kind of relationship that is regarded to qualify an organization for being targeted by the United States under the 2001 law. The problem is that the Islamic State would not qualify as an associated force of core al-Qaeda under the Administration's own concept of associated forces. The definition of "associated forces" that the Administration has used with respect to core al-Qaeda has been organizations that have become co-belligerents with al-Qaeda because they have "entered the fight alongside al Qaeda" to work with "al Qaeda in hostilities against the United States or its coalition partners."⁹ This requires more than ideological sympathy; it requires operational linkage for the purpose of attacking the United States or American allies. However, the Islamic State is no longer party to the al-Qaeda network and does not fight alongside al-Qaeda. Brookings Institution legal expert Benjamin Wittes, who takes an expansive view of what constitutes associated forces, has concluded, "Surely associated forces doesn't mean forces that are actively hostile and have publicly broken with and been repudiated by al Qaeda. Whatever 'associated' means, I don't think it means that."¹⁰

Second, the White House has also argued that the Islamic State is covered by the 2001 AUMF because the organization is the "true inheritor of Usama bin Laden's legacy." In the Administration's view, the Islamic State's status as an inheritor is demonstrated by statements from a limited number of individual members and factions of al-Qaeda affiliates expressing support for the organization.¹¹ Law professor Steve Vladeck interprets this argument as "the claim is that ISIL *is* al Qaeda."¹² However, in addition to being counterintuitive, the Administration's apparent declaration that the Islamic State is al-Qaeda ignores the ideological divergence between the two organizations, which was a source of strain between the organizations for as long as they cooperated and was a component of the groups' schism earlier this year. The Islamic State has always rejected bin Laden's strategy of prioritizing the "far enemy," the United States, except as a target of opportunity, and has always advocated instead exploiting power vacuums in the region to establish a state. This strategy is so at odds with bin Laden's legacy and core al-Qaeda strategy that it forced the Islamic State into open conflict with al-Qaeda's leadership and other affiliates.¹³

Any claim that the Islamic State is the inheritor of Osama bin Laden's legacy is so far unsubstantiated. To date, no al-Qaeda franchises have switched their allegiance from Ayman al-Zawahiri, the emir of al-Qaeda, to Abu Bakr al-Baghdadi, the self-proclaimed caliph of the Islamic State; only individual fighters and small breakaway factions have shifted their loyalties.¹⁴ Even if one concedes for the sake of argument that the Administration has the authority to redefine who al-Qaeda *is*, it seems unfounded to believe that the *new* al-Qaeda could somehow be an organization ejected by core al-Qaeda and which has not received any formal pledges of loyalty from al-Qaeda affiliates.

2002 Iraq AUMF

While the Administration maintains that the 2002 authorization should be repealed, a senior Administration official has stated, “the 2002 Iraq AUMF would serve as an alternative statutory basis” for armed conflict against the Islamic State.¹⁵ But, as others have pointed out, this use of the 2002 AUMF would redefine the purpose of the law, which was to deal with the Iraqi government under the control of Saddam Hussein. Repurposing the law to engage the Islamic State would transform it into a blanket authorization to use armed force to counter threats in, around, or somehow generally involving the territory of Iraq. This would be to disregard the preamble of the law, which discusses at length Saddam Hussein’s regime, its behavior, its failure to meet obligations under the United Nations, and the threat it was considered to pose to the United States. Moreover, the section that grants formal authority for use of force against Iraq refers to “[enforcing] all relevant United Nations Security Council resolutions”¹⁶ that applied to the government of Iraq.¹⁷ It would be extraordinary to disregard these facts and instead claim the 2002 law authorizes the targeting of an organization – the Islamic State – that not only did not exist at the time the law was written but, on the contrary, was in part a consequence of the very war the law authorized.

Justification before Authorization

Legal authorization for armed conflict against the Islamic State should not be construed to take the place of justifying the conflict or the need for a comprehensive strategy for its execution. Justification and strategy must come first. No authorization should be approved unless the Administration publicly meets its burden of demonstrating that it has a comprehensive counter-Islamic State strategy with reasonable prospects of successfully defending U.S. national security interests.

In his address to the nation, President Obama outlined a four-point strategy to “degrade and ultimately destroy” the Islamic State in both Iraq and Syria, consisting of: a systematic campaign of airstrikes; support for local forces in Iraq and Syria fighting against the Islamic State; the application of intelligence and law enforcement counterterrorism assets, including efforts to counter Islamic State ideology; and continued humanitarian assistance to civilians affected by the conflict.¹⁸ Some components of this developing strategy are sound. However, serious questions remain unanswered that risk its reasonable prospects for success.

Key Questions

Q1: How does the Administration define success, and at what point has the Islamic State been effectively “destroyed”?

Unless the Administration clearly defines its objectives, the United States runs the risk of committing itself to a perpetual state of war with no realistic and foreseeable end.¹⁹ Speaking on September 10, President Obama said, “Our objective is clear: We will degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy.” But what “degrade” and “destroy” mean in practice is hardly clear. At what point is an organization effectively destroyed? If the U.S. Army’s definition of “destroy” is strictly adhered to,²⁰ the Administration risks setting unrealistic objectives that could induce over-involvement in a regional conflict. U.S. counterterrorism efforts over the past decade have demonstrated that the complete elimination of every last radicalized individual in an organization, or even rendering an enemy “combat-incapable,” as specified by the U.S. Army definition of “destroy,” is not a realistic objective. Thirteen years after the passage of the 2001 AUMF, both core al-Qaeda and the Taliban continue to exist. Relatedly, policymakers should consider whether completely eliminating the Islamic State is necessary for U.S. national security. Could American security interests be fulfilled by more modest objectives, such as

destroying the capacity of the Islamic State to stage attacks that would threaten the U.S. homeland and its personnel and installations overseas?

Q2: Is Iraq prepared to take the necessary and sustained steps to govern inclusively and re-legitimize its governmental authority among minorities?

The Obama Administration has rightly noted that the Islamic State cannot be defeated by military force, and that its successes in Iraq's west and north are largely the result of the alienation of Iraq's minority populations under Prime Minister Nouri al-Maliki's increasingly authoritarian government. Maliki has now been succeeded by Haider al-Abadi, but has been appointed as one of three vice presidents in the new government. It is still unclear whether this newly formed government is committed to the inclusive policies that could begin to reconcile the nation's diverse political, religious, and ethnic rivals and alleviate the grievances that the Islamic State has so effectively exploited. These reforms will necessarily include long-term security sector reform to ensure that minority groups are represented at all levels of the Iraqi Security Forces and the redistribution of forces so that there is religious and ethnic parity in the forces pacifying insurgents and the populations in which insurgents are active.

The Islamic State will not be defeated until Baghdad is seen by Iraqi minorities as a legitimate government that represents their interests, and U.S. policymakers should watch for signs that indicate a lack of commitment by the Iraqi government, such as potential walk-outs by Kurdish and Sunni politicians or intransigence in approving conciliatory measures.

Q3: Are the moderate elements inside Syria willing and able to roll back the Islamic State effectively, and can support be isolated to vetted moderate elements to the exclusion of violent Salafi extremist organizations?

Though clandestine efforts by the United States to train and assist moderate elements of the Syrian opposition and proposed plans to expand this mission have focused on forces vetted by U.S. intelligence and determined to be moderate, any provision of assistance to the Syrian opposition must accept significant risks. In practice, moderate Syrian rebels cooperate with extremists, including at times Jabhat al-Nusra and the Islamic State, when operating in the same area.²¹ There can be no guarantees that arms provided to vetted rebels will not find their way into the hands of Islamic State or al-Qaeda-affiliated fighters. Even the vetted groups are affiliated with local militias whose interests are confined to a specific area – policymakers must understand and expect the interests of local affiliates of the vetted moderate opposition to be at times significantly divergent from U.S. interests.²²

Moreover, none of the rebel groups in Syria share the United States' priorities in Syria. The United States has as its foremost goal the defeat of the Islamic State; all Syrian rebel groups see the defeat of the Islamic State as secondary to the defeat of the Assad regime. Thus, it is unclear to what extent U.S. assistance to the moderate Syrian rebels would be directed against the Islamic State in practice.

Q4: What authorities exist in Syria – or can be reasonably created – that can extend legitimate political order over territory and population presently held by the Islamic State?

The Western-backed Syrian National Coalition exists primarily as a government in exile with little actual capacity to govern in Syria. Though the United States has supported efforts to bolster the National Coalition's legitimacy, it "suffers from a lack of stable leadership, a problem exacerbated by the competition for influence among regional actors," and has struggled in its relations with constituent local councils, according to a new report by the Center for American Progress.²³ The National Coalition at present lacks the stability or reach to fill the power vacuum in areas where the Islamic State would be rolled back. The United States will have to embark on an uncertain course to strengthen and stabilize the National Coalition while also building ties with local partners to ensure the Islamic State or another extremist organization does not fill any void in governance. Such efforts will not be sustainable without a resolution to the Syrian civil war; any governance established on a regional basis while the state of hostilities persists will be liable to collapse or shift with the tides of the war.

Q5: Is the United States prepared to manage the rival interests of the countries cooperating to defeat the Islamic State?

As the United States works to coordinate a coalition of countries to take the fight to the Islamic State, it is unclear that it is prepared to coordinate a field of rivals. Regional actors that have expressed support include Turkey, Qatar, the United Arab Emirates, and Saudi Arabia, which have frequently feuded over which Syrian rebel groups (or other political groups in the region, for that matter) to support and how. Several of the countries involved have seriously strained relationships with Baghdad. The largest potential spoiler in this regard is Iran – which the United States has excluded from coordinating discussions on the Islamic State, but which currently has troops operating in Iraq and Syria. Though archrivals, Saudi Arabia and Iran have reportedly opened a line of communication to discuss countering the Islamic State.²⁴ But this apparent comity is unlikely to last as these countries and their competing interests begin to come into conflict in Iraq and Syria.

A High-Standard AUMF against the Islamic State

Putting in place legal authority for a sustained campaign against the Islamic State will require Congress to pass an Authorization for the Use of Military Force. Such an authorization should be constructed to take into account American interests relevant to the appropriate scope and regulation of the proposed campaign. This would mean constructing an AUMF to include precise objectives, specific limits on the use of force, and regular reporting requirements. Such a narrow, high-standard approach is especially appropriate given the likelihood that the conflict against the Islamic State will continue into the tenure of the next president, introducing a greater element of uncertainty into the future of U.S. policy.

This kind of high-standard approach confers three important benefits:

1. Setting legal parameters that hedge against mission creep and ensure the war policy is subject to continued political assessments.
2. Preventing the law from being abused by future administrations or repurposed for unintended applications. The severity of these risks is demonstrated by the Obama Administration's attempt to repurpose the 2001 and 2002 AUMFs for use against the Islamic State.
3. Setting a precedent for authorizations against terrorist organizations in the future in terms of combining specificity of purpose, groups targeted, and insurance against abuse.

Elements of a High-Standard Islamic State AUMF

1. Authorize Clearly Stated and Achievable Objectives

Though the Administration has proposed the goal of the conflict is to “degrade and ultimately destroy” the Islamic State, it has yet to define what this objective means in practical terms. The wholesale destruction of the Islamic State, something which in 13 years of war the United States has not achieved with al-Qaeda, the Taliban, or any associated organizations, is not a realistic objective. Any authorization by Congress

should specifically define what achievable end state is the objective against the Islamic State in order to protect U.S. national security.

Three objectives appear sufficient to protect American interests. These objectives are more realistically achievable than the wholesale destruction of the Islamic State and more specifically define the states of affairs that can be achieved or prevented by U.S. intervention:

- A. Prevent the Islamic State from conducting acts of international terrorism against the United States that exceed the capacity of law enforcement and intelligence agencies to effectively counter;
- B. Prevent the Islamic State from conducting acts of terrorism against American allies that threaten their sovereignty or continuity of governance *and* that exceed the capacity of their security services to effectively counter;
- C. Destroy the capacity of the Islamic State to effectively control populated areas.

1.1 Preventing International Terrorist Attacks against the United States

Stating part of the objective in the statute in terms of preventing international terrorist attacks against the United States underscores that the primary American interest in confronting the Islamic State is to protect itself against possible, but as of yet unrealized, Islamic State planning and execution of attacks against the homeland. The explicit reference to “international terrorism” (18 U.S. Code S. 2331) underscores that the role of armed force is to prevent terrorist acts against the United States that “transcend national boundaries in terms of the means by which they are accomplished,” including execution, planning, personnel, financing, and so on.²⁵ This contrasts with a mission to prevent lone-wolf domestic terrorism against the United States in which U.S. citizens could be inspired to acts of terrorism as a result of sympathy with Islamic State or other violent Salafi extremist ideology. The latter form of terrorist activity is properly the domain of law enforcement and should not be confused with the objectives of a military campaign in Iraq or Syria.

1.2 The Relevance of Law Enforcement and Intelligence

It is important to qualify the extent of any terrorist threat that requires armed conflict to counter. A threat level that exceeds the ability of law enforcement and intelligence agencies is particularly salient. For armed conflict to be justified, it must conform to the principle of necessity. That is, the goal of armed conflict should be to achieve objectives

that are not achievable by other means. In the case of potential terrorist threat against the United States, the other means available to counter that threat are intelligence and law enforcement. If it is or becomes the case that the real or foreseeable terrorist threat posed by the Islamic State is something manageable by intelligence and law enforcement, there would be no necessity for the use of military force to interdict that threat. This point is particularly important given that the threat of terrorist attack cannot be reduced to zero, but can be reduced to levels of lower risk that can be countered by civilian agencies, which have prevented over 60 terrorist attacks against the United States since September 11, 2001.²⁶

1.3 U.S. Commitment to the Security of Foreign Partners

Stating in law that U.S. objectives include protecting allies would reflect that the United States has strategic national security interests in the security of European and Middle Eastern partners, most immediately Iraq and the Kurdistan Regional Government (KRG) that are most under pressure by the Islamic State.

However, U.S. interests in – and appropriate commitment to – the security of foreign partners are limited. Their security should not be considered as significant to U.S. policy as the direct, physical security of the United States itself. To reflect this, lawmakers should define the degree of security that U.S. armed forces will assist foreign partners to achieve. One such degree would be to help prevent insecurity that rises to the level of threatening the sovereignty or continuity of governance of foreign partner states. This would be to say that American military power will not be applied to achieve – and it is unclear that it could achieve – complete security for allies, but can and will prevent the Islamic State from threatening the essential political order in places like Iraq and Iraqi Kurdistan.

Failure to qualify the U.S. commitment to the security of partner states could leave the door open to the policy of using American armed forces to prevent incidents like the relatively small-scale but still tragic terrorist attacks across Iraq that occurred before the U.S. withdrawal in 2011 and have persisted since.²⁷ This qualification of the role of U.S. direct military action could also send the message to foreign partners that they do not have an open-ended security commitment by the United States vis-à-vis the Islamic State. Making clear such a limited but still robust commitment could compel foreign partners to take all necessary and appropriate steps to provide for their own long-term security, including making hard domestic political choices and governing inclusively, while still being reassured by the United States.

1.4 Destroying the Islamic State's Capacity to Control Populated Areas

Destroying the capacity of the Islamic State to control populated areas ensures that the organization will not be able to maintain safe havens in civilian communities from which financial and other resources can be extracted. Destroying this capacity is more realistic than the open-ended objective of destroying the entire organization, which is not achievable by military means. In practice, targeting the capacity of the Islamic State to control populated areas would entail not only severely degrading the organization's guerilla forces, but also its nascent governmental structures and economic and financial networks through a variety of means, including kinetic strikes, intelligence operations, propaganda, cyber warfare, and ground forces belonging to foreign partner organizations and states. Such a campaign would reduce the Islamic State to a much less capable network of operatives rather than its present composition as an extensively financed organization that maintains large numbers of irregular fighters and controls significant swaths of territory. Once the Islamic State is dismantled to such an extent, the nature of further operations against them could then be assessed and implemented.

2. Limit Authority Specifically to Targeting the Islamic State and Exclude Application to Associated Forces Outside Iraq and Syria

Any authorization should be exclusively limited to the Islamic State, which has been the sole focus of the Obama Administration's emerging strategy and the justifications offered for escalating hostilities. However, some proposals for statutory authority would allow for a much broader conflict, offering immediate examples of what lawmakers should avoid. Rep. Frank Wolf (R-VA) has proposed an AUMF that would include a host of other organizations by name and even blanket authority to go to war against "any other emerging regional terrorist groups that share a common extremist ideology."²⁸ Such a proposal would enable a perpetual and expansive global war against terrorist organizations – even those that do not yet exist – for which there is no strategy and no articulated national security justification. Rep. Wolf's AUMF would also authorize the use of force against the "supporters" of the groups it would target. As law professor Jennifer Daskal has pointed out, broad interpretation of this language could open the door to action against those "speaking out in support of the groups, and perhaps even journalists that refused to disclose information about the groups."²⁹

2.1 The Need to Exclude Application Against Associated Forces outside Iraq and Syria

As a corollary to solely naming the Islamic State in statute, any authorization should be clear that it does not authorize taking direct action against any potential associated

forces of the Islamic State outside of Iraq or Syria. Harold Koh, former legal adviser to the State Department, has suggested any AUMF should include a provision “requiring the president to return to Capitol Hill for express approval should he wish to use force against any armed groups ‘associated with ISIL.’”³⁰ According to the strict meaning of “associated force” applied by the Administration to al-Qaeda, discussed above, Islamic State-associated forces would be those that entered the fight alongside the Islamic State against the United States or its coalition partners. This would require a relationship beyond ideological sympathy and require some degree of co-belligerence to be the case, i.e., operational linkage or coordination.

The need for explicitly excluding associated forces of the Islamic State outside of Iraq and Syria in any authorization is twofold. First, the idea of “associated forces” is dangerously close to becoming abused to the point of losing any coherent meaning or value in institutionalized usage. The Administration appears ready to significantly stretch the notion of “associated force” by claiming that the 2001 AUMF applies to the Islamic State, as discussed above, to something else that is no longer limited to the principle of co-belligerence under international law. The definition of this “something else” is not clear as of yet, but could reduce “associated forces” to an unreliable term limited only by what political expediency will allow. The Administration’s claim that the 2001 AUMF applies to the Islamic State follows on reported conversations within the Administration to that considered broadening the doctrine of targeting “associated forces” to targeting “associates of associates.”³¹ Taken together, these problems make clear the irresponsible implications of leaving the door open to this Administration – or future administrations – to use “associated forces” as a justification to claim expansive warmaking authority that is not expressly granted in statute.

Second, even if the concept of associated forces is not abused in the future, failing to exclude targeting Islamic State-associated forces outside Iraq and Syria would leave the door open for to expanding the conflict in unforeseen and unpredictable ways. While the Administration is presently proposing a conflict against only the Islamic State, circumstances may change as the campaign stretches into the tenure of the next president. Such unforeseen expansion of conflict was precisely what happened following the 2001 AUMF, which was drafted to target those responsible for the September 11 attacks but has since enabled the expansion of direct military action against at least eight organizations in at least four countries, to the dismay of some lawmakers.³² While only a couple of small groups have announced their alignment with the Islamic State and it is still unclear if they have any operational coordination, there are signs substantial realignments could be possible in the future. Subgroups or prominent figures from a number of organizations outside of Iraq and Syria have signaled various degrees of support for the Islamic State, including al-Qaeda in the

Islamic Maghreb (AQIM), al-Qaeda in the Arab Peninsula (AQAP), Jemaah Islamiyah, Abu Sayyaf Group, and Hezb-e-Islami.³³

To handle these problems, an AUMF for the Islamic State could implement a two-tiered system for regulating the targeting of associated forces on the model of what Sen. Tim Kaine (D-VA) has proposed.

First, an AUMF should expressly state that it does not apply to Islamic State-associated forces outside of Iraq or Syria. If in the future the Executive Branch judged it necessary to engage organizations that hypothetically have affiliated and coordinated themselves with the Islamic State outside of Iraq and Syria and intend to strike the United States, the President should make the case to Congress for an amendment to the Islamic State AUMF that would include the specific authority to target any additional organization(s) in question.

Second, as Sen. Kaine has proposed, an AUMF could allow Islamic State-associated forces *inside* Iraq and Syria to be attacked *if* “such forces are identified in a report” regularly submitted to Congress that would maintain a list of “individuals or organizations that are immediately and directly fighting alongside ISIL in Iraq and Syria.” In this way, unforeseen and inappropriate expansion of the conflict could be avoided while still allowing the United States to target other forces serving directly alongside the Islamic State. This language also uses a precise concept of associated forces that corresponds to traditional meanings.³⁴

While it may appear simpler to avoid this problem altogether by including geographic limits to an Islamic State AUMF, codifying a mechanism like the above has the advantage of setting a legislative precedent and building a vehicle for dealing with the associated forces problem head on, which is likely to arise again in future cases given the nature of sub-state and terrorist networks.

3. Sunset Clause to Limit Duration of Authorization

Any authorization against the Islamic State should include a time limit by way of a sunset clause to avoid the risk of perpetual war. This is in line with the President’s view that “all wars must end,” which reflects the principle codified in the 1863 Lieber Code that “The ultimate object of all modern war is a renewed state of peace.”³⁵ That the Administration is abusing the 2001 AUMF by attempting to apply it to the Islamic State – and claiming the 2002 AUMF could also be applied – further underscores the need to make sure authorizations for war are on a natural course toward expiration, because the potential for their abuse remains as long as they stay on the books.

The sunset clause in any authorization against the Islamic State should be on a rapid cycle, requiring reauthorization every 12 months. The need for regular reauthorization of the law would build in opportunities to reassess the conflict and U.S. strategy, particularly in combination with reporting requirements, as discussed later.

While the need for reauthorization every year may appear more rapid than is politically practical, two factors argue strongly in favor of rapid sunset. First, the complexities of a sustained military campaign against the Islamic State, as discussed above, carry significant risks to the soundness of U.S. strategy. Even if the idea is appealing at present, there are a number of variables outside of U.S. control that could significantly affect the calculus of policymakers. For example, Iraqi politics may be unable to deliver inclusive governance. Or moderate Syrian rebels may be unable or unwilling to deliver battlefield victories against the Islamic State or could cooperate with Salafi extremists to unacceptable extents, possibly including the transfer of U.S.-provided war materiel. Second, because the conflict will very likely continue into the tenure of the next president, Congress and the American people should receive the opportunity to check the war policy of an as-yet undetermined next Administration.

4. Prohibition on Deployment of Regular Ground Forces

Any Authorization for Use of Military Force against the Islamic State should expressly prohibit the deployment of regular ground forces to Iraq or Syria outside of a limited presence to protect American diplomatic installations. For clarity, it may be worth stating in statute that such a prohibition shall not apply to special operations forces or forces deployed with the purpose of advising or training partner militaries, as proposed AUMFs drafted by Rep. Adam Schiff (D-CA) and Sen. Tim Kaine (D-VA) have done.³⁶ So far, the Administration and some members of Congress have explicitly ruled out sending regular ground forces – as opposed to Special Operators – into either Iraq or Syria. Nonetheless, it is not inconceivable that unforeseen political or military facts could emerge in the future that would change the mind of the President – especially during the next Administration. Already, General Martin Dempsey, Chairman of the Joint Chiefs of Staff, left it an open question about whether he might recommend a direct combat role for the use of U.S. ground forces based on circumstances.³⁷ Indeed, as a sign of what could become possible, some prominent conservative analysts have already suggested the deployment of 25,000 American troops to Iraq and neighboring countries.³⁸

5. Robust Reporting Requirements

Congress should include an extensive set of reporting requirements in any Authorization for Use of Military Force against the Islamic State in order to assist transparency and oversight efforts. These efforts, in turn, can serve as mechanisms to press the current or future administrations on appropriate strategy and effective implementation. If Congress vigorously pursues its oversight functions, it may be able to reduce the possibility of strategic error. Alternatively, robust transparency and oversight may help lawmakers or the American people conclude more rapidly than they would have otherwise that armed conflict against the Islamic State should be terminated, if that is what the facts bear. Importantly, combining reporting requirements with the need to periodically reauthorize the conflict would add teeth to Congress' oversight function and support sustained debate over continued U.S. intervention.

5.1 Reporting on Strategy, Implementation, and Risks

Clarity on a counter-Islamic State strategy will be important to calibrate expectations and monitor progress. Therefore, any authorization for use of force should require an interagency report on the selected counter-Islamic State strategy, issued jointly by the National Security Council, Department of Defense, State Department, and any other relevant agencies. The strategy should be articulated meaningfully in terms of ends, ways, and means, pursued with the diplomatic, economic, military, and informational power of the United States and its broader coalition. Periodic reporting should also be required on the implementation of the strategy, including: (1) the definition of metrics used to evaluate success, and updates on progress according to those metrics; (2) the political progress of Iraq and partners in Syria in extending their political legitimacy over previously held Islamic State territory or in ways otherwise relevant to American strategy; (3) the amount and kind of weapons transferred by the United States to Syrian elements; (4) any detected cooperation between Syrian opposition elements receiving U.S. aid and violent Salafi extremist organizations, including the transfer of U.S.-supplied weapons by Syrian opposition elements to extremists; and (5) the capacity and any planning of the Islamic State to launch attacks against the United States, if any.

5.2 Reporting on Civilian Casualties

If the United States is to assist Iraqi and Syrian actors to re-extend legitimate governance over territory held by the Islamic State, the perceived legitimacy and moral quality of American power will itself be materially relevant to success. Therefore, Congress should require the Department of Defense to monitor and report on civilian

casualties caused by direct military action undertaken by the United States. While a critic may counter that reporting on civilian casualties would undermine the perceived moral quality of American power, that view is mistaken. Populations living in and around areas subject to direct U.S. military action would not rely on congressionally mandated reports to become informed of the deaths of neighbors. Moreover, non-governmental reporting on civilian casualties has become common and U.S. government reporting would allow an authoritative response to NGO assessments. Finally, and most importantly, it is possible that requiring the Department of Defense to monitor and report on its killing of civilians would help further incentivize the U.S. armed forces and political leadership to take additional steps to minimize civilian deaths. To help dissuade or counterbalance overly-generous self-reporting, lawmakers could require regular audits of U.S. government reports on civilian deaths by an appropriate government authority, an independent contractor, or both.

6. Ensure Applicability of Relevant Human Rights Laws

Aspects of the Administration's counter-Islamic State strategy pose a challenge to conforming to domestic human rights laws. President Obama has proposed that efforts to train and equip the moderate Syrian opposition be funded by a \$500 million allocation drawn from the Administration's Counterterrorism Partnerships Fund (CTPF).³⁹ Since the CTPF was proposed in May 2014, members of Congress have expressed concerns that the Administration has been vague about the purpose of this spending. Those concerns were reinforced in June, when the Administration stipulated in budget amendments sent to Congress that "the Secretary of Defense may obligate and expend funds transferred" as part of the CTPF allocation "notwithstanding any limitation in a provision of law that would otherwise restrict the amount or recipients of such support or assistance."⁴⁰

The language expressed in the Administration's June 26 budget amendment request seems specifically designed to circumvent human rights provisions, including the Leahy Law. The Leahy Law, which is actually multiple laws governing both the Departments of State and Defense, has been in place since 1998 to prevent U.S. funding from aiding recognized human rights abusers. Almost all U.S. security assistance is subject to the Leahy Law, including all Foreign Military Sales (FMS), Foreign Military Financing (FMF), International Military Education and Training (IMET), Peacekeeping Operations, and Section 1206 funding for Building Partnership Capacity – traditionally the programs used to achieve the CTPF's stated goals.⁴¹

Congress should ensure that any funds appropriated to support the Syrian rebels, Kurdish Peshmerga, Iraqi Security Forces, or any other partner force are subject to all

relevant and applicable human rights provisions. This should be stipulated either in the continuing resolution that may contain the authority for the training and equipping of Syrian rebels or any Authorization for Use of Military Force against the Islamic State – or both. The Leahy Law helps ensure that the U.S. supports its partners around the world in a manner that respects American values and is demonstrative of U.S. moral – not just military and diplomatic – leadership. It is important to recognize that American moral integrity has strategic value, especially in the context of countering the Islamic State. As mentioned above, if the United States is to assist Iraqi and Syrian actors to re-extend legitimate governance over territory held by the Islamic State, the perceived legitimacy and moral quality of American power will itself be materially relevant to success. Especially in a conflict as brutal as the Syrian civil war, which has been marked by horrific atrocities, the United States should lead by example and exercise care in the partners it supports.

Conclusion

Policymakers in Congress and the Executive Branch are rightfully focused on addressing the threat posed by the Islamic State. Together, they can work to articulate a full, clear justification and strategy appropriate to that end. Moreover, by constructing an authorization for the specific purpose of a sustained campaign against the Islamic State, they can protect American national security interests while also operating clearly within the rule of law. Taking the prudent steps recommended in this brief would help establish a better political and legal foundation for an escalated military intervention, improving its prospects of success. Moreover, by constructing an AUMF according to the high standard of precise objectives and reasonable limits, policymakers would also take a step toward preventing a new era of legal complications in prosecuting counterterrorism operations, such as those that arose and remain under the 2001 authorization. Policymakers have an opportunity today to produce a prudent AUMF that responsibly limits a counter-Islamic State campaign into the next administration, while also setting a high standard for AUMFs to come against terrorist organizations in the future.

Notes

¹ For clarity, this report refers to the organization by the name they formally adopted in June, though many people still refer to the Islamic State by translations of its previous name, the Islamic State of Iraq and al-Sham (ISIS) or the Islamic State of Iraq and the Levant (ISIL).

² A finding in the excellent and timely memo recently released by Mieke Eoyang and Peter Billerbeck, “Making the case: Congress should Pass a New Authorization for Use of Forces against ISIS,” Third Way National Security Program, September 16, 2014. Available at: <http://www.thirdway.org/publications/860>

³ While the position of the Office of Legal Counsel (OLC) is not public, the nature of the campaign proposed against the Islamic State would also seem to rise to the level of war in the constitutional sense, thereby requiring congressionally granted authority, from the point of view of the argument advanced by the OLC with respect to the 2011 Libya intervention. The OLC argued the Libya intervention should not be considered war in the constitutional sense because the “fact-specific assessment of the anticipated nature, scope, and duration” of the operation did not involve “substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” However, unlike Libya, the proposed intervention against the Islamic State is expected to: (1) be extended in *duration* (up to three years); (2) operate at the *scope* necessary to destroy the Islamic State (something which has not been accomplished in 13 years against other terrorist organizations in the course of armed conflict authorized by the 2001 AUMF and for which the Executive sought authorization, as well as in the course of operations pursuant to the 2002 AUMF against al Qaeda in Iraq, the predecessor to the Islamic State); and (3), unlike Libya, the *nature* of the proposed operation includes the deployment of ground forces (and has already seen the deployment or ordered deployment of 1,600 ground forces), which the Chairman of the Joint Chiefs of Staff made clear during his testimony of September 16, 2014 could “accompany Iraqi troops on attacks against specific [Islamic State] Targets” and indicated the President has requested recommendations on the employment of ground forces on a “case-by-case basis.” It therefore appears sound to conclude that a “fact-specific assessment of the anticipated nature, scope, and duration” of U.S. operations against the Islamic State rises to the level of “substantial military engagements” that entail “exposure of U.S. military personnel to significant risk over a substantial period.” See: “Authority to Use Military Force in Libya,” Office of Legal Counsel Memorandum, April 1, 2011. Available at: http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf

⁴ See the comments made by the spokespeople for the White House, State Department and Department of Defense. Kristen Welker, Courtney Kube and Erin McClam, “Obama Administration Says U.S. Is ‘At War’ With ISIS,” NBC News, September 12, 2014, Available at: <http://www.nbcnews.com/storyline/isis-terror/obama-administration-says-u-s-war-isis-n202336>

⁵ Senior Administration official, “IS War Powers Theory Background Statement,” Contributed by Charles Savage, New York Times, September 12, 2014, Available at: <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>

⁶ John Kerry quoted by Eric Schmitt, Michael Gordon and Helene Cooper, “Destroying ISIS May Take Years, U.S. Officials Say,” *New York Times*, September 7, 2014, Available at:

http://www.nytimes.com/2014/09/08/world/middleeast/destroying-isis-may-take-3-years-white-house-says.html?_r=0

⁷ To our knowledge, Jennifer Daskal was the first to frame the Administration as having two possible lines of reasoning, though it seems to us both arguments could coincide. Jennifer Daskal, “Democracy’s Failure,” *Just Security*, September 11, 2014. Available at: <http://justsecurity.org/14820/democracys-failure/>

⁸ Senior Administration Official, “IS War Powers Theory Background Statement,” Contributed by Charles Savage, New York Times, September 12, 2014, Available at: <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>

⁹ Jeh Johnson, cited by Bill French and John Bradshaw, “Ending the Endless War: An Incremental Approach to Repealing the 2001 AUMF,” National Security Network, August 2014, Available at: http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL1.pdf

¹⁰ Benjamin Wittes, quoted by Eli Lake, “Obama’s New War on ISIS May Be Illegal,” *The Daily Beast*, September 10, 2014, Available at: <http://www.thedailybeast.com/articles/2014/09/10/is-obama-s-new-war-against-isis-illegal.html>

¹¹ Senior Administration Official, “IS War Powers Theory Background Statement,” Contributed by Charles Savage, New York Times, September 12, 2014, Available at: <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>

¹² Steve Vladek, "ISIL as al Qaeda: Three Reactions," Lawfare, September 11, 2014, Available at:

<http://www.lawfareblog.com/2014/09/2001-aumf-isil/>

¹³ Aaron Y. Zelin, "The War Between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement," Washington Institute for Near East Policy, June 2014, Available at:

http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf

¹⁴ J.M. Berger, "The Islamic State vs. al Qaeda," *Foreign Policy*, September 2, 2014, Available at:

http://www.foreignpolicy.com/articles/2014/09/02/islamic_state_vs_al_qaeda_next_jihadi_super_power

¹⁵ Charlie Savage, "Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says," *New York Times*, September 12, 2014, Available at: http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html?_r=1#story-continues-1

¹⁶ This component of the law was cited by the authors listed in the following footnote, but can be viewed in its original form at: Public Law 107-243, 107th Congress (2002) Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/html/PLAW-107publ243.htm>

¹⁷ The argument here made regarding the preamble and U.N. inspections clause in the 2002 AUMF, including their citation of the law, is drawn directly from Jennifer Daskal, Ryan Goodman and Steve Vladek, "The Premature Discussion of ISIS and the 2001/2002 AUMFs," Just Security, June 17, 2014, Available at: <http://justsecurity.org/11692/isis-aumfs/>

¹⁸ Barack Obama, "Statement by the President on ISIL," September 10, 2014, Available at: <http://www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation>

¹⁹ This section drawn from "President Obama's Islamic State Strategy: Sound in Principle, but Plan Still Incomplete," National Security Network, September 11, 2014, Available at: <http://nsnetwork.org/president-obamas-islamic-state-strategy-sound-in-principle-but-plan-still-incomplete/>

²⁰ U.S. Army [definition](#): "A tactical mission task that physically renders an enemy force combat-ineffective until it is reconstituted." *ADRP 1-02 Terms and Military Symbols*, U.S. Army, September 2013, Available at: http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp1_02.pdf

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