

BACKGROUND

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A Framework for an Authorization for Use of Military Force Against ISIS

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Abstract

For over a decade, the United States has been in armed conflict with Islamist terrorists. In a variety of organizations and forms, this agile and adaptive enemy continues to wage war against the interests of both the U.S. and its allies. ISIS poses a “direct and significant threat to us” and must be defeated using all necessary means. The American people support military action against ISIS, and the Administration accordingly must develop a comprehensive, overarching strategy to confront and ultimately defeat this enemy. Working with our partners and allies and the countries in the region that are most affected by ISIS, the United States must do what it traditionally has done: lead.

The Obama Administration is struggling both to define a comprehensive, coordinated strategy to defeat the Islamic State in Iraq and Syria (ISIS),¹ a decade-old al-Qaeda-inspired terrorist organization, and to explain the national and international² legal basis for such military action. Some in Congress are considering proposing a joint resolution in the form of an authorization for use of military force (AUMF) against ISIS.

In his address to the nation on September 10, President Barack Obama suggested that he had the necessary authority as commander in chief to carry out a sustained campaign to degrade and destroy ISIS. On the night of the President’s speech, a senior Administration official, speaking on background, suggested that the President will rely on domestic law—namely, the 2001 AUMF—as the legal authority for military action against ISIS. That decision is controversial among some of the nation’s most distinguished law of war scholars.³ Others think it makes perfect legal sense.⁴

KEY POINTS

- President Barack Obama will rely on the 2001 authorization for use of military force as legal authority for military action against ISIS.
- The current debate regarding the legal basis for this military action is partly due to the fact that the Administration has yet to provide a clear, comprehensive legal analysis of its power to use military force against ISIS.
- When a President puts troops in harm’s way for a sustained period of time, it is advisable for him to consult with and obtain express authorization from Congress. That consultation and debate should be public and not influenced by electoral politics.
- If Congress crafts an AUMF, it should do so with an understanding of the threat posed by ISIS, including how the group came into existence and its connection to al-Qaeda.
- Congress and the American people should also understand the history and analytical components of previous congressional AUMFs.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2957>

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The vibrant debate among legal scholars regarding the domestic and international law basis for U.S. military action against ISIS is partly due to the fact that the Administration has yet to provide the public with a clear, comprehensive legal analysis of its power to use military force against ISIS. As a general principle, when a President puts our troops in harm's way for a sustained period of time, it is advisable for him to propose, consult with, and obtain express authorization from Congress. That consultation and debate should be public, not buried in a continuing resolution or other must-pass legislation. Sending our troops into war requires a sober, deliberate debate that is not influenced by electoral politics.

If and when the President proposes—or, more likely, Congress crafts—an AUMF, it should be with an understanding of the threat posed by ISIS, including how the group came into existence and its connection to al-Qaeda. Congress and the American people should also understand the history of congressional AUMFs and the analytical components of previous AUMFs.

Who Is ISIS?

According to National Counterterrorism Center Director Matthew Olsen, veteran Sunni terrorist Abu Musab al-Zarqawi founded ISIS in 2004 and pledged his allegiance to Osama bin Laden.⁵ Known then as al-Qaeda in Iraq, the terrorist organization targeted U.S. forces, civilians, and coalition partners, using suicide bombers, car bombs, and executions to pressure the U.S. and other countries to leave Iraq.

According to Olsen, the group “gained a reputation for brutality and tyranny.”⁶

ISIS is composed of Sunni Muslims drawn to radical Islamist ideology. Most of its members are Iraqi and Syrian Arabs, although it has attracted a wide range of foreign militants, especially Arabs from Saudi Arabia, Jordan, Libya, Yemen, and Egypt.

After Zarqawi was killed in a U.S. airstrike in 2006, his organization was decimated by a U.S.-led counterterrorism campaign. The group made a comeback in Iraq after the withdrawal of U.S. troops in 2011.

ISIS seeks to overthrow the governments of Iraq, Syria, Lebanon, and Jordan and establish an Islamic state governed by a harsh and brutal interpretation of Islamic law. Its long-term goals are to launch a jihad to drive Western influence out of the Middle East, destroy Israel, and become the nucleus of a global Islamic empire.⁷ The group is determined to impose its harsh totalitarian Islamist ideology on all Muslims; kill off apostates (defined by ISIS as all Muslims who do not accept its brand of Islam); subjugate all non-Muslims; and build a radical Islamic state from which to launch its jihad.

ISIS proudly videotapes and broadcasts its brutal treatment of its enemies and those who violate its radical interpretation of Islamic law. It has cited the Koran to justify beheading and crucifixion. Its victims reportedly are usually killed before being strung up for display on a cross.

ISIS leader Abu Bakr al-Baghdadi threatened to launch attacks in the “heart” of America in 2012.⁸

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1. The Islamic State in Iraq and Syria (ISIS) is also known as the Islamic State (IS) or the Islamic State of Iraq and the Levant (ISIL).
 2. John Bellinger, “The Administration Should Explain Its International Legal Basis to Attack ISIL in Syria,” *Lawfare*, September 13, 2014, <http://www.lawfareblog.com/2014/09/the-administration-should-explain-its-international-legal-basis-to-attack-isil-in-syria/> (accessed September 16, 2014).
 3. See Marty Lederman, “The Legal Theory Behind the President’s New Military Initiative Against ISIL,” *Just Security*, September 10, 2014, <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/> (accessed September 16, 2014), and Jack Goldsmith, “President Obama’s Astonishing War Powers Legacy,” *Lawfare*, September 11, 2014, <http://www.lawfareblog.com/2014/09/president-obamas-astonishing-war-powers-legacy/> (accessed September 16, 2014).
 4. See Steve Vladeck, “ISIL as al Qaeda: Three Reactions,” *Lawfare*, September 13, 2014, <http://www.lawfareblog.com/2014/09/2001-aumf-isil/> (accessed September 16, 2014).
 5. Matthew G. Olsen, remarks at The Brookings Institution, September 3, 2014, <http://www.dni.gov/files/documents/2014-09-03%20Remarks%20for%20the%20Brookings%20Institution.pdf> (accessed September 16, 2014).
 6. *Ibid.*
 7. Kelsey Harkness and James Phillips, “Q&A: What You Need to Know About ISIS in Iraq,” *The Daily Signal*, June 14, 2014, <http://dailysignal.com/2014/06/14/qa-need-know-isis-iraq/>.
 8. *Ibid.*
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The group has been recruiting foreign radical Islamists, including Americans and Europeans, who have flocked to the jihad in Syria.

ISIS broke away from al-Qaeda leadership in 2013 after a dispute over leadership of the jihad in Syria. It now rejects the leadership of Osama bin Laden's successor, Ayman al-Zawahiri, who criticized its extreme brutality, which has alienated many Muslims.

As Director Olsen has said, "ISIL poses a direct and significant threat to us—and to Iraqi and Syrian civilians—in the region and potentially to us here at home."⁹ Heritage Foundation experts recently outlined 11 reasons why ISIS might be more dangerous than al-Qaeda.¹⁰

Congress, the Administration, military leaders, and the intelligence community have additional classified information related to the ISIS threat that should be utilized in gauging whether another AUMF is legally necessary to confront and defeat this enemy, but it is already clear that confronting ISIS supports our vital interests. Left unchallenged, ISIS will continue to exploit the conflict in Syria and the sectarian tensions in Iraq, grab more land, and establish its version of an Islamist caliphate in the region.

AUMFs: A Historical Perspective

According to law of war experts Curtis Bradley and Jack Goldsmith, the United States has not declared war "in any of its many post-World War II conflicts, even though some of them have been significant and prolonged."¹¹ Bradley and Goldsmith point to these reasons: "[the] longstanding political branch practice of initiating war without formal declaration of war, consistent judicial approval of

this practice, changes in international law that render war declarations less relevant, and general scholarly consensus."¹²

Congress has expressly authorized the President to use military force dozens of times in United States history.¹³ Many of those authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes.¹⁴ The September 18, 2001, AUMF directed at "those nations, organizations, or persons" that were responsible for the 9/11 attacks was no different.

According to Bradley and Goldsmith, congressional use of force authorizations can be divided into five analytical components:

1. The authorized military *resources*,
2. The authorized *methods* of force,
3. The authorized *target*,
4. The *purpose* of the use of force, and
5. The *timing and procedural restrictions* on the use of force.¹⁵

The 2001 AUMF contains those five analytical components. It is, as detailed in my testimony before the Senate Armed Services Committee, also self-limiting.¹⁶

With respect to the resources and methods of force, it authorized the President "to use all necessary and appropriate force."¹⁷ It is limited with respect to the authorized target in that force is authorized only against those "nations, organizations, or persons" that the President determines

9. Olsen, remarks at The Brookings Institution.

10. Steven Bucci et al., "11 Reasons Why ISIS Might Be More Dangerous Than al-Qaeda," The Daily Signal, August 28, 2014, <http://dailysignal.com/2014/08/28/11-reasons-isis-might-dangerous-al-qaeda/>.

11. Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review*, Vol. 118 (May 2005), p. 2060.

12. *Ibid.*, p. 2062.

13. *Ibid.*, p. 2072, and Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Chicago: University of Illinois Press, 1989), p. 55.

14. Bradley and Goldsmith, "Congressional Authorization and the War on Terrorism," p. 2066.

15. *Ibid.*, p. 2072 (emphasis added).

16. Charles D. Stimson, "Law of Armed Conflict and the Use of Military Force," testimony before the Committee on Armed Services, U.S. Senate, May 16, 2013, <http://www.heritage.org/research/testimony/2013/05/the-law-of-armed-conflict>.

17. Authorization for Use of Military Force, Public Law 107-40.

“planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁸

Note that the AUMF does not name the enemy (e.g., Germany in the declaration of World War II) but rather describes them. Both the Bush and Obama Administrations subsequently determined that the target is al-Qaeda, the Taliban, and persons and forces associated with those organizations.

The purpose of the 2001 AUMF is “to prevent any future acts of international terrorism against the United States.” This use of force authorization is further limited by the law of armed conflict and the rules contained therein.¹⁹ It contains a further restriction in that it requires that the President periodically report to Congress on the status of hostilities, consistent with the War Powers Resolution.²⁰

An AUMF Is Not a Substitute for a Comprehensive Strategy

An authorization for use of military force is not a substitute for a comprehensive strategy to confront and defeat an enemy, whether the enemy is a state actor (i.e., a country) or a non-state actor, such as a terrorist organization.

Only the President, pursuant to Article II, Section 2 of the United States Constitution, is commander in chief of the armed forces. He is legally responsible “to preserve, protect and defend the Constitution of the United States,” as well as the American people, from all enemies, foreign and domestic.

It is the President who, utilizing the vast resources of the executive branch, must assess any threats to our national security and, if they exist, must make the case to the American people and Congress as to how our vital interests are jeopardized by the threat. Then it is the President who must lead by develop-

ing a comprehensive, intelligent strategy to confront and defeat the enemy.

On August 28, 2014, President Obama said, “We don’t have a strategy yet” to defeat ISIS.²¹ The President’s September 10 speech, which was a mere 14 minutes in length, painted in broad strokes the outlines of a comprehensive strategy.

A Framework for Authorization for Use of Military Force Against ISIS²²

First and foremost, Congress must closely analyze whether ISIS could fall under the 2001 AUMF. In other words, given the historical ties between ISIS and al-Qaeda, do they fit into the narrow class of targets that fall under the 2001 AUMF? If they do, as a legal matter, there may be no need for a stand-alone congressional authorization for use of force against ISIS.

Clearly, the Administration, at least for now, believes that the 2001 AUMF offers sufficient legal authority to use military force against ISIS. Their justification, as stated on background by a senior Administration official, is that:

Based on ISIL’s longstanding relationship with al-Qa’ida (AQ) and Usama bin Laden; its long history of conducting, and continued desire to conduct, attacks against U.S. persons and interests, the extensive history of U.S. combat operations against ISIL dating back to the time the group first affiliated with AQ in 2004; **and ISIL’s position—supported by some individual members and factions of AQ-aligned groups—that it is the true inheritor of Usama bin Laden’s legacy**, the President may rely on the 2001 AUMF as statutory authority for the use of force against ISIL, notwithstanding the recent public split between AQ’s senior leadership and ISIL.²³

18. Ibid.

19. Bradley and Goldsmith, “Congressional Authorization and the War on Terrorism,” note 11.

20. Ibid., p. 2082. See also Section 2(b)(1) of Authorization for Use of Military Force, Public Law 107-40. Both Republican and Democratic Presidents have refused to acknowledge the legitimacy of the War Powers Resolution on constitutional grounds, a topic that is beyond the scope of this paper.

21. Jennifer Epstein, “Obama: White House Still Working on ISIL Plan,” *Politico*, August 28, 2014, <http://www.politico.com/story/2014/08/white-house-isil-russia-ukraine-110426.html> (accessed September 16, 2014).

22. See Jack Goldsmith, “A Politically Palatable Authorization to Use Force Against IS [UPDATED],” *Lawfare*, August 27, 2014, <http://www.lawfareblog.com/2014/08/a-politically-palatable-authorization-to-use-force-against-is/> (accessed September 16, 2014), and Harold Hongju Koh, “The Lawful Way to Fight the Islamic State,” *Politico*, August 29, 2014, <http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444.html#.VAoEak2Ybcs> (accessed September 16, 2014).

23. Lederman, “The Legal Theory Behind the President’s New Military Initiative Against ISIL” (emphasis in original).

In other words, ISIS is al-Qaeda, in so many words. In his speech, however, President Obama nevertheless left the door open for further discussions with Congress regarding support for the campaign against ISIS, including, one must surmise, an ISIS-specific AUMF. He stated:

My Administration has also secured bipartisan support for this approach here at home. I have the authority to address the threat from ISIL. But I believe we are strongest as a nation when the President and Congress work together. So I welcome congressional support for this effort in order to show the world that Americans are united in confronting this danger.²⁴

Assuming for the sake of argument that ISIS is not included in the narrow class of targets that fall under the 2001 AUMF, then an AUMF designed specifically to confront and defeat ISIS would be required. Such an AUMF should define in its preamble the vital interests at stake that make the use of U.S. force necessary and make clear that the goal is to protect the homeland and to drive ISIS out of Iraq, thus diminishing the potential for a regional sectarian conflict.

An ISIS-specific AUMF should include the analytical components of a congressional use of force authorization:

- 1. Methods and Resources:** Congress should authorize the use of all necessary and appropriate force.
- 2. Target:** The only targets of this force should be ISIS and any group that might succeed ISIS.
- 3. Purpose:** The goal of the AUMF should be to prevent terrorist attacks by ISIS against the United States and drive ISIS out of Iraq.
- 4. Timing/Procedural Restrictions:** Limitations of the AUMF should include reporting requirements consistent with the War Powers Resolution.

Conclusion

For over a decade, the United States has been in armed conflict with Islamist terrorists. In a variety of organizations and forms, this agile and adaptive enemy continues to wage war against the interests of both the U.S. and its allies. ISIS poses a “direct and significant threat to us” and must be defeated using all necessary means.

The American people support military action against ISIS, and the Administration accordingly must develop a comprehensive, overarching strategy to confront and ultimately defeat this enemy. Working with our partners and allies and the countries in the region that are most affected by ISIS, the United States must do what it traditionally has done: lead.

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24. Barack Obama, “Statement by the President on ISIL,” address to the nation, September 10, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation> (accessed September 16, 2014). See also then-candidate Senator Obama’s comments to the *Boston Globe* in 2007: “History has shown us time and again...that military action is most successful when it is authorized and supported by the Legislative branch.” Charlie Savage, “Barack Obama’s Q&A,” *Boston Globe*, December 20, 2007, <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/> (accessed September 18, 2014).