LOOSE ASSOCIATIONS: MISAPPLICATIONS OF THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

JEFF MEEHAN*

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I. INTRODUCTION

On September 11, 2001, a new enemy confronted the United States. The enemy, al Qaeda, challenged traditional conceptions of wartime combatants. Al Qaeda bore no state affiliation or geographic home base. Its members lived among the community, wore no uniform, and targeted civilians. Al Qaeda was a unique challenger that demanded a unique response. As a result, in 2001, Congress passed the Authorization for Use of Military Force ("2001 AUMF"). This resolution authorized the President to "use all necessary and appropriate force" against the groups responsible for the September 11th attacks.[1] But, after a twenty-year war predicated on its authority, the AUMF has been stretched well beyond this purpose to target groups wholly disconnected from the 9/11 attacks.

The 2001 AUMF was not Congress's first or last act empowering the President to launch military action in the Middle East. Congress passed separate Authorizations for Use of Military Force in 1991 and again later in 2002 to respond to threats posed by Saddam Hussein's regime in Iraq ("1991 AUMF" and "2002 AUMF," respectively).[2] While these other AUMFs remain on the books, recent congressional movement suggests that their repeal is imminent.[3] On March 29, 2023, the Senate passed a bill with bipartisan support that would repeal both the 1991 and 2002 AUMF.[4] Senator Chuck Schumer justified his support of the bill by explaining that "[w]ar powers belong in the hands of Congress, and so we have an obligation to prevent future presidents from exploiting

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[1] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[2] Authorization for Use of Military Force Against Iraq Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3 (1991); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).
[3] A Bill to Repeal Authorizations for Use of Military Force Against Iraq, S. 316, 118th Cong. (2023)
[4] Amy B. Wang, *Senate Votes to Repeal Decades-old Authorizations for Iraq, Gulf Wars*, WASH. POST (updated March 29, 2023), https://www.washingtonpost.com/politics/2023/03/29/senate-iraq-war-repeal-aumf/.

these AUMFs to bumble us into a new Middle East conflict."[5] Given that Iraq has become a "strategic partner" for the United States in the Middle East, there is no reason for the 1991 and 2002 AUMFs to remain in effect.[6] Yet, the irony of Senator Schumer's comments is glaring. So long as the 2001 AUMF remains good law, the President will maintain a broad ability to usurp Congress's war powers and launch attacks against organized groups in the Middle East and beyond.

In this article, I analyze how the President has been able to apply the 2001 AUMF in a manner divorced from its original purpose. I assert that the Executive Branch has found a loophole in its authority. By designating enemies as "associated forces," the President has extended the AUMF's reach to cover groups with only tangential connections to al Qaeda and the Taliban. However, this practice runs contrary to the express intentions of Congress. In Part I, I explain that Congress intentionally sought to limit the reach of the 2001 AUMF to ensure that it was not applied broadly to any terrorist group. I further highlight the ambiguities in the President's defining criteria of associated forces in Part II. In Part III, I assert that these ambiguities have allowed the Executive to misapply the AUMF to groups unaffiliated with the perpetrators of 9/11. In Part IV, I describe how this practice violates the War Powers Resolution. Last, in Part V, I call for a new AUMF to target these specific attenuated groups and offer recommendations for its construction.

II. CRAFTING THE 2001 AUMF

In the immediate aftermath of 9/11, the President maintained that his Commander-in-Chief powers enabled him to respond to the attacks with military force unilaterally.[7] President Bush explained that it was the "longstanding position of the executive branch" that he was constitutionally

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[5] *Id.*
[6] *Id.*
[7] *See* U.S. CONST., art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States").

authorized under Article II to deploy U.S. armed forces in response to domestic attacks.[8] However, by receiving a formal authorization to use force from Congress, the President would receive a "clear statutory mandate to execute the military actions that he deemed necessary."[9] Congress granted the President this statutory authorization in the form of the Authorization for Use of Military Force of 2001 ("AUMF") – a joint resolution passed only three days after the September 11th attacks.[10]

Despite its speedy passage into law, the draft text of the 2001 AUMF suggests that its original scope was open-ended and disconnected from any particular enemy group or nation.[11] After the initial draft was circulated, the 2001 AUMF met intense criticism because of its broad scope.[12] The draft text authorized the use of force to "deter and pre-empt *any* future acts of terrorism or aggression against the United States."[13] If passed, this resolution would have granted the President broad authority to use force against any potential terrorist target or aggressor. It was not limited to actors connected to the September 11th attacks or any attacks against the U.S. Key legislators opposed this measure as an unjustified expansion of military power and advocated for a narrower resolution focused on actors responsible for the 9/11 attacks.[14]

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[8] *See* Press Release, Statement of President George W. Bush, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html; *see also* War Powers Resolution, 50 U.S.C. §§ 1541-48 (2001); 147 CONG. REC. H5632-33 (daily ed. Sept. 14, 2001) (statement of Rep. Peter Defazio) (recognizing that President Bush "already has the authority to respond to the attacks" under the War Powers Resolution).

[9] 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, 72 (2002). By acting under express authorization from Congress, the President's authority would operate "at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). As a result, the President could deploy armed forces with the full weight of federal sovereignty.

[10] RICHARD F. GRIMMETT, CONG. RSCH. SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 3 (2006).

[11] *Id.*

[12] *See id.*

[13] *See id.* (emphasis added).

[14] *Id.; See Senate Oks $40 Billion in Aid, Use of Force*, ASSOCIATED PRESS (Sept. 14, 2001), https://www.deseret.com/2001/9/14/19606533/senate-oks-40-billion-in-aid-use-of-force (discussing Sen. John McCain's goal to "fashion the language so that we don't have another Tonkin Gulf Resolution").

These objections were successful. While the final AUMF does not explicitly name its targets, it requires them to have some nexus to the 9/11 attacks. Specifically, the resolution allows the President 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 organizations or persons."[15] Those who voted for its passage did so with the understanding that it would authorize armed force against a narrow class of combatants. In particular, Rep. Diane Watson carefully explained her understanding that:

> [T]he resolution is not a carte blanche endorsement for the use of force against *any suspected terrorist group anywhere in the world*, but is more narrowly crafted to endorse all necessary and appropriate use of force against nations, organizations, and persons that participated in the attacks that occurred on September 11(emphasis added).[16]

Both al Qaeda and the Taliban were understood to have been "organizations" responsible for the 9/11 attacks.[17] Therefore, they satisfied the requisite nexus prong under the AUMF. By their nature, however, terror groups are fluid; they can rename, rebrand, or realign themselves more easily than a nation-state. Thus, by not naming al Qaeda or the Taliban expressly within the text itself, Congress afforded the AUMF some flexibility in its application.

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[15] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[16] 147 CONG. REC. H5676 (daily ed. Sept. 14, 2001) (statement of Rep. Diane Watson); *see also id.* at H5663 (statement of Rep. Jake Schakowksy) (noting that the final AUMF was "carefully drafted to restrict our response to those we know to be responsible for this atrocity"); *id.* at 5654 (statement of Rep. Lamar Smith) (clarifying that the resolution permitted "using force only against those responsible for the terrorist attacks last Tuesday").
[17] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.").

Notably, the AUMF does not contain any durational or temporal restrictions. This omission was not accidental. Congress contemplated that the AUMF would provide an indefinite mechanism to neutralize the parties responsible for the September 11th attacks.[18] While circumstances –such as eliminating the threat of those responsible for 9/11– may nullify the purpose of the AUMF, the mere passage of time does not invalidate Congress's authorization.[19] The absence of durational restrictions did not go unnoticed. The only member of Congress who voted against the AUMF did so out of concerns that it provided the military "a blank check . . . anywhere, in any country . . . and without time limit."[20]

Additionally, the resolution contains no geographic limitations.[21] The government has successfully advanced the theory that a geographic limit would frustrate the purpose of the AUMF.[22] Without any temporal or geographic limits, any appropriate backstop to the AUMF's application must rest in its "nations, organizations, or persons" elements.

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[18] 147 CONG. REC. S9422-23 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph R. Biden, Jr.) ("[The AUMF] does not limit the amount of time that the President may prosecute this action against the parties guilty for the September 11 attacks.").

[19] Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 72 (2012).

[20] Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. GATE (Sept. 23, 2001), http://www.sfgate.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php.

[21] However, congressional debates suggest that the AUMF was passed with the expectation that it was limited to the use of force abroad. 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.").

[22] Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, *In re* Guantanamo Bay Detainee Litigation, 624 F. Supp. 2d 27 (D.D.C. 2009) (No. 08-0442) (quoting Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005) [hereinafter March 13 Brief] (arguing that such limitations would "unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary").

III. ASSOCIATED FORCES: AMBIGUITY IN APPLICATION

A. Defining "Associated Forces"

Over the last three presidential administrations, the Executive Branch has interpreted the 2001 AUMF to reach groups that have fought alongside or in collaboration with al Qaeda and the Taliban. In the National Defense Authorization Act for Fiscal Year 2012 ("2012 NDAA"), Congress confirmed that the AUMF could authorize force against groups other than al Qaeda and the Taliban.[23] The 2012 NDAA explicitly extended the AUMF to cover any person "who was a part of or substantially supported al-Qa'ida, the Taliban, *or associated forces* that are engaged in hostilities against the United States or its coalition partners."[24]

The term "associated forces" was first used publicly in a 2004 order establishing an administrative process to review Guantanamo Bay detainees' challenges to their detention.[25] Yet, the defining elements of an associated force were not provided. However, the government provided clarification in a 2008 brief supporting the detention of a Uighur detainee in Guantanamo Bay. Under the government's theory, the petitioner was detained because of his connection to the Eastern Turkistan Islamic Movement ("ETIM"), a militant organization engaged in a regional struggle in China.[26] The ETIM maintained ties to and derived resources from al Qaeda, so the government considered it an associated force. The brief asserted that the detention of members of an associated force was justified "by the established laws-of-war concept of 'co-belligerency.'"[27] The *Parhat* case displays one of the first attempts by the Executive to ground the associated force

[23] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1021(a), 125 Stat. 1562 (2011)
[24] *Id.* (emphasis added).
[25] Memorandum from Paul Wolfowitz, Dep. Sec'y of Def, to Gordon R. England, Sec'y of the Navy (July 7, 2004), https://upload.wikimedia.org/wikipedia/commons/8/81/Order_establishing_combatant_status_review_tribunal%2C_July_7%2C_2004.pdf (establishing combatant status review tribunals).
[26] Corrected Brief for Respondent at 33, Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008) (No. 06-1397) [hereinafter *Parhat* Brief].
[27] *Id.*

element of the AUMF in firm legal doctrine. By analogizing to co-belligerents, the government drew upon international legal standards to legitimize the AUMF's extension to associated forces.[28]

The Executive Branch expressly incorporated co-belligerency into its first detailed definition of an associated force.[29] In the government's view, a group must satisfy two conditions to be considered an associated force. First, the "entity must be an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban."[30] Second, the group "must be a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners."[31] Former General Counsel of the Department of Defense, Jeh Johnson, has contended that this test "impose[s] important limits on our ability to act unilaterally," and limits the scope of the AUMF.[32] Initially, this two-pronged test does appear to adequately demarcate groups that can and cannot be brought within reach of the AUMF as associated forces. In application, however, its instructive value is illusory.

1. The "Entered the Fight" Prong

The "entered the fight" prong of the associated force test suggests that a group must directly engage in hostilities against the United States before it can be considered an associated force. However, in practice, the President has seemed willing to accept a lower threshold. In 2015, the Obama administration released a comprehensive list of groups considered associated forces.[33] This list included the "Nusrah Front and, specifically, those members of al Qa'ida referred to as the

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[28] *See* Jeh Johnson, Gen. Counsel, Dep't of Def., Address Before Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) [hereinafter Jeh Johnson Address to Yale Law School]; Hamlily v. Obama, 616 F. Supp. 2d 63, at 74-75 (D.D.C. 2009) ("[T]he government's detention authority also reaches those who were members of 'associated forces'", defining associated forces as "'co-belligerents' as that term is understood under the laws of war.").
[29] Jeh Johnson Address to Yale Law School, *supra* note 28.
[30] *Id. See also* The White House, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations 4 (Dec. 2016).
[31] Jeh Johnson Address to Yale Law School, *supra* note 28.
[32] *Id.*
[33] *See* Stephen W. Preston, Gen. Counsel, Dep't. of Defense, Address to the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11(Apr. 10, 2015).

Khorasan Group in Syria."[34] The Nusrah Front is a Syrian rebel group that has directed violence toward the Syrian government throughout the nation's civil war.[35] At the time, the group had not participated in active attacks against the United States.[36] From the Obama administration's language, it is unclear if the Nusrah Front as a whole was considered an associated force or only its members with more direct ties to al Qaeda.[37] If the Executive did intend to designate the entirety of the Nusrah Front as an associated force, this would suggest that a group could "enter the fight" without first participating in open hostilities against the United States.

Similarly, the Obama administration "decided to deem" the terrorist group al-Shabaab to be "part of the armed conflict that Congress authorized against the perpetrators" of 9/11.[38] Though some al-Shabaab leaders are close affiliates of al Qaeda, the group itself is still ultimately focused on a localized conflict within Somalia.[39] Despite sharing ideology with Al Qaeda, the group has not engaged in hostilities with the U.S. Despite these facts, President Obama authorized an airstrike against al-Shabaab in 2015.[40]

By applying the associated forces theory to the Nusrah Front and al-Shabaab, the Executive has indicated that a group may be brought within the orbit of the associated forces theory before

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[34] *Id.*

[35] *Hay'at Tahrir al-Sham*, Center for International Security and Cooperation (last accessed October 11, 2023), https://cisac.fsi.stanford.edu/mappingmilitants/profiles/hayat-tahrir-al-sham#text_block_19543.

[36] Rebecca Ingber, *Co-belligerency*, 42 YALE J. INT'L L. 67, 82 n. 57 (2017).

[37] *Id.* Since then, executive officials have obfuscated from declaring Nusrah Front leaders to be "legitimate target[s]." *See* Peter Cook, *Press Secretary Peter Cook in the Pentagon Briefing Room,* U.S. DEPT. DEFENSE (Apr. 4, 2016), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/713174/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in/ (distinguishing between targeting a Nusrah Front member closely affiliated with al Qaeda and targeting the Nusrah Front as a group).

[38] Charlie Savage, Eric Schmitt, & Mark Mazzetti, *Obama Expands War with Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html. *See also* CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 274-79 (2015) (discussing internal debates within the Executive Branch over whether to brand al-Shabaab an associated force of al Qaeda).

[39] JAMES R. CLAPPER, DIR. OF NAT. INTEL., WORLDWIDE THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 5 (Feb. 9, 2016), https://www.dni.gov/files/documents/SASC_Unclassified_2016_ATA_SFR_FINAL.pdf.

[40] Letter from the President – War Powers Resolution (Dec. 11, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/12/11/letter-president-war-powers-resolution.

directly attacking the United States.[41] These examples suggest that satisfaction of the "entered the fight" criterion is not required to become an associated force.

2. The "Co-belligerents" Prong

The government's frequent interchangeable use of the terms "associated forces" and "co-belligerents" suggests that the second prong of the associated force test carries greater weight.[42] This is problematic because "co-belligerent" is a vaguely defined term. "Co-belligerent" is a "fairly informal term of identification" typically reserved for state-to-state conflicts.[43] Some evidence does suggest that its meaning has been adapted to refer to parties on the same side of an armed conflict.[44] However, little to no sources in international law have elaborated on the precise preconditions a non-state actor must satisfy to be considered a co-belligerent.[45]

The most instructive sources of the Executive's co-belligerency theory are found in briefs submitted by the government during the Guantanamo Bay habeas litigation.[46] One brief submitted by the government in *Al-Bihani v. Obama* draws upon neutrality law to inform its interpretation of co-belligerency.[47] Jack Goldsmith, the former head of the Office of Legal Counsel during the Bush administration, has lent credence to this interpretation, arguing that neutrality law "principles provide a guide for determining which terrorist organizations are included within the AUMF."[48]

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[41] *See* Ingber, *supra* note 36, at 83 (noting that this conflict is helpful to understand the Executive's authority limits but insufficient to create a hard rule to apply to future cases).
[42] Government's Memorandum of Law in Support of Final Judgement Denying a Permanent Injunction and Dismissing this Action at 6, Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012) (No. 12 Civ. 331); Hamlily v. Obama, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009) ("[A]ssociated forces" "mean[s] 'co-belligerents' as that term is understood under the law of war.").
[43] Ingber *supra* note 36, at 80.
[44] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (excluding "nationals of a co-belligerent state" from the protections of the Convention, so long as "the State of which they are nationals has normal diplomatic representation in the State in whose hands they are").
[45] Ingber, *supra* note 36, at 80-81.
[46] Brief for Appellees at 31, Al-Bihani v. Obama 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051).
[47] *Id.* ("[T]he international law concepts of neutrality and co-belligerency . . . confirm that the 'enemy' in an armed conflict can include the enemy's affiliates.").
[48] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2113 (2005).

Under neutrality law, a "neutral state's fundamental duties are nonparticipation in the conflict and impartiality toward belligerents."[49] According to Goldsmith, a state becomes a co-belligerent "through systematic or significant violations" of neutrality law.[50] Neutrality law can be breached by "participat[ing] in acts of war by the belligerent" and "supply[ing] war materials to a belligerent."[51] However, neutrality law can also be breached by more passive acts such as "permit[ting] belligerents to use its territory to move troops or munitions, or to establish wartime communication channels."[52] The government seems to have adopted Goldsmith's theory that these same principles can be applied in an armed conflict involving non-state actors. By "substantially support[ing]" the Taliban or al-Qaeda in breach of neutrality law, the government consequently contends that a group becomes a co-belligerent.[53]

However, under international law, a violation of neutrality does not transform a state into a co-belligerent.[54] Under neutrality law, a state that violates neutrality *can*, in some instances, become subject to attack in response but does not automatically become a party to the conflict.[55] Instead, only subsequent declarations of war or direct attacks relegate neutrality violators to co-belligerency status.[56] Goldsmith overstates the consequences of a neutrality breach. While a violator of neutrality law *can* become a co-belligerent, this result is far from inevitable.[57] Thus, breaching neutrality law does not instantaneously convey whether a group has "joined with the Taliban or al Qaida" to become a co-belligerent.[58]

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[49] *Id* at 2112.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] March 13 Brief, *supra* note 22, at 2.
[54] Ingber, *supra* note 36, at 90.
[55] *Id.*
[56] *Id.* at 92.
[57] *Id.*
[58] *Parhat* Brief, *supra* note 22, at 30.

The principles of neutrality law offer an unclear and insufficient standard that nonetheless controls co-belligerency status. Such an ambiguous standard has left the co-belligerent prong of the associated forces test undefined. The associated force test lacks precision when read in conjunction with the inconsistent application of the entered the fight prong. The ambiguities of the test leave the President with too much discretion when determining which groups can be considered associated forces.[59]

3. Implications of an Undefined Test

The ambiguities laden throughout the associated forces test leave the scope of the AUMF undefined. The Executive's interpretation of neutrality law has allowed the President to classify virtually any group that has offered support to al Qaeda or the Taliban to be designated a co-belligerent. Though including the first prong suggests an attempt to mitigate this broad authority, the Executive has often ignored it. Therefore, while the test appears to limit an associated force designation to groups who have engaged in active hostilities against the U.S., the Executive Branch has adopted a much lower standard internally.

The current associated force test permits a broad and flexible application of the AUMF. Though the AUMF was initially limited to actors connected to 9/11, the ambiguities of the associated force element have allowed the President to meet evolving terror threats without seeking new congressional authorization. Capitalizing on these statutory ambiguities, the AUMF has been used to authorize force against groups several degrees removed from al Qaeda, with either a noticeably attenuated connection or no discernible connection to the September 11th attacks.

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[59] *See* Harold Hongju Koh, *How to End the Forever War,* YALEGLOBAL ONLINE (May 14, 2013), https://archive-yaleglobal.yale.edu/content/how-end-forever-war (warning against sustaining perpetual "global war on terror").

B. *Misapplication of Associated Forces*

The flexibility of the associated forces test has allowed the Executive to stretch the 2001 AUMF's authority well beyond its original purpose. After 9/11, Congress expressly rejected a broad authorization that would grant the President power to "deter and pre-empt any future acts of terrorism or aggression against the United States."[60] Instead, the AUMF was limited only to actors responsible for the 9/11 attacks – an attempt to cabin the reach of its authority. In 2012, the General Counsel of the Defense Department, Jeh Johnson, envisioned an appropriate end to the 2001 AUMF. He explained that when al Qaeda is "no longer able to attempt to launch a strategic attack against the United States . . . [the United States] should no longer be considered [in] an 'armed conflict against al Qaeda and its associated forces.'"[61]

In an address to the National Defense University in 2013, President Obama suggested that this end goal had been reached. He expressed a desire to "refine and repeal" the AUMF based on his contention that the U.S. must:

> Continue to fight terrorism without keeping America on a perpetual wartime footing . . . . The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP [al Qaeda in the Arabian Peninsula] must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant

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[60] *See* GRIMMETT, *supra* note 10.

[61] Jeh Johnson, Gen. Counsel, Dep't of Def., Speech at the Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012).

> Presidents unbounded powers more suited for traditional armed conflict between nation states.[62]

President Obama's remarks seem to actualize the defeated al Qaeda envisioned by Jeh Johnson.[63] Because al Qaeda had become a "shell of its former self," President Obama conceded that the "unbounded" power conferred to him through the AUMF must be reined in.[64]

Yet, since then, the Executive has repeatedly invoked the 2001 AUMF to target new enemies, including groups with only tangential connections to al Qaeda and the Taliban.[65] The co-belligerency standard underlying the associated force test requires a group to show only some substantial support for al Qaeda. As a result, the Executive has been able to employ the "some substantial support" provision to designate groups with only loose connections to al Qaeda as associated forces.

1. ISIS as an Associated Force

Perhaps the most notorious and easily recognized associated force targeted under the AUMF has been the Islamic State of Iraq and Syria ("ISIS"). The Obama administration initially contended that ISIS was an affiliated faction of al Qaeda.[66] But, in 2018, President Trump affirmed ISIS' status

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[62] President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) [hereinafter Remarks by the President at NDU], https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

[63] Natasha Bertrand & Katie Bo Lillis, *New U.S. Intelligence Suggests al Qaeda Unlikely to Revive in Afghanistan, but Officials Warn ISIS Threat Remains*, CNN (Sept. 8, 2023), https://www.cnn.com/2023/09/08/politics/us-intelligence-al-qaeda-afghanistan/index.html.

[64] Remarks by the President at NDU, *supra* note 62.

[65] Stephen Preston, Gen. Counsel, Dep't of Def., Address to the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015) [hereinafter Preston Address to the ASIL] (revealing the groups to whom the Obama Administration had used force against pursuant to the AUMF in one of the most comprehensive listings of associated forces to date: al Qaeda and the Taliban; "other terrorist or insurgent groups in Afghanistan"; individuals who are part of al Qaeda in Somalia and Libya; al Qaeda in the Arabian Peninsula (AQAP) in Yemen; "Nusrah Front and, specifically, those members of al Qa'ida referred to as the Khorasan Group in Syria"; and ISIL).

[66] *See* Press Secretary Josh Earnest, Press Briefing (Sept. 11, 2014) (asserting that ISIS is an extension of al Qaeda because of their shared origin, ideological ambitions, and decade-long relationship).

as an independent associated force in Executive Order 13823.[67] However, this designation is legally problematic vis-a-vis the 2001 AUMF because ISIS bears no affiliation with nor provides any support to al Qaeda. Rather, ISIS can only be considered an associated force through the broadest interpretation of the associated force test.

ISIS' designation as an associated force relies on the assumption that they "entered the fight" alongside al Qaeda in 2004. Because ISIS originally emerged from a group known as "al Qaeda in Iraq," the Obama administration argued that they still functionally operate as an extension of al Qaeda.[68] By continuing to engage in hostilities with U.S. forces, under this interpretation, ISIS has breached neutrality law and can be considered a "co-belligerent" to al Qaeda. However, this argument cannot hold because ISIS and al Qaeda have severed any partnership they once shared.[69] Al Qaeda's General Command has stated that "ISIS 'is not a branch of the al-Qaeda group . . . [and] does not have an organizational relationship with it and [al-Qaeda] is not the group responsible for their actions."[70] Further distinguishing them, the two groups seek different goals and employ different strategies. For example, al Qaeda's ultimate goal is to "overthrow the corrupt 'apostate' regimes in the Middle East" and declare the United States their primary enemy.[71] Despite this declaration aimed at the United States, in practice, ISIS has instead targeted more regional enemies

[67] Executive Order: Protecting America Through Lawful Detention of Terrorists (Jan. 30, 2018), https://fas.org/irp/offdocs/eo/eo-13823.pdf ("[T]he United States remains engaged in an armed conflict with al-Qa'ida, the Taliban, and associated forces, including with the Islamic State of Iraq and Syria.").
[68] Preston Address to the ASIL, *supra* note 65 ("The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004.").
[69] Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS group in Syria, Iraq*, WASH. POST (Feb. 3, 2014), https://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.
[70] *Id. See also* Daniel L. Byman, *Comparing Al Qaeda and ISIS: Different Goals, Different Targets*, BROOKINGS (Apr. 29, 2015), https://www.brookings.edu/testimonies/comparing-al-qaeda-and-isis-different-goals-different-targets/ (In 2006, "Al Qaeda spokesman Adam Gadahn recommended to Bin Laden that Al Qaeda publicly 'sever its ties' with Al Qaeda in Iraq because of the group's sectarian violence.").
[71] Byman, *supra* note 70.

to create an expansive territorial caliphate.[72] Not only did ISIS play no role in the 9/11 attacks, but they were also actively opposed to the groups that did.[73] While the associated force test is flexible and undefined, designating ISIS as an associated force is a perversion of the AUMF's purpose.

2. Associations of Associated Forces

Defining ISIS as an associated force set a frightening precedent that has introduced the specter of "perpetual warfare" feared by President Obama.[74] As a result of ISIS' designation as an associated force, the Executive has taken the opportunity to extend the reach of the AUMF even further. U.S. forces have since been authorized to target affiliates of ISIS in Libya, Yemen, and Afghanistan (as opposed to just targets located in Iraq).[75] When asked whether the AUMF can be used to authorize force against West African ISIS affiliate Boko Haram during a 2015 Senate hearing, Defense Secretary Ashton Carter answered in the affirmative.[76] Therefore, the AUMF is now being cited as legal authority to target groups with only a mere tertiary link to al Qaeda.

The application of the AUMF to forces such as Boko Haram are particularly alarming. Secretary Carter fell short of labeling Boko Haram as an associated force during his Senate hearing. Instead, he stated that a group need only "engage[] in 'hostilities against the United States or its coalition partner'" to be brought within the scope of the AUMF.[77] This broad interpretation of the

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[72] *Id.* While al Qaeda seeks to target the "far enemies" of the West, in particular, the United States and Western Europe, ISIS instead employs the "near enemy" strategy. As such, ISIS has focused on overthrowing the "apostate" regimes in the Arab world—namely, the Asad regime in Syria and the Abadi regime in Iraq. *Id.*

[73] *See Countering a Resurgent Terrorist Threat in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (April 14, 2022), https://www.cfr.org/report/countering-resurgent-terrorist-threat-afghanistan ("While ISIS-K is a sworn enemy of the Taliban and al Qaeda, its goal is similar to that of al-Qaeda: to establish a pan-Islamic caliphate.").

[74] *See* Remarks by the President at NDU, *supra* note 62.

[75] Harleen Gambhir, *The Next Wave of AUMF Expansion? The Islamic State's Global Affiliates*, LAWFARE (Nov. 13, 2017), https://www.lawfareblog.com/next-wave-aumf-expansion-islamic-states-global-affiliates.

[76] Kate Brannen, *Fighting ISIS Here, There, and Everywhere*, FOREIGN POLICY (March 11, 2015), https://foreignpolicy.com/2015/03/11/fighting-isis-here-there-and-everywhere-aumf/; *But see* Jimmy Gurulé, *Deploying U.S. Armed Forces in Niger is Unlawful*, CNN (Oct. 24, 2017), https://www.cnn.com/2017/10/24/opinions/deploying-us-armed-forces-in-niger-is-unlawful-opinion-gurul/index.html (arguing that the AUMF does not provide the authority "to place American soldiers in Niger to engage in military actions against ISIS fighters").

[77] *Id.*; *see* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1034(3)(b), 125 Stat. 1562 (2011).

AUMF disregards its original 9/11-nexus requirement and actually resembles the resolution originally rejected by Congress in 2001.[78] Presumably, the Administration did not categorize Boko Haram as an associated force because it could not satisfy even the loose conditions of the two-pronged test. Boko Haram is an offshoot of ISIS and has no affiliation with al Qaeda. Instead, they are devoted to a regional struggle to build an Islamic caliphate in West Africa. The Obama administration likely foresaw that any argument that Boko Haram has "joined the fight with al Qaeda" will not survive. By adopting a new standard removed from the associated force test, they avoided the question altogether.

The AUMF is currently used to authorize actions well beyond Congress's intent. The Executive first extended the AUMF's reach by adopting an elastic standard to target associated forces of al Qaeda. However, today, the Executive has abandoned any attempts to tie the AUMF's application to its original purpose. As a result, the U.S. has now found the means to keep America on "perpetual wartime footing."[79]

C. Congressional Oversight

In response, Congress has offered little pushback on the extension of the AUMF to ISIS and affiliated forces. Perhaps in recognition of the strained connection between ISIS and al Qaeda, President Obama requested that Congress explicitly authorize force against ISIS in a resolution separate from the AUMF.[80] Although this resolution would not have limited the AUMF, the President reiterated that his administration "remain[ed] committed" to refining and repealing it.[81] However, this resolution died a "quiet death" on Capitol Hill after a lack of support from both

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[78] *See* GRIMMETT, *supra* note 10.
[79] Remarks by the President at NDU, *supra* note 62.
[80] *See* Draft Joint Resolution to Authorize the Limited Use of the United States Armed Forces Against the Islamic State of Iraq and the Levant (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf.
[81] The White House, Letter from the President – Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant (Feb. 11, 205) [hereinafter Letter Authorizing Force Against ISIS], https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection.

parties.[82] This lack of congressional action may have resulted from a belief that a new AUMF would be meaningless while leaving the 2001 AUMF in place.[83] Because of the broad flexibility of the 2001 AUMF, many congresspersons likely believed that the President could invoke his authority when actions did not fit within the parameters of the ISIS AUMF. More recently, congressional leaders have expressed a desire to repeal the 2001 AUMF.[84] However, no substantive action has so far been taken to limit its authority.

D. Judicial Deference

Like the inaction in Congress, the Article III courts have also displayed routine deference to the President's associated force determinations. During the Bush administration, habeas corpus litigation from Guantanamo Bay detainees was the primary vehicle through which the courts clarified the scope of the AUMF.[85] However, the courts have frequently declined to answer whether a particular group is appropriately classified as an associated force.[86] Additionally, the Obama, Trump, and Biden administrations have not brought any new detainees to Guantanamo Bay. Therefore, courts have not had recent opportunities to decide whether ISIS or ISIS-affiliated groups are appropriately considered associated forces.[87]

However, precedent suggests that a court could lawfully limit an Executive's associated force determination. In *Hamdi v. Rumsfeld*, the Supreme Court held that the AUMF "clearly and

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[82] 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.
[83] *See* Benjamin Wittes, *The Consequences of Congressional Inaction on the AUMF*, LAWFARE (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.").
[84] *See* Lindsey McPherson, *Pelosi Wants New AUMF But Says 'It's Harder Than You Would Think'*, ROLL CALL (Jan. 9, 2020), https://www.rollcall.com/2020/01/09/pelosi-wants-new-aumf-but-says-its-harder-than-you-would-think/.
[85] Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. OF INT'L L. 628, 638 (2016).
[86] *See Parhat*, 532 F.3d at 844 ("We need not decide the precise meaning of the term."); Barhoumi v. Obama, 609 F.3d 416, 423 (D.C. Cir. 2010) (declining to answer whether Abu Zubaydah's militia qualifies as an associated force).
[87] A detained U.S. citizen and purported ISIS member recently appealed to the D.C. Circuit seeking release from military detention in Iraq. However, the question of whether ISIS was lawfully considered an associated force was not presented to the court in that case. Doe v. Mattis, 889 F. 3d 745 (D.C. Cir. 2018).

unmistakably" authorized the detention of an American citizen who fought alongside the Taliban.[88] The Court stated that "there can be no doubt" Congress considered members of al Qaeda and the Taliban to be targets of the AUMF.[89] Central to the lawfulness of Hamdi's detention was the clarity of the congressional intent to use the AUMF to detain combatants captured during the war against al Qaeda and the Taliban in Afghanistan. The plurality stressed the limited reach of its holding and approved only the detention of an American citizen who fell clearly and unmistakably within the AUMF's scope.[90] Therefore, it is possible that a court may find that the AUMF was not intended to target individuals who are members of groups with inadequate connections to al Qaeda. However, because of the large degree of deference the courts have previously shown to the determinations of the Executive on these matters, it is unclear if the court would act as a backstop to this facet of the AUMF.

E. Consequences of Misapplication

Classifying groups with only tangential links to al Qaeda as associated forces have divorced the AUMF from its original purpose. The Obama administration has conceded that the AUMF is "more suited for traditional armed conflict between nations states," and must not be used to perpetuate endless war.[91] Yet, both the Obama and Trump administrations have applied the AUMF so broadly that it can now be used to authorize force against virtually any terrorist group with nominal connections to al Qaeda. According to John Bellinger, a State Department legal advisor during the Bush administration, applying the AUMF to ISIS represents a "dramatic reversal of course" and a "remarkable change in legal position."[92] Instead, he asserts that:

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[88] *Hamdi*, 542 U.S. at 519.
[89] *Id.*
[90] *Id.* at 518.
[91] Remarks by the President at NDU, *supra* note 62.
[92] Molly O'Toole, *Obama's Dramatic Reversal on Bush's Laws of War*, DEFENSE ONE (Sept. 15, 2014), https://www.defenseone.com/policy/2014/09/obamas-dramatic-reversal-bushs-laws-war/94169/.

> This seems to be more of a case where the lawyers have been sent back to the drawing board and told, 'We want to rely on the 2001 AUMF, come up with your best arguments.' So this seems to be more of a political justification, a political decision to rely on the 2001 AUMF, rather than a carefully laid out legal case. And it's politically very convenient because one, the president doesn't have to ask for and get an authorization right now, and two, the War Powers Act wouldn't be triggered.[93]

As the War on Terror enters its second decade, the AUMF is being used to authorize force against groups it was never intended to reach. Al Qaeda no longer poses a substantial threat to national security[94], and the United States has also brokered peace with the Taliban.[95] Though the AUMF anticipated threats to evolve from these two organizations, the Executive has manipulated these parameters to authorize force against organizations with only minimal links to the perpetrators of 9/11. The evolving threat of armed terrorist groups like ISIS and Boko Haram undoubtedly threatens our nation's national security. However, the Executive's current interpretation of the scope of the AUMF goes well beyond those objectives by leaving the President with nearly boundless authority to use force. The Executive's authority is compounded further through the unchecked acquiescence he receives from Congress and the courts. As currently applied, the AUMF serves as an instrument of convenience for the President to pursue terrorist forces under a veil of

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[93] *Id.*
[94] Bruce Ridel, *Al-Qaida Today, 18 Years After 9/11*, BROOKINGS (Sept. 10, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/09/10/al-qaida-today-18-years-after-9-11/
[95] Joint Declaration Between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan, Feb. 20, 2020, https://www.state.gov/wp-content/uploads/2020/02/02.29.20-US-Afghanistan-Joint-Declaration.pdf.

congressional authority. In effect, the AUMF has permitted the President to circumvent his obligations under the War Powers Resolution.

IV. CIRCUMVENTING THE WAR POWERS RESOLUTION

A. Defining the War Powers Resolution

The War Powers Resolution ("WPR") was enacted in 1973 in response to the President's unrestricted use of the military during the Vietnam War.[96] After Congress passed the Gulf of Tonkin Resolution, President Johnson was essentially granted a "blank check" to deploy military force.[97] After the Gulf of Tonkin Resolution was repealed, President Nixon looked to military appropriations as implicit congressional authorization to continue to launch military campaigns in Southeast Asia.[98] The Gulf of Tonkin Resolution, in essence, conferred the President with unilateral military power that contravened Congress's ability to declare war.[99]

The WPR was passed to restore Congress's role in authorizing the use of force abroad.[100] The resolution sought to codify the narrow instances in which a President can introduce the military into armed conflict without congressional approval.[101] President Nixon initially vetoed the WPR,

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[96] ELLEN C. COLLIER & RICHARD F. GRIMMETT, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS & PRACTICE (updated 2019).
[97] *See* Orlando v. Laird, 443 F.2d 1039, 1041-44 (2d Cir. 1971) (concluding that the broad furnishment of manpower and materials of war serves as sufficient congressional action to authorize military activity); *see also* Donald A. Dechert, III, *Perpetual Warfare: Proposing a New Constitutional Amendment for the War Powers*, 52 Val. U. L. Rev. 457, 463 (2018) (noting that Congress "essentially dealt President Johnson a blank check to use the military [in Vietnam]").
[98] *See* Donald A. Dechert, III, *Perpetual Warfare: Proposing a New Constitutional Amendment for the War Powers*, 52 VAL. U. L. REV. 457, 463 (2018).
[99] U.S. CONST. art. I, § 8, cl. 11.
[100] JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL3113, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUNDS AND LEGAL IMPLICATIONS 31 (2014).
[101] *See* 50 U.S.C. § 1541(c) (providing that 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").

stating that its limitations on the Executive were "clearly unconstitutional" and "undermin[ed] foreign policy."[102] Since then, every president since Nixon has maintained the same position.[103]

The WPR has elicited this controversy because of the restrictions it imposes on the President's Commander-in-Chief powers. The resolution requires the President to submit a report to Congress within forty-eight hours after directing the military into an armed conflict without a formal declaration of war.[104] Furthermore, absent Congressional authorization, U.S. military forces must withdraw within sixty days, with a possible extension of thirty days in times of impending danger during withdrawal.[105] However, if Congress provides the President with specific authorization to launch a military operation, the restrictions of the WPR are not invoked.[106] With the passage of the WPR, Congress expressed its belief that these provisions would confine the President's war powers to the constitutional boundaries envisioned by the Founding Fathers.[107]

B. The WPR and the AUMF

The AUMF provides flexible congressional authorization to the President to respond to the enemies responsible for 9/11 in a manner consistent with the WPR.[108] The AUMF states that the resolution "constitute[s] specific statutory authorization within the meaning of . . . the War Powers Resolution."[109] Thus, the AUMF is not restricted by the WPR. Instead, by enacting the AUMF,

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[102] President Richard Nixon, *Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT (Oct. 24, 29173), https://www.presidency.ucsb.edu/documents/veto-the-war-powers-resolution.
[103] RICHARD F. GRIMMETT, CONG. RSCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 6 (2010).
[104] 50 U.S.C. § 1543(a).
[105] *Id.; see* Dechert, *supra* note 98, at 464.
[106] 50 U.S.C. § 1541(c)(2).
[107] *See* War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) ("[I]t is the purpose of this joint resolution to fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities").
[108] Pub. L. No. 107-40 § 2(b)(1), 115 Stat. 224 (2001) ("[N]othing in this resolution supersedes any requirement of the War Powers Resolution."). This language allows the President and Congress to maintain their respective positions on the constitutionality of the WPR, while also finding a legislative vehicle that which both branches can jointly confront terrorist threats to the United States. CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 39-40 (2019) [hereinafter WAR POWERS CONCEPTS AND PRACTICE].
[109] Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(b)(1), 115 Stat. 224 (2001).

Congress substituted the WPR with a specific authorization measure contemplated by the language of the War Powers Resolution itself. As a result, the President is under no obligation to report to Congress when introducing force under the AUMF. Military operations authorized by the AUMF can continue indefinitely past the sixty-day limitation imposed by the WPR.[110]

When President Obama first authorized armed attacks against ISIS, he provided seven reports to Congress pursuant to the WPR.[111] Four of these reports concerned combat-equipped troop deployments with no hostilities active, and three addressed airstrikes directed against ISIS forces.[112] In each of these notifications, President Obama cited no war declaration or legislative authorization for military force but instead relied on his Commander-in-Chief authority.[113]

After providing the first seven reports to Congress, President Obama changed course and began relying on the AUMF to expand the military campaign against ISIS and its affiliates.[114] Because the AUMF provides a legislative basis to use force, the President was not required to make disclosures to Congress, nor subject to the sixty-day withdrawal requirement. Thus, the AUMF has been used as a means for the Executive to engage with new enemy forces without the congressional approval required by the WPR.

Using the AUMF as a basis to authorize force against ISIS and other nebulous associated forces violates the WPR. The WPR demands the automatic withdrawal of armed forces within sixty days unless there is *specific* congressional approval.[115] As explained in Part II, the 2001 AUMF is laden with ambiguities. However, from the AUMF's text, it is clear that its authority applies only to those who "planned, authorized, committed, or aided" the 9/11 attacks.[116] There is no dispute that

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[110] WAR POWERS CONCEPTS AND PRACTICE, *supra* note 108, at 39.
[111] *Id.* at 45-46.
[112] *Id.*
[113] *Id.* at 46-47. These actions underscore the theory that President Obama did not initially consider ISIS to be a legitimate associated force contemplated by the AUMF.
[114] Letter Authorizing Force Against ISIS, *supra* note 81.
[115] 50 U.S.C. § 1544(b) (2013).
[116] Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(b)(1), 115 Stat. 224 (2001).

the 2001 AUMF confers specific congressional approval to the President to direct armed action against al Qaeda and the Taliban. It is clear that Congress understood them to be responsible for the September 11th terror attacks. However, ISIS and its affiliated groups did not even exist in 2001. Therefore, Congress could not have *specifically* approved any force against them by enacting the AUMF. Though labeling these groups as associated forces may provide a veil of congressional approval, these designations are mere smokescreens that block Congress from corralling the President's military power. The AUMF, therefore, serves as a convenient vehicle by which the President can bypass the WPR. As a result, the Executive has been left with nearly unharnessed military authority – an outcome that the WPR was designed to prevent.[117]

C. Three Branch Complicity

The U.S. Constitution envisioned a system of checks and balances to ensure that no branch maintains unrestricted power in any area of governance.[118] This intention was evident in the sections of the Constitution that discuss the war powers. The Founders left Congress with the ability to declare war and fund military operations.[119] This allocation of power was meant to counterbalance the President's Commander-in-Chief power. Therefore, the President's unilateral declaration of hostilities runs contrary to the Constitution.

Currently, however, Congress does not declare war. Instead, Congress has constructed AUMFs under the WPR to delegate its power to the President.[120] By doing so, Congress has abdicated its role in declaring war and ceded the use of military force to the President's discretion.[121] Yet, the AUMF has been shown to confer broad power to the President to enter into new conflicts

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[117] *See supra* text accompanying note 107.
[118] *See* THE FEDERALIST NO. 51 (February 6, 1788).
[119] *See* U.S. CONST. art. I, § 8, cl. 11 (granting only Congress the plenary power to declare war); *id.* § 8, cl. 12 (granting Congress the power to appropriate funds for the military).
[120] *See* Dechert, *supra* note 98, at 482.
[121] *Id.* at 482-483.

against an undefined number of enemies. As a result, enemy forces have been targeted that are not specifically authorized by the AUMF. While undoubtedly alarming, it is unlikely that any of the three branches of government will step in to reinforce the WPR as a backstop to the President's broad military power.

1. The Courts and the AUMF's Scope

The courts will likely decline to restrict the scope of the AUMF under the WPR. Citing separation of powers concerns, courts have repeatedly dismissed litigation that invokes the WPR to challenge the AUMF. Recent litigation has suggested that this trend will continue.

First, the courts have avoided deciding whether the AUMF conforms with the WPR by dismissing suits for lack of standing. In *Smith v. Obama*, a U.S. Army Captain sought a declaration from the court that the military campaign against ISIS is illegal because Congress has not authorized it.[122] Captain Smith asserted that he suffered injury by being deployed to a war that violated his oath to "preserve, protect, and defend the Constitution of the United States."[123] Yet, the D.C. District Court found that Captain Smith's oath of service did not grant him sufficient standing.[124] Similarly, the courts have also found that a plaintiff's status as a citizen and taxpayer is insufficient grounds for standing.[125]

Additionally, members of Congress have also had their own litigation attempts barred because of a lack of standing. When Congresspersons sought an injunction against the President's use of force in Iraq, the courts found that their case was "not fit . . . for judicial review."[126] Instead,

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[122] Smith v. Obama, 217 F. Supp. 3d 283, 285 (D.D.C. 2016).
[123] Complaint for Declaratory Relief, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 1:16-cv-00843).
[124] *Smith*, 217 F. Supp. 3d at 291 ("Plaintiff's bare desire to have this Court determine the legality of President Obama's actions is neither a concrete nor a particularized injury.").
[125] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-28 (1974) (holding that a case was properly dismissed due to the standing requirement, which reservists could not demonstrate as either citizens or taxpayers); *see also* Pietsch v. Bush, 935 F.2d 1278 (2d Cir. 1991) (holding that plaintiff lacked standing despite being a taxpayer).
[126] Doe v. Bush, 323 F.3d 133, 139 (1st Cir. 2003).

the court suggested that their complaints against executive war power decisions should be reserved for debates in the House and Senate.[127]

Next, even if litigants had standing to bring forth a case invoking the WPR, a court would likely dismiss it on other doctrinal grounds. Under the political question doctrine, courts will not review policy decisions more aptly suited for the Executive or Legislative Branch.[128] Courts have traditionally invoked the political question doctrine when asked to review the President's foreign policy decisions, particularly those that concern military force.[129] Thus, the courts are an inappropriate avenue to invalidate the AUMF's continued violations of the WPR. The various doctrinal hurdles that bar these suits from adjudication have relegated any WPR policy adjustment to the other branches' discretion. As a result, the WPR has been rendered dead-letter law.[130]

2. Congress

Clearly, Congress cannot rely on the courts to reimpose WPR restrictions over the AUMF. If truly a political question, then Congress is responsible for restricting any further enlargement of the President's Article II war powers. However, Congress has only halfheartedly made attempts to amend the WPR to police the loopholes utilized by the President. While Congress has modified the WPR to require the President to consult more frequently with Congress, these changes have not yielded results.[131] No congressional declaration has stated explicitly that actions being taken against

[127] *Id.* at 144; *see also* Raines v. Byrd, 521 U.S. 811, 829-30 (1997) (holding that Congress has the congressional forum on its own to express its displeasure with presidential policy, and that such suits are barred by standing and political question doctrines); Kucinich v. Obama, 821 F. Supp. 2d 110, 119, 125 (D.D.C. 2011) (holding that a Congressman lacked standing to challenge President Obama's policy over Libya because the Congressman already had a congressional forum to challenge presidential power).
[128] *See* Baker v. Carr, 369 U.S. 186, 196-200 (1962) (discussing the parameters of the political question doctrine and reiterating that Article III courts may not hear a dispute if they do not have jurisdiction over its subject matter).
[129] *Id.* at 211 (noting that foreign policy decisions "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature"); Orlando v. Laird, 443 F.2d 1039, 1043-44 (2d Cir. 1971) (dismissing a case seeking to limit the President's authority under the Gulf of Tonkin Resolution).
[130] *See* Dechert, *supra* note 98, at 487.
[131] *Id.* at 489.

associated forces are not expressly authorized by Congress. Therefore, Congress does not yet have grounds to dispute the President's authority under the AUMF.

Congress has not only abdicated its war powers to the President through inaction. It is also responsible for expanding the AUMF's reach by actively funding continued military force.[132] The Founders bestowed Congress with the power of the purse – a power that encompasses funding wars and the military.[133] The power to fund military force was reserved for Congress to potentially withhold appropriations for any unauthorized use of force. Instead, Congress has merely acted as a rubber stamp for financing military actions under the AUMF. It would be naïve to overlook the political ramifications of a Congress that ceased funding for troops actively deployed abroad. With political considerations in mind, it is unlikely that a member of Congress would ever vote to take measures that would jeopardize the safety of American soldiers. If a scenario such as this arose, any congressperson who voted to withhold funds would likely face backlash from constituents and colleagues alike.

However, by continuing to fund actions taken under the AUMF, Congress appears to tacitly consent to the President's use of force.[134] The argument can be made that appropriation bills "should not be interpreted to authorize continuing military operations because those appropriations could just as easily be understood as providing resources for men and women already in combat."[135] In fact, interpreting appropriation bills to authorize military force is expressly prohibited by the

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[132] Rebecca Kheel, *Administration: ISIS War Funding Amounts to Authorization*, THE HILL (July 13, 2016), https://thehill.com/policy/defense/287534-administration-isis-war-funding-amounts-to-authorization.
[133] U.S. CONST. art. I, § 8, cl. 12.
[134] *See* Defendant's Memorandum of Law in Support of His Motion to Dismiss, Smith v. Obama, 217 F.Supp.3d 283 (No. 16-843) ("The President has determined that he has the authority to take military action against ISIL, and Congress has ratified that determination by appropriating billions of dollars in support of the military operation."); *see also Orlando*, 443 F.2d at 1042-44 (holding that the Gulf of Tonkin Resolution and subsequent financial appropriations for the Vietnam War equated to Congressional approval).
[135] Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 338 (2000), https://www.justice.gov/file/19306/download.

WPR.[136] However, because Congress has refused to declare actions against associated forces as acts without "specific statutory authorization," the President has been able to find an exception to this provision and infer congressional approval.

As a coequal branch of government, Congress has options. Yet, it must endeavor to exercise them to avoid this inadvertent interpretation of the law. For example, Congress could include a sunset provision in their appropriations bills to phase out military action against specific associated forces. Such a provision would allow troops to be safely withdrawn and American assets to be secured before funds are cut off. Alternatively, Congress could prohibit funds from being used to introduce additional troops. Both of these actions would signal to the Executive that military force used against forces attenuated from the original scope of the AUMF has not been authorized and cannot be continued.

3. The President

The current positions of Congress and the courts leave the President with broad, unchallenged powers. Undoubtedly, the President enjoys the benefits of the routine dismissal of lawsuits challenging the WPR. Because these cases rarely, if ever, have standing, the President can continue deploying the AUMF without judicial interference. Additionally, Congress has allowed the President to monopolize the war powers. Though Congress's power to declare war and control military funding is enshrined in the Constitution, they have failed to invoke these powers to check the Executive. Instead, Congress has routinely allowed the President to expand military offensives without specific authority.

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[136] War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (2012) (emphasis added) ("Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances *shall not be inferred* . . . from any provision of law *including any provision contained in any appropriation Act*.").

The Executive is unlikely to self-regulate and reapportion its power to accord with the spirit of the WPR. As a result, the President has been able to use the AUMF as a blank check to legitimate force against virtually any Islamic terrorist group.[137] The seemingly unlimited scope of the resolution has kept "America on . . . perpetual wartime footing."[138] Though the WPR was initially enacted to reign in the President's similarly broad powers during the Vietnam War, that goal has been undermined by the elasticity of the AUMF. A former legal advisor to President Obama has conceded that the legal grounds of the AUMF "are shakier and less durable than they should be for a sustained conflict."[139] Therefore, a new AUMF should be constructed to resolve the ambiguities of the 2001 AUMF and accord with the War Powers Resolution.

V. RECOMMENDATIONS FOR A NEW AUMF

The most egregious misapplications of the 2001 AUMF stem from the United States efforts to neutralize ISIS and its affiliates. ISIS' designation as an associated force was inappropriate because of the group's strained connections to al Qaeda. However, the threat ISIS poses to the national security of the United States is undeniable. The United States has had success halting the spread of ISIS' caliphate and dismantling their organizational structure.[140] But ISIS is far from defeated.[141] Affiliates of ISIS have sprung up across the globe. These groups have vowed to continue building a caliphate under ISIS' banner.[142] The threat of ISIS will undoubtedly continue to pose a threat to the United States and ally nations for years to come.

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[137] *See supra* text accompanying note 14.
[138] Remarks by the President at NDU, *supra* note 62.
[139] Harold Hongju Koh, *Obama's ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY (Sept. 29, 2014), https://www.justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really/.
[140] Anthony H. Cordesman, *The Real World Capabilities of ISIS: The Threat Continues*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Sept. 9, 2020), https://www.csis.org/analysis/real-world-capabilities-isis-threat-continues.
[141] *Id.*
[142] *Id.*

Thus, a new AUMF should be enacted by Congress that provides specific statutory authorization of military force against ISIS. Issuing an ISIS AUMF would significantly scale back the President's abuse of the 2001 AUMF. By providing an independent AUMF that authorizes force against ISIS, the President will no longer need to rely on illegitimate authority to conduct action against them.

A new ISIS AUMF should be accompanied by a repeal of the 2001 AUMF. If the 2001 AUMF is left in place, the ISIS AUMF would be rendered meaningless. Further, the 2001 AUMF would likely be employed by the President to authorize force against a target not covered by the ISIS AUMF. Since the original targets of the 2001 AUMF have been effectively neutralized, its repeal would be welcomed as a sign of victory. Yet, it would not leave the United States unprotected because of the substituting ISIS AUMF.

The repeal of the 2001 AUMF should be repealed through a sunset provision that requires the military to withdraw from any operations that are currently authorized under the resolution. Once the sunset provision is triggered, Congress should withdraw funding from the operation to ensure compliance. If circumstances exist in a particular theatre that would require a prolonged U.S. military presence, the Executive should seek independent authorization from Congress.

A. Purpose of the ISIS AUMF

The purpose of the ISIS AUMF should be clearly articulated so that it can be unambiguously interpreted when invoked. The new AUMF should allow the President some discretion in determining what force is necessary to defeat the enemy but not afford him unlimited flexibility. While the 2001 AUMF was intended to "prevent any future acts of international terrorism against the AUMF," the ISIS AUMF should be narrower.

Senators Tim Kaine (D-VA) and Jeff Flake (R-AZ) introduced an ISIS AUMF proposal that contained a balanced purpose.[143] In their proposal, the authorization's purpose was limited to protecting U.S. citizens and supporting the military campaigns of "regional partners" to defeat ISIS.[144] Their proposal stated explicitly that the use of "significant United States ground troops" is "not consistent with such purpose," except to protect U.S. citizens.[145] This proposal offers an effective model for the purpose of a new ISIS AUMF. First, it ensures that the United States is not the only nation invested in the fight against ISIS. By cooperating with other nations, the U.S. will be unable to manipulate the new AUMF for its own geopolitical interest and will focus it on the defeat of ISIS. Second, it includes a restraint on introducing ground forces, implying that most support will come from aerial strikes and intelligence. This approach would protect American troops from harm and also prevent the U.S. from becoming an occupying presence.

Last, the ISIS AUMF should also declare consistency with the WPR. The inclusion of this provision recognizes Congress's authority to declare war and simultaneously situates the President as an equal branch when conducting war. This provision was included in all eight of the ISIS AUMFs proposed during the 113th Congress[146] – underscoring the congressional desire to reinforce the weight of the WPR.

B. Scope of the ISIS AUMF

The scope of the new AUMF should be expressly limited to ISIS and its named affiliates. Because the 2001 AUMF did not name specific targets, its scope was left unclear and thus expanded by the Executive beyond the original intent of Congress. Thus, naming specific targets within the

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143 Quinta, Jurecic, *Senators Jeff Flake and Tim Kaine Introduce New AUMF*, LAWFARE (May 25, 2017), https://www.lawfaremedia.org/article/senators-jeff-flake-and-tim-kaine-introduce-new-aumf.
144 MATTHEW C. WEED, CONG. RSCH. SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 6 (2017).
145 *Id.*
146 *Id.* at 23.

new AUMF will ensure that the President does not expand its scope beyond Congress's intent. First, Congress should list ISIS as the primary target in the new AUMF. Explicitly authorizing force against ISIS's main organization will solve the immediate problem of the group's remaining force in Iraq and Syria. However, due to the fluidity of terrorist organizations, remaining ISIS members may instead break into new factions with similar or identical goals.

Therefore, the ISIS AUMF should also authorize force against "subsequent organizations" of ISIS.[147] Proposals for ISIS AUMFs introduced by Rep. Adam Schiff (D-CA) and Sen. Lindsey Graham (R-SC) have mirrored the 2001 AUMF by allowing the President to use force against "associated forces" of ISIS. However, as explained earlier, "associated forces" is a flexible, ambiguous term of art. Relying on the "associated forces" language will once again afford the President the opportunity to unlawfully extend the scope to forces only tangential to ISIS. Instead, using the term "subsequent organization" would imply that a group needs a more immediate connection to ISIS.

Furthermore, the ISIS AUMF should require congressional approval before force is authorized against a subsequent organization. The Executive has historically been hesitant to reveal which groups have been targeted by the 2001 AUMF. This lack of disclosure prevented Congress from overseeing military activity and runs contrary to the intention of the WPR. By including a procedure that requires Congress's permission before extending the ISIS AUMF to a new group, the President will no longer have a "blank check" to perpetuate the conflict. Congress could create a specific committee to hear the President's requests to designate a group as a subsequent organization to ensure a minimal loss of efficiency.[148] Additionally, this committee would be able to offer specific authorization for force against a subsequent organization in order to align with the WPR.

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[147] Gregory A. Wagner, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEM. L. REV. 235, 264 (2015).
[148] *Id.* at 265.

C. Reporting Requirements

Last, similar to the reporting requirements of the WPR, the ISIS AUMF should require the President to regularly submit reports to Congress that contain updates on the progress of the military campaigns. Because the ISIS AUMF and subsequent organization committee decisions should provide specific statutory authorization for the force used by the President, the reporting requirements mandated by the WPR would not be invoked. Yet, lessons from the 2001 AUMF illustrate the importance of a check on the Executive when conducting such an expansive and complex war on terror. Congress should be regularly informed of operations so that it can, in good faith, counterbalance the Commander-in-Chief's decisions and faithfully execute its own power to declare war. These reports will also allow Congress to keep the President within the scope of the ISIS AUMF. By ensuring that the President is acting only to serve the intentions of the ISIS AUMF, Congress will help facilitate a speedier conclusion of hostilities.

VI. CONCLUSION

The ambiguity of the term "associated forces" has allowed the President to apply the 2001 AUMF well beyond its intended purpose. Congress explicitly sought to limit the application of the AUMF to the forces responsible for 9/11. However, the "associated force" element of the AUMF has revealed a convenient loophole. The lack of definitional clarity on an associated force has allowed the President to mold its meaning to cover new threats as they arise without being restrained by congressional restrictions. As a result, the President has secured unharnessed military power under the guise of statutory authority. This conduct cannot continue. While supporters of the 2001 AUMF may find its flexibility to address new threats appealing, this same feature has proved instead to be a bug – inviting more war, death, and economic burdens. If the 2001 AUMF is not repealed, the President may continue manipulating its scope to fit an unauthorized agenda. By

continuing to launch attacks in the name of defeating "associated forces," the United States will continue living in perpetual wartime.