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# Congressional Authorization of the Campaign Against ISIL

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# Congressional Authorization of the Campaign Against ISIL

TYLER SALWAY\*

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In June of 2014, the “Islamic State” (ISIL)<sup>1</sup>, a former al-Qaeda affiliate, seized control of Mosul, a city in northern Iraq close to the border of both Syria and Turkey.<sup>2</sup> Shortly after the seizure of Mosul, the group declared a worldwide caliphate and demanded allegiance from other Islamist groups.<sup>3</sup> Since this declaration, ISIL’s territorial control has rapidly spread across northern Iraq and Syria.<sup>4</sup> In addition to expanding its geographical presence, ISIL has also taken responsibility for a number of terrorist attacks throughout the world—perhaps most notably, the November 2015 Paris attacks.<sup>5</sup>

In response to the emergence of ISIL, the United States began using military force in an attempt to stop the group’s growth. The United States has mostly used strategic airstrikes to attack ISIL, but there has also been some use of special operations

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1. The Islamic State is referred to by a number of different names, the most common being the Islamic State in Iraq and Syria, the Islamic State in Iraq and the Levant, and Daesh (داعش). Faisal Irshaid, *Isis, Isil, IS or Daesh? One Group, Many Names*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-27994277> [https://perma.cc/M8SJ-YL8J]. For the purpose of this Note I will refer to the group as ISIL.

2. Martin Chulov, *Isis Insurgents Seize Control of Iraqi City of Mosul*, GUARDIAN (June 10, 2014), <https://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul> [https://perma.cc/8YE9-EPDC].

3. Matt Bradley, *ISIS Declares New Islamic Caliphate*, WALL ST. J. (June 29, 2014), <http://www.wsj.com/articles/isis-declares-new-islamist-caliphate-1404065263> [https://perma.cc/2D5H-KZJG]; David Ignatius, *How ISIS Spread in the Middle East*, ATLANTIC (Oct. 29, 2015), <http://www.theatlantic.com/international/archive/2015/10/how-isis-started-syria-iraq/412042/> [https://perma.cc/5MR2-W95Y].

4. Ben Piven, *Who, What and Where Is ISIL? Explaining the Islamic State*, ALJAZEERA (Sept. 18, 2014), <http://america.aljazeera.com/articles/2014/9/18/isil-threat-explained.html> [https://perma.cc/XL6F-TZAL].

5. Steve Almasy, Pierre Meilhan & Jim Bittermann, *Paris Massacre: At Least 128 Killed in Gunfire and Blasts, French Officials Say*, CNN (Nov. 14, 2015), <http://www.cnn.com/2015/11/13/world/paris-shooting/> [https://perma.cc/22NC-3H8B].

troops. Additionally, in some instances, the United States has supplied equipment and training to local troops who oppose ISIL.<sup>6</sup> Despite the United States' continued use of force against ISIL, Congress has not granted authorization specifically permitting the executive branch to use military force in response to ISIL's emergence.

In recent military campaigns Congress has typically passed legislation that authorizes the executive's use of military force. For example, Congress passed an authorization for the use of military force (AUMF) following the September 11th attacks in 2001. During his presidency, President Obama requested that Congress pass a new AUMF specifically granting the use of force against ISIL, but Congress failed to enact any specified authorization.<sup>7</sup> President Trump has not renewed Obama's attempt to receive new authorization from Congress, but members of his cabinet have expressed their support for new legislation.<sup>8</sup>

Congress refused to pass Obama's proposed resolution due to differences in beliefs regarding the extent of authorization that should be granted.<sup>9</sup> It is unlikely that any compromise will be made due to the heavy division of opinion among lawmakers, as even members of the same party have differing opinions about the proper parameters for using force against ISIL.<sup>10</sup> Despite the general disagreement regarding the extent of power that should be allocated to the executive, the majority of Congress does support the use of force against ISIL.<sup>11</sup>

In the absence of such an authorization, the Obama administration relied on the AUMF that was passed in 2001 as a response to the September 11th terror attacks (9/11 AUMF).<sup>12</sup> This provision states:

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

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6. Ashley Fantz, *War on ISIS: Who's Doing What?*, CNN (Nov. 27, 2015), <http://www.cnn.com/2015/11/20/world/war-on-isis-whos-doing-what/> [<https://perma.cc/HL6N-V8ZH>]; Eric Messinger, *Congress Appropriates Funds for President to Train Syrian Opposition*, JUST SECURITY (Sept. 19, 2014), <https://www.justsecurity.org/15221/congress-appropriates-funds-president-train-syrian-opposition/> [<https://perma.cc/47FQ-M74L>].

7. Jim Acosta & Jeremy Diamond, *Obama ISIS Fight Request Sent to Congress*, CNN (Feb. 12, 2015), <http://www.cnn.com/2015/02/11/politics/isis-aumf-white-house-congress/> [<https://perma.cc/6DV4-AAYA>].

8. Jeremy Herb, *Mattis, Tillerson Talk Authorizing ISIS War*, CNN (Aug. 2, 2017), <http://www.cnn.com/2017/08/02/politics/mattis-tillerson-isis-war/index.html> [<https://perma.cc/EU25-SN6V>].

9. Acosta & Diamond, *supra* note 7.

10. *Id.*

11. *Id.*; Herb, *supra* note 8.

12. Marty Lederman, *The Legal Theory Behind the President's New Military Initiative Against ISIL*, JUST SECURITY (Sept. 10, 2014), <https://www.justsecurity.org/14799/legal-theory-presidents-military-initiative-isis/> [<https://perma.cc/D9PP-37QK>].

to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>13</sup>

The Obama administration asserted that the 9/11 AUMF has always allowed the President to “address the threat from ISIL” and that President Obama only requested a new AUMF because he “believe[s] we are strongest as a nation when the President and Congress work together.”<sup>14</sup> The Obama administration asserted that ISIL falls within the scope of the 9/11 AUMF under the legal theory that:

[b]ased on ISIL’s longstanding relationship with [al-Qaeda] . . . and continued desire to conduct [*sic*] attacks against U.S. persons and interests . . . and ISIL’s position—supported by some individual members and factions of [al-Qaeda]-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 [al-Qaeda’s] senior leadership and ISIL.<sup>15</sup>

This theory essentially asserts that because ISIL was closely affiliated with al-Qaeda and because ISIL has replaced al-Qaeda as the U.S.’s primary threat in the Middle East, ISIL is effectively the same as al-Qaeda and should be included under the AUMF. The Trump administration has continued to rely on this precedent established by President Obama, as his cabinet members have expressed that the 9/11 AUMF is sufficient to continue the United States’ military campaigns.<sup>16</sup>

Despite this rationalization, a number of law professors and legal scholars have taken the position that the executive branch’s attempt to justify its actions against ISIL by relying on the 9/11 AUMF is improper.<sup>17</sup> The general consensus among those taking this position is that the executive must seek additional authority to fight ISIL through either a new AUMF or another form of congressional approval.<sup>18</sup> While this may be the “legally safer” route to take, it ignores the strong likelihood that President Trump will be left without this type of authorization due to the divided state of Congress.<sup>19</sup> This creates an obvious issue because the interests of the United

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13. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541).

14. Lederman, *supra* note 12.

15. *Id.*

16. Andrew Rudalevige, *Here’s Why the Trump Administration May Actually Want Congress to Pass a New Authorization for Military Force*, WASH. POST (Nov. 20, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/20/heres-why-the-trump-administration-may-actually-want-congress-to-pass-a-new-authorization-for-military-force/?utm\\_term=.05f1ab186a5f](https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/20/heres-why-the-trump-administration-may-actually-want-congress-to-pass-a-new-authorization-for-military-force/?utm_term=.05f1ab186a5f) [<https://perma.cc/23G7-NHLU>].

17. *See, e.g.*, Bruce Ackerman, *The War Against ISIS is Unconstitutional*, LAWFARE (May 5, 2016), <https://www.lawfareblog.com/war-against-isis-unconstitutional> [<https://perma.cc/PTX5-4YU9>].

18. *See, e.g.*, William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J.L. & PUB. POL’Y 509, 512 (2015).

19. Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 974 (2016) (“[W]e are living through a uniquely toxic U.S. domestic political

States—and the rest of the world—are best served by eradicating the threat ISIL poses to worldwide security and stability.

ISIL is perhaps the most dangerous terror organization in the world.<sup>20</sup> Although the exact number of members is not known, it is estimated that the organization has around 20,000 members.<sup>21</sup> At the beginning of 2016, ISIL was responsible for at least 18,800 deaths in Iraq alone.<sup>22</sup> Another dangerous aspect of the organization is its ability to inspire others to commit acts of terror. Outside of Iraq and Syria, 1200 people have died in attacks either inspired or organized by ISIL.<sup>23</sup> For example, the Orlando nightclub shooting that took place in July 2016 is considered an act of terror that was inspired by ISIL.<sup>24</sup>

Recently President Trump and Russian President Vladimir Putin both declared that ISIL has been defeated in Syria<sup>25</sup> and Iraq Prime Minister Haider Al-Abadi announced that the Iraqi Military successfully liberated Iraq from ISIL.<sup>26</sup> Despite the

environment, where interbranch cooperation has been almost entirely stalemated.”). In the past, Congress was unable to pass such legislation leaving President Obama in the gray for years despite the obvious threat posed by ISIL.

20. Andrew Flowers, *Global Terrorism Declined Last Year—But Not in the West*, FIVETHIRTYEIGHT (June 30, 2016), <http://fivethirtyeight.com/features/global-terrorism-declined-last-year-but-not-in-the-west/> [https://perma.cc/WM49-WX8W] (being responsible for over 8000 confirmable deaths, ISIL was the deadliest terror group in 2015); see also Annalise Lekas, Comment, *#ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT’LL. REV. 313, 314 (2015).

21. Harriet Agerholm, *ISIS ‘Decimated’ in Iraq and Syria and Could Have Only 15,000 Fighters Left, US Commander Says*, INDEPENDENT (Aug. 11, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-syria-iraq-fighters-number-us-military-campaign-impact-how-many-soldiers-a7184886.html> [https://perma.cc/2GVZ-SU55].

22. Alastair Jamieson, *ISIS Death Toll: 18,800 Killed in Iraq in 2 Years, U.N. Says*, NBC NEWS (Jan. 19, 2016), <http://www.nbcnews.com/storyline/isis-terror/isis-death-toll-18-800-killed-iraq-2-years-u-n499426> [https://perma.cc/2XJ4-JCK5]. Although incomparable to the loss of human life, it is notable that ISIL has been responsible for the destruction of many historical monuments and sites. Rachel Van Bokkem, *History in Ruins: Cultural Heritage Destruction Around the World*, AM. HISTORICAL ASS’N (Apr. 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/april-2017/history-in-ruins-cultural-heritage-destruction-around-the-world> [https://perma.cc/LNM2-9XQR].

23. Karen Yourish, Derek Watkins, Tom Giratikanon & Jasmine C. Lee, *How Many People Have Been Killed in ISIS Attacks Around the World*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world.html> [https://perma.cc/9DEX-UXVS].

24. Ralph Ellis, Ashley Fantz, Elliott C. McLaughlin & Tim Hume, *Orlando Shooting: What Motivated a Killer?*, CNN (June 14, 2016), <http://www.cnn.com/2016/06/13/us/orlando-nightclub-shooting/> [https://perma.cc/BEE5-YTLX] (explaining that investigators found that the gunman was most likely “self-radicalized” through consumption of “jihadist propaganda” on the internet).

25. Hashem Osseiran, *Has ISIS Really Been Defeated?*, PAC. STANDARD (Dec 21, 2017), <https://psmag.com/news/has-the-demise-of-isis-been-exaggerated> [https://perma.cc/LUK9-AGYA].

26. Haider Al-Abadi (@HaiderAlAbadi), TWITTER (Dec. 9, 2017, 8:00 AM),

success seen during 2017, it is too soon to declare victory while ISIL fighters remain active and the organization maintains control over territory in North Africa and the Middle East.

Even President Trump admits that the fight against ISIL is not over, as the organization has “spread to other areas.”<sup>27</sup> Considering the negative impacts of ISIL on the global community, it is apparent that the security and stability of the United States and its allies rely on our continued efforts to suppress and fully eliminate the organization and its influence.

If an explicit congressional authorization—such as an Islamic State AUMF—is truly required to continue using force against ISIL, the United States faces an ultimatum of fighting an illegal war or remaining idle. This Note proposes an alternative by making the argument that Congress has already approved the executive’s use of force against ISIL.

This Note argues that Congress has already expressly or implicitly authorized the use of force against ISIL through past legislation. I make this argument by applying the existing evidence of authorization of force to the framework laid by *Youngstown*.<sup>28</sup> The argument is two-fold: that the hostilities are expressly authorized under the 9/11 AUMF and that the hostilities are implicitly authorized by congressional appropriations.

In Part I of this note, I outline both the birth and rise of ISIL. I examine the background of the organization in order to illustrate why ISIL falls within the scope of the 9/11 AUMF. Part II of this Note then explains the manners in which Congress has already granted authorization to use force. In Part II.A, I outline how Congress has explicitly authorized the executive to use force against ISIL through the 9/11 AUMF. In Part II.B, I explore how Congress has implicitly authorized the executive to use force against ISIL through appropriations. In Part III, I examine how the avenue used by the Obama administration could be used by President Trump as he continues the campaign against ISIL.

## I. THE BIRTH OF ISIL

In order to understand why ISIL falls within the scope of the 9/11 AUMF, an examination of the history of ISIL is necessary. A common argument against ISIL being covered by the existing AUMF is that it was not Congress’s intent to authorize military action against groups that did not exist at the time the AUMF was passed. This argument assumes a major simplification in the organization’s history: that ISIL

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<https://twitter.com/HaiderAlAbadi/status/939525191637532672>

[<https://perma.cc/NCV4-N982>] (“We announce to the world the liberation of Iraq and the defeat of Daesh”); Eric Levenson & Jomana Karadsheh, *Iraq is ‘Fully Liberated’ from ISIS, Its Military Says*, CNN (Dec. 9, 2017), <http://www.cnn.com/2017/12/09/middleeast/iraq-isis-military-liberated/index.html> [<https://perma.cc/X5W4-3UVF>].

27. Donald Trump, President of the United States, Remarks by President Trump at Signing of H.R. 2810, National Defense Authorization Act for FY2018 (Dec. 12, 2017) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-2810-national-defense-authorization-act-fy2018/> [<https://perma.cc/RKM5-APCY>]).

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

did not exist until after the death of Usama bin-Laden, well after the influence of al-Qaeda began to decline. An exploration into the group's origin and its involvement in United States-Middle Eastern affairs illustrates how these arguments may be misguided.

In 1991, Abu Musab al-Zarqawi<sup>29</sup> founded Jamaat al-Tawhid wa-l-Jihad (JTWJ)—an Islamist group that would later become ISIL.<sup>30</sup> Unlike al-Qaeda, which had the primary goal of defeating the West, JTWJ aimed to overthrow the monarchy established in Jordan and eventually take control of the Levant.<sup>31</sup> Despite the differences in goals, Usama bin-Laden—the leader of al-Qaeda from its formation until his death in 2011—sent al-Zarqawi funding to establish training camps in the region. Bin-Laden would continue sending money for this purpose until the September 11th attacks.<sup>32</sup>

After the September 11th attacks, al-Zarqawi's group fought the United States in Afghanistan alongside al-Qaeda and the Taliban.<sup>33</sup> Following the initial U.S. airstrikes in Afghanistan, al-Zarqawi recruited fighters and mobilized resources to prepare to oppose United States and coalition forces in Iraq.<sup>34</sup> Al-Zarqawi became notorious among other terror leaders in Iraq, eventually becoming the most important contact for all terror organizations in the region.<sup>35</sup>

In 2004, al-Zarqawi swore a pledge of loyalty—known as *bay'ah*<sup>36</sup>—to bin-Laden and changed JTWJ's name to “al-Qaeda in the Land of Two Rivers” or al-Qaeda in Iraq (AQI), which brought the group into the greater al-Qaeda network.<sup>37</sup> Despite

29. Although less widely known than Usama bin-Laden, al-Zarqawi was a high-profile Islamist leader who, *inter alia*, was infamously known for killing Nicolas Berg in a video that resulted in horror across the world. ‘Zarqawi’ Beheaded US Man in Iraq, BBC (May 13, 2004), [http://news.bbc.co.uk/2/hi/middle\\_east/3712421.stm](http://news.bbc.co.uk/2/hi/middle_east/3712421.stm) [<https://perma.cc/2ATP-YEBS>]. He was eventually killed by the United States during an airstrike in 2006. Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, ATLANTIC (June 8, 2006), <http://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/> [<https://perma.cc/4LNW-5B8L>].

30. AARON Y. ZELIN, WASH. INST. FOR NEAR E. POLICY, THE WAR BETWEEN ISIS AND AL-QAEDA FOR SUPREMACY OF THE GLOBAL JIHADIST MOVEMENT 1 (2014), [http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote\\_20\\_Zelin.pdf](http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf) [<https://perma.cc/7277-3THK>].

31. *Id.* The Levant is the region comprised of Israel, Jordan, Lebanon, Palestine, Syria, and southern Turkey (sometimes including Cyprus). Muhammad Ali Siddiqi, *What is the Levant?*, DAWN (June 17, 2014), <http://www.dawn.com/news/1113209> [<https://perma.cc/MLG6-ME6B>].

32. Stanford University, *Mapping Militant Organizations: The Islamic State* (Oct. 23, 2017), <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1> [<https://perma.cc/VZU6-CVA6>].

33. M. J. KIRDAR, CTR. FOR STRATEGIC & INT’L STUDIES, AL QAEDA IN IRAQ 1 (2001), [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/110614\\_Kirdar\\_AlQaedaIraq\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110614_Kirdar_AlQaedaIraq_Web.pdf) [<https://perma.cc/6NN4-Z2GM>].

34. *Id.* at 3.

35. *Id.*

36. NORMAN CIGAR, AL-QAIDA, THE TRIBES, AND THE GOVERNMENT: LESSONS AND PROSPECTS FOR IRAQ’S UNSTABLE TRIANGLE 18 (2015).

37. ZELIN, *supra* note 30, at 2.

being aligned with al-Qaeda, AQI often acted in ways that frustrated al-Qaeda's leadership.<sup>38</sup> Regardless, Al-Zarqawi, by instruction of al-Qaeda leadership, began recruiting to expand the organization's ranks. In early 2006, al-Zarqawi brought several lesser known organizations into the al-Qaeda network.<sup>39</sup> These terror groups, in addition to AQI, aligned into an umbrella organizational structure called "Majlis Shura al-Mujhadein" (MSM).<sup>40</sup> Al-Zarqawi served as the leader of MSM until his death in June 2006.<sup>41</sup> Abu Hamza al-Muhajar was promoted to lead both AQI and MSM after Al-Zarqawi's death.<sup>42</sup>

In October 2006, MSM made an announcement establishing itself as the Islamic State in Iraq (ISI) and appointing Abu Omar al-Baghdadi<sup>43</sup> as its leader.<sup>44</sup> Al-Muhajar<sup>45</sup> then pledged *bay'ah* to al-Baghdadi, fully merging AQI into ISI in the process.<sup>46</sup> Even after al-Zarqawi's death and the establishment of the Islamic State, the group remained a part of the al-Qaeda network, sharing resources and collaborating until 2014 when al-Qaeda severed its ties with what had become ISIL.<sup>47</sup>

Much of ISIL's uprising can be attributed to the unrest in Syria. In the early 2010s, a revolutionary movement known as the "Arab Spring" spread across the Middle East.<sup>48</sup> In 2011, the Arab Spring reached Syria, sparking demonstrations by both Syrian youth and those experiencing economic hardship caused by Syrian President Assad's policy changes.<sup>49</sup> The Syrian government responded with violence in an attempt to quell the demonstrations.<sup>50</sup> The opposite occurred and more Syrians began opposing Assad in light of the extreme measures he took against his citizenry.<sup>51</sup>

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38. *Id.* For example, Usama bin-Laden and Ayman al-Zawahri (the current leader of al-Qaeda) often instructed al-Zarqawi to stop committing acts of violence aimed toward Sunni citizens, to which he refused compliance. *Id.* at 3.

39. *Id.*

40. *Id.*

41. *Id.*

42. Ahmed S. Hashim, *The Islamic State: From al-Qaeda Affiliate to Caliphate*, 21 MIDDLE E. POL'Y COUNCIL 69 (2014).

43. Abu Omar al-Baghdadi was the first leader of the Islamic State of Iraq and was succeeded by Abu Bakr al-Baghdadi al-Husseini al-Qurashi, the first and current leader of ISIL. See Anthony Shadid, *Iraqi Insurgent Group Names New Leaders*, N.Y. TIMES (May 16, 2010), [http://atwar.blogs.nytimes.com/2010/05/16/iraqi-insurgent-group-names-new-leaders/?\\_php=true&\\_type=blogs&\\_r=1](http://atwar.blogs.nytimes.com/2010/05/16/iraqi-insurgent-group-names-new-leaders/?_php=true&_type=blogs&_r=1) [<https://perma.cc/2VNC-NT93>].

44. ZELIN, *supra* note 30, at 2.

45. Abu Hamza al-Muhajar also served as the leader of MSM from June 2006 until October 2006. The position then shifted to al-Baghdadi when the Islamic State in Iraq was declared.

46. ZELIN, *supra* note 30, at 2.

47. *Id.* at 3.

48. For a background of the countries affected by the Arab Spring, see generally *Arab Uprisings*, BBC, <http://www.bbc.com/news/world-middle-east-12813859> [<https://perma.cc/M3V6-QHLH>].

49. CHRISTOPHER PHILLIPS, LONDON SCH. OF ECON., AFTER THE ARAB SPRING: POWER SHIFT IN THE MIDDLE EAST?: SYRIA'S BLOODY ARAB SPRING 38-39 (2012), <http://eprints.lse.ac.uk/43464/> [<https://perma.cc/UN2Y-EETB>].

50. *Id.*

51. *Id.*



Eventually the citizens began rebelling against the Assad regime, resulting in the current civil war.<sup>52</sup> The chaos resulting from the conflict allowed ISIL to take control of a significant portion of Syria, which further spread the group's dominion and influence.<sup>53</sup>

After building support in Syria, ISIL began laying claim to territory in Iraq and Syria. After claiming Mosul in June 2014, ISIL declared a worldwide caliphate and called for the support of other Islamist organizations.<sup>54</sup> At the organization's peak, it controlled about a third of both Syria and Iraq.<sup>55</sup> In early 2017, the group's control had been reduced to 52,700 square kilometers.<sup>56</sup>

In an effort to halt the growth of ISIL, the United States formed an anti-ISIL coalition.<sup>57</sup> Over sixty countries support the coalition, including the countries comprising the European Union and the Arab League.<sup>58</sup> To date, significant progress has been made in the coalition's campaign against ISIL. One year after ISIL declared the worldwide caliphate, the anti-ISIL coalition had led more than 5500 airstrikes against ISIL targets.<sup>59</sup> At the end of 2016, U.S. officials announced that "US-led airstrikes have killed up to 75% of [ISIL] fighters and 180 of its leaders."<sup>60</sup> Although

52. For a brief survey of the Syrian Civil War, see generally Kathy Gilsinan, *The Confused Person's Guide to the Syrian Civil War*, ATLANTIC (Oct. 29, 2015), <http://www.theatlantic.com/international/archive/2015/10/syrian-civil-war-guide-isis/410746/> [https://perma.cc/X4ZX-PNK8].

53. Stephen Zunes, *The U.S. and the Rise of ISIS*, HUFFINGTON POST (Dec. 8, 2015), [http://www.huffingtonpost.com/stephen-zunes/the-us-and-the-rise-of-is\\_b\\_8754584.html](http://www.huffingtonpost.com/stephen-zunes/the-us-and-the-rise-of-is_b_8754584.html) [https://perma.cc/6QDW-KWER].

54. See *supra* notes 1–3 and accompanying text.

55. See Henry Johnsen, *Mapped: The Islamic State Is Losing Its Territory—and Fast*, FOREIGN POL'Y (Mar. 16, 2016), <http://foreignpolicy.com/2016/03/16/mapped-the-islamic-state-is-losing-its-territory-and-fast/> [https://perma.cc/CBV5-J8FH].

56. SETH G. JONES, JAMES DOBBINS, DANIEL BYMAN, CHRISTOPHER S. CHIVVIS, BEN CONNABLE, JEFFREY MARTINI, ERIC ROBINSON & NATHAN CHANDLER, ROLLING BACK THE ISLAMIC STATE 9 (2017), [https://www.rand.org/pubs/research\\_reports/RR1912.html](https://www.rand.org/pubs/research_reports/RR1912.html) [https://perma.cc/6FP7-EQMU]; see also, Rukmini Callimachi (@rcallimachi), TWITTER (Oct. 17, 2017, 5:48 PM), <https://twitter.com/rcallimachi/status/920451475624677377> [https://perma.cc/QC9Z-G4S4] (reporting that ISIL holds only 10,210 square kilometers in Iraq and Syria).

57. Sebastian Payne, *What the 60-Plus Members of the Anti-Islamic State Coalition Are Doing*, WASH. POST (Sept. 25, 2014), [https://www.washingtonpost.com/news/checkpoint/wp/2014/09/25/what-the-60-members-of-the-anti-islamic-state-coalition-are-doing/?utm\\_term=.46cd60eb3ebd](https://www.washingtonpost.com/news/checkpoint/wp/2014/09/25/what-the-60-members-of-the-anti-islamic-state-coalition-are-doing/?utm_term=.46cd60eb3ebd) [https://perma.cc/A6CR-MX5Y].

58. *Id.*

59. Jim Michaels, *Islamic State Recruiting Offsets 15,000 Killed by Airstrikes in Past Year*, USA TODAY (July 29, 2015), <http://www.usatoday.com/story/news/world/2015/07/29/air-campaign-kills-15000-isis-militants-pentagon-iraq-syria/30750327/> [https://perma.cc/R6RD-CAVK].

60. Nicole Gaouette, *Obama has Degraded ISIS. Can Trump Finish the Job?*, CNN (Dec. 14, 2016), <http://www.cnn.com/2016/12/14/politics/isis-degraded-trump-policy/> [https://perma.cc/SR33-UHA8].

the organization's numbers are thinning, the Pentagon has reported that "a lot of work remains" before the conflict with ISIL is concluded.<sup>61</sup>

## II. CONGRESSIONAL AUTHORIZATION

The U.S. Constitution grants Congress the power to declare war.<sup>62</sup> Despite this allocation of power, the Constitution instructs that the President shall be the Commander in Chief.<sup>63</sup> These provisions attempt to balance the power between the two branches by giving the President control of the military, but, generally, requiring authorization from Congress before the military can be used.

The Court explored this balance of powers in *Youngstown Sheet & Tube Co. v. Sawyer*, where Justice Jackson outlined that the level of the President's power fluctuates with "disjunction or conjunction" in relation to congressional power.<sup>64</sup> To illustrate this fluctuation, Jackson described the President's power in three different instances, which he referred to as zones. He outlined that the executive is in the first zone, where its power is at its highest, when "the President acts pursuant to an express or implied authorization of Congress."<sup>65</sup> Continuing, the executive is in the third zone, where its power is at its lowest, "when the President takes measures incompatible with the expressed or implied will of Congress."<sup>66</sup> Finally, in the middle is the second zone, or the "zone of twilight," where "the President acts in absence of either a congressional grant or denial of authority."<sup>67</sup> It is within this zone that the executive may act using its own independent powers because either power has either been distributed to both Congress and the President, or the distribution of powers is unknown.<sup>68</sup>

In order for the President's decision to engage in military action against ISIL to be considered in *Youngstown's* first zone, Congress must have given authorization. Congress, at this time, has not formally declared war against ISIL; however, courts have generally held that such a formal declaration of war is not required.<sup>69</sup> Alternatively, in recent instances Congress has enacted statutes to expressly

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61. *Id.*

62. U.S. CONST. art. I, § 8, cl. 11.

63. U.S. CONST. art. II, § 2, cl. 1.

64. 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring). Although Jackson's opinion is only the concurrence it is treated as the controlling opinion. *See, e.g.*, Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 269 (2010).

65. *Youngstown*, 343 U.S. at 635.

66. *Id.* at 637.

67. *Id.*

68. *Id.*

69. *See, e.g.*, *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) ("[I]t is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval."). In fact, Congress rarely declares war in a formal manner. *Berk v. Laird*, 317 F. Supp. 715, 722 (E.D.N.Y. 1970), *aff'd* sub nom., *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (explaining that in the 159 instances in which U.S. armed forces were used abroad spanning from 1798 to 1945, only six involved a formal declaration of war by any party). Congress has not formally declared war since declaring war on Bulgaria, Hungary, and Romania in 1942. *See* H.R.J. Res. 319, 77th Cong. (1942) (enacted); H.R.J. Res. 320, 77th Cong. (1942) (enacted); H.R.J. Res. 321, 77th Cong. (1942) (enacted).

authorize the use of military force.<sup>70</sup> For example, Congress authorized the Gulf War, the Afghanistan War, and the Iraq War through AUMFs rather than formal declarations of war.<sup>71</sup> While these are means of express authorization, Congress can also implicitly authorize the executive's actions. "The Supreme Court has recognized that, as a general matter, appropriation statutes may 'stand[] as confirmation and ratification of the action of the Chief Executive.'"<sup>72</sup> In this instance, it is possible that Congress has expressly (through the 9/11 AUMF) or implicitly (through appropriations) authorized the executive to use force to combat ISIL. Such authorization would put the executive at its apex of authority to continue the campaign against ISIL.

### A. Express Authorization

On September 12, 2001, the White House proposed a resolution to Congress requesting authorization of the use of force against not only those "nations, organizations, and persons" directly linked to the events of September 11, but also to use any "required action to deter and preempt any future acts of terrorism or aggression against the United States."<sup>73</sup> By proposing this resolution, President Bush seemingly requested that Congress give the executive the authority to engage in armed conflict with terrorist organizations everywhere in the world.<sup>74</sup> Although Congress reeled in Bush's initial resolution from any terrorist anywhere to the comparatively narrower scope of "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," the scope of authorization Congress granted to the executive in the 9/11 AUMF remained broad.<sup>75</sup>

The 9/11 AUMF is an express authorization from Congress, meaning that it places the President in *Youngstown's* first zone where executive power is at its greatest. In order to determine if the 9/11 AUMF can be applied to ISIL, the scope of authorization must first be examined.

#### 1. Methods of Inclusion

At the time the AUMF was passed, Congress had some intelligence regarding the extent of bin-Laden, al-Qaeda, and the Taliban's involvement in and responsibility for the September 11th attacks.<sup>76</sup> Despite this, the AUMF names no specific parties.

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70. The AUMF has become the usual manner of Congressional authorization, rather than a formal declaration of war. Scott M. Sullivan, *Interpreting Force Authorization*, 43 FLA. ST. U. L. REV. 241, 241 (2015).

71. *Id.*

72. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 332 (2000) (citing *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947)).

73. 107 Cong. Rec S.9949 (2001).

74. *See id.*; *see also* Richard F. Grimmett, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, CONGRESSIONAL RES. SERV. (2007).

75. Authorization for Use of Military Force, *supra* note 13.

76. *President Bush Addresses the Nation*, WASH. POST (Sept. 20, 2001),

Instead, Congress used only general nouns regarding “nations, persons, or organizations.”<sup>77</sup> The broad language of this authorization allowed al-Qaeda, the Taliban, and other terror organizations to fall within the scope of the AUMF. This language should include ISIL within the scope of authorization for the reasons discussed in this Part.<sup>78</sup>

The scope of the 9/11 AUMF should be treated as a web that is composed of a center with several strands sprouting outward. The nations, persons, or organizations directly involved in the September 11th attacks are at the center of this web. Naturally, under the 9/11 AUMF the “persons” and “organizations” directly responsible for the September 11th attacks, such as Usama bin-Laden and the “core al-Qaeda group,” fall within the scope of “those persons or organizations” Congress has authorized force against.<sup>79</sup> It is important to note that while most AUMFs have targeted a specific country or countries, the 9/11 AUMF gave authorization to use force against “organizations or persons.”<sup>80</sup> Prior to this particular AUMF, Congress had never given authorization in such a broad manner.<sup>81</sup>

Although not every member of the core al-Qaeda group was directly involved in the September 11th attacks, the AUMF covers these individuals for their membership in the culpable organization.<sup>82</sup> These members are a part of the organization that

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[http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) [<https://perma.cc/MTF5-KF7P>].

77. Authorization for Use of Military Force, *supra* note 13.

78. There are some scholars who argue that the 2002 Iraq AUMF authorizes hostilities against ISIL, at least in Iraq. *See, e.g.*, Jack Goldsmith, *The 2002 Iraq AUMF Almost Certainly Authorizes the President to Use Force Today in Iraq (and Might Authorize the Use of Force in Syria)*, LAWFARE (June 13, 2014), <https://www.lawfareblog.com/2002-iraq-aumf-almost-certainly-authorizes-president-use-force-today-iraq-and-might-authorize-use> [<https://perma.cc/MNA9-HHMN>]. The Obama administration previously asserted that although the 2002 AUMF “is no longer used for any U.S. government activities,” it could be used as authorization to combat ISIL; however, that authorization would be limited to Iraq. Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html> [<https://perma.cc/W6VB-9DFA>].

79. The Obama administration recognized the al-Qaeda organization operating in Pakistan as the “core al-Qaeda” group. The administration defines al-Qaeda’s affiliates as “groups that have aligned with al-Qaeda” and includes al-Qaeda in the Arabian Peninsula, al-Shabaab, al-Qaeda in the Maghreb, al-Qaeda in Iraq, Tehrik-e-Taliban Pakistan, and Lashkar-e-Taiba. In reality, the core al-Qaeda only recognized six al-Qaeda affiliate organizations: al-Qaeda in Iraq, al-Qaeda in the Maghreb, al-Qaeda in the Arabian Peninsula, Jabhat al-Nusra, al-Shabaab, and the Islamic Emirate of the Caucasus. KATHERINE ZIMMERMAN, AEI CRITICAL THREATS PROJECT, *THE AL-QAEDA NETWORK* 11–14 (2013), [http://www.aei.org/wp-content/uploads/2013/09/-the-al-qaeda-network-a-new-framework-for-defining-the-enemy\\_133443407958.pdf](http://www.aei.org/wp-content/uploads/2013/09/-the-al-qaeda-network-a-new-framework-for-defining-the-enemy_133443407958.pdf) [<https://perma.cc/TM2N-CZUN>].

80. RICHARD F. GRIMMET, CRS REPORT FOR CONGRESS: AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY, RS22357, at 4 (2007), <https://fas.org/sgp/crs/natsec/RS22357.pdf> [<https://perma.cc/QJ5T-W7H5>].

81. *Id.*

82. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on*

caused the attacks and would therefore also fall within the center of the web. Considering that the AUMF aimed to “prevent any future acts of international terrorism against the United States by such . . . organizations,”<sup>83</sup> the scope is reasonable because all members of al-Qaeda inherently pose a threat to the United States and its citizens.<sup>84</sup> Using the same reasoning, al-Qaeda members who joined after the attacks are equally dangerous and should be covered by the 9/11 AUMF as well.<sup>85</sup>

Parties that are covered by the AUMF due to their association with al-Qaeda (rather than their membership in the organization) fall on the “strands” of the web. For example, some parties are covered by the AUMF because they “harbored such organizations or persons.” The Taliban is a primary example of such an organization. The Taliban had no direct connection to the September 11th attacks; instead, this organization was implicated because it harbored and provided aid to Usama bin-Laden and al-Qaeda.<sup>86</sup> The Supreme Court confirmed that the Taliban fell within the scope of the 9/11 AUMF in *Hamdi*, when it explained that “[t]here 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.”<sup>87</sup> From this holding, it can be concluded that any “organization that joins al Qaeda in its conflict with the United States, even after September 11th, can be viewed as part of the ‘organization’ against which Congress authorized force.”<sup>88</sup>

Further, courts have held that, “[i]n addition to members of al-Qaeda and the Taliban,” the 9/11 AUMF applies to “members of ‘associated forces.’”<sup>89</sup> The court in *Hamlily* held that a group constitutes an associated force if it is a co-belligerent as defined under the laws of war.<sup>90</sup> Although the court in *Hamlily* determined that the international laws of war should be used to interpret what constitutes an “associated force,” there is no evidence that Congress intended international laws to limit the 9/11 AUMF’s authorization.<sup>91</sup> The Obama administration asserted that in order to be

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*Terrorism*, 118 HARV. L. REV. 2047, 2108 (2005).

83. Authorization for Use of Military Force, *supra* at 13.

84. Bradley & Goldsmith, *supra* note 82, at 2107–17.

85. *Id.* at 2108–09.

86. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

87. *Id.*

88. Bradley & Goldsmith, *supra* note 82, at 2110. *Cf.* CHARLIE SAVAGE, POWER WARS 276 (2015) (explaining that Jeh Johnson held the position that al-Shabaab was not covered by the AUMF because there was not enough evidence to prove that the organization “had joined the broader fight against the United States and its allies”).

89. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74. (D.D.C. 2009). Inclusion of “associated forces” is consistent with congressional intent because it includes groups closely affiliated with al-Qaeda that pose a threat to U.S. security but prevents worldwide authorization of use of force.

90. *Id.*

91. *Al-Bihani v. Obama* 590 F.3d 866, 872 (D.C. Cir. 2010) (relying on the definitions outlined in the Military Commissions Act of 2006 and 2009 to determine if the Plaintiff fell within the scope of the 9/11 AUMF for detainment purposes; these acts apply the AUMF to “those who purposefully and materially support such forces in hostilities against U.S. Coalition partners”).

an associated force, the group must be “(1) an organized, armed group that (2) aligned itself with al-Qaeda, and (3) entered the fight against the United States and its coalition partners.”<sup>92</sup> The position that ISIL is an “associated force” under the 9/11 AUMF has been maintained by the Trump Administration.<sup>93</sup>

## 2. ISIL’s Inclusion Under the 9/11 AUMF

Even in the absence of an ISIL-specific AUMF, President Obama asserted that he had “the authority to address the threat from ISIL” due to the 9/11 AUMF.<sup>94</sup> An application of the AUMF’s scope to ISIL justifies both President Obama and President Trump’s reliance on the 9/11 AUMF to combat ISIL.

The most immediate cause for ISIL’s inclusion under the AUMF would be if the organization holds some responsibility for the September 11th attacks. This methodology will not work because there is no evidence that ISIL (at the time, JTWJ) played any role in the attacks.<sup>95</sup> Regardless, it is still possible that ISIL falls within the AUMF’s initial scope. All members of the al-Qaeda organization fall within the 9/11 AUMF’s authorization, even if they joined al-Qaeda after the September 11th attacks.<sup>96</sup> This may include ISIL in the scope of the AUMF because it joined the al-Qaeda network after the attacks.<sup>97</sup> While this cause for inclusion would work for an organization that merged with al-Qaeda; it does not work for affiliate organizations because their members do not belong to the core al-Qaeda. Therefore, this cause for inclusion is likely insufficient because ISIL never merged with al-Qaeda; meaning that its members did not belong to the core al-Qaeda group.<sup>98</sup>

Although ISIL was a part of the al-Qaeda network, the group was an affiliate organization and not a part of the core al-Qaeda group in Pakistan. While one may argue that every al-Qaeda affiliate organization is implicated in the same manner, this is an incorrect analysis of congressional intent. If every al-Qaeda affiliate fell within the scope of the AUMF, the authorization would reach far outside the Middle East to all areas of the world.<sup>99</sup> By denying President Bush’s initial resolution,

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92. SAVAGE, *supra* note 88, at 275.

93. Letter from Charles Faulkner, Deputy Assistant Sec’y of St. for Reg’l, Glob., and Functional Aff., to Bob Corker, Chairman of the Comm. on Foreign Rel. (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000>, [<https://perma.cc/7MGK-H9CJ>].

94. Lederman, *supra* note 12.

95. Cf. Graham Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT’L L. 377, 381–82 (2012) (explaining why responsibility for the September 11th attacks cannot be attributed to al-Qaeda affiliate groups).

96. Bradley & Goldsmith, *supra* note 82, at 2108.

97. ISIL, under a different name, fought with al-Qaeda in 2001 and officially swore allegiance to al-Qaeda in 2004. See *supra* notes 29–36 and accompanying text.

98. *Id.* There are likely some members of ISIL that at one time were members of al-Qaeda. However, for the purposes of this Note I am arguing that the AUMF should cover ISIL in its entirety rather than specific members.

99. Al-Qaeda affiliates are present in countries from west Africa to east Asia. Additionally, al-Qaeda cells are present in many western countries, including the United States and most of Europe. See *Al-Qaeda*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/para/al-qaida.htm> [<https://perma.cc/KF5T->

Congress made it clear that it did not want to give the executive worldwide authorization to use force against every terror organization.<sup>100</sup> Therefore, such an interpretation would be contrary to Congress's intent when the 9/11 AUMF was passed.

If the 9/11 AUMF includes al-Qaeda affiliates, presumably it would only include those closest to the core al-Qaeda group to avoid worldwide authorization. ISIL would meet this qualifying criterion because it is one of the few organizations that swore allegiance to al-Qaeda *and* was officially recognized by the al-Qaeda core.<sup>101</sup> This may still be a problematic interpretation because the affiliates officially recognized by the al-Qaeda core spread from West Africa to parts of South Asia and Eurasia.<sup>102</sup> Although this may not constitute worldwide authorization, it would grant an authorization to use force against organizations that are unlikely to pose a future security threat to the United States.<sup>103</sup> This is the type of authorization Congress wanted to avoid when it denied Bush's proposed AUMF and implemented the 9/11 AUMF.<sup>104</sup> While authorization in this fashion is possible, relying on an associated force analysis would include ISIL while excluding organizations that have no history with the United States. Therefore, whether ISIL is an associated force must be determined.

When determining whether an organization is an associated force, a functional rather than formalistic approach should be used.<sup>105</sup> This is because there cannot be an exhaustive list of which organizations are considered an associated force.<sup>106</sup> When applying ISIL to the associated force elements outlined by the Obama administration, the organization clearly constitutes an associated force. As previously outlined, a terror organization is considered an associated force if it is "(1) an organized, armed group that (2) aligned itself with al-Qaeda, and (3) entered the fight against the United States and its coalition partners."<sup>107</sup>

ISIL is an organized armed group and it was aligned with al-Qaeda for at least a decade.<sup>108</sup> Additionally, the organization fought against the United States and its coalition partners in Afghanistan in 2001, in Iraq from 2004 to the present day, and in Syria from 2014 to the present day.<sup>109</sup> Furthermore, inclusion of ISIL as an associated force is consistent with the Supreme Court's ruling in *Hamdi*, where the

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100. *See supra* note 75 and accompanying text.

101. *See supra* note 79.

102. *Id.*

103. *See infra* notes 113–14 and accompanying text.

104. *See supra* note 75 and accompanying text.

105. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75. (D.D.C. 2009) ("With respect to the criteria to be used in determining whether someone was 'part of' the 'Taliban or al Qaida or associated forces,' the Court will not attempt to set forth an exhaustive list because such determinations must be made on an individualized basis. But this Court will, by necessity, employ an approach that is more functional than formal, as there are no settled criteria for determining who is a 'part of' an organization such as al Qaeda.").

106. *Id.*

107. SAVAGE, *supra* note 88, at 275.

108. *See supra* notes 29–47 and accompanying text.

109. *Id.*

Court concluded that the Taliban fell within the scope of the 9/11 AUMF because it fought against the United States alongside al-Qaeda.<sup>110</sup> Therefore ISIL should be considered an associated force and should be included within the authorization created by the 9/11 AUMF.

There are a few compelling, but ultimately misguided, arguments against the inclusion of ISIL within the scope of the 9/11 AUMF. The first counterargument is that Congress did not intend to authorize any armed conflict with ISIL because the organization did not exist when the September 11th attacks occurred. This argument is valid only if the name of an organization is the key factor when determining whether a person or organization is included within the scope of authorization. As established, the group, although under a different name at the time, was part of the al-Qaeda network for a decade, supported Usama bin-Laden and al-Qaeda in efforts made against the United States, and still threatens future terror attacks against the United States and its allies. If ISIL had not changed its name in 2014, it would presumably still be covered by the AUMF. To rule that ISIL is not included within the AUMF because it did not “exist” in 2001, would be the equivalent of ruling that an organization does not fall within the scope of the AUMF because it went through a rearrangement of organizational structure.<sup>111</sup> Applying authorizations in this manner would seemingly create a legal loophole where an enemy of the United States could render the U.S. Commander in Chief powerless by simply going through a “rebranding” phase. Ruling groups outside the scope of the AUMF in this manner severely hinders the executive’s ability to “prevent any future acts” by “such organizations” because terror organizations tend to frequently reorganize.<sup>112</sup>

A second counterargument is that interpreting the 9/11 AUMF in this manner could create future wars against unknown enemies in unspecified regions. As the AUMF is currently being used, the authorization cannot be consolidated upon a single group or even into one particular region. Originally the AUMF authorized the use of force in Afghanistan, but it is now being used to authorize force in various countries throughout the Middle East and Africa. For example, in addition to ISIL, the Obama Administration used the AUMF to combat al-Shabaab, a terror organization in Somalia.<sup>113</sup> Al-Shabaab, although dangerous, had no involvement in

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110. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

111. Bradley & Goldsmith, *supra* note 82, at 2111 (“Interpreting the term ‘organization’ to include only groups that at the lowest possible abstraction were responsible for the September 11 attacks would . . . permit the perpetrators of the September 11 attacks to take themselves outside the ambit of the AUMF through the simple mechanisms of changing organizational names or rearranging organizational structure.”).

112. “Congress must have known that the traits of targets would change over time.” Saikrishna Bangalore Prakash, *Military Force and Violence, but Neither War nor Hostilities*, 64 *DRAKE L. REV.* 995, 1023 (2016) (outlining how the targets of authorized force can change over time without further congressional approval).

113. Charlie Savage, Eric Schmitt & Mark Mazzetti, *Obama Expands War with Al Qaeda to Include Shabab in Somalia*, *N.Y. TIMES* (Nov. 27, 2016), <http://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html> [<https://perma.cc/M7TU-XP26>]. *But see* Pierce Rand, *Back to the Congressional Drawing Board: Inapplicability of the AUMF to Al-Shabaab and Other New Faces of Terrorism*, 37 *LOY. L.A. INT’L & COMP. L. REV.* 117 (2015) (explaining the background of Al-Shabaab and the difficulty of applying the 9/11 AUMF).



the September 11th attacks, has weak connections with al-Qaeda, and has not entered into hostilities directly with the United States or its allies.<sup>114</sup> Arguably, if the 9/11 AUMF can be applied to groups such as al-Shabaab, it could be continuously used to authorize hostilities against terror organizations so long as some remote connection to al-Qaeda exists. This cannot be the correct interpretation. However, the inclusion of groups like ISIL in the scope of the 9/11 AUMF is consistent with congressional intent.

By denying President Bush's initial resolution, Congress made it apparent that it did not want to allow the President to use force worldwide in an effort to prevent *any and all* future terror threats. For this reason, the AUMF could not be applied to a terror organization in South America that has no ties to al-Qaeda.<sup>115</sup> It may also be incorrect to apply the AUMF to organizations that have never directly threatened the United States and maintain only loose ties to al-Qaeda. However, the AUMF is being used correctly when it is applied to ISIL due to its deep ties to al-Qaeda and the threat it poses to the United States and its allies.

A final counterargument is that the AUMF, framed to include ISIL, potentially creates a war that could last forever, which could not have been the intent of Congress. The AUMF has already been used to authorize conflict for over a decade and, if left unchecked, could be used well into the future. Because the authorization granted by the 9/11 AUMF continues to change as new threats emerge, there may be no natural end to the hostilities authorized by the AUMF. Although this seems problematic, it is hardly the first time Congress has granted such indefinite authorization. During the Vietnam War Congress passed the Gulf of Tonkin Resolution, which was used as a blanket authorization against conflict in Southeast Asia—the region specified within the resolution.<sup>116</sup> Congress later repealed this resolution because it did not wish to grant such broad authorization.<sup>117</sup> When considering previous legislation, it is apparent that the indefinite nature of the 9/11 AUMF does not undermine its validity, especially because Congress could ultimately repeal the AUMF. The 9/11 AUMF may not be an ideal piece of legislation, but it was written in a way that allows continuation of an indefinite war in various regions.<sup>118</sup>

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114. Rand, *supra* note 113, at 141–46 (arguing that the 9/11 AUMF should not include Al-Shabaab because the group has weak connections to Al-Qaeda and has had little impact on the security of the United States and its allies).

115. For example, a group such as the Revolutionary Armed Forces of Colombia may have fallen under the scope of the AUMF requested by President Bush, but surely falls outside the scope of the AUMF Congress actually passed. See *Who Are the Farc?*, BBC (Nov. 24, 2016), <http://www.bbc.com/news/world-latin-america-36605769> [<https://perma.cc/E5B9-QHA9>].

116. ENCYCLOPEDIA BRITANNICA, GULF OF TONKIN RESOLUTION (1998), <https://www.britannica.com/event/Gulf-of-Tonkin-Resolution> [<https://perma.cc/XF7A-FMLL>].

117. *Id.* Unlike the Gulf of Tonkin Resolution, the 2001 AUMF has not been repealed. In fact, many members of Congress insist that it gives the President the authorization to fight ISIL. Peter Beinart, *Why Won't the GOP Declare War on ISIS?*, ATLANTIC (May 28, 2015), <http://www.theatlantic.com/politics/archive/2015/05/congress-aumf-isis-war/394268/> [<https://perma.cc/8T2U-4KFH>] (explaining that Senate hawks, such as Marco Rubio, believe the 2001 AUMF constitutes authorization for the conflict with ISIL).

118. Samuel Moyn, *Debating the Legacy of the Post-9/11 'Forever War'*, COUNCIL ON

Many claim that the 9/11 AUMF should no longer be in effect because the war against al-Qaeda is over. For an apt comparison, consider the famous Greek myth of Hercules and the Hydra. In this story, Hercules faces a hydra with numerous heads. When Hercules cuts off one of the heads, another grows in its place. It is only after the final head is removed that Hercules can claim he has defeated the hydra.<sup>119</sup> To claim that the AUMF is no longer applicable because Usama bin-Laden is dead or because “al-Qaeda” has lost influence is to pretend that the hydra is somehow a different beast simply because some of the heads have been removed. ISIL has significant connections to al-Qaeda and poses the type of threat Congress wanted to eliminate when enacting the 9/11 AUMF. Therefore, ISIL should fall within the scope of explicit authorization.

### *B. Implicit Authorization*

As previously stated, Congress denied President Obama’s request for new legislation authorizing hostilities with ISIL. While it is true that Congress failed to pass a new AUMF, it is important to note that Congress is not divided on whether force should be used against ISIL. Instead, Congress is divided in deciding how broad or narrow the authorization should be drawn. Senator Rand Paul, joined by several Senate Democrats, wanted the authorization to be limited to the use of force against ISIL in Iraq and Syria.<sup>120</sup> Comparatively, some lawmakers, like Senators Lindsey Graham and John McCain, have expressed support for an AUMF with no limitations on the executive’s actions toward ISIL.<sup>121</sup> Meanwhile, many members of Congress believe that the 9/11 AUMF is sufficient to cover any military action the executive takes in opposition to ISIL.<sup>122</sup>

Further, a fraction of Congress opposes a new AUMF simply because they do not want to face the political consequences of declaring a new war.<sup>123</sup> The political consequences of supporting a war were made obvious by the 2016 election, when many politicians faced scrutiny for approving the Iraq AUMF in 2002.<sup>124</sup> Some

FOREIGN REL. (Sept. 1, 2016), <https://www.cfr.org/expert-roundup/debating-legality-post-911-forever-war> [<https://perma.cc/5795-JYH9>] (criticizing Congress for enacting what is essentially a second Gulf of Tonkin Resolution).

119. Perseus Project, *The Lernean Hydra*, <http://www.perseus.tufts.edu/Herakles/hydra.html> [<https://perma.cc/8RWK-SV9D>].

120. Beinart, *supra* note 117.

121. *See id.*

122. *Id.*

123. Gregory A. Wagner, Note, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEM. L. REV. 235, 259–60 (2015); Aaron Blake, *Donald Trump Declares ‘War’ on ISIS. But Congress Probably Won’t*, WASH. POST (July 15, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/14/donald-trump-wants-congress-to-declare-war-on-isis-it-hasnt-done-that-since-world-war-ii/> [<https://perma.cc/TK55-6HWA>] (explaining that “lawmakers paid a political price for supporting the Iraq war”).

124. *See, e.g.,* Kurtis Lee, *Hillary Clinton Can’t Escape Questions About Her Support for the Iraq War*, L.A. TIMES (Sept. 7, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-1473294427-htmlstory.html> [<https://perma.cc/7HGD-P3LV>].

congressional members have called their colleagues “cowards” for their unwillingness to pass a new AUMF.<sup>125</sup> Regardless of intent, there is an obvious disincentive to passing a new authorization, especially when the opposition to ISIL continues without one.<sup>126</sup>

One might argue that Congress acquiesced to the assertion that the 9/11 AUMF is sufficient by failing to act upon President Obama’s proposed resolution. Failure to act could constitute acquiescence because only a “few of the members of Congress who are refusing to pass a new authorization are also claiming that the president lacks legal authority to take action.”<sup>127</sup> Assuming Congress’s actions do not constitute acquiescence, Congress has authorized the use of force in another manner.

Despite failing to pass a new AUMF, Congress has passed legislation that provides funding for engaging in combat with ISIL. In the 2016 Fiscal Year Spending Bill, Congress allocated 58.6 billion dollars to fund Overseas Contingency Operations and the Global War on Terror.<sup>128</sup> Hal Rogers, the previous chairman of the House Appropriations Committee, indicated that a portion of these funds were for the purpose of “combat[ing] the threat presented by ISIL.”<sup>129</sup> Similar funding was proposed by President Obama and requested by the Department of Defense for the 2017 fiscal year.<sup>130</sup> President Trump continued the request for funding in his first budget blueprint where he asked for an increase of over three billion dollars to be allocated to the campaign against ISIL.<sup>131</sup> Congress responded to these requests in

125. Matt Fuller, *Why Won't Congress Declare War on ISIS?*, HUFFINGTON POST (Dec. 15, 2015), [http://www.huffingtonpost.com/entry/congress-isis-war\\_us\\_566f47cae4b0fcee16f938b](http://www.huffingtonpost.com/entry/congress-isis-war_us_566f47cae4b0fcee16f938b) [<https://perma.cc/T5ZH-VPWZ>].

126. JOHN HART ELY, *WAR AND RESPONSIBILITY* 52 (1993) (“Decisions on war and peace are tough, and more to the point they’re politically risky. Since 1950 Congress has seen little advantage in making them . . .”).

127. Benjamin Wittes, *The AUMF Is Dead. Long Live the AUMF*, LAWFARE (Apr. 14, 2015), <https://www.lawfareblog.com/aumf-dead-long-live-aumf> [<https://perma.cc/769B-FYR4>].

128. Jennifer Bendery, *Congress Just Voted to Fund the War Against ISIS. Did They Authorize It, Too?*, HUFFINGTON POST (Dec. 18, 2015), [http://www.huffingtonpost.com/entry/congress-war-authorization-isis\\_us\\_56743423e4b0b958f656590a](http://www.huffingtonpost.com/entry/congress-war-authorization-isis_us_56743423e4b0b958f656590a) [<https://perma.cc/URH9-GALE>]; *see also* Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, 129 Stat. 2242.

129. Committee Summary by Hal Rogers, FY 2016 Omnibus—Department of Defense Appropriations (2015), [http://appropriations.house.gov/uploadedfiles/12.15.15\\_fy\\_2016\\_omnibus\\_-\\_defense\\_-\\_summary.pdf](http://appropriations.house.gov/uploadedfiles/12.15.15_fy_2016_omnibus_-_defense_-_summary.pdf) [<https://perma.cc/MA85-CBH5>].

130. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2017* (2016); UNITED STATES DEP’T OF DEFENSE, *FISCAL YEAR 2017 BUDGET REQUEST: OVERSEAS CONTINGENCY OPERATIONS BUDGET AMENDMENT* (2016), [http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2017/marchAmendment/FY17\\_March\\_Amendment.pdf](http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2017/marchAmendment/FY17_March_Amendment.pdf) [<https://perma.cc/Y8Y6-HRGU>].

131. Zachary Cohen, *Trump Proposes \$54 Billion Defense Spending Hike*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/16/politics/donald-trump-defense-budget-blueprint/> [<https://perma.cc/39G5-LLY5>].

the 2017 National Defense Act, where it further increased the funding appropriated to fight ISIL and requested details on the executive branch's combat strategy.<sup>132</sup>

The funds Congress has allocated for the purpose of combating ISIL may serve as the authorization needed under a *Youngstown* analysis. In *Youngstown*, Justice Jackson explained that the President's powers are at their highest when the President acts with express or implied authority. In this case Congress, through the means of funding, has authorized, at least implicitly, the President to engage in hostilities against ISIL.

It is well established that "Congress may express approval through the appropriations process."<sup>133</sup> The Supreme Court supports this proposition, as the Court has held in many cases that Congress authorized executive action through appropriations.<sup>134</sup> Prior to the introduction of the War Powers Resolution, Congress "authorized U.S. involvement in armed conflict at least in part through appropriation laws."<sup>135</sup> The reasoning of this policy is logical because Congress would not fund something it does not support.

Although appropriations constituted authorization in the past, the War Powers Resolution seemingly prohibited this practice when it was passed in 1973.<sup>136</sup> On its face, the War Powers Resolution prevents authorization of hostilities through appropriations because it states: "Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred – (1) from any provision of law . . . including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities . . ." <sup>137</sup> However, it is possible that the War Powers Resolution "does not bar later Congresses from authorizing military operations through appropriations," because the Constitution forbids an earlier Congress from binding a later one.<sup>138</sup> If this section of the War Powers Resolution does not bind the current Congress, authorization to use force could be granted through appropriations.

One of the most commonly referenced instance of authorization through appropriations is the Vietnam War. Congress appropriated billions of dollars to

132. National Defense Authorization Act, H.R. 2810, 115th Cong. (2017) (enacted Pub. L. No. 115–91); Trump, *supra* note 27 ("[The resolution] authorizes funding for our continued campaign to obliterate ISIS.").

133. Authorization for Continuing Hostilities in Kosovo, *supra* note 72, at 339.

134. See, e.g., *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (holding that appropriation of funds "stands as confirmation and ratification of the action of the Chief Executive"); see also Authorization for Continuing Hostilities in Kosovo, *supra* note 72, at 332 (outlining instances where the Supreme Court held that Congress authorized executive action through means of appropriation).

135. Authorization for Continuing Hostilities in Kosovo, *supra* note 72, at 333–39 (giving examples where appropriations were used as authorization for hostilities, spanning from hostilities with the Native American tribes to the Vietnam War).

136. See 50 U.S.C. § 1547 (2012).

137. 50 U.S.C. § 1547(a)(1) (2012).

138. Jack Goldsmith, *Congress Is About To Vote On an AUMF Against ISIL, Quietly and Without Debate*, LAWFARE (Dec. 17, 2015), <https://lawfareblog.com/congress-about-vote-aumf-against-isil-quietly-and-without-debate> [<https://perma.cc/H6MS-YZHZ>] (quoting Authorization for Continuing Hostilities in Kosovo, Op. Off. Legal Counsel 332 (Dec. 19, 2000)).

support the Vietnam War without ever actually declaring war. Although a few members of Congress ensured they were not voting “to approve the sending of combat troops into South Vietnam,” Congress continued expanding the draft and appropriating money for the cause.<sup>139</sup> This funding could be—and by supporters was—construed as congressional authorization for the war.<sup>140</sup> In fact, courts even held that the congressional appropriations for the war served as a means of authorization.<sup>141</sup>

Admittedly, using the Vietnam War as an example for implicit authorization is somewhat problematic because it is difficult to determine the true intent of Congress. It is possible that Congress was implicitly authorizing the Vietnam War through appropriations to avoid political consequences. Alternatively, it could be that Congress appropriated funding for the sole purpose of supporting the troops that were already fighting in Vietnam.<sup>142</sup> For example, Senator McGovern, a senator during the Vietnam War, said the following in regard to funding the war: “[I]t involves more [than] the throwing of a rope to a man in the water. We may have cause to question how he got there, but he is there, he is a human being, he is our friend and a member of our family . . . .”<sup>143</sup> Testimonies like this suggest that lawmakers, regardless of their position on the war itself, would continue appropriating funds to support U.S. troops. If the purpose of funding is to ensure American troops remained fully supplied, it is difficult to argue that such appropriations constitute any type of authorization.<sup>144</sup>

However, the conflict with ISIL is significantly different from the Vietnam War, namely because an absence of funding would not put the lives of American troops directly at risk. For the most part, our military efforts against ISIL have been primarily composed of tactical airstrikes.<sup>145</sup> The only ground forces allocated to the campaign against ISIL are the few special operations troops, whose primary purpose is training Syrian rebels and providing support to the Iraqi military.<sup>146</sup> In this

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139. ELY, *supra* note 126, at 27 (internal quotation marks omitted).

140. *Id.*

141. *See, e.g.,* Da Costa v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971) (“[T]here was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution.”).

142. *See e.g.,* Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) (“A Congressman wholly opposed to the war’s commencement and continuation might vote for the military appropriations . . . because he was unwilling to abandon without support men already fighting.”).

143. ELY, *supra* note 126, at 29.

144. *Mitchell*, 488 F.2d at 615.

145. Fantz, *supra* note 6.

146. Michael S. Schmidt & Eric Schmitt, *U.S. Plans to Step Up Military Campaign Against ISIS*, N.Y. TIMES (Apr. 16, 2016), <http://www.nytimes.com/2016/04/17/world/middleeast/us-plans-to-step-up-military-campaign-against-isis.html> [<https://perma.cc/VJ7E-DTLW>]; *see* Dan Lamothe, *There Are Four Times As Many U.S. Troops in Syria As Previously Acknowledged by the Pentagon*, WASH. POST (Dec. 6, 2017), [https://www.washingtonpost.com/news/checkpoint/wp/2017/12/06/there-are-four-times-as-many-u-s-troops-in-syria-as-previously-acknowledged-by-the-pentagon/?noredirect=on&utm\\_term=.6dfc05dcab9b](https://www.washingtonpost.com/news/checkpoint/wp/2017/12/06/there-are-four-times-as-many-u-s-troops-in-syria-as-previously-acknowledged-by-the-pentagon/?noredirect=on&utm_term=.6dfc05dcab9b) [<https://perma.cc/LNK6-QPXE>] (reporting “2,000

instance, if Congress did not appropriate funds the world effort to suppress the threat of ISIL would be heavily undermined, but U.S. troops would not be exposed to heightened danger—at least not to the extent of those fighting in Vietnam—due to the lack of congressional support.

Although appropriations can constitute authorization, it should not be presumed. When considering whether an appropriation statute is a signal of approval or disapproval from Congress, “[t]he whole question depends on the intention of Congress as expressed in the statutes.”<sup>147</sup> In addition to intent, Congress must act with knowledge of the purpose of the funding in order for an appropriation to constitute authorization.<sup>148</sup> In this instance there are several indicators that Congress did have knowledge of—and supported—the purpose of the appropriations.

The first indicator that Congress acted with knowledge is the testimony of the chairman of the House Appropriations Committee.<sup>149</sup> As previously stated, the chairman indicated that a portion of appropriated funds were for the purpose of combating ISIL.<sup>150</sup> Such indications have continued, as spending legislation directly outlines that funds are allocated for the purpose of fighting ISIL.<sup>151</sup> Furthermore, the reasonable use of the funds should also be considered. Funds have been appropriated specifically to engage in hostilities in both Iraq and Syria.<sup>152</sup> It would be unreasonable to conclude that none of the appropriated funds are to be used to engage in hostilities against ISIL—the main force opposing the United States in the region.<sup>153</sup>

A final, but perhaps less clear, indicator is the opinions of the constituents lawmakers have been elected to serve. U.S. citizens have overwhelmingly expressed that the threat of ISIL is one of their top concerns.<sup>154</sup> Due to the fear of ISIL, seventy-one percent of Americans believe that the ability of a terrorist organization to launch an attack on the United States is at least as high as it was on September 11th.<sup>155</sup>

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U.S. troops deployed in Syria”); Mohammed Tawfeeq, *US Will Reduce Troop Levels in Iraq, Baghdad Says*, CNN (Feb. 6, 2018), <https://www.cnn.com/2018/02/06/middleeast/american-troops-iraq-intl/index.html> [https://perma.cc/X2MG-N8LP] (reporting “around 5,200 American forces in Iraq.”).

147. *United States v. Mitchell*, 109 U.S. 146, 150 (1883).

148. ELY, *supra* note 126, at 27 (“If there is no reason to infer that Congress knew what the agency or program in question was about, the fact that it was buried in an appropriations measure is typically not taken to constitute authorization of it.”).

149. *See supra* note 129 and accompanying text.

150. *Id.*

151. *See supra* notes 128–132.

152. Goldsmith, *supra* note 138.

153. *Id.*

154. Bruce Drake & Carrol Doherty, *Key Findings on How Americans View the U.S. Role in the World*, PEW RES. CTR. (May 5, 2016), <http://www.pewresearch.org/fact-tank/2016/05/05/key-findings-on-how-americans-view-the-u-s-role-in-the-world/> [https://perma.cc/97QX-DAPP] (reporting that 80% of Americans consider ISIL a major threat).

155. *15 Years After 9/11, A Sharp Partisan Divide on Ability of Terrorists to Strike U.S.*, PEW RES. CTR. tbl. 1 (Sept. 7, 2016), <http://www.people-press.org/2016/09/07/15-years-after-911-a-sharp-partisan-divide-on-ability-of-terrorists-to-strike-u-s/> [https://perma.cc/9BLM-3MG7]. These concerns may be justified considering that terror attacks in the West increased in 2015. Flowers, *supra* note 20.

Regardless of security concerns, a majority of Americans, regardless of political affiliation, support the campaign against ISIL, and at least half of Americans believe that the United States should be more involved in subduing ISIL.<sup>156</sup> It is a reasonable conclusion that lawmakers have acted on behalf of their constituents by funding the campaign against ISIL, thus giving the President authorization through appropriations.

In the Constitution, there is no required manner by which Congress must “declare war,” meaning that appropriations can serve as authorization.<sup>157</sup> If Congress has knowledge and its intent is obvious, appropriations can be considered evidence of approval.<sup>158</sup> Three factors indicate these requirements have been met: (1) the direct testimony of the chairman of the Appropriations Committee, (2) the appropriation of funds for use of force in a region where ISIL is the major enemy combatant, and (3) the desires of American citizens. Under these conditions it is apparent that Congress used appropriations to authorize the use of force against ISIL.

### III. ISIL AND THE TRUMP PRESIDENCY

Although it has been difficult to predict almost anything about how the Trump administration addresses U.S. foreign policy, it is safe to assume that subduing ISIL will remain on the agenda. During his campaign, President Trump frequently made promises that, if elected, he would eliminate the threat of ISIL.<sup>159</sup> Although there has not been an increase in the use of military force against ISIL, the campaign against ISIL has continued steadily through both the presidential transition and Trump’s first year as President.<sup>160</sup> Trump has also recognized that despite the decline of ISIL’s influence in Iraq and Syria, the group remains a threat because of its presence elsewhere.<sup>161</sup> Based on Trump’s rhetoric and his continuous request for funding to

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156. *U.S. Military Action Against ISIS, Policy Toward Terrorism*, PEW RES. CTR. tbl. 1 (May 4, 2016), <http://www.people-press.org/2016/05/05/4-u-s-military-action-against-isis-policy-toward-terrorism/> [<https://perma.cc/R64T-99RF>] (reporting that 66% of Republicans, 65% of Democrats, and 57% of Independents support the campaign against ISIL). Despite the support for continuing the campaign against ISIL, Americans remain divided on whether ground troops should be committed to combat ISIL. *Id.* at tbl. 4 (reporting that 46% of Americans support using ground troops while 50% oppose their use).

157. *United States v. Castillo*, 34 M.J. 1160, 1164 (N.M.C.M.R. 1992) (“Congress may assent to the waging of war by means other than a formal declaration of war, and what form it chooses to record that assent is within its discretion to decide.”).

158. ELY, *supra* note 126, at 27.

159. *Foreign Policy and Defeating ISIS*, TRUMP-PENCE, <https://www.donaldjtrump.com/policies/foreign-policy-and-defeating-isis> (archived at <https://web.archive.org/web/2016112015440/https://www.donaldjtrump.com/policies/foreign-policy-and-defeating-isis/> [<https://perma.cc/V3LG-JRTN>]).

160. Julian Borger, *Trump’s Claim US Hitting ‘Much Harder’ After NY Attack Not Supported by Data*, GUARDIAN (Nov. 3, 2017), <https://www.theguardian.com/us-news/2017/nov/03/trump-isis-us-new-york-military-data> [<https://perma.cc/LM9K-382V>].

161. Trump, *supra* note 27. Although it seems the Trump administration is relying on the associated forces theory for justification, it has been somewhat vague when explaining why the 9/11 AUMF is sufficient authorization. Rita Siemion, *Trump Administration Says Its Broad Powers Under the 2001 AUMF Are Plenty*, JUST SECURITY (Aug. 2, 2017),

combat ISIL,<sup>162</sup> it seems that he, unsurprisingly, will continue the use of military force against the organization into the indefinite future.

Despite the stark contrast between President Trump and former President Obama's political ideologies, Trump has followed in Obama's footsteps by relying on the 9/11 AUMF as justification for using force against ISIL. Seemingly, the administration is using the same "associated forces" legal theory as its predecessor.<sup>163</sup> Considering that Congress is controlled by Republicans, Trump could have simply requested a new AUMF to authorize hostilities against ISIL.<sup>164</sup> If such a request were made, there exists the possibility that Congress would refuse to pass legislation due to the still-existing disagreement on how much power should be granted to the executive.<sup>165</sup> Trump's cabinet has suggested it would support a new form of authorization being passed, but ultimately contends that the 9/11 AUMF is sufficient authorization.<sup>166</sup>

One concern the Trump administration should have is the possibility of the 9/11 AUMF being repealed. In June 2017 an amendment to the 2018 Defense Appropriations Bill was passed by the House of Representatives' Appropriations Committee that, if enacted, would have repealed the AUMF.<sup>167</sup> The amendment was introduced by Representative Barbara Lee, who argued that the 9/11 AUMF acts as a "blank check" to give the executive unlimited authority.<sup>168</sup> Although the amendment ultimately died in the senate, many lawmakers agreed that it was time to have a vote on a new authorization.<sup>169</sup> It is possible that in the future the 9/11 AUMF will successfully be repealed, which would effectively end any explicit or implicit authorization.<sup>170</sup>

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<https://www.justsecurity.org/43831/trump-administration-broad-powers-2001-aumf-plenty/> [https://perma.cc/3EZY-3QNJ].

162. See, e.g., Tom Vanden Brook, *White House Asks Congress for \$5 Billion Now to Ramp up ISIS Fight*, USA TODAY (Mar. 17, 2017), <https://www.usatoday.com/story/news/politics/2017/03/16/white-house-asks-for-5-billion-to-speed-up-isis-fight/99254510/> [https://perma.cc/A2AZ-Y4LE].

163. See Letter from Charles Faulkner, *supra* note 93.

164. Mark Z. Barabak & Lisa Mascaro, *Republicans Hold the House and Senate, But Will that End the Washington Gridlock, Even with President Trump?*, L.A. TIMES (Nov. 9, 2016), [www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html](http://www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html) [https://perma.cc/BB53-HKCH].

165. It may also be difficult because President Trump does not have the best relationship with many Republican lawmakers. See *id.*

166. Herb, *supra* note 8.

167. Christopher Woody, *Congress May Repeal the Post-9/11 Act the US Military Used to Justify the Fight Against ISIS*, BUS. INSIDER (June 29, 2017), <http://www.businessinsider.com/a-bill-to-repeal-the-aumf-just-passed-2017-6> [https://perma.cc/TNU9-XNG5].

168. *Id.*

169. Connor O'Brien, *Senate Scuttles Rand Paul's War Powers Repeal*, POLITICO (Sept. 13, 2017), <https://www.politico.com/story/2017/09/13/war-powers-aumf-rand-paul-senate-242662> [https://perma.cc/C4QW-F3LH].

170. The threat of this occurring is heightened due to the upcoming midterm elections where new lawmakers will be entering the political arena.



## CONCLUSION

The Constitution generally requires that the President receive authorization from Congress before conducting hostilities against an opposing force. Because Congress has not passed an ISIL specific AUMF or declared war on ISIL, the authorization must come from a different source. The campaign against ISIL is not unconstitutional because Congress has authorized action in two different ways. First, the executive has explicit authorization because ISIL is an associated force of al-Qaeda and therefore falls under the 9/11 AUMF that was passed by Congress in 2001. Second, the executive has implicit authorization because Congress continuously provides funding to the executive for the purpose of conducting hostilities against ISIL, which constitutes an authorization though means of appropriation.

The future of U.S. foreign policy has been somewhat unpredictable since the election of Donald Trump as President. Due to the uncertainty of how Trump will proceed during his presidency, it is hard to estimate how he will continue to combat ISIL, which legal theory he will use to justify his actions, or who the U.S.'s key allies will be in the campaign. Perhaps the only certain future aspect of U.S. foreign policy is that the elimination of ISIL's influence will remain a critical goal of both the United States and its allies.

The constitutionality of the campaign against ISIL is a question that has become increasingly important as most of the U.S. Government refuses to make any type of meaningful decision. In addition to congressional gridlock, the judicial branch has also refrained from providing guidance on the legality of the hostilities.<sup>171</sup> A standstill of these two branches seemingly creates an ultimatum of fighting an unconstitutional war or halting the campaign against ISIL. The second option would be detrimental to the United States and its allies because it would effectively halt the efforts against ISIL, leaving the organization to continue expanding and conducting devastating attacks. Fortunately, Congress has authorized, whether explicitly or implicitly, U.S. military action against ISIL.

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171. *Smith v. Obama*, 217 F. Supp. 3d 283, 304 (D.D.C. 2016) (dismissing the case under the political question doctrine).