

THE ARGUMENT FOR A NEW AND FLEXIBLE AUTHORIZATION FOR THE USE OF MILITARY FORCE

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INTRODUCTION

With the murder of American citizens, the unraveling of opportunities provided by our service members to the people of Iraq, and the potential destabilization of the Middle East, few will argue that the terrorist organization known as the Islamic State (IS) does not pose “a clear and present danger to the national security of the United States.”¹ Accordingly, President Obama has committed his Administration to the objective of “degrade[ing] and ultimately destroy[ing]” IS.² However, this raises the central legal question that occurs whenever our forces are committed to combat: Under what legal authority can the President use military force?

I agree with President Obama’s assertion that he has the constitutional authority to conduct military operations against IS.³

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1. Senator Orrin G. Hatch, Statement on Principles Which Should be Included in an Authorization for the Use of Military Force (Feb. 9, 2015) [hereinafter Statement of Principles for AUMF], *available at* <http://www.hatch.senate.gov/public/index.cfm/2015/2/hatch-speaks-on-national-security-authorization-for-the-use-of-militarized-force> [<http://perma.cc/G3PS-R9B7>].

2. President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation> [<http://perma.cc/ZEG4-X3NM>].

3. Letter from President Barack Obama to the Speaker of the U.S. House of Representatives, John Boehner, and the President Pro Tempore of the U.S. Senate, Patrick Leahy (Sept. 23, 2014) [hereinafter Letter to the Speaker and President Pro Tempore], *available at* <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq> [<http://perma.cc/ZEG4-X3NM>].

In addition to this Article II power, President Obama was appropriate in invoking the 2001 Authorization for the Use of Military Force (2001 AUMF) and the 2002 Authorization for Use of Military Force Against Iraq Resolution (2002 AUMF) as additional bases for using force against IS.⁴

Nevertheless, the President continues to insist on limiting the types of strategies and tactics that can be utilized by our forces against this new enemy.⁵ The Administration's initial policy was to prohibit "boots on the ground" in Iraq and Syria.⁶ With the publication of the President's AUMF proposal, this position appears to have been modified so as to prohibit "the use of the United States Armed Forces in enduring offensive ground combat operations."⁷ Additionally, the President's proposal would cap the new authorization at three years.⁸

The importance of maintaining legal flexibility for the possible use of additional military capabilities against IS was underscored by former Defense Secretary Robert Gates's recent warning that "there will be boots on the ground if there is to be any hope of success in the strategy."⁹ This point was echoed by General David Petraeus in his admonition that defeating IS will take "months and years, not days or weeks."¹⁰

4. *Id.*

5. President Barack Obama, Remarks by the President on Request to Congress for Authorization of Force Against ISIL (Feb. 11, 2015) [hereinafter President Obama's Remarks on AUMF Against ISIL], available at <http://www.whitehouse.gov/the-press-office/2015/02/11/remarks-president-request-congress-authorization-force-against-isil> [<http://perma.cc/HEW4-LG49>]. See also Senator Orrin G. Hatch, Statement on Authorizing the Use of Force Against the Islamic State (Mar. 10, 2015) [hereinafter Statement on AUMF Against IS], available at <http://www.hatch.senate.gov/public/index.cfm/2015/3/senator-hatch-speaks-on-president-obama-s-plan-to-fight-isis> [<http://perma.cc/794E-2SF9>]; Senator Orrin G. Hatch, *To Defeat the Islamic State, Give Our Forces the Flexibility They Need* (forthcoming May 2015).

6. Mark Landler, *A White House Position that stands on a Narrow Definition of War*, NY TIMES, Sept. 18, 2014, http://www.nytimes.com/2014/09/19/us/politics/19post.html?_r=0 [<http://perma.cc/G6JQ-L6RG>].

7. See President Obama's Draft AUMF (Feb. 11, 2015), available at http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf [<http://perma.cc/P35F-LMAG>].

8. See *id.*

9. See Kristina Wong, *Robert Gates: Obama will need ground troops*, THE HILL, Sept. 17, 2014, <http://thehill.com/policy/defense/218003-robert-gates-troops-needed-to-defeat-isis> [<http://perma.cc/J2KF-N2AZ>].

10. Francesca Chambers, *Top general stands by claim that US boots on ground could be needed to destroy ISIS saying: 'I will recommend . . . what it takes to destroy ISIS'*, DAILY MAIL (Sept. 26, 2014, 2:23 PM), <http://www.dailymail.co.uk/news/article-2771158/I->

But just as the President appears to have changed his position from a policy of prohibiting “boots on the ground” to not authorizing an “enduring offensive ground combat operation,”¹¹ the Administration has on a number of occasions revised its interpretation of the existing AUMFs over the past two years.¹² This fluctuation could lead to questions as to the legitimacy of using the 2001 and 2002 AUMFs as the basis for the use of force against IS. Though the President has ample war powers to confront IS, Congress should follow the President’s adjure¹³ and enact a third AUMF to address any lingering concerns and ensure there is no legal doubt that our military has maximum flexibility to eliminate IS. However, it is of vital importance that any new AUMF not create the artificial and potentially harmful limitations which are unfortunately a hallmark of the President’s proposal.¹⁴

stand-statement-Top-military-general-Dempsey-says-ll-recommend-ground-troops-defeat-ISIS-necessary.html [http://perma.cc/ZD4K-FRUD]. In addition, noted defense analyst Loren Thompson has stated: “We already know that air power and sea power can’t get at adversaries who have sought sanctuary among civilians unless they are backed up by ground forces—or our leaders elect to kill thousands of hapless noncombatants as they root out the enemy.” Loren Thompson, *Five Reasons America’s Army Won’t Be Ready for the Next War*, FORBES (Oct. 14, 2014, 10:43 AM), <http://www.forbes.com/sites/lorenthompson/2014/10/14/five-reasons-american-army-wont-be-ready-for-the-next-war/> [http://perma.cc/SF23-8PP9].

11. See President Obama’s Draft AUMF, *supra* note 7.

12. See Robert Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INSTITUTION, at 6 (Feb. 25, 2013), available at <http://www.hoover.org/research/statutory-framework-next-generation-terrorist-threats> [http://perma.cc/L58A-U8BV]; Harold Hongju Koh, *Obama’s ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY, Oct. 8, 2014, <http://justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really/> [http://perma.cc/3FDS-DMPR]; Molly O’Toole, *Obama’s Dramatic Reversal on Bush’s Laws of War*, DEFENSEONE, Sept. 15 2013, <http://www.defenseone.com/politics/2014/09/obamas-dramatic-reversal-bushs-laws-war/94169/> [http://perma.cc/723B-DAZX]; Charles Stimson, *A Framework for an Authorization for Use of Military Force Against ISIS*, HERITAGE FOUNDATION, 2 (2014) (Backgrounder No. 2957), available at thf_media.s3.amazonaws.com/2014/pdf/BG2957.pdf [http://perma.cc/J63D-TPXW].

13. President Obama, Remarks by the President in State of Union Address (Jan. 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [http://perma.cc/FT99-WA5S].

14. See President Obama’s Draft AUMF, *supra* note 7. See also Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Senator James Inhofe, Statement on the Need for an AUMF (Feb. 9, 2015), available at <http://www.inhofe.senate.gov/newsroom/press-releases/inhofe-delivers-floor-speech-on-the-need-for-an-aumf> [http://perma.cc/85H6-BSM9].

Accordingly, this Article argues for the adoption of a third AUMF, but for one unencumbered by the shortcomings of the President's draft sent to Congress on February 11. Instead, Congress should enact the 113th Congress's Senate Joint Resolution 43 (S.J. Res. 43),¹⁵ which complements but does not replace the 2001 and 2002 AUMFs. Though the President has ample war powers to confront IS without a new authorization, adoption of S.J. Res. 43 will eliminate any ambiguity as to the nation's resolve to conduct operations against IS.¹⁶ Equally important, the adoption of either piece of legislation will preclude any politically-motivated legal restrictions regarding "time, geography, and type of forces," which unnecessarily jeopardize the goal of eliminating IS and needlessly add to the risks faced by the U.S. Armed Forces.¹⁷ Part I of this Article describes the constitutional and statutory history of the President's war powers and the benefits of an AUMF. Part II discusses the ambiguity caused by the Administration's continuing policy revisions regarding the 2001 and 2002 AUMFs. Part III argues for the enactment of a third AUMF and prescribes both the structure and necessary elements of such legislation. As part of the discussion of what components should be part of the new AUMF, this article argues that S.J. Res. 43, rather than the President's draft, meets the requirements of what provisions should be included in this third authorization.

I. HISTORICAL AND LEGAL CONTEXT

Though only sixteen words, Article II, Section 2 of the U.S. Constitution conveys broad war powers upon the President, even without congressional authorization.¹⁸ Yet, how does a clause providing that "[t]he President shall be commander in chief of the Army and Navy of the United States" authorize the President to commit our armed forces in combat overseas?¹⁹

15. S.J. Res. 43, 113th Cong. (2014). This bill was authored by Senator James M. Inhofe (R-OK). He was then Ranking Member of the Senate Armed Services Committee.

16. See Hatch, *To Defeat the Islamic State*, *supra* note 5.

17. See Hatch, Statement on AUMF Against IS, *supra* note 5; Chesney et al., *supra* note 12; Inhofe, *supra* note 14.

18. See U.S. CONST. art. II, § 2, cl.1, subcl. 1.

19. *Id.*

The Constitution does not spell out the President's war powers.²⁰ Therefore, these war powers "must inhere in the Commander-in-Chief Clause and the judicial and executive glosses on it."²¹ Accordingly, to better decipher what these specific powers are, Stephen Dycus dissects the President's power into three specific categories.²² The President's "customary war powers" are defined as those powers of the President that have been "acquired by consistent practice with congressional acquiescence."²³ Simply put, in our nation's history the President has exercised necessary and inherent authority to deploy U.S. forces abroad, many times in combat, without the authorization of Congress.²⁴

Supporting this historical precedent argument, Dycus lays out a variety of sources supporting his contention that congressional acquiescence has given the President broad war powers. Dycus cites a Congressional Research Report which concludes that "[a]lthough we have formally declared war only 11 times in our history, we had used armed force abroad on more than 300 occasions through 2004."²⁵ In addition, Dycus also invokes a writing of Leonard Meeker, a former Vietnam-era Legal Advisor to the State Department, who "inferred from 125 prior congressionally unauthorized uses of armed forces abroad that the President had the 'power to deploy American forces abroad and commit them to military operations when [he] deems such action necessary to maintain the security and defense of the United States."²⁶ Finally, Dycus cites a law review article from noted constitutional law professor, Henry P. Monaghan, who in 1970 wrote:

From the beginning of our constitutional history, presidents have both deployed the armed forces abroad and committed

20. Stephen Dycus, et al., NATIONAL SECURITY LAW 67 (5th ed. 2011).

21. *Id.*

22. *Id.* ("First, we consider . . . the President's power to defend the nation against attack and insurrection – which will call 'the defensive war power.' Second, we address "customary war powers' Third, we analyze . . . the third "core" command authority inherent in the title Commander in Chief.").

23. *Id.* at 72.

24. *Id.*

25. *Id.* (citing RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL30172, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2008 (2010)).

26. *Id.* (citing Leonard C. Meeker, *The Legality of United States Participation in the Defense of Vietnam*, 75 YALE L.J. 1085, 1100–01 (1966)).

them to actual hostilities without explicit congressional authorization. In excess of one hundred and twenty instances of such action exist. The precedents extend back to Washington and include that great "strict constructionist" Jefferson; they run through the nineteenth century; and with the emergence of the United States as a global power in this century, they become sharper and more spectacular. . . . Moreover, no recent president has refused to commit the armed forces to actual hostilities because of a lack of congressional approval, as the conduct of Truman in Korea, [and] Johnson in the Dominican Republic . . . demonstrate . . . [T]hus, argues the state department, "practice and precedent have confirmed the constitutional authority of the president to commit the armed forces to battle without a declaration of war."²⁷

These examples provide ample evidence demonstrating that the President has broad constitutional war powers based the historical use of those powers.

In more recent times, there are other important examples of the President using his war powers without the express authorization of Congress. During our military intervention in Grenada, Congress hardly reacted at all, despite the fact that, "according to Secretary of State George Shultz's own account, no member of Congress was consulted prior to the invasion."²⁸ This has also been the case in other instances of hostilities, as well. Indeed,

[f]or the most part, congressional Democrats applauded Reagan's 1986 unilateral strikes on Libya despite a lack of consultation with Congress prior to military action. In 1989, the Democratic majority supported the Republican President George. H. W. Bush's invasion of Panama, even though

27. *Id.* at 74 (citing Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 26 (1970)). In the quoted article, Professor Monaghan goes on to state that Presidents Kennedy, Johnson and Nixon did not have congressional approval for the conflict in Southeast Asia. Many might dispute this point by citing the Gulf of Tonkin Resolution, which states that "the United States is therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." Pub. L. No. 88-408 (1964).

28. Louis Fisher, Ryan Hendrickson & Stephen R. Weissman, *Congress at War*, FOREIGN AFFAIRS (May/June 2008) (letter to the editor), <http://www.foreignaffairs.com/articles/64297/louis-fisher-ryan-hendrickson-and-stephen-r-weissman/congress-at-war> [<http://perma.cc/2VKP-KN2U>].

Congress was given only five hours' prior notice and thus could not vote before the operation was launched.²⁹

Although these were smaller operations, they establish a pattern of presidential action.

Bosnia, one of the largest U.S. military operations of the last century, was also launched without specific congressional authorization.³⁰ Although President Bill Clinton repeatedly stated he was in favor of congressional authorization before using U.S. military force in combat,³¹ his statements on the matter began to evolve over time.³² For example, President Clinton repeatedly objected to legislative efforts to restrict his military options. "[H]e opposed any amendment 'that affects the way our military people do their business, working with NATO and other military allies,' or any amendment that 'unduly restricted the ability of the President to make foreign policy.'"³³ In the end, "[a]cting on what he considered sufficient authority under Article II of the Constitution and NATO obligations, Clinton ordered the deployment of 20,000 American ground troops to Bosnia without obtaining the authority or support from Congress."³⁴ Clearly, the Clinton Administration believed it had sufficient war powers to conduct a large-scale operation that could have lasted for a significant period of time.

Ironically, many contemporary commentators have complained that the Executive appears to seek authorization for the use of force not from the Congress but from international organizations.³⁵ They note: "Truman in Korea, Bush in Iraq, Clinton in Haiti and Bosnia—in each instance a President circumvented Congress by relying either on the UN or NATO."³⁶

Additionally, although Professors Curtis Bradley and Jack Goldsmith argue for a different conclusion, they point out a possible intent of the Founding Fathers when it comes to the role of Congress in authorizing military action. "[T]here were

29. *Id.*

30. See Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1273–74 (1997).

31. *Id.* at 1272.

32. See *id.* at 1272–73.

33. *Id.*

34. *Id.* at 1275.

35. *Id.* at 1237.

36. See *id.*

numerous undeclared wars in the years leading up to the Constitution, and the *Federalist Papers* specifically noted that ‘the ceremony of a formal denunciation of war has of late fallen into disuse.’³⁷ As a result, Bradley and Goldsmith state: “It therefore seems unlikely that the Founders believed that a congressional declaration of war was a constitutional prerequisite for U.S. warmaking.”³⁸

At this point, President Obama apparently agrees that the Executive Branch has wide ranging war powers. However, only a few years ago, then-Senator Obama was adamant that “[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”³⁹ However, President Obama contradicted his earlier position in his 2013 address to the nation regarding potential strikes against Syria: “it is in the national security interests of the United States to respond to the Assad regime’s use of chemical weapons through a targeted military strike [, and] I possess the authority to order [such] strikes”⁴⁰ To be fair, the President argued that “it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress.”⁴¹ Yet, this phrase at the end of the thought does not negate the Executive war powers authority the President asserted at the beginning of his speech—that he, as President, has the power to strike Syria without the express authorization of Congress. Any possible ambiguity regarding the President’s position on his ability to use force without congressional authorization was largely addressed when he spoke to the nation exactly one year later and described his policies for confronting the IS threat. The President specifically stated, “I have the authority to address the threat from ISIL . . . [but] I welcome con-

37. Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2058–59 (2005).

38. *Id.* at 2059.

39. Doug Mataconis, *Candidate Obama vs. President Obama on the Use of Military Force*, OUTSIDE THE BELTWAY, Mar. 18, 2011, <http://www.outsidethebeltway.com/candidate-obama-vs-president-obama-a-message-on-the-use-of-military-force/> [<http://perma.cc/BWS5-MA7P>].

40. President Barack Obama, Address to the Nation on Syria (Sept. 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria> [<http://perma.cc/5RZM-EUD6>].

41. *Id.*

gressional support for this effort in order to show the world that Americans are united in confronting this danger.”⁴² The President’s statement can be broken into two parts. The first part clearly expresses his opinion that he has the ability to take military action. In the second, he states that he welcomes “congressional support.”⁴³ However, importantly, he does not say that he requires or feels that he needs congressional support. Rather, he stated simply that he would “welcome” support.⁴⁴ Indeed, even after President Obama stated that he was “going to begin engaging Congress over a new authorization to use military force against ISIL,”⁴⁵ his aides were quick to reiterate that the President “still believed he had that authority, but with the elections over, he concluded that the time was right to petition Congress for more explicit authority.”⁴⁶

Interestingly, President Clinton made a very similar statement when discussing whether he was required to seek congressional authorization to conduct operations in Bosnia. At a press conference in 1995, President Clinton stated, “I am not going to lay down any of my constitutional prerogatives here today. I have said before and I will say again, I would welcome and I hope I get an expression of congressional support.”⁴⁷ On the same day, President Clinton sent a letter to Senator Robert C. Byrd, which also “invited ‘an expression of support by Congress.’”⁴⁸ Therefore, it appears both President Obama and President Clinton have similar opinions that the Executive Branch has sufficient war powers to conduct significant military operations without the express authorization of Congress, yet it is preferable to receive “an expression of congressional support.”

42. See Letter to the Speaker and President Pro Tempore, *supra* note 3.

43. *Id.*

44. *Id.*

45. President Barack Obama, The President Holds a Press Conference After the Midterm Election (Nov. 5, 2014) [hereinafter President Obama’s Press Conference on Midterm Elections], available at <https://www.whitehouse.gov/photos-and-video/video/2014/11/05/president-holds-press-conference-after-midterm-elections> [<http://perma.cc/55CE-3YW9>].

46. See Mark Lander & David E. Sanger, *Obama to Seek Congressional Backing for Military Campaign Against ISIS*, N.Y. TIMES, Nov. 5, 2014, http://www.nytimes.com/2014/11/06/world/middleeast/obama-to-seek-congressional-backing-for-military-campaign-against-isis.html?_r=0 [<http://perma.cc/W24F-RB6N>].

47. Fisher, *supra* note 30, at 1274–75.

48. *Id.* at 1275.

Clearly, based upon historical precedent, the President has “customary war powers” in which to deploy U.S. Armed Forces overseas into combat.⁴⁹ Yet, despite the evidence to support this analysis, when the President deploys our forces overseas in combat situations, as a practical and political matter, there are important benefits to enacting an AUMF.⁵⁰ Before the 1991 war with Iraq, for example, then-Secretary of State James Baker argued that although the President did not require “congressional approval to order troops into combat, [he] counseled that sending hundreds of thousands of soldiers into battle ‘with the possibility of significant casualties, but *without* legislative imprimatur, could well prove to be a Pyrrhic victory.’”⁵¹ During the past fifty years, the Congress has sought to carve out a greater role for itself in determining whether and how U.S. forces are deployed into combat situations by imposing specific statutory limitations. However, it is also clear, as a practical and political matter, the enactment of an AUMF assists in resolving many of the legal questions that arise as a result of entering into combat.⁵²

Undoubtedly, Congress’s efforts to impose specific statutory limitations have been influenced by Associate Justice Robert H. Jackson’s concurring opinion in the case of *Youngstown Sheet & Tube v. Sawyer*.⁵³ Justice Jackson’s opinion discusses two possible limitations on Executive war powers. First, Congress can

49. See Dycus et al., *supra* note 20, at 67.

50. See Chesney et al., *supra* note 12, at 7, 8; Stimson, *supra* note 12.

51. Fisher, *supra* note 30, at 1267. See also *id.* (“[Baker] feared that if Bush did not obtain congressional approval, ‘we would be unable to sustain an attack on Saddam from a practical political standpoint and might have to settle for a policy of containment.’”).

52. See Chesney et al., *supra* note 12, at 1; Stimson, *supra* note 12.

53. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). Justice Jackson divides the President’s powers into three categories. The first category is when the President’s “authority is at its maximum . . . [and] may be said (for what it may be worth) to personify the federal sovereignty.” *Id.* at 635–36. This occurs “[w]hen the President acts pursuant to an express or implied authorization of Congress.” *Id.* at 635. The second is “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent president responsibility.” *Id.* at 637. The third consists of “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Id.*

limit the President through a “denial of authority”; if the Congress does so, the President “can only rely upon his independent powers.”⁵⁴ Second, Justice Jackson argued that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁵⁵ Therefore, Congress can arguably take action to limit the President’s war powers.

The most notable specific statutory limitation is the War Powers Resolution (WPR).⁵⁶ The WPR was enacted in 1973 over President Nixon’s veto following the Vietnam War to address questions “as to the President’s authority to deploy U.S. armed forces into hostile situations abroad without a declaration of war or some other form of Congressional approval.”⁵⁷ Congress passed the WPR “to reassert control over the decision to engage in military action.”⁵⁸

The primary mechanism the WPR uses to impose restrictions on the President’s power can be found in Section 5 of the law.⁵⁹ The President is required under Section 4 to file a report to Congress, “[i]n the absence of a declaration of war, in any case in which the United States Armed Forces are introduced—(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁶⁰ Once that report is filed with the Speaker of the House and the President Pro Tempore of the Senate, Section 5 requires:

Within sixty calendar days after a report is submitted or is required to be submitted . . . the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day peri-

54. *Id.* at 637 (Jackson, J., concurrence).

55. *Id.*

56. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2012).

57. The Law Library of Cong., *War Powers*, LOC.GOV (Feb. 28, 2014), <http://www.loc.gov/law/help/war-powers.php> [<http://perma.cc/3XMJ-YJF7>].

58. See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 487 n.177 (2011).

59. See War Powers Resolution, 50 U.S.C. § 1543 (2012).

60. *Id.*

od . . . Such sixty day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such Armed Forces in the course of bringing about a prompt removal of such forces.⁶¹

Clearly, Congress has taken heed of Justice Jackson's concurrence and has put in place a legal mechanism designed to assist in the determination whether the President's action is "incompatible with the expressed or implied will of Congress."⁶²

Despite this, "no President has conceded the constitutionality of the WPR or technically complied with its mandates."⁶³ Indeed,

[b]oth the constitutionality and effectiveness of the resolution has been the subject of significant debate. The Congressional Research Service sounded a pessimistic note in 2007: "[s]ince its enactment in 1973, there is no specific instance when the Congress has successfully utilized the War Powers Resolution to compel the withdrawal of U.S. military forces from foreign deployments against the President's will."⁶⁴

Notwithstanding the Executive Branch's disavowal of the constitutionality of the WPR, there are still practical advantages to the enactment of an AUMF. For example, Barry Pavel of the Atlantic Council recently stated:

I was shocked that [the Obama Administration] went to Congress [for strikes against Syria] . . . I thought it was a significant undermining of [P]residential prerogatives and precedent. [But] . . . [w]hen you're talking about an operation for 'years,' it's pretty significant and it's of a scale and expected duration that warrants a discussion with the American people, not altogether unlike the Iraq invasion. I would as gently as possible suggest that they should consider [congressional authorization], especially as he hands it off to his successor. We don't know how this is going to play out . . . You want other people along for the ride, a political sharing of risk and responsibilities, as a nation.⁶⁵

61. *Id.* at § 1544(b).

62. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

63. OPERATIONAL LAW HANDBOOK 7 (Joseph B. Berger III, Derek Grimes & Eric T. Jensen eds., 2004).

64. Ackerman & Hathaway, *supra* note 58, at 487 n.178.

65. O'Toole, *supra* note 12.

In addition, as the authors of *A Statutory Framework for Next-Generation Terrorist Threats* argue, “presidential action based on statutory authority has more political and legal legitimacy than action based on Article II alone. Article II actions leave the president without overt support of Congress, which can later snipe his decisions or take actions to undermine them.”⁶⁶

Another significant advantage to congressional authorizations is that these enactments often contain language that resolves any lingering debates as to the constitutionality of Executive decisions to deploy the U.S. Armed Forces in a military conflict. By way of example, this was accomplished in both the 2001 and 2002 AUMFs, which contained sections designed to satisfy Section 5 of the WPR.⁶⁷ Accordingly, these AUMFs provided explicit congressional support for the Executive Branch to conduct military operations against al Qaeda, the Taliban, and threats in Iraq.⁶⁸

An AUMF also assists in the resolution of questions regarding whether individuals, including American citizens, can be detained in a conflict. Some argue that “the president faces significant legal hurdles to detaining dangerous terrorism suspects over the longer term under Article II, and at a minimum would encounter substantial political and legal opposition if he attempted it.”⁶⁹ This issue was put to the Supreme Court in *Hamdi v. Rumsfeld*.⁷⁰ In this seminal case, the Court did not attempt to answer, “the threshold question . . . whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’”⁷¹ Rather, a plurality of the Court found no need to answer the question of whether congressional authorization was required.⁷² Specifically, Justice O’Connor wrote:

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Con-

66. See Chesney et al., *supra* note 12, at 6.

67. See Pub. L. No. 107-40 (2001); Pub. L. No. 107-243 (2002). Both statutes contain identical language: “Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”

68. Bradley & Goldsmith, *supra* note 37, at 2083.

69. Chesney et al., *supra* note 12, at 6.

70. 542 U.S. 507 (2004).

71. *Id.* at 516.

72. *Id.* at 517.

stitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, the Congress has in fact authorized Hamdi's detention, through the AUMF.⁷³

Therefore, the Supreme Court did settle the question of whether the 2001 AUMF provided authorization for the United States to hold detainees for the duration of this conflict, even U.S. citizens who have taken up arms against the United States.⁷⁴ Thus, though not required given the President's Article II power and historical practice, the 2001 AUMF provided a clear example of how a congressional authorization resolved one of the most important legal questions surrounding the war against al Qaeda.

The 2001 AUMF has also been of assistance in resolving the "geographic scope of the conflict."⁷⁵ For example, the Senate Armed Services Committee (SASC) conducted a recent hearing titled: *Law of Armed Conflict, The Use of Military Force and 2001 Authorization for Use of Military Force*.⁷⁶ As part of that hearing, former Deputy Assistant Secretary of Defense Charles "Cully" Stimson provided written testimony asserting that, "in practice, there is no geographic limit or scope to the AUMF. Rather, the [2001] AUMF gives the President the authority to confront the enemy wherever he deems the enemy resides."⁷⁷ Additionally, Mr. Stimson discussed the most important reason for an AUMF: providing legitimacy. "The [2001] AUMF has served the country well. It has enabled our warfighters, intelligence professionals, and other stakeholders to carry out their work, knowing that Congress has given express authorization for the use of appropriate and proportional force to confront an enemy"⁷⁸

73. *Id.* at 517–18.

74. *Id.* at 519.

75. See *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, before the S. Comm. on Armed Services*, 113th Cong. 7 (2013) (joint prepared statement of Robert S. Taylor et al.) [hereinafter Department of Defense Joint Statement for the Record].

76. *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, before the S. Comm. on Armed Services*, 113th Cong. (2013)

77. *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, before the S. Comm. on Armed Services*, 113th Cong. 6 (2013) (written statement of Charles Stimson, Senior Fellow and Manager, Heritage Foundation) [Stimson SASC Testimony].

78. *Id.* at 5.

Clearly, based upon historical precedent, the President has “customary War Powers” in which to deploy U.S. Armed Forces overseas into combat.⁷⁹ Yet, the legitimacy derived from an AUMF is also important and shows support for our service members as they confront a dangerous enemy.⁸⁰

II. THE OBAMA ADMINISTRATION’S CHANGING INTERPRETATION OF THE EXISTING AUMF

Despite the inherent Executive war powers discussed above, when the President deploys our forces overseas to conduct combat operations, there are practical and political benefits to enacting an AUMF.⁸¹ When the Administration continues to change its interpretation of an existing AUMF, however, this creates policy and legal confusion that can undermine our nation’s ability to prosecute wars.

Unfortunately, the Obama Administration has a demonstrated record of making fundamental changes to its interpretation and use of the AUMFs. For example, the President stated his desire for Congress “to refine, and ultimately repeal” the 2001 AUMF in his May 2013 address at National Defense University (NDU).⁸² At the time, the President’s preference was 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 Presidents

79. Dycus et al., *supra* note 20, at 67.

80. See Chesney et al., *supra* note 12, at 1–6; Koh, *supra* note 12; O’Toole, *supra* note 12; Stimson, *supra* note 12, at 2.

81. See Chesney et al., *supra* note 12, at 8–12; Stimson, *supra* note 12, at 2–5.

82. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) [hereinafter President Obama’s Remarks at NDU], <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<http://perma.cc/C5WL-6C5D>].

unbounded powers more suited for traditional armed conflict between nation states.⁸³

In contrast, in his September 23, 2014 War Powers Resolution letter notifying Congress of operations against IS, the President cited his “constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 [2001 AUMF] and Public Law 107-243 [2002 AUMF]) and as Chief Executive, as well as [his] constitutional and statutory authority to conduct the foreign relations of the United States.”⁸⁴ This is a remarkable change, as he is now arguing, in part, that the 2001 AUMF is a basis for his attacks against IS.

Several experts have taken note of the magnitude of this reversal. John Bellinger, a legal adviser to the Bush Administration’s National Security Council and the State Department, explained in an interview “that Obama’s address marked a ‘dramatic reversal of course’ and a ‘remarkable change in legal position.’”⁸⁵ Even the Obama Administration’s former Legal Advisor to the State Department, Professor Harold Koh, wrote an article titled *Obama’s ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*⁸⁶ In this piece, Professor Koh conceded that the bungled rollout “reinforced the unfortunate impression that the government was making up its legal argument as it went along Meanwhile, . . . the controversy over the domestic legal case boiled.”⁸⁷

Mr. Bellinger has his own hypothesis as to the reasons behind the Obama Administration’s reversal:

Of course, I haven’t seen the intelligence, but the administration has not suggested that they have evidence of association or at least any significant connection 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 presi-

83. *Id.*

84. Letter to the Speaker and the President of the President Pro Tempore, *supra* note 3.

85. O’Toole, *supra* note 12, at 3.

86. Koh, *supra* note 12.

87. *Id.*

dent doesn't have to ask for and get an authorization right now, and two, the War Powers Act wouldn't be triggered.⁸⁸

Assuming that Mr. Bellinger's theory is accurate, the reversal indicates a manipulation of legal judgment to justify policy, it could undermine the legitimacy of using the 2001 AUMF as an authorization to use force against IS.

The confusion created by the Administration's revised position regarding the 2001 AUMF was also exacerbated by the implication in the President's 2013 NDU speech that the 2001 AUMF is "more suited for traditional armed conflict between nation states."⁸⁹ Yet, the Administration more recently categorized IS as a terrorist organization⁹⁰ and as the "true inheritor of Osama bin Laden's legacy."⁹¹ Therefore, the Administration's own statements have created a juxtaposition which could be used to undermine the use of the 2001 AUMF for actions against IS. Specifically, the Administration appears at one time to believe the flexibility inherent in the 2001 AUMF is best suited for conflicts against states, yet that same flexibility is now essential for pursuing military operations against IS, a terrorist organization.

This is not the only contradiction between the Administration's previous position on an AUMF and its current stance of using such authorization as a legal justification for operations against IS. For example, the Administration has previously stated that the 2002 AUMF is an "alternative statutory basis" (in addition to the 2001 AUMF) for conducting operations against IS.⁹² Yet two months earlier, the President's National Security Advisor, Susan Rice, wrote to the Speaker of the House, John Boehner, stating that the 2002 "Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal."⁹³ As late as mid-August, the National Security Council reaffirmed the Administration's

88. O'Toole, *supra* note 12, at 4.

89. President Obama's Remarks at NDU, *supra* note 82.

90. Office of the Spokesperson, *Terrorist Designations of Groups Operating in Syria*, U.S. DEPARTMENT OF STATE (May 14, 2014), <http://www.state.gov/t/pa/prs/ps/2014/05/226067.htm> [<http://perma.cc/A7Y6-2E82>].

91. O'Toole, *supra* note 12, at 2.

92. *Id.*

93. Letter from Susan Rice, National Security Advisor, to the Honorable John A. Boehner, Speaker of the U.S. House of Representatives (July 25, 2014), http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3 [<http://perma.cc/A74B-2JSV>].

preference for repealing the 2002 AUMF.⁹⁴ The incongruity of calling for the repeal of the 2002 AUMF and then using it as a basis to support operations can only add to the possible arguments, albeit misplaced, that the 2002 AUMF is not an appropriate mechanism to authorize the use of force against IS.⁹⁵ This discombobulation only increased after the President's news conference in November 2014, when he once again called into question the appropriateness of extending the 2002 AUMF to the conflict against IS, only weeks after citing it as basis for the use of force. Specifically, the President stated:

With respect to Iraq, there was a very specific AUMF. We now have a different enemy. The strategy is different, and how we partner with Iraq and other Gulf countries and the international coalition, that has to be structured differently. So, it makes sense for us to make sure that the authorization from Congress reflects what we perceive to be not just our strategy over the next two or three months, but our strategy going forward.⁹⁶

Undoubtedly, in an effort to address the confusion caused by the inconsistency between the September 23 report to Congress and the July 25 letter from National Security Adviser Rice's letter to Speaker Boehner, the Administration distributed an information paper on September 30, 2014, titled *Legal Basis for U.S. Military Operations in Syria*.⁹⁷ Specifically, the Administration now argues:

The military operations taken by the United States against the Islamic State and the Levant (ISIL) and the Khorasan Group in Syria are consistent with domestic and international law. As a matter of domestic law, in addition to his constitutional authority to conduct U.S. foreign relations, and as Commander in Chief and Chief Executive, the President is relying on the 2001 Authorization for Use of Military Force (AUMF) to conduct strikes against ISIL and the

94. See O'Toole, *supra* note 12. When stating this preference, NSC spokesman, Caitlin Hayden, also called into question whether the 2001 AUMF applied, asserting that the administration was "reviewing the applicability of the 2001 AUMF to this situation, which would be in addition to the President's constitutional authority as noted in the War Powers report." *Id.* at 1.

95. See O'Toole, *supra* note 12.

96. President Obama's Press Conference on Midterm Elections, *supra* note 45.

97. See The Obama Administration, *Legal Basis for U.S. Military Operations in Syria* (Sept. 30, 2014) (on file with author).

Khorasan Group in Syria. In addition, the President has statutory authority to conduct airstrikes against ISIL in Syria under the 2002 Iraq AUMF at least to the extent that such operations are necessary to address the threat posed by ISIL's operations in Iraq.⁹⁸

But on its face this justification differs from the President's letter to Congress only seven days earlier.⁹⁹ There, President Obama emphasized his Article II authority as Commander in Chief and only cited the 2001 and 2002 AUMF parenthetically.¹⁰⁰ Specifically, the letter reads: "pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 and Public Law 107-243) and as Chief Executive."¹⁰¹ The September 30 information paper, on the other hand, clearly highlights the powers the 2001 AUMFs provides: "[T]he President is *relying* on the 2001 Authorization for the Use of Military Force (AUMF) to conduct against ISIL and the Khorasan Group in Syria."¹⁰² To be fair, the information paper begins by stating that "*in addition* to his constitutional authority . . . the President is relying on the 2001 [AUMF] . . ." ¹⁰³ However, the difference in emphasis for authorizing combat operations between the September 23 letter and the September 30 information paper underlies a substantive difference in the justifications asserted.

Moreover, there are additional contradictions in the Administration's application of the AUMFs. During a May 16, 2013 SASC hearing related to the 2001 AUMF (that occurred just seven days before the President's aforementioned address at NDU), Department of Defense (DoD) witnesses provided the SASC with a Joint Statement for the Record. Central to the Administration's argument, and on the first page of the testimony, was the following conclusion:

As a matter of domestic law, all three branches of our Government have recognized that the President may use military force in order to prosecute the conflict against al Qaeda, the Taliban and its associated forces. The Authorization for

98. *Id.* at 1.

99. See Letter to the Speaker and President Pro Tempore, *supra* note 3.

100. *Id.*

101. *Id.*

102. The Obama Administration, *supra* note 97, at 1 (emphasis added).

103. *Id.* (emphasis added).

the Use of Military Force, enacted one week after the attacks of September 11, 2001, explicitly authorizes the President to direct the use of military force in defending the nation.¹⁰⁴

This was not the first time the Administration had emphasized the importance of the 2001 AUMF. In a 2012 speech at Yale Law School, then-DoD General Counsel and current Secretary of Homeland Security, Jeh Johnson, attempted to “summarize . . . some of the basic legal principles that form the basis for the U.S. military’s counterterrorism efforts against al Qaeda and its associated forces.”¹⁰⁵ In his address, he asserted that “in the conflict against al Qaeda and associated forces, the bedrock of the military’s domestic legal authority continues to be the Authorization for the Use of Military Force passed by Congress one week after 9-11 Ten years later, the AUMF remains on the books, and it is still a viable authorization today.”¹⁰⁶

Secretary Johnson’s speech went on to discuss the importance of the 2001 AUMF to the Guantanamo Bay detainee debate:

In the detention context, we in the Obama Administration have interpreted [the 2001 AUMF] to include ‘those persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.’ This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantanamo Bay detainees. In 2011, Congress joined the executive and judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year’s [FY12] National Defense Authorization Act¹⁰⁷

Given the significance attributed to the 2001 AUMF in then-DoD General Counsel Johnson’s Yale Law School address, and in the written statements of the DoD witnesses to the SASC, it is remarkable the President would then alter this position one week after the SASC hearing and assert that the 2001 AUMF should be “refined and ultimately repealed.”¹⁰⁸ This indicates

104. Department of Defense Joint Statement for the Record, *supra* note 75.

105. See Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 145–46 (2012).

106. *Id.*

107. *Id.*

108. See President Obama’s Remarks at NDU, *supra* note 82.

that the Administration was markedly changing its position on the congressional authorizations for the use of force. Observers in the legal community justifiably have been confused by this fundamental change, and as a result, have begun to question the legitimacy of the use of the 2001 AUMF in this context.¹⁰⁹

In addition, other contradictions can be found through a closer comparison between Secretary Johnson's speech and the President's NDU address. The Secretary asserted that the U.S. "must consistently apply *conventional* legal principles" in a "conflict against an *unconventional* enemy such as al Qaeda," and that this had occurred throughout the Obama administration.¹¹⁰ He then explained that the law of armed conflict, the Geneva Convention, and customary international law are sources of these conventional legal principles.¹¹¹ In contrast, during his NDU speech President Obama signaled his desire for Congress to modify and ultimately repeal the 2001 AUMF, in part because it granted "[the Presidency] unbound[ed] powers more suited for traditional armed conflict between nation states."¹¹² Thus, at one point a senior national security official appeared to be arguing that the Administration was following proper and conventional "legal principles" in execution of military operations. The President then created ambiguity on this point in another setting by suggesting that the AUMFs afforded the President unbounded powers.¹¹³

Highlighting this inconsistency does not imply that the President would prefer that a revised AUMF disregard conventional legal principles. Rather, it presents a question of whether the President is seeking a new and innovative legal mechanism to authorize his conduct of military operations. Regardless of what this might entail, one of the central benefits of any new AUMF is its presumption of validity.¹¹⁴ An AUMF expressly authorizes the use of force and provides our combat forces with the assurance that their actions are lawful and in the best interests of

109. See Chesney et al., *supra* note 12, at 1–6; Koh, *supra* note 12; O'Toole, *supra* note 12; Stimson, *supra* note 12, at 1–2.

110. Johnson, *supra* note 105, at 145.

111. See *id.*

112. President Obama's Remarks at NDU, *supra* note 82.

113. *Id.*

114. See Bradley & Goldsmith, *supra* note 37, at 2050–52.

the United States.¹¹⁵ However, if the President questions the authorization under which we are conducting operations by arguing that it consists of “unbounded powers,” does that not undermine the credibility of the initial authorization? What effect might that have on the morale of our military force?

Interestingly, Secretary Johnson’s speech argues against the President’s proposition that the 2001 AUMF is of “unbounded powers.” Specifically, Secretary Johnson states the 2001 AUMF is “not open ended. It does not authorize military force against anyone the Executive labels a ‘terrorist.’ Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11 or associated forces.”¹¹⁶

The confusion this reversal caused is reflected in the comments of John Bellinger:

He [the President] said he wanted to repeal and refine the AUMF and that he would not sign any law to expand it So here he has not signed a law to expand it, he’s expanded it himself, and contributed to one of its most significant expansions, to go after a new group in Iraq and Syria. He’s essentially just come full circle.¹¹⁷

As discussed above, one of the primary benefits of any AUMF is to express the resolve of the nation that its military operations are authorized and in the best interests of the United States. The current AUMFs provide this understanding, as evidenced by Jeh Johnson’s comments.¹¹⁸ Unfortunately, since the President’s 2013 NDU speech, the Administration has thrown this understanding into question through contradictory statements. This uncertainty has only been exacerbated because the Administration’s new instructional paper uses the authorizations that we were supposed to “refine and ultimately repeal” as a basis to conduct operations against IS.¹¹⁹ Even Professor Koh has stated, “these [legal] grounds are shakier and less durable than they should be for a sustained conflict intended to degrade and ultimately destroy an evolving enemy.”¹²⁰ Thus, to

115. See Chesney et al., *supra* note 12, at 6.

116. Johnson, *supra* note 105, at 146.

117. O’Toole, *supra* note 12.

118. Johnson, *supra* note 105, at 146.

119. The Obama Administration, *supra* note 97, at 1.

120. Koh, *supra* note 12.

ensure there is no ambiguity as to the resolve of our nation, we must consider the enactment of a new AUMF.

III. HOW A NEW AUMF SHOULD BE STRUCTURED

Given that the Obama Administration's interpretative reversals have brought into question the authority conferred by the existing AUMFs, the President's request for a third AUMF should be heeded. However, the question remains as to how this new authorization should be structured. In this section, I outline three key principles for any new AUMF that have been advanced by Senators James Inhofe and Orrin Hatch.¹²¹ First, any new AUMF must clearly affirm that the Executive Branch is authorized to use all necessary force against IS, so long as it complies with the laws of war.¹²² Second, the new authorization must be flexible enough to confront not only IS as it is presently constituted, but also its future forms.¹²³ Third, it is critical that "artificial and unnecessary limitations, based on time, geography and type of force[s]" not be erected which could interfere with the U.S. strategic objective of defeating IS.¹²⁴

Despite its brevity, I believe that the operative text of S.J. Res. 43 clearly confers on the Executive Branch the authority to use appropriate force against IS and is flexible enough to be employed against future manifestations of IS.¹²⁵ Equally important, this proposed authorization does not contain any spurious geographic, temporal, or force-type limitations which

121. See Hatch, Statement on AUMF Against IS, *supra* note 5.; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

122. Hatch, Statement on AUMF Against IS, *supra* note 5.; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

123. See Chesney et al., *supra* note 12, at 8.

124. Hatch, Statement on AUMF Against IS, *supra* note 5.; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

125. Subsection (a) of S.J. Res 43 states:

In General – That the President is authorized to use all necessary and appropriate force in order to defend the national security of the United States against the threat posed by the organization called the Islamic State (or 'IS'), formally known as the Islamic State of Iraq and the Levant, as well as any successor organization.

could needlessly place additional risks on members of our armed forces in their pursuit of IS.¹²⁶

Others have written extensively on a proper framework for a new AUMF.¹²⁷ Professors Bradley and Goldsmith have proposed that “authorizations can be broken down into five analytical components,”¹²⁸ and this has undoubtedly influenced the number of proposed structures. For example, in the article, *A Statutory Framework for Next-Generation Terrorist Threats*, several preeminent scholars of the laws of war argue the new AUMF should consist of three main parts.¹²⁹ First, they argue that the new AUMF should be tied to Article II or international law.¹³⁰ Second, the legislation should specify the individual terrorist groups targeted, as well as the geographies in which operations can be conducted.¹³¹ Finally, they recommend that “Congress set[]forth general statutory criteria for presidential uses of force against new terrorist threats but require[] the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force.”¹³²

Former Deputy Assistant Secretary of Defense Charles Stimson has proffered his own framework.¹³³ He believes an AUMF against IS should contain four parts.¹³⁴ First, he argues, the new AUMF must “authorize the use of all necessary and appropriate force.”¹³⁵ Second, “[t]he only targets of this force should be ISIS and any group that might succeed ISIS.”¹³⁶ Third, “[t]he goal of the AUMF should be to prevent terrorist attacks by ISIS against the United States and drive ISIS out of Iraq.”¹³⁷ Finally, regarding the question of time and procedural restrictions,

126. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

127. Chesney et al., *supra* note 12.

128. Bradley & Goldsmith, *supra* note 37, at 2072.

129. Chesney et al., *supra* note 12, at 8.

130. *Id.*

131. *Id.* at 9.

132. *Id.* at 10.

133. Stimson, *supra* note 12, at 5.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

"[l]imitations of the AUMF should include reporting requirements consistent with the War Powers Resolution."¹³⁸

These are all important points to consider. However, it is critical to the success of any new AUMF that it successfully strikes a balance between removing any uncertainty regarding what force is being authorized while simultaneously affording sufficient flexibility to meet the changing nature of the threat.¹³⁹ Secretary of State John Kerry echoed this point in his testimony before Senate Foreign Relations Committee last December. Specifically, the Secretary stated, "Our position on the text is pretty straightforward—the Authorization—or AUMF—should give the President the clear mandate and flexibility he needs to successfully prosecute the armed conflict against ISIL and affiliated forces."¹⁴⁰

The academic authors of *A Statutory Framework for Next-Generation Terrorist Threats* also recognized this and noted that "a central challenge in designing such a statute [AUMF] is to provide sufficient flexibility to meet the changing threat environment which at the same time cabin[ing] discretion to use force and subjecting it to the sort of serious constraints that confer legitimacy and ensure sound strategic deliberation."¹⁴¹ This balancing can be achieved. Yet the creation of false restrictions, such as time, geographic, and force-type limitations, are antithetical to the need for flexibility for the Commander in Chief to prosecute this new conflict.¹⁴² Such manufactured obstacles will only hinder our nation's ability to defeat the IS threat and create greater risks for our men and women in uniform. As then-House Armed Services Committee Chairman Howard P. "Buck" McKeon wrote to the Washington Post about crafting a new IS AUMF:

[S]uch legislation must not be an authorization to use *some* military force. Artificial limitations provide Washington pol-

138. Stimson, *supra* note 12, at 5.

139. *See id.*

140. *Authorization for Use of Military Force Against ISIL: Hearing before the S. Comm. on Foreign Relations, 113th Cong. (2014)* (statement of John F. Kerry, Secretary of State), available at <http://www.foreign.senate.gov/imo/media/doc/Secretary%20Kerry%20-%20Testimony.pdf> [<http://perma.cc/9DZA-8JNH>].

141. Chesney et al., *supra* note 12, at 8.

142. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

iticians with political cover rather than providing our military commanders with the legal authority they need. Robust oversight is the guard against aimless conflicts, not congressional constraints on tactics, geography or time at the outset.¹⁴³

Flexibility was also central to Senator Inhofe's arguments when he introduced S.J. Res. 43 on the Senate floor:

With this resolution, the President, in coordination with allies and partners, will have clear authority to go after IS fighters, finances and their networks across the globe. IS operations are not confined by borders or timelines and neither should the U.S. effort to defeat them. IS is an evolving threat, and the President must have the flexibility needed to adjust as conditions on the ground change. Limitations placed on the tools available to the President will create seams that are certain to be fully exploited by IS and will decrease the effectiveness of any action taken."¹⁴⁴

Clearly communicating the authorization of force and its flexibility are central to an AUMF, and this is one of the most important elements of both the 2001 and 2002 AUMFs. Charles Stimson's testimony before the SASC about the 2001 AUMF further drives home this point: "The [2001] AUMF's allowance that the President may bring to bear '*all necessary and appropriate force*' against the entities encompassed by it is consistent with our constitutional architecture, with centuries of precedent, and with the need for flexibility in fighting a diverse and always evolving threat."¹⁴⁵ The 2002 AUMF includes similar language: "The President is authorized to use the Armed Forces of the United States as he determines to be *necessary and appropriate* in order to defend the national security of the United States against the continuing threat posed by Iraq."¹⁴⁶ Therefore, in both of these AUMFs, we understand what type of

143. Chairman Howard P. "Buck" McKeon, *An Authorization for the Use of Military Force can give leaders the tools they need*, WASH. POST, Sept. 9, 2014, available at http://www.washingtonpost.com/opinions/congressional-authorization-can-give-military-leaders-the-tools-they-need/2014/09/28/683334da-45a7-11e4-8042-aaff1640082e_story.html [<http://perma.cc/5H4N-K7KU>].

144. Press Release, Senator James Inhofe, Inhofe Introduces Resolution to Authorize Use of Force Against IS (Sept. 9, 2014) [hereinafter Inhofe AUMF Against IS Press Release], <http://www.inhofe.senate.gov/newsroom/press-releases/inhofe-introduces-resolution-to-authorize-use-of-force-against-is> [<http://perma.cc/2WK7-3U93>].

145. Stimson SASC Testimony, *surpa* note 77 (emphasis added).

146. Authorization for Use of Military Force, Pub. L. No. 107-243, § 3, 116 Stat. 1498 (2002) (emphasis added).

force has been authorized: the use of force which is necessary and appropriate—that is, all actions conducted within the laws of war.¹⁴⁷ But, as Mr. Stimson points out—these authorizations are flexible enough to deal with a metastasizing threat.¹⁴⁸

Accordingly, to clarify what force is authorized, S.J. Res. 43 incorporates similar language: “the President is authorized to use *all necessary and appropriate force* in order to defend the national security of the United States against the threat posed by the organization call the Islamic State (or ‘IS’)”¹⁴⁹ By distinctly stating the President may use “all necessary and appropriate force,” S.J. Res. 43 meets the fundamental test of providing clear authority to the Executive Branch to conduct operations against IS under the laws of war while using all elements of our national power to defeat the IS threat in whatever form it arises.¹⁵⁰ Indeed, using this language has the advantage of consistent interpretation of meaning across the scope of all outstanding AUMFs.

Another challenge any new AUMF must overcome is ensuring it does not become obsolete, as many, including the President, have argued the 2001 AUMF has become.¹⁵¹ Chesney and his coauthors suggest this happened for the 2001 authorization because it describes the September 11 conflict, which has grown “less salient as U.S. and allied actions degrade the core of al Qaeda and the U.S. military draws down its forces fighting the Taliban in Afghanistan.”¹⁵² Applying the 2001 AUMF to emerging terrorist groups becomes a distant interpretive leap to newer terrorist groups with limited, if any, ties with al Qaeda. As a result, the President has limited statutory authority to meet evolving terrorist threats.¹⁵³ The Obama Administration’s recent arguments regarding the 2001 AUMF ad-

147. See Bradley & Goldsmith, *supra* note 37, at 2092.

148. Stimson SASC Testimony, *supra* note 77.

149. S.J. Res. 43. (emphasis added).

150. Inhofe AUMF Against IS Press Release, *supra* note 144.

151. See Chesney et al., *supra* note 12.

152. *Id.* (citing John B. Bellinger III, *A counterterrorism law in need of updating*, WASH. POST, Nov. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html> [<http://perma.cc/CMU3-DFC5>]).

153. *Id.*

dress this interpretive leap by arguing that al Qaeda in Iraq was antecedent to IS and, therefore, the 2001 AUMF applies.¹⁵⁴

However, S.J. Res. 43 goes a step further and provides additional flexibility, as it is structured to apply even if IS changes its name or further fractures into new organizations.¹⁵⁵ This flexibility is particularly important since some have questioned the legitimacy of the President's theory that the 2001 AUMF can be applied to IS.¹⁵⁶ For example, Professor Goldsmith has written that IS has a "remarkably loose affiliation with al Qaeda"¹⁵⁷ and the President's legal analysis could be used "against any ambitious jihadist terrorist group that fights against the United States."¹⁵⁸ I submit this argument has already been addressed through then-DoD General Counsel Johnson's comments at Yale Law School, in which he explained that the 2001 AUMF "is not open ended."¹⁵⁹ "Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces."¹⁶⁰ However, to address outstanding concerns and ensure the application of the new authorization against potential IS splinter groups,¹⁶¹ S.J. Res. 43 includes a clause covering "any successor organization."¹⁶² Accordingly, if IS changes its name as it has done in the past,¹⁶³ or a group breaks off from IS, as IS did from al Qaeda,¹⁶⁴ S.J. Res. 43 authorization would still apply.¹⁶⁵ Accordingly, S.J. Res. 43 has the flexibility required to meet both current and future threats.

154. MICHAEL JOHN GARCIA & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R43720, U.S. MILITARY ACTION AGAINST THE ISLAMIC STATE: ANSWERS TO FREQUENTLY ASKED LEGAL QUESTIONS 8 (2014), available at <http://fas.org/sgp/crs/natsec/R43720.pdf> [<http://perma.cc/2FH7-V3GE>].

155. Inhofe AUMF Against IS Press Release, *supra* note 144.

156. See Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME, Sept. 11, 2014, <http://time.com/3326689/obama-isis-war-powers-bush/#3326689/obama-isis-war-powers-bush/> [<http://perma.cc/5PGA-M652>].

157. *Id.*

158. *Id.*

159. Johnson, *supra* note 105, at 146.

160. *Id.*

161. See Robert Chesney, *An AUMF for ISIL At Last? Questions Raised by the Post's Account of the White House Debate*, LAWFARE (Aug. 23, 2014, 12:41AM), <http://www.lawfareblog.com/2014/08/an-aumf-for-isil-at-last-questions-raised-by-the-posts-account-of-the-white-house-debate/> [<http://perma.cc/R9PN-34NC>].

162. S.J. Res. 43, 113th Cong. (2014).

163. Office of the Spokesperson, *supra* note 87.

164. See Chesney, *supra* note 161.

165. Inhofe AUMF Against IS Press Release, *supra* note 144.

Another issue confronting a new AUMF is whether geographic limitations should be included in the authorization. Although Congress could authorize the President to use force against specified terrorist groups or in specified geographic areas, the downside to geographic limitations is that Congress may not be able to act quickly enough—identifying the threat, conduct hearings, crafting legislation, engaging in floor debates and, enacting changes—as “threats evolve and merge” and expand to new locations.¹⁶⁶

Even more importantly, such artificial geographic limitations could hinder our operational ability to defeat IS. This was discussed in Professor Geoffrey Corn’s statement to the SASC during the AUMF hearing. He suggested that amending the current AUMF to:

define the geographic scope of military operations . . . would fundamentally undermine the efficacy of U.S. counter-terror military operations by overtly signaling to the enemy exactly where to pursue safe-haven and de facto immunity from the reach of U.S. power It is an operational and tactical axiom that insurgent and non-state threats rarely seek the proverbial “toe to toe” confrontation with clearly superior military forces Imposing an arbitrary geographic limitation of the scope of military operations against this threat would therefore be inconsistent with the strategic objective of preventing future terrorist attacks against the United States.¹⁶⁷

The Administration also is opposed to geographic constraints. As Secretary Kerry recently testified:

We don’t anticipate conducting operations in countries other than Iraq and Syria. But to the extent that ISIL poses a threat to American interests and personnel in other countries, we would not want an AUMF to constrain our ability to use appropriate force against ISIL in those locations if necessary. In our view, it would be a mistake to advertise to ISIL that there are safe havens for them outside of Iraq and Syria.¹⁶⁸

166. Chesney et al., *supra* note 12, at 9.

167. *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, Before the S. Comm. on Armed Serv.*, 113th Cong. (2013) (statement of Lieutenant Colonel Geoffrey Corn, U.S. Army (Ret.), Professor of Law, South Texas College of Law).

168. *Authorization for Use of Military Force Against ISIL: Hearing before the S. Comm. on Foreign Relations*, 113th Cong. (2014) (statement of John F. Kerry, Secretary of State),

Therefore, it is a clear mistake to impose geographic limitations on the use of force. Accordingly, S.J. Res. 43 does not impose any such geographic limitations on where force can be employed to defeat the IS threat.

Accommodating the geographic operational concerns of our armed forces in a new AUMF does not provide legal *carte blanche* to conduct operations wherever the President chooses. Similar to the 2001 AUMF, S.J. Res. 43 limits where operations can be conducted. Specifically, then-DoD General Counsel Johnson in his address at Yale stated:

[T]here is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the ‘hot’ battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the *AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation*. The legal point is important because, in fact, over the past ten years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven. However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe . . . we can use military force whenever we want, wherever we want. International legal principles, including respect for a state’s sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.¹⁶⁹

Once again the clause “necessary and appropriate force” has important meaning and restricts the use of force. In this case, it binds where we are authorized to use force. Therefore since S.J. Res. 43 also contains this clause, it would enable us to conduct operations throughout the globe against IS, but only to the extent they are consistent with the laws of war.

Equally as important is ensuring a time limitation is not included in the new AUMF.¹⁷⁰ Professors Bradley and Goldsmith

available at <http://www.foreign.senate.gov/imo/media/doc/Secretary%20Kerry%20-%20Testimony.pdf> [<http://perma.cc/9DZA-8JNH>].

169. Johnson, *supra* note 105, at 147 (emphasis added).

170. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

wrote about the Congressional debate that occurred before the enactment of the 2001 AUMF, finding that many members of Congress considered in debates that “the war against the perpetrators of the September 11 attacks might take a very long time,” and accordingly, they did not suggest a corresponding time limitation.¹⁷¹ “The lack of a time limitation is further indicated by Congress’s inclusion of sunset clauses in other prominent statutes passed in response to the September 11 attacks, but not in the AUMF.”¹⁷²

The importance of not including time limitations in AUMFs is also seen in the related area of setting troop withdrawal deadlines based on considerations other than the conditions where the operations are being conducted.¹⁷³ For example, President Obama’s announcement that all U.S. forces would be removed from Afghanistan by 2016 was met with strong concerns from Senators John McCain, Lindsey Graham and Kelly Ayotte.¹⁷⁴ Specifically, they argued that:

[t]he President’s decision to set an arbitrary date for the full withdrawal of U.S. troops in Afghanistan is a monumental mistake and a triumph of politics over strategy. This is a shortsighted decision that will make it harder to end the war in Afghanistan responsibly. The President came into office wanting to end the wars he inherited. But wars do not end just because politicians say so. The President appears to have learned nothing from the damage done by his previous withdrawal announcements in Afghanistan and his disastrous decision to withdraw all U.S. forces from Iraq. Today’s announcement will embolden our enemies and discourage our partners in Afghanistan and the region The withdrawal of U.S. troops in Afghanistan, should be determined by conditions on the ground, not by the President’s concern for his legacy.¹⁷⁵

Withdrawal should also not be based on artificial time limits created for domestic political purposes and not based on

171. See Bradley & Goldsmith, *supra* note 37, at 2123.

172. See *id.*

173. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

174. Press Release, Senators John McCain, Lindsey Graham, Kelly Ayotte, Sens. McCain, Graham, and Ayotte on Afghanistan Troop Announcement (May 27, 2014), <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=de23d2f5-3704-4e71-bffd-57396b52527b> [<http://perma.cc/HN6W-FJSH>].

175. *Id.*

achieving the long-term strategic objectives of the country. Therefore, if the objective of a new AUMF is to assist in achieving our long-term strategic goals, time limits should not be placed in a new AUMF.¹⁷⁶

But this is not just the perspective of those Senators. It is also the opinion of those military leaders who advocated for a strategy that was successfully used against al Qaeda in Iraq (AQI) before it changed its name to IS. Specifically, General John Keane USA (Ret.), who is a former Army Vice Chief of Staff, and the “Godfather” of the so-called surge strategy,¹⁷⁷ harshly criticized the President’s decision to remove all U.S. combat forces out of Iraq by 2012.¹⁷⁸ In responding to questions regarding the length of time required to defeat IS, the General commented that the time length was uncertain because the U.S. does not know how effective the ground units of the Iraqi Army and the Peshmerga¹⁷⁹ are going to be.¹⁸⁰

If the “Godfather” of the strategy that significantly dismantled IS in its previous form cannot provide a timeline for the defeat IS in its current configuration, how can lawmakers make a realistic estimate of how long such an operation will last? Indeed, if a realistic date cannot be established, what merit, other than for domestic political consumption, is there in establishing a time limit in a new AUMF? As a result of these strong argu-

176. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

177. Octavian Manea, *The Philosophy Behind the Iraq Surge: An Interview with General Jack Keane*, SMALL WARS J., Apr. 5, 2011, <http://smallwarsjournal.com/blog/journal/docs-temp/726-manea.pdf> [<http://perma.cc/C3PZ-VUVJ>].

178. Rowan Scarborough, *Key general: Iraq pullout plan a “disaster”*, WASH. TIMES, Oct. 23, 2011 (“I think it’s an absolute disaster . . . We won the war in Iraq, and we’re now losing the peace . . . We should be staying there to strengthen that democracy, to let them get the political gains they need to get and keep the Iranians away from strangling that country. That should be our objective, and we are walking away from that objective.”), <http://www.washingtontimes.com/news/2011/oct/23/key-general-calls-iraq-pullout-plan-a-disaster/> [<http://perma.cc/5B97-3ZE5>].

179. “The Peshmerga, whose name translates as ‘those who face death’ are Kurdish fighters in northern Iraq.” Recently they have been fighting against IS in that region of Iraq. BBC News, Profile: *Who are the Peshmerga?*, (Aug. 12, 2014), <http://www.bbc.com/news/world-middle-east-28738975> [<http://perma.cc/34NA-62HT>].

180. Chris Wallace, *Sen. McCain, Gen. Keane Break Down Options Against ISIS*, FOX NEWS SUNDAY, Aug. 24, 2014, <http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2014/08/24/sen-mccain-gen-keane-break-down-options-against-isis-dr-carson-rev-jackson-provide#p/v/3746466067001> [<http://perma.cc/38K3-LQ3Y>].

ments that temporal limitations do not facilitate the accomplishment of our strategic objective of defeating IS, S.J. Res. 43 does not incorporate such obstructions.¹⁸¹

Indeed, even the highest ranking uniformed officer of our military, Chairman of the Joint Chiefs of Staff, General Martin Dempsey, who was nominated by President Obama, argued earlier this year that “[c]onstraints on time, or a ‘sunset clause’, I just don’t think it’s necessary. I think the nation should speak of its intent to confront this radical ideological barbaric group and leave that option until we can deal with it.”¹⁸²

Some may then argue that, instead of providing a date certain for the expiration of a new AUMF, language should be inserted which provides for the expiration of the new AUMF if and when the President certifies that certain conditions are met. For example, Section 3 of the Gulf of Tonkin Resolution stated that its authorization would expire “when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise”¹⁸³ However, including a provision which only encourages the President to unilaterally declare an end to hostilities may be unwise due to this Administration’s insistence on ending U.S. military actions regardless of conditions on the ground.

The question remains whether a new AUMF should include restrictions on the types of forces which can be utilized against IS. Any such restriction would undermine the flexibility for conducting war inherent in both the U.S. Constitution and the contemporaneous AUMFs. Even more important than this legal argument is the effect such a restriction would have operationally. It appears General Dempsey was alluding to this very

181. Inhofe AUMF Against IS Press Release, *supra* note 144.

182. Lisa Ferdinando, *Dempsey: Keep All Options on the Table for Use of Force Against ISIL*, DOD NEWS, Jan. 23, 2015, <http://www.defense.gov/news/newsarticle.aspx?id=128023> [<http://perma.cc/W4LC-TWPT>]. See also Senator Hatch, Statement of Principles for AUMF, *supra* note 1.

183. Pub. L. No. 88-408 (1964). It should also be noted the resolution goes on to state that the statute can be terminated by concurrent resolution of Congress. However, this law was written before the Supreme Court’s decision in *INS v. Chadha*, 462 US 919 (1983). As a result of *Chadha*, “legislative vetoes” were ruled unconstitutional. Undoubtedly, because a concurrent resolution is only a congressional action and is not presented to the President for his signature or disapproval, this section of the Resolution, if enacted today would be considered unconstitutional.

point in his comments on January 23, 2015.¹⁸⁴ Specifically, the General stated:

I think in crafting of the AUMF, all options should be on the table and then we can debate whether we want to use them... It would always be my recommendation as the senior military leader to keep our options open as long and as wide as possible – whether [or not] we ever use them, it's important to have them.¹⁸⁵

Maintaining flexibility is crucial to the operational military commanders. Would that flexibility not be fundamentally undermined by restrictions on the type of forces that can be utilized?¹⁸⁶

One final but critical area that S.J. Res. 43 addresses is the requirements for the WPR. As noted above, since its enactment, no Administration has stated the WPR is constitutional.¹⁸⁷ However, one of the important attributes of both the 2001 and 2002 AUMFs is that they are “intended to constitute specific statutory authorization within the meaning of the . . . War Powers Resolution.”¹⁸⁸ Accordingly, S.J. Res. 43 has a section ensuring that if the new AUMF is enacted, the provisions of the WPR will be satisfied.

In sum, in order to meet the IS threat, any new AUMF must be clear and concise as to the authority it is granting the Executive Branch to use force, consistent with the laws of war, against IS.¹⁸⁹ The new AUMF must be flexible enough to continue to confront that threat as IS metastasizes and will not become obsolete.¹⁹⁰ It also must not contain any artificial limitations, such as geo-

184. See Ferdinando, *supra* note 174.

185. *Id.*; see also Hatch, Statement on AUMF Against IS, *supra* note 5; Press Release, Senators John McCain, Lindsey Graham, Kelly Ayotte, *Sens. McCain, Graham, and Ayotte on Afghanistan Troop Announcement* (May 27, 2014), <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=de23d2f5-3704-4e71-bffd-57396b52527b> [<http://perma.cc/HN6W-FJSH>].

186. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

187. Ackerman & Hathaway, *supra* note 57.

188. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498 (2002).

189. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

190. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

graphic, temporal, or force-type restrictions, which will interfere with our operations against IS.¹⁹¹ Finally, a new AUMF must remove any question that the requirements of the WPR have been met.¹⁹² Presently, I am only aware of one Senate proposal, S.J. Res. 43, which meets each of these requirements.

Unfortunately, the draft AUMF which was sent by the President to Congress on February 11 does not meet the critical elements articulated above. Specifically, the President's proposal creates "artificial and unnecessary limitations" based upon time and type of force.¹⁹³ It also contains an unnecessarily-restrictive definition of "associated forces."¹⁹⁴

The first major deficiency in the President's proposal is its time limitation. The President's AUMF would expire after only three years. Senator Hatch, in an op-ed critical of the President proposal, addressed this temporal limitation, arguing that:

the inclusion of an arbitrary deadline for military disengagement is tragically ironic; after all, the Islamic State was only allowed to metastasize because of the premature withdrawal of U.S. forces from Iraq determined by domestic political concerns, rather than the security situation on the ground. A time limit on a future authorization only invites the repetition of this deadly folly.¹⁹⁵

In addition, the Senator also stated in a floor address: "If we advertise when the authorizations expires at an arbitrary date and time, will they [IS] not hunker down and wait for that date."¹⁹⁶

The President's proposed AUMF is also flawed in restricting the types of forces that can be employed against IS. Specifically, the draft AUMF "does not authorize the use of the United States Armed Forces in enduring offensive ground combat op-

191. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

192. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

193. President Obama's Draft AUMF (Feb. 11, 2015), available at http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf [<http://perma.cc/P35F-LMAG>]; Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

194. *Id.*

195. Hatch, *To Defeat the Islamic State*, *supra* note 5.

196. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

erations.”¹⁹⁷ In response, Senator Hatch opines “[t]he exact meaning of this phrase is troublingly unclear” and, based upon the President’s proposal accompanying letter, appears to “only authorize certain Special Forces-type missions.”¹⁹⁸

The importance of not limiting the types of ground forces is not a mere academic concern. It goes directly to the question of what the United States’ strategy should be if the President’s current policies fail. For example, General Keane’s recent testimony before the SASC discussed what the U.S. military strategy should entail in order to defeat IS. The General’s written testimony stated:

The U.S. should plan now to have U.S./coalition advisors accompany front line troops with the added capability to call in air strikes. Direct action SOFs [Special Operation Forces] both ground and air should assist by targeting ISIS [IS] leaders. *U.S. and coalition combat brigades should be designated for deployment and moved to Kuwait to be ready for employment if the counter offensive stalls or is defeated.*¹⁹⁹

Clearly, the General believes more conventional forces—specifically the combat brigades—may be required.²⁰⁰ However, the use of such conventional forces would be explicitly *prohibited* by the draft AUMF.²⁰¹ Therefore, if the President’s proposal is enacted and a change in strategy is later required—which results in the need for a different type of force to be deployed—the flow of forces may be unnecessarily delayed until Congress acts.²⁰² As Senator Hatch noted:

Over the course of the past thirteen years, we have far too often failed to adapt our battlefield strategies to the constantly changing threat posed by our enemies, the price of which has often been paid in American lives. By attempting

197. President Obama’s Draft AUMF (Feb. 11, 2015), available at http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf [<http://perma.cc/P35F-LMAG>].

198. Hatch, *To Defeat the Islamic State*, *supra* note 5.

199. *Global Challenges and U.S. National Security Strategy, Hearing before the S. Comm. on Armed Services*, 114th Cong. (2015) (written statement of General John M. Keane, USA (Ret.)) (emphasis added).

200. *Id.*

201. President Obama’s Draft AUMF (Feb. 11, 2015) [hereinafter President Obama Draft AUMF], available at http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf [<http://perma.cc/P35F-LMAG>].

202. Hatch, *To Defeat the Islamic State*, *supra* note 5.

to limit the tools [or force] to fight our enemy, President Obama demonstrates that this lesson has been lost on him.²⁰³

Finally, the President's proposal also needlessly restricts the definition of "associated forces."²⁰⁴ Ensuring the proper definition of "associated forces" is included in any AUMF is critical.²⁰⁵ For example, our forces have, in part, the legal authorization to conduct operations against al Qaeda in the Arabian Peninsula or AQAP—a terrorist organization which has launched attacks on the homeland—because it has been determined to be an "associated force" of al Qaeda.²⁰⁶ Therefore, the 2001 AUMF has been utilized against AQAP, despite the fact when the authorization was devised no such organization existed.²⁰⁷ The obvious consequences of instead allowing AQAP to run amuck plainly demonstrate the importance of a broad definition of "associated forces."²⁰⁸

Unfortunately, the President's draft AUMF is much narrower and, if enacted, would unnecessarily restrict the ability of this, and future Administrations, to target those who are in league with IS.²⁰⁹ Specifically, the President would only be able to designate as an "associated force [those] . . . individuals and organizations fighting for, on behalf of, or alongside ISIL [IS]."²¹⁰ This limitation has already created controversy. For example, Senator Hatch has asked if this provision would also apply to those who were providing "material support, such as arms and monies?"²¹¹ Ensuring that any AUMF includes the authority to use force against those who provide material support to IS, should incentivize Congress to discard this portion of the President's draft.²¹²

The President's proposal seeks to put into place artificial, unwarranted and unnecessary restrictions on our forces ability to

203. *Id.*

204. *Id.*

205. *Id.*

206. *Authorization for the Use of Military Force after Afghanistan and Iraq: Hearing before the S. Comm. on Foreign Relations Committee*, 113th Cong. (2014) (statement of Stephen Preston, General Counsel Department of Defense).

207. Hatch, *To Defeat the Islamic State*, *supra* note 5.

208. President Obama Draft AUMF.

209. Hatch, *To Defeat the Islamic State*, *supra* note 5.

210. President Obama Draft AUMF.

211. Hatch, *To Defeat the Islamic State*, *supra* note 5.

212. It should be noted, S.J. Res. 43 does not define or use the phrase "associated force." This omission could be rectified as the Congress considers this legislation.

use force against IS.²¹³ Clearly, this is an imprudent course of action. Any AUMF enacted should provide the maximum flexibility for our forces and Commander in Chief.²¹⁴

IV. CONCLUSION

The President has cited the 2001 and 2002 AUMFs, Yet, as the legal basis for the use of force, in addition to his Article II authorities.²¹⁵ However, the Administration's frequent changes in applications and policies toward the two AUMFs have led to questions as to the legitimacy of using the existing AUMFs as an authorization to use force.²¹⁶ True, the President's Article II powers enable him to conduct operations against IS. Yet having an AUMF, as a practical and political consideration, helps resolve lingering questions about the President's authority to conduct operations and matters such as the detainment of individuals.²¹⁷ Therefore, a new AUMF should be enacted, and it should be written to affirm, clearly and concisely, that the Executive Branch has the authority to conduct operations against IS, within the boundaries of the laws of war.²¹⁸ This new authorization must also be flexible enough to meet the challenges posed by IS as it metastasizes.²¹⁹ On no account should a new AUMF create artificial geographic, temporal, or force-type limitations, on our troops.²²⁰ No other legislation meets these criteria other than S.J. Res. 43. Therefore, it should be used as the basis for a new AUMF against IS.

213. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

214. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.

215. The Obama Administration, *supra* note 97.

216. Hatch, Statement on AUMF Against IS, *supra* note 5.

217. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

218. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

219. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1.

220. Hatch, Statement on AUMF Against IS, *supra* note 5; Hatch, *To Defeat the Islamic State*, *supra* note 5; Hatch, Statement of Principles for AUMF, *supra* note 1; Inhofe, *supra* note 14.