



Understanding Authorizations for the Use of Military Force

By Ken Gude September 24, 2014

Since President Barack Obama laid out his strategy to degrade and ultimately defeat the Islamic State of Iraq and al-Sham, or ISIS, the debate has turned to whether he has sufficient legal authority to carry out that strategy or whether he needs a new congressional authorization for this mission. This is now even more pressing as U.S. and coalition air forces began striking ISIS targets in Syria this week, expanding U.S. military action to a second country. While the Obama administration has asserted that it has sufficient legal authority for this mission, many legal scholars and some elected officials on both sides of the aisle disagree.

There are multiple potential sources of authority in U.S. law for military action. As commander in chief, the president derives authority to use military force in certain circumstances from Article II of the Constitution. Congressional authorizations for the use of military force allow the president to lead a military campaign consistent with the scope defined by Congress. The War Powers Resolution was an attempt to restore the original constitutional balance on war powers between the legislative and executive branches.¹ But in practice, it has afforded the president greater latitude to use military force at the outset of a conflict.

Regardless of the merits of the various legal claims, the best path forward is for President Obama and Congress to work together on a new authorization for the campaign against ISIS. This new authorization should be exclusively directed at ISIS, prohibit the large-scale deployment of U.S. ground combat troops, and include both a geographic limitation and a resolution clause based on agreed criteria for ending the military phase of the fight against ISIS.

The president's legal authority for military action

The Constitution divides the power to declare war and the power to conduct war between the legislative and executive branches. Article I of the Constitution invests Congress with the authority to declare war and to raise and maintain military forces. Article II of the Constitution establishes the president as commander in chief of the

U.S. military and gives that office the authority to lead American military forces and prosecute armed conflicts. In this system, Congress decides whether to fight, and the president as commander in chief manages the fight authorized by Congress.²

The roots of war powers

The division of power between the legislative and executive branches was initially intended to address two very specific experiences and concerns. First, the Founding Fathers feared unilateral decisions to initiate military actions that were common to monarchs with absolute rule; giving Congress the authority to initiate military action broke with European norms and would be a check on reckless military adventurism.³ Second, they recognized that collective decision making during war, as many had experienced during the American Revolution, was ineffective.⁴ Granting the president the sole responsibility for leading the military ensured unity of command. It also enabled the president to respond to immediate threats under Article II.

The limitations of declaring full war became apparent early in American history during the XYZ Affair, also known as the Quasi-War, when the French government began to seize American merchant ships in 1798. Rather than declare war, Congress authorized the president to “acquire, arm, and man no more than twelve vessels, of up to twenty-two guns each” and then authorized public U.S. vessels to capture armed French vessels.⁵ From that time, both declarations of war and other authorizations for the use of military force have provided congressional sanction for war.⁶

Historical congressional authorizations of force

More than half of all the congressional use of force authorizations—18 of 35—came in the first 30 years after independence.⁷ These ranged from large wars, such as the War of 1812, to small engagements to fight naval piracy. It was also relatively common for Congress to restrict the president to the use of specific types of armed force. This was the case in the Quasi-War, which even limited the number of naval ships that could be used.⁸ Even though it was a long time ago, the only time this congressional power was tested in the Supreme Court, it was upheld unanimously.⁹

Congressional authorizations have grown much less frequent over time, with only nine occurring in the nearly 100 years since the United States entered World War I.¹⁰ The last actual declaration of war under Article I was for World War II.¹¹ Congressional authorizations in the 20th century have often been for major military actions such as World Wars I and II, the Gulf War, the Iraq War, and the response to the 9/11 attacks. The 2001 authorization for the use of military force, or AUMF, directed at the perpetrators of the 9/11 attacks is the longest continuously used congressional use of force authorization.¹²

The president's Article II powers

The Korean and Vietnam Wars are notable exceptions to seeking congressional authority. President Harry Truman claimed the Korean War was a “police action” and did not require congressional authorization.¹³ President Lyndon B. Johnson exploited the vaguely worded Gulf of Tonkin Resolution as justification for pursuing the armed conflict in Vietnam.¹⁴ These significant examples show how war powers have shifted toward the executive branch since the early days of American history.

Recent presidents of both parties and in different contexts have concluded that it is lawful for the president to use military force without congressional authorization in a wide range of circumstances. Generally, since the Korean War, presidential use of military force without congressional authorization has rested on two criteria.¹⁵ First, the military action is intended to defend U.S. persons, property, or national interests. Second, the military operation is clearly short of the traditional understanding of war. The Obama administration relied on this interpretation of its Article II authority to undertake the bombing campaign in Libya in 2011 and the initial deployment of U.S. forces to Baghdad and airstrikes targeting ISIS in August.¹⁶

In reaction to the continued prosecution of the Vietnam War without specific congressional authorization, Congress passed the 1973 War Powers Resolution, or WPR, to re-establish congressional prerogatives.¹⁷ In cases of legitimate military action in self-defense, the president must notify Congress within 48 hours and obtain congressional authority within 60 days of deploying American military forces into hostilities. This can be extended another 30 days if requested by the president.¹⁸ The common interpretation of the WPR has created a 60-day or 90-day window during which the president has a virtually free pass to use force. This is often referred to as the “sixty-day clock.”¹⁹

War powers and the conflict with ISIS

The Obama administration claims that both the 2001 AUMF in response to 9/11 and the 2002 Iraq War AUMF provide the necessary congressional authorization for its military campaign against ISIS.²⁰ Since it has not yet put forward a formal legal rationale, it is not clear whether the Obama administration is relying on both Article II and this statutory authority or if it has dropped its Article II claim. The interpretation that the 2001 and 2002 AUMFs cover the current conflict with ISIS has caused considerable controversy among legal scholars and elected officials and raised concerns that it has, at a minimum, stretched those AUMFs beyond their originally intended use.²¹

Regardless of the legal controversy, proceeding without a new and clear authorization to use force against ISIS will undermine President Obama's previously stated desire to establish a durable legal framework for the fight against terrorist groups.²² Without

congressional action, future presidents would likely follow this precedent and apply an expansive interpretation of existing authority to take military action against terrorist groups and limit Congress' appropriate role in such actions.

In order to avoid such a precedent, the Obama administration and Congress should work in concert to develop a specific congressional authorization for the conflict with ISIS that builds on the strategy the president presented to the nation earlier this month. Congress is in recess until after the election, but it will reconvene for a lame duck session in November and should enact an AUMF focused on ISIS at that time.

What an ISIS AUMF should look like

The United States has the experience of nearly 13 years of armed conflict against Al Qaeda, which can inform any process for a new use of force authorization against ISIS. As Sen. Tim Kaine (D-VA) said yesterday at the Center for American Progress Action Fund, enacting “the 2001 AUMF with no geographic limitation and no temporal limitation was a serious mistake.”²³

Rather than simply extend the 2001 AUMF to include ISIS and more groups, a new AUMF directed at ISIS should provide clarity of mission and purpose and sufficient authority to achieve those objectives. This could be a step toward the durable legal framework President Obama wants to leave to his successor.

Targeting ISIS

First, the new AUMF should explicitly name ISIS in the operative portion of the authorization. There must be enough flexibility to account for the frequent name changes and splintering of terrorist groups: ISIS is on its third name just this year, evidenced by President Obama's references to the group as the “Islamic State of Iraq and the Levant,” or ISIL, and the group shortening its own name to simply the “Islamic State.”

ISIS presents a unique set of challenges: It is operating across a former international border with sanctuary in ungoverned spaces in both Iraq and Syria; controls large amounts of cash, military equipment, and foreign fighters; and has access to oil fields and other substantial sources of revenue.²⁴ The AUMF should focus on these challenges and how to combat them, as outlined in the recent CAP report “Supporting the Syrian Opposition.”²⁵

Determining the extent of military engagement

Second, Congress is within its power to define the nature of U.S. military engagement against ISIS. President Obama has repeatedly pledged that no U.S. ground troops would be involved in this military campaign. To ensure that no large-scale U.S. combat forces are deployed, the AUMF could authorize President Obama to deploy specific capabilities against ISIS. These would most likely involve air power and special operations forces for specific missions such as assisting airstrikes, training and advising local forces, or providing support to protect Americans who are directly threatened by ISIS forces. Congressional approval for these missions should include a requirement that the president seek additional authority for the long-term deployment of regular ground forces. This would be distinct from last week's vote in Congress to authorize the U.S. military to provide training and military equipment to the Syrian rebels in their fight against ISIS and the Assad regime.²⁶

Additionally, the AUMF should include a geographic scope placing boundaries on the areas where the president is permitted to use force. When combating a nation-state, the geographic limits are understood, but a non-state actor such as ISIS can slip across multiple international borders. Consequently, Congress should define a geographic scope in Iraq and Syria to provide clarity about the military mission to the American people. It should acknowledge that ISIS could move across another recognized border and allow for use of force in areas outside of Iraq and Syria with congressional notification within 30 days. At that point, Congress can determine whether it is necessary to amend the original scope of the authorization to include the new area of operation.

Determining a conclusion to military action

Finally, the AUMF should include a clause that determines the conclusion of military action against ISIS. Again, unlike in conflicts between nation-states, there will be no potential peace treaty or cease-fire agreement negotiated between the two sides. In such situations, determining when the conflict is over is extremely difficult and fraught with political risk, but simply allowing the authority to continue carries little such risk. Without agreeing to terms that define the conditions necessary to shift to normal law enforcement and intelligence in the fight against ISIS, this authorization could create the kind of permanent state of war that President Obama has rightly decried.

This mechanism should establish a set of criteria for President Obama and Congress to agree on the point when the armed conflict with ISIS is over. White House Chief of Staff Denis McDonough recently said on Meet The Press, "Success looks like an ISIL that no longer threatens our friends in the region, no longer threatens the United States. An ISIL that can't accumulate followers, or threaten Muslims in Syria, Iran, Iraq or otherwise."²⁷

Building on that starting point, the criteria should include a determination that ISIS is no longer capable of threatening the U.S. homeland, does not control territory, and is diminished to the point that local military and law enforcement can manage the threat. This could allow a transitional period akin to examples in which the United States has helped countries reduce and manage the threat from insurgencies so that local governments can handle them on their own. Despite the ongoing challenges in countries such as Afghanistan, Pakistan, Yemen, and Somalia, it can and has been done successfully in Columbia and the Philippines. With consistent and targeted assistance from the United States, those two countries have experienced a significant reduction in violence and reached a level of stability and economic growth that few thought possible a decade ago.²⁸

To evaluate the status of this conditions-based approach to the conflict, the president would be required to submit an annual report assessing the capabilities of ISIS against the agreed criteria. If the president determines that ISIS is degraded to the point that the criteria have been met, Congress would then vote to either accept or reject those findings, with an affirmative vote concluding the authority of the AUMF.

Conclusion

President Obama should seek an authorization for the use of military force, or AUMF, that is explicitly and exclusively directed at ISIS, prohibits the large-scale deployment of U.S. ground combat troops, and includes both a geographic limitation and a resolution clause based on agreed criteria for ending the military phase of the fight against ISIS. This will set up a rational and durable framework for fighting terrorism.

Ken Gude is a Senior Fellow with the National Security and International Policy team at the Center for American Progress.

Endnotes

- 1 Richard F. Grimmet, "The War Powers Resolution: After Thirty Years" (Washington: Congressional Research Service, 2004), available at <http://fas.org/man/crs/RL32267.html>.
- 2 The Constitution Project, "Deciding to Use Force Abroad" (2005), pp. 10, 14, available at http://www.constitution-project.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf.
- 3 John Jay, "The Federalist Papers: No. 4," Yale Law School Avalon Project, available at http://avalon.law.yale.edu/18th_century/fed04.asp (last accessed September 2014).
- 4 Letter from Samuel Chase to Richard Henry Lee, May 17, 1776. In Paul H. Smith, ed., *Letters of Delegates to Congress*, vol. IV (Washington: Library of Congress, 1976).
- 5 J. Gregory Sidak, "The Quasi War Cases—And Their Relevance to Whether 'Letters of Marque and Reprisal' Constrain Presidential Powers," *Harvard Journal of Law & Public Policy* 28 (2) (2005): 465–500, available at http://www.criterioneconomics.com/pdfs/gsidak_pdfs/The_Quasi_War_Cases.pdf.
- 6 Donald R. Hickey, "The Quasi War: America's First Limited War, 1798–1801," *The Northern Mariner* 18 (3–4) (2008): 67–77, available at http://www.cnrs-scrn.org/northern_mariner/vol18/ntm_18_3-4_67-77.pdf.
- 7 Bill French and John Bradshaw, "Ending the Endless War: An Incremental Approach to Repealing the 2001 AUMF" (Washington: National Security Network, 2014), Appendix 2, available at http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL.pdf.
- 8 Sidak, "The Quasi War Cases."
- 9 Ibid.
- 10 French and Bradshaw, "Ending the Endless War."
- 11 Ibid.
- 12 Gene Healey, "Let's End Congress's Blanket Authorization of Force," *Reason.com*, May 20, 2014, available at <http://reason.com/archives/2014/05/20/lets-end-congresss-blanket-authorization>.
- 13 Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," *The American Journal of International Law* 89 (21) (1995): 21–39, available at <http://www.constitutionproject.org/wp-content/uploads/2012/09/425.pdf>.
- 14 Edwin E. Moise, *Tonkin Gulf and the Escalation of the Vietnam War* (Chapel Hill, NC: University of North Carolina Press, 1996), p. 244.
- 15 Letter from Walter Dellinger to U.S. senators, "Deployment of United States Armed Forces into Haiti," September 27, 1994, available at <http://www.justice.gov/sites/default/files/olc/opinions/1994/09/31/op-olc-v018-p0173.pdf>.
- 16 For more information about airstrikes in Libya, see Letter from Caroline D. Crass to the attorney general, "Authority to Use Military Force in Libya," April 1, 2011, available at <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>. For more information about 2014 airstrikes in Iraq, see The White House, "Letter from the President—War Powers Resolution Regarding Iraq," Press release, August 17, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>.
- 17 Richard F. Grimmet, "The War Powers Resolution: After Thirty Years."
- 18 *War Powers Resolution*, Public Law 93-148, 93rd Cong., 1st sess. (November 7, 1973).
- 19 The Constitution Project, "Deciding to Use Force Abroad."
- 20 Charlie Savage, "Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says," *The New York Times*, September 12, 2014, available at <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>.
- 21 Jennifer Daskal, "Democracy's Failure," *Just Security*, September 11, 2012, available at <http://justsecurity.org/14820/democracys-failure>.
- 22 The White House, "Remarks by the President at the National Defense University," Press release, May 23, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.
- 23 Center for American Progress Action Fund, "The Role of Congress in the Fights Against ISIS: Remarks by Sen. Tim Kaine (D-VA)," September 23, 2014, available at <http://www.americanprogressaction.org/events/2014/09/17/97338/the-role-of-congress-in-the-fight-against-isis>.
- 24 Patrick B. Johnson and Benjamin Bahney, "Hitting ISIS Where It Hurts," *The New York Times*, August 14, 2014, available at <http://www.nytimes.com/2014/08/14/opinion/disrupt-isis-cash-flow-in-iraq.html>.
- 25 Hardin Lang, Mokhtar Awad, Ken Sofer, Peter Juul, and Brian Katulis, "Supporting the Syrian Opposition: Lessons from the Field in the Fight Against ISIS and Assad" (Washington: Center for American Progress, 2014), available at <http://www.americanprogress.org/issues/security/report/2014/09/12/96990/supporting-the-syrian-opposition>.
- 26 Zeke J. Miller, "Congress Votes to Arm Syrian Rebels," *Time*, September 18, 2014, available at <http://time.com/3399746/congress-votes-to-arm-syrian-rebels>.
- 27 NBC News, "Meet the Press Transcript," September 14, 2014, available at <http://www.nbcnews.com/meet-the-press/meet-the-press-transcript-september-14-2014-n205036>.
- 28 Michael O'Hanlon, "Columbia's lessons for counterinsurgency – and Afghanistan," CNN, March 10, 2012, available at <http://globalpublicsquare.blogs.cnn.com/2012/03/10/columbias-lessons-for-counterinsurgency-and-afghanistan>.