

**“Outside Perspectives on the President’s Proposed  
Authorization for the Use of Military Force Against  
the Islamic State of Iraq and the Levant”**

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Chairman Thornberry, Ranking Member Smith, and members of the committee, thank you for the opportunity to testify on this important topic. Though debates no doubt will always rage regarding whether and when it is strictly necessary for Congress to assent in order for the use of force to be constitutional, there is no doubt that it is always important and desirable for Congress to express its views when American's armed forces are sent into harm's way.

I begin by summarizing four key takeaways from the pages that follow:

1. The administration has not abandoned its claims of authority to attack ISIL under Article II or the 2001 AUMF, rendering the constraints set forth in the draft AUMF largely (though not entirely) academic as a legal matter.
2. There is no on-point precedent for authorizing military force to “defeat” an enemy while at the same time forbidding the Commander-in-Chief to engage in certain forms of ground combat operations towards that end; prior AUMFs that authorized only limited forms of force did so in connection with narrower objectives, such as stopping foreign powers from seizing American shipping or participating in peacekeeping operations.
3. Whether it is constitutional or not, any limitation on the role of ground forces in the AUMF must not create unnecessary legal uncertainty for commanders. The draft's vague prohibition on “enduring offensive ground combat operations” violates this principle.
4. Sunset provisions are especially desirable in an AUMF where, as here, the nature of the mission is uncertain, the demands of meeting the mission likely will evolve over time, and the benefits of refreshing the democratic legitimacy of an overseas military operation accordingly are higher than normal.

I explain these claims in more detail below, along with a number of other points. Part I begins by placing the Administration's proposal in context with the authority the Administration already claims under color of Article II of the Constitution of the United States as well as the 2001 AUMF directed at al Qaeda. Part II surveys the provisions of the draft AUMF that have generated the most controversy and debate, including: (a) its lack of a stated purpose; (b) the prohibition on “enduring offensive ground combat operations”; (c) its definition of “associated forces”; (d) its transparency and oversight provision; (e) its relationship to the Law of Armed Conflict; (f) its sunset clause; and (g) one final matter that has flown under the radar up to this point insofar as ISIL is concerned.

## I. Would This AUMF Matter, Given Other Claimed Authorities?

Yes, but not much.

Several commentators have observed that the Administration's draft AUMF may be largely academic (at least on the constraint side), since it fails to address the existing authorities—Article II of the Constitution of the United States and the 2001 al Qaeda AUMF—that the Administration has relied upon to conduct operations against ISIL up to this point, operations that appear more or less comparable to what the Administration appears to contemplate conducting under color of the draft AUMF were it to pass.<sup>1</sup> This observations seems accurate to me.

Recall that when U.S. airstrikes against ISIL began in August 2014, the President invoked his authority under Article II of the Constitution to justify them. No mention was made of any AUMF at that time. In a letter to Congress, he explained:

I have authorized the U.S. Armed Forces to conduct targeted airstrikes in Iraq. These military operations will be limited in their scope and duration as necessary to protect American personnel in Iraq by stopping the current advance on Erbil by the terrorist group Islamic State of Iraq and the Levant and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there. ... I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.<sup>2</sup>

Nine days later, the President issued a second letter to Congress repeating this line of argument, this time in connection with air strikes to drive ISIL fighters away from the Mosul Dam:

The failure of the Mosul Dam could threaten the lives of large numbers of civilians, endanger U.S. personnel and facilities, including the U.S. Embassy in

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<sup>1</sup> See, e.g., Jack Goldsmith, "Errors and Misconceptions About the Obama Draft AUMF," LAWFARE (Feb. 16, 2015) (available at <http://www.lawfareblog.com/2015/02/errors-and-misconceptions-about-the-obama-draft-aumf/>); Marty Lederman, "Suggestions for Clarifying/Amending the President's Draft ISIL AUMF," JUST SECURITY (Feb. 12, 2015) (available at <http://justsecurity.org/19928/suggestions-clarifying-amending-draft-aumf/>). A number of prior AUMF proposals, in contrast, have included language that in various ways clarified that they would be the sole *statutory* authority for anti-ISIL operations going forward, superseding the 2001 AUMF in that context.

<sup>2</sup> Letter from the President to the Speaker of the House (Aug. 8, 2014) (available at <http://www.lawfareblog.com/wp-content/uploads/2014/08/IraqWPR.pdf>).

Baghdad, and prevent the Iraqi government from providing critical services to the Iraqi populace. Pursuant to this authorization, on the evening of August 15, 2014, U.S. military forces commenced targeted airstrike operations in Iraq. I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. These actions are being undertaken in coordination with the Iraqi government.<sup>3</sup>

This assertion of unilateral executive-branch authority to deploy the armed forces into a combat setting was consistent, to some degree, with the Administration's prior assertion of similar authority in connection with the multi-month air campaign against the regime of Muammar Gaddafi in Libya in 2011, as well as the Administration's consideration of airstrikes against the Assad regime in Syria in connection with the use of chemical weapons in 2013. In both those cases, the Administration appeared to assert that the President has authority to use some degree of military force in pursuit of important national interests, at least where American forces will not be present on the ground in a direct combat role.

Though the Administration has since added claims under color of the 2001 al Qaeda AUMF (i.e., the statutory foundation for all al Qaeda-related military activity around the world, including not just the Af-Pak region but also Yemen and Somalia to give two pressing examples) and the 2002 Iraq AUMF, it has not backed away from its assertion of Article II authority. And the logic of its Article II claims as first expressed in August 2014—i.e., that force may be used to (i) stop ISIL forces from threatening U.S. personnel on the ground in Iraq or (ii) protect Iraqi civilians from imminent harm at ISIL's hands—arguably have extensive application to the situation in Iraq today. First, U.S. personnel are now present on the ground in much greater numbers than in August 2014, and they are there on a comparatively widespread basis bringing them into geographic proximity to ISIL in many places.<sup>4</sup> The Administration's extended "force protection" theory would go a considerable way towards justifying continuing the use of force against ISIL on this basis alone. Similarly, the fact that ISIL currently controls a considerable amount of territory—including Mosul—means that the protection-of-civilians theory also has substantial application.

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<sup>3</sup> Letter from the President to the Speaker of the House (Aug. 17, 2014) (available at <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>).

<sup>4</sup> See "Bombers Make It Onto Iraq Base Used by U.S. Troops," CBS NEWS (Feb. 13, 2015) (available at <http://www.cbsnews.com/news/suicide-bombers-iraq-ain-al-assad-airbase-us-marines-near-isis/>).

None of this is to say that either theory is, or is not, persuasive as applied in Iraq then or now.<sup>5</sup> The point, rather, is that there may be little about current anti-ISIL operations that actually depends, as a legal matter, on the relevance of any AUMF given the breadth of the Administration's understanding of its Article II authority. On this view, the relevance of an AUMF is to enhance the legal and political legitimacy of the current campaign, but it is not strictly necessary to create that legitimacy in the first place.<sup>6</sup>

A similar point can be made about the Administration's eventual decision to invoke the 2001 al Qaeda AUMF in connection with anti-ISIL operations, in addition to its assertion of Article II authority. In early September 2014, Administration officials confirmed that they were now prepared to invoke the 2001 al Qaeda AUMF in support of the accelerating operations against ISIL. One official explained the underlying theory, which held that ISIL amounted to a partial successor to al Qaeda:

Based on ISIL's longstanding relationship with al-Qa'ida (AQ) and Usama bin Laden; its long history of conducting, and continued desire to conduct, attacks against U.S. persons and interests, the extensive history of U.S. combat operations against ISIL dating back to the time the group first affiliated with AQ in 2004; and ISIL's position – supported by some individual members and factions of AQ-aligned groups – that it is the true inheritor of Usama bin Laden's legacy, the President may rely on the 2001 AUMF as statutory authority for the use of force against ISIL, notwithstanding the recent public split between AQ's senior leadership and ISIL.<sup>7</sup>

Whatever the merits of this theory—I was among those who questioned it—the important thing about it is that the Administration continues to embrace it, and nothing in the draft AUMF for ISIS purports to limit or abandon it (let alone to terminate the 2001 AUMF itself). This is rather significant, since none of the constraint provisions that the Administration has included in its proposed AUMF for ISIL appear in the 2001 AUMF.<sup>8</sup>

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<sup>5</sup> For skepticism about application of the Article II argument to support a sustained air campaign, see Jack Goldsmith, “The Relatively Weak Article II Basis for Bombing Iraq and Syria (and Remember the President’s August 31, 2013 Speech?)” (June 14, 2014) (available at <http://www.lawfareblog.com/2014/06/the-relatively-weak-article-ii-basis-for-bombing-iraq-and-syria-and-remember-the-presidents-august-31-2013-speech/>).

<sup>6</sup> Note that this perspective is closely related to the long-standing view that the executive branch has Article II authority to use lethal force in order to prevent terrorist attacks against the United States in at least some circumstances, quite apart from whether there is any AUMF. I discuss this topic at length in Robert M. Chesney, *Postwar*, 5 HARVARD NATIONAL SECURITY JOURNAL 305 (2014) (available at <http://ssrn.com/abstract=2332228>).

<sup>7</sup> The statement was published at <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>.

<sup>8</sup> The Draft AUMF does, in contrast, terminate the 2002 Iraq AUMF, which the administration also has cited in support of its current operations.

On this view, passage of the draft AUMF would add a third layer of legal authorization on top of two others already asserted by the Administration in support of current combat operations (Article II, and the 2001 AUMF). Bearing this in mind, does the draft AUMF really matter?

At one level, the answer must be yes. Neither the Article II nor the 2001 AUMF arguments recounted above are without critics, and the draft AUMF would definitively remove lingering questions regarding the Administration's authority to conduct the current campaign. Of course, there is no reason to think that the merits of the Article II or 2001 AUMF arguments are likely to find their way into court anytime soon, and hence some will doubt whether there really is anything to settle in this respect. For my part, I think it is quite important, if for no other reason than that our armed forces should not be sent into harm's way with such uncertainty lingering over their mission if the political will exists—as it seems to in this setting—to present a united front between the President and Congress in support of their mission.

A separate way in which the draft AUMF might matter is in connection with the various constraints it entails, which I will discuss in more detail in the next Part. But some have argued that those constraints are meaningless if they do not also bind the President in acting under his claims of Article II and 2001 AUMF authority.

Is this correct? I think it largely is, but the question is a bit more complicated than seems to be the case at first blush. First, there is no doubt that adoption of these constraints will have genuine *political* impact, making it considerably more costly for this or a future Administration to act in violation of them notwithstanding the existence of the parallel (and comparatively unconstrained) Article II and 2001 AUMF tracks. Second, some may argue that these constraints really should be read to apply to the 2001 AUMF (if not Article II as well) insofar as ISIL is concerned, by implication (i.e., despite the lack of explicit language to that effect). That may or may not be a plausible reading of the draft AUMF, but the argument likely would be made sooner or later, thus adding at least a bit to the teeth of the constraints. Finally, the constraints certainly would have full effect insofar as there are any situations covered by the draft AUMF but not by the 2001 AUMF or Article II—and as noted below in the discussion of “associated forces,” there is some reason to think that the draft AUMF does break new ground to a limited extent.

What if anything should Congress do in light of all this? Professor Marty Lederman has suggested adding in the language from Section 6 of the 2014 AUMF draft from the Senate Foreign Relations Committee, which stated that

“The provisions of this joint resolution pertaining to the authorization for use of force against the Islamic State of Iraq and the Levant shall supersede any preceding authorization for use of military force.”<sup>9</sup>

I would clarify that a bit in order to avoid a reading suggesting that the new AUMF entirely replaces the 2001 AUMF in *all* respects, thereby potentially leaving al Qaeda entities uncovered unintentionally. The following language would accomplish this:

“The provisions of this joint resolution shall supersede the terms of any preceding authorization for use of military force in relation to the Islamic State of Iraq and the Levant and its associated forces.”

Would the White House accept this shift? Apparently so. On February 23<sup>rd</sup>, the media reported that the White House is aware of this issue and willing to address it through changes to the draft AUMF. As an initial matter, White House officials apparently explained, the President would “no longer rely on the authority approved in 2001” in order to justify operations against ISIL if a new ISIL-specific AUMF is passed. More significantly, a White House official expressly invited Congress to “make that clear within the statute by adding that limitation to the authorization.”<sup>10</sup> Why the White House did not do this in its own draft to begin with is not clear; perhaps it was not possible to generate sufficient internal consensus on the point, and the hope (or expectation) was the Congress in any event would take the lead in breaking with the 2001 AUMF as the basis for anti-ISIL operations. At any rate, it appears the Administration would support such a shift.

All that said: adding this language would suffice to address the overlap with authorities under the 2001 AUMF, but it would not speak to the parallel claims of authority that the Administration has made under Article II itself. The draft AUMF in theory could be amended to clarify not only that it is the sole *statutory* authority for using force against ISIL, but also the sole authority of any kind, to the exclusion of Article II authority. In my view, however, such an attempted preclusion of Article II authority would likely be unconstitutional. The actual answer of course would depend on the scope of the particular claim of Article II authority at issue.

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<sup>9</sup> See *supra* note 1.

<sup>10</sup> Nedra Pickler, “Obama Open to Changes to Military Authority Against IS,” *Assoc. Press* (Feb. 23, 2014) (available at [http://hosted.ap.org/dynamic/stories/U/US\\_CONGRESS\\_WAR\\_POWERS?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/U/US_CONGRESS_WAR_POWERS?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)).

## II. The Contested Provisions of the Draft AUMF

I turn now to a review of various elements of the Administration’s draft AUMF that have attracted criticism.

### A. The Lack of a Stated Purpose

When Congress authorized force in the aftermath of the 9/11 attacks, it specified a particular objective and it did so in the operative provision of the joint resolution:

“(a) In General.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*” (emphasis added)

That purposive language was no afterthought, but rather was the product of considerable discussion between the White House and Congressional leaders.

The Administration’s draft AUMF for ISIL is curiously different in that respect, both because it lacks any purposive language<sup>11</sup> and because, so far as the public record indicates, here has not yet been meaningful dialogue between the White House and Congress regarding what such language might say.<sup>12</sup> The key operative provision authorizing force in the draft AUMF—section 2(a)—provides:

“(a) AUTHORIZATION.—The President is authorized, subject to the limitations in subsection (c), to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5.”

The task of defining the purpose of the U.S. military intervention against ISIL is a matter for policymakers, *not lawyers*, to decide. That said, I note that the President in

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<sup>11</sup> The one reference to purpose in the draft AUMF, contained in one of the Whereas clauses, refers vaguely to “*working with regional and global allies and partners to degrade and defeat ISIL, to cut off its funding, to stop the flow of foreign fighters to its ranks, and to support local communities as they reject ISIL;*” (emphasis added).

<sup>12</sup> President Obama has previously declared that the goal of U.S. policy is to “degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy.” Statement by the President (Sep. 10, 2014) (available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>). But note the nuance in that language; that policy calls for ISIL’s destruction via a multifaceted counterterrorism strategy that includes a major role for U.S. air power but that contemplates local ground forces rather than U.S. forces playing the lead role in taking the fight to ISIL on land.



his transmittal letter conveying the draft AUMF to Congress offered a statement of purpose of sorts:

“I am submitting a draft AUMF that would authorize the continued use of military force to degrade and defeat ISIL.”<sup>13</sup>

This language leaves much unsaid. It does not clarify, for example, whether our underlying purpose is to prop up the government of Iraq, to preserve Iraq’s territorial integrity, to prevent ISIL from maintaining a safe haven there or in Syria, to minimize ISIL’s capacity to conduct external operations, to destroy ISIL outright, or some combination of the above. Relatedly, the President’s language does not actually define what it means to “defeat” ISIL. These are all pressing questions for Congress and the White House to explore. And yet inclusion of the “degrade and defeat” language in the operative portion of the statute would at least be an improvement over the status quo.<sup>14</sup>

## **B. “Enduring Offensive Ground Combat Operations”**

The most striking constraint contained in the draft AUMF is found in section 2(c), which provides:

“(c) LIMITATIONS.— The authority granted in subsection (a) does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.”

The “enduring offensive ground combat” language at the heart of this provision is grossly indeterminate on its face. It is entirely unclear what counts as “enduring,” at least on the margins. Does a ground deployment become enduring after a few weeks? A few months? Only after a few years? “Offensive” is equally uncertain in this setting. Will the upcoming operation to liberate Mosul be offensive, for example, given that it was ISIL that first attacked and then occupied that city? What about any given attack on ISIL forces caught out in the open, perhaps moving to carry out an attack somewhere?

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<sup>13</sup> The letter is posted at [http://www.lawfareblog.com/wp-content/uploads/2015/02/02-11-15\\_White-House\\_AUMF\\_Transmittal-Letter.pdf](http://www.lawfareblog.com/wp-content/uploads/2015/02/02-11-15_White-House_AUMF_Transmittal-Letter.pdf).

<sup>14</sup> I note that in a draft AUMF composed by me, Jack Goldsmith, Matt Waxman, and Benjamin Wittes in November 2014, we too failed to specify a particular purpose in our proposed operative section. *See* “A Draft AUMF to Get the Discussion Going,” LAWFARE (available at <http://www.lawfareblog.com/2014/11/a-draft-aumf-to-get-the-discussion-going/>).

It is not that we have no idea what the Administration has in mind here. The transmittal letter lays down several markers, for what it is worth. On one hand, the President writes that the

“draft AUMF would not authorize long-term, large-scale ground combat operations like those our Nation conducted in Iraq and Afghanistan. Local forces, rather than U.S. military forces, should be deployed to conduct such operations.”<sup>15</sup>

On the other hand, certain other ground operations would be permitted. To wit:

“The authorization I propose would provide the flexibility to conduct ground combat operations in other, more limited circumstances, such as rescue operations involving U.S. or coalition personnel or the use of special operations forces to take military action against ISIL leadership. It would also authorize the use of U.S. forces in situations where ground combat operations are not expected or intended, such as intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces.”<sup>16</sup>

But this leaves a great deal uncertain. Can military advisers embedded with Iraqi and Kurdish units fire their weapons when those units are engaged with ISIL, for example, apart from in strictly-immediate self-defense? Why would that not be ok, if SOF raids targeting leadership targets is permitted? Commanders should not be left to guess where the boundary lines lie. If the use of ground forces *are* to be constrained, far more care must be taken to develop, articulate, and enshrine the boundary lines.

*Should* the use of ground forces be constrained at all? That too is not a question for lawyers, at least not when framed in that way. But there is a related question that is decidedly legal: Would any such constraint be constitutional?

Some have argued that Congress plainly does have authority to impose such a constraint if it wishes to do so, not just pursuant to the power of the purse (a point which few would dispute) but also simply as a condition for issuing an AUMF in the first instance. Others argue that such an intervention would improperly infringe the President’s authority as Commander-in-Chief (particularly the notion that the particulars of waging war, once properly authorized, should be left to the President).

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Advocates of the view that section 2(c) is constitutional have pointed out that Congress has on many past occasions authorized to use the military only for limited means or in limited ways. Leading examples along those lines include:

- The several statutes Congress enacted during the Naval (Quasi) War with France during the Adams Administration, each of which called for the use of naval force against French vessels in response to “depredations on the commerce of the United States.”<sup>17</sup>
- The statutes Congress enacted in the early 19<sup>th</sup> century to authorize the use of force against Barbary Coast pirates preying upon American shipping.<sup>18</sup>
- An 1890 statute authorizing the President to take measures he deems necessary to compel Venezuela to provide satisfaction for its earlier seizure of three American own steamships.<sup>19</sup>
- A 1955 statute authorizing the President to use the armed forces as necessary to protect Formosa [Taiwan] and the Pescadores from attack.<sup>20</sup>
- A 1983 statute authorizing the continued deployment of U.S. forces in Lebanon as part of a multinational peacekeeping force despite the outbreak of hostilities there, subject to limits specified in an exchange of diplomatic notes between the United States and Lebanon.<sup>21</sup>

Each of these examples bears some similarity to the present case, but most are readily distinguished, and none are precisely on point. Simply put, we have never before had a situation in which the United States sought to “defeat” or “destroy” a military enemy while Congress affirmatively forbade the Commander-in-Chief from pursuing that end with ground forces. The only close example on the list would be the Naval (Quasi) War statutes that famously authorized the Adams Administration to employ the Navy to seize French vessels, and even then only in limited circumstances (limitations that Chief Justice Marshall enforced in *Little v. Barreme*).<sup>22</sup> That example can be distinguished, however, on the ground that America’s aim in using force against France was quite limited, and certainly nothing like the call for “defeat” and “destruction” characterizing current policy towards ISIL. Put another way, the Naval

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<sup>17</sup> Act of May 28, 1798, ch. 48, 1 Stat. 561; Act of June 28, 1798, 1 Stat. 574; Act of July 9, 1798, ch. 68, 1 Stat. 578).

<sup>18</sup> Act of Feb. 6, 1802, ch. 4, 2 Stat. 129 (Tripoli); Act of Mar. 3, 1815, ch. 90, 3 Stat. 230 (Algiers). Note, though, that in both these cases Congress not only authorized the use of the navy but also included a general authorization “for the President...to cause to be done all such other acts of precaution or hostility, as the state of war will justify, and may in his opinion require.” *See id.* s.2.

<sup>19</sup> Joint Resolution of June 19, 1890, 26 Stat. 674.

<sup>20</sup> Act of Jan. 29, 1955, ch. 4, 69 Stat. 7.

<sup>21</sup> Pub. L. 98-119, 97 Stat. 804 (Oct. 12, 1983).

<sup>22</sup> 6 U.S. 170 (1804).

(Quasi) War with France was not a situation in which the United States was doing its level best to destroy a military opponent, as does appear to be the aim with ISIL.

Of course, it is equally true that we do not have a clear example of something similar to s. 2(c) being proposed but then rejected on constitutional ground in the past. The absence of an on-point practical precedent thus is best understood merely to make the constitutional question harder, not to conclusively resolve it.

This leaves both sides in the debate to argue from deeper principles about the respective privileges of the President and Congress. There are few clear lines in this area, unfortunately, particularly when a novel constraint such as this arises. My own view is that this is an unusually close case, and an unwise proposal, but I do not think it lies beyond the powers of Congress in the current circumstances. Were the facts to change—for example, if it became the case that an “enduring offensive ground combat operation” was necessary in order to prevent ISIL from attacking the United States directly, thus more directly implicating the Article II authority and duty of the President to take actions to defend the nation—my answer might well be different. To the best of my knowledge, however, this is not currently the case.

### **C. The Associated Forces Definition**

There has been some talk of the associated forces definition in the draft AUMF, including criticism for its failure to include the language of “co-belligerency” and its inclusion of the notion that ISIL may spawn “successor groups.” I am not convinced that the absence of the co-belligerency language has practical significance, but I also think it is wise to tap into the existing understandings of “associated forces” that the government and the courts have developed over more than a dozen years’ worth of experience in connection with the 2001 AUMF. There seems to be no harm in tweaking the language to do this. As for the notion of pre-incorporating successor groups that may emerge later, the experience of this Administration reading precisely that argument into the 2001 AUMF suggests that such language will be implied into any ISIL AUMF in any event, unless of course the idea is affirmatively prohibited.

### **D. Transparency and Oversight**

The draft AUMF makes a tantalizing gesture towards transparency and oversight in the government’s application of the authority it confers, but falls short of the mark by (i) failing to explain in any detail just what events or actions actually trigger the reporting requirement, and (ii) limiting the reporting to Congress while saying nothing about disclosures to the public. The provision should be amended to at least require

periodic disclosure to the public as to any new groups or organizations brought within the scope of the associated forces language in the AUMF, and also with respect to uses of force under color of the AUMF in locations outside of Iraq or Syria (such as, say, Libya). Thought also should be given as to how authority granted under an ISIL AUMF would relate to the HASC-originated reporting requirements previously adopted for Special Military Operations.

### **E. The Law of Armed Conflict**

The draft AUMF is conspicuously silent with respect to whether the force it authorizes must comport with the law of armed conflict (“LOAC”). This is not unusual, to be sure; usually AUMFs do not say anything explicitly on this point, and LOAC’s relevance instead is simply assumed when, for example, litigation may arise requiring a judgment on the matter. In this particular instance, however, the precise way in which s.2(a) grants authority does raise at least the possibility that the President will receive discretion to determine that some actions inconsistent with LOAC nonetheless are “necessary and appropriate” under the statute. This would probably not be a fair reading, but to dispel any doubt it would be worth including language in the AUMF clearly stating LOAC’s relevance.

### **F. The Sunset Clause**

Sunset clauses offer a mix of advantages and disadvantages. They are problematic insofar as one believes that (i) the authority in issue will be desirable to maintain when the sunset arrives but (ii) for some reason there is a substantial risk that this insight will not be appreciated or acted upon. They are beneficial, on the other hand, in that they compel a future Congress and President to commit their own political capital should they wish to preserve a sunset authority, in which case the authority receives an injection of fresh political and legal legitimacy (not to mention a fresh public airing on the merits and in light of changed circumstances).

In this case, there are special factors militating in favor of a sunset of *some* kind. As noted above, there is a degree of uncertainty regarding the military’s mission. That, combined with the high likelihood of substantially-changed facts on the ground in Iraq and Syria in the years ahead, cuts in favor of ensuring that a future President and Congress will come to grips with these issues on their own. The current debate surrounding the continuing vitality of the 2001 AUMF is a good illustration of the way in which the passage of time and evolution of facts on the ground can erode perceptions of legitimacy for long-standing AUMFs, generating friction and doubt that unhelpfully overhangs the decisions of military commanders. More generally, it is

highly desirable as a matter of democratic accountability that the people's representatives periodically weigh in on—and invest their own political capital in—armed conflicts that have become protracted. And so too for a new president.

All that said, it is problematic to time the sunset such that the need to consider renewal would fall on the desk of a just-elected president, and it is imperative as well to minimize any impression that the United States from the outset is focused more on exiting the mission rather than accomplishing it (a matter of atmospherics, yes, but one that matters both in terms of the enemy's perceptions and the perceptions of our allies). To address both these concerns, I recommend shifting the term of the proposed sunset clause from three to five years.<sup>23</sup>

## **G. Detention**

I close by noting that the draft AUMF is conspicuously silent on the subject of detention. At one level this is understandable; the Administration plainly would prefer for the Government of Iraq or others to take responsibility for any detention that occurs in connection with ISIL members, and this may well be the most desirable approach as a matter of policy. It is disconcerting, however, to contemplate the enactment of an AUMF that will authorize continued use of airstrikes and other forms of lethal military force under color of the law of armed conflict, but that will be silent with respect to the possibility that the United States might, in the right circumstances, want to or even need to employ LOAC-compliant detention of captured ISIL personnel. I hope that this committee, and Congress more generally, will give thought to this matter.

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Thank you for your time and attention. I look forward to the opportunity to answer your questions.

Robert Chesney

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<sup>23</sup> This is a revised view, as I previously had suggested that three years might suffice. *See supra* note 14.