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U.S. Military Action Against the Islamic State: Answers to Frequently Asked Legal Questions

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Summary

Ongoing U.S. military operations against the Islamic State (which formerly referred to itself as the Islamic State of Iraq and the Levant, and is also commonly referred to as IS, ISIS, or ISIL) raise issues concerning the allocation of war powers between Congress and the President, including whether such operations have been (or are required to be) authorized by an act of Congress. In August 2014, President Obama ordered U.S. forces to commence airstrikes against IS targets in Iraq to assist the Iraqi government in combating the insurgent force, protect U.S. military and nonmilitary personnel in Iraq, and support certain humanitarian operations. In a public address on September 10, 2014, President Obama announced the pursuit of a strategy to “degrade and ultimately destroy” the Islamic State, including through the escalation of U.S. airstrikes against IS forces in Iraq, as well as the possible initiation of U.S. airstrikes against IS forces located in neighboring Syria. On September 23, 2014, the United States began airstrikes in Syria targeting IS forces and certain other groups within that country believed to be affiliated with Al Qaeda.

As of the date of this report, Congress has not enacted legislation specifically authorizing U.S. force against the Islamic State. In enacting the Continuing Appropriations Resolution, 2015 (P.L. 113-164), which was signed into law on September 19, 2014, Congress authorized the President to arm and train vetted elements of Syrian opposition groups, including for purposes of deterring attacks on the Syrian populace by the Islamic State, but the legislation expressly provides that it does not constitute statutory authorization for the introduction of U.S. forces into actual or imminent hostilities. Initially, the Obama Administration cited the President’s authority under Article II of the Constitution as the legal basis for U.S. operations against the Islamic State. More recently, however, the Administration has claimed that the 2002 Authorization for Use of Military Force Against Iraq (2002 Iraq AUMF; P.L. 107-243) and the 2001 Authorization for Use of Military Force (2001 AUMF; P.L. 107-40), provide congressional authority for military operations against the Islamic State. Some observers and Members of Congress have expressed disagreement with this interpretation, though it is unclear whether any dispute over application of these statutes to the Islamic State would give rise to a cognizable claim that would be resolved by the courts.

This report addresses select legal questions raised by the use of military force against the Islamic State. Questions addressed in this report include potential sources (and limitations) of presidential authority to use military force against the Islamic State without express congressional authorization; the potential relevance of the 2002 Iraq AUMF, the 2001 AUMF, and the Continuing Appropriations Resolution, 2015; the constraints imposed by the War Powers Resolution upon U.S. military action that has not been authorized by Congress; and the applicability of the United Nations Charter to ongoing U.S. military strikes in Iraq and Syria. The report will be updated as warranted by events.

Many of the legal issues discussed in this report concerning congressional oversight of U.S. military action are addressed in greater detail in CRS Report R41989, *Congressional Authority to Limit Military Operations*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola. Further discussion regarding U.S. operations against the Islamic State in Iraq and Syria can be found in CRS Report R43612, *The “Islamic State” Crisis and U.S. Policy*, by Kenneth Katzman et al.; *Iraq Crisis and U.S. Policy*, by Kenneth Katzman et al.; and CRS Report RL33487, *Armed Conflict in Syria: Overview and U.S. Response*, coordinated by Christopher M. Blanchard.

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Introduction

Ongoing U.S. military operations against the Islamic State (which formerly referred to itself as the Islamic State of Iraq and the Levant, and is also commonly referred to as IS, ISIS, or ISIL) raise issues concerning the allocation of war powers between Congress and the President, including whether such operations have been (or are required to be) authorized by an act of Congress. In August 2014, President Obama ordered U.S. forces to commence airstrikes against IS targets in Iraq to assist the Iraqi government in combating the insurgent force, protect U.S. military and nonmilitary personnel in Iraq, and support certain humanitarian operations. On September 10, 2014, President Obama announced the pursuit of a strategy to “degrade and ultimately destroy” the Islamic State, including through the possible initiation of U.S. airstrikes against IS forces located in neighboring Syria.¹ On September 23, 2014, the United States began airstrikes in Syria targeting IS forces and certain other groups within that country believed to be affiliated with Al Qaeda.

The capture of significant portions of Iraqi territory in June 2014 by the Islamic State prompted significant military operations by U.S. forces in Iraq for the first time in more than three years. Between March 2003 and the end of 2011, the U.S. military forces had been deployed in Iraq first to remove the Saddam Hussein regime from power and then to assist the nascent post-Saddam government in responding to threats to the country’s stability.² Following the expiration of the U.S.-Iraq Security Agreement at the end of 2011, offensive U.S. military operations in Iraq were terminated and most U.S. forces were withdrawn from the country.

In the wake of the successful offensive in northern and central Iraq by IS forces in June 2014, however, the Iraqi government requested U.S. assistance in responding to advancing IS forces, including through airstrikes.³ Shortly thereafter, the United States deployed military personnel to collect intelligence and logistical information regarding IS activities, advise Iraqi security forces, and bolster protection for U.S. personnel and facilities within Iraq.⁴ In early August, President Obama authorized U.S. forces to begin limited airstrikes against IS forces to stop further advances and to protect U.S. military and nonmilitary personnel, including those providing humanitarian assistance to Iraqi civilians trapped by IS-led forces on the Sinjar Mountain.⁵ A

¹ White House, Office of Press Secretary, *Statement by the President on ISIL*, September 10, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

² For further discussion, see CRS Report RS21968, *Iraq: Politics, Governance, and Human Rights*, by Kenneth Katzman.

³ See Craig Whitlock, *U.S. military leaders warn of difficulty of conducting airstrikes in Iraq*, online version, WASHINGTON POST, June 18, 2014 (including embedded video of Army Gen. Martin E. Dempsey, chairman of Joint Chiefs of Staff, acknowledging formal request by Iraqi government during testimony before Senate Appropriations Committee).

⁴ White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Letter regarding Iraq*, June 26, 2014 (text of letter submitted to notify Congress of additional U.S. military forces in Iraq to advise Iraqi security forces and collect intelligence and logistical information), available at <http://www.whitehouse.gov/the-press-office/2014/06/26/letter-president-war-powers-resolution-letter-regarding-iraq>; White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Letter regarding Iraq*, June 30, 2014 (letter notifying Congress of increase in U.S. forces to protect U.S. personnel and facilities in Iraq, and acknowledging an earlier notification which was submitted on June 16, 2014 concerning previous deployment of U.S. forces for such purposes), available at <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-war-powers-resolution-letter-regarding-iraq>.

⁵ White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Letter regarding Iraq*, August 8, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>.

week later, President Obama authorized additional airstrikes to assist Iraqi forces in recapturing the Mosul Dam from IS forces.⁶ U.S. airstrikes were subsequently authorized in support of an operation to deliver humanitarian assistance to civilians located in the town of Amirli and to prevent an IS offensive against the Haditha Dam in Anbar Province.⁷

Continuing activities by the Islamic State, including the group's apparent responsibility for the execution of two U.S. journalists, led some policy makers to consider the possibility of expanding the scope of U.S. military action against the group, including potentially targeting IS forces located in Syria. In a public address on September 10, 2014, President Obama announced the pursuit of a strategy to "degrade and ultimately destroy" the Islamic State, including through the escalation of U.S. airstrikes of IS forces in Iraq, as well as the possible initiation of U.S. airstrikes against IS forces located in neighboring Syria.⁸ On September 23, 2014, the United States began airstrikes in Syria targeting IS forces and the Khorasan Group, which is believed to be an element of Al Qaeda.⁹

Initially, the Obama Administration cited the President's authority under Article II of the Constitution as the legal basis for U.S. operations against the Islamic State.¹⁰ More recently, however, the Administration has claimed that the 2002 Authorization for Use of Military Force Against Iraq (2002 Iraq AUMF; P.L. 107-243) and the 2001 Authorization for Use of Military Force (2001 AUMF; P.L. 107-40) confer congressional authorization for military operations against the Islamic State.¹¹ Some observers and Members of Congress have expressed disagreement with this interpretation,¹² though it is unclear whether any dispute over application

⁶ White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Letter regarding Iraq*, August 30, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>.

⁷ White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Letter regarding Iraq*, September 1, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/09/01/letter-president-war-powers-resolution-regarding-iraq>; *Letter from the President—War Powers Resolution Letter regarding Iraq*, September 8, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/09/08/letter-president-war-powers-resolution-regarding-iraq>.

⁸ *Statement by the President on ISIL*, *supra* footnote 1.

⁹ White House, Office of Press Secretary, *Statement by the President on Airstrikes in Syria*, September 23, 2014 (identifying both the Islamic State and the "seasoned al Qaeda operatives in Syria who are known as the Khorasan Group" as targets of U.S. airstrikes in Syria), available at <http://www.whitehouse.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>; White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Regarding Syria*, September 23, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>.

¹⁰ See *supra* footnotes 5-7 (collecting various War Powers Resolution notifications between June and early September 2014, which described U.S. action against the Islamic State as having been undertaken pursuant to the President's constitutional authority "to conduct U.S. foreign relations and as Commander in Chief and Chief Executive").

¹¹ See White House, Office of Press Secretary, *Letter from the President—War Powers Resolution Letter regarding Military Action in Iraq*, September 23, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>.

¹² See, e.g., U.S. Congress, Senate Committee on Foreign Relations, *Hearing on U.S. Strategy on ISIL*, 113th Cong., 1st sess., September 17, 2014 (remarks of Chairman Menendez and Senator Cardin). Other Members of Congress, however, have taken the view that the Executive possesses all necessary legal authority to order military action against the Islamic State. See House Speaker John Boehner, Press Release, *Boehner Discusses Jobs, ISIL, Border Security, and More on ABC's "This Week,"* September 28, 2014 (statement by Speaker Boehner that he would support congressional consideration of a resolution authorizing the use of force if requested by the President, but continuing that the President "believes he has authority under existing resolutions [to use force against the Islamic State].... I think he does have the authority to do it."), at <http://www.speaker.gov/general/boehner-discusses-jobs-isil-border-security-and-more-abc-s-week>.

of these statutes to the Islamic State would give rise to a cognizable claim that would be resolved by the courts.

As of the date of this report, Congress has not enacted legislation specifically authorizing U.S. force against the Islamic State. As part of the Continuing Appropriations Resolution, 2015 (2015 CR, P.L. 113-164), which was signed into law on September 19, 2014, Congress authorized the President to arm and train vetted elements of Syrian opposition groups, including for purposes of deterring attacks on the Syrian populace by the Islamic State, but the legislation expressly provides that it does not constitute statutory authorization for the introduction of U.S. forces into actual or imminent hostilities. Legislative proposals have been introduced, including H.Con.Res. 105, passed by the House in July, and provisions within the House-passed version of the Department of Defense Appropriations Act, 2015 (H.R. 4870), which appear intended to constrain the executive's ability to engage in certain types of military action in Iraq or Syria without congressional authorization.¹³ Other legislative proposals have been introduced that would expressly authorize the use of military force against the Islamic State, though in some instances these authorizations would limit the ability to deploy ground troops into combat operations, or would authorize force only for a limited period.¹⁴

This report addresses select legal questions raised by the use of military force against the Islamic State. Questions addressed in this report include potential sources (and limitations) of presidential authority to use military force against the Islamic State assuming the absence of express congressional authorization; the potential relevance of the 2002 Iraq AUMF, the 2001 AUMF, and the Continuing Appropriations Resolution, 2015 (2015 CR, P.L. 113-164); the constraints imposed by the War Powers Resolution upon U.S. military action that has not been authorized by Congress; and the applicability of the United Nations Charter to ongoing U.S. military strikes in Iraq and Syria. The report will be updated as warranted by events.

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Does the Use of Force Against the Islamic State Require Congressional Authorization?

Until recently, the executive branch cited only to the President's independent authority under Article II of the U.S. Constitution as the legal basis for the military action taken against the

¹³ H.R. 4870, as passed by the House, contains provisions which bar appropriated funds from being used in contravention of the War Powers Resolution, both generally and with respect to military action in Iraq and Syria. H.R. 4870, House-passed version, §§8113, 9013, and 10012. The version of H.R. 4870 reported by the Senate Committee on Appropriations would retain the provision barring funds from being used in contravention of the War Powers Resolution with respect to military action in Syria.

¹⁴ See, e.g., H.J.Res. 123, H.J.Res. 125, H.J.Res. 127, H.R. 128, S.J.Res. 42, S.J.Res. 43, S.J.Res. 44.

Islamic State.¹⁵ Some observers and lawmakers questioned whether some or all of these actions are lawful without congressional authorization, and some wonder whether or at what point further military action would require express congressional approval.¹⁶ While the Executive has recently claimed that the 2001 AUMF and 2002 Iraq AUMF provide statutory authorization for military action against the Islamic State,¹⁷ questions remain as to whether the President possesses independent authority to order the use of force against the group even if these statutes are deemed to be inapplicable or are subsequently repealed or narrowed by legislation.

The Constitution divides authority between Congress and the President on matters of war and the use of military force. Under Article I, Section 8, Congress has the power to declare war, tax and spend for the common defense, provide for the army and navy, make rules regulating the Armed Forces, and make rules concerning captures.¹⁸ Additionally, Congress has authority to make all laws “necessary and proper” for carrying out not only its own powers under Article I, Section 8 but also all of the powers vested by the Constitution in the executive and judicial branches as well.¹⁹

On the executive side, the Constitution vests the President with the “executive Power,”²⁰ and appoints him “Commander in Chief of the Army and Navy of the United States,”²¹ and bound to “take Care that the Laws be faithfully executed.”²² He is also required by oath to “faithfully execute the Office of President of the United States,” and, to the best of his “Ability, preserve, protect and defend the Constitution of the United States.”²³ Although not explicitly made plain by the Constitution, he is also understood to be primarily responsible for carrying out the country’s foreign affairs.²⁴

The circumstances when the executive may order the use of force without congressional authorization have been the subject of long-standing inter-branch and scholarly debate. The executive has long asserted that the President has independent authority to conduct at least some military operations in the absence of an authorizing act of Congress,²⁵ including protecting U.S.

¹⁵ See *supra* footnotes 5-8 (collecting various War Powers Resolution notifications).

¹⁶ In July, over 100 Members of Congress signed a letter to the President arguing that congressional authorization is necessary for “offensive military operations abroad,” and that military force in Iraq should be pursuant to an act of Congress. Rep. Barbara Lee, Letter to the President, July 2, 2014, available at http://lee.house.gov/sites/lee.house.gov/files/wysiwyg_uploaded/Final%20Lee-Rigell%20Iraq%20Letter-%20July%2016.pdf.

¹⁷ See War Powers Resolution Notification Concerning Attacks on IS Forces in Iraq, *supra* footnote 11.

¹⁸ Under Article I, Section 8, Congress has the power “To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence,” “To raise and support Armies,” “To provide and maintain a Navy,” “To make Rules for the Government and Regulation of the land and naval Forces,” and “To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” as well as “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”

¹⁹ U.S. CONST., Art. I, §8, cl. 18.

²⁰ U.S. CONST., Art. II, §1, cl. 1.

²¹ *Id.*, §2, cl.1.

²² *Id.*, §3.

²³ *Id.*, §1, cl. 8.

²⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936) (discussing “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).

²⁵ See, e.g., Dept. of Justice, Office of Legal Counsel, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4 Op. O.L.C. 185, 187 (1980) (“We believe that the substantive constitutional limits on the (continued...)”).

persons abroad²⁶ (and possibly foreign nationals, as well),²⁷ repelling attacks against the United States or its military forces,²⁸ or defending a “national interest” of the United States.²⁹

In legislative enactments, however, Congress has characterized the President’s independent constitutional authority to introduce U.S. forces into hostilities as being significantly more limited in scope. Notably, the War Powers Resolution of 1973 declares Congress’s view that

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to

- (1) a declaration of war,
- (2) specific statutory authorization, or

(...continued)

exercise of these inherent powers [to use military force] by the President are, at any particular time, a function of historical practice and the political relationship between the President and Congress. Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.”)

²⁶ See, e.g., Dept. of Justice, Office of Legal Counsel (OLC), *Presidential Powers Relating to the Situation in Iran*, 4 Op. O.L.C. 115, 120 (1979) (recognizing such authority and claiming that the “power has been used conspicuously in recent years in a variety of situations. These include: landing troops in the Dominican Republic to protect the lives of citizens believed to be threatened by rebels (1965), the Danang sealfit during the collapse of Vietnam defense (1975), the evacuation of Phnom Penh (Cambodia, 1975), the evacuation of Saigon (1975), the Mayaguez incident (1975), evacuation of civilians during the civil war in Lebanon (1976), and the dispatch of forces to aid American victims in Guyana (1978).”); *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, *supra* footnote 25, at 187 (characterizing presidential power as permitting the use of force both to protect U.S. persons and retaliate against those causing them injury); *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 1, 6 (2004) (arguing that presidential war powers permitted deployment of U.S. forces in Haiti to protect U.S. persons and property located there, following the collapse of the ruling government, as the President “could reasonably conclude that they would be in danger if the country were to descend into lawlessness”). For discussion of the possible limits on such authority, including a discussion of the limited case law concerning presidential authority to use military force to protect U.S. persons, see CRS Legal Sidebar WSLG974, *When Can the President Use Military Force to Rescue or Protect U.S. Persons Abroad?*, by Michael John Garcia and Victoria Slatton.

²⁷ Dept. of Justice, OLC, *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 11 (1992) (“Past military interventions that extended to the protection of foreign nationals provide precedent for action to protect endangered Somalians and other non-United States citizens.”).

²⁸ Dept. of Justice, OLC, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 32 Op. O.L.C. 1, 28-29 (2006) (“Among the President’s most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility.”). Both the legislative and judicial branches have recognized that the President possesses independent constitutional authority to authorize the use of force to defend the country against attack, but the scope of such authority may be the subject of debate and disagreement. See *Prize Cases*, 67 U.S. (2 Bl.) 635, 668 (1863) (upholding lawfulness of Union blockade of Southern ports instituted by President Lincoln in April 1861, at a time when Congress was not in session, and “[The President] does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority.”); War Powers Resolution, P.L. 93-148 (1973), §2, codified at 50 U.S.C. §1541(c)(3) (characterizing the President’s Commander-in-Chief authority as enabling him to introduce U.S. forces in hostilities in the case of a “national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”).

²⁹ Dept. of Justice, OLC, *Authority to Use Military Force in Libya*, 6-7 (2011), available at http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf. National interests that have been claimed by the executive to support the use of force in the absence of congressional authorization have included, inter alia, for purposes of protecting regional stability (including as a result of a humanitarian crisis), enforcing United Nations Security Council mandates, and supporting U.S. personnel involved in U.N.-supported relief efforts. *Id.* (citing prior assertions of national interests supporting U.S. military action relating to Somalia, Haiti, and Bosnia).

(3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.³⁰

Although U.S. courts have occasionally found the exercise of military power to be impermissible when it is found to exceed or conflict with relevant statutory authority,³¹ there has been little jurisprudence concerning the scope of presidential authority to order the use of force when Congress has neither expressly authorized nor prohibited military action. A determination of the permissibility of military action that has not been authorized by Congress may require consideration of Congress's will towards the President's action and an assessment of how the Constitution allocates the asserted power between Congress and the President. When the allocation of power between the executive and legislative branches is unclear, Congress's support for, or "inertia, indifference, or quiescence" to executive action, may be relevant to an assessment of the action's constitutional validity.³²

In *Dames & Moore v. Regan*, the Supreme Court assessed the legality of presidential actions which fall within the "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."³³ In such circumstances, the Court indicated that the validity of the President's action may depend on consideration of all circumstances which shed light on the views of the legislative branch towards the action. In *Dames & Moore*, the petitioners challenged an executive order by President Carter to establish regulations furthering compliance with the terms of a claim-settling executive agreement with Iran. Congress had not expressly authorized these measures via statute. Nonetheless, the Court found that Congress's historical treatment of similar matters had evidenced intent to accord the President broad discretion to act on the matter:

Although we have declined to conclude that [the relevant statute] directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone

³⁰ War Powers Resolution, P.L. 93-148 (1973), §2, codified at 50 U.S.C. §1541(c). The executive branch has consistently disagreed with this characterization of the scope of its independent constitutional authority to commit U.S. forces to hostilities.

³¹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (striking down military tribunals established by presidential order to try persons captured in conflict with Al Qaeda because the tribunals did not comply with relevant statutory requirements); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down a presidential order requiring the military to take possession of steel mills in order to keep up production for the Korean conflict); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (giving effect to a statute suspending habeas corpus for prisoners of war rather than a presidential order which proclaimed the privilege suspended for a broader category of persons); *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804) (finding seizure of vessel during limited hostilities with France could not be justified by presidential order, as order exceeded parameters of statutory authorization). Conversely, there appears to be no instance where a U.S. court has struck down a legislative enactment on the grounds that it impermissibly intruded upon the President's constitutional authority as Commander in Chief.

³² *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Justice Jackson's concurring opinion established a tripartite analytical framework that is often used by reviewing courts to assess the propriety of presidential action:

When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum.... Congressional inertia, indifference or quiescence may ... invite, measures of independent Presidential responsibility.... When 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. at 635-638.

³³ *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially ... in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility.” At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.³⁴

The Court “has been careful to note that past practice does not, by itself, create power.”³⁵ However, in at least some instances, it appears that a history of congressional acquiescence to long-standing presidential practice in a particular field “may be treated as a gloss on ‘Executive Power’ vested in the President.”³⁶

In the case of military affairs, the executive has argued that there has been a “historical pattern of presidential initiative and congressional acquiescence” to the use of military force in certain situations where statutory authorization has not been given.³⁷ Accordingly, the executive may claim that congressional inaction in this realm is entitled to a greater degree of legal significance than congressional acquiescence to executive action in another field.

The executive branch, while taking the view that not all military action requires congressional authorization, has acknowledged that action of a certain intensity requires the approval of Congress (at least when such action is not done to defend the country from attack, etc.). In a 2011 opinion from the Department of Justice’s Office of Legal Counsel concerning the legality of military action in Libya, for example, it was alleged that

[T]he historical practice of presidential military action without congressional approval precludes any suggestion that Congress’s authority to declare war covers every military engagement, however limited, that the President initiates. In our view, determining whether a particular planned engagement constitutes a “war” for constitutional purposes instead requires a fact-specific assessment of the “anticipated nature, scope, and duration” of the planned military operations. This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.³⁸

The executive’s characterization of its constitutional authority to act militarily in the absence of congressional authorization, including whether congressional inaction constitutes “acquiescence”

³⁴ *Dames & Moore*, 453 U.S. 678-679 (internal citations omitted).

³⁵ *Medellin v. Texas*, 552 U.S. 491, 531-532 (2008) (internal citations omitted).

³⁶ *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 611 (Frankfurter, J., concurring)).

³⁷ OLC Opinion on Use of Force without Congressional Authorization, *supra* footnote 25, at 187 (“We believe that the substantive constitutional limits on the exercise of these inherent powers by the President are, at any particular time, a function of historical practice and the political relationship between the President and Congress. Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.”). On several occasions in the nation’s history, the President has ordered the use of military force without clear statutory authorization.

³⁸ OLC Opinion on Military Action against Libya, *supra* footnote 29, at 8.

to presidential assertions of independent authority, has been criticized by some observers and Members of Congress.³⁹ However, U.S. courts have not yet found the opportunity to consider the validity of these claims, in part because challenges to military actions that have not been unauthorized by Congress have typically been dismissed on procedural grounds without the reviewing court reaching the merits of the litigants' claims.⁴⁰

Does the 2002 Iraq AUMF Authorize Military Action Against the Islamic State?⁴¹

Until recently, the Obama Administration had not cited to the 2002 Iraq AUMF in public statements concerning the legal basis for military action against the Islamic State. Indeed, shortly after the deployment of U.S. military forces to Iraq to provide logistical and other support to Iraqi security forces (but prior to the commencement of U.S. airstrikes against the Islamic State), the White House reaffirmed its support for the repeal of the 2002 Iraq AUMF.⁴² However, in a congressional notification submitted on September 23, 2014, the Administration cited to the 2002 Iraq AUMF as providing statutory authorization for at least some aspects of U.S. operations against the Islamic State in Iraq and Syria.⁴³ Nonetheless, some have questioned whether the 2002 Iraq AUMF could be construed to provide statutory authorization for U.S. military action against the Islamic State and other security threats presently located in Iraq.⁴⁴

The 2002 Iraq AUMF was enacted in response to the perceived threat posed by the regime of Saddam Hussein, and in particular the prospect that Iraq had or was acquiring weapons of mass destruction. However, the operative clauses of the 2002 law do not specifically refer to the Hussein regime. Rather, the authorizing language of the 2002 Iraq AUMF permits the President to

³⁹ See, e.g., Letter from Members to Congress on Military Action against the Islamic State, *supra* footnote 16 (stating that the Constitution vests Congress with responsibility for authorizing the offense use of military force abroad); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and Separation of Powers*, 126 HARV. L. REV. 411, 466-467 (2012) (disputing certain executive claims concerning instances where Congress purportedly “acquiesced” to military action taken without congressional authorization).

⁴⁰ See generally CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia.

⁴¹ Portions of this discussion are taken from CRS Legal Sidebar WSLG970, *Is the 2002 Iraq AUMF Still Good Law? And Can the President Use Force in Iraq Regardless?*, by Michael John Garcia.

⁴² The White House, Letter from Susan E. Rice, Asst. to the President for National Security Affairs, to House Speaker John A. Boehner, July 25, 2014 (affirming Administration support for repeal of the 2002 Iraq AUMF, and stating that the statute “is no longer used for any U.S. government activities”), available at http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3.

⁴³ See War Powers Resolution Notification Concerning Attacks on IS Forces in Iraq, *supra* footnote 11.

⁴⁴ See, e.g., Alexander Bolton, *Obama, Democrats Back in Iraq*, THE HILL, June 18, 2014 (quoting a few lawmakers' conflicting views concerning the applicability of the 2002 Iraq AUMF to military action against IS); Jack Goldsmith, *The 2002 Iraq AUMF Almost Certainly Authorizes the President to Use Force Today in Iraq (and Might Authorize the Use of Force in Syria)*, LAWFARE BLOG, June 13, 2014 (arguing that plain text of 2002 Iraq AUMF may be reasonably construed to permit military action to deal with the threat posed by an IS-destabilized Iraq), at <http://www.lawfareblog.com/2014/06/the-2002-iraq-aumf-almost-certainly-authorizes-the-president-to-use-force-today-in-iraq-and-maybe-syria/>; Jennifer Daskal, Ryan Goodman, & Steve Vladeck, *The Premature Discussion of ISIS and the 2001/2002 AUMFs*, JUST SECURITY BLOG, June 17, 2014 (arguing that 2002 Iraq AUMF does not authorize hostilities against IS, as purpose and design of the enactment concerned the Saddam Hussein regime).

use U.S. Armed Forces in certain specified instances, including to “defend the national security of the United States against the continuing threat posed by Iraq....”⁴⁵

Arguably, this language could be construed to cover any threat to U.S. national security interests posed by a new crisis in Iraq, even after the removal of the Hussein regime and the establishment of a new Iraqi government. Because the 2002 Iraq AUMF does not specifically define what constitutes a “threat” to the “national security of the United States,” the statute arguably affords the President a fair degree of discretion in assessing the meaning and application of those terms. It might be possible, therefore, for some to argue that the IS insurgency, by threatening to impose a new government in Iraq at odds with U.S. interests, makes Iraq once again a direct threat to U.S. security.⁴⁶ Accordingly, it might be argued that the operative language of the 2002 Iraq AUMF confers authority on the President to use force to respond to this threat.

On the other hand, the context in which the 2002 Iraq AUMF was enacted, along with language found in the act’s nonoperative clauses which reference the “current Iraqi regime,”⁴⁷ could be cited in opposition to arguments that the 2002 Iraq AUMF authorizes U.S. military action over a decade after Saddam Hussein’s regime had been deposed. Moreover, the withdrawal of most U.S. forces from Iraq and the cessation of offensive military activities at the end of 2011 following the termination of the U.S.-Iraq Security Agreement,⁴⁸ along with subsequent statements by White House officials that the 2002 Iraq AUMF is not used for current U.S. activities,⁴⁹ provide grounds for interpreting the enactment as not being relevant to U.S. military action against non-government actors operating in Iraq in 2014.

If the 2002 Iraq AUMF is interpreted to cover the IS threat in Iraq, it may also become necessary to address whether or to what extent the resolution authorizes military action against IS targets in Syria. The answer to that question may be dependent on whether the conflict in Syria is deemed to be part of the same armed conflict that is occurring in Iraq and whether this can be interpreted to be a continuation of the original threat posed by Iraq. If the answer to both these questions is yes, then the 2002 Iraq AUMF, which is not expressly limited to the territory of Iraq, may be read impliedly to cover that part of the threat emanating from Syria. On the other hand, it might still be argued that the threat IS operations in Syria pose to the Assad regime is not easily construed to be a threat posed against U.S. national security “by Iraq,” and that the 2002 Iraq AUMF does not confer statutory authorization of U.S. actions against IS forces located in Syria. In a notification submitted to Congress on September 23, 2014, the Obama Administration cited to the 2002 Iraq AUMF (along with the 2001 AUMF and the President’s independent constitutional authority) as providing legal authority for military operations against the Islamic State in both Iraq and Syria.⁵⁰

⁴⁵ 2002 Authorization for Use of Military Force Against Iraq, P.L. 107-243, §3(a)(1).

⁴⁶ See President Barack Obama, *Remarks by the President on the Situation in Iraq*, White House, Office of the Press Secretary, June 19, 2014 (claiming that “ISIL poses a threat to the Iraqi people, to the region, and to U.S. interests.”), available at <http://www.whitehouse.gov/the-press-office/2014/06/19/remarks-president-situation-iraq>.

⁴⁷ P.L. 107-243, preamble, cl. 8-9, 13, 17.

⁴⁸ Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, 2008 U.S.T. LEXIS 115. Signed in Baghdad November 17, 2008. Entered into force January 1, 2009, and effective until January 1, 2012.

⁴⁹ See, e.g., White House letter to House Speaker Boehner, *supra* footnote 42. See also President Barack Obama, *Remarks by the President and First Lady on the End of the War in Iraq*, White House, Office of the Press Secretary, December 14, 2011 (stating that when U.S. troops completed their departure from Iraq at the end of the year, “America’s war in Iraq will be over.”).

⁵⁰ See War Powers Resolution Notification Concerning Attacks on IS Forces in Iraq, *supra* footnote 11.

Does the 2001 AUMF Authorize Military Action Against the Islamic State?

Recently, the Obama Administration has claimed that the 2001 AUMF provides a separate statutory ground for military action against the Islamic State.⁵¹ The 2001 AUMF has been the primary domestic legal authority governing U.S. military action against Al Qaeda, the Taliban, and associated forces. The application of the 2001 AUMF to the Islamic State would likely turn upon the entity's relationship with covered groups (and in particular, Al Qaeda), and whether this relationship is sufficiently close for the group to be considered an "associated force."

Following the terrorist attacks of September 11, 2001, Congress passed the 2001 AUMF, which granted the President the authority:

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.⁵²

The AUMF clearly authorizes the President to use military force against entities responsible for the terrorist attacks of 9/11, as well as certain entities that harbored them. Although no organization is expressly named by the AUMF, the statute has been construed by all three branches of government to authorize military action against Al Qaeda (the entity responsible for the 9/11 attacks) and the Taliban (the entity which harbored them); as well as other "associated forces" that have fought alongside these groups in hostilities against the United States.⁵³

The AUMF's application to entities other than Al Qaeda and the Taliban has been the subject of some debate, particularly regarding the nature and degree of support that would result in another organization being deemed an "associated force."⁵⁴ The AUMF has not been construed by either

⁵¹ *Id.*

⁵² P.L. 107-40, §2(a).

⁵³ See, e.g., National Defense Authorization Act for FY2012, P.L. 112-8, §1021(b) (construing the AUMF to permit the detention of a "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces"); *In re Guantanamo Bay Detainee Litigation*, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.) (brief filed by the executive in litigation concerning Guantanamo detainees, claiming that the AUMF confers on the President "the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces"), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>; *Almerferdi v. Obama*, 654 F.3d 1, 4 n.2 (D.C. Cir. 2011) (describing circuit court's jurisprudence as recognizing that under the AUMF, "the government may detain any individual engaged in hostilities ... against the United States, who purposefully and materially supported hostilities against the United States or its coalition partners, or who is part of the Taliban, al Qaeda, or associated forces") (internal citations and quotations omitted).

⁵⁴ Litigation concerning the scope of persons covered by the AUMF has primarily arisen in the context of habeas challenges brought by suspected enemy belligerents detained by the United States at the U.S. Naval Station in Guantanamo Bay, Cuba or other locations. For a detailed discussion of such litigation, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

the executive or judicial branches as authorizing military action against an entity solely on account of its participation in terrorism—indeed, entities that might sympathize with Al Qaeda’s goals, but have no ties to the group, have been understood to fall outside the scope of the AUMF.⁵⁵ For their part, the officials within the executive branch have claimed that

to be an “associated force,” a group must be both (1) an organized, armed group that has entered the fight alongside al-Qa’ida or the Taliban and (2) a co-belligerent with al-Qa’ida or the Taliban in hostilities against the United States or its coalition partners.⁵⁶

Accordingly, an assessment of whether the 2001 AUMF confers statutory authorization for military action against the Islamic State likely depends on the nature of the group’s relationship with Al Qaeda or the Taliban, and in particular whether the group is properly considered an “associated force.” Although antecedent entities to the Islamic State affiliated themselves with Al Qaeda, the precise nature of the relationship between the Islamic State of Iraq and the Levant/Islamic State and Al Qaeda leaders from 2006 onward is unclear. Current IS leaders have reportedly stated that the Islamic State is not an offshoot of Al Qaeda.⁵⁷

The Obama Administration argues that the Islamic State is covered by the AUMF because it is a successor to the version of Al Qaeda responsible for the 9/11 attacks. According to this argument, what matters is that ISIL’s antecedent, Al Qaeda in Iraq, was functionally part of Al Qaeda. A schism arose between at least two components of Al Qaeda—one of which now refers to itself as the Islamic State and the other which still calls itself Al Qaeda—with both claiming the mantle of Osama Bin Laden. Accordingly, the 2001 AUMF applies equally to both groups, notwithstanding the possibility that the Islamic State does not meet the definition for an “associated force.” The legitimacy of this argument appears to depend on a factual assessment of the Islamic State’s relationship with the entity responsible for the 9/11 attacks, especially at the time of those attacks. If it were part of Al Qaeda prior to splitting off into a separate group, it arguably continues to bear responsibility for the attacks and falls within the plain meaning of the 2001 AUMF. Such an assessment might also consider other factors related to the Islamic State’s lineage, including the composition of its membership and leadership, its association with groups that have or had been affiliated with Al Qaeda, its perception of itself as a successor to the entity responsible for the 9/11 attacks, and its mission.

⁵⁵ See, e.g., *supra* footnote 53 (noting legislative enactments, executive branch materials, and judicial rulings addressing entities covered by the AUMF); Senate Foreign Relations Committee Hearing, *Authorization For Use Of Military Force After Iraq And Afghanistan*, May 21, 2014, written testimony of Dept. of Defense General Counsel Stephen W. Preston (“It is not the case in law or in practice that the concept of an ‘associated force’ is open-ended or otherwise provides the Administration with unlimited flexibility to define the scope of the AUMF. A group that simply embraces al-Qa’ida’s ideology is not an ‘associated force,’ nor is every group or individual that commits terrorist acts.”), available at http://www.foreign.senate.gov/imo/media/doc/Preston_Testimony.pdf; *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (“purely independent conduct of a freelancer” not enough for person to be considered part of Al Qaeda, the Taliban, or an associated force); *Hamlily v. Obama* 616 F.Supp.2d 63, 75 n.17 (D.D.C., 2009) (“‘Associated forces’ do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda—there must be an actual association in the current conflict with al Qaeda or the Taliban.”).

⁵⁶ Preston testimony, *supra* footnote 55.

⁵⁷ For further discussion of the IS, including the group’s relationship with Al Qaeda, see CRS Report R43612, *The “Islamic State” Crisis and U.S. Policy*, by Kenneth Katzman et al.

Does the Continuing Resolution Authorize Military Action Against the Islamic State?

While appropriations measures have sometimes been interpreted to provide authority for ongoing military operations that were not otherwise expressly covered by any legislation authorizing force,⁵⁸ the measure in the Continuing Appropriations Resolution, 2015 (2015 CR §149, P.L. 113-164), authorizing aid to certain Syrian rebels appears to be written in a way that forecloses such a reading. While the relevant language authorizes assistance to appropriately vetted Syrian rebel groups, the type of assistance authorized expressly includes “training, equipment, supplies, and sustainment,” which could be read to imply that only similar forms of assistance are authorized. Other types of assistance are not expressly prohibited. However, section 149(i) provides that

Nothing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.

This language seems intended to preclude reading the provision as authorizing assistance in the form of a direct combat role. On the other hand, nothing in the 2015 CR prohibits the expenditure of funds for airstrikes against IS targets in Iraq or Syria. If these operations are separately authorized by the 2001 AUMF or the 2002 Iraq AUMF, then perhaps the availability of any funds in the 2015 CR that are permitted for use in support of operations under these authorizations, coupled with knowledge of their interpretation by the executive branch, could be construed to suggest congressional acquiescence to the Executive’s characterization of a connection between operations against the Islamic State and other operations which Congress had already authorized.

How Does the War Powers Resolution Apply to Military Action Against the Islamic State?

Enacted in 1973 over President Nixon’s veto, the War Powers Resolution (WPR)⁵⁹ was an effort by Congress to reassert its role in matters of war—a role that many Members believed had been allowed to erode during the Korean and Vietnam conflicts. The WPR provides a mechanism by which Congress may ostensibly force the President to withdraw U.S. forces from those hostilities which had not been authorized by a declaration of war or specific statutory authorization. In more than four decades since its enactment, however, the mechanisms to compel troop withdrawal have

⁵⁸ For example, in 1971, Congress passed and President Nixon signed a measure rescinding the 1964 Gulf of Tonkin resolution, which had provided congressional authorization for U.S. military operations against North Vietnam. Federal courts heard a number of suits challenging the legality of continued hostilities in the absence of congressional authorization. None of these challenges proved successful, in large part because Congress continued to appropriate money for military operations, which courts interpreted as continuing authorization for the activities being funded. *See DaCosta v. Laird*, 448 F.2d 1368, 1369 (2nd Cir. 1971), *cert. denied*, 405 U.S. 979 (“In other words, there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution.”). *See also infra*, footnote 65 (discussing executive branch interpretation of appropriations legislation as authorizing Kosovo action).

⁵⁹ P.L. 93-148 (1973). For further background and explanation of the War Powers Resolution, see archived CRS Report RL33532, *War Powers Resolution: Presidential Compliance*, by Richard F. Grimmett.

never been successfully employed. Moreover, successive presidential administrations have viewed aspects of the WPR as unconstitutionally trenching upon the executive's constitutional authority in matters of war and foreign relations.⁶⁰ Nonetheless, the WPR appears to constrain the scope and duration of military action that may be taken against IS forces in the absence of legislative authorization.

The WPR requires the President to consult with Congress “in every possible instance” prior to introducing U.S. Armed Forces into actual or imminent hostilities.⁶¹ A report is required to be submitted to Congress within 48 hours when, absent a declaration of war, U.S. Armed Forces are introduced into “hostilities or ... situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁶² Congressional notification is also required within 48 hours, absent a declaration of war, when combat-equipped U.S. forces are deployed to a foreign nation, or deployed in numbers which substantially enlarge the amount of combat-equipped U.S. forces already stationed there.⁶³

Section 5(b) of the WPR provides that after this report regarding the introduction of U.S. forces into actual or imminent hostilities is submitted (or after such date that it was required to be submitted), U.S. troops must thereafter be withdrawn within 60 days (or within 90 days in certain circumstances),⁶⁴ unless Congress authorizes continued involvement by passing a declaration of war or some other specific authorization for continued U.S. involvement in hostilities.⁶⁵ Moreover, Section 5(c) provides a means by which Congress may, at any time, compel the withdrawal of U.S. forces from *unauthorized* hostilities occurring outside the United States by means of a concurrent resolution. If the Administration's assertions that the introduction of U.S. Armed Forces into hostilities against the Islamic State are authorized under previous authorizations to use force are accepted, then the WPR provision for compelling the withdrawal of U.S. forces would seem to be inapplicable.

⁶⁰ See generally Dept. of Justice, Office of Legal Counsel, *Authority of the President under Domestic and International Law to Use Military Force against Iraq*, 26 Op. O.L.C. 1, 39-45 (2002) (discussing presidential views and Dept. of Justice opinions concerning the constitutionality of the War Powers Resolution). The Department of Justice's Office of Legal Counsel (OLC) has noted that while it had “has long questioned the constitutionality of the WPR, ...[it had] not done so consistently.” *Id.* at 43 n.18. Although OLC opinions are not legally binding, they are generally adhered to within the executive branch unless overruled by the President or the Attorney General.

⁶¹ 50 U.S.C. §1542.

⁶² *Id.* at §1543(a)(1).

⁶³ *Id.* at §1543(a)(2)-(3).

⁶⁴ *Id.* at §1544. The sixty-day period may be extended by no more than thirty additional days if the President certifies in writing to Congress that “unavoidable military necessity respecting the safety” of U.S. forces compels the continued use of such forces in the course of bringing about their withdrawal. *Id.*

⁶⁵ *Id.* See also 50 U.S.C. §1447(a)(1) (stating that authorization to introduce U.S. forces into hostilities shall not be inferred “unless such provision specifically authorizes the introduction of United States Armed Forces”). Congress has passed several measures authorizing the use of military force which describe themselves as constituting “specific authorization” under the WPR. See e.g., P.L. 107-40 (2001) (the authorization to use force against entities responsible for attacks of September 11, 2001 constituted specific authorization under the WPR); P.L. 107-243 (2002) (authorization to use force against Iraq constituted specific authorization under the WPR); P.L. 102-1 (1991) (authorization for first Persian Gulf conflict). The executive branch, however, has taken the position that the WPR does not bind future Congresses from impliedly authorizing hostilities, and took the position that Congress had authorized continuing hostilities against Yugoslavia via appropriations legislation, despite the fact that this legislation did not describe itself as constituting specific authorization under the WPR. See Dept. of Justice, OLC, *Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327 (2000).

Compelling Termination of U.S. Military Action via Concurrent Resolution

On July 28, 2014, the House agreed to a concurrent resolution (H.Con.Res. 105) which provides that “The President shall not deploy or maintain United States Armed Forces in a sustained combat role in Iraq without specific statutory authorization for such use enacted after the date of the adoption of this concurrent resolution.”⁶⁶ The concurrent resolution, if agreed to by the Senate, would appear to trigger the requirements of Section 5(c) of the WPR, and arguably provide a mechanism by which Congress could compel the President to terminate any “sustained combat role in Iraq” by U.S. forces. Existing jurisprudence concerning the legally binding nature of concurrent resolutions, however, casts doubt on such a measure being interpreted to have legal effect.

There appears to be a general consensus that the constitutional validity of Section 5(c) is doubtful in the aftermath of the Supreme Court’s ruling in the 1983 case of *INS v. Chadha*.⁶⁷ In *Chadha*, the Court held that for a resolution to become a law, it must go through the bicameral and presentment process in its entirety.⁶⁸ Accordingly, concurrent or simple resolutions, which are not presented to the President for his signature, could not be used as “legislative vetoes” against executive action. Although the *Chadha* Court did not expressly find WPR Section 5(c) to be unconstitutional, it was listed in Justice White’s dissent as one of nearly 200 legislative vetoes for which the majority had sounded the “death knell,”⁶⁹ and most commentators have agreed with this assessment.⁷⁰

It seems highly unlikely a concurrent resolution could legally compel the termination of U.S. military operations, notwithstanding the requirements of Section 5(c) of the WPR. Nonetheless, a concurrent resolution instructing the executive branch to terminate U.S. hostilities would seem to counter any executive branch arguments that Congress had “acquiesced” to the President’s use of military force.

⁶⁶ The concurrent resolution does not attempt to define the nature or scope of U.S. military action which may constitute a “sustained combat role in Iraq.”

⁶⁷ 462 U.S. 919 (1983).

⁶⁸ *Id.* at 951.

⁶⁹ *Id.* at 967, 1003 (White, J., dissenting).

⁷⁰ See, e.g., Senate Foreign Relations Comm. Rep., *Persian Gulf and the War Powers Resolution*, S.REPT. NO. 106, 100th Cong., 1st Sess., at 6 (1987) (describing §5(c) as being “effectively nullified” by the *Chadha* decision); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 126-127 (2d. ed. 2002) (recognizing invalidation of §5(c) by *Chadha* and describing arguments to the contrary as “plausible but not compelling”); FRANCIS D. WORMUTH AND EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 222 (2nd ed. 1989) (noting that the reasoning of *Chadha* “apparently invalidates section 5(c) of the War Powers Resolution”); Ronald D. Rotunda, *The War Powers Act in Perspective*, 2 MICH. L. & POL’Y REV. 1, 8 (1997) (claiming that most “scholars have concluded that... [§5(c)] is unconstitutional ever since *INS v. Chadha*”). In contrast, some have argued that neither a declaration of war nor a subsequent rescission of authorization to use force constitutes an “ordinary” act of legislation falling under the requirements of the Presentment Clause. See Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 130-132 (1984). The legitimacy of this argument is untested and highly controversial, as Congress has always presented a declaration of war or authorization to use military force to the President. Further, even assuming *arguendo* that a declaration of war does not need to be presented to the President, it is not necessarily clear that legislation ending hostilities would also not require presentment. See HENKIN, *supra* at 127, 379; Carter, *supra*, at 130-132 (describing weaknesses of argument against presentment requirement); see also J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 84-85 (1991) (discussing historical and scholarly view that presentment is necessary).

Cessation of Unauthorized Hostilities within 60 Days

Section 5(b) of the WPR, which provides for the termination of U.S. military action within 60 days of the President submitting (or having been required to submit) a report of the introduction of U.S. forces into actual or imminent hostilities, may constrain the executive's ability to use force against the Islamic State in the absence of further action by Congress. Although some legal observers have raised constitutional concerns regarding Section 5(b),⁷¹ the weight of opinion,⁷² including possibly within the executive branch,⁷³ appears to recognize the provision as a facially permissible exercise of Congress's constitutional authority over matters of war. Nonetheless, even assuming that the provision is constitutionally valid, it does not necessarily act as a statutory constraint to military action.

Application to Unauthorized Hostilities

As an initial matter, Section 5(b) establishes a requirement for the withdrawal of U.S. troops when they were introduced into actual or imminent hostilities *without congressional authorization*, unless Congress subsequently enacts legislation providing authority for the use of force or extends the deadline for the withdrawal of U.S. troops.⁷⁴ Accordingly, if the 2002 Iraq AUMF and 2001 AUMF are construed as authorizing military action against the IS, Section 5(b) of the WPR would not establish a deadline for the termination of U.S. military strikes against IS forces. For discussion of the applicability of these statutes to military action against the Islamic State, see *supra* at “Does the 2002 Iraq AUMF Authorize Military Action Against the Islamic State?” and “Does the 2001 AUMF Authorize Military Action Against the Islamic State?”.

⁷¹ See, e.g., Bradley Larschan, *The War Powers Resolution: Conflicting Constitutional Powers, The War Powers, and U.S. Foreign Policy*, 16 DENVER J. INT'L L. & POL'Y 33, 44-45 (1987) (arguing that Section 5(b) of the WPR is effectively “legislative veto” which is constitutionally impermissible post-*Chadha*, because it requires the President to terminate the use of military force in the event that Congress fails to take any legislative action).

⁷² See, e.g., Carter, *supra* footnote 70, at 133 (characterizing Section 5(b) as “surely constitutional, even after *Chadha*,” and characterizing the provision as a sunset law rather than an unconstitutional legislative veto); HENKIN, *supra* footnote 70, at 107-108 (taking the view that provisions of WPR other than Section 5(c) do not raise facial constitutional objections); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1392 (1988).

⁷³ In a 1980 opinion, the Department of Justice's OLC stated its view that “Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by” the WPR. OLC Opinion on Use of Force without Congressional Authorization, *supra* footnote 25, at 196 (1980). In an interview describing the Obama Administration's position that the WPR did not prohibit ongoing U.S. operations against Libya, Administration officials acknowledged that the 1980 OLC Opinion remains in effect, and also claimed that the Administration's position that the U.S. military operation beyond 60 days was lawful was not premised on the view that the WPR is unconstitutional. Charlie Savage and Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011 (discussing interview with White House counsel Robert Bauer and State Department Legal Adviser Harold Koh). See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1071 n.529 (2008) (discussing views of various presidential administrations regarding the constitutionality of Section 5(b), and characterizing them as generally “complicated and equivocal”).

⁷⁴ The requirement in Section 5(b) does not apply in cases in which Congress “is physically unable to meet as a result of an armed attack upon the United States.” 50 U.S.C. §1554. The 60-day deadline is automatically extended for 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.”

Meaning of “Hostilities”

Moreover, assuming for the sake of argument that the 2001 AUMF or 2002 Iraq AUMF cannot be reasonably construed to cover military action against the Islamic State, it is unclear whether this would necessarily mean that all offensive military operations against the Islamic State would be required to cease within the period established under Section 5(b) of the WPR. The executive branch has submitted numerous reports “consistent with the War Powers Resolution” since June concerning U.S. military actions related to the IS. These reports have not specified whether they are believed to satisfy the WPR’s requirements relating to the introduction of U.S. forces into actual or imminent hostilities (which would trigger the 60-day timeline for the termination of U.S. action under Section 5(b) of the WPR) or are intended to satisfy the notification requirements concerning the deployment of combat-equipped U.S. forces into a foreign country (which do not trigger the termination requirements). While the deployment of U.S. forces to Iraq in June for purposes of protecting U.S. facilities and personnel located away from active zones of combat could arguably be construed as not constituting the introduction of U.S. forces into actual or imminent hostilities, this argument appears less persuasive with respect to repeated U.S. airstrikes against the Islamic State that began in August.

It might be argued that each of the reports “consistent with” the WPR is intended to ensure the activities described in each report trigger distinct 60-day termination requirements,⁷⁵ in the event that such operations cannot be construed as having been authorized by the 2001 AUMF, the 2002 Iraq AUMF, or another statute. Such an interpretation, however, would seem to enable the executive to engage in unauthorized hostilities against an enemy force for an indefinite period, so long as it promptly submitted reports to Congress describing specific military actions that had been taken (e.g., the bombing of a particular enemy facility; a battle with enemy forces at a particular location), each of which was expected to last less than 60 days. This would appear to defeat the purpose of Section 5(b) of the WPR, which was to assure the termination of unauthorized military action after a specified time period even in the absence of action by Congress.

Moreover, disagreement may arise between the political branches regarding the scope of military activities covered by Section 5(b). Such a disagreement occurred during U.S. operations in support of the NATO-led mission against Muammar al Qadhafi’s regime in Libya. When U.S. operations continued beyond the 60-day deadline for unauthorized hostilities established by the WPR, some argued that Section 5(b) required their immediate termination unless authorization was obtained from Congress. The Obama Administration did not challenge the constitutionality of the WPR’s requirement that unauthorized hostilities be terminated within 60 days, but claimed that this requirement did not apply to ongoing U.S. operations. The continued engagement in manned and unmanned aerial attacks upon Libyan targets, in the Administration’s view, was sufficiently limited so as not to constitute “hostilities” under the WPR, because they “do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops.”⁷⁶ The use of separate WPR reports for each anti-IS operation may be intended to prevent the 60-day clock from starting at all, by suggesting that the scope and

⁷⁵ See Jack Goldsmith, *A New Tactic to Avoid War Powers Resolution Time Limits?*, LAWFARE BLOG, September 2, 2014, at <http://www.lawfareblog.com/2014/09/a-new-tactic-to-avoid-war-powers-resolution-time-limits/> (suggesting possible rationales for the Administration’s decision to submit multiple WPR notifications to Congress).

⁷⁶ *Report to the House of Representatives on United States Activities in Libya*, submitted June 15, 2011, at 25, available at http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERS_DOC.html?ref=politics.

duration of each operation is too limited to amount to “hostilities” within the meaning of the WPR, even though the operations might seem more substantial in the aggregate.

The Obama Administration’s interpretation of the WPR’s application to military activity has been criticized by some observers as overly constrained.⁷⁷ Neither the express language of the WPR nor the legislative history of the measure provide a precise indication as to the range of military activities intended to be covered by the term “hostilities,” but the legislative history suggests that Congress intended the act to apply to significant military engagements, including at least some confrontations with belligerent forces that do not involve an exchange of fire.⁷⁸ Moreover, at least as a matter of international legal practice, repeated military strikes by one sovereign entity against another entity may be deemed “hostilities,” even if such actions do not expose the attacking force to serious threat of injury.⁷⁹

Further, some have suggested that the Administration’s analysis too narrowly focuses on the question of whether the U.S. operation can be construed as “hostilities” standing alone.⁸⁰ Some argue that in assessing whether U.S. forces are currently engaged in hostilities, it is appropriate to consider the overarching military conflict, rather than simply the supporting role that U.S. forces play within these operations.⁸¹ Under this interpretation, it would be appropriate to consider U.S. actions in the broader context of the ongoing military action in Iraq, including military action not only directly involving the United States, but also Iraqi security forces and the Islamic State.⁸²

⁷⁷ See, e.g., David A. Fahrenthold & Felicia Sonmez, *Congressmen Criticize Obama’s Stand on Libya*, WASHINGTON POST., June 16, 2011 (quoting House Speaker John Boehner and others expressing disagreement with the Administration’s interpretation); Bruce Ackerman, Op-Ed, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 20, 2011, available at <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>.

⁷⁸ According to the House Report on the WPR:

[t]he word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. “*Imminent hostilities*” denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

H.R. Rep. 93-287 (1973), at 7. The legislative history suggests that the WPR was generally aimed at deterring “the commitment of U.S. forces exclusively by the President ... without congressional approval or adequate consultation by Congress.” *Id.*

⁷⁹ See PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 57 (International Comm. of the Red Cross, ed., Edward Markee and Susan Mutti, trans.1992) (defining “hostilities” as “Acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience....”).

⁸⁰ See Jack Goldsmith, *Problems with the Obama Administration’s War Powers Resolution Theory*, LAWFARE BLOG, June 16, 2011, at <http://www.lawfareblog.com/2011/06/problems-with-the-obama-administration%E2%80%99s-war-powers-resolution-theory-2/>.

⁸¹ When authorizing Member States to prevent the Libyan government from attacking civilians, the U.N. Security Council appeared to view such attacks as occurring within the context of an armed conflict between the Libyan government and portions of the populace. See United Nations Security Council Res. 1973, at Preamble, cl. 3 (“Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians”). Arguably, military action taken by coalition forces to protect Libyan civilians could be characterized as being a part of this conflict.

⁸² Section 8(c) of the WPR indicates that references to the “introduction of U.S. Armed Forces” were intended to cover situations where U.S. personnel, though perhaps not directly participating in combat operations themselves, “command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.” 50 U.S.C. §1547(c). Arguably, this provision could be construed to support arguments that, (continued...)

Possible Limitations on Judicial Resolution of Claims

Ultimately, however, it seems unlikely that the dispute will be definitively resolved by the courts. Although there have been several instances where Members of Congress have brought suit against the executive and argued that a particular military action contravenes the WPR or the constitutional allocation of war powers,⁸³ in all cases where final rulings have been issued, these challenges have been dismissed without the reviewing court reaching the underlying merits of the litigants' claims. The courts have variously relied on the political question doctrine, the equitable/remedial discretion doctrine, ripeness, mootness, and congressional standing concerns as grounds for dismissal.⁸⁴ The courts have made clear, however, that while formidable, none of the aforementioned procedural barriers constitutes an insurmountable obstacle to resolving the statutory or constitutional issues concerning war powers. All of the opinions to date indicate that the barrier to the exercise of jurisdiction stems from the posture of the cases, not some institutional shortcoming. Absent such an irreconcilable conflict,⁸⁵ however, many believe it is unlikely that the courts will venture into this politically and constitutionally charged thicket.

Is the U.S. Military Action Against the Islamic State Permitted Under the United Nations Charter?

U.S. military strikes against the Islamic State that have occurred within the territory of Iraq have been undertaken with the consent of the Iraqi government and consequently would not constitute a use of force against Iraq. However, IS fighters “have used Syria both as a staging ground for

(...continued)

when examining whether U.S. forces are involved in “hostilities,” it is appropriate to look also to the operations of the military forces that they assist. On the other hand, the Obama Administration has taken the position that this definitional provision is not dispositive, as Section 8(c) “is textually linked (through the term ‘introduction of United States Armed Forces’) not to the ‘hostilities’ language ... that triggers the automatic pullout provision in section 5(b), but rather, to a different clause later down in that section that triggers a reporting requirement.” Senate Foreign Relations Committee, *Libya and War Powers*, 112th Cong., 1st Sess. (2011) (written testimony of State Department Legal Adviser Harold Koh), available at <http://www.state.gov/s/l/releases/remarks/167250.htm>.

⁸³ Kucinich v. Obama, 821 F. Supp. 2d 110 (D.D.C. 2011).

⁸⁴ See CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia (discussing various challenges brought by Members of Congress to executive action which purportedly contravenes the War Powers Resolution). Lawsuits brought by private parties alleging that presidential action has violated the WPR have also proven unsuccessful. See, e.g., *Whitney v. Obama*, 845 F. Supp. 2d 136 (D.D.C. 2012) (rejecting on mootness grounds a challenge by private parties alleging that U.S. operations in Libya violated the WPR).

⁸⁵ See CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia. See also *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982) (dismissing on political question grounds a challenge by several Members of Congress which claimed that the executive’s military assistance to the government of El Salvador violated the WPR and constitutional allocation of war powers, but suggesting that “were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented”), *aff’d per curiam*, 720 F.2d 1355, 1357 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210-211 (D.C. Cir. 1985) (Ginsburg, Ruth Bader, J., concurring) (agreeing on ripeness grounds with the dismissal of suit filed by several Members of Congress which challenged the Reagan Administration’s provision of assistance to Nicaraguan Contra rebels, and emphasizing that political branches had not as yet reached “a constitutional impasse” requiring judicial resolution).

attacks in Iraq and as a parallel theater of operations,⁸⁶ leading U.S. policy makers to expand military operations to include strikes attacking IS personnel and assets within Syria as well.⁸⁷ Syrian officials have stated that they would perceive military attacks by the United States or other outside forces as “act[s] of aggression” if they were not undertaken with the cooperation and consent of the Syrian government.⁸⁸ The use of force in Syria without its consent or a U.N. Security Council resolution could have implications under international law.

In general, international law prohibits one state from acting militarily within the territory of another without its consent. A few exceptions to this prohibition exist, most of which are premised upon a nation’s inherent right to self-defense.⁸⁹ Prior to World War II, states were recognized as having a sovereign right to use military force against other states to vindicate any number of wrongs. In drafting the United Nations (U.N.) Charter, member states sought to reduce the incidence of war by curtailing the rights of states to use force against one another. Article 2(4) of the U.N. Charter generally prohibits member states from using or threatening to use force “against the territorial integrity or political independence of any state.”⁹⁰

In the absence of authorization from the U.N. Security Council, the sole exception to this prohibition that is expressly recognized by the U.N. Charter concerns the use of force by Member States acting in collective or individual self-defense. Specifically, Article 51 preserves the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to

⁸⁶ CRS Report R43612, *The “Islamic State” Crisis and U.S. Policy*, by Kenneth Katzman et al., *supra* footnote 57, at 12 (quoting version of report updated August 8, 2014).

⁸⁷ In late August, President Obama approved the aerial surveillance of IS operations within Syria, reportedly as a precursor to potential U.S. military attacks against IS fighters and assets located there. See Mark Landler & Helene Cooper, *Obama Authorizes Air Surveillance of ISIS in Syria*, N.Y. TIMES, August 25, 2014, available at <http://www.nytimes.com/2014/08/26/world/middleeast/obama-syria-ISIS.html>.

⁸⁸ See Liz Sly, *Syria Warns against U.S. Strikes on Islamic State on Its Soil*, WASHINGTON POST, August 25, 2014 (quoting Syrian Foreign Minister Walid al-Moualem), available at http://www.washingtonpost.com/world/middle_east/syria-warns-against-strikes-on-islamic-state-on-its-soil/2014/08/25/6fe98b38-2c5d-11e4-994d-202962a9150c_story.html.

⁸⁹ Some nations and outside observers have argued that humanitarian interventions (e.g., to deter human rights violations or war crimes) may be permissible as well, even without U.N. Security Council approval and notwithstanding the lack of clear recognition of such action in the U.N. Charter. See e.g., United Kingdom Government, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, August 29, 2013 (proposing criteria for when military force against a foreign state could be justified under the doctrine of humanitarian intervention), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf. Some proponents of legal recognition of humanitarian intervention, even in the absence of U.N. Security Council authorization, point to the NATO-led military action against Kosovo in 1999. Others, however, dispute the notion that the Kosovo action was purported by most NATO parties to be legally justified pursuant to the doctrine of humanitarian intervention, and also note that relatively few countries have taken the view that international law permits the use of force against another country solely on the basis of humanitarian concerns. See Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, August 28, 2013, at <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> (discussing state recognition and nonrecognition of the humanitarian intervention doctrine, and noting that in litigation before the International Court of Justice only two NATO parties explicitly relied on the doctrine of humanitarian intervention as legal justification for the Kosovo action). For its part, it does not appear that the executive branch of the United States has ever taken the official view that international law permits military intervention on the basis of humanitarian concerns alone.

⁹⁰ UNITED NATIONS CHARTER, art. 2(3). The use of force is further precluded “in any other manner inconsistent with the Purposes of the United Nations.” *Id.*

maintain international peace and security.”⁹¹ Read literally, Article 51’s articulation of the right seems to preclude a state’s use of force until *after* an armed attack has already commenced and not merely on the threat of any use of force,⁹² but some authorities regard the right as encompassing the previously existing inherent right of self-defense under customary international law,⁹³ which many likewise regard as including a right to preemptive (or “anticipatory”) self-defense in the event of an imminent attack.⁹⁴

If the state on whose territory force is to be used gives its consent, there is no violation of Article 2(4) of the UN Charter and therefore no need to invoke a theory of self-defense. Accordingly, ongoing U.S. military actions against IS forces in Iraq do not raise concerns of a violation of Iraq’s territorial integrity, as these actions have been undertaken with the consent of the Iraqi government. On the other hand, military action by the United States against IS forces and Al Qaeda associated groups in Syria, absent the consent of the Syrian government (or authorization by the U.N. Security Council), would appear to conflict with the requirements of the U.N. Charter unless it could be justified as an exercise of the inherent right of individual or collective self-defense that would be permissible under Article 51.

The classic formulation of the right to use force in self-defense on the territory of a foreign state was set forth by U.S. Secretary of State Daniel Webster in connection with the famous *Caroline* incident. In 1837 British troops attacked a private American ship, the *Caroline*, while it was moored for the night on the New York side of the Niagara River, asserting that the ship was being used to provide supplies to insurrectionists against British rule in Canada who were based on an island on the Canadian side of the river. The United States protested this “extraordinary outrage” and demanded an apology and reparations. In the course of the ensuing diplomatic exchanges with the British Government, Secretary of State Daniel Webster asserted that an intrusion into the territory of another state can be justified as an act of self-defense only in those “cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and

⁹¹ “Armed attack” is not defined by the U.N. Charter. The International Court of Justice has suggested that “armed attack” is limited to attacks of sufficient intensity launched by or under the direction of a state. *See e.g.*, *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *Oil Platforms* (Iran v. U.S.), 42 I.L.M. 1334 (November 6, 2003); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 147 (December 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9). However, the UN Security Council recognized that the 9/11 attacks gave rise to a right to self defense. UN Sec. Council Res. 1368, S/RES/1368 (12 September 2001). Recent state practice seems to confirm that attacks by nonstate actors can amount to an armed attack and may give rise to a right of self defense. *See* Michael Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum*, 56 *Naval L. Rev.* 1, 8 (2008) (positing that the international response to 9/11 demonstrates the acceptability of military force in response to violent acts by nonstate actors with no connection to any state, which until that time remained the province of law enforcement).

⁹² YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 166-68 (3d ed. 2001).

⁹³ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 666-67 (Bruno Simma, ed., 1994) (hereinafter “UN COMMENTARY”) (describing the “prevailing view” as holding that Article 51 is a limitation on the customary right of self-defense, while noting that an opposing view considers that Article 51 preserves a customary right of self-defense that is not limited to cases of armed attack, but may be invoked against lesser threats); DINSTEIN, *supra* footnote 92, at 167-68 (noting, but disagreeing with a “strong school of thought maintaining that Article 51 only highlights one form of self-defence ... [but] does not negate other patterns of legitimate action in self-defence”).

⁹⁴ UN Commentary, *supra* footnote 93, at 675 (describing lack of consensus in international legal doctrine with respect to the point at which self-defense measures may be taken); DINSTEIN, *supra* footnote 92, at 165-66 (assessing that the majority of commentators regard self-defense under customary international law as encompassing a right to anticipatory self-defense, but arguing that the right of self-defense under the UN Charter is more restricted); ANTONIO CASSESE, *INTERNATIONAL LAW* 307-11 (2001) (describing U.S. position on self-defense as broader than that which appears to be generally accepted among states).

no moment for deliberation.”⁹⁵ Moreover, he wrote that even if justified, the use of defensive force must be proportional to the threat, “since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”⁹⁶

The three conditions of necessity, proportionality, and immediacy (or imminence) are widely regarded as establishing the grounds for invoking the right to resort to force extraterritorially.⁹⁷ The application of these conditions to military action by the United States against IS forces in Syria depends, in part, upon whether such action is characterized as an act of self-defense by the United States, or is characterized as a form of collective defense undertaken on behalf of the Iraqi government or another sovereign entity (or collection of entities). Whereas the Islamic State clearly constitutes an ongoing threat to the security and territorial integrity of Iraq and Syria, the nature of the threat the Islamic State presently poses to the United States is less direct or substantial (though arguments could be made that the group currently poses a threat to U.S. persons and personnel located in Iraq). Importantly, however, if U.S. military action against IS forces outside Iraq is justified as a form of collective defense, it would appear that Iraq or any other nation that the United States sought to defend would likely need to consent to military actions that the United States took on its behalf.⁹⁸

Another possibility for resolving a possible conflict of sovereignty in order to justify the use of force in Syria without the consent of its government would be to justify intervention on the basis that Syria is “unable or unwilling” to remove the threat emanating from its territory.⁹⁹ In present-day application, it is not clear whether the “unwilling or unable” test is understood to be a separate test from the *Caroline* test,¹⁰⁰ an additional consideration (for example, an element of necessity),¹⁰¹ or a substitute for one of the factors, perhaps immediacy in the case of a continuing threat. In the context of the war against Al Qaeda and the Taliban, the Obama Administration has indicated that it views as lawful military operations outside of Afghanistan without the consent of the country in which they take place if a determination has been made that the country is unable or unwilling to deal with a threat to the United States.¹⁰² Although the “unwilling and unable”

⁹⁵ Letter from Secretary of State Daniel Webster to Lord Ashburton of August 6, 1842, set forth in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906).

⁹⁶ Letter from Mr. Webster to Mr. Fox of April 24, 1841, 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1857), quoted in LORI DAMROSCH, INTERNATIONAL LAW: CASES AND MATERIALS 923 (2001).

⁹⁷ DINSTEN, *supra* footnote 92, at 219 (noting that the Webster correspondence has come to be “looked upon as transcending the specific legal contours of extra-territorial law enforcement” to influence the entire field of self defense).

⁹⁸ *Nicaragua v. United States*, *supra* footnote 91, para. 232 (International Court of Justice ruling recognizing that it was “entitled to take account, in judging the asserted justification of the exercise of collective self-defence ... the actual conduct of [affected States] at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack ... and of the making of a request by the victim State ... for help in the exercise of collective self-defence.”). Acts of self-defense taken by U.N. Member States must be “immediately reported” to the U.N. Security Council. U.N. CHARTER, art. 51.

⁹⁹ Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L 483 LAW (2012).

¹⁰⁰ In fact, the dispute over the *Caroline* did include as part of the British justification an allegation that the United States was unable to prevent insurgents from using its territory to launch attacks against British Canada. *Id.* at 502; Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 218-19 (2003).

¹⁰¹ See Deeks, *supra* footnote 99, at 12-13. (suggesting that the “unwilling and unable test” plays a part in the determination of whether military action is necessary).

¹⁰² See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Department of State, *Speech before the Annual Meeting of the American Society of International Law*, Washington, DC, March 25, 2010 (listing “willingness and ability of ... states (continued...)”).

doctrine seems to be supported by precedent in U.S. practice, it is unclear whether an international consensus exists for when or whether it may validly be applied.¹⁰³

The United States has reportedly informed the U.N. Security Council in accordance with Article 51 of the U.N. Charter that it has commenced military operations in Syria against the Islamic State and the Khorasan Group.¹⁰⁴ In its letter, the Administration explains that the operations against the Islamic State are justified as measures of both individual and collective self-defense and emphasizes that the government of Iraq had requested U.S. assistance.¹⁰⁵ Moreover, the letter applies the “unable and unwilling” test, asserting that “[t]he Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself.”¹⁰⁶ With respect to the Khorasan Group, the letter notes “the terrorist threats that they pose to the United States and our partners and allies,” suggesting that military strikes of those targets are also justified as measures of individual and collective self-defense.¹⁰⁷ In a subsequent statement, UN Secretary-General Ban Ki-moon seemed to accept the “unable and unwilling” theory, noting in support of the operations that “the strikes took place in areas no longer under the effective control of that Government.”¹⁰⁸ It remains to be seen whether the airstrikes against Syria will gain sufficient acceptance among states as a valid exercise of self-defense in order to advance the legitimacy of the “unwilling and unable” doctrine in international law.¹⁰⁹

(...continued)

to suppress the threat the target poses” among factors taken into consideration in deciding whether a targeted killing is appropriate in a particular country), prepared text available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; Attorney General Eric Holder, *Speech at Northwestern University School of Law*, March 5, 2012 (“the use of force in foreign territory would be consistent with ... international legal principles if conducted... after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”), prepared text available at <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/#more-6236>; Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President’s Counterterrorism Strategy*, Woodrow Wilson International Center for Scholars, April 30, 2012 (“[N]othing in international law that ... prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.”), prepared text available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

¹⁰³ See TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 455 (2010) (concluding that certain post-9/11 precedent may support recognition that “attacks by non-State actors may exceptionally constitute ‘armed attacks’ in the sense of Article 51 of the UN Charter, warranting defensive measures when the territorial State is unwilling or unable to prevent cross-border attacks,” but noting reservations about whether the rule has been established as binding international law); THOMAS M. FRANCK, RECOURSE TO FORCE 64-68 (2002).

¹⁰⁴ Marty Lederman, *The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group*, JUST SECURITY BLOG, September 23, 2014, available at <http://justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>.

¹⁰⁵ See Letter from the Permanent Representative of the United States of America to the United Nations, September 23, 2014, UN Doc. S/2014/695, available at http://www.cbsnews.com/htdocs/pdf/00_2014/09-2014/USlettertoSecretaryGeneral092314.pdf.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *U.N. Chief welcomes airstrikes in Syria*, AP September 23, 2014, available at <http://www.newsobserver.com/2014/09/23/4175611/un-chief-welcomes-airstrikes-in.html>; Ryan Goodman and Sarah Knuckey, *Remarkable statement by UN Secretary General on US Airstrikes in Syria*, JUST SECURITY BLOG, September 23, 2014, available at <http://justsecurity.org/15456/remarkable-statement-secretary-general-airstrikes-syria/>.

¹⁰⁹ See Ryan Goodman, *Australia, France, Netherlands Express Legal Reservations about Airstrikes in Syria*, JUST SECURITY BLOG, September 25, 2014 (noting that some other governments dispute the legal position with respect to the “unwilling and unable” test), available at <http://justsecurity.org/15545/australia-france-netherlands-express-legal-reservations-airstrikes-syria/>.

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