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## BLACK FLAGS BEHIND BARS: *DOE V. MATTIS* AND WHY THE 2001 AUMF DOES NOT JUSTIFY THE DETENTION OF U.S.-CITIZEN ISLAMIC STATE FIGHTERS

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NOTE

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## INTRODUCTION

On July 4, 2014, Abu Bakr al-Baghdadi, the leader of the group formerly known as the Islamic State of Iraq and al-Sham<sup>1</sup> climbed the pulpit of the Great Mosque of al-Nuri in Mosul, Iraq, and delivered his first sermon as Caliph of the Islamic State.<sup>2</sup> This sermon officially established a new Islamic caliphate in Iraq and Syria.<sup>3</sup> Prior to his announcement, Baghdadi's group had attracted thousands of foreign fighters to its cause,<sup>4</sup> and, with the establishment of an official Islamic caliphate, would continue to attract thousands more.<sup>5</sup> According to the Federal Bureau of Investigation (FBI), approximately 300 of those foreign fighters were American citizens.<sup>6</sup>

The declaration of an Islamic caliphate and the large amounts of territory the group seized in mid-2014 rang alarm bells in Washington.<sup>7</sup> In response, President Obama authorized a targeted airstrike

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1. See Hannah Strange, *Islamic State Leader Abu Bakr al-Baghdadi Addresses Muslims in Mosul*, TELEGRAPH (July 5, 2014, 3:25 PM), <https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10948480/Islamic-State-leader-Abu-Bakr-al-Baghdadi-addresses-Muslims-in-Mosul.html> [https://perma.cc/Q8G2-X8UN]. Baghdadi recently died in an October 2019 raid conducted by U.S. Special Operations Forces in northwestern Syria. Rukmini Callimachi & Falih Hassan, *Abu Bakr al-Baghdadi, ISIS Leader Known for His Brutality, Is Dead at 48*, N.Y. TIMES (Oct. 27, 2019), <https://www.nytimes.com/2019/10/27/world/middleeast/al-baghdadi-dead.html> [https://perma.cc/44JU-ZLP3]. There has been significant debate over what to call Baghdadi's jihadist group, with various governments and media outlets alternating between the names ISIS, ISIL, the Islamic State, and Daesh. See Faisal Irshaid, *Isis, Isil, IS or Daesh? One Group, Many Names*, BBC NEWS (Dec. 2, 2015), <https://www.bbc.com/news/world-middle-east-27994277> [https://perma.cc/CNX4-FXZH] (describing the various names used to refer to Baghdadi's group). For reasons of clarity, this Note will refer to the group as the Islamic State, the name the group itself has used since June 2014. See *id.*

2. See JOBY WARRICK, BLACK FLAGS: THE RISE OF ISIS 304-05 (2015).

3. See *id.*

4. See THE SOUFAN GRP., FOREIGN FIGHTERS: AN UPDATED ASSESSMENT OF THE FLOW OF FOREIGN FIGHTERS INTO SYRIA AND IRAQ 4 (2015), [http://soufangroup.com/wp-content/uploads/2015/12/TSG\\_ForeignFightersUpdate3.pdf](http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf) [https://perma.cc/6EYZ-DMNF].

5. See *id.*; Rukmini Callimachi, *Fight to Retake Last ISIS Territory Begins*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/world/middleeast/isis-syria.html> [https://perma.cc/FX4U-KJHF].

6. See ALEXANDER MELEAGROU-HITCHENS ET AL., THE TRAVELERS: AMERICAN JIHADISTS IN SYRIA AND IRAQ 5 (2018), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/TravelersAmericanJihadistsinSyriaandIraq.pdf> [https://perma.cc/PKL8-LXKX].

7. See BRIAN MICHAEL JENKINS, *Foreword* to MELEAGROU-HITCHENS ET AL., *supra* note

campaign against the group.<sup>8</sup> To justify these strikes, the Obama administration relied upon the 2001 Authorization for Use of Military Force (2001 AUMF).<sup>9</sup> The 2001 AUMF, which Congress passed in the immediate wake of the September 11th terrorist attacks, broadly authorizes the President to use military force against the parties responsible for those attacks.<sup>10</sup> After its passage, the executive branch used the 2001 AUMF as the main legal justification for U.S. anti-terror operations against al-Qaeda, the Taliban, and the associated forces of either group.<sup>11</sup> These anti-terror operations included the detention of terrorists as well as traditional military operations.<sup>12</sup>

Both the Obama and Trump administrations have continued to rely upon the 2001 AUMF to justify the use of force against terrorist organizations across the world, including the Islamic State.<sup>13</sup>

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6, at ix (quoting United States Senators as saying, “[W]e are in the most dangerous position we ever have been as a nation” and “[military action must be taken] before we all get killed here at home”).

8. See Barack Obama, President of the U.S., Statement Addressing the United States’ Response to the Crisis in Iraq (Aug. 7, 2014, 9:30 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president> [<https://perma.cc/73E3-65X6>].

9. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)); see also Press Release, White House Office of the Press Sec’y, Background Conference Call on the President’s Address to the Nation (Sept. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation> [<https://perma.cc/JDW9-VHRD>] (stating that the 2001 AUMF provides the statutory authority for the President’s airstrike campaign against the Islamic State).

10. MATTHEW C. WEED, CONG. RESEARCH SERV., R43983, 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION 1 (2015).

11. See *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. 1 (2014) (statement of Sen. Menendez, Chairman) [hereinafter *AUMF Hearings*], [https://www.foreign.senate.gov/imo/media/doc/052114\\_Transcript\\_Authorization%20for%20Use%20of%20Military%20Force%20After%20Iraq%20and%20Afghanistan.pdf](https://www.foreign.senate.gov/imo/media/doc/052114_Transcript_Authorization%20for%20Use%20of%20Military%20Force%20After%20Iraq%20and%20Afghanistan.pdf) [<https://perma.cc/A9XC-TB34>].

12. See Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 123, 125 (2013).

13. See *AUMF Hearings*, *supra* note 11, at 8 (statement of Hon. Stephen W. Preston, Gen. Counsel, U.S. Dep’t of Def.) (“The Department of Defense relies on the AUMF in ... military operations against al-Qaeda and associated forces ... and detention operations.”); Lt. Col. Daniel L. Davis, *Abuse of the 2001 AUMF Weakens Our National Security*, HILL (Feb. 28, 2018, 3:45 PM) (describing the use of the 2001 AUMF by the Bush, Obama, and Trump administrations), <https://thehill.com/opinion/national-security/376067-abuse-of-the-2001-aumf-weakens-our-national-security> [<https://perma.cc/7LAW-3L6A>].

However, there has been uncertainty over whether the 2001 AUMF applies to the Islamic State,<sup>14</sup> which has led to questions concerning the legality of using it to justify the continued use of force against the Islamic State and its members.<sup>15</sup>

One such legal question was the central issue in *Doe v. Mattis*, a habeas corpus case that addressed the rights of a U.S.-citizen Islamic State fighter who had been detained as an enemy combatant by the U.S. government.<sup>16</sup> On September 11, 2017, Syrian Democratic Forces (SDF) captured Doe—an unnamed dual U.S.-Saudi citizen who had been fighting for the Islamic State—at a checkpoint in Syria.<sup>17</sup> After learning that Doe was a U.S. citizen, the SDF transferred custody of Doe to the U.S. military.<sup>18</sup> Upon obtaining custody of Doe, the U.S. government concluded, after a four-month investigation (during which Doe remained in custody),<sup>19</sup> that there

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14. See Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014), <https://time.com/3326689/obama-isis-war-powers-bush/> [<https://perma.cc/4XJ8-PPXM>] (stating the Islamic States “loose affiliation” to al-Qaeda makes Obama’s application of the AUMF “presidential unilateralism masquerading as implausible statutory interpretation”); Steve Vladeck, *ISIL as al Qaeda: Three Reactions*, LAWFARE (Sept. 11, 2014, 1:52 AM), <https://www.lawfareblog.com/isis-al-qaeda-three-reactions> [<https://perma.cc/M5R2-4XFR>] (discussing the reactions of legal scholars to Obama’s announcement that the Islamic State falls within the 2001 AUMF).

15. See Wells Bennett, *The 2001 AUMF Covers 2014 Counterterrorism Operations Against ISIS?*, LAWFARE (Sept. 10, 2014, 10:05 PM), <https://www.lawfareblog.com/2001-aumf-covers-2014-counterterrorism-operations-against-isis> [<https://perma.cc/MUW2-KNBW>] (stating that the application of the 2001 AUMF “in Iraq and Syria against ISIS ... seems like quite a stretch”); Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces*, LAWFARE (Sept. 10, 2014, 11:46 PM), <https://www.lawfareblog.com/2001-aumf-associated-forces-disassociated-successor-forces> [<https://perma.cc/YHF6-URYK>] (stating that the Obama Administration’s application of the 2001 AUMF to the Islamic State is “stunning from a legal perspective”); Benjamin Wittes, *Not Asking the Girl to Dance*, LAWFARE (Sept. 10, 2014, 9:41 PM), <https://www.lawfareblog.com/not-asking-girl-dance> [<https://perma.cc/Q8JL-CZUG>] (stating that it is “extremely implausible” that the scope of the 2001 AUMF encompasses the Islamic State).

16. Robert Chesney, *A Primer on the Legal Dispute in Doe v. Mattis*, LAWFARE (Mar. 9, 2018, 8:13 AM), <https://www.lawfareblog.com/primer-legal-dispute-doe-v-mattis> [<https://perma.cc/P8G7-FTKA>].

17. Respondent’s Factual Return at 2, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-02069-TSC).

18. *Id.*

19. The government took Doe into custody in mid-September 2017 and filed its first response to Doe’s habeas claim in mid-February 2018, in which it argued that Doe should remain in custody. See *id.*

were sufficient factual<sup>20</sup> and legal<sup>21</sup> bases to detain Doe as an enemy combatant. The government rested its legal argument on “three independent bases: The 2001 Authorization for Use of Military Force, the 2002 Authorization for Use of Military Force Against Iraq, and the President’s Authority under Article II.”<sup>22</sup>

In response, Doe challenged the government’s legal authority to detain him.<sup>23</sup> Doe claimed that (1) there must be a clear statutory grant from Congress allowing for the lawful detention of U.S. citizens for the government’s stated purpose; and (2) the 2001 AUMF does not provide the clear statutory grant authorizing the specific detention of Doe.<sup>24</sup> In October of 2018, Doe reached a settlement with the U.S. government and was released in Bahrain before a court could adjudicate the legal merits of his case.<sup>25</sup>

Doe’s<sup>26</sup> situation—the indefinite detention of a *U.S. citizen* as an enemy combatant—is one that has rarely reared its head in the recent years of the war on terror.<sup>27</sup> However, in early January of 2019, Kurdish forces captured two American citizens in Syria—Warren Christopher Clark and Zaid Abed al-Hamid—who have been accused of fighting for the Islamic State.<sup>28</sup> Additionally, President Trump recently ordered the withdrawal of U.S. forces from along the Syria-Turkey border, which could potentially result in the

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20. *See id.* at 3-4.

21. *See id.* at 3.

22. *Id.* (footnotes omitted).

23. *See* Petitioner’s Response to Respondent’s Factual Return at 1, *Doe*, 288 F. Supp. 3d 195 (“[T]he executive lacks the legal authority to detain [Doe].”).

24. *Id.* at 2-3; Chesney, *supra* note 16.

25. *See* Robert Chesney, *Doe v. Mattis Ends With a Transfer and a Cancelled Passport: Lessons Learned*, LAWFARE (Oct. 29, 2018, 11:14 AM), <https://www.lawfareblog.com/doe-v-mattis-ends-transfer-and-cancelled-passport-lessons-learned> [<https://perma.cc/V39T-KJGZ>] (“[Thirteen] months passed here without a merits ruling.”).

26. As a result of his release, Doe’s real name was revealed as Abdulrahman Ahmad Alsheikh; however, for clarity purposes, this Note will continue to refer to him as John Doe. *See* Chesney, *supra* note 25.

27. *See* Robert Chesney, *An American Enemy Combatant Case? The News Out of DOD, and What Might Happen Next*, LAWFARE (Sept. 15, 2017, 12:33 PM), <https://www.lawfareblog.com/american-enemy-combatant-case-news-out-dod-and-what-might-happen-next> [<https://perma.cc/SKK4-KKGS>].

28. *See* Louisa Loveluck & Erin Cunningham, *2 Americans Accused of Fighting for ISIS Are Captured by Kurds in Syria*, WASH. POST (Jan. 6, 2019), [https://www.washingtonpost.com/world/middle\\_east/2-americans-accused-of-fighting-for-isis-are-captured-by-kurds-in-syria/2019/01/06/afb8dd54-11f5-11e9-ab79-30cd4f7926f2\\_story.html](https://www.washingtonpost.com/world/middle_east/2-americans-accused-of-fighting-for-isis-are-captured-by-kurds-in-syria/2019/01/06/afb8dd54-11f5-11e9-ab79-30cd4f7926f2_story.html) [<https://perma.cc/5NAD-9EC5>].

release of 11,000 Islamic State fighters, 2000 of whom are foreign fighters.<sup>29</sup> The captures of Doe, Clark, and al-Hamid, combined with the recent territorial losses the Islamic State has suffered and the potential release of thousands of foreign Islamic State fighters from SDF detention,<sup>30</sup> make it increasingly likely that the U.S. government will again face the need to detain a U.S.-citizen Islamic State fighter.<sup>31</sup>

This Note proposes that the current legal authority the United States relies on to detain these persons—the 2001 AUMF—does not provide an adequate justification for the detention of Islamic State fighters who are U.S. citizens. This Note argues that despite a marriage of convenience, the Islamic State’s organizational and operational differences from al-Qaeda make it a factually distinct organization.<sup>32</sup> Because the Islamic State and al-Qaeda are two different entities, the Islamic State falls outside the scope of the 2001 AUMF.<sup>33</sup> Thus, the 2001 AUMF should not apply to the detention of U.S.-citizen Islamic State fighters because the government’s detention authority rests on the Islamic State falling within the purview of the 2001 AUMF.<sup>34</sup>

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29. See Robert Chesney, *Will Abandoning the Kurds Result in the Mass Release of Islamic State Fighters?*, *LAWFARE* (Oct. 7, 2019, 10:50 AM), <https://www.lawfareblog.com/will-abandoning-kurds-result-mass-release-islamic-state-fighters> [<https://perma.cc/Z7EP-GDMQ>] (“Now it seems that both triggering conditions for a collapse of the SDF detention system [for Islamic State fighters] are looming before us, thanks to President Trump’s precipitous decision to green-light a Turkish invasion of northern Syria.”); Kathy Gilsinan, *There Is No Plan B for ISIS Prisoners*, *ATLANTIC* (Oct. 17, 2019), <https://www.theatlantic.com/politics/archive/2019/10/there-is-no-plan-b-for-isis-prisoners/600187/> [<https://perma.cc/2LC2-J9CS>] (“[T]he U.S. has relied on Kurdish-led militias to hold some 11,000 ISIS fighters, about 2,000 of whom were ‘foreign fighters.’”).

30. See Daniel L. Byman, *What Happens When ISIS Goes Underground?*, *BROOKINGS INST.* (Jan. 18, 2018), <https://www.brookings.edu/blog/markaz/2018/01/18/what-happens-when-isis-goes-underground> [<https://perma.cc/9LEA-RGVL>]; Chesney, *supra* note 29.

31. See Byman, *supra* note 30; Chesney, *supra* note 29; THE SOUFAN GRP., *supra* note 4, at 19-21. Due to Turkey’s invasion of northern Syria, the United States military has already taken custody of Islamic State fighters previously held by the SDF, although none have been U.S. citizens so far. See Charlie Savage, *U.S. Moves to Take ‘High Value’ ISIS Detainees, Including Britons Who Abused Hostages*, *N.Y. TIMES* (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/us/politics/beatles-isis-us-custody.html> [<https://perma.cc/A54Q-2XQL>].

32. See *infra* Part II.B.

33. See *infra* Part II.B.

34. See *infra* Parts I, II.A.

The idea of an updated AUMF has long been discussed as an appropriate measure to continue operations against the Islamic State.<sup>35</sup> This Note proposes that because the Islamic State and al-Qaeda are factually distinct organizations, Congress must pass a new AUMF that specifically includes the Islamic State in order to justify detaining individuals like Doe. This Note explores three principles that would best help execute an Islamic State-specific AUMF and justify current and future detentions of U.S.-citizen Islamic State fighters: (1) an explicit reference to the Islamic State in the AUMF's language; (2) the inclusion of a sunset clause; and (3) a provision requiring reports to Congress. The addition of these provisions to an Islamic State-specific AUMF would resolve any ambiguity over whether a new AUMF extends to the Islamic State and, as a result, whether there is a justifiable legal basis for the detention of its members.

Part I outlines the U.S. government's authority for detaining Doe as an enemy combatant. This Part examines the government's authority by analyzing constitutional and statutory sources, and the limitations imposed on this authority. Part II explores the current theory for including the Islamic State within the scope of the 2001 AUMF, and then outlines the organizational and motivational differences that make the Islamic State a factually distinct organization and not a "successor" force of al-Qaeda. Part II also addresses two counterarguments that critics could make in response to this Note. Part III presents this Note's suggestions for principles that should be included in a new Islamic State-inclusive AUMF. This Part outlines three key principles that would ensure that the Islamic State is within the scope of the new AUMF, and explains why these provisions offer a better legal basis for the detention of U.S.-citizen Islamic State fighters.

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35. See Authorization for Use of Military Force 2018, S.J. Res. 59, 115th Cong. (2018) (bipartisan proposal to "provide[] uninterrupted authority to use all necessary and appropriate force in the current and continuing armed conflict against the Taliban, al Qaeda, ISIS, and associated forces"); Heather Brandon-Smith, *An ISIS AUMF: Where We Are Now, Where to Go Next, and Why It's So Important to Get It Right*, JUST SECURITY (May 5, 2017), <https://www.justsecurity.org/40549/isis-aumf-now-next-important/> [<https://perma.cc/2VDM-QRLN>]; Jessica Michek, *What the AUMF Is and Why You Should Care*, BIPARTISAN POL'Y CTR. (Apr. 18, 2018), <https://bipartisanpolicy.org/blog/what-the-aumf-is-and-why-you-should-care-2018/> [<https://perma.cc/U5YA-8B3M>].



## I. LEGAL FRAMEWORK FOR THE DETENTION OF U.S.-CITIZEN ISLAMIC STATE FIGHTERS AS ENEMY COMBATANTS

The first prong of Doe’s challenge to his detention was that a clear statutory grant from Congress is necessary for the government to detain an American citizen in a noncriminal context.<sup>36</sup> Implicit in this argument is the recognition that, in certain situations, the government has the authority to detain American citizens in non-criminal contexts.<sup>37</sup>

This Part considers the sources of the government’s authority to detain citizens as enemy combatants, and then analyzes Doe’s argument concerning the restrictions placed on this authority. Part I.A summarizes the constitutional authority that the government may rely upon to detain U.S. citizens as enemy combatants. Part I.B explores the 2002 Iraq AUMF and the 2001 AUMF, which the government relied upon as statutory authority for detaining U.S. citizens as enemy combatants. Part I.C analyzes whether the 2001 AUMF satisfies the clear statement requirement of the Non-Detention Act, specifically in the context of the detention of U.S. citizens as enemy combatants because of their membership in a terrorist organization.

### A. *Constitutional Authority to Detain Citizens as Enemy Combatants*

The Bush administration first invoked a constitutional justification for a broad detention power after the September 11th terror attacks. In *Hamdi v. Rumsfeld*, a case concerning the detention of a U.S. citizen as an enemy combatant, the Bush administration argued that the Commander-in-Chief powers granted by Article II of the Constitution<sup>38</sup> authorized the government to indefinitely

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36. See Petitioner’s Response to Respondent’s Factual Return, *supra* note 23, at 5; Chesney, *supra* note 16 (“First, [Doe] asserts that an American citizen cannot lawfully be detained without criminal trial unless there is a clear statutory grant of authority by Congress for that purpose.”).

37. See, e.g., Hathaway et al., *supra* note 12, at 128 (describing the sources of the “President’s statutory authority to detain individuals in the course of military operations”).

38. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the

detain a citizen as an enemy combatant.<sup>39</sup> The government also argued that the power to detain is a fundamental function of the President's role as Commander in Chief.<sup>40</sup> While the plurality acknowledged this argument,<sup>41</sup> they did not rule on its merits.<sup>42</sup> However, Justice Thomas did treat the detention power as one of the President's war powers in his dissenting opinion, illustrating that at least one Justice found this theory compelling.<sup>43</sup> Despite the lack of a ruling on its merits in *Hamdi*, the Bush administration continued to rely on the argument that the ability to detain enemy combatants fell within the President's Commander-in-Chief powers in subsequent cases.<sup>44</sup>

While the Court has consistently chosen not to rule on the merits of this argument, it has not expressly denied the merits either.<sup>45</sup> As a result, there has been a broad recognition that the government's

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Army and Navy of the United States.”).

39. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004) (plurality opinion); Brief for the Respondents at 13-14, *Hamdi*, 542 U.S. 507 (“The Challenged Wartime Detention Falls Squarely Within the Commander In Chief’s War Powers.”).

40. See Brief for Respondents-Appellants at 13, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895) (“This case directly involves the President’s core functions as Commander in Chief in wartime: the capture, detention, and treatment of the enemy.”).

41. See *Hamdi*, 542 U.S. at 516 (“The Government maintains that ... the Executive possesses plenary authority to detain pursuant to Article II.”).

42. See *id.* at 517 (“We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position.”).

43. See *id.* at 587 (Thomas, J., dissenting) (“It follows that this power [to wage war by the national government] ... quite obviously includes the ability to detain those (even United States citizens) who fight against our troops or those of our allies.” (citations omitted)).

44. See, e.g., Brief for the Respondent-Appellee at 35-36, *Al-Marri ex rel. Berman v. Wright*, 487 F.3d 160 (4th Cir. 2006) (No. 06-7427) (“[T]he President[s] war-making powers ... include the authority to capture and detain.”); Opening Brief for the Appellant at 18, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (“[T]he district court erred in holding that the President lacks the inherent authority as Commander in Chief to detain Padilla as an enemy combatant”); Jack Goldsmith, *Detention, the AUMF, and the Bush Administration—Correcting the Record*, LAWFARE (Sept. 14, 2010, 3:06 PM), <https://www.lawfareblog.com/detention-aumf-and-bush-administration-correcting-record> [<https://perma.cc/J3VH-83GD>].

45. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (stating that while the Court ruled on the petitioners’ access to writs of habeas corpus, the Court’s opinion did not undermine the “Executive’s powers as Commander in Chief”); *Hamdi*, 542 U.S. at 517 (plurality opinion) (stating again that the Court did not reach the question of the President’s authority to detain individuals); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004) (stating that the Court did not reach the question of whether the President had the authority to detain Padilla).

ability to detain individuals may have its roots in the President's Commander-in-Chief powers.<sup>46</sup>

*B. The Government's Statutory Authority to Detain Citizens as Enemy Combatants*

The government also alleged that its statutory authority to detain Doe as an enemy combatant stemmed from two separate statutes: the 2002 Iraq AUMF<sup>47</sup> and the 2001 AUMF.<sup>48</sup> The 2002 Iraq AUMF has not been consistently relied upon as a source of authority to detain U.S. citizens as enemy combatants. The 2002 AUMF has predominantly been relied upon to detain individuals in Iraq itself, with even that authority becoming less relied upon in recent years.<sup>49</sup> Additionally, the main cases concerning the detention of a U.S. citizen as an enemy combatant have implicated the 2001 AUMF rather than the 2002 Iraq AUMF.<sup>50</sup> However, the Islamic State does have characteristics that may bring it within the scope of the 2002 Iraq AUMF,<sup>51</sup> and, as an authorization for use of force, courts are likely to interpret it similarly to the 2001 AUMF.<sup>52</sup> Therefore, this Part will briefly summarize the 2002 Iraq AUMF and its use in detention cases, though this Note will primarily focus on the 2001 AUMF.<sup>53</sup>

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46. See, e.g., Hathaway et al., *supra* note 12, at 147 (stating that there is broad consensus that the President's detention authority rises from his Article II powers).

47. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

48. See Respondent's Factual Return, *supra* note 17, at 12-20.

49. See, e.g., Hathaway et al., *supra* note 12, at 140-41.

50. See *Hamdi*, 542 U.S. at 517; *Padilla*, 542 U.S. at 431.

51. See *infra* Part I.B.1.

52. See Respondent's Factual Return, *supra* note 17, at 22 ("The power to detain enemy combatants under the 2002 Iraq AUMF and the validity of such detentions depend on the same factors as under the 2001 AUMF.").

53. A full analysis of the 2002 Iraq AUMF's applicability to detaining U.S.-citizen Islamic State fighters is outside the scope of this Note. See Hathaway et al., *supra* note 12, at 140-42 (offering a full analysis of the 2002 Iraq AUMF's detention authority).

### 1. *The 2002 Iraq AUMF*

Congress passed the Iraq AUMF in 2002 to supply the legal authorization for the coming invasion and war in Iraq.<sup>54</sup> The Iraq AUMF authorizes the use of the U.S. military against Iraq by allowing the President to use force “as he determines to be necessary and appropriate” to “(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq.”<sup>55</sup>

The Iraq AUMF does not explicitly authorize the detention of individuals; however, the authorization does not explicitly limit the types of force that are “necessary and appropriate” to “defend the national security of the United States” either.<sup>56</sup> As a result, the government’s authority to detain is likely read into this language as a “necessary and appropriate” use of force in military operations.<sup>57</sup>

Although the government presumably has the general authority to detain individuals under the Iraq AUMF, this authority is limited by the Authorization’s first prong, which states that any force must be in direct relation to “the continuing threat posed by Iraq.”<sup>58</sup> It is not clear what Congress intended by this term, and legal scholars have debated this particular issue.<sup>59</sup> One view is that the term

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54. See MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 2 (2017).

55. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501.

56. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2076 (2005) (“The Iraq authorization places no apparent restriction on methods of force.”).

57. Hathaway et al., *supra* note 12, at 140-41. The Supreme Court has held this to be true for similar language found in the 2001 AUMF. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (“We conclude that detention of individuals ... is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”).

58. See Hathaway et al., *supra* note 12, at 140-41 (internal quotations omitted).

59. Compare Wells Bennett, *Congressional Intent, the 2002 AUMF, and ISIS*, LAWFARE (June 13, 2014, 3:32 PM), <https://www.lawfareblog.com/congressional-intent-2002-aumf-and-isis> [https://perma.cc/43UB-DBHF], with Jack Goldsmith, *The 2002 Iraq AUMF Almost Certainly Authorizes the President to Use Force Today in Iraq (and Might Authorize the Use of Force in Syria)*, LAWFARE (June 13, 2014, 11:29 AM), <https://www.lawfareblog.com/2002-iraq-aumf-almost-certainly-authorizes-president-use-force-today-iraq-and-might-authorize-use>

should be read narrowly as to apply only to those threats posed by the Saddam Hussein regime, its Weapons of Mass Destruction Programs, and other threats specifically posed by the Iraqi government.<sup>60</sup> Another view argues for a broader reading, claiming that because the operative language does not make any explicit references to Saddam Hussein or the Iraqi government—just to “Iraq” in general—the AUMF authorizes force against any “continuing threat” that involves Iraq.<sup>61</sup> This view holds that threats posed by groups in Iraq, as well as threats to Iraq by groups outside of its borders, could pose a threat to U.S. national security.<sup>62</sup>

The ability of the U.S. government to detain individuals under the Iraq AUMF is directly tied to the interpretation of a “continuing threat posed by Iraq.” Under the narrow view, the Iraq AUMF no longer carries any force, and any detention made pursuant to it would be unlawful.<sup>63</sup> However, under a broader interpretation, the government could presumably detain any individual who poses a threat that is in any way connected to Iraq.<sup>64</sup> While the correct interpretation of this language has been left undecided, it is apparent that the Iraq AUMF provides the government with detention authority in certain contexts.

## 2. *The 2001 AUMF*

Congress passed the 2001 AUMF one week after the September 11th terrorist attacks.<sup>65</sup> The 2001 AUMF authorized the President to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on

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[<https://perma.cc/66T4-BKPA>].

60. See WEED, *supra* note 54, at 2; Bennett, *supra* note 59 (“Section 3’s reference to ‘Iraq’ might properly be read in a narrower, more government-centric fashion.”).

61. WEED, *supra* note 54, at 2; Goldsmith, *supra* note 59.

62. See WEED, *supra* note 54, at 2; Goldsmith, *supra* note 59.

63. See Hathaway et al., *supra* note 12, at 141 (“The purpose-oriented clauses of the resolution suggest that the document should cease to be a source of legal authority once these conditions have been met.”).

64. See Goldsmith, *supra* note 59.

65. See WEED, *supra* note 10, at 1.

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.<sup>66</sup>

The 2001 AUMF does not contain any language that explicitly states that detention is a “necessary and appropriate” use of force; however, the detention of U.S. citizens as enemy combatants has been confirmed as a valid use of the detention power under the 2001 AUMF.<sup>67</sup>

The Supreme Court first confronted the question of whether the 2001 AUMF authorized the detention of a U.S. citizen as an enemy combatant in *Hamdi v. Rumsfeld*.<sup>68</sup> The case involved the detention of Yaser Esam Hamdi, a dual U.S.-Saudi citizen who, as an alleged member of the Taliban, was captured on the battlefield in Afghanistan by U.S. allies and transferred to U.S. military custody.<sup>69</sup> Hamdi was later transferred and detained on a military brig in South Carolina after the government determined that he was a U.S. citizen.<sup>70</sup>

The U.S. government argued that the 2001 AUMF granted it the authority to detain Hamdi indefinitely as an enemy combatant without any “formal charges or proceedings.”<sup>71</sup> The government also argued that the President possessed the authority to detain Hamdi pursuant to his Article II powers; however, the Court did not reach this issue, because it found that the AUMF argument answered the question at hand.<sup>72</sup>

In response, Hamdi’s father filed a petition for a writ of habeas corpus, alleging that Hamdi’s status as a U.S. citizen afforded him

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66. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

67. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31724, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS 4 (2005) (“The Supreme Court ... affirm[ed] the President’s authority to detain [a United States citizen] as an ‘enemy combatant’ under the [2001] AUMF.”).

68. 542 U.S. 507, 510 (2004) (plurality opinion).

69. *Id.*

70. *Id.*; William C. Banks, *United States Responses to September 11*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 496 (Victor V. Ramraj et al. eds., 2005). The factual details of Hamdi’s case are strikingly similar to those of John Doe. See Chesney, *supra* note 16.

71. *Hamdi*, 542 U.S. at 510.

72. *Id.* at 516-17.

due process rights under the Fifth and Fourteenth Amendments, and that his indefinite detention violated these rights.<sup>73</sup> In a plurality opinion, the Court held that a detainee’s status as a U.S. citizen did not bar the government from detaining him indefinitely as an enemy combatant,<sup>74</sup> but that the detainee must be afforded the opportunity to challenge the factual basis of his classification as an enemy combatant in front of a “neutral decisionmaker.”<sup>75</sup> The Court emphasized that this holding was a narrow one, only answering whether the detention of citizens who were “part of or supporting forces hostile to the United States or coalition partners ... and who engaged in an armed conflict against the United States” is authorized.<sup>76</sup>

In finding that the detention of U.S. citizens was authorized, the plurality faced Hamdi’s chief legal claim against his detention. Hamdi argued that the Non-Detention Act (NDA), which requires that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,”<sup>77</sup> barred his detention because the 2001 AUMF lacked a clear authorization by Congress for the indefinite detention of a U.S. citizen.<sup>78</sup> The plurality dismissed this claim, stating that “the [2001] AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe ... and that the AUMF satisfied” the NDA’s congressional authorization requirement.<sup>79</sup>

To answer this question, the plurality first turned to the language of the AUMF to describe this narrow category, holding that “[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing

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73. *Id.* at 511.

74. *Id.* at 519 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

75. *Id.* at 533.

76. *Id.* at 516 (internal quotations omitted) (quoting Brief for Respondents at 3).

77. 18 U.S.C. § 4001(a) (2012). Congress enacted the NDA in order to prevent situations similar to the internment of Japanese citizens during World War II. *See Hamdi*, 542 U.S. at 517 (plurality opinion); Chesney, *supra* note 16.

78. *Hamdi*, 542 U.S. at 517, 519.

79. *Id.* at 517.

the [2001] AUMF.”<sup>80</sup> Next, the plurality concluded that the detention of enemy combatants, in order to prevent their return to the battlefield, is a “fundamental incident of waging war,” and, therefore, within the scope of “necessary and appropriate force” authorized by the 2001 AUMF.<sup>81</sup> The plurality reached this conclusion by examining international law-of-war principles.<sup>82</sup> Ultimately, the plurality’s holding established that the 2001 AUMF provided sufficient statutory authorization under the NDA to detain, for the duration of the conflict, individuals who fell within the narrow category of persons the plurality described.<sup>83</sup>

### C. *The Non-Detention Act Applied in Doe v. Mattis*

The plurality in *Hamdi* “clearly and unmistakably” concluded that the 2001 AUMF provided the authority to detain a U.S. citizen as an enemy combatant in “the narrow circumstances” of that case.<sup>84</sup> However, the narrow nature of the plurality’s holding left open the question of whether the same analysis would apply to groups other than al-Qaeda and the Taliban.<sup>85</sup> This was precisely the question presented in *Doe v. Mattis*.<sup>86</sup>

The U.S. government justified Doe’s detention by claiming that the Islamic State fell within the scope of the 2001 AUMF and, because Doe is a member of the Islamic State, it had the authority to detain Doe as an enemy combatant.<sup>87</sup> In response, Doe made the same NDA claim as Hamdi, arguing that the 2001 AUMF should not be construed as explicit congressional authorization for the detention of a U.S.-citizen Islamic State fighter.<sup>88</sup>

Based on the *Hamdi* plurality, a court faced with this question would likely find that detention is a “necessary and appropriate” use

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80. *Id.* at 518.

81. *Id.* at 519 (internal quotations omitted).

82. *See id.* at 518, 520-21 (“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”).

83. *See id.* at 519, 521.

84. *Id.* at 519.

85. *See Chesney, supra* note 16.

86. *See id.*

87. *See* Respondent’s Factual Return, *supra* note 17, at 15.

88. *See* Petitioner’s Response to Respondent’s Factual Return, *supra* note 23, at 8-9.



of force under the 2001 AUMF.<sup>89</sup> However, the authorization to detain Doe would only apply if the Islamic State fell within the scope of the 2001 AUMF as the Taliban did in *Hamdi*.<sup>90</sup> The next Part of this Note will argue that the Islamic State does not fall within the scope of the 2001 AUMF because it is factually distinct from al-Qaeda and, therefore, the 2001 AUMF cannot be relied upon to detain Islamic State fighters who are U.S. citizens.

## II. THE 2001 AUMF AND THE ISLAMIC STATE

The 2001 AUMF authorizes the use of “all necessary and appropriate force against those nations, organizations, or persons” that were either responsible for the September 11th terrorist attacks or aided or assisted those “organizations or persons” that were responsible.<sup>91</sup> In 2014, the Obama administration designated the Islamic State as one such organization and commenced a bombing campaign against the group.<sup>92</sup> The Trump administration has since adopted the same legal theory and concluded that the 2001 AUMF authorizes the use of force against the Islamic State.<sup>93</sup> Part II.A will first briefly outline the current legal theory for including the Islamic State within the scope of the 2001 AUMF. Next, Part II.B will outline the organizational and operational differences that make the Islamic State a distinct group from al-Qaeda and, therefore, a group outside the scope of the 2001 AUMF. Finally, Part II.C will explore two counterarguments to this theory and propose responses to each.

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89. See Chesney, *supra* note 16.

90. *Id.*

91. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

92. See Obama, *supra* note 8 and accompanying text.

93. Charlie Savage, *U.S. Troops Can Stay in Syria Without New Authorization*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/politics/isis-syria-american-troops.html> [<https://perma.cc/QZ7L-26EK>] (“The executive branch’s core legal theory that it is authorized by Congress to fight the Islamic State ... was first put forward by the Obama Administration in 2014 ... [and the executive branch] argue[s] that the war against the Islamic State is covered by a 2001 law authorizing the use of military force against the perpetrators of the Sept. 11 attacks.”).

A. *The Current Legal Theory for Including the Islamic State  
Within the Scope of the 2001 AUMF*

The U.S. government's current legal theory for including the Islamic State within the scope of the 2001 AUMF is based upon the Islamic State's affiliation with al-Qaeda.<sup>94</sup> In 2004, Abu Musab al-Zarqawi<sup>95</sup> pledged allegiance to Osama bin Laden and thus brought his terrorist group into affiliation with al-Qaeda.<sup>96</sup> Zarqawi's group, which would go on to become the Islamic State,<sup>97</sup> adopted the name al-Qaeda in Iraq (AQI) and conducted military operations in Iraq and Syria until 2011.<sup>98</sup> The U.S. government claims that because al-Qaeda has consistently been found to be within the scope of the 2001 AUMF, AQI, and later the Islamic State, also fell squarely within the scope of the 2001 AUMF during this period of time.<sup>99</sup>

Recently, al-Qaeda senior leadership (al-Qaeda Central) and the Islamic State split from each other, but the government claims that this has had no effect on the Islamic State's status in regard to the 2001 AUMF.<sup>100</sup> The government points to the Islamic State's statement that it, rather than al-Qaeda Central, "is the true executor of bin Laden's legacy," as proof of their ongoing tie to the original al-Qaeda organization.<sup>101</sup> In essence, the government alleges that al-Qaeda effectively split into two organizations, and the Islamic State *is* al-Qaeda and a "successor" to Osama bin Laden's legacy, rather than its own separate organization.<sup>102</sup> Thus, since al-Qaeda is still

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94. See WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 5 (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf) [<https://perma.cc/CPV8-WH4P>].

95. Up until this point, Zarqawi had been leading the terror group al-Tawhid wal-Jihad in terror operations in Iraq. See WARRICK, *supra* note 2, at 159.

96. *See id.*

97. *See id.* at 8.

98. *See* WHITE HOUSE, *supra* note 94, at 5-6.

99. *See id.* at 5.

100. *See id.* at 6 ("The subsequent 2014 split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF.").

101. *Id.*

102. See Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL Is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014), <https://www.justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure/> [<https://perma.cc/54GG-M8J8>] ("[T]he administration's position is not that ISIL is an 'associated force' of AQ, but instead that ISIL is al-Qaeda itself; ISIL is one of two splinter

a group that the 2001 AUMF authorizes the use of force against, so is the Islamic State.

Although this theory highlights some of the connections that undoubtedly exist between the Islamic State and al-Qaeda, it contains factual inaccuracies as to their organizational relationship and does not account for the distinct operational goals of the two groups.

### *B. The Islamic State Is Not a Successor Force of al-Qaeda*

The Islamic State is not a group that Congress initially authorized force against, and it never truly integrated with al-Qaeda after the September 11th attacks as the government alleges.<sup>103</sup> Despite at one point taking on the al-Qaeda name,<sup>104</sup> the Islamic State has always been organizationally and operationally separate from al-Qaeda Central.<sup>105</sup>

#### *1. The Islamic State is Organizationally Distinct from al-Qaeda*

The Islamic State and al-Qaeda have been independent organizations even since their first affiliation with each other. The Islamic State did not exist at the time of the September 11th attacks.<sup>106</sup> In the months leading up to the attacks, Zarqawi, the Islamic State's founder, met Osama bin Laden and began to operate a terrorist training camp in Afghanistan.<sup>107</sup> Al-Qaeda funded the camp, but Zarqawi operated it independently from bin Laden's organization—neither swearing allegiance to bin Laden nor fully

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groups or a 'successor.'").

103. *See id.* ("It appears that ISIL's predecessor, al-Qaeda in Iraq (AQI), was at best an associated force of AQ-Central, not part of a unified organization. Hence, it is an added stretch to claim ISIL is a successor or derivative.").

104. Zarqawi declared allegiance to bin Laden in 2004 and announced the creation of his new jihadist group, Tanzim Qaedat al Jihad fi Bilad al Rafidayn. *See* JESSICA STERN & J.M. BERGER, *ISIS: THE STATE OF TERROR* 21 (2015). The English translation of Zarqawi's group was "al Qaeda in the Land of the Two Rivers," however, it became commonly known as al-Qaeda in Iraq. *Id.*; *see also* DANIEL BYMAN, *AL QAEDA, THE ISLAMIC STATE, AND THE GLOBAL JIHADIST MOVEMENT: WHAT EVERYONE NEEDS TO KNOW* 163 (2015) ("After ... Zarqawi's decision to accept Bin Laden's leadership, the group became Al Qaeda in the Land of the Two Rivers, usually referred to as Al Qaeda in Iraq (AQI).").

105. *See* Goodman & Roisman, *supra* note 102.

106. *See id.*

107. *See* WARRICK, *supra* note 2, at 67-68.

accepting al-Qaeda's ideology.<sup>108</sup> The camp included women and children, and was operated as a "mini Islamic society" rather than an organized terrorist group.<sup>109</sup> Zarqawi operated the camp without taking part in al-Qaeda's broader terrorist operations; in fact, bin Laden did not notify Zarqawi of the September 11th attacks until after they had been carried out, effectively eliminating any possibility that Zarqawi or his disciples had participated in their planning or execution.<sup>110</sup>

After the September 11th attacks, Zarqawi and his disciples did not flee to Afghanistan with bin Laden and the rest of al-Qaeda leadership.<sup>111</sup> Instead, they fled to the Iran-Iraq border and joined another terrorist group, Ansar al-Islam.<sup>112</sup> This further illustrates that Zarqawi was not yet leading his own distinct terrorist organization at the time just after the September 11th attacks.<sup>113</sup> When Congress initially authorized the use of force against al-Qaeda with the passage of the 2001 AUMF, Zarqawi had not yet founded the group that would transform into the Islamic State, nor had he or his followers joined or aided bin Laden in carrying out the September 11th attacks as part of al-Qaeda.<sup>114</sup> Therefore, "Congress' initial authorization ... did not apply" to the Islamic State at this time.<sup>115</sup>

After pledging allegiance to al-Qaeda in 2004, Zarqawi and AQI continued to operate independently from bin Laden and his organization.<sup>116</sup> According to an analyst at the CIA's Counterterrorism Center, bin Laden "exercised virtually no command and control" over AQI, and Zarqawi's group was "always relatively independent of al-Qaeda central leadership."<sup>117</sup> In 2006, after Zarqawi had died, AQI established the Islamic State of Iraq (ISI), which would become

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108. *See id.*

109. *Id.* at 68.

110. *See id.* at 68-69 ("Zarqawi was kept in the dark about al-Qaeda's plans until after the strikes against New York and Washington.").

111. *See id.* at 69.

112. *See id.* at 69-70.

113. *See id.*

114. *See* Goodman & Roisman, *supra* note 102.

115. *Id.*

116. *See* STERN & BERGER, *supra* note 104, at 22 (stating that despite Zarqawi's pledge of allegiance to bin Laden, he "continued to act independently of al Qaeda Central").

117. Marshall Erwin, *Is al-Qaeda in Iraq?*, JUST SECURITY (June 25, 2014), <https://www.justsecurity.org/12082/guest-post-al-qaeda-iraq/> [<https://perma.cc/DW8Q-BTDF>].

the Islamic State that exists today.<sup>118</sup> AQI independently established ISI “without the buy-in from al-Qaeda leadership.”<sup>119</sup> The modern Islamic State continued this strain of independent action when, in 2013, Abu Bakr al-Baghdadi—the leader of the Islamic State—refused to follow the orders of al-Qaeda leader Ayman al-Zawahiri.<sup>120</sup> As of 2014, “[t]he level of direct coordination between Al Qaeda’s leadership in Pakistan and the group that originally was known as Al Qaeda in Iraq ... has appeared pretty much dead since 2006.”<sup>121</sup> The consistent independent action of the Islamic State and its predecessor groups, despite leadership changes within the organization, illustrate that organizational independence has always been a structural characteristic of its relationship with al-Qaeda Central.<sup>122</sup>

However, some critics have suggested that the mere affiliation between the groups and their military operations against the United States during the Iraq War brought AQI within the scope of the 2001 AUMF.<sup>123</sup> But, even if AQI and al-Qaeda were sufficiently connected to bring the Islamic State within the scope of the 2001 AUMF at that time, the subsequent 2014 split between the Islamic State and al-Qaeda severed any organizational ties that existed between the groups.<sup>124</sup>

The Islamic State and al-Qaeda cut ties in 2014<sup>125</sup> due to a disagreement between their two leaders relating to the allegiance of Jabhat al-Nusra, al-Qaeda’s Syrian affiliate.<sup>126</sup> Baghdadi claimed

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118. *See id.*

119. *Id.*

120. *See* Barak Mendelsohn, *After Disowning ISIS, al Qaeda Is Back on Top*, FOREIGN AFF. (Feb. 13, 2014), <https://www.foreignaffairs.com/articles/middle-east/2014-02-13/after-disowning-isis-al-qaeda-back-top> [<https://perma.cc/M69E-ZGTY>].

121. Dan Murphy, *Al Qaeda’s Boss Is Fed Up with Al Qaeda’s Syrian ‘Affiliate’ ISIS*, CHRISTIAN SCI. MONITOR (Feb. 3, 2014), <https://www.csmonitor.com/World/Security-Watch/Backchannels/2014/0203/Al-Qaeda-s-boss-is-fed-up-with-Al-Qaeda-s-Syrian-affiliate-ISIS> [<https://perma.cc/Y765-HF8A>].

122. *See* WARRICK, *supra* note 2, at 283-84.

123. *See* Goodman & Roisman, *supra* note 102 (explaining an analysis of the successor model by a scholar who holds that it “surely applies to groups and individuals who joined Al Qaeda after 9/11”).

124. *See* WARRICK, *supra* note 2, at 286 (stating that “al-Qaeda refused to have anything to do with ISIS” after the split); Goodman & Roisman, *supra* note 102; *see also* STERN & BERGER, *supra* note 104, at 43.

125. *See* STERN & BERGER, *supra* note 104, at 43.

126. *See* Mendelsohn, *supra* note 120.

command of Jabhat al-Nusra, which Zawahiri disputed and generally refused to acknowledge.<sup>127</sup> Then-Secretary of State John Kerry argued that this split was superficial, and that the Islamic State and al-Qaeda Central were merely trying to avoid attacks by the U.S. military.<sup>128</sup> However, seven months prior to Secretary Kerry's remarks, U.S. government officials admitted that "there is no doubt the ban [of the Islamic State] was real and not a ruse."<sup>129</sup> Additionally, the leader of al-Qaeda, Ayman al-Zawahiri, publicly denounced the Islamic State and stated that it was no longer part of al-Qaeda.<sup>130</sup>

Abu Bakr al-Baghdadi, the leader of the Islamic State, also took actions that publicly defied al-Zawahiri.<sup>131</sup> The split between the two organizations resulted in clashes between al-Qaeda and Islamic State militants where both groups suffered losses, further illustrating that the disagreement was not a ploy.<sup>132</sup> At the time of the split, the United States was not involved in military operations against the Islamic State.<sup>133</sup> As a result, once the organizational ties between the Islamic State and al-Qaeda officially severed, so did the government's authority to use military force against the Islamic State pursuant to the theory that it was organizationally akin to al-Qaeda and thus covered by the 2001 AUMF.<sup>134</sup>

127. *See id.*

128. *United States Strategy to Defeat the Islamic State in Iraq and the Levant: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. (2014) (statement of John F. Kerry, Secretary of State, U.S. Dep't of State) ("[A] mere publicity stunt to separate yourself ... does not get you out from under the force of the United States law.").

129. Karen DeYoung & Greg Miller, *Al-Qaeda's Expulsion of Islamist Group in Syria Prompts U.S. Debate*, WASH. POST (Feb. 10, 2014), [https://www.washingtonpost.com/world/national-security/al-qaedas-excommunication-of-islamist-group-in-syria-prompts-high-level-us-debate/2014/02/10/339d8654-8f4e-11e3-b46a-5a3d0d2130da\\_story.html](https://www.washingtonpost.com/world/national-security/al-qaedas-excommunication-of-islamist-group-in-syria-prompts-high-level-us-debate/2014/02/10/339d8654-8f4e-11e3-b46a-5a3d0d2130da_story.html) [<https://perma.cc/6QZD-SWXM>].

130. *See* STERN & BERGER, *supra* note 104, at 43 ("ISIS is not a branch of the [al-Qaeda] group, we have no organizational relationship with it, and [al-Qaeda] is not responsible for its actions." (alternation in original) (internal citations omitted) (quoting a written statement from al-Qaeda in February 2014)).

131. *See* Mendelsohn, *supra* note 120.

132. *See* STERN & BERGER, *supra* note 104, at 43-44 (describing the Islamic State's violent response to the split with al-Qaeda); WARRICK, *supra* note 2, at 284, 286 (describing the assassination of Zawahiri's "personal emissary" by Islamic State suicide bombers).

133. *See AUMF Hearings*, *supra* note 11, at 3 (statement of Sen. Corker).

134. *See* Goodman & Roisman, *supra* note 102.

## 2. *The Islamic State Is Operationally Distinct from al-Qaeda*

The U.S. government's legal theory for applying the 2001 AUMF to the Islamic State also relies upon the similarity of the Islamic State's operational goals to those of al-Qaeda.<sup>135</sup> The Obama administration first used force against the Islamic State in August of 2014 and claimed that their authority to do so stretched back to at least 2004.<sup>136</sup> Assuming that the Islamic State has a sufficient tie to the September 11th attacks, in order for this theory to be true, it must follow that the operational goals of the Islamic State and its predecessors were to carry out "acts of international terrorism against the United States" from 2004 until the start of the Obama administration's bombing campaign in 2014.<sup>137</sup> However, the Islamic State's main operational goal before its split with al-Qaeda was never to attack the United States, and it did not develop such a goal in the subsequent seven months before the United States began to use military force against the group.

The merger between Zarqawi's own terrorist group and al-Qaeda, which created the Islamic State's predecessor, AQI, was described as a "'marriage of convenience,' rather than a meeting of the minds."<sup>138</sup> At the time of the merger, al-Qaeda was focused on attacking the West, while Zarqawi and his group emphasized local, sectarian targets.<sup>139</sup> This emphasis continued after Zarqawi's group seemingly merged with al-Qaeda, with bin Laden specifically pushing for U.S. targets while "Zarqawi (and those who took his place after his death in 2006 from a U.S. air strike) emphasized sectarian war and attacks on Sunni Muslims."<sup>140</sup> In fact, in the time between the start of U.S. troop withdrawal from Iraq in 2009 and the commencement of later bombing campaigns in August of 2014, the Islamic State did not kill a single American.<sup>141</sup> The difference in

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135. See Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL Is a Successor to Al Qaeda—Part 2 (Organizational Goals)*, JUST SECURITY (Oct. 6, 2014), <https://www.justsecurity.org/16003/assessing-claim-isil-successor-al-qaeda-part-2-organizational-goals/> [<https://perma.cc/GKG4-NYMD>].

136. See WHITE HOUSE, *supra* note 94.

137. Goodman & Roisman, *supra* note 135.

138. STERN & BERGER, *supra* note 104, at 21 (internal footnote omitted).

139. See, e.g., BYMAN, *supra* note 104, at 166; WARRICK, *supra* note 2, at 7-8.

140. BYMAN, *supra* note 104, at 166; see also Goodman & Roisman, *supra* note 135.

141. Goodman & Roisman, *supra* note 135.

operational targets between the two groups has been cited as one of the main reasons for the Islamic State's 2014 split from al-Qaeda.<sup>142</sup>

President Obama himself signaled that he did not believe the Islamic State had intentions to strike against the United States when, in January of 2014, he explained his understanding that there is a difference “between the capacity and reach of a bin Laden ... network that is actively planning major terrorist plots against the homeland” and “jihadists who are engaged in local power struggles and disputes, often sectarian.”<sup>143</sup> Even after the start of the bombing campaign in 2014, President Obama admitted that the Islamic State was not planning any attacks against the United States,<sup>144</sup> with U.S. government officials echoing this statement.<sup>145</sup> Although the Islamic State later claimed responsibility for attacks in the United States,<sup>146</sup> the key legal concern is whether the Islamic State posed a threat to the United States at the time the government first decided to engage them militarily.<sup>147</sup> Based on the group's own objectives and statements by U.S. government officials as high ranking as the President, this threat did not exist prior to the U.S. government's use of force against the Islamic State.<sup>148</sup>

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142. See, e.g., Doug Bandow, *Fighting ISIL Is Not America's War: Other Countries Should Lead Coalition Against Islamic State*, FORBES (Sept. 13, 2014, 11:11 AM), <https://www.forbes.com/sites/dougbandow/2014/09/13/fighting-isil-is-not-americas-war-other-countries-should-lead-coalition-against-islamic-state/#76fce1bff9e0> [https://perma.cc/WZ5S-LYZ9].

143. David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER (Jan. 27, 2014), <https://www.newyorker.com/magazine/2014/01/27/going-the-distance-david-remnick> [https://perma.cc/ZZP9-FQL6].

144. Barack Obama, President of the U.S., Statement by the President on ISIL (Sept. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1> [https://perma.cc/V6HV-JL57] (“we have not yet detected specific plotting against our homeland” by the Islamic State).

145. See Goodman & Roisman, *supra* note 135 (quoting then-Secretary of the Department of Homeland Security and the director of the Counterterrorism Center as saying there is “no credible information that ISIL is planning to attack the U.S.”); Mark Mazzetti et al., *Struggling to Gauge ISIS Threat, Even as U.S. Prepares to Act*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/world/middleeast/struggling-to-gauge-isis-threat-even-as-us-prepares-to-act.html> [https://perma.cc/4JBV-QN2Q] (“it is not clear to intelligence officials that the group even wants to” attack the United States).

146. See Tim Lister et al., *ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043*, CNN (Feb. 12, 2018, 11:24 AM), <https://www.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html> [https://perma.cc/886D-6D8F].

147. See Goodman & Roisman, *supra* note 135.

148. See Goodman & Roisman, *supra* note 135 (“The public record, including the Administration's statements, seems to suggest that ISIL, in fact, did not harbor designs to



Congress passed the 2001 AUMF in order to target those responsible for the September 11th terrorist attacks and to prevent those groups from carrying out future attacks against the United States.<sup>149</sup> The government alleges that the 2001 AUMF applies to the Islamic State because it was organizationally and operationally unified with al-Qaeda, one of the perpetrators of the September 11th attacks, and the use of force against them is therefore necessary to protect the United States.<sup>150</sup> However, the Islamic State was organizationally and operationally independent from al-Qaeda before the United States initiated the use of force against it.<sup>151</sup> Thus, the Islamic State is outside the scope of the 2001 AUMF, and it cannot be relied upon as the legal basis to detain U.S.-citizen Islamic State fighters.

### *C. Counterarguments*

Legal scholars who oppose this argument may point to two counterarguments to illustrate that the government's authority to use force against the Islamic State pursuant to the 2001 AUMF is valid. The first counterargument asserts that Congress has authorized the use of the 2001 AUMF against the Islamic State by repeatedly authorizing funds for that purpose.<sup>152</sup> The second counterargument claims that determining which groups fall within the scope of the 2001 AUMF is a nonjusticiable political question, and therefore the executive branch is due binding deference in its determination.<sup>153</sup>

#### *1. Has Congress Already Authorized the Use of Force Against the Islamic State?*

One argument several critics have asserted is that Congress has authorized the use of military force against the Islamic State—and thus the legal authority underlying this use of force—by consistently

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attack the United States prior to the US strikes against it.”).

149. See *supra* note 66 and accompanying text.

150. See *supra* Part II.A.

151. See *supra* Part II.B.

152. See WHITE HOUSE, *supra* note 94, at 6.

153. See Chesney, *supra* note 16.

appropriating funds for the purpose of countering the threat posed by the Islamic State.<sup>154</sup> The Office of Legal Counsel (OLC) outlined this theory in an opinion regarding military hostilities in Kosovo where the office stated that Congress may authorize military force through the appropriations process “when the appropriations measure is directly and conspicuously focused on specific military action.”<sup>155</sup> The OLC stated that “[t]he most conspicuous example of Congress authorizing hostilities through its appropriations power” was the appropriation of funds for the Vietnam War.<sup>156</sup> Specifically, the opinion points to President Johnson asking for, and receiving, \$700 million in initial funding to combat military action in Southeast Asia.<sup>157</sup> The OLC opinion asserts that because the actual act appropriating the funds was a special appropriation that only contained one item—the appropriation of funds for use in military activities in Southeast Asia—the appropriation was a “clear congressional endorsement and approval of the actions taken by the President.”<sup>158</sup>

After beginning military operations against the Islamic State in 2014, the executive branch has sought—and received—over \$10 billion in congressionally appropriated funds to support the fight against the Islamic State.<sup>159</sup> Congress was aware that the 2001 AUMF was the legal authority relied upon to carry out these military operations and still approved these funds over the course of multiple annual budget cycles.<sup>160</sup> Thus, opponents argue that Congress has authorized the use of military force—and, by extension, detention authority—against the Islamic State under the 2001

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154. See WHITE HOUSE, *supra* note 94, at 6 (“Congress has repeatedly and specifically funded the President’s military actions against ISIL through an unbroken stream of appropriations over multiple years.”).

155. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 339 (2000) [hereinafter OLC Opinion].

156. *Id.* at 335.

157. See *id.* at 336 (citing Erwin N. Griswold, *The Indochina War—Is It Legal?*, reprinted in 117 Cong. Rec. 28,978 (1971)).

158. *Id.* at 335-36 (quoting Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP’T ST. BULL. 474, 487-88 (1966)).

159. See WHITE HOUSE, *supra* note 94, at 6.

160. See *id.*

AUMF by appropriating funds to counter the threat posed by the Islamic State.<sup>161</sup>

There are two responses to this argument. First, the OLC opinion clearly states that congressional authorization by appropriation only occurs “when the appropriations measure is directly and conspicuously focused on specific military action.”<sup>162</sup> As an example, the OLC opinion cites the initial \$700 million special appropriation that President Johnson received for the Vietnam War.<sup>163</sup> This appropriation came as a stand-alone act that only contained one item, the appropriation of funds for the Vietnam conflict.<sup>164</sup> In contrast, the first stream of appropriations that President Obama received for military activities against the Islamic State came as part of a larger appropriations act that contained funding for a myriad of governmental agencies and initiatives.<sup>165</sup> Inasmuch as the Act references the Islamic State, it provides that the funds “may only be used for emergency and extraordinary expenses associated with activities to counter the Islamic State,” with those activities including the provision of “training; equipment; logistics support, supplies, and services; stipends; infrastructure repair, renovation, and sustainment to military and other security forces ... with a national security mission, to counter the Islamic State.”<sup>166</sup>

Unlike the initial appropriations act for the Vietnam War—which was a stand-alone act that provided funds solely for military activity in Vietnam—the funds that President Obama received came as part of a larger package that did not specifically appropriate funds for the use of military force by the U.S. military against the Islamic State.<sup>167</sup> Instead, the Act focused on training and assisting home-country military units.<sup>168</sup> This is far from the “direct[] and conspicuous[] focus[] on specific military action” that the OLC states is

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161. *See id.* at 3-6.

162. OLC Opinion, *supra* note 155, at 339.

163. *See id.* at 336.

164. *See id.* at 335-36.

165. *See* WHITE HOUSE, *supra* note 94, at 6. *See generally* Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2285-95.

166. Consolidated and Further Continuing Appropriations Act of 2015, 128 Stat. at 2288, 2290.

167. *See id.*

168. *See id.*

necessary and, therefore, not a situation where congressional authorization by appropriation occurs.<sup>169</sup>

The second response to the theory posed by the OLC opinion is that the Supreme Court has held that congressional appropriations only act as congressional authorizations in very limited circumstances.<sup>170</sup> In *Tennessee Valley Authority v. Hill*, the Court acknowledged that congressional appropriations are “Acts of Congress,” but stated that appropriations “have the limited and specific purpose of providing funds for authorized programs.”<sup>171</sup> In other words, appropriations may only be seen as congressional authorizations if they are appropriating funds to programs already authorized by Congress.<sup>172</sup> In contrast, the use of force against the Islamic State pursuant to the 2001 AUMF is not an already congressionally authorized program. President Obama initiated military strikes against the Islamic State unilaterally without first securing congressional authorization.<sup>173</sup> Therefore, the subsequent stream of appropriations have not been based off of prior congressional authorization for the use of force against the Islamic State.

Critics may still argue that the congressional authorization came with the passage of the 2001 AUMF after the September 11th attacks. However, the scope of the 2001 AUMF is limited to “those nations, organizations, or persons” who “planned, authorized, committed, or aided” the September 11th attacks.<sup>174</sup> As the organizational and operational distinctions between the Islamic State and al-Qaeda outlined in this Note illustrate, the Islamic State has never been one such group.<sup>175</sup> Therefore, since Congress did not initially authorize the use of force against the Islamic State specifically, the subsequent appropriations funding the fight against them cannot be seen as explicit congressional authorization.

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169. OLC Opinion, *supra* note 155, at 339.

170. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

171. *Id.*

172. *See id.*

173. *See* White House Office of the Press Sec’y, *supra* note 9 (“the President would welcome congressional support for the administration’s efforts against” the Islamic State).

174. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

175. *See supra* Part II.B.

2. *Is Determining Whether the Islamic State Falls Within the Scope of the 2001 AUMF a Nonjusticiable Political Question?*

Critics have also asserted that determining whether or not an organization falls within the scope of the 2001 AUMF is a “mixed question[] of law and fact” that represents a political question outside the realm of judicial review.<sup>176</sup> More specifically, the argument is that the factual questions concerning whether or not the Islamic State has sufficient enough ties with al-Qaeda (so as to fall within the scope of the 2001 AUMF) “are not of a type [a] court is equipped to handle with traditional judicially manageable standards.”<sup>177</sup> Instead, those questions are “sensitive military determinations, presumably made based on intelligence collected on the ground in a live theatre of combat, and potentially changing and developing on an ongoing basis.”<sup>178</sup> Thus, critics argue that these determinations should be left to the executive branch and not to the courts.

The first response to this argument is that courts have regularly addressed factual questions of whether certain terrorist groups, and individuals, fell within the scope of the 2001 AUMF.<sup>179</sup> An analysis of whether the Islamic State is an organization that falls within the scope of the 2001 AUMF would be functionally similar to the analyses already conducted by courts in those cases.<sup>180</sup>

Secondly, this theory misapplies the Court’s political question doctrine by conflating the merits of an argument with its justiciability. The factual arguments posited by the executive branch

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176. Chesney, *supra* note 16.

177. *Smith v. Obama*, 217 F. Supp. 3d 283, 300 (D.D.C. 2016).

178. *Id.*

179. *See, e.g., Khan v. Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011) (finding that Hezb-i-Islami Gulbuddin is an associated force of the Taliban after outlining the fractious relationship between the two forces); *Barhoumi v. Obama*, 609 F.3d 416, 420, 432 (D.C. Cir. 2010) (holding that an individual was part of an al-Qaeda associated force and therefore covered by the AUMF, based on identification by another member of an organization covered by the AUMF); *Awad v. Obama*, 646 F. Supp. 2d 20, 27 (D.D.C. 2009) (finding that an individual was part of al-Qaeda and covered by the AUMF based on his statements of intent, joining of al-Qaeda forces, and identification as a member by other al-Qaeda members).

180. *See Chesney, supra* note 16 (stating that this analysis would be akin to cases involving “GTMO habeas litigation”).

for establishing a sufficient connection between the Islamic State and al-Qaeda are arguments that go to the merits of whether Congress authorized the use of force against the Islamic State with the passage of the 2001 AUMF.<sup>181</sup> If the executive branch can establish a connection between the two groups, then it would win on the merits of any case alleging the opposite.

The executive branch's potential ability to establish such a connection, however, does not mean a case involving these factual questions is nonjusticiable. A court may not be faced with determining whether the executive branch's factual assertions are actually true. Instead, a court would merely be faced with the question of whether, if the executive's factual assertions are true, Congress authorized the use of force against the Islamic State with the 2001 AUMF.<sup>182</sup> This would be "a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented" to the court.<sup>183</sup> The Supreme Court has held that "interpreting congressional legislation is a recurring and accepted task for the federal courts" and "one of the Judiciary's characteristic roles."<sup>184</sup> To determine whether the Islamic State is covered by the 2001 AUMF, a court would merely have to interpret the statute and then apply that analysis to the facts presented to it—which is clearly a justiciable inquiry.<sup>185</sup>

Furthermore, even if a court did have to inquire into the factual assertions concerning the Islamic State's relationship with al-Qaeda, that would only require a court to give deference to the executive branch on the merits.<sup>186</sup> A court "could simply accept the

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181. See Marty Lederman, *DOJ's Motion to Dismiss in Smith v. Obama, the Case Challenging the Legality of the War Against ISIL*, JUST SECURITY (July 14, 2016), <https://www.justsecurity.org/31984/dojs-motion-dismiss-smith-v-obama-case-challenging-legality-war-isil/> [<https://perma.cc/M8MF-DV5K>].

182. See Marty Lederman, *DOJ Reply Brief in Smith v. Obama*, JUST SECURITY (Sept. 16, 2016), <https://www.justsecurity.org/33008/doj-reply-smith-v-obama/> [<https://perma.cc/3SRY-9LU8>].

183. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

184. *Id.*

185. See Lederman, *supra* note 182.

186. See, e.g., Marty Lederman, *Judge Kollar-Kotelly Dismisses Captain Smith's Suit*, JUST SECURITY (Nov. 22, 2016), <https://www.justsecurity.org/34778/judge-kollar-kotelly-dismisses-captain-smiths-suit/> [<https://perma.cc/4LG2-2BBA>].

President's view of [the Islamic State's] mission and then determine whether, *if* that assessment is correct, the 2001 ... AUMF[] authorize[s]" the use of force against them.<sup>187</sup>

In sum, the theory that the executive branch should be given binding deference in determining whether or not the 2001 AUMF authorizes force against the Islamic State, because such an inquiry presents a nonjusticiable political question, both misapplies the Court's political question doctrine and fails to account for the fact that such analyses have already been conducted by federal courts.

### III. THE PROPOSAL: AN ISLAMIC STATE INCLUSIVE AUMF

This Note proposes that Congress must pass a new Islamic State-inclusive AUMF for the government to detain Islamic State fighters who are U.S. citizens. By passing a new Islamic State-inclusive AUMF, Congress will finally provide explicit authorization of the government's ability to detain U.S.-citizen Islamic State fighters. In 2014, a group of legal scholars put forward a set of "principles" to guide Congress in passing a new Islamic State specific AUMF.<sup>188</sup> This Note will highlight three principles that will best help Congress execute a new Islamic State AUMF.<sup>189</sup>

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187. *Id.*

188. See Rosa Brooks et al., *Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL* (Nov. 10, 2014), <https://www.justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf> [<https://perma.cc/EP6X-TRK3>].

189. The three principles outlined in this Part are also principles discussed in a 2015 student Note published in the *University of Memphis Law Review*. See Gregory A. Wagner, Note, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, U. MEM. L. REV. 235, 262-268 (2015). Mr. Wagner's Note argues that the application of the 2001 AUMF to the Islamic State "is inappropriate and skirts the checks and balances required by the Constitution," and proposes that Congress should remedy this imbalance of power with a new AUMF. *Id.* at 240. While this Note also proposes the need for a new AUMF that contains these principles, it argues that a new AUMF is necessary not because of an imbalance in constitutional powers, but because the Islamic State and al-Qaeda are factually distinct organizations. Compare Wagner, *supra* at 238-40, with *supra* Part II.A-B (describing the current legal theory for applying the 2001 AUMF to the Islamic State, and arguing that factual differences with al-Qaeda bring the Islamic State outside the scope of the 2001 AUMF).

### A. Naming the Islamic State

The first principle is that the new AUMF should specifically name and limit the authorization of force to the Islamic State.<sup>190</sup> This principle is advantageous because it acts as explicit congressional authorization to use force against the Islamic State and, therefore, would meet the clear statement requirement set forth in *Hamdi*.<sup>191</sup> Additionally, while acting as clear authorization to detain members of the Islamic State, this principle will also act as a clear statutory limit on that detention authority.<sup>192</sup> One of the main sources of ambiguity surrounding the 2001 AUMF was its broad authorization to use force against the perpetrators of the September 11th attacks,<sup>193</sup> and the use of that language to subsequently authorize force against nebulous, associated groups of those perpetrators.<sup>194</sup> By explicitly naming the Islamic State and limiting the use of force to just that organization, this principle ensures that future questions of applicability to other terror organizations will not arise.

### B. Sunset Clause

Congress should also consider implementing a sunset clause in the new Islamic State-specific AUMF.<sup>195</sup> A sunset clause would “precommit[] Congress and the President to revisit the nature and scope of the very diffuse war against Islamic terrorists on a regular basis.”<sup>196</sup> In other words, a sunset clause would force Congress to review the fight against the Islamic State and explicitly reauthorize it after a set period of time.

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190. See Brooks et al., *supra* note 188, at 1.

191. See Chesney, *supra* note 16.

192. See Brooks et al., *supra* note 188, at 1.

193. See Chesney, *supra* note 16.

194. See, e.g., Brooks et al., *supra* note 188, at 1 (emphasizing that any new AUMF should clearly address whether or not the authorization extends to “associated forces” of the Islamic State (internal quotation marks omitted)); Chesney, *supra* note 16 (discussing the initial skepticism surrounding the Obama Administration’s use of the 2001 AUMF to justify force against the Islamic State after its split with al-Qaeda).

195. See Brooks et al., *supra* note 188, at 2.

196. Jack Goldsmith, *Why a Sunset Clause Is Important in Any New AUMF*, LAWFARE (Feb. 5, 2015, 10:24 AM), <https://www.lawfareblog.com/why-sunset-clause-important-any-new-aumf> [<https://perma.cc/XFD5-A8QN>].



A sunset clause and its ramifications are significant for multiple reasons. First, reoccurring authorization eliminates any questions relating to Congress's intent to authorize force against the Islamic State.<sup>197</sup> If, for example, Congress enacts an Islamic State AUMF that sunsets after eighteen months, and then immediately reauthorizes another such authorization after being asked by the President, there can be no question that Congress still supports the use of force against the Islamic State. Second, AUMFs have included such sunset clauses in the past as ways to "require any reauthorization to take place after an intervening election."<sup>198</sup> By requiring authorization by a new Congress or administration, such a clause would further eliminate uncertainty surrounding congressional authorization by injecting a measure of political accountability into the process. In sum, a sunset clause would ensure that Congress has explicitly authorized the use of force against the Islamic State and, therefore, would help meet the clear statutory authority requirement from *Hamdi*.<sup>199</sup>

### *C. Reporting Requirement*

An Islamic State specific AUMF should also include a reporting requirement to Congress.<sup>200</sup> Such a provision would require the President to report certain facts and justifications to Congress after a set period of time, such as a description of the current conflict, any changes in the parties involved in the conflict, and "any significant legal analyses regarding the scope of, and legal authority for, U.S. uses of force."<sup>201</sup>

Terrorist organizations are, by their nature, entities that can quickly change allegiances, identities, and forms.<sup>202</sup> Additionally, military operations are also fast-moving exercises that quickly

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197. See Brooks et al., *supra* note 188, at 2-3.

198. *Id.* at 2.

199. See Chesney, *supra* note 16.

200. See Brooks et al., *supra* note 188, at 3 ("A New AUMF Should Require Greater Transparency and Congressional Oversight.").

201. *Id.*

202. See KIM CRAGIN & SARA A. DALY, *THE DYNAMIC TERRORIST THREAT: AN ASSESSMENT OF GROUP MOTIVATIONS AND CAPABILITIES IN A CHANGING WORLD* 61-81 (2004).

change in scope and nature.<sup>203</sup> A reporting requirement to Congress will ensure that Congress is aware of any sudden changes in military operations and will retain some of Congress's oversight ability by allowing it to judge whether operations against the Islamic State are authorized.<sup>204</sup> This will help eliminate uncertainty in detention cases by again signaling Congress's continued intent to authorize the use of force against the Islamic State.

### CONCLUSION

In *Hamdi v. Rumsfeld*, the Supreme Court found that under the specific facts of that case, the 2001 AUMF constituted an explicit statutory grant from Congress for the detention of a U.S. citizen as an enemy combatant.<sup>205</sup> Although the Court emphasized the narrow nature of its decision, that same statutory authority has now been used as the primary legal authorization to detain a U.S. citizen who fought for the Islamic State.<sup>206</sup> However, because the Islamic State is, and always has been, a distinct entity from al-Qaeda, Congress must pass a new Islamic State-inclusive AUMF that will provide the requisite legal authority for any future detentions of U.S.-citizen Islamic State fighters. A new Islamic State-inclusive AUMF that explicitly refers to the Islamic State, includes a sunset clause, and requires the President to report to Congress, would provide the government with the requisite clear statutory grant from Congress to detain U.S.-citizen Islamic State fighters as enemy combatants.

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203. *See id.*

204. *See* Brooks et al., *supra* note 188, at 3.

205. *See supra* Part I.B.2.

206. *See supra* Part I.C.