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**ISIS Under the 2001 AUMF: Does ISIS Satisfy the Government’s Two-Prong Test of
“Associated Forces”?**

I. INTRODUCTION

On September 11, 2001, the United States found itself in turmoil, suddenly the U.S. entered a new kind of struggle, a struggle that required swift and severe actions to defeat those behind the September 11, 2001,¹ terrorist attacks. In response this new threat, Congress passed the Authorization for Use of Military Force. This statute 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 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.²

As apparent from its text, this Congressional authorization gave the President the authority to use force against those, and their allies, determined to have planned, authorized, committed, or aided in the 9/11 attacks. Specifically, in 2001, this authorization was applicable to Al-Qaeda and its leader, Osama Bin Laden, who planned and carried out the 9/11 attacks; and the Taliban, who harbored Al-Qaeda. It is obvious that the AUMF’s purpose was to provide the President with

¹ See, *9/11 attacks*, History.com, A+E Networks (2010), available at <http://www.history.com/topics/9-11-attacks>. (On September 11, 2001, 19 militants associated with al-Qaeda hijacked four airplanes and carried out suicide attacks against United States (herein after “9/11 attacks or attacks”).

² Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (herein after “2001 AUMF” or “AUMF”).

domestic authorization for use of force against those who “planned, authorized, committed, or aided the 9/11 attacks or harbored such organizations or persons”.³ However, 17 years after the attacks and 7 years after Bin Laden’s death, the government has been using the AUMF to justify the use of force against new terrorist and extremist groups, many of which were not closely involved in 9/11 and may not have even existed in 2001.⁴ This new theory was first introduced by President Obama in 2009. Shortly after he took office, the Obama Administration filed a memorandum in the Guantanamo Bay Detainee litigation explaining the President’s interpretation of his statutory authority to detain enemy forces as an facet of his authority to use force under the 2001 AUMF.⁵ The memo explained that the statute authorized the detention of “persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.”⁶ Though no court has ruled on the legality of extending the 2001 AUMF to ISIS, the Supreme Court and D.C. Circuit have validated the President’s authority to detain “associated forces” of those responsible for the 9/11 attacks under the 2001 AUMF. In *Hamdi v. Rumsfeld*, the Supreme Court addressed the question of whether the President has the authority to detain citizens who qualify as “enemy combatants,” understood to be any

³ *Id.*

⁴ *see* Letter from President Trump (Dec. 11, 2017), *available at* <https://www.whitehouse.gov/briefings-statements/text-letter-President-speaker-house-representatives-President-pro-tempore-senate-2/> (affirming use of force against ISIL is authorized by President’s constitutional and statutory authority, including both the 2001 and 2002 AUMFs).

⁵ Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to detainees held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litigation*, 624 F. Supp. 2d 27 (D.D.C. Mar. 13, 2009) (Nos. 05-0763, 05-1646, 05-2378) (hereinafter Memorandum Regarding the Government’s Detention Authority).

⁶ *Id.*

individuals who were part of or supported enemy forces in Afghanistan and who engaged the United States in armed conflict. The plurality wrote that “the AUMF is explicit congressional authorization for the detention of individuals in the narrow category [...] describe[d].”⁷ Based on *Hamdi*, the D.C. Circuit has rejected many habeas petitions based on the ruling that the President has the authority to detain individuals who were part of or associated with the Taliban or al-Qaeda.⁸ For example, In *Al-Adahi v. Obama*, the D.C. Circuit held that Mohammed Al-Adahi was “part of” al-Qaeda and lawfully detained under the 2001 AUMF. Al-Adahi, a Yemeni national, moved to Afghanistan in the summer of 2001. He stayed in Kandahar with his brother-in-law, who was a close associate of Osama bin Laden. Al-Adahi met with bin Laden twice and then attended al-Qaeda’s Al Farouq training camp. The court concluded that all of the evidence against Al-Adahi, including his training at Al Farouq, was sufficient to connect him to an enemy force covered by the AUMF.⁹ In another case, in *Hussain v. Obama*, the D.C. Circuit held that Abdul al Qader Ahmed Hussain, a Yemeni, was “part of” al-Qaeda and the Taliban and lawfully detained under the 2001 AUMF because he lived with three Taliban guards and who provided him with a firearm. The district court concluded that his loyalty to enemy forces was based on fact that Taliban soldiers gave him an AK-47 while he lived among them near the battle lines.¹⁰

The Trump Administration has embraced Obama’s theory of associated forces in detaining ISIS associates.¹¹ If President Trump delivers on his promise to “load up

⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

⁸ Charles Stimson & Hugh Danilack, *The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS*, April 17, 2017, available at https://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its#_ftnref13

⁹ *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010).

¹⁰ *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010).

¹¹ *See, e.g., supra* note 4.

[Guantanamo] with bad dudes”¹², which could very well include ISIS fighters, those detainees might successfully challenge not only their own detention under the AUMF, but also the Trump Administration’s entire legal justification for the authority to use force in the fight against ISIS. Indeed, that is precisely why happened, the Trump Administration has been challenged on its detention of an alleged ISIS fighter captured in Iraq in September, 2017. In October 2017, The American Civil Liberties Union filed a habeas corpus petition on behalf of an unnamed U.S. citizen detained by U.S. military in Iraq as an enemy combatant for allegedly being an ISIS fighter in Syria. Doe asserts that an American citizen cannot lawfully be detained without due process absent a clear statutory authorization by Congress for that specific purpose.¹³ Among other defenses, the government contends that its actions are authorized by Congress under the 2001 AUMF, which authorizes the use of force, including military detention, against both al-Qaeda and “associated forces” of al-Qaeda. Hence, as an alleged member of ISIS, Doe is a member of an associated force of Al-Qaeda.¹⁴ Thus, under the governments interpretation, ISIS is part of al-Qaeda and is rightly covered under the 2001 AUMF.¹⁵ Additionally, the Obama Administration argued that the the President’s authority to fight ISIL is further reinforced by the 2002 AUMF against Iraq.¹⁶ That AUMF authorized the use of force to, among other things,

¹² Associated Press, *Trump: Load Guantanamo Bay Up with 'Bad Dudes'* YouTube (Feb. 26, 2016), <https://www.youtube.com/watch?v=j7dmMI3CtKI>. (Then Presidential candidate Trump promising to load GTMO with bad dudes, referencing enemy combatant detainees).

¹³ Pet. For a Writ of Habeas Corpus, Am. Civil Liberties Union Found. v. Mattis (D.D.C. 2017); Order, Am. Civil Liberties Union Found. v. Mattis, No. 17-cv-2069 (TSC) (D.D.C. 2017).

¹⁴ Respondents’ Factual Return, 5-12 Am. Civil Liberties Union Found. v. Mattis, No. 17-cv-2069 (TSC) (D.D.C. 2017).

¹⁵ *see* Memorandum Regarding the Government's Detention Authority, *supra* note 5. The government has maintained that authority under the 2001 AUMF extends to "associated forces," as well as those directly involved in planning, authorizing, committing, or aiding the attacks.

¹⁶ *The Framework Under U.S. Law for Current Military Operations: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. (2014) (statement of Stephen W. Preston, Gen. Counsel, Dep’t of Def.) (General Counsel of the CIA giving a speech on President Obama’s

“defend the national security of the United States against the continuing threat posed by Iraq.”¹⁷

Now that President Trump has opened the door to judicial review of his interpretation and extension of the 2001 AUMF to ISIS, we may soon have an answer as to whether the President’s military efforts against ISIS under the 2001 AUMF is lawful.

Giving the lack of precedent on this specific issue, it is uncertain as to what the court will decide.

It’s possible that the court will agree with President Obama’s original interpretation.¹⁸ It is also likely that the court will accept the government’s assertion that Congress has authorized and supported the use of force against ISIS through its repeated funding of the President’s counter-ISIS military actions.¹⁹ As the government has put forth a number of defenses to justify its use of force against ISIS, it’s likely that the court might decide that the President’s extension far exceeds his authority under the 2001 AUMF while validating the President’s actions under the 2002 AUMF because of the imminent threat that ISIS poses to our national security. Using force against ISIS could be interpreted as the President defending the country’s national security interest, which would fall under the 2002 AUMF. Lastly, in line with the 2001 and 2002 AUMF argument, there’s also a possibility that the court could side with the President in asserting that military operations against ISIS is cover under the President’s Article II powers since Congress had passed the 2002 AUMF authorizing offensive ground operations against those who posed a threat in Iraq, including ISIS’ ever growing presence in Iraq. Thus, it could be argued that the

legal framework for his evolving military operations under the 2001 and 2002 AUMFs since the 9/11 attacks).

¹⁷ Authorization for Use of Military Force, Pub. L. No. 107-242, 116 Stat. 1501 (2002) (herein after “2002 AUMF”).

¹⁸ See the report, *supra* note 5. (the government has maintained that authority under the 2001 AUMF extends to "associated forces," as well as those directly involved in planning, authorizing, committing, or aiding the attacks).

¹⁹ See *Doe v. Mattis*, *supra* note 15.

President can invoke his Article II powers against ISIS without seeking additional authorization from Congress. However, while the government has many avenues to which it seeks to validate its use of force against ISIS, this paper will solely focus on the government authority under the 2001 AUMF. This article will argue that ISIS is not an associated force of Al-Qaeda, thus ISIS is not covered under the 2001 AUMF. This article neither substantively disputes nor advocate Obama's associated force theory. This article will simply analyze Obama's interpretation of the AUMF and apply government's definition of associate forces to ISIS to determine whether ISIS meets the two-prong test under the government's definition. Accepting the government's concept of associated forces, the primary focus of this article is to determine, based on ISIS' history and current relationship with Al-Qaeda, whether ISIS meets the government's two-prong test under the "associated forces" theory. First, the article will discuss the relationship between ISIS and Al-Qaeda. Next, the article will examine 2001 AUMF currently in effect, its goals, and how it was intended to be used. Third, the article will discuss the government's concept of associated forces. Lastly, the article will lay out reasons why ISIS did not meet the definition of associated forces in 2009 when it was first announced by the Obama Administration, and why it still does not qualify in 2018 under the Trump Administration.

II. ISIS v. AL-QAEDA

Prior to analyzing whether ISIS is an associate force of Al-Qaeda, we must first understand the history of both organizations, their ideologies, and current relationship status. Under this section, the article will first discuss the Al-Qaeda's history, then it will discuss the history of ISIS, and subsequently discuss their ideologies. Lastly, the article will analyze the current dispute between the two groups and the current state as it stands today.

a. History of Al-Qaeda

Al-Qaeda emerged out of the anti-Soviet jihad in Afghanistan in the 1980s.²⁰ As the Soviets prepared to withdraw, Osama Bin Laden and his associates decided to capitalize on the network they had built to take jihad global.²¹ Using contacts and resources from the anti-Soviet struggle to turn the organization's focus toward new perceived enemies of Islam beyond Afghanistan's borders.²² Bin Laden wanted to create a team of elite fighters to lead the global jihad movement and bring together the hundreds of small jihadist groups under a single umbrella.²³ In the early 1990s, as the group gained greater notoriety and due to pressure by various governments and authorities, it changed its base of operations from Afghanistan to Saudi Arabia in 1990, to Sudan in 1991, and finally back to Afghanistan in 1996.²⁴ After his return to Afghanistan, Bin Laden received the support from the Taliban regime, and established a base in their territories.²⁵ At that point, Bin Laden wanted to reorient the movement as a whole, focusing it on what he saw as the bigger enemy undermining his efforts to unite the jihad world: The United States. Al-Qaeda allied with and supported terrorist groups throughout the world, recruited local jihadists, trained them, and sent its own members to help other groups in their struggles in other parts of the world.

The 1998 attacks on two U.S. embassies in Africa, and of course 9/11, made Al-Qaeda's brand a household name. The attacks demonstrated the power, capabilities, reach, and sheer audacity of the organization. Although the 9/11 attacks electrified the global jihadist movement and raised

²⁰ Daniel Byman and Jennifer Williams, *ISIS v. Al-Qaeda, Jihadism global civil war*, Brookings, (February 24, 2015), <https://www.brookings.edu/articles/isis-vs-al-Qaeda-jihadisms-global-civil-war/>. (explain the history and rivalry between ISIS and Al-Qaeda).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Al-Qaeda's profile on the global stage, the U.S. counterterrorism response that followed was devastating to both Al-Qaeda and the broader movement it purported to lead. Over the next decade, the U.S. relentlessly pursued Al-Qaeda, targeting its leadership, disrupting its finances, destroying its training camps, infiltrating its communications networks, and ultimately crippling its ability to function. It remained a symbol of the global jihadist movement, but its inability to successfully launch another major attack against the United States meant that symbol was becoming less powerful.²⁶ While al-Qaeda's influence has decreased over the years since the 9/11 attacks, its presence and influence remain strong around the world Muslim world. In mere days after the attacks, an unprecedented onslaught from the U.S. followed. One-third of al-Qaida's leadership was killed or captured in the following year.²⁷ The group lost its safe haven in Afghanistan, including its extensive training infrastructure there. However, al-Qaeda had not been defeated as its leader Bin Laden was still at large. With help from allies, al-Qaeda was able to survive the immediate aftermath of 9/11. The Afghan Taliban stood by al-Qaeda after the attack, refusing to surrender Bin Laden and thereby precipitating the U.S. invasion of Afghanistan. Al-Qaeda's first and most notorious affiliate alliance was al-Qaida in Iraq (AQI), who protected them in 2004 during the U.S. invasion in Iraq. AQI was founded by an associate of Bin Laden, a Jordanian jihadist, Abu Musab al-Zarqawi.²⁸ This very group is now known as Islamic State of Iraq and the Levant,²⁹ leading many to believe that ISIS is a product of al-Qaeda.

²⁶ *Id.*

²⁷ Tricia Bacon, *Why al-Qaida is still strong 16 years after 9/11*, *The Conversation* (Sept. 10, 2017), <https://theconversation.com/why-al-qaida-is-still-strong-16-years-after-9-11-83403>.

²⁸ *Supra* note 21.

²⁹ More commonly known as ISIS or ISIL

b. History of ISIS

ISIS' roots can be traced back to 2004, founded by Abu Musab al-Zarqawi under the name al-Qaeda in Iraq (AQI). Al-Zarqawi was originally part of bin Laden's al-Qaeda network, whom he met during the Soviet invasion in Afghanistan. Prior to pledging allegiance to Al-Qaeda in 2004 and changing its name, the group was originally called Jam'at al-Tawhid wa'al Jihad. However, even from the early days of its partnership, the groups disagreed on targeted enemies. Bin Laden focused on the U.S. as its main target and Al-Zarqawi emphasized sectarian war and attacks on Sunni Muslims deemed as apostates, such as those who collaborated with the Shi'a-led regime.³⁰ AQI bombed Shia mosques and slaughtered Shia civilians, hoping to provoke mass Shia reprisals against Sunni civilians and force the Sunnis to rally behind them. al-Zarqawi died in the 2006 U.S. airstrikes, after which Egyptian, Abu Ayyub al-Masri took over and announced the creation of the Islamic State in Iraq (ISI). al-Masri was later killed in 2010 and his predecessor, Abu Bakr al-Baghdadi, took over in 2011. al-Baghdadi asserted unilateral control over all al-Qaeda operations in Iraq and Syria, changing the group's official name to the Islamic State in Iraq and Syria (ISIS).³¹ This mass expansion angered al-Qaeda leader, Ayman al-Zawahiri, leading to the split between Isis and al-Qaeda.³² In February 2014, Zawahiri publicly disavowed Baghdadi's group, formally ending their affiliation.³³ This split divided the jihadist movement, leading many to believe that ISIS is the the true inheritor of Osama bin Laden's

³⁰ *Id.*

³¹ *Id.*

³² Zach Beauchamp, *ISIS, a history: how the world's worst terror group came to be*, Vox, (November 19, 2015), <https://www.vox.com/2015/11/19/9760284/isis-history> (explaining the ultimate decision that led to ISIS and al-Qaeda's split, dividing the jihadist movement in Syria).

³³ *Id.*

legacy.³⁴ At one point in time, the two groups seemed indistinguishable. The groups, who's leaders once fought side by side and protected each other in times of need, no longer share that bond. At the present time, while al-Qaeda remains true to Bin Laden's legacy to spread Islam throughout the Middle East by overthrowing corrupt "apostate" regimes in the Middle East and replacing them with "true" Islamic governments, and weakening western influence in the Middle East, ISIS is much more concerned with expanding its territory and purifying the Muslim world, even if it means killing fellow Muslims. While they share a common goal, their approach to accomplishing that goal are vastly different.³⁵ The next section explores those differences.

c. Different Ideologies

The dispute between ISIS and Al-Qaeda is more than just a fight for power within the Jihadist movement. The two organizations differ on enemies, strategies, tactics, and other fundamental concerns.³⁶ Although the ultimate goal of Al-Qaeda is to overthrow the corrupt "apostate" regimes in the Middle East and replace them with "true" Islamic governments, Al-Qaeda's primary enemy is the United States, which it sees as the root of its problems in the Middle East. By targeting the United States, Al-Qaeda believes it will eventually induce the U.S. to end support for these Muslim state regimes and withdraw from the region altogether, thus leaving the regimes vulnerable to attack from within. Al-Qaeda considers Shia Muslims to be

³⁴ <https://millercenter.org/president/obama/foreign-affairs> (The White House argued that the resolution covered a war on ISIS because the terrorist organization is "the true inheritor of Osama bin Laden's legacy—notwithstanding the recent public split between al Qaeda's senior leadership and ISIS).

³⁵ Daniel Byman, *Comparing Al Qaeda and ISIS: Different goals, different targets*, Brookings, (April 29, 2015), available at <https://www.brookings.edu/testimonies/comparing-al-qaeda-and-isis-different-goals-different-targets/>. (explaining the history and rivalry between ISIS and Al-Qaeda).

³⁶ From early in the partnership the group differences were apparent which led ISIS being reluctant to join al-Qaeda.

apostates but sees their killing to be too extreme, a waste of resources, and detrimental to the broader jihadist project.³⁷

The Islamic State, on the other hand, does not follow Al-Qaeda's "far enemy" strategy, preferring instead the "near enemy" strategy, albeit on a regional level. As such, the primary target of the Islamic State has not been the United States, although ISIS has taken credit for many attacks in the U.S. and in Europe,³⁸ but rather "apostate" regimes in the Arab world—namely, the Assad regime in Syria and the Abadi regime in Iraq. Like his predecessors, Baghdadi favors purifying the Islamic community first by attacking Shi'a and other religious minorities as well as rival jihadist groups. ISIS emphasizes that "all Muslims must associate exclusively with fellow true Muslims and dissociate from anyone not fitting this narrow definition; failure to rule in accordance with God's law constitutes unbelief; all Shia Muslims are apostates."³⁹ ISIS also differs from al-Qaeda in that it promotes offensive and defensive jihad.⁴⁰ To the contrary, al-Qaeda focuses on defensive jihad, promoting only what it classifies as defensive military acts.⁴¹ Offensive jihad focuses on the "the uprooting of *shirk*, idolatry, wherever it is found."⁴² Lastly, The Islamic State's strategy is to control territory, steadily consolidating and expanding its position. Part of it is ideological: it wants to create a government where Muslims can live under Islamic law. Part of this also is inspirational: by creating an Islamic state, it electrifies

³⁷ *Id.*

³⁸ Brooke Sigman, *Timeline of Recent Terror Attacks Against the West*, FoxNews Channel (Nov. 1, 2017), <http://www.foxnews.com/world/2017/11/01/timeline-recent-terror-attacks-against-west.html>.

³⁹ Samantha Arrington Sliney, *Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria*, 6 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 1, 7–8 (2016) at 11.

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² *Id.*

many Muslims who then embrace the group. And part of it is basic strategy: by controlling territory it can build an army, and by using its army it can control more territory. Indeed, ISIS' connection to al-Qaeda cannot be ignored. From its inception when Bin Laden funded some of its startup operations, to AQI sheltering Bin Laden from U.S. forces in 2004, al-Qaeda's imprint is embedded in ISIS' history. However, many things have changed since AQI first emerged in 2004. The most important change being ISIS' relationship with al-Qaeda. The relationship, as it was known to the world in 2004, is no longer. The groups no longer share a common goal or ideology. All association between the two groups have been denounced, taking ISIS out of the ambit of the AUMF. Having determined that the association between ISIS and al-Qaeda is no longer, the next section of the article will analyze the 2001 AUMF and Obama's interpretation and extension of the AUMF to ISIS.

III. THE 2001 AUMF

The AUMF was introduced and passed both the House and Senate on September 14, 2001.⁴³ The AUMF was signed into law on September 18, 2001, by President George W. Bush. The text of the AUMF gives the President authority to use force against those that the President determines are responsible for the 9/11 attacks.⁴⁴ In a mere 60-word paragraph, the AUMF provides the President with authorization to use all necessary and appropriate force against nations, organizations, or persons he determines planned, authorized, committed, or aided the 9/11 attacks, 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.⁴⁵

⁴³ *see* AUMF, *supra* note 2.

⁴⁴ *Id.*

⁴⁵ *See* Authorization for Use of Military Force § 2(a).

Nowhere in the statute does Congress explicitly mentioned the concept of associated forces. Any target under the AUMF must be linked to responsibility for the 9/11 attacks.⁴⁶ The AUMF was clearly directed at the perpetrators of 9/11 and their allies. President Bush initially demanded broader authority under the AUMF, but Congress rejected his request for such broad authorization.⁴⁷ Initially, the Bush Administration sought authority to “deter and pre-empt any future attacks of terrorism or aggression against the United States.”⁴⁸ President Bush’s initial draft of the AUMF did not contain the 9/11 nexus, requiring those targeted under the AUMF to be responsible for the 9/11 attacks. This authorization would have allowed the President to use preventative force against terrorism anywhere in the world, regardless of whether there was a nexus between the target and the 9/11 attacks.⁴⁹ This draft would have allowed the U.S. to target ISIS at any point in its development if the President determined that the use of force was necessary to deter and prevent a future attack against the United States.⁵⁰ Congress rejected the Bush Administration’s version for the current wording of the AUMF, leaving the requirement of a nexus to the 9/11 attacks in place.⁵¹

The 9/11 clause in the AUMF gives the President discretion to determine the method of attack, the target of the attack, and the location of the attack if the target can be linked back to the

⁴⁶ LoGaglio, Gabrielle. "*Crisis With ISIS: Using ISIS's Development to Analyze "Associated Forces" Under the AUMF.*" National Security Law Brief 5, no. 1 (2014): 127-171, at 132.

⁴⁷ *see generally* Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *harv. l. rev.* 2047 (2005) (explaining that the AUMF has no jurisdictional limit, allowing the President to target an individual with a nexus to executing the 9/11 attacks anywhere in the world).

⁴⁸ Jennifer Daskal & Steve Vladeck, *After the AUMF: a Response to Cheney, Goldsmith, Waxman and Wittes*, *lawFare* (Mar. 17, 2013), <http://www.lawfareblog.com/2013/03/after-the-aumf/> (quoting the Bush Administration’s proposed language for the AUMF).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id. supra* note 49.

9/11 attacks.⁵² While the AUMF describes the nexus for potential targets, it does not specify an actual target, such as al-Qaeda or the Taliban, or a specific geographic location. It authorizes the President to use force against any “nation, organization, or persons” that the President determines “planned, authorized, committed or aided” in the 9/11 attacks.⁵³ It also places no explicit limits on the methods of attack that the President may use to target those responsible for the 9/11 attacks.⁵⁴ It simply dictates that the President may use all “necessary and appropriate force.”⁵⁵ In accord with his broad concept, the Supreme Court has interpreted this language to include detention of enemy combatants, specifically stating that the AUMF authorizes the President to detain those suspected of aiding in the 9/11 attacks.⁵⁶ As explained the introductory section, the Supreme Court in *Hamdi* upheld the detention of those considered to be part of or substantially supported al-Qaeda, the Taliban, or associated forces, affirming the detention of individuals linked to 9/11 as enemy combatants.⁵⁷ Lastly, the AUMF contains no end date or sunset clause, allowing it to exist until Congress takes action to repeal the bill. Even now that the threat from al-Qaeda (and those individuals responsible for the 9/11 attacks) has subsided, the AUMF remains in force until Congress takes action to repeal or amend it.⁵⁸ Although there have been proposals to repeal the AUMF or set a sunset date, none of those efforts have succeeded.⁵⁹

⁵² See Bradley & Goldsmith, *supra* note 29, at 2050-51.

⁵³ See Authorization for Use of Military Force § 2(a).

⁵⁴ See Bradley & Goldsmith, *supra* note 29, at 2078-79.

⁵⁵ See *supra* note 2.

⁵⁶ *Hamdi*, 542 U.S. at 521 (2004).

⁵⁷ *Id.*

⁵⁸ Gregory D. Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BuzzFeed (Jan. 16, 2014), <http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-story-of-the-most>.

⁵⁹ Karen DeYoung, *Obama’s Revamp of anti-terror policies stalls*, Wash. Post, May 21, 2014, http://www.washingtonpost.com/world/national-security/2014/05/21/79ac0f20-e053-11e3-8dcc-d6b7fede081a_story.html (criticizing the Obama Administration for not taking steps to repeal the AUMF).

Given that the original bill is still in effect, the next section will analyze interpretation and extension of the bill.

a. Obama’s Extension of The 2001 AUMF

The theory of associated forces was first introduced by the Obama Administration in 2009 in its Memorandum Regarding the Government's Detention Authority⁶⁰ to expand the reach of the AUMF without going back to Congress for approval to use military force against new terror groups.⁶¹ This memo maintains that authority under the 2001 AUMF extends to “associated forces,” as well as those directly involved in planning, authorizing, committing, or aiding the attacks.⁶² In December 2016, President Obama released the White House Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations identifying two domestic legal bases for the use of military force: the 2001 AUMF and the President’s “Commander in Chief” constitutional powers.⁶³ For purposes of this article, we will focus solely on the President’s AUMF argument. According to the report, “all three branches of the U.S. Government have affirmed the ongoing authority conferred by the 2001 AUMF and its application to al-Qaeda, to the Taliban, and to forces associated with those two organizations within and outside Afghanistan.”⁶⁴ Indeed, while the Supreme Court and Congress, through their respective actions, have validated this interpretation with regard to those who are part of or substantially supported al-Qaeda or the Taliban, they’ve not extended the 2001 AUMF to cover ISIS. As cited in the report, Congress passed the 2012

⁶⁰ See Memorandum Regarding the Government's Detention Authority, *supra* note 5.

⁶¹ Report on The Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations, p. 4, <https://fas.org/man/eprint/frameworks.pdf>.

⁶² See, e.g. Memorandum Regarding the Government's Detention Authority, *supra* note 5.

⁶³ See the report, *supra* note 62.

⁶⁴ *Id* at 4.

National Defense Authorization Act to provide funding for military operations and while also expanding the President’s authority under the 2001 AUMF. The NDAA codifies the expensive interpretation of the detention authority under the 2001 AUMF advanced by the Obama Administration. It provides pursuant to the 2001 AUMF, the president has the authority to detain “covered persons”, including those who planned, authorized, committed, or aided the 9/11 terrorist attacks, or harbored those responsible for those attacks and those who were “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.”⁶⁵ Similarly, In *Hamdi* the Court affirmed the President’s power to indefinitely detain members of al Qaeda and the Taliban, holding that detentions of citizen-detainees are part of the exercise of “necessary and appropriate force” authorized by the AUMF.⁶⁶

The report then defined and outlined conditions that must be met for an entity to be considered an “associated force” for the purposes of the 2001 AUMF. According to the government’s definition, to be considered an “associate force” of al-Qaeda under the 2001 AUMF, an entity must satisfy two conditions: 1) the entity must be an organized, armed group that has entered the fight alongside al-Qaeda; and 2) the group must be a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.⁶⁷ Thus, as explained in the report, a group is not an associate force merely because it aligns with al-Qaeda or embraces their ideology. Rather, it must have entered al-Qaeda’s fight against the U.S. or a U.S. ally.⁶⁸

⁶⁵ The National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011) (hereinafter 2012 NDAA).

⁶⁶ *Hamdi*, 542 U.S. at 521 (2004).

⁶⁷ *Id. supra* note 30

⁶⁸ *Id.*

To further elaborate on this concept, the report provided two examples of how these principles have been applied. First, Al-Shabaab, operating in Somalia, is an associated force of al-Qaeda because it (1) publicly pledged loyalty to al-Qaeda, (2) made clear that the United States is an enemy, and (3) is responsible for attacks and threats against US interests and persons. Likewise, the report laid out specific examples as to why ISIS also meets this definition. The government asserts that ISIS meets its definition of associated forces because the group now called ISIS, although not in existence in 2001, was founded by an associate of Osama bin Laden in 2003 and conducted a series of terrorist attacks in Iraq beginning that same year. A year after its foundation, the group publicly pledged allegiance to bin Laden, with Bin Laden declaring them the leader of al-Qaeda in Iraq in 2004, 3 years after the 9/11 attacks and nearly a year after it had been operating on its own without Bin Laden's assistance. Therefore, notwithstanding ISIS's feud and publicly disassociation from al-Qaeda in 2014, the government maintains that ISIS is still an associate force of al-Qaeda because it "continues to wage hostilities against the United States as it has since 2004, when it joined bin Laden's al-Qaeda."⁶⁹ Accepting the government's definition as true, the next section will analyze whether ISIS meets the government's two-prong test.

IV. IS ISIS AN ASSOCIATED FORCE OF AL-QAEDA?

With a better understanding of the history between ISIS and al-Qaeda, the history and goals behind the 2001 AUMF, and the government's interpretation and expansion of the 2001 AUMF, this section will analyze whether ISIS satisfies the two-prong standard developed by the Obama Administration. A deeper analysis of the Obama two-prong test reveals the repetitive

⁶⁹ See the report, *supra* note 62.

nature of the “associated forces” theory. In analyzing and applying each standard to ISIS, it becomes readily apparent the two-prongs are one and the same. As articulated by December 5th report, an associated force of al-Qaeda must be 1) an organized, armed group that has entered the fight alongside al-Qaeda, and (2) a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.⁷⁰ However, under the concept of co-belligerency as established under the law of war, when a group has joined in the fight with al-Qaeda, they have also essentially become a co-belligerent of al-Qaeda. Co-belligerency is defined as “fully fledged belligerent fighting in association with one or more belligerent powers.”⁷¹ Accordingly, stating that a group has “entered the fight alongside al-Qaeda” is essentially stating that a group is “co-belligerent of al-Qaeda”. As such, this subsection will focus primarily on whether ISIS is an organized and armed group as required under the first prong. Since “entering the fight along alongside al-Qaeda” and being a “co-belligerent with al-Qaeda” are essentially the same, those two elements will be analyzed simultaneously in the subsequent subsection. Again, the article does not seek to substantively dispute or advocate Obama’s associated force theory. The article will determine if ISIS satisfies the government’s definition of associated forces under its proffered two-prong test. Though the article does not analyze the substantive components of the Obama Test, it will nonetheless provide a modified version of the two-prong test, as well a suggestion for a new AUMF, better suited to encompass ISIS in the conclusion section of the article.

b. First Prong

⁷⁰ LoGaglio, Gabrielle. “*Crisis With ISIS: Using ISIS’s Development to Analyze “Associated Forces” Under the AUMF.*” National Security Law Brief 5, no. 1 (2014): 127-171, at 130.

⁷¹ *Id.*

In its current state, ISIS certainly fits the definition of an organized and armed group. Though that has not always been the case, as ISIS has had its fair share of ups and downs. From when it was first known as AQI, its structure and actions made them an organized and armed group. After pledging allegiance to al-Qaeda, AQI gained popularity, increasingly used brutal tactics and attacked Shia religious sites.⁷² AQI organized criminal activities, orchestrated attacks, and released statement to disseminate its message. AQI established and orchestrated the use of suicide bombings and roadside bombings, a tactic that al-Qaeda widely accepted.⁷³ by the end of 2004, AQI was estimated to have 15,000 active members.⁷⁴ Zarqawi, AQI's leader, was also skilled in his use of the internet and media to disseminate al-Qaeda's message.⁷⁵ Zarqawi began using chat rooms, video clips and gruesome videos to convey his message.⁷⁶ After the death of Zarqawi in 2006, AQI's reign and power began to crumble as it transitioned to new leadership.⁷⁷ It took on a new name as Islamic State of Iraq (ISI) and attempted to rebrand itself.⁷⁸ However, its efforts were unsuccessful. By 2008, ISI was on the verge of collapse.⁷⁹ ISI was no longer able to launch attacks with the same frequency or to hold territory.⁸⁰ It's organized structure had

⁷² *Id.* at 152

⁷³ See Karen DeYoung & Walter Pincus, *Al-Qaeda in Iraq May Not Be Threat Here*, *Wash. Post*, Mar. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701373_pf.html (noting Zarqawi's early reliance on these tactics).

⁷⁴ M.J. Kirdar, *Al-Qaeda in Iraq*, center For strategic & international studies; al-Qaeda and associated movement Futures ProJect 1, 5 (June 2011), http://csis.org/files/publication/110614_Kirdar_AlQaedaIraq_Web.pdf

⁷⁵ *Id.* at 8

⁷⁶ *Id.*

⁷⁷ DeYoung & Pincus, *supra* note 40.

⁷⁸ Kirdar, *supra* note 53, at 5.

⁷⁹ Daniel Byman, *The Foreign Policy Essay: "2013- The Year We Lost Iraq?"*, *lawFare* (Jan. 5, 2014), <http://www.lawfareblog.com/2014/01/the-foreign-policy-essay-2013-the-year-we-lost-iraq/#more-30543>.

⁸⁰ *Id.*

become so weak that CIA director Michael Hayden declared that ISI was no longer a threat to the United States.⁸¹ ISI's leadership structure crumbled, leading ISI's members to dissolve into other Sunni insurgencies. By 2012, under new leadership and less ties to al-Qaeda, came the birth of ISIS. The group had regained its strength and was active again.⁸² ISIS had become a force to be reckoned with. ISIS coordinated attacks on Shia markets, cafes, and mosques. 2012-2013, marked the beginning of one of ISIS's bloodiest periods. They coordinated attacks across several cities in Iraq that targeted Shias and killed civilians.⁸³ For twelve days straight in 2012, ISIS launched coordinated attacks that each killed at least 25 Iraqis per attack.⁸⁴ ISIS's resurgence between 2012-2013 led US officials to reevaluate the threat level of ISIS. Matt Olson, the head of the National Counterterrorism Center stated that ISIS, at this point, was stronger than any previous point in its history.⁸⁵ After ISIS's resurgence in Iraq, the United States offered ten million dollars for information that would help authorities to capture or kill Baghdadi.⁸⁶ ISIS managed to rebuild its organizational structure and successfully launched large-scale attacks. ISIS's structure allowed the group to hold territory and to expand into Syria, demonstrating a strong organizational structure that allowed ISIS to plan and execute sophisticated attacks inside Iraq. Dating back to 2012 ISIS was certainly, and still remains, an organized and armed group. Thus, meeting the first part of the first prong analysis. However, it is less uncertain whether ISIS

⁸¹ See Byman, *supra* note 58 (explaining the almost collapse of al-Qaeda).

⁸² Zachary Laub, *Al-Qaeda in Iraq (a.k.a. Islamic State in Iraq and Greater Syria)*, (Jonathan Masters ed.) council on Foreign relations (Jan. 9, 2014), <http://www.cfr.org/iraq/al-Qaeda-iraq-k-islamic-state-iraq-greater-syria/p14811>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Byman, *supra* note 58

⁸⁶ Jen Psaki, Spokesperson, Office of the Spokesperson, *U.S. Condemns Terrorist Attack in Iraq and Pledges to Help Combat al-Qaeda*, Dep't of State (Aug. 10, 2013), <http://www.state.gov/r/pa/prs/ps/2013/08/213032.htm>. 356 *Id.*

satisfies the second part of this prong, requiring it to have entered the fight alongside al-Qaeda. As detailed in the next section, dating back to 2014, ISIS neither entered the fight against the U.S. alongside al-Qaeda nor was it an associated force of or co-belligerent with al-Qaeda. Therefore, ISIS does not meet the first prong under Obama’s two-prong associated forces test.

c. The Second Prong

For the second prong, the associate force must be “a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners”.⁸⁷ As the AUMF does not explicitly mention the “associated forces” language, the Obama Administration has drawn an analogy to the concept of co-belligerency under the law of war to support its theory.⁸⁸ According to this analogy, the United States can use force against associated forces of al-Qaeda because those forces essentially amount to co-belligerents of al-Qaeda.⁸⁹ However, under the concept of co-belligerency as established under the law of war, when a group has joined in the fight with al-Qaeda, they have also essentially become a co-belligerent with al-Qaeda. As defined by author and law professor, Morris Green, a co-belligerency is a “fully fledged belligerent fighting in association with one or more belligerent powers.”⁹⁰ thus, stating that a group has “entered the fight alongside al-Qaeda” is essentially stating that a group is a “co-belligerent of al-Qaeda”. Accordingly, if a group does not meet the first prong, it will likely not meet the second prong under Obama’s two-prong test. Nevertheless, it still remains uncertain whether the law of war

⁸⁷ See AUMF, *supra* note 2.

⁸⁸ Jeh Johnson, Gen. Counsel of the Dep’t of Def. Dean’s Lecture at Yale Law School “National security law, lawyers, and lawyering in the Obama Administration” (Feb. 22, 2012) (explaining that the targeting of associated forces of al-Qaeda is rooted in the concept of co-belligerency under the law of war).

⁸⁹ *Id.*

⁹⁰ Morris Greenspan, *The Modern Law of Land Warfare*, 531 (1959).

can be expanded to the United States' non-international armed conflict with al-Qaeda or the Taliban.⁹¹

i. The Concept of Co-Belligerency

To fully understand the debate surrounding the United States' use of co-belligerency principles, this subsection will first discuss how co-belligerency functions under the law of war. With that understanding, this subsection then will analyze how the United States has incorporated those ideas into defining the associated forces of al-Qaeda and it will provide reasons why the U.S.'s application of co-belligerency to ISIS is improper. Under international law, there are two general types of armed conflicts, international armed conflicts (IACs) and non-international armed conflicts (NIACs).⁹² The International Committee of the Red Cross (ICRC) has defined IACs as conflicts with two or more opposing states and NIACs as armed conflicts between governmental forces and non-governmental armed groups or between only non-governmental armed groups.⁹³ The law of war, including the Geneva Conventions, governs IACs.⁹⁴ However, NIACs are not as well defined and therefore are not as strictly governed under international law.⁹⁵ Co-belligerency, however, is well-defined and incorporated into the law of

⁹¹ *E.g.* Ben Emmerson, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, human rights counsel (Feb. 28, 2014) (explaining that the United States has improperly extended co-belligerency principles to its conflict with al-Qaeda); *see also* Christof Heyns, *Report of the Special Rapporteur on extrajudicial summary or arbitrary executions*, united national general assembly (Sept. 13, 2013) (explaining that the United States cannot use principles of co-belligerency to target associated forces of al-Qaeda).

⁹² *How is the Term "Armed Conflict" Defined in International Humanitarian Law*, International committee of the red cross (Mar. 17, 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

⁹³ *Id.*

⁹⁴ *Id.* at 1-2

⁹⁵ *See* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with al-Qaeda*, 47 *tex. int'l l.J.* 75, 81 (2011) (explaining that NIACs are more difficult to define because the concept of the "enemy is murky").

war governing IACs.⁹⁶ A co-belligerent is a state that has entered a conflict alongside another belligerent, itself becoming a belligerent and a party to the conflict.⁹⁷ A co-belligerent state is a “fully fledged belligerent fighting in association with one or more belligerent powers.”⁹⁸ According to the ICRC Commentaries to the Geneva Conventions, co-belligerency can be demonstrated through a “de facto relationship” that “may find expression merely by tacit agreement,” if the operations are such as to indicate clearly for which side the belligerent organization is fighting.⁹⁹ While an IAC is taking place, a third-party state’s breach of neutrality (such as providing soft support to the enemy state) is not enough to render the third-party a co-belligerent.¹⁰⁰ A third-party must join the belligerent in the fight and must be fighting in association with the belligerent in order to amount to a co-belligerent. Similarly, under the Obama standard, a group is not an associated force simply because it aligns with or embraces the belligerent’s ideology. Therefore, “[d]uring an IAC, a state may use force against a co-belligerent of its enemy without an additional authorization or declaration of war.”¹⁰¹ Hence why the Obama Administration adopted this concept as a tactic to use force against ISIS without express congressional authority. Although co-belligerency is well defined in IACs, co-belligerency has not been as readily extended to NIACs.¹⁰² Co-belligerency stems from state-based neutrality law.¹⁰³ Neutrality law addresses the rights and responsibilities of states that are

⁹⁶ *See Id.* at 90 (explaining that under the concept of co-belligerency, a state may enter the conflict alongside a belligerent, therefore becoming a co-belligerent).

⁹⁷ LoGaglio, *supra* note 28, at 137.

⁹⁸ *Id.*

⁹⁹ Convention (III) relative to the Treatment of Prisoners of War, art. 4A (commentary), Aug. 12, 1949, 75 U.N.T.S.

¹⁰⁰ *See* Ingber, *supra* note 73, at 96.

¹⁰¹ *See* Bradley & Goldsmith, *supra* note 29, at 2111-12.

¹⁰² LoGaglio, *supra* note 28, at 137.

¹⁰³ *See* Ingber, *supra* note 73, at 88.

not enemies in a conflict. Each state has an obligation to remain neutral while an IAC is taking place.¹⁰⁴ Remaining neutral means that a third-party must not support one party to a conflict over another.¹⁰⁵ Small violations, such as expressing public support for one side absent material support, are not sufficient to turn a third-party into a co-belligerent.¹⁰⁶ However, if a party joins a belligerent in the conflict, they will be breaking their own neutrality and become a co-belligerent to the conflict.¹⁰⁷

Neutrality law only binds states.¹⁰⁸ Individuals or organizations are free to provide support to a belligerent in a conflict without it violating their host state's neutrality.¹⁰⁹ Given that neutrality law is an inter-state concept, it has not been determined as to what extent it can be applied to non-state actors, like ISIS, in a non-international armed conflict.¹¹⁰ Despite these uncertainties, the Obama Administration has readily implemented principles of co-belligerency in reading the AUMF to authorize the United States to target and detain associated forces of al-Qaeda and the Taliban.¹¹¹ This concept is illustrated in *Hamdan*, wherein the Supreme Court held that the United States is engaged in a NIAC with al-Qaeda and the Taliban¹¹². Therefore, unless the government can proffer evidence to establish that the concept of co-belligerency, as

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 86-87 (explaining that the law of neutrality requires neutral states to not participate in a conflict and remain impartial to all involved parties, including not giving resources to a party in the conflict).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 88

¹¹¹ *See Johnson, supra* note 68 (drawing an analogy between the concept of co-belligerency and al-Qaeda's relationship with its affiliates to justify targeted associated forces of al-Qaeda under the AUMF).

¹¹² *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629–32 (2006) (holding that the United States is in a NIAC with al-Qaeda because the conflict “does not involve a clash between nations”).

defined under international law, applies or has been applied to a non-governmental armed groups like ISIS, it is clearly out of the confines of the AUMF based on *Hamdan*.

ii. Is ISIS a Co-Belligerent Under the 2001 AUMF?

With a better understanding of the co-belligerent concept, this subsection will analyze whether ISIS fits that definition under the second prong of the Obama two-prong test. Accepting the Obama definition as true, this subsection will conclude that ISIS does not meet the second prong even under the Administration's own definition and application. Dating back to ISIS's foundation when it was known as AQI and was initially led by Abu Musab al-Zarqawi, a close associate of Bin Laden who publicly pledged allegiance, and who was tasked with spreading al-Qaeda to Iraq, ISIS could almost certainly have been considered a co-belligerent of al-Qaeda. Additionally, the U.S. could have relied on the 2002 authorization to attack and retaliate against insurgents inside of Iraq in its efforts to destroy al-Qaeda.¹¹³ Even outside of Iraq, the U.S. could have used the 2001 AUMF to attack or detain AQI forces operating outside of Iraq as, at that time, they were operating as an associate of al-Qaeda for many reasons: 1) AQI was founded to be an extension of al-Qaeda and to allow al-Qaeda to directly attack U.S. forces in Iraq; 2) Zarqawi was taken in by Bin Laden and specifically tasked with developing an al-Qaeda affiliate that would spread al-Qaeda's goals to Iraq; 3) Bin Laden gave Zarqawi the funds and resources to conduct its operations; and 4) Zarqawi followed Bin Laden's orders to move the group from Jordan to Iraq to attack U.S. forces. Zarqawi's formal acknowledgment of Bin Laden's leadership in 2004 demonstrated that AQI recognized that it was working under al-Qaeda in executing al-Qaeda's agenda, closely resembling the concept of a co-belligerency.¹¹⁴ All of these

¹¹³ Kirdar, *supra* note 53, at 8.

¹¹⁴ See Heyns, *supra* note 69, at 17-18 (explaining that an armed actor must have an integrated command structure with a belligerent to be a co-belligerent).

facts show that AQI was operating under the umbrella of al-Qaeda by working to spread al-Qaeda's message in Iraq. Therefore, could have properly been classified as a co-belligerent. At this particular phase, AQI had indeed "joined the fight alongside al-Qaeda in the fight against the United States" and fully pledged allegiance to fighting in association with al-Qaeda. However, fast forward to September 2009, when the government first announced its "associated forces" theory, ISIS was no longer associated with or fighting alongside al-Qaeda; hence, it was not a co-belligerent and out of the realm of the AUMF. Most notably, 2006 marked the "beginning of the end" of AQI.¹¹⁵ By that time, the U.S. had killed its fearless leader and was alienated from al-Qaeda and affiliates due to ideological differences. After it joined forces with al-Qaeda in 2004, AQI engaged in a number of brutal tactics and high profile attacks on the Shais, which al-Qaeda did not agree with, causing severe tension between AQI and al-Qaeda.¹¹⁶ After Zarqawi's death, both U.S. and Iraqi security experts expected AQI to crumble; however, the group transitioned to new leadership Abu Ayyub al-Marsi (A.K.A Abu Hamza al Muhajir).¹¹⁷ As AQI continued to use brutal violence, Sunnis, including al-Qaeda, turned against AQI, forcing AQI to rebrand itself as tensions grew stronger between AQI and Al-Qaeda.¹¹⁸ In October 2006, In response to attacks from within the Sunni community, Marsi changed AQI's name to Islamic State of Iraq (ISI).¹¹⁹ Changing the group's name to ISI reflected the group's new focus on building its reputation inside Iraq. Nevertheless, ISI was not strong enough to withstand all of its enemies, both in and outside of Iraq. By 2008, 2,400 members of ISI had been killed and 8,800 had been

¹¹⁵ See Scott Peterson, *Picture of a Weakened Iraqi Insurgency*, the christian science monitor (June 16, 2006), <http://www.csmonitor.com/2006/0616/p01s04-woiq.html> (describing the rapid escalation of U.S. attacks on AQI surrounding Zarqawi terror).

¹¹⁶ Laub, *supra* note 61.

¹¹⁷ *Id.*

¹¹⁸ DeYoung & Pincut, *supra* note 40.

¹¹⁹ Kirdar, *supra* note 53, at 5.

captured.¹²⁰ In 2007 Zarqawi, who was second-in-command of al-Qaeda at the time, had announced that there was no longer an al-Qaeda affiliate in Iraq.¹²¹ Thus, severing all ties between ISI and al-Qaeda. From that moment, al-Qaeda no longer recognized ISI as an associate. Therefore, at this phase, ISI is clearly no longer an associate force when Zawahiri declared that there is no al-Qaeda affiliate in Iraq. Even if established that ISIS was once an associate of al-Qaeda, by 2007 that relationship was no longer. Additionally, after the death of its second leader, Marsi, in 2008, ISI was on the verge of collapse.¹²² CIA director Michael Hayden declared that ISI was no longer a threat to the U.S.¹²³ This declaration shows not only had the alliance or co-belligerency between ISI and al-Qaeda ended, it shows that the U.S. was successful in destroying said association, if it even existed. After 2008, the United States could not use the AUMF to target ISI outside of Iraq. This phase marked a turning point when al-Qaeda began distancing its organization away from ISIS. ISI's transition out of being an associated force of al-Qaeda illustrates a flawed area in the test. The Government's test is flawed because based on the government's definition, a group is a co-belligerent with al-Qaeda if the group is involved in hostilities against the United States or its coalition partners. At this state in its existence, ISI was clearly not involved in hostilities against the U.S. on al-Qaeda's behalf.

In 2012, ISI was rebranded under a new leadership and a new name, Islamic State of Iraq and Syria, ISIS. As ISIS sought to rebuild its organization, it was less focused on renewing its an

¹²⁰ *Id.*

¹²¹ Aymenn Jawad Al-Tamimi, *Comprehensive Reference Guide to Sunni Militant Groups in Iraq*, Jihadology (Jan. 23, 2014), <http://www.aymennjawad.org/14350/comprehensive-reference-guide-to-sunni-militant>.

¹²² Daniel Byman, *The Foreign Policy Essay: "2013- The Year We Lost Iraq?"*, lawFare (Jan. 5, 2014), <http://www.lawfareblog.com/2014/01/the-foreign-policy-essay-2013-the-year-we-lost-iraq/#more-30543>.

¹²³ *Id.* (explaining the almost collapse of al-Qaeda).

association with al-Qaeda and more focused on expanding its territory. The new leader was more focused on rebuilding ISIS and expanding its territory into Syria than building associations.¹²⁴ At this point, ISIS was neither fighting U.S. troops nor attempting to launch attacks against U.S. forces or its coalitions. Still at this point in time, ISIS could not be considered a co-belligerent with al-Qaeda in the fight against the U.S. Lastly, in 2013, dispute between ISIS' leader, Baghdadi, and al-Qaeda's leader, Zawahiri, led to Baghdadi releasing an audio recording stating, "I have to choose between the rule of God and the rule of al-Zawahiri and I choose the rule of god.", boldly demonstrating Baghdadi's defiance of al-Qaeda.¹²⁵ This act of defiance insinuated that ISIS would not follow al-Qaeda's agenda or respect their authority; a crucial criterion in determining whether ISIS is an associated force or a co-belligerent of al-Qaeda. Again, on February 3, 2014, ISIS tensions with al-Qaeda came to a head and al-Qaeda disavowed ISIS as an affiliate.¹²⁶ Zawahiri released a statement explaining that since Baghdadi refused orders from Zawahiri and al-Qaeda, ISIS was cut off from al-Qaeda, announcing that al-Qaeda has "no connection" to ISIS and was "not responsible for ISIS's actions."¹²⁷ Zawahiri stated that "the branches of al-Qaeda are the ones that the General Command of al-Qaeda announces and recognized" and that ISIS was no longer recognized by al-Qaeda. There is no greater act of dissociation than that. al-Qaeda publicly announced that it has no connection to ISIS, obliterating any doubt that ISIS meets the Obama Administration's two-prong "associated force" theory. At

¹²⁴ Laub, *supra* note 61 (chronicling the rising and falling of ISI power).

¹²⁵ See Basma Atassi, *Al-Qaeda Chief annuls Syrian-Iraqi Jihad merger*, al Jazeera (June 9, 2013), <http://www.aljazeera.com/news/middleeast/2013/06/2013699425657882.html> (explaining that ISIS and al Nusra engaged in infighting after the annulled merger).

¹²⁶ Thomas Joscelyn, *Al-Qaeda's general command disowns the Islamic State of Iraq and the Sham*, the long war Journal (Feb. 3, 2014), http://www.longwarjournal.org/archives/2014/02/al_qaedas_general_co.php (reporting on Zawahiri's announcement that AQSL was no longer associated with ISIS).

¹²⁷ See also *id.* (finalizing the decision to break clean from ISIS and its actions).

the time this concept was launched, ISIS was no longer fighting in association with al-Qaeda and is currently not fighting against the United States or its coalition partners. Under the government's own theory, ISIS does not meet its test of associated forces.

On a counter argument, the government has argued that 2001 AUMF covers the use of force against ISIS because the terrorist organization is “the true inheritor of Osama bin Laden’s legacy—notwithstanding the recent public split between al Qaeda’s senior leadership and ISIS.”¹²⁸ the government asserts that the 2014 split between ISIL and current al-Qaeda leadership does not remove ISIL from coverage under the 2001 AUMF.¹²⁹ The government sees ISIS as the same organization that continues to wage hostilities against the United States since 2004, when it joined al-Qaeda in its conflict against the United States. In turn, the government appears to be adopting the “once an associated force, always an associated force” theory. Even if that was the government’s intension, this reasoning would be flawed. As the former CIA Director, Michael Hayden, declared in 2008, ISI was no longer a threat to the United States. The war against ISI was over. The U.S. dismantled the organization that it believed supported or aided al-Qaeda, that organization no longer exist. The AUMF does not grant the president unlimited power to start wars with every terrorist group it deems to be a threat to the United States, only against nations, organizations, or persons the president determines planned, authorized, committed, or aided the 9/11 attacks, or associates of those organizations. Even under the government’s own definition, ISIS does not fit this category. Therefore, the AUMF cannot be used as a tool to use military force against ISIS absent congressional approval.

V. CONCLUSION

¹²⁸ See the report, *supra* note 62.

¹²⁹ *Id.*

In conclusion, the Obama “associated forces” theory is not the proper tool to combat ISIS under the 2001 AUMF. ISIS cannot be considered an associate force of al-Qaeda because it does not satisfy the two-prong test. The theory was not sufficient in 2009 when it was first enacted, and it is still not sufficient in 2018 under the Trump Administration. Unless, the U.S. is prepared to adopt the “once an associate, always an associate” theory, ISIS does not meet its associated forces concept. Based on the research and analysis set forth in this article, the only possible time when ISIS was or should have been considered an associate force of al-Qaeda for purposes of the AUMF was at the start of its foundation when it’s every move depended on al-Qaeda’s guidance. The U.S. had its chance and seized it; it eliminated the threat that ISI presented until ISI “was no longer a threat to the U.S.”¹³⁰

The ISIS that exists today is not the same ISIS that existed under Bin Laden in 2004. This ISIS is an independent belligerent with little ties to 9/11. The government should consider modifying its two-prong test so that it is applicable to ISIS. This can be established by adding a third prong stating “any organization who at any time after 9/11 supports, protects, provides shelter, or shields al-Qaeda or the Taliban in an effort to protect them from U.S. military actions pursuant to the 9/11 attacks, is and will always be considered a co-belligerent in order to prevent any future terrorist attacks by such organizations or their successors. However, enacting a new ISIS specific AUMF might prove to be more effective than adding a third prong to the current test. Under the current conditions, the United States would need a separate Congressional authorization to attack ISIS either in Syria or Iraq. A new AUMF explicitly naming ISIS would

¹³⁰ See Whitney Eulich, *Al-Qaeda Disavowal of ISIS opens door to other jihadist groups*, the christian science monitor (Feb. 4, 2014), <http://www.csmonitor.com/World/Security-Watch/terrorism-security/2014/0204/Al-Qaeda-disavowal-of-ISIS-opens-door-to-other-jihadist-groups>.

certainly be sufficient to accomplish the government's goal. A new AUMF should state a clear purpose for which force is being authorized; a clear definition of targeted enemies, with a more precise definition of "associated forces"; compliance with domestic and international law; specify the ISIS AUMF provides the sole source of authority to use force against ISIS; and provide a sunset date.