

The US has been fighting ISIS for two years without explicit authority from Congress. That's perfectly normal.



UNDECLARED WAR

By Jennifer Hlad



Above: An F-15 drops a bomb aimed at an ISIS headquarters target in Iraq on Sept. 12. Here: A bomb dropped during that September mission destroys an ISIS headquarters and chemical weapons facility.

Images from USAF video by TSgt. Jeremy Roman



Since August 2014, the US has been at war with ISIS forces in Syria and Iraq, bombing fixed targets and providing close air support for Iraqi army troops and Kurdish Peshmerga fighters. But while Congress has provided funds to carry out this air campaign, it has—so far—not explicitly authorized this particular action as a “war,” and will probably never get around to it.

In fact, though the US has been involved in many armed conflicts over the last seven decades, the last time Congress actually declared war was some 75 years ago, after the Japanese attack on Pearl Harbor. Since then, the US has gone to war largely at the behest of the President, with Congress supplying some covering legislation after the fact, such as the Gulf of Tonkin Resolution that underpinned the Vietnam War.

The authorizing history for the current fight goes back 15 years.

■ On Sept. 14, 2001, Congress passed a joint resolution to authorize the use of military force “against those responsible for the recent attacks launched against the United States.” This was a response to the 9/11 attacks.

■ President George W. Bush signed the legislation on Sept. 18, 2001, and the Authorization for Use of Military Force, or AUMF, became law. Less than three weeks later, on Oct. 7, the US launched Operation Enduring Freedom in Afghanistan.

■ In October 2002, another AUMF—authorizing the use of force in Iraq—was

approved by Congress and became law; Operation Iraqi Freedom began about five months later, in March 2003.

■ On Aug. 7, 2014, President Barack Obama authorized the first air strikes against ISIS, beginning the campaign now known as Operation Inherent Resolve.

THE SCOPE OF AN AUMF

Instead of pushing for a new AUMF, though, the Obama administration argued in September 2014 that the actions against ISIS are covered by the 2001 legislation.

“I have the authority to address the threat” from ISIS, Obama said Sept. 10, 2014, announcing the creation of a “broad coalition” against the terrorist group. “But I believe we are strongest as a nation when the President and Congress work together. So I welcome congressional support for this effort.”

More than two years since that speech, the fight against ISIS has only intensified. Yet despite support from lawmakers on both sides of the aisle, there is still no AUMF specifically for OIR—and there may never be.

The 2001 AUMF states that the President “is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 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.”

Stephen W. Preston, general counsel for the Department of Defense, has argued that ISIS is covered by the authorization because it is associated with al Qaeda. In a 2015 address to the American Society of International Law, he said that while “the name may have changed,” the group now known as ISIS or ISIL “has been an enemy of the United States within the scope of the 2001 AUMF since at least 2004.”

He explained, “A power struggle may have broken out within [Osama] bin Laden’s jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day.”

Preston noted that while the 2002 AUMF allowed the use of force in Iraq based on the threat of Saddam Hussein’s regime, it “has always been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing the terrorist threats emanating from Iraq” and therefore authorizes military operations against ISIS in Iraq.

Michael E. O’Hanlon, a senior fellow in foreign policy at the Brookings Institution, told *Air Force Magazine* he believes using the 2001 war powers authorization for the current fight is legal because, “while its name and leadership have changed multiple times—and while ISIS is now in fact in direct competition with another al Qaeda derivative in Syria—both those groups have common origins, ideology, and to some extent, membership with



Maintainers ready an F-15E for the mission against ISIS targets on Sept. 12, 2016. US assets including A-10s, F-15Es, F-16s, F/A-18s, and B-52s participated in the strike package.

the original al Qaeda organization that carried out the 9/11 attacks.”

Sen. Tim Kaine (D-Va.), the 2016 Democratic nominee for vice president, disagreed.

At an April 28, 2016, Senate Armed Services Committee hearing, Kaine said he is “in a minority in this body in Congress in believing that the 2001 authorization does not provide a legal justification for this war. And I think that there isn’t a domestic legal justification unless and until we” so vote.

Then-Defense Secretary Ashton B. Carter responded that while he agrees with Kaine that a new AUMF would “signify to the troops that the country is behind them,” he believes the 2001 law for OIR is, in fact, legal.

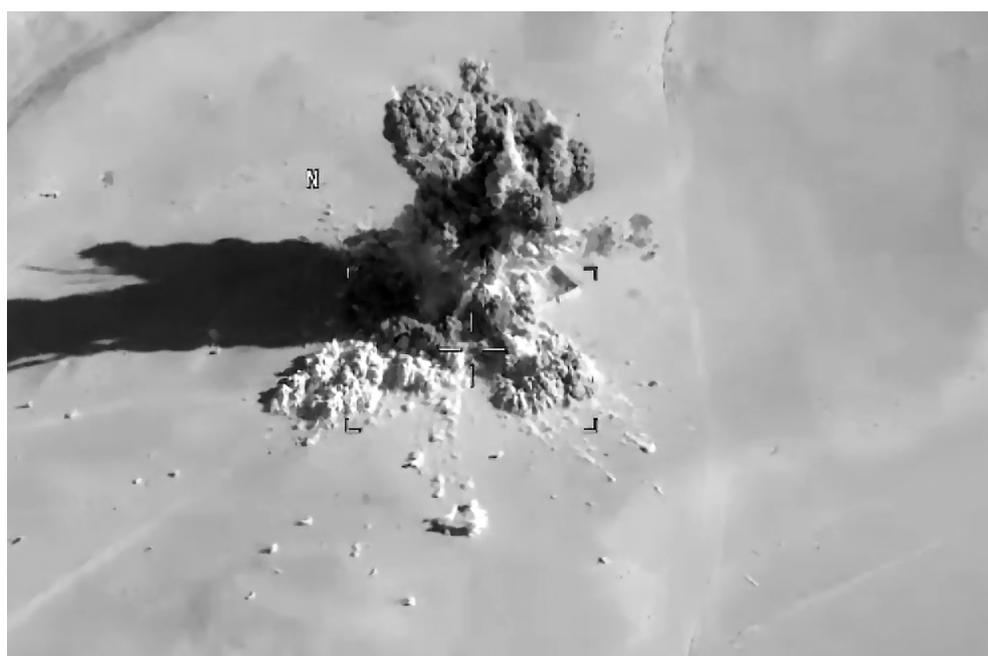
“I am told by the lawyers, and I believe this, that the legal basis ... exists in both domestic law and international law for everything we’re doing,” he said, adding that he’s not a lawyer and couldn’t explain the particulars.

The issue has been raised by Army Capt. Nathan Michael Smith, who in May sued Obama.

In the lawsuit, Smith wrote that he brought the legal action to ask the court “to tell the President that he must get proper authority from Congress, under the War Powers Resolution, to wage the war against ISIS in Iraq and Syria.”



USAF video image



The lawsuit was dismissed by a federal district court judge in November, however.

“This case raises questions that are committed to the political branches of government,” Judge Colleen Kollar-Kotelly wrote, according to a copy of the decision obtained by *The New York Times*. “The court is not well-equipped to resolve these questions, and the political branches [that] are so equipped do not appear to be in dispute as to their answers.”

The debate about how much power the President has over the use of military forces goes all the way back to the constitutional convention in 1787, explained retired Army Maj. Gen. John D. Altenburg, who served as deputy judge advocate general of the Army and is now a principal with the D.C. office of the Greenberg Traurig law firm. Altenburg is also a law lecturer at the George Washington University Law School.

The clause originally read “‘make war;’ and they specifically edited it and changed

and Italy). However, since the 1790s, Congress has passed statutory provisions authorizing the President to use military force in locations around the world. The Vietnam War and the Korean War were never “declared,” for instance.

ROOM FOR DEBATE

In 1973, Congress overruled a presidential veto to pass the War Powers Resolution, in hopes of ensuring that the “collective judgment of both the Congress and the President will apply to the introduction of United States armed forces into hostilities.”

Beyond explicit congressional authorization, there is an argument that if Congress has appropriated funds for a military operation, that provides enough authority for the President to continue using military force, Altenburg said.

“Congress can, in one vote, stop the funding,” he said.

use of military force to degrade and defeat ISIL.”

In a letter to Congress about the proposal, he stated that it would not authorize “long-term, large-scale ground combat operations” like the wars in Iraq and Afghanistan. Instead, it would “provide the flexibility to conduct ground operations in other, more limited circumstances, such as rescue operations involving US or coalition personnel.”

The draft included a suggested endpoint—three years after the date of enactment—and would repeal the 2002 Authorization for Use of Military Force against Iraq. However, it did not address the 2001 authorization, though Obama in the letter to Congress said he was committed to refining it.

“Enacting an AUMF that is specific to the threat posed by ISIL could serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF,” he wrote.

The proposal stalled in Congress, as Republican lawmakers argued for a less limited AUMF.

Then-House Speaker John A. Boehner (R-Ohio) said in a statement that “any authorization for the use of military force must give our military commanders the flexibility and authorities they need to succeed and protect our people. ... I have concerns that the President’s request does not meet this standard.”

Sen. John McCain (R-Ariz.), chairman of the Senate Armed Services Committee, said he was “pleased” that Obama had proposed an AUMF, but McCain confessed to “deep concerns” about aspects of the proposal, “including limitations placed on the constitutional authority of the Commander in Chief, the failure to articulate an objective for the use of military force, and a narrow definition of strategy.”

Other initiatives for a new AUMF—including versions sponsored by Sen. Lindsey O. Graham (R-S.C.), Rep. Adam B. Schiff (D-Calif.), Rep. Adam D. Kinzinger (R-Ill.), Sen. Robert Menendez (D-N.J.), and Kaine—have also failed to advance.

O’Hanlon said the problem is that “everyone wants to use the new legislation for their own, often conflicting, purposes. Hawks want to revalidate the war effort, doves want to curtail it in time or place or means. Thus, a new majority fails to emerge on any specific proposal.”



Above left: In an Air Force video, an F-15E backseater checks the area of operations during a mission. Left: USAF forces destroyed an ISIS training camp (shown here in a screenshot from a USAF video) near Raqqah, Syria, Nov. 19. Above: F-15s fly in formation. The Sept. 12 strike mission included four F-15s.

it to ‘declare war,’ the implication being, it’s the executive that actually makes war and conducts tactics and strategy and the like, but Congress is the only one that can declare war,” Altenburg told *Air Force Magazine*.

Since that time, there have been just 11 declarations of war for five wars from the War of 1812 through World War II (when the US declared war on Germany, Japan,

As for the question of whether a new AUMF is necessary, Altenburg said there is “room to debate on both sides, but there is room to say that the 2001 and 2002 authorizations for the use of force are adequate for ... conducting operations against al Qaeda, ISIS, and similar organizations.”

Even though Obama and administration officials said they didn’t need a new AUMF to pursue the fight against ISIS, Obama nevertheless sought one.

He called on Congress to pass a new AUMF in his January 2015 State of the Union speech, and in February of that year, he submitted a draft AUMF that he said would “authorize the continued

USAF video image by TSgt. Jeremy Roman



Image from USAF Central Command video

Left: An F-16 pilot signals to another aircraft during an Operation Inherent Resolve mission. The OIR air component comprises some 20 nations. Below: SSgt. Trevor Lowder, a contingency response group airman, on the flight line at Qayyarah West Airfield, Iraq, in November. CRGs rapidly deploy personnel to establish, expand, sustain, and coordinate air mobility operations at austere bases.

they don't like the one that the President has sent them, there's nothing wrong with that; they can turn around and pass an AUMF that they believe in their heart is the right sort of thing to do and show the unity of the Congress."

USAF photo by SrA. Jordan Castelan



Altenburg agreed.

"The difficulty in drafting another AUMF is, will there be an even bigger argument about how it would be restricted?" Altenburg asked. "We'll be in a debate that never ends" about what it should look like, he asserted.

So why pursue a new AUMF in the first place?

Preston, in his speech to the international-law society, said the most obvious reason the President would seek a new AUMF is that "the world needs to know we are united behind the effort against ISIL, and the men and women of our military deserve clear and unified support."

HERE'S TO A NEW AUMF

Chairman of the Joint Chiefs of Staff Marine Corps Gen. Joseph F. Dunford Jr. told the House Armed Services Committee in December 2015 that he "absolutely" believes "that a clear and unequivocal statement of support for the men and

women [who] are prosecuting the campaign and our allies from their elected officials" would be helpful.

O'Hanlon said a new AUMF could offer "greater precision and specificity."

It could "clarify that, for example, we shouldn't be using substantial numbers of US forces to attack Boko Haram, or a Salafist organization besides ISIS and al Nusra/Conquest Front in Syria, or another offshoot of the original movement that is too far away in location or too different in membership [or] leadership for the same single AUMF to cover that, too."

Retired Marine Corps Gen. James N. Mattis, the former head of US Central Command and nominee for Defense Secretary, in April 2016 told a group at the Center for Strategic and International Studies that an AUMF for the fight against ISIS "would again demonstrate American stability and focus on the region."

Referencing Congress' apparent inability to pass a new AUMF, he said: "If

Instead, he said, "they appear to be more willing to sit outside and criticize the President than to put themselves on the line and say, 'Here's where we stand.'"

Still, Obama seemed undeterred by the congressional inaction. In his January 2016 State of the Union address, he urged Congress to "take a vote" if members were "serious about winning this war." By late November, the administration was planning to expand the reach of the 2001 AUMF to include al Shabab in Somalia, according to *The New York Times*.

Lisa O. Monaco, Obama's top counterterrorism advisor, said in a statement that the terrorist threat "is constantly evolving and requires an adaptable response," the *Times* reported. ★

Jennifer Hlad is a freelance journalist based in the Middle East. Her most recent article for *Air Force Magazine* was "Separation Anxiety" in the February issue.