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CRISIS WITH ISIS: USING ISIS'S DEVELOPMENT TO ANALYZE "ASSOCIATED FORCES" UNDER THE AUMF

GABRIELLE LOGAGLIO

INTRODUCTION

Four days after the September 11th 2001 attacks on the World Trade Center and the Pentagon, the United States Congress introduced the Authorization for Use of Military Force (AUMF).¹ The bill was passed by both the House of Representatives and the Senate on the same day and was signed by President George W. Bush on September 18, 2001.² The AUMF granted the U.S. President the authority to use all "necessary and appropriate" force against "those responsible for the recent attacks launched against the United States."³ This authorization is unique in that it allowed the President to attack those responsible for the 9/11 attacks, regardless of both who the target is and where the target is located.⁴ Initially, the United States mainly used the AUMF to attack the Taliban and al Qaeda at its bases in Afghanistan and Pakistan.⁵ Subsequently, as al Qaeda expanded and developed affiliate groups, the AUMF was interpreted to include "associated forces" of al Qaeda and the Taliban.⁶ This interpretation allows the President to use force against al Qaeda-affiliated armed groups, as long as the target is deemed an associated force of those responsible for the 9/11 attacks, or al Qaeda.⁷ Since the AUMF does not actually contain the "associated forces" language, the Obama Administration has drawn an analogy to the concept of co-belligerency under the law of war.⁸ 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.⁹ Whether the law of war can be expanded to the United States' non-international armed conflict with al Qaeda and the Taliban is an unresolved questions that the international community is still debating about.¹⁰

1 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

2 *Id.*

3 *Id.* at § 2(a).

4 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).

5 *Id.* at 2108.

6 See *Hamli v. Obama*, 616 F. Supp. 2d 62, 64 (D.D.C. 2009) (recognizing that the AUMF allows "associated forces" of al Qaeda or the Taliban to also be detained under the AUMF).

7 *Id.*

8 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).

9 *Id.*

10 E.g. Ben Emmerson, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental*

Despite the ongoing debate, the Obama Administration currently relies on a standard established by Jeh Johnson, the current Secretary of Homeland Security, to determine which armed groups are associated forces of al Qaeda.¹¹ The Johnson Standard requires associated forces to have two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.¹² Johnson further elaborated on this standard by adding that the organization must not merely share al Qaeda's ideology, but must have actually entered the fight alongside al Qaeda.¹³

However, as al Qaeda has developed a more dispersed and nebulous network of affiliated forces it has become increasingly difficult to apply the associated forces doctrine.¹⁴ As many of those directly responsible for 9/11 have been either detained or killed, the Obama Administration has increasingly relied on the Johnson Standard to attack targets considered to be associated forces of al Qaeda, rather than members of al Qaeda itself.¹⁵ As the al Qaeda network spread, the Johnson Standard has allowed the Obama Administration to rely on the AUMF to authorize the use force against threats outside of the Afghanistan/Pakistan region.¹⁶ Specifically, the Obama Administration has cited the AUMF as its authorization to use force against al Qaeda in the Arabian Peninsula in Yemen¹⁷ and against individuals associated with al Shabaab in Somalia.¹⁸

The latest development in al Qaeda's network is the resurgence of an al Qaeda cell in Iraq.¹⁹ The group was initially know as al Qaeda in Iraq (AQI) and was led by Ayman al- Zarqawi.²⁰ Although AQI was initially successful in gaining territory, funds, and prestige inside Iraq, tensions

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).

11 *See* Johnson, *supra* note 8.

12 *Id.*

13 *Id.*

14 *See* Bradley & Goldsmith, *supra* note 4, at 2109 (explaining that al Qaeda has expanded to a loosely connected network of affiliated cells).

15 Rosa Brooks, *Mission Creep in the War on Terror*, FOREIGN POLICY (Mar. 14, 2013), http://www.foreignpolicy.com/articles/2013/03/14/mission_creep_in_the_war_on_terror (explaining that the United States has killed the majority of al Qaeda and the Taliban's senior leadership already and now the AUMF is mostly used to target franchises of al Qaeda).

16 *Id.* at 5.

17 Jack Goldsmith, *The Growing Problem of Extra-AUMF Threats*, LAWFARE (Sept. 30, 2010, 11:53 PM), <http://www.lawfareblog.com/2010/09/the-growing-problem-of-extra-aumf-threats/#.UvQZ7nddWGk> (explaining that the United States used the AUMF to target Al-Aulaqi and Al Qaeda in the Arabian Peninsula because the United States considered them an associated force of al Qaeda).

18 Bill Roggio, *US justified Somalia raid under AUMF, which Obama seeks to repeal*, THE LONG WAR JOURNAL (Oct. 8, 2013), http://www.longwarjournal.org/archives/2013/10/us_justifies_somalia.php (explaining that the United States used the AUMF's authority to target a senior al Shabaab leader, Adbikadir Mohamed Abdikadir, in Somalia).

19 Bill Ardolino, *The Resurgence of al Qaeda in Iraqnce Iraq, and in Syria, Jordan and Libya*, THE LONG WAR JOURNAL (Dec. 8, 2012 4:42 PM), http://www.longwarjournal.org/threat-matrix/archives/2012/12/the_resurgence_of_al_qaeda_in.php (summarizing how an al Qaeda affiliate in Iraq quickly developed once US forces left Iraq).

20 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>.

eventually developed between Osama bin Laden, the leader of Al Qaeda's core base and Zarqawi.²¹ Zarqawi was known for publicizing his brutal attacks, particularly those against Shias.²² Bin Laden and al Qaeda's senior leadership (AQSL) instructed Zarqawi to forgo such brutal tactics, particularly against Shias, because they were angering the Iraqi population and turning them against al Qaeda.²³ With the tensions between Zarqawi and Bin Laden unresolved, Zarqawi was killed in a U.S. airstrike in 2006.²⁴ Between 2006 and 2013, AQI tried to rebuild and establish a presence within Iraq.²⁵ However, the organization was unable to make substantial gains in Iraq.²⁶

In 2012, AQI reemerged with new leadership and a new name.²⁷ The organization became known as Islamic State in Iraq and Syria (ISIS) and was led by Abu Bakr al-Baghdadi.²⁸ This group quickly gained territory in Iraq by using brutal tactics that were reminiscent of Zarqawi's tactics.²⁹ ISIS then expanded into Syria to aid in the rebellion against Assad.³⁰ In Syria, tension began to build between ISIS and another al Qaeda affiliate, al Nusra. Baghdadi announced a merger between the two organizations, which al Nusra resisted.³¹ Zawahiri, the current leader of al Qaeda, annulled the merger.³² After the attempted merger, ISIS and al Nusra began fighting each other for dominance in the region.³³ After several months of infighting and an attempt at arbitration, Zawahiri disavowed ISIS in a statement released to a jihadist blog on February 3, 2014.³⁴ The statement admonished ISIS and Baghdadi for their infighting with al Nusra and their brutal and public attacks.³⁵ Zawahiri further asserted that al Nusra was the only al Qaeda affiliate in the region.³⁶ After the disavowal ISIS has successfully held onto territory inside of Iraq and continues to build up its base and expand into new territories in Syria.³⁷ It appears that ISIS intends to become its own, autonomous jihadist

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 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

26 *Id.* at 5.

27 *The Resurgence of al Qaeda in Iraq, Hearing before the Terrorism, Nonproliferation, and Trade Subcomm. and the Middle East and North Afr. Subcomm. of the House Comm. on Foreign Affairs*, 113th Cong. (2013) [hereinafter *The Resurgence*] (statement of Daniel L. Byman, Research Director, Saban Center for Middle East Policy).

28 *E.g.*, Laub, *supra* note 20, at 3.

29 *See id.* at 3 (explaining how ISIS has launches attacks against Iraqis).

30 *Id.* at 1.

31 *Id.* at 4.

32 *Id.*

33 *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).

34 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).

35 *Id.*

36 *Id.*

37 *See* Duraid Adnan, *Islamic Militants Extend Battle Into another Iraqi Province*, N.Y. TIMES, Feb. 4, 2014, http://www.nytimes.com/2014/02/06/world/middleeast/islamic-militants-extend-battle-into-another-iraqi-province.html?_r=0

insurgency, without the al Qaeda name.

During AQI/ISIS's development, the group fluctuated in how reliant and responsive AQI/ISIS was to AQSL.³⁸ Those fluctuations make it difficult to determine during which phases, if any, the United States could use force against or detain AQI/ISIS as an associated force of al Qaeda under the AUMF.³⁹ This paper aims to answer whether, and at what points of AQI/ISIS's development, the United States could use force against or detain them under the AUMF. This will begin with a discussion of the AUMF and its authorization to use force against and detain associated forces of al Qaeda. This section includes a section on co-belligerency and how this concept has informed the way the United States interpreted the AUMF to include associated forces of al Qaeda and the Taliban. This paper then breaks AQI/ISIS's development down into five phases and analyzes during which of those stages AQI/ISIS could be considered an associated force of al Qaeda, as defined by the Johnson Standard. This paper will then move to analyze whether the Johnson Standard is useful as more semi-automatous and nebulous al Qaeda-affiliated insurgencies develop.

The analysis of AQI's development into ISIS reveals the repetitive nature of the two-pronged Johnson Standard. In applying the Johnson Standard, it becomes readily apparent that Johnson's two prongs are actually one and the same. As articulated by Johnson, 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.⁴⁰ However, when a group has joined in the fighting with al Qaeda, they have also essentially become a co-belligerent with al Qaeda. Johnson and the Obama Administration state that they drew the definition of associated force from the concept of co-belligerency.⁴¹ Co-belligerency is defined as "fully fledged belligerent fighting in association with one or more belligerent powers."⁴² The language "entered the fight along side al Qaeda" and "co-belligerent of al Qaeda" is asking the same question. It is repetitive to examine the two-prongs as separate questions. To eliminate the repetitive language, this paper will analyze 1) whether the group is armed and organized, and 2) whether the group has joined the fight alongside al Qaeda. By using this analysis, this paper will eliminate the repetitive nature of the Johnson Standard and focus on the two real requirements in the Johnson Standard.

After applying the analysis modified to each of ISIS's five phases of development, this paper will conclude that the Johnson Standard is not useful in allowing the United States to target and detain groups affiliated with al Qaeda because when ISIS became threatening, the group

(explaining that ISIS has expanded into provinces neighboring Anbar); *see also* Memlik Pasha, *ISIS Insurgents Have Almost Surrounded Baghdad*, VICE NEWS (Apr. 29, 2014), <https://news.vice.com/article/isis-insurgents-have-almost-surrounded-baghdad> (explaining ISIS's expansion in Iraq and Syria and ISIS's position to invade Baghdad).

38 *See* Laub, *supra* note 20 (explaining AQI's origins and association with al Qaeda); *see also* Kirdar, *supra* note 25 (explaining AQI's development into ISIS and their return to reliance on al Qaeda).

39 *See* Karen DeYoung & Greg Miller, *Al-Qaeda's expulsion of Islamist group in Syria prompts U.S. Debate*, WASH. POST, Feb. 10, 2014 (explaining the debate surrounding whether ISIS can currently be considered an associated force of al Qaeda; the disavowal by al Qaeda would indicate no, while their longstanding connections to al Qaeda indicate yes).

40 Johnson, *supra* note 8, at 7.

41 *Id.*

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

separated from al Qaeda. If the goal of extending the AUMF to associated forces of al Qaeda was to allow the United States to combat terrorist organizations that are affiliates of al Qaeda, the Johnson Standard is not useful. If other al Qaeda affiliates follow a similar trajectory as ISIS, the Johnson Standard will not be useful in allowing the United States to target or detain those affiliated. The United States should either seek other legal authority to attack associated forces or decide to use soft-power alternatives (such as providing aid to host states) to combat the affiliates of al Qaeda. Although AQI began as an associated force of al Qaeda, and therefore its members could be targeted or detained under the AUMF, this paper will illustrate how ISIS developed into an autonomous group that could not be targeted under the AUMF. However, AQI's development into an autonomous group was not linear. In phase 1, AQI's conception until 2004, the AQI did meet the Johnson Standard for being an associated force of al Qaeda, and therefore, al Qaeda or its members could be targeted or detained by the United States. In phase 2, as AQI became more powerful and well-organized, the group became more autonomous and stepped away from being an associated force of al Qaeda. In phase 3, after Zarqawi's death in 2006, the group again weakened and was unable to withstand attacks from U.S. forces in Iraq. By 2008, AQI's presence in Iraq significantly diminished until the group was no longer considered a threat.⁴³ During phase 4 AQI resurged as ISIS and stepped closer to being an associated force of al Qaeda. ISIS's efforts were effective and the group quickly grew and expanded into Syria.⁴⁴ However, as ISIS gained power and no longer needed al Qaeda for support, the group became more autonomous and resisted al Qaeda's authority and control.⁴⁵ Finally, in phase 5, ISIS's ambitions and differing agenda from al Qaeda led al Qaeda to disavow the group, making ISIS an autonomous insurgency and excluding ISIS from being an associated force of al Qaeda.

AQI's non-linear development into current ISIS, an autonomous Iraqi insurgency, demonstrates a problem with the usefulness of the Johnson Standard; the AUMF does not allow the United States to attack or detain affiliates of al Qaeda when they are at their most threatening to the United States. As ISIS's development demonstrates, when the group was weak and posed little threat to the United States, ISIS relied more heavily on al Qaeda and was willing to submit to al Qaeda's authority. However, when the group gained power and became more threatening to the United States, ISIS separated from al Qaeda and functioned more autonomously. When ISIS is at its most threatening, it will act autonomously from al Qaeda and will therefore not be a lawful target under the AUMF. However when the group is weaker, it will recoil and again rely on al Qaeda for support, bringing the group closer to meeting the Johnson Standard for an associated force. Other al Qaeda affiliates, such as Armed Islam Group, al Shabaab, and AQIM have gone through similar patterns of only respecting al Qaeda's authority when the group needed to rely on al Qaeda's funding and resources for survival.⁴⁶ If other al Qaeda affiliates follow the same trajectory as ISIS,

43 See The Resurgence, *supra* note 27, at 124 (explaining that in 2008 AQI was significantly weakened and on the verge of collapse).

44 *Id.* (explaining that ISIS quickly became the dominant insurgency in the region and potentially the most important al Qaeda affiliate).

45 *Id.*

46 See generally Tricia Bacon, *Foreign Policy Essay: ISIS's rejection of al Qaeda - The End of an Era*, LAWFARE (Feb. 16, 2014) <http://www.lawfareblog.com/2014/02/the-foreign-policy-essay-isis-rejection-of-al-qaeda-the-end-of-an-era-2/>

the Johnson Standard will not allow the United States to target these groups when they are at their most threatening. If the United States wants to combat the presence of terrorist organizations associated with al Qaeda, the United States should either seek other legal authority (such as a new Congressional authorization) or use soft-power alternatives to combat the group's presence.

CHAPTER I: THE AUMF

PART 1: PASSING THE AUMF

The AUMF was introduced to the House and the Senate and passed both Chambers on September 14, 2001.⁴⁷ The bill passed in the Senate by 98 - 0 and in the House by 420-1, with Barbra Lee, a representative from California, being the only nay.⁴⁸ Lee opposed the bill for being a “blank check” and for giving the President an unprecedented amount of power.⁴⁹ The AUMF was signed into law on September 18, 2001, by President George W. Bush.⁵⁰

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.⁵¹ The law contains five “whereas” sections, a 60-word body, and a War Powers Clause. The AUMF begins by condemning the “acts of treacherous violence” committed on 9/11 and states that it is “both necessary and appropriate that the United States exercise its right of self-defense” in response to 9/11.⁵² This sentence invokes the United States’ inherent right to self-defense, as stated in the UN Charter.⁵³ The “whereas” section also invokes the President’s authority to take action to deter terrorism and protect the United States.⁵⁴ The binding body of the AUMF states that the President is authorized to use all “necessary and appropriate force” against “nations, organizations, or persons” that the President determines “planned, authorized, committed, or aided” or “harbored such organizations” in the 9/11 attacks.⁵⁵ Any target under the AUMF must be linked to responsibility for the 9/11 attacks. The bill then contains a section stating that the AUMF is consistent with the War Powers Resolution and not

(discussing the Armed Islamic Group’s separation from al Qaeda for similar reasons as ISIS’s separation as well as how al Shabaab has remained); *see also* William McCants, *How Zawahiri Lost al Qaeda*, FOREIGN AFFAIRS (Nov. 19, 2014) <http://www.foreignaffairs.com/articles/140273/william-mccants/how-zawahiri-lost-al-qaeda> (explaining how al Qaeda affiliates have been distancing themselves from al Qaeda as they encounter more opportunities to expand in their own region); *see also* Charles E. Berger, *The Balkanization of Al Qaeda*, THE NATIONAL INTEREST (Feb. 21, 2014) <http://nationalinterest.org/commentary/the-balkanization-al-qaeda-9912> (explaining the development of Al Qaeda’s affiliates and how those affiliates have become more distant from al Qaeda as they develop).

47 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

48 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-end-the-untold-story-of-the-most>.

49 *Id.*

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

51 *Id.*

52 *Id.*

53 U.N. Charter art. 51.

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

55 *Id.*

intended to override it.⁵⁶

President Bush and his Administration initially requested broader authority under the AUMF, but Congress was unwilling to give the President an even broader authorization.⁵⁷ Initially, the Bush Administration advocated for authority to “deter and pre-empt any future attacks of terrorism or aggression against the United States.”⁵⁸ President Bush’s initial draft of the AUMF did not contain a 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 pre-emptive force against terrorism anywhere in the world, regardless of whether there was a nexus between the target and the 9/11 attacks.⁵⁹ This draft would have allowed the United States to target AQI/ISIS at any point of their development if the President determined that the use of force was necessary to deter and pre-empt a future attack against the United States. Congress pushed back and refused to grant President Bush such a broad authorization.⁶⁰ 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.

Passing the AUMF as a Congressional authorization, rather than an executive order, gave the President’s actions more credibility.⁶¹ There is some debate as to whether the President could have acted unilaterally, without Congressional authorization, to retaliate in self-defense against those responsible for the 9/11 attacks.⁶² Presidential actions often lack Congressional authorization.⁶³ Here, Congress specifically authorized the use of force for the individuals responsible for the 9/11 attacks. Separate from U.S. domestic law, the United Nations Charter specifically allows a state to use self-defense in response to an armed attack under international law.⁶⁴ By invoking self-defense language in the AUMF, the Bush Administration was relying on principles already established in international law to authorize the use of force against al Qaeda and the Taliban.⁶⁵

PART 2: LIMITS ON THE AUMF’S USAGE

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 9/11 attacks.⁶⁶ Although the AUMF describes the target, it does not specify the target or the

56 *Id.* at §2(b).

57 *See* Bradley & Goldsmith, *supra* note 4, at 2079.

58 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).

59 *Id.*

60 *Id.*

61 *See* Bradley & Goldsmith, *supra* note 4, at 2050-51 (“[P]residential wartime acts not authorized by Congress lack the same presumption of validity”).

62 *Id.*

63 *See id.* (explaining that for most of the U.S. history, significant military engagements have been initiated without congressional authorization, i.e. the Korean War and the Kosovo bombing campaign).

64 *See* U.N. Charter, *supra* note 53.

65 *See* Bradley & Goldsmith, *supra* note 4, at 2050-51.

66 *See id.* at 2080-81 (explaining that the AUMF contains no additional limits on targets).

geographic location.⁶⁷ Subsequently, as the AUMF has been interpreted to include the associated forces of al Qaeda and the Taliban. As a result, the AUMF has lost some specificity and has been interpreted more broadly, even though the 9/11 nexus remains in place. This section will first address the methods of force that can be used, including where the United States can use force, and who can be targeted under the AUMF. This paper will then address how the concept of co-belligerency, from the law of war, was used to interpret the AUMF to include associated forces of al Qaeda and the Taliban, thus expanding who could be targeted or detained under the AUMF.

The AUMF gives the President discretion to choose the method, location, and target of the use of force, as long as the target can be linked back to those responsible for the 9/11 attacks.⁶⁸ The AUMF places no explicit limits on the methods of attack that the President may use to target those responsible for the 9/11 attacks.⁶⁹ The AUMF dictates that the President may use all “necessary and appropriate force.”⁷⁰ Aside from previously standing international law, the language of the AUMF places no limits on the President’s resources or methods in launching attacks.⁷¹ The U.S. Supreme Court has interpreted this language to include all typical types of wartime measures, specifically stating that the AUMF authorizes the President to detain those suspected of aiding in the 9/11 attacks.⁷² The Department of Justice has also interpreted the “necessary and appropriate force” language to allow for the use of unmanned drone strikes against those responsible for the 9/11 attacks or their associated forces.⁷³ The AUMF authorizes the President to use any methods or resources to target or detain those responsible for the 9/11 attacks as long as it comports with the “necessary and appropriate force” language contained within the AUMF.

The AUMF contains no geographical limit on where the President may launch an attack or detain an individual.⁷⁴ The AUMF describes who can be targeted and does not name a specific state or region against which the President may use force.⁷⁵ The language of the AUMF implies that the President may launch an attack anywhere in the world as long as the target of the attack can be linked back to culpability in the 9/11 attacks.⁷⁶ The President has discretion to use force wherever he determines that a valid target is located.

The AUMF does not specify who may be targeted under the AUMF; the only requirement is that the target be linked back to responsibility for the 9/11 attacks.⁷⁷ The AUMF authorizes the President to use force against any “nation, organization, or persons” that the President determines

67 *Id.* at 2082.

68 *Id.* at 2080-82.

69 *Id.* at 2078-79.

70 *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

71 *See* Bradley & Goldsmith, *supra* note 4, at 2078-79.

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

73 U.S. Dep’t of Justice, *Dep’t of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, Draft, (Nov. 8, 2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_WhitePaper.pdf.

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

75 *See* Bradley & Goldsmith, *supra* note 4, at 2082.

76 *Id.* at 2079-80.

77 *Id.*

“planned, authorized, committed or aided” in the 9/11 attacks.⁷⁸ Of the “nation, organization, or persons” language, “persons” has been the most problematic to interpret.⁷⁹ Typically authorizations to use force are against states, making this part of the authorization not unusual or problematic.⁸⁰ Authorizations to use force do not usually authorize force against specific persons, which is not unusual or problematic.⁸¹ The greatest difficulty in allowing specific individuals to be targeted is in determining what level of support or membership a person detained under the AUMF must have provided to al Qaeda.⁸² The President resolved this dilemma requiring that an individual provide “material support” to al Qaeda or the Taliban against the United States or its coalition partners in order to be detained under the AUMF.⁸³ Individuals can only be targeted with lethal force under the AUMF when they are members of al Qaeda, the Taliban, or an associated force.⁸⁴ The term “organizations” has been defined to include core al Qaeda and the Taliban.⁸⁵ Including “organizations” in the AUMF allows the President to target new members of al Qaeda and the Taliban and members that were not apart of the planning or execution of the 9/11 attacks.⁸⁶ These individuals could not be targeted under the “persons” language of the AUMF because they, as individuals, do not have a nexus to the 9/11 attacks.⁸⁷ However, by targeting them as being a member of an organization that does have a nexus to the 9/11 attacks, the United States may target new generations of core al Qaeda under the AUMF.⁸⁸ The AUMF gives the President broad discretion to determine who or which organizations can be targeted under the AUMF.⁸⁹

Finally, the AUMF contains no end date or sunset clause, allowing it to exist until Congress takes action to repeal the bill.⁹⁰ Congress must take affirmative action to repeal the AUMF.⁹¹ 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.⁹² Although there have been proposals to repeal the AUMF or set a sunset date, these bills have been unable to garner support in either chamber. Most recently, Representative Adam Schiff introduced a bill that

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

79 See Bradley & Goldsmith, *supra* note 4, at 2107-11 (arguing that persons who were not involved with 9/11 may stay fall under the AUMF for belonging to associated organizations).

80 See *Id.* at 2107-11.

81 See *Id.* at 2108.

82 See *Id.*

83 See Military Commissions Act of 2009, 10 U.S.C. § 47 (2009) (concluding that an individual will be targeted if they provide “material support or resources” to a terrorist organization).

84 *Id.*

85 See Bradley & Goldsmith, *supra* note 4, at 2107-11 (arguing that persons who were not involved with 9/11 may still fall under the AUMF for belonging to associated organizations).

86 *Id.* at 2109.

87 *Id.*

88 *Id.* at 2109-10.

89 *Id.* at 2082.

90 See Johnsen, *supra* note 48 (stating that when Congress drafted this legislation no one looked ahead to when the war would end so they failed to set a day in which the legislation would end).

91 *Id.*

92 *Id.*

would sunset the AUMF by 2015, however, it was initially defeated in the House.⁹³ President Obama has publicly stated that al Qaeda is on the “path of defeat” and he looked forward to repealing the AUMF.⁹⁴ Currently, a year after President Obama’s statement, he has made no efforts to repeal the AUMF.⁹⁵ In a Senate hearing on May 20, 2014, the President was criticized by law makers for making no efforts to repeal the AUMF.⁹⁶ Representative Schliff has reintroduced his bill to sunset the AUMF by 2015 and it was debated in the House on May 20, 2014.⁹⁷

PART 3: CO-BELLIGERENCY AND THE INCLUSION THE “ASSOCIATED FORCES” TO THE AUMF

As al Qaeda developed affiliates in other countries, the United States has interpreted the AUMF to allow for the use of forces against “associated forces” of al Qaeda and the Taliban.⁹⁸ The associated forces language does not actually appear in the text of the AUMF.⁹⁹ The United States sought legal authority as the basis for including associated forces under the AUMF.¹⁰⁰ The United States has relied on the concept of co-belligerency, which is already established in international law, in including associated forces of al Qaeda and the Taliban under the AUMF.¹⁰¹ Although principles of co-belligerency are firmly established under the law of war, the concept had not previously been applied to a non-state actor and its affiliates.¹⁰² Scholars and practitioners alike have questioned whether the United States has overextended the concept of co-belligerency in reading the AUMF to include associated forces of al Qaeda and the Taliban.¹⁰³ Despite a lack of precedent, the United

93 Sunset to the Authorization for Use of Military Force Act, H.R. Res. 2324, 113th Cong. (2013).

94 President Barack Obama, Address at the National Defense University (May 23, 2013).

95 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).

96 *Id.*

97 *Id.*

98 See Brooks, *supra* note 15 (arguing that once the United States had targeted or detained a majority of those responsible for the 9/11 attacks, the United States then expanded the AUMF to include associated forces, who were more attenuated from the 9/11 perpetrators).

99 See Authorization for Use of Military Force § 2(a) (showing no language of “associated forces” in the AUMF); see also Johnson, *supra* note 8 (explaining that the phrase “associated forces” language is not in the AUMF).

100 See Brooks, *supra* note 15 (explaining how the “associated forces” language was slowly included into how the AUMF is interpreted).

101 See Johnson, *supra* note 8 (explaining that the definition of “associated forces of Al Qaeda are groups that amount to co-belligerents of Al Qaeda).

102 Kevin Jon Heller, *The ACLU/CCR Reply Brief in Al-Aulaqi (and My Reply to Wittes)*, OPINIO JURIS (Oct. 9, 2010), <http://opiniojuris.org/2010/10/09/the-aclu-ccr-reply-brief-in-al-aulaqi-and-my-reply-to-wittes/> (arguing that co-belligerency only exists in an international armed conflict and cannot be applied to a non-international armed conflict).

103 See generally Emmerson, *supra* note 10 (critiquing the United States for using co-belligerency principles to target al Qaeda); see also Christof Heyns, *Report of the Special Rapporteur on extrajudicial summary or arbitrary executions*, UNITED NATIONAL GENERAL ASSEMBLY (Sept. 13, 2013), <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx> (explaining that the United States cannot use principles of co-belligerency to target associated forces of al Qaeda); see Kevin Jon Heller, *D.C. Circuit Rejected “Co-Belligerency” in Al-Bibani*, OPINIO JURIS (Oct. 17, 2010), <http://opiniojuris.org/2010/10/17/dc-circuit-rejects-co-belligerency> (arguing that the D.C. court rejected the government’s use of co-belligerency principles); see Jack Goldsmith, *The D.C. Circuit Has Not Rejected Co-Belligerency*,

States readily drew an analogy between traditional co-belligerency between states and al Qaeda's relationship with affiliated armed groups.¹⁰⁴ The United States used this analogy to define the Johnson definition of an associated force of al Qaeda or the Taliban.¹⁰⁵ To fully understand the debate surrounding the United States' use of co-belligerency principles, this section will first discuss how co-belligerency functions under the law of war. With that understanding, this section will analyze how the United States has incorporated those ideas into defining the associated forces of al Qaeda and the Taliban and outline the critiques of the United States' application of co-belligerency to groups affiliated with al Qaeda.

Under international law, there are two general types of armed conflicts, international armed conflicts (IACs) and non-international armed conflicts (NIACs).¹⁰⁶ The International Committee of the Red Cross (ICRC) has defined IACs as conflicts with two or more opposing states.¹⁰⁷ The ICRC has defined NIACs as armed conflicts between governmental forces and non-governmental armed groups or between only non-governmental armed groups.¹⁰⁸ The law of war, including the Geneva Conventions, governs IACs.¹⁰⁹ NIACs are not as well defined and subsequently are not as strictly governed under international law.¹¹⁰ Co-belligerency is well-defined and incorporated into the law of war governing IACs. A co-belligerent is a state that has entered a conflict alongside another belligerent, itself becoming a belligerent and a party to the conflict.¹¹¹ A co-belligerent state is a "fully fledged belligerent fighting in association with one or more belligerent powers."¹¹² 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.¹¹³ 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.¹¹⁴ 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.

LAWFARE (Oct. 18, 2010), <http://www.lawfareblog.com/2010/10/the-d-c-circuit-has-not-rejected-co-belligerency> (arguing that the D.C Circuit Court is relying on co-belligerency principles in determining the associated forces of Al Qaeda).

104 See Johnson, *supra* note 8 (drawing an analogy between co-belligerency and the groups that the United States deems associated forces of Al Qaeda).

105 *Id.*

106 *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>.

107 *Id.* at 1.

108 *Id.*

109 *Id.* at 1-2.

110 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").

111 See *id.* at 90 (explaining that under the concept of co-belligerency, a state may enter the conflict along side a belligerent, therefore becoming a co-belligerent).

112 See Greenspan, *supra* note 42.

113 Convention (III) relative to the Treatment of Prisoners of War, art. 4A (commentary), Aug. 12, 1949, 75 U.N.T.S. 135.

114 See Ingber, *supra* note 110, at 96.

During an IAC, a state may use force against a co-belligerent of its enemy without an additional authorization or declaration of war.¹¹⁵ For example, when Vichy France entered into World War II alongside Germany, the U.S. President did not need additional authorization to use force against this new party to the conflict because it was considered an ally or co-belligerent of Germany.¹¹⁶ However, any use of force against a co-belligerent is still constrained by the law of war and *Jus in Bello* principles of necessity, distinction, and proportionality.¹¹⁷

Although co-belligerency is well defined in IACs, co-belligerency has not been as readily extended to NIACs. Co-belligerency has its roots in state-centric neutrality law.¹¹⁸ Neutrality law addresses the rights and responsibilities of states that are not enemies in a conflict. Each state has an obligation to remain neutral while an IAC is taking place.¹¹⁹ Remaining neutral means that a third-party must not support one party to a conflict over another.¹²⁰ Small infringements are not sufficient to turn a third-party into a co-belligerent.¹²¹ 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.¹²² Neutrality law only binds states.¹²³ Individuals or organizations are free to provide support to a belligerent in a conflict without it violating their host state's neutrality.¹²⁴ Since neutrality law is an inter-state concept, it remains unclear to what extent it can be applied to non-state actors in a non-international armed conflict.¹²⁵

Despite the uncertainties surrounding how co-belligerency may or may not extend to NIACs, 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.¹²⁶ The Supreme Court of the United States determined that the United States is engaged in a NIAC with al Qaeda and the Taliban.¹²⁷ However, as al Qaeda has developed affiliated cells in other countries, the United States has read the AUMF to also authorize the United States to use force against associated forces of al Qaeda and the Taliban.¹²⁸ Since the associated forces language does not appear in the AUMF itself, the Obama Administration has drawn an analogy to co-

115 See Bradley & Goldsmith, *supra* note 4, at 2111-12.

116 *Id.*

117 See Ingber, *supra* note 110, at 81-83 (explaining that *jus in bello* must operate with the “principle of humanity”).

118 *Id.* at 88.

119 *Id.*

120 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).

121 *Id.*

122 *Id.* at 87-88.

123 *Id.*

124 *Id.*

125 *Id.* at 88.

126 See Johnson, *supra* note 8 (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).

127 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”).

128 See Brooks, *supra* note 15 (arguing that the US has expanded the AUMF to include associated forces, who were more attenuated from the 9/11 perpetrators).

belligerency for its authority to attack associated forces of al Qaeda.¹²⁹ According to the analogy, since the law of war allows a state to attack a co-belligerent of its enemy, the law surrounding NIACs similarly allows the United States to target and detain those organizations that have joined al Qaeda and the Taliban in their conflict with the United States.¹³⁰ The Johnson Standard even requires that the actor be a “co-belligerent” of al Qaeda or the Taliban to determine whether an organization is an associated force.¹³¹ Both the Federal Courts and Congress have recognized that the AUMF authorizes the United States to detain associated forces of those responsible for 9/11.¹³²

Despite the Federal Courts recognition that the AUMF allows the United States to detain associated forces of al Qaeda, there is a debate within the courts on whether an associated force essentially amounts to a co-belligerent.¹³³ In *Hamlily*, the court held that the government has the authority to detain members of the associated forces of al Qaeda as long as those forces would be considered co-belligerents under the law of war.¹³⁴ The court stated, “Like many other elements of the law of war, co-belligerency is a concept that has developed almost exclusively in the context of international armed conflicts. However, there is no reason why this principle is not equally applicable to non-state actors involved in non-international conflicts.”¹³⁵ The *Hamlily* Court acknowledges that co-belligerency is not inherent to NIACs, but decides that there is no reason not to expand co-belligerency to NIACs.¹³⁶

Conversely, the *Al-Bihani* court described the government’s attempt to apply co-belligerency to a non-state actor as “folly,” arguing that the law surrounding state-based conflicts (IACs) cannot be applied to a conflict involving non-state actors.¹³⁷ The *Al-Bihani* court ultimately held that the law of war could not constrain U.S. domestic law.¹³⁸ The court held that Al-Bihani could be detained under the AUMF for his membership in a group that supported the Taliban, regardless of what the law of war permitted.¹³⁹ The court found no legal basis to expand co-belligerency to a non-state actor.¹⁴⁰

129 See Johnson, *supra* note 8 (concluding that the United States is allowed to ultimately target and detain organizations that have joined Al Qaeda and the Taliban).

130 *Id.*

131 *Id.*

132 See *Hamlily v. Obama*, 616 F. Supp. 2d 62, 64 (D.D.C. 2009) (holding that the United States can detain associated forces of al Qaeda if those forces amount to co-belligerents); see also National Defense Authorization Act for Fiscal Year 2012, Pub.L. No. 112–81, § 1021(b)(2), 125 Stat. 1298 (Dec. 31, 2011).

133 See *id.* at 75 (interpreting “associated forces” of al Qaeda to mean co-belligerents as the term is understood under the law of war); but see *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (holding that principles, like co-belligerency, that are based in the law of war, cannot be applied to NIACs).

134 See *Hamlily*, 616 F. Supp. at 78 (holding that the President may detain an individual who has committed or participated in a belligerent act to help in aiding enemy combatants).

135 *Id.* at 74.

136 *Id.*

137 *Al-Bihani*, 590 F.3d at 873 (D.C. Cir. 2010).

138 See Jack Goldsmith, *The D.C. Circuit Has Not Rejected Co-Belligerency*, LAWFARE (Oct. 18, 2010), <http://www.lawfareblog.com/2010/10/the-d-c-circuit-has-not-rejected-co-belligerency> (explaining that the Presiding Judge in *Al-Bihani* did not reject applying co-belligerency in NIACs, but instead intended it to not limit the AUMF’s authority).

139 *Al Bihani*, 590 F.3d at 885.

140 *Id.* at 873.

While some scholars agree with the United States' analogy to co-belligerency in the conflict with al Qaeda and the Taliban, there is also doubt as to whether the principle can be so easily extended to NIACs.¹⁴¹ On one hand, Goldsmith and Bradley argue that the United States has properly expanded co-belligerency to extend to NIACs.¹⁴² They argue that associated forces that "participate with al Qaeda in acts of war against the U.S. or systematically provided military resources to al Qaeda" amount to co-belligerents of al Qaeda and can be targeted and detained under the AUMF.¹⁴³ However, on the other side of the debate, there is significant doubt as to whether a principle based state-centric law of war can be extended to NIACs, where one party is not a state.¹⁴⁴ Scholars in opposition to Bradley and Goldsmith argue that there is no justification for the government to import the concept of co-belligerency to a NIAC and that incorporating the concept of co-belligerency to NIACs would expand the law surrounding NIACs too broadly without placing any clear limits on how the concept would be applied.¹⁴⁵

Two United Nations reports challenge whether the concept of co-belligerency can be extended to NIACs, particularly, in the United States' conflict with al Qaeda. First, the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Heyns Report) concludes that in a NIAC where individual targets are not a part of the same command or control structure as the non-state actor or are not a part of a singular military structure, the individual should not be viewed as part of the same group, even if the two groups are associated.¹⁴⁶ The report implies that the United States cannot target individuals that are members of groups that are associated with al Qaeda unless the group has an integrated command structure with al Qaeda.¹⁴⁷ The Heyns Report specifically states that many of the non-state actors that currently associate with al Qaeda do not possess the integrated command structure with al Qaeda that would justify considering them the same actor participating in a NIAC.¹⁴⁸ Heyns concludes that a state can only attack an associated force when the intensity of violence between the associated force and the state crosses the intensity threshold for creating a separate NIAC.¹⁴⁹ The Heyns Report concludes that the concept of co-belligerency cannot be expanded to NIACs because to do so would open the door too broadly and expand whom a state could target without clear limits.¹⁵⁰

The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Emmerson Report) reached a similar conclusion as the Heyns Report. First, the Emmerson Report concluded that to use force against an armed non-state actor located in another state, a state must obtain consent from the host state, the actions of the non-state actor must be attributable to the host state, or the Security Council must

141 See Bradley & Goldsmith, *supra* note 4, at 2111-13; see *Heller*, *supra* note 103.

142 See Bradley & Goldsmith, *supra* note 4, at 2111-13.

143 *Id.* at 2113.

144 See, e.g., *Heller*, *supra* note 103 (arguing that co-belligerency can not exist in non-international armed conflict).

145 *Id.*

146 See Heyns, *supra* note 103, at 17-18.

147 *Id.* at 10.

148 *Id.*

149 *Id.* at 13.

150 *Id.*

pre-approve the action.¹⁵¹ If none of these conditions are met, a state has unlawfully violated the sovereignty of the host state.¹⁵² While the United States has asserted that its right to self-defense entitles the to United States to engage in non-consensual military operations against armed groups, the Emmerson Report concludes that international law does not allow this.¹⁵³ Further, the report requires that a non-state actor have an integrated command structure or launch joint military operations to be considered either an associated force or a co-belligerent of al Qaeda.¹⁵⁴ This standard is similar to the Heyns Report. The Emmerson Report doubts that the United States has properly applied principles of co-belligerency to the al Qaeda affiliates.¹⁵⁵

Despite the ongoing debate surrounding whether the concept of co-belligerency can be extended to NIACs and the UN reports rejecting that al Qaeda affiliated groups can amount to co-belligerents, the United States is still targeting and detaining members of associated forces of al Qaeda under the AUMF.¹⁵⁶ Given the controversy in expanding the AUMF to include associated forces, the United States has had a difficult time in defining which of al Qaeda's affiliates amount to co-belligerents or associated forces of al Qaeda. The next section discusses how the United States extended the AUMF to cover associated forces of al Qaeda and the Taliban and how the United States has determined which groups qualify as associated forces under the AUMF.

PART 4: THE INCLUSION OF ASSOCIATED FORCES INTO THE AUMF

Currently, many of those responsible for the 9/11 attacks have either been killed or detained and the AUMF is largely used to target the associated forces of al Qaeda.¹⁵⁷ The inclusion of "associated forces" in the AUMF is a more recent development that developed through later interpretation of the AUMF. Although the inclusion of associated forces of al Qaeda under the AUMF is based on principles of co-belligerency, the associated forces doctrine has gained its own basis and definition in domestic law through the Obama Administration, Congress, and the Federal Courts.¹⁵⁸

As mentioned in the above section, the Federal Courts first recognized that associated forces

151 Emmerson, *supra* note 10, at 14-16.

152 *Id.* at 16.

153 *Id.*

154 *See id.* at 19 (questioning whether an associated force must have an operational connection with the host state in order to invoke the international law principle of self defense).

155 *See id.* (arguing that the United States interpretations of international legal principles run contrary to international consensus).

156 *See* Johnson, *supra* note 8 (justifying the United State's use of co-belligerency in defining the associated forces of al Qaeda).

157 *See* Brooks, *supra* note 15 (explaining that the United States has killed the majority of al Qaeda and the Taliban's senior leadership already and now the AUMF is mostly used to target franchises of al Qaeda).

158 *See generally* Johnson, *supra* note 8 (explaining the Obama Administration definition of associated forces); *see also* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 § 1021(b) (2011); *Hamlily*, *supra* note 6.

of al Qaeda could be included in the AUMF in *Hamhily v. Obama*.¹⁵⁹ In *Hamhily*, the District Court held that the AUMF authorized the United States to detain individuals that were “part of” the forces of organizations that could be targeted under the AUMF.¹⁶⁰ The court further held that the United States could detain members of “associated forces” of the organizations that could be targeted or detained under the AUMF.¹⁶¹ The court held that the AUMF did not permit the government to detain individuals who provided “substantial support” to, but were not a “part of,” a targeted organization.¹⁶² Despite the court’s recognition of the inclusion of associated forces, the court did not specifically define “associated forces.”¹⁶³ Judge Bates, the presiding judge of the *Hamhily* court only defined “associated forces” as forces that must be actually associated with al Qaeda or the Taliban within their current conflict with the United States, not simply terrorist organization that share the same philosophy or common purpose as al Qaeda.¹⁶⁴ The *Hamhily* opinion was the first explicit affirmation that the AUMF extended to the associated forces of al Qaeda and the Taliban.

After the *Hamhily* opinion, Congress recognized that the AUMF authorized the United States to use force against al Qaeda, the Taliban and their associated forces in 2011.¹⁶⁵ In 2011, the House Armed Services Committee approved a measure entitled *Affirmation of Armed Conflict with Al-Qaeda, the Taliban, and Associated Forces* (Affirmation).¹⁶⁶ This measure affirmed that the United States is:

[E]ngaged in an armed conflict with al-Qaeda, the Taliban, and associated forces” and that the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces Pursuant to the Authorization for Use of Military force.¹⁶⁷

Although this affirmation is not binding law, it is still the first time that Congress explicitly recognized that the United States could use force against the associated forces of al Qaeda under the AUMF. The Affirmation did not define or provide any criteria for “associated forces.”

Both Congress and the Federal Courts left it to the President to determine how to define “associated forces.” Neither the *Hamhily* court nor the Affirmation provided a workable and practical

159 See *Hamhily*, 616 F. Supp. at 62 (explaining the Federal Courts Act for Fiscal Year 2012, Pub.L. No. 112rces); 1021(b)(2).

160 See *id.* at 70 (recognizing that the court allows individuals that were e No of” legally targeted organizations to also be detained under the AUMF).

161 See *id.* (showing that the scope of who can be detained under the AUMF had expanded).

162 See *id.* (explaining the limit the court set on who can be detained under the AUMF).

163 See Goldsmith, *supra* note 17 (explaining that Judge Bates’ definition of associated forces does not speak to what level of association an affiliate must have to and does not address the groups that are cooperative while having their own agenda).

164 See *Hamhily*, 616 F. Supp. at 75 (explaining the Court decision to limit the scope of the AUMF with regards to associated forces).

165 See National Defense Authorization Act for 2012, H.R. 1540, 112th Cong., §1034 (2011) (showing Congressional affirmation of the Hamhily opinion).

166 See *id.* (referring to the title of the approved measure).

167 See *id.* at §1034(1)-(2).

definition for determining which organizations were associated forces of al Qaeda.¹⁶⁸ The President was left to come to his own determination on which organizations were included as associated forces under the AUMF. Although the associated forces language was not approved by the *Hamli* court until after the Bush Administration left office, their definitions of who could be targeted under the AUMF preceded the Obama Administration's policies towards the AUMF.¹⁶⁹ The Obama Administration drafted policies that were similar to the Bush Administration policies on who could be either targeted or detained under the AUMF and how they would define associated forces of al Qaeda and the Taliban.¹⁷⁰

The Bush Administration did not define associated forces, but allowed individuals and organizations to be targeted for providing "support" to al Qaeda or the Taliban.¹⁷¹ The Bush Administration initially relied on the AUMF and, as an alternative, the President's Article II powers to detain members of both al Qaeda and the Taliban.¹⁷² However, by 2005 the Bush Administration relied on the AUMF alone to target and detain individuals that were members of or provided support to al Qaeda and the Taliban.¹⁷³ On November 13th, 2001, President Bush issued *The Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism Order*, (Order) which defined who, in the conflict against al Qaeda and The Taliban, was considered an enemy combatant and who could be detained or targeted.¹⁷⁴ This Order included individuals who were either currently or previously members of al Qaeda and:

[A]ided or abetted, or conspired to commit acts of international terrorism, or act in preparation therefor, that have caused, threaten to cause, or have as their aim to cause injury to or adverse effects on the United States, its citizens, national security, foreign policy or economy.¹⁷⁵

The Order also included those who harbored anyone who fit the above criteria.¹⁷⁶ Individuals that

168 See Goldsmith, *supra* note 17 (explaining that Judge Bates' definition of associated forces does not speak to what level of association an affiliate must have to and does not address the groups that are cooperative while having their own agenda); see also National Defense Authorization Act (providing no definition or criteria for an associated forces of al Qaeda).

169 See generally, Jack Goldsmith, *Detention, the AUMF, and the Bush Administration- Correcting the Record*, LAWFARE (Sep. 14, 2010), <http://www.lawfareblog.com/2010/09/detention-the-aumf-and-the-bush-administration-correcting-the-record/#.UvVX8nddWGk> (explaining the differences between the Bush Administration policy on targeting individual under the AUMF and the Obama Administration policy and that Obama embraced many of the Bush Administration policies).

170 See *id.* (comparing Bush and Obama policies regarding targeting under the AUMF).

171 See *id.* (explaining that the Bush Administration interpreted the AUMF to allow the US to dean those who "support" terrorist groups).

172 See *id.* (arguing that although the Bush Administration did rely on its Article II power as an alternative to the AUMF for detention authority).

173 See *id.* (showing the President's reliance on the AUMF to justify targeting methods).

174 See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (specifying the criteria for targeting and detention).

175 See *id.*

176 See *id.* (showing the addition of reliance on the AUMF to justify taa to be targeted).

fit into the above criteria were considered enemy combatants and could be targeted or detained.¹⁷⁷ The Bush Administration used “enemy combatant” language and detained and tried “enemy combatants” by military commission under the President’s war powers.¹⁷⁸ Although this Order was written before either Congress or the courts had used the “associated forces” language to target affiliates of al Qaeda under the AUMF, this Order defined co-belligerents and informed who was considered an associated with al Qaeda.¹⁷⁹

Although the Obama Administration abandoned the enemy combatant language that the Bush Administration had relied on, there was not a significant change in the way the AUMF was applied.¹⁸⁰ In 2009, United States Attorney General, Eric Holder issued a statement that the Obama Administration would stop using the enemy combatant language and the Obama Administration would stop using the enemy combatant language and the “support” standard that the Bush Administration had used to determine who could be detained under the AUMF.¹⁸¹ In 2010, the Obama Administration determined that the AUMF authorized the detention of “persons who were part of, or substantially supported, the Taliban, or al Qaeda, or its associated forces.”¹⁸² Although this standard reads as a higher bar than the Bush Administration standard of just providing “support” for al Qaeda, the two standards were applied similarly and there was no significant difference between them.¹⁸³ Further, the Obama Administration did not define who was considered an associated force of al Qaeda until 2012.¹⁸⁴ Although the Obama Administration decided to forgo the Bush Administration language, the Obama Administration did not issue significantly different policies as to who could be detained under the AUMF.

In the 2012 National Defense Authorization Act (NDAA), the Obama Administration solidified its definition of associated forces of al Qaeda or the Taliban by codifying its own standard.¹⁸⁵ The NDAA affirmed the United States’ authority to detain persons covered by the AUMF. The Act defined a covered person as either:

- (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for this attacks, (2) a person who was part of or substantially supported al-Qaeda, the Taliban or associated forces

177 *See id.*

178 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 §948b (2006) (explaining the use of the term “enemy combatant” to try detained persons).

179 *See id.* § 948a(1) (showing the relation between the Order and the Military Commissions Act).

180 *See* Goldsmith, *supra* note 17 (explaining the Obama Administration interpretation of AUMF).

181 *See* Randall Mikkelsen, *Guantanamo Inmates no Longer “Enemy Combatants”*, REUTERS (Mar. 14, 2009), <http://www.reuters.com/article/2009/03/14/us-obama-security-combatant-idUSTRE52C59220090314?sp=true> (demonstrating the Obama Administration’s intentions of moving away from the Bush Administration interpretation of the AUMF).

182 *See* Goldsmith, *supra* note 17.

183 *See id.* (comparing interpretations and practices of the AUMF between the two Administrations).

184 *See* Johnson, *supra* note 8 (defining the criteria for an associated force of al Qaeda).

185 *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, 125 Stat. 1298 § 1021(b) (2011) (demonstrating that Congress accepted the Obama Administration definition of associated forces by passing legislation using similar language).

that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.¹⁸⁶

The NDAA set out a standard determining if a terrorist organization is an associated force of al Qaeda. Jeh Johnson further clarified this criterion during a Dean's Lecture at Yale Law School.¹⁸⁷ Johnson, who was General Counsel to the Department of Defense (DOD) at the time of the speech, explained that an associated force of al Qaeda had two defining characteristics: 1) there must be an organization or 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. Johnson went on to explain that the group must not simply be aligned with al Qaeda, it must have also entered in the fight against the United States or its coalition partners.¹⁸⁸ A group that merely embraces the al Qaeda ideology cannot be considered an associated force under the Johnson Standard.¹⁸⁹

The Obama Administration has relied on the associated forces addition to the AUMF to target al Qaeda affiliated organizations throughout the Middle East and into North Africa. To summarize Janet Napolitano's testimony to Congress, the problem with al Qaeda is that it inspires affiliates, but that inspiration is not enough to consider that group an associated force of al Qaeda.¹⁹⁰ Since pure inspiration from al Qaeda is not enough, the Obama Administration has stuck to the Johnson Standard, relying on the idea of co-belligerency to determine which of al Qaeda's affiliates are considered associated forces.¹⁹¹ The Obama Administration views Al Qaeda in the Arabian Peninsula (AQAP) as an associated force of al Qaeda and has used drone strikes to target AQAP members in Yemen.¹⁹² The Obama Administration targeted a member of al Shabaab, based in Somalia.¹⁹³ However, the United States targeted the member of al Shabaab due to his association with al Qaeda, rather than targeting based on al Shabaab's association with al Qaeda.¹⁹⁴ It is not clear whether the Obama Administration considers al Shabaab an associated force of al Qaeda.¹⁹⁵ At a Senate hearing in May 2013, Department of Defense officials stated that the AUMF authorized the use of force against terrorist organizations in Libya and Syria.¹⁹⁶ Specifically, the official stated that he considered al Nusra, an al Qaeda affiliate in Syria, an associated force of al Qaeda and that the

186 *See id.*

187 *See* Johnson, *supra* note 8 (explaining the concept of a for an associated force of al Qaeda).

188 *See id.* (offering further clarification on the definition of d by courts).

189 *See id.* (explaining limits of the Johnson standard).

190 *See* Goldsmith, *supra* note 17 (explaining the Administration's rationale on limiting who is considered an "associated force").

191 *See* Johnson, *supra* note 8 (explaining the concept of co-belligerency as stricter standard than mere inspiration).

192 *See* Goldsmith, *supra* note 17 (providing an example of co-belligerency).

193 *See generally* Roggio, *supra* note 18 (explaining the targeting of a non-al Qaeda member under the AUMF).

194 *See id.* (explaining individual association rather than group association).

195 *But see* Jennifer Daskal & Steve Vladeck, *Westgate, al Shabaab, and the AUMF*, JUST SECURITY (Sep. 23, 2013), <http://justsecurity.org/930/westgate-al-shabaab-aumf/> (Showing inconsistency of application of AUMF).

196 *See* Johnson, *supra* note 48 (demonstrating the Administration extending the AUMF to other organizations in Syria and Libya).

United States has the authority to attack if al Nusra becomes a security threat.¹⁹⁷ He stated that the President had the domestic authority to put boots on the ground in both Yemen and the Congo, however, he later recanted and said that this authority was not necessarily from the AUMF.¹⁹⁸ The United States' action in Yemen and Somalia and the DOD's testimony at the Senate hearing show that the Obama Administration has a broad view of which organizations are associated forces of al Qaeda.¹⁹⁹

During the Senate hearing in May 2013, several Senators expressed their disagreement with both the AUMF and with the President's reliance on the associated forces doctrine.²⁰⁰ Specifically, Senator John McCain disagreed with the DOD's assertion that the AUMF did not need to be updated.²⁰¹ Senator McCain called for the AUMF to be updated to reflect the current state of the al Qaeda threat.²⁰² Senator Angus King took issue with the President's use of the AUMF to attack associated forces of al Qaeda when that language does not appear anywhere in the AUMF.²⁰³ Overall, the Senate hearing revealed that the Obama Administration does not feel restrained by the AUMF and that the Senate oversight committee was kept out of the loop in determining which organizations are associated forces of al Qaeda.²⁰⁴

Following the Senate hearing, President Obama made several pledges to reform the AUMF. Speaking to the National Defense University on May 23, 2013, President Obama made three pledges regarding the AUMF: 1) he pledged to engage Congress about the AUMF and to determine how to continue to fight terrorism without keeping America in perpetual war, 2) he pledged to not sign a law to expand the AUMF any further, and 3) he stated that he looks forward to helping to refine and ultimately repeal the AUMF.²⁰⁵ However, since giving that speech the Obama Administration has taken no active steps to achieve any of these three pledges.²⁰⁶ Further, in October 2013, only a few months after this speech, the Obama Administration launched a raid on a senior al Shabaab leader in Somalia under the AUMF.²⁰⁷ The Obama Administration is still actively relying on the AUMF's authority and the Administration may not want to sunset the AUMF and constrain the President's ability to use forces against threatening al Qaeda affiliates.

197 See Jack Goldsmith, *Congress Must Figure Out What Our Government Is Doing In The Name of the AUMF*, LAWFARE (May 17, 2013), <http://www.lawfareblog.com/2013/05/congress-must-figure-out-what-our-government-is-doing-in-the-name-of-the-aumf/#.UvVGwHddWGn> (explaining reasoning for applying the AUMF to al Nusra).

198 See *id.*

199 See *id.*

200 See Johnsen, *supra* note 48 (explaining lack of unanimity regarding applying the AUMF to the current conflict in Iraq and Syria).

201 See *id.* (explaining the McCain disagreement on how to legally use force in Syria and Iraq).

202 See *id.* (arguing that the current AUMF cannot be extended to individuals or organizations in Syria and Iraq).

203 See *id.* (demonstrating that the language of the AUMF needs to be less ambiguous).

204 See Goldsmith, *supra* note 197 (explaining political conflict behind the legal arguments regarding the AUMF).

205 See President Barack Obama, *supra* note 94 (explaining the political compromises the Administration promised to make before taking action).

206 See DeYoung, *supra* note 95 (explaining that the President has not taken any steps to fulfill the three pledges made during his National Defense University Speech).

207 See Roggio, *supra* note 18 (demonstrating that the Administration will act regardless of political debates surrounding the AUMF).

CHAPTER II: ISIS AS AN ASSOCIATED FORCE OF AL QAEDA

Keeping in mind the development of the AUMF, specifically the associated forces doctrine, this paper will now analyze how and when the AUMF applies to al Qaeda in Iraq (AQI) at various points in its history. The development of the Iraqi al Qaeda affiliate has been broken up into five phases. Each phase will be described and then the Johnson Standard will be applied to determine if the organization could be targeted under the AUMF. As discussed earlier, rather than applying each prong of the Johnson Standard verbatim, this paper will analyze the two core requirements expressed in the Johnson Standard: 1) if the group is organized and armed, and 2) whether the group amounts to a co-belligerent of al Qaeda by entering the fight against the United States and its coalition partners alongside al Qaeda. By breaking the Johnson Standard down into these two requirements, this analysis eliminates its repetitive nature. After the analysis, this paper will examine whether the Johnson Standard is useful in allowing the United States to combat groups affiliated with al Qaeda and whether other methods should be implemented to combat these threats.

INTRODUCTION TO AL QAEDA IN IRAQ

Al Qaeda and Al Qaeda in Iraq (AQI) share the same religious beliefs and ideology. Both groups are strict Sunni/Salafists.²⁰⁸ Following the belief system of al Qaeda, AQI seeks to create civil unrest in Iraq and the Levant region to gain control of territory and garner support for their cause.²⁰⁹ AQI believes that by inciting civil unrest, they can incite a civil war.²¹⁰ Al Qaeda and AQI's share the ultimate goal of establishing a transnational Islamic state that is based in Sharia law.²¹¹ Early in AQI's development, its members were primarily from Pakistan and Afghanistan.²¹² As the group grew, it attracted more recruits from Syria and Iraq.²¹³ By 2006, AQI's members were predominately Iraqi.²¹⁴ Iraq's population is majority Shia Muslim, with a minority Sunni.²¹⁵ The Sunni population feels discriminated against because of this dynamic.²¹⁶ Since AQI is a Sunni group, AQI has painted themselves as a defender of Sunnis against the Shia majority.

AQI was initially led by Abu Musab al-Zarqawi who was known as charismatic leader that employed brutal methods to achieve his goals.²¹⁷ Zarqawi was a close associate of Osama Bin Laden and was tasked with spreading al Qaeda to Iraq.²¹⁸ Zarqawi used brutal and shocking methods, such

208 See Laub, *supra* note 20 (explaining AQI's historical origins).

209 See *id.* (showing similarities between AQI and al Qaeda).

210 See Kirdar, *supra* note 25, at 4 (outlining AQI's overarching goals).

211 See Laub, *supra* note 20 (demonstrating greater overlap between AQI and al Qaeda's objectives).

212 See *id.* (demonstrating that AQI's original members were from al Qaeda's core group in Afghanistan and Pakistan).

213 See *id.* (explaining the evolution of AQI into a more regional group with closer ties to Syria and Iraq).

214 See Laub, *supra* note 20 (explaining the groups current ethnic and national makeup).

215 *The World Factbook: Iraq*, CENTRAL INTELLIGENCE AGENCY (May 12, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html> (explaining the ethnic makeup of Iraq as a whole).

216 See *Shias dominate Sunnis in the new Iraq*, CBC NEWS (Apr. 3, 2012), <http://www.cbc.ca/news/world/shias-dominate-sunnis-in-the-new-iraq-1.1269416> (showing the economic and social disparity between Sunnis and Shias in Iraq).

217 See Kirdar, *supra* note 25, at 2 (describing the history of AQI under Zarqawi).

218 See *id.* at 3 (explaining operational connection between the main al Qaeda leadership and Zarqawi).

as suicide bombings and releasing videos of beheadings and public executions.²¹⁹ These methods created tension between Zarqawi and Osama Bin Laden.²²⁰ Bin Laden and AQSL worried that Zarqawi's methods would turn the public against AQI.²²¹ Zarqawi led AQI until he was killed by a U.S. airstrike in 2006.²²²

After Zarqawi's death, Abu Ayyub al-Marsi (A.K.A. Abu Hamza al Muhajir) took over leadership of the group.²²³ Al-Marsi had previously worked closely with Zarqawi and had strong ties to al Qaeda.²²⁴ Al-Marsi rebranded the group as the Islamic State of Iraq (ISI). Al-Marsi led ISIS until it was taken over by the current leader Abu Bakr al-Baghdadi.²²⁵ Baghdadi changed the groups name to Islamic State of Iraq and Syria (ISIS) to reflect the group's expansion into Syria.²²⁶ Most recently, ISIS gained control of territory in Fallujah in Iraq.²²⁷ However, as ISIS increasingly moved into Syria, tensions arose between ISIS and al Nusra, an al Qaeda affiliate native to Syria. These tensions led to infighting and eventually led AQSL to publicly denounce ISIS and disavow ISIS as an al Qaeda affiliate.

As ISIS developed, its relationship with AQSL has wavered between periods of harmony and directly disobeying AQSL. This tumultuous relationship has made it difficult to determine at which points the AUMF would authorize the United States to use force against AQI or ISIS as an associated force of al Qaeda. This question has only become more pressing as ISIS has made significant gains in Iraq, particularly by holding Fallujah. By breaking down AQI's development into phases we can determine when AQI/ISIS fits the Johnson Standard, and therefore, could be targeted under the AUMF as an associated forces of al Qaeda.

PHASE 1: AQI'S CREATION AND DEVELOPMENT INTO AN ASSOCIATED FORCE OF AL QAEDA.

Al Qaeda in Iraq initially began in Jordan in the early 1990's.²²⁸ From the beginning, the group was led by Zarqawi. Previously, Zarqawi was arrested for drug possession in Jordan.²²⁹ He remained in jail until 1988 and adopted radical religious beliefs while he was in prison.²³⁰ After his release from prison, Zarqawi participated in the end of the Soviet-Afghan conflict.²³¹ Although

219 *See id.* at 4 (demonstrating AQI's tactics).

220 *See id.* (explaining that AQI's connection between the by the main al Qaeda branch).

221 *See id.* (demonstrating the beginning of a rift within al Qaeda).

222 *See* Kirdar, *supra* note 25, at 5 (providing history of AQI leadership).

223 *See id.*

224 *See id.* (showing increasing ties to al Qaeda under the leadership of Al-Marsi).

225 *See* Laub, *supra* note 20 (explaining change of AQI leadership).

226 *See id.* (demonstrating that the change of leadership also came with change of goals and branding).

227 *See* Bill Roggio, *Al Qaeda, tribal allies 'control' Fallujah*, THE LONG WAR JOURNAL (Jan. 4, 2014), http://www.longwarjournal.org/archives/2014/01/al_qaeda_tribal_alli.php# (showing growth of ISIS since its change in leadership).

228 *See* Kirdar, *supra* note 25, at 1.

229 *See id.* at 2.

230 *See id.*

231 *See* Lee Hudson Teslik, *Profile: Aub Musab al-Zarqawi*, COUNCIL ON FOREIGN RELATIONS (June 8, 2006), <http://www.cfr.org/iraq/profile-abu-musab-al-zarqawi/p9866>.

Soviet forces were already withdrawing by the time Zarqawi joined, this experience exposed him to al Qaeda and the Salafi religious doctrine.²³² Zarqawi founded Bayal al Iman, a jihadist group, in Jordan.²³³ Zarqawi was again arrested in Jordan in 1993.²³⁴ While Zarqawi was in jail, he became increasingly religious and built up a following, which garnered the attention of Bin Laden.²³⁵ Zarqawi was released from prison in 1999 and left for Afghanistan.²³⁶ In Afghanistan, Zarqawi met with Bin Laden and the two planned to expand al Qaeda.²³⁷ Bin Laden reportedly gave Zarqawi \$5,000 to set up his own training camp in Herat.²³⁸ By 2001, that camp had 2,000-3,000 recruits.²³⁹ Zarqawi changed the group's name to al-Tawhid wal-Juhad, before later adopting the name al Qaeda in Iraq.²⁴⁰ Zarqawi commanded volunteers in Herat until he fled to North Iraq in 2001.²⁴¹ Once in North Iraq, Zarqawi joined Ansar al-Islam (a Kurdish separatist movement), of which he led the Arab contingent.²⁴²

Al Qaeda in Iraq first emerged in Iraq shortly after the U.S. invasion to oust Saddam Hussein.²⁴³ Bin Laden saw the U.S. invasion of Iraq as an opportunity to directly fight the United States, and he seized this opportunity by sending Zarqawi to set up an al Qaeda branch in Iraq.²⁴⁴ The U.S. invasion brought instability into the country that created a power vacuum.²⁴⁵ The lawlessness that came with the invasion allowed AQI to profit from criminal activities and to build public support.²⁴⁶ AQI successfully used guerrilla war tactics against U.S. coalition forces to gain territory.²⁴⁷ Zarqawi and AQI initially flourished in Iraq after the U.S. invasion in 2003.²⁴⁸ Al Qaeda helped to funnel Arab Islamists through Syria and into Iraq to increase Zarqawi's recruits.²⁴⁹ Zarqawi also heavily recruited from the Sunni triangle (the area between Baghdad Ramadi, and Tikrit).²⁵⁰ As Zarqawi's network increased, he became the default conduit for smuggling for many Islamic terrorist and Jihadist groups in the region.²⁵¹

Zarqawi devised a four-part strategy to combat the U.S. and coalition forces.²⁵² Zarqawi

232 *Id.*

233 Kirdar, *supra* note 25, at 1.

234 *Id.* at 2.

235 *Id.* at 2-3.

236 *Id.* at 2.

237 *Id.*

238 *Id.*

239 Kirdar, *supra* note 25, at 2.

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

244 Kirdar, *supra* note 25, at 2.

245 *Id.*

246 *Id.*

247 Laub, *supra* note 20.

248 *Id.*

249 *Id.*

250 Kirdar, *supra* note 25, at 1.

251 *Id.*

252 *Id.* at 3-4.

focused on completing this strategy in order to expand his network and take control of territory in Iraq.²⁵³ Zarqawi's strategy was: 1) to isolate American forces by targeting the United States' coalition partners to drive them out of the conflict, 2) to deter Iraqi cooperation with US forces, 3) to prevent the rebuilding process through attacks and by attacking and preventing humanitarian efforts to rebuild, and 4) to spark a civil war between Sunni and Shia Muslims to ensnare the United States in a prolonged conflict.²⁵⁴ Most infamously, in May 2004, Zarqawi and his followers beheaded a humanitarian aid worker and released a video of the beheading.²⁵⁵ Zarqawi also frequently attacked Shia targets. AQI attacked Shia leader, Sayyid Muhamid in Najaf.²⁵⁶

Zarqawi first officially vowed allegiance to Osama Bin Laden as the leader of Al Qaeda in October 2004.²⁵⁷ Shortly after pledging allegiance to Bin Laden, AQI began distributing leaflets to the public demanding that the public either comply with AQI's beliefs or face execution.²⁵⁸ After Zarqawi pledged allegiance to al Qaeda, the U.S. State Department immediately listed AQI as a foreign terrorist organization.²⁵⁹ The United States also launched a psychological operation, distributing leaflets decrying Zarqawi as a foreigner.²⁶⁰

As Zarqawi gained popularity, he increasingly used brutal tactics and attacked Shia religious sites. Zarqawi pioneered the way that al Qaeda uses suicide bombings and roadside bombings.²⁶¹ Zarqawi was the first to use multiple coordinated attacks on different targets to instill fear in the public.²⁶² Tensions between Zarqawi and other factions within the Iraqi insurgency developed.²⁶³ Many felt that Zarqawi was too brutal, or unfairly brutal towards Iraqi Shias.²⁶⁴ Simultaneously, the controversy over the treatment of prisoners at Abu Ghraib prison developed.²⁶⁵ This scandal increased AQI's popularity within Iraq and garnered more support for AQI over other insurgencies.²⁶⁶ During this period, AQI was estimated to have 15,000 active members.²⁶⁷ Although this period marked the peak of Zarqawi's prominence, some more nationalistic insurgencies in Iraq began to distance themselves from AQI due to Zarqawi's brutality and religious agenda.²⁶⁸

Zarqawi also refined the way that al Qaeda uses the internet and media to disseminate

253 *Id.*

254 *Id.*

255 *Id.*

256 Kirdar, *supra* note 25, at 4.

257 *Id.*

258 *Id.*

259 Laub, *supra* note 20.

260 Kirdar, *supra* note 25, at 8.

261 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).

262 Kirdar, *supra* note 25, at 4, 8.

263 *Id.* at 4.

264 *Id.* at 8.5.

265 *Id.* at 7.

266 *Id.*

267 Kirdar, *supra* note 25, at 5.

268 *Id.* at 4.

their message.²⁶⁹ Zarqawi began using chat rooms, video clips and gruesome videos to convey his message.²⁷⁰ This marketing technique brought more international attention to AQI.²⁷¹ Al Qaeda learned from Zarqawi's success with online media and adopted his strategies for their own operations.²⁷² Additionally, AQI's strategies had discouraged foreign investment by popularizing the idea of the Iraqi region as unstable and unsafe.²⁷³ Without foreign investment, Iraq remained unstable, allowing AQI to develop and gain territory.²⁷⁴

ANALYSIS OF PHASE 1:

During the first phase of AQI's development, AQI likely met the Johnson Standard and could be considered an associated force of al Qaeda. Of the five phases of AQI's development, the first phase most clearly fits into the Johnson Standard for an associated force of al Qaeda. Therefore, AQI likely could have been targeted and its members could have been detained under the AUMF during this phase. However, during phase 1, the United States was engaged in a war in Iraq and therefore did not need to rely on the AUMF to target AQI inside Iraq. Congress passed a separate authorization for the war in Iraq that allowed U.S. troops to attack and retaliate against insurgents inside of Iraq.²⁷⁵ The United States could have used the AUMF to attack or detain AQI forces operating outside of Iraq. For example, if the United States wanted to attack training camps or bases that AQI had in Jordan, it could have done so under the AUMF, as ISIS is an associated force of al Qaeda and therefore the United States can target its bases anywhere in the world. The United States could have also detained members of AQI that were operating in other countries under the AUMF. For example, if the United States captured an ISIS member in Jordan or Syria, the United States could have detained that individual for being a member of an associated force of al Qaeda.

In applying the Johnson Standard to phase 1, AQI was an armed and organized group that amounted to a co-belligerent of al Qaeda by joining al Qaeda in its fight against the United States and its coalition partners. First, AQI's structure and actions make them an organized and armed group. During phase 1, AQI had a well-defined organizational structure, with Zarqawi as the leader. AQI organized criminal activities, orchestrated attacks, and released statement to disseminate its message. AQI was organized enough to serve as a conduit for other insurgencies to smuggle equipment, supplies, and funds to Iraq. AQI maintained training camps to prepare new recruits to join. AQI's organization allowed the group to pioneer the way that al Qaeda used the Internet and media to decimate their message and gain support. With its organizational structure established, AQI was also an armed group. AQI executed coordinated and deadly attacks. AQI carefully selected targets that would garner them the most attention and produce the most brutal and shocking results.

269 *Id.* at 8.

270 *Id.*

271 *Id.*

272 Kirdar, *supra* note 25, at 8.

273 *Id.*

274 *Id.*

275 Authorization For Use of Military Force Against Iraq, Pub. L. No. 243, 116, Stat 1498 (2002).

AQI was also officially listed by the United States as a terrorist organization. AQI was both an organized and armed group, therefore meeting the first requirement of the Johnson Standard.

During phase 1, AQI also amounted to a co-belligerent of al Qaeda by joining al Qaeda in the fight against the United States and its coalition partners. AQI was founded to be an extension of al Qaeda and to allow al Qaeda to directly attack U.S. forces in Iraq. 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. Bin Laden gave Zarqawi the funds and resources to do so. Zarqawi followed Bin Laden's orders to move the group from Jordan to Iraq to attack U.S. forces. AQI adopted al Qaeda's religious and political beliefs and brought al Qaeda's ideology to Iraq. Further, Zarqawi formally acknowledged Bin Laden's leadership in 2004, this acknowledgement demonstrated that AQI recognized that it was working under al Qaeda in executing al Qaeda's agenda. This acknowledgement shows that AQI was taking orders from AQSL and seemed to be operating under the command structure of core al Qaeda (which closely resembled what the Heyns and Emmerson Report require for showing co-belligerency).²⁷⁶ AQI also shared its strategies with al Qaeda on both building an internet campaign and using coordinated suicide and roadside bombings. All of these facts show that AQI was operating under the umbrella of al Qaeda by working to spread al Qaeda's agenda to Iraq. During phase 1, AQI met the standard of being joining the fight alongside al Qaeda in the fight against the United States. AQI even potentially met the high standard of co-belligerency, stated in the Heyns and Emmerson report, of having an integrated command structure during this period. During phase 1 AQI had entered the fight along side al Qaeda against the United States and its coalition partners and was active working to achieve al Qaeda's goals.

AQI's relationship with al Qaeda and its attacks on American forces at Bin Laden's behest during phase 1 satisfy the two requirements Johnson Standard. Phase 1 marks the most clear-cut example of when AQI/ISIS was an associated force of al Qaeda under the Johnson Standard. As the rest of this analysis will show, AQI worked more closely with al Qaeda during this phase than during any other. During this phase, AQI functioned as a mouthpiece for al Qaeda and did not show much autonomy from al Qaeda. Al Qaeda and AQI appeared to have a cooperative relationship. Through later phases, the relationship between AQI/ISIS and al Qaeda becomes more complicated and contentious, making it harder to determine if the two Johnson requirements are met. The relationship between al Qaeda and AQI in phase 1 serves as a benchmark for showing what type of relationship clearly meets the Johnson Standard. The United States could have used the AUMF to target or detain AQI members, even if those members were located outside of Iraq through phrase 1.

PHASE 2: TENSIONS ARISE BETWEEN AQI AND AL QAEDA

Despite AQI's brutal tactics and high profile attacks, the group failed to maintain meaningful gains inside Iraq, which eventually diminished the group's prestige.²⁷⁷ Although AQI continued

²⁷⁶ See Heyns, *supra* note 103, at 17-18 (explaining that an armed actor must have an integrated command structure with a belligerent to be a co-belligerent).

²⁷⁷ Kirdar, *supra* note 25, at 1.

executing brutal attacks and releasing gruesome videos, these actions soon backfired and diminished AQI's popularity and hurt their credibility.²⁷⁸ The ideological motivations of Zarqawi and the attacks on Shias were at odds with the nationalist insurgencies and turned public opinion away from AQI.²⁷⁹ AQI's insistence on dominating the insurgency movement led other Iraqi insurgent groups to band together against AQI as well. AQI's position as the most prominent insurgent group in Iraq led other smaller and nationalist insurgencies to counter AQI's dominance.²⁸⁰ This increased the tensions between AQI and other insurgencies and further diminished AQI's popularity.

As AQI began to lose popular support and the support of other insurgencies, al Qaeda sought deeper involvement in the group.²⁸¹ AQSL questioned Zarqawi's brutal methods through written correspondence.²⁸² Zarqawi refused al Qaeda's orders and AQI continued to use brutal tactics and target Shias.²⁸³ Most significantly, AQI bombed the Gold Dome of a Shia shrine in Samarra in February 2006.²⁸⁴ Zarqawi's refusal to obey AQSL's order led to severe tension between AQI and al Qaeda.²⁸⁵ Despite mounting tension with al Qaeda and a loss of public support in Iraq, Zarqawi continued using brutal tactics, which deepened the rift between al Qaeda and AQI.

After resisting further involvement from al Qaeda, Zarqawi tried to rebuild AQI's public image on his own by collaborating with other terrorist organizations in the region.²⁸⁶ AQI joined five other Iraqi terrorist organizations to create the Mujahideen Shura Council.²⁸⁷ The purpose of the Council was for the groups to coordinate to achieve their common goals and to ease tension between rival insurgencies.²⁸⁸ However, instead of including Zarqawi, the Council excluded him from their meetings and decisions.²⁸⁹ Zarqawi's exclusion from the council diminished his prestige within Iraq.²⁹⁰ Zarqawi and AQI became further ostracized in Iraq after joining the council.

In addition to a developing rift with al Qaeda, AQI's ranks were severely depleted by U.S. special operations and the Sunni Awakening movement.²⁹¹ Most significantly, in June 2006, the United States launched an airstrike that killed Zarqawi.²⁹² Zarqawi's death marked a huge victory for the United States and Iraqi intelligence.²⁹³ In the week following Zarqawi's death, the United States conducted 452 raids in Iraq, killing 104 Iraqi insurgents and capturing 759 anti-Iraqi elements.²⁹⁴ In

278 *Id.* at 9.

279 *Id.* at 8.

280 *Id.* at 9 (explaining that many fighters for other insurgencies turned to supporting Iraqi Security forces or nationalist insurgencies against AQI).

281 *Id.* at 2.

282 *See* Laub, *supra* note 20.

283 *Id.*

284 DeYoung & Pincut, *supra* note 261.

285 Laub, *supra* note 20.

286 Kirdar, *supra* note 25, at 5.

287 *Id.* at 4-5.

288 *Id.*

289 *Id.*

290 *Id.*

291 Laub, *supra* note 20.

292 *Id.*

293 *Id.*

294 *See* Scott Peterson, *Picture of a Weakened Iraqi Insurgency*, THE CHRISTIAN SCIENCE MONITOR (June 16, 2006), <http://>

the aftermath of these raids, Iraqi security officials declared it the “beginning of the end” of AQI.²⁹⁵ AQI’s ranks were significantly depleted and AQI was forced to reorganize.²⁹⁶

After Zarqawi’s death, both U.S. and Iraqi security experts expected AQI to crumble, however the group transitioned to new leadership.²⁹⁷ Abu Ayyub al-Marsi (A.K.A Abu Hamza al Muhajir) took over leadership of AQI.²⁹⁸ Marsi previously served as AQI’s Emir.²⁹⁹ Marsi was born in Egypt and began his militant career leading the Egyptian Islamic Jihad under Zawahiri.³⁰⁰ Marsi was a member of Zawahiri’s Egyptian Islamic Jihad and had known Zawahiri since 1982.³⁰¹ Marsi successfully increased ISI’s sectarian violence and maintained the pace of operations of the AQI had under Zarqawi.³⁰² AQI bombed a Shia stronghold in Sadr City in Baghdad in November 2006.³⁰³ This attack demonstrated that AQI could maintain the same level of brutal violence that Zarqawi was known for.³⁰⁴ In the 2006-2007 transition from Zarqawi to Marsi, terrorist attacks or violence only fell by 6%, dropping from 6,631 attacks to 6,201.³⁰⁵

As AQI continued to use brutal violence, Sunnis, including al Qaeda, turned against AQI, forcing AQI to rebrand itself. Tensions between AQI and Al Qaeda only deepened after Marsi took over leadership.³⁰⁶ Initially only Shias retaliated against AQI’s attacks.³⁰⁷ However, in early 2006, other Sunni insurgencies launched covert missions against AQI.³⁰⁸ These attacks became public in September.³⁰⁹ By the spring of 2009, 100,000 Sunni tribesman and former insurgents were on the United States’ payroll fighting against AQI.³¹⁰ In response to attacks from within the Sunni community, Marsi changed AQI’s name to Islamic State of Iraq (ISI) in October 2006.³¹¹ The ISI name was designed to attract Sunni recruits and to end infighting with Sunni insurgencies.³¹² Changing the group’s name to ISI reflected the group’s new focus on building its reputation inside Iraq.

Despite ISI’s effort to rebrand, a surge of U.S. troops in Iraq combined with increasing tensions between ISI and al Qaeda led ISI to essentially dissolve by the end of 2007. In the

www.csmonitor.com/2006/0616/p01s04-woiq.html (describing the rapid escalation of U.S. attacks on AQI surrounding Zarqawi terror).

295 *Id.*

296 *Id.*

297 DeYoung & Pincut, *supra* note 261.

298 Laub, *supra* note 20.

299 Kirdar, *supra* note 25, at 5.

300 *Id.*

301 *Id.* at 9.

302 DeYoung & Pincut, *supra* note 261.

303 *Id.*

304 *Id.*

305 Kirdar, *supra* note 25, at 5.

306 DeYoung & Pincut, *supra* note 261.

307 *Id.*

308 Kirdar, *supra* note 25, at 5.

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.*

beginning of 2007, the United States deployed an additional 20,000 troops to Iraq.³¹³ These additional troops worked with the Sunni tribesman on the United States' payroll to undermine ISI's presence in Iraq.³¹⁴ By 2008, 2,400 members of ISI had been killed and 8,800 had been captured.³¹⁵ The terrorism incidents in Iraq sunk to only 3,256 in 2008. The number of foreign fighters traveling to Iraq to join the jihad withered from 120 per month to only 45 per month. By 2009, only five or six fighters would enter Iraq to join the insurgency each month.³¹⁶ Al Qaeda dramatically reduced their statements about Iraq and ISI, indicating their self-admitted defeat.³¹⁷ The U.S. troop increase succeeded in significantly diminishing ISI presence in Iraq. Finally in 2007, Zarqawi, who was second-in-command of al Qaeda at the time, announced that there was no longer an al Qaeda affiliate in Iraq.³¹⁸ He announced that the al Qaeda cell in Iraq has been dissolved into other groups and no longer existed as an independent organization.³¹⁹

By 2008, ISI was on the verge of collapse.³²⁰ ISI was no longer able to launch attacks with the same frequency or to hold territory.³²¹ On April 18, 2010, Marsi, was killed in a joint American and Iraqi operation.³²² The U.S. and Iraqi forces followed-up with a series of raids over a 90-day period.³²³ The United States reported either detaining or killing 34 of the top 42 ISI leaders.³²⁴ United States and Iraqi action cut ISI off from AQSL and forced ISI to reorganize.³²⁵ The death of Marsi was a crushing blow to ISI. CIA director Michael Hayden declared that ISI was no longer a threat to the United States.³²⁶ Abu Suleiman al-Nasser took over leadership of ISI.³²⁷ In an attempt to rebuild its reputation, ISI, under Nasser, first planned high profile attacks, such as bombing the World Cup in South Africa.³²⁸ However, ISI was unable to complete these attacks, which damaged ISI's credibility.³²⁹ ISI completed smaller attacks, such as their attack on a Roman Catholic Church in Baghdad and coordinating fifteen car bombings across Baghdad.³³⁰ These attacks were successful, but it was not enough to rebuild ISI's severely damaged reputation.

313 *Id.*

314 Kirdar, *supra* note 25, at 5.

315 *Id.*

316 *Id.*

317 *Id.* at 10.

318 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>.

319 *Id.*

320 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>.

321 *Id.*

322 Kirdar, *supra* note 25, at 5.

323 Bill Roggio, *Al Qaeda in Iraq is 'broken,' cut off from leaders in Pakistan, Says top U.S. General*, THE LONG WAR JOURNAL (June 5, 2010), http://www.longwarjournal.org/archives/2010/06/al_qaeda_in_iraq_is.php.

324 *Id.*

325 *Id.*

326 *See* Byman, *supra* note 320 (explaining the almost collapse of al Qaeda).

327 *See* Kirdar, *supra* note 25, at 5.

328 *Id.*

329 *See id.* (describing loss of local support of ISI).

330 *Id.*

ANALYSIS OF PHASE 2:

Phase 2 marks ISI stepping away from its association with al Qaeda. Although ISI began this phase as solidly fitting into the Johnson Standard of an associated force, Zarqawi's death, distance from al Qaeda, and the successful surge of U.S. troops, all cut ISI off from al Qaeda and significantly diminished their presence in the region. First, while AQI began phase 2 as an organized armed group, the group's organization and capacity to launch attacks quickly diminished. Although ISI maintained a basic organizational structure, the group was not as organized as it was in phase 1. Second, ISI shifted away from al Qaeda and was not as cooperative or as supported by al Qaeda during phase 2. Al Qaeda stopped acknowledging ISI by 2007, indicating that the groups were no longer affiliated. By the end of phase 2, ISI likely did not meet the Johnson Standard for an associated force of al Qaeda.

In examining the two requirements of the Johnson Standard, ISI lost its organizational structure and was not as successful at launching attacks during phase 2. ISI stepped away from meeting the first requirement, that the group be armed and organized, in phase 2. ISI was forced to reorganize after the death of Zarqawi, who had founded the group and was responsible for the group's success thus far. Although ISI navigated the transition to Marsi's leadership, the group struggled to transition to Nasser's leadership. Additionally, the U.S. raids and airstrikes in Iraq significantly diminished ISI's ranks in Iraq. As ISI's structure became more disorganized, ISI was unable to launch high profile attacks. Unlike Zarqawi and Marsi, al-Nasser had not worked with Bin Laden or Zawahiri. Al-Nasser did not have the same exposure to al Qaeda that ISI's previous leaders had. Al-Nasser was unable to hold together ISI's leadership and structure while under heavy attack by U.S. troops. ISI was cut off from communications with AQSL, leaving ISI to try to combat the U.S. troops without outside help. While ISI remained ambitious, their lack of organization prevented them from successfully launching high profile attacks. ISI still completed smaller attacks inside Iraq. Eventually, as the U.S. troops prevailed, ISI's leadership structure crumbled, leading ISI's members to dissolve into other Sunni insurgencies. Zawahiri's acknowledgement that there was no longer an al Qaeda affiliate in Iraq shows that the group's organizational structure had collapsed. During phase 2, ISI stepped further away from meeting the first requirement of the Johnson Standard. By the end of phase 2, ISI would likely not meet the Johnson Standard as their organization had fallen apart and they were no longer launching attacks.

ISI likely did not meet the second requirement of the Johnson Standard because ISI was no longer acknowledged by al Qaeda by the end of phase 2. The Johnson Standard requires that the group enter right alongside al Qaeda. While AQI began phase 2 with many of the same broad goals as al Qaeda, AQI began rejecting al Qaeda and AQSL's authority in phase 2. The public turned against Zarqawi because of his brutality. Maintaining public support has always been a part of al Qaeda's grand strategy and Zarqawi's decision to forgo public image was in direct conflict with al Qaeda's strategy. Marsi continued what Zarqawi started by resisting al Qaeda's authority and disobeying al Qaeda's orders. As Marsi shifted the group to a more nationalistic focus, ISI and al Qaeda were no longer acting with one mind, as they were in phase 1. This trend continued as ISI transitioned to Marsi and Nasser's leadership. As ISI continued to act

more autonomously and separated from al Qaeda, Zawahiri stated that there was no al Qaeda affiliate in Iraq. This demonstrated to the public just how separate the two groups had become. The Johnson requirement of joining the fight alongside al Qaeda cannot be met once Zawahiri stopped acknowledging ISI as an al Qaeda affiliate. Without acknowledgement from al Qaeda, it is impossible for ISI to be a co-belligerent or to join the fight along side al Qaeda. Although both ISI and al Qaeda still shared an ideology and aggression towards the United States, ISI and al Qaeda were not as closely linked or cooperative as they were in phase one. As Jeh Johnson and Judge Bates expressed, sharing an ideology with al Qaeda is not enough to amount to a co-belligerent.³³¹ The beginning of phase 2 represents a gray area in the Johnson Standard where it is unclear whether ISI amounts to a co-belligerent of al Qaeda. However, by the end of phase 2, it is clear that ISI cannot be considered a co-belligerent of al Qaeda because al Qaeda no longer acknowledged ISI as an affiliate. By the end of phase 2 ISI no longer met the standard for being an associated force of al Qaeda.

By the conclusion of phase 2, the United States could not use the AUMF to target ISI outside of Iraq. The beginning of phase 2 marks a turning point where ISI began to move away from being an associated force of al Qaeda. It's not exactly clear when ISI crosses this line, but ISI is clearly no longer an associated force when Zawahiri states that there is no al Qaeda affiliate in Iraq. ISI's transition out of being an associated force of al Qaeda illustrates a gray area in the Johnson Standard. It is not clear when ISI crosses to line from associated force to independent belligerent. The Johnson Standard provides no specific guidance on how to resolve this. In the early stages of phase 2, the President would be left to determine whether or not ISI still amounted to an associated force. In phase 2, the United States was still engaged in a war in Iraq and had a separate authorization to use force in that conflict. Under this separate authorization, the United States would be able to target ISI members or bases that were inside Iraq. However, since ISI was not an associated force of al Qaeda by the end of phase 2, the United States could not use the AUMF to target ISI's members or bases located outside of Iraq. During phase 1, the United States had the authority to target or detain ISI members outside of Iraq because ISI was an associated forces of al Qaeda. The United States lost that ability in phase 2 when ISI became more disorganized and was no longer recognized by al Qaeda as their Iraqi affiliate. ISI was significantly weakened by the end of phase 2 and was not a threat to the United States so the United States may not felt threatened enough to target ISI member or bases in other countries. However, if the United States wanted to use force against ISI targets, the United States would have obtained a separate Congressional authorization.

PHASE 3: ISI RESURGENCE IN IRAQ

Although ISI initially had trouble recovering from a series of US and Iraqi attacks, by 2012,

331 See Johnson, *supra* note 8 (explaining that an associated force is not simply any terrorist organization that embraces al Qaeda ideology); see also Hamlily, *supra* note 6 (holding sharing an ideology with al Qaeda is not enough to amount to an associated forces or co-belligerent).

the group had regained its strength and was active again.³³² Baghdadi took over leadership of the group and changed the group's name to the Islamic State of Iraq and Syria (ISIS).³³³ The group is alternatively known as the Islamic State of Iraq in the Levant (ISIL). Baghdadi changed the group's name to reflect his ambitions to expand the group into Syria.³³⁴ The violence inside of Syria had helped ISIS to rebuild. The violence in Syria created chaos along the border, which allows ISIS to operate more freely.³³⁵ The U.S. troops left Iraq in 2011.³³⁶ Since U.S. troops were gone and the Iraqi troops were distracted by the developing chaos in Syria, ISIS rebuilt its ranks and resurged inside Iraq, with the ambition of expanding into Syria.

Inside Iraq, ISIS flourished by portraying themselves as the defenders of the Sunnis against the Malaki Government.³³⁷ Sunnis increasingly felt marginalized by the Malaki Government and public opinion turned against Malaki, which bolstered support for Sunni insurgencies, like ISIS, that were against Malaki.³³⁸ Sunnis began protesting against Malaki in the Anbar province in December 2012.³³⁹ This civil unrest allowed ISIS to portray themselves as defenders of the Iraqi Sunnis.³⁴⁰ ISIS again relied on car bombings and suicide bombing attacks, reminiscent of Zarqawi, to rebuild their reputation.³⁴¹ ISIS used coordinated attacks on Shia markets, cafes, and mosques. 2012-2013, marked the beginning of one of ISIS's bloodiest periods. ISIS coordinated attacks across several cities in Iraq that targeted Shias and killed civilians.³⁴² For a dozen days straight in 2012, ISIS launched coordinated attacks that each killed at least 25 Iraqis per attack.³⁴³ Four of those attacks left over one hundred Iraqis dead.³⁴⁴ In April 2013, Iraqi security forces raided a protest camp in a-Hawija, which provoked Sunnis and led to even more violence and Sunni militancy against Malaki.³⁴⁵ In July 2013, Baghdadi and ISIS broke into Abu Ghraib Prison.³⁴⁶ ISIS used suicide bombers and 50 militia members to break into the prison.³⁴⁷ They freed 1,000 prisoners.³⁴⁸

332 See Laub, *supra* note 20 (chronicling the rising and falling of ISI power).

333 *Id.*

334 *Id.*

335 See Byman, *supra* note 320 (arguing that the conflict in Syria has helped ISIS to prosper).

336 Joseph Logan, *Last U.S. Troops Leave Iraq, ending war*, REUTERS (Dec. 18, 2011), <http://www.reuters.com/article/2011/12/18/us-iraq-withdrawal-idustre7bh03320111218>.

337 See Byman, *supra* note 320 (describing Malaki's preference for Shi'a advisors and Sunni exclusion in the government).

338 *Id.*

339 See Laub, *supra* note 20.

340 See *id.* (explaining how marginalization of Sunnis by Malaki government led to increased support for ISIS).

341 *Id.*

342 *Id.*

343 *Id.*

344 See Laub, *supra* note 20.

345 *Id.*

346 Colin Freeman, *How the ruthless leader behind al-Qaeda's resurgence in Iraq became the new poster-boy for jihadist militants*, NATIONAL POST (Jan. 13, 2014), <http://news.nationalpost.com/2014/01/13/how-the-ruthless-leader-behind-al-qaeda-resurgence-in-iraq-became-the-new-poster-boy-for-jihadist-militants>.

347 *Id.*

348 *Id.*

Of those 1,000, about half were affiliated with al Qaeda.³⁴⁹ The attack on Abu Ghraib not only replenished ISIS ranks, but it significantly bolstered their reputation inside Iraq.

After the Abu Ghraib break in, ISIS continued to launch brutal attacks in Iraq and forced the United States to reevaluate the threat level of ISIS. In summer 2013, ISIS launched a series of attacks in Baghdad over a 90-day period.³⁵⁰ This series of attacks culminated when ISIS attacked families celebrating Eid Al Fitr in Baghdad.³⁵¹ In December 2013, ISIS reportedly killed more than 700 civilians in Baghdad.³⁵² ISIS alone reportedly killed 7,818 Iraqis throughout 2013, making it Iraq's bloodiest year since 2001.³⁵³ 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.³⁵⁴ After ISIS's resurgence in Iraq, the United States offered ten million dollars for information that would help authorities to capture or kill Baghdadi.³⁵⁵ The United States stated that it is prepared and willing to work with the Iraqi government to help combat ISIS.³⁵⁶

ANALYSIS OF PHASE 3:

During Phase 3, ISI resurged as ISIS and became closer to meeting the Johnson Standard. ISIS rebuilt its organizational structure and successfully launched large-scale attacks. The group also rebuilt its relationship with al Qaeda, although not to the level that the Johnson Standard requires. Since ISIS was more organized and armed during this phase, ISIS met the first requirement of the Johnson Standard. ISIS comes closer to meeting the second requirement of Johnson Standard than the group was in phase 2, but ISIS still did not have as strong of a relationship with al Qaeda as AQI had in phase 1. Further, ISIS was not attacking U.S. or coalition troops once the troops had left Iraq. While ISIS shared al Qaeda's aggression towards the United States, ISIS was focused on gaining territory in Iraq and Syria as opposed to attacking the United States. During phase 3, ISIS came closer to being an associated force of al Qaeda than in phase 2, however, ISIS was not fighting U.S. or coalition forces and therefore cannot meet the Johnson Standard.

In analyzing the first requirement of the Johnson Standard during phase 3, ISIS became an organized and armed group. After ISI was decimated by US forces in phase 2, ISIS emerged in 2012 as an organized terrorist group that completed large scale attacks. Baghdadi established new leadership and set up an organizational structure for ISIS. ISIS rebuilt its structure through new recruits. Baghdadi's break in to Abu Ghraib prison helped to fill ISIS's ranks with members that

349 *Id.*

350 Greg Ahlstrand, *U.S. Condemns Iraq Attacks That Killed Dozens During Holiday*, BLOOMBERG (Aug. 10, 2013), <http://www.bloomberg.com/news/2013-08-11/u-s-condemns-iraq-attacks-that-killed-dozens-during-holiday.html>.

351 *Id.*

352 *US Assisting in Iraq in Fight Against al Qaeda 2 years After Troops Withdrew*, ABC NEWS (Jan. 23, 2014), <http://abcnews.go.com/blogs/headlines/2014/01/us-assisting-iraq-in-fight-against-al-qaeda-2-years-after-troops-withdraw>.

353 *Id.*

354 *See* Byman, *supra* note 320.

355 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.*

were trained by al Qaeda. Baghdadi again relied on the coordinated suicide bombing attacks that were reminiscent of the way Zarqawi's leadership style. ISIS's structure allowed the group to hold territory and to expand into Syria. All of these facts demonstrate that ISIS once again had a strong organizational structure that allowed ISIS to plan and execute sophisticated attacks inside Iraq.

Although ISIS met the first requirement of the Johnson Standard during phase 3, it is not as clear whether the group met the second requirement of joining the fight against the United States alongside al Qaeda. When ISIS reemerged, the group still shared al Qaeda's core beliefs and ideology. However, this fact alone is not enough to make ISIS an associated force of al Qaeda. During Phase 3, ISIS did not resist al Qaeda's orders the way that ISI had during phase 2; however, the group was not particularly cooperative with al Qaeda either. Baghdadi did not have a relationship with Zawahiri previously and did not have the same connection to al Qaeda that Zarqawi and Marsi had. However, even though ISIS did not explicitly pledge its allegiance to al Qaeda, under Jihadist doctrine, ISIS must be loyal to al Qaeda since ISIS was born from ISI who had pledged allegiance to al Qaeda.³⁵⁷ ISIS was under al Qaeda's banner by default.³⁵⁸ ISIS did cooperate with al Nusra, who had explicitly pledged allegiance to al Qaeda. While ISIS did have a more cooperative relationship with al Qaeda in phase 3, the relationship was still not as close as it was in phase 1. However, ISIS still fell under the al Qaeda banner and was cooperating with al Qaeda and al Qaeda's affiliate, al Nusra during this phase.

During phase 3, ISIS did not fight against the United States or its coalition partners, meaning that ISIS cannot meet the second requirement of the Johnson Standard. Although ISIS was more cooperative with al Qaeda during phase 3, the Johnson Standard requires that the group has joined al Qaeda's fight against the United States and its coalition partners. While ISIS may have joined along side al Qaeda during phase 3, the group did not join al Qaeda's fight against the United States. ISIS was focused on launching attacks against Malaki in Iraq and against Assad in Syria. The group was focused on gaining territory in these two states. ISIS was not fighting U.S. troops or attempting to launch an attack against U.S. resources in the region or the U.S. homeland. Had ISIS launched an attack on a U.S. base or tried, even unsuccessfully, to launch an attack on the U.S. homeland, ISIS likely would have met the Johnson Standard and therefore could have been targeted by the AUMF. However, ISIS did not take any action against the United States and therefore cannot meet the second requirement of the Johnson Standard. Since ISIS does not meet the second prong of the Johnson Standard, the United States could not use the AUMF to target ISIS's bases or members either in Iraq or Syria.

Although the United States could not have targeted ISIS under the AUMF, the United States still could have provided resources and aid to Malaki to help Iraq fight ISIS from inside Iraq. The United States could have provided resources or aid to both Iraq and Syria to help combat ISIS. Although, politically speaking, the United States would not have given aid to the Assad regime, the United States could have legally done so to combat ISIS's presence in Syria. Since the United States

357 Suhaib Angarini, *The Evolution of ISIS*, AL MONITOR (Nov. 1, 2013), <http://www.al-monitor.com/pulse/ar/security/2013/11/syria-islamic-state-iraq-sham-growth.html#> (explaining that the "loyalty to al Qaeda may be the common denominator between ISIS and Jabhat al-Nusra").

358 *See id.* (describing that ISIS is loyal to al Qaeda because it is a branch of the main organization).

was politically constrained and could not provide aid to fight ISIS in Syria, the United States' only option was to give aid to Malaki to fight ISIS in Iraq. In January 2014, the U.S. Secretary of State, John Kerry, stated that the United States would help Iraq in any way possible to fight ISIS and other jihadist insurgencies in Iraq.³⁵⁹ Secretary Kerry further stated that although the United States would provide military aid, the United States would not put troops back in Iraq.³⁶⁰ Although the United States cannot target ISIS under the AUMF, the United States can still help to combat ISIS in Iraq by providing military aid to Malaki.

PHASE 4: ISIS GAINS POWER AND SEPARATES FROM AL QAEDA'S AUTHORITY

While ISIS maintained territory in Iraq, ISIS also expanded into Syria and worked with already established insurgencies in Syria. The general population of Syria is religiously conservative, but open to religious coexistence.³⁶¹ However, as more Sunni Jihadists have joined the rebellion against Assad, a Shia, ISIS expanded operations into the northern and eastern provinces of Syria.³⁶² ISIS initially took administrative control of border towns by providing services to the community but then imposed strict Sharia law.³⁶³ ISIS signed a truce with the Free Syrian Army in late 2013.³⁶⁴ The Free Syrian Army is one of the main sectarian groups that is fighting against Assad.³⁶⁵ In signing the truce, the Free Syrian Army acknowledged ISIS's efficacy in establishing a presence in Syria and combatting Assad's control.³⁶⁶

After signing the truce with the Free Syrian Army, ISIS announced a merger with Jahat al Nusra. Al Nusra is an al Qaeda affiliated insurgency that is native to Syria.³⁶⁷ ISIS has cooperated with al Nusra since early 2013, but Baghdadi officially announced the merger later in the year.³⁶⁸ Al Nusra was one of the most effective rebel group inside Syria.³⁶⁹ When Baghdadi first announced the merger, many non-Syrian al Nusra fighters left to join ISIS.³⁷⁰ One al Nusra fighter estimated that 70% of al Nusra's fighters in the Ldib province defected to join ISIS.³⁷¹ Reportedly, in Syria's

359 Loveday Morris & Anne Gearan, *Kerry says U.S. will help Iraq against al-Qaeda but won't send troops back in*, WASH. POST, Jan. 5, 2014, http://www.washingtonpost.com/world/kerry-says-us-will-help-iraq-against-al-qaeda-but-wont-send-troops-back-in/2014/01/05/8ebc7754-7642-11e3-b1c5-739e63e9c9a7_story.html.

360 *Id.*

361 *Id.*

362 Laub, *supra* note 20.

363 *Id.*

364 *Id.*

365 See Michael Pizzi, *Syrian Rebels Turn On Each Other As 'Big Tent' Strategy Collapses*, AL JAZEERA (Sept. 30, 2013), <http://america.aljazeera.com/articles/2013/9/20/syrian-rebel-s-bigtentstrategycollapsing.html> (explaining that Free Syrian Army is one of the most prominent insurgencies in Syria and although the FSA tried to cooperate with ISIS, the two groups could not cooperate).

366 Laub, *supra* note 20.

367 *Id.*

368 See Atassi, *supra* note 33 (describing al Qaeda's leaderships' attempt to put an end to tensions and infighting between Jabhat al Nusra and ISI).

369 *Id.*

370 *Id.*

371 *Id.*

eastern regions even a higher percentage of al Nusra's fighters left to join ISIS.³⁷² Those defections led to confusion as to the organizational structure and who was in command.³⁷³ After the merger announcement, the leader of al Nusra, Abu Mohammad al- Joulani issued an audio recording saying that the merger was invalid because he had not been consulted.³⁷⁴ He demanded that al Nusra fighters remain with al Nusra and not join ISIS.³⁷⁵ Despite Joulani's announcement Baghdadi still traveled with ISIS fighters to Aleppo to broaden ISIS's Syrian operations.³⁷⁶

Baghdadi continued to advance into Syria, which angered al Nusra and created infighting between the groups, leading Zawahiri to try to resolve the dispute. In June 2013, Zawahiri, who had become the leader of al Qaeda in 2011, announced that the merger between ISIS and al Nusra was invalid.³⁷⁷ Zawahiri commanded Baghdadi to only pursue operations in Iraq and to leave Syrian operations to al Nusra. Zawahiri also sent an annulment letter to both groups.³⁷⁸ Zawahiri chastised both groups for fighting publicly and for focusing on fighting each other rather than fighting Assad.³⁷⁹ Zawahiri's announcement instructed both groups to return to their respective countries and focus on operations there.

Baghdadi immediately rejected Zawahiri's announcement and continued operations in Syria. Baghdadi refused Zawahiri's order to return to Iraq in a public statement made on June 14, 2013.³⁸⁰ In the statement, Baghdadi questioned Zawahiri's authority as the leader of al Qaeda.³⁸¹ Baghdadi continued to launch attacks in Syria to undermine the Assad regime.³⁸² While ISIS and al Nusra fought along side each other in attacking Assad, the infighting between the two groups steadily increased.³⁸³ After Zawahiri's announcement, both groups engaged in turf battles to determine who controls what territory.³⁸⁴

As the infighting between ISIS and al Nusra increased, both groups called on al Qaeda to mediate the conflict.³⁸⁵ This mediation was ultimately unsuccessful and Baghdadi rejected Zawahiri's authority.³⁸⁶ Both Joulani and Baghdadi sent separate letters to Zawahiri to ask him to mediate.³⁸⁷ Zawahiri called on both groups to cooperate and support each other with funds, weapons, and

372 *Id.*

373 *See* Atassi, *supra* note 33 (explaining infighting over who was commanding on the battlefield).

374 *Id.*

375 *Id.* (explaining the defection from al Nusra to ISIS).

376 *Id.*

377 *Id.*

378 *See* Atassi, *supra* note 33.

379 Thomas Joscelyn, *State Department confirms al Qaeda in Iraq Leader has relocated to Syria*, THE LONG WAR JOURNAL (Aug. 12, 2013), http://www.longwarjournal.org/archives/2013/08/state_department_con.php#.

380 *See* Atassi, *supra* note 33.

381 *See id.* (questioning if Baghdadi will accept the merger being voided).

382 *Id.*

383 *See id.* (describing the serious leadership dispute between the groups).

384 Aryn Baker, *Why al-Qaeda kicked out its Deadly Syria Franchise*, TIME (Feb. 3, 2014), <http://world.time.com/2014/02/03/why-al-qaeda-kicked-out-its-deadly-syria-franchise>.

385 *See* Atassi, *supra* note 33 (describing letters sent to Zawahiri by dueling commanders).

386 *See* Baker, *supra* note 384 (explaining that ISIS continued to fight with al-Nusra until al Qaeda disavowed ISIS).

387 *See* Atassi, *supra* note 33 (explaining that the divisions pushed for action to be taken).

fighters.³⁸⁸ Zawahiri appointed a local al Qaeda commander to oversee cooperation between ISIS and al Nusra.³⁸⁹ Shortly after the mediation began, Baghdadi released 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.”³⁹⁰ Baghdadi’s statement boldly demonstrated Baghdadi’s defiance.³⁹¹ Baghdadi implied that ISIS would not follow al Qaeda’s agenda or respect their authority. This led to a sharp increase in the infighting between ISIS and other insurgent groups in January 2014.³⁹² Al Nusra critiqued ISIS for focusing too much on establishing an Islamic state rather than focusing on the fight against Assad.³⁹³ As infighting increased, al Nusra received more funding and support than ISIS.³⁹⁴

In January 2014, ISIS took total control of Fallujah and areas in Ramadi.³⁹⁵ Although ISIS had been fighting for Fallujah for several months, they were able to take total control on January 1, 2014.³⁹⁶ ISIS fought Iraqi troops and police forces that remained in Fallujah and Ramdi.³⁹⁷ On New Year’s Eve, Malaki pulled his troops out of both cities.³⁹⁸ With the military gone, ISIS took over Fallujah and Ramdi. ISIS used snipers, rocket propelled grenades, and heavy street-fighting to gain control.³⁹⁹ At least nineteen civilians were killed during the fighting. Iraqi forces reported that sixty insurgents were killed.⁴⁰⁰ After taking control of Fallujah, Baghdadi released a statement saying “you will see the mujahdeen at the head of your country...our war with you has only now started.”⁴⁰¹ This statement was aimed at the United States, indicating that ISIS planned to overthrow Malaki government that the United States established in Iraq.⁴⁰² ISIS declared Fallujah Islamic emirate and instituted sharia law.⁴⁰³ ISIS worked with other insurgencies to set up an administration to keep public services running.⁴⁰⁴ After ISIS held Fallujah for several weeks, Malaki and the Iraqi

388 *Id.*

389 *Id.*

390 *Id.*

391 *See id.* (stating that Baghdadi was spreading into the suburbs of Aleppo).

392 *See* Anne Barnard, *Syria Rebels Turn Against Most Radical Group*, N.Y. TIMES (Jan. 12, 2014) <http://www.nytimes.com/2014/01/13/world/middleeast/syria-rebels-turn-against-most-radical-group-tied-to-al-qaeda.html> (reporting that more than 500 were left dead due to infighting).

393 *See id.* (stating that there was disbelief that there was not a greater fight against Assad).

394 *See* Laub, *supra* note 20.

395 *See* Roggio, *supra* note 227.

396 *See* Ahmed Rasheed, *Time to end al Qaeda presence in Fallujah; Iraq’s Maliki*, REUTERS (Jan. 22, 2014), <http://www.reuters.com/article/2014/01/22/us-iraq-falluja-idUSBREA0L1UP20140122> (claiming that Sunni Muslim groups supported ISIS gained territorial control).

397 *See* Freeman, *supra* note 346.

398 *See* Memlik Pasha, *ISIS Insurgents Have Almost Surrounded Baghdad*, VICE NEWS (Apr. 29, 2014), <https://news.vice.com/article/isis-insurgents-have-almost-surrounded-baghdad> (reporting that due to fear of losing control Maliki took cautious measures).

399 *See id.* (acknowledging that although ISIS was at a disadvantage, they were able to gain control).

400 *See also* Yasir Ghazi & Tim Arango, *Qaeda-Linked militants in Iraq secure nearly full control of Fallujah*, N.Y. TIMES, Jan. 4, 2014, <http://www.nytimes.com/2014/01/05/world/middleeast/shelling-in-iraqi-city-held-by-qaeda-linked-militants-kills-at-least-8.html>.

401 *See* Freeman, *supra* note 346.

402 *Id.*

403 *See* Pasha, *supra* note 398 (stating that ISIS displayed their flag on Fallujah buildings).

404 *See id.* (stating that ISIS had established a “Committee for the Promotion of Virtue and the Prevention of Vice”).

government renewed their efforts to drive ISIS out of Fallujah.⁴⁰⁵ On January 22, 2013, Malaki spoke to the public stating that it was time to clear ISIS out of Fallujah.⁴⁰⁶ Iraqi helicopters bombarded the eastern and northern districts of Fallujah later that day.⁴⁰⁷ UN officials reported that tens of thousands of civilians have fled the city in anticipation of a military strike.⁴⁰⁸ Malaki did not set a deadline or a timeline for military action.⁴⁰⁹ As of May 18, 2014, ISIS still controlled Fallujah, despite Malaki's efforts to regain control.⁴¹⁰

In addition to holding Fallujah, ISIS retook Raqqa in Syria in mid-January.⁴¹¹ At the time, ISIS was estimated to have 7,000 fighters in Northern Syria.⁴¹² To take Raqqa, ISIS forced out a coalition of rebel groups.⁴¹³ After several days of clashes, al Nusra joined the resistance against ISIS. These clashes began in Western Aleppo and spread into Idlib, Raqqa, and Seir Ezzor.⁴¹⁴ ISIS succeeded in cutting off supply lines for other insurgency groups, including al Nusra. Syrian civilians living in rebel-held towns protested against ISIS as ISIS clashed with other insurgencies.⁴¹⁵ These protests created an image problem for ISIS, who wanted to be the dominant insurgency in the region while winning the support of the Syrian people. ISIS is allegedly holding hundred of rivals, rebels, activists, and journalists captive.⁴¹⁶ This has further damaged ISIS's public image and turned the Syrian public against them.

As ISIS continued fighting with al Nusra, ISIS further distanced themselves from al Qaeda. The al Qaeda operative appointed to mediate between al Nusra and ISIS publicly chastised Baghdadi and blamed him for the infighting between the two groups.⁴¹⁷ He blamed Baghdadi for not respecting the territory of al Nusra and for provoking more infighting between the two groups.⁴¹⁸ Despite the reprimand from al Qaeda, Baghdadi has not slowed down his efforts in Syria and the infighting in Syria continued.⁴¹⁹ ISIS launched a double suicide bombing attack in Aleppo that killed

405 See Rasheed, *supra* note 396.

406 *Id.*

407 *Id.*

408 *Id.*

409 *Id.*

410 See Patrick Cockburn, *The Battle for Fallujah: Fighting returns to Iraqi city as al-Qaeda-linked rebels gain stronghold* (May 18, 2014) <http://www.independent.co.uk/news/world/middle-east/the-battle-for-fallujah-fighting-returns-to-iraqi-city-as-alqaidalinked-rebels-gain-stronghold-9392741.html> (stating that ISIS had gained momentum and strength as an entity).

411 *ISIL recaptures Raqqa from Syria's rebels*, AL JAZEERA (Jan. 14, 2014), <http://www.aljazeera.com/news/middleeast/2014/01/isil-recaptures-raqqa-from-syrias-rebels-2014114201917453586.html>.

412 See Freeman, *supra* note 346.

413 See *ISIL recaptures Raqqa from Syria's rebels*, *supra* note 411.

414 Hassan Hassan, *Breaking Syria's reign of terror*, FOREIGN POLICY, (Jan. 9, 2014), http://www.foreignpolicy.com/articles/2014/01/09/breaking_the_reign_of_terror_syria_al_qaeda.

415 See *id.* (commenting on the different strategies of the jihad group).

416 See *ISIL recaptures Raqqa from Syria's rebels*, *supra* note 411.

417 See Joscelyn, *supra* note 34 (highlighting the response of the infighting between ISIS and other jihad groups).

418 See *id.* (describing Baghdadi's actions as altruistic).

419 See *Al-Qaeda fighters kill Syrian rebel leaders*, AL JAZEERA (Feb. 2, 2014), <http://www.aljazeera.com/news/middleeast/2014/02/al-qaeda-fighters-kill-syrian-rebel-leader-2014229511898140.html> (criticizing Baghdadi's most recent attacks).

twenty-six individuals.⁴²⁰ These attacks indicate that ISIS disregarded al Qaeda's order and will keep fighting in Syria.

ANALYSIS OF PHASE 4:

During phase 4, ISIS stepped further away from its association with al Qaeda. While ISIS still met the first requirement of the Johnson Standard, by being an armed and organized group, ISIS moved even further away from meeting the second requirement. By the end of phase 4, ISIS no longer had a cooperative relationship with al Qaeda and was not attacking US or coalition forces in Iraq. As ISIS became more powerful and held territory and procure its own resources and fighters, ISIS no longer needed to rely on al Qaeda for help. ISIS began to disobey al Qaeda's orders and act more autonomously. By the end of phase 4, ISIS was operating as an autonomous insurgency and no longer met the Johnson Standard for being an associated force of al Qaeda. The United States could not target ISIS, either in Iraq or Syria, under the AUMF. If the United States wanted to combat ISIS, the United States would need a separate Congressional authorization or have to rely on providing aid to the host states so that those states could combat ISIS.

In phase 4, ISIS was still an organized and armed group and therefore still met the first requirement of the Johnson Standard. ISIS had a strong leadership structure, maintained territory that it previously held, expanded into new territory, and even set up an administration inside Fallujah. ISIS successfully launched large-scale attacks inside Iraq and Syria, and it still met the first requirement of the Johnson Standard during Phase 4.

In phase 4, ISIS was no longer fighting alongside al Qaeda and was not fighting against the U.S. or coalition forces. ISIS did not meet the second requirement of the Johnson Standard and therefore could not be targeted under the AUMF. During phase 4, Baghdadi ignored orders from AQSL to returned to Iraq announced that ISIS no longer acknowledged Zawahiri's authority. This statement clearly demonstrated that ISIS did not consider itself under the command of al Qaeda. ISIS's decision to announce a merger without permission from al Nusra's leadership or AQSL further indicated that ISIS desired to be autonomous. Although ISIS initially looked to al Qaeda to mediate the conflict with al Nusra, ISIS did not respond to the mediator's orders to return to Iraq. ISIS's open fighting with al Nusra indicates that ISIS did not see al Nusra as an ally and instead fought with them for dominance in the region. Similarly to phase 3, ISIS was also still not fighting against US troops or its coalition partners. As ISIS grew and no longer needed al Qaeda's help, ISIS became more independent and acted without al Qaeda's approval. ISIS's rejection of al Qaeda's authority demonstrates that, during phase 4, ISIS was not fighting along side al Qaeda.

Phase 4 marks the beginning of ISIS's development into its own autonomous insurgency. ISIS. During phase 4, ISIS would not be able to be targeted under the AUMF. The United States could not use the AUMF's authority to target any of their operations, either in Iraq or Syria. The United States could also not use the AUMF's authority o detain members of ISIS in Guantanamo. If the United States wanted to combat ISIS, the United States would need a separate Congressional authorization to use force against ISIS. The United States could still continue providing aid to

420 *See also id.* (highlighting the mass casualties).

Malaki to help the Iraqi government combat ISIS.

PHASE 5: ISIS'S DISAVOWAL FROM AL QAEDA

In early February 2014, ISIS tensions with al Qaeda came to a head and al Qaeda disavowed ISIS as an affiliate of al Qaeda.⁴²¹ On February 3, 2014, Zawahiri released a statement explaining that since Baghdadi refused orders from Zawahiri and al Qaeda, ISIS was cut off from al Qaeda.⁴²² Zawahiri announced that al Qaeda has “no connection” to ISIS and was “not responsible for ISIS’s actions.”⁴²³ 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.⁴²⁴ Zawahiri explained, that al Qaeda’s short-term goals are to remove the American presence from the region and establish an Islamic Emirate in Iraq.⁴²⁵ Zawahiri stated that the best weapon to achieve this was the popular support from Iraqi Muslims and that the “scenes of slaughter” of captives and civilians were only turning the public against ISIS and undermining al Qaeda’s goals.⁴²⁶ Al Qaeda has never formally disavowed an affiliate before.⁴²⁷ This public demonstration shows how far tensions had developed between al Qaeda and ISIS. This disavowal solidified pre-existing tensions between ISIS and al Qaeda.

As al Qaeda separated from ISIS, al Qaeda cooperated more with Syrian insurgents.⁴²⁸ Al Nusra is now the only al Qaeda affiliate operating in Syria.⁴²⁹ Previously, al Nusra was seen as an associated force of ISIS, making them two steps removed from al Qaeda.⁴³⁰ Now, al Nusra has become the frontrunner in the Syrian insurgency.⁴³¹ Al Nusra has increased separation from ISIS since its disavowal.⁴³² This shows al Nusra’s intentions to stay connected to al Qaeda. Al Nusra has aligned with more moderate insurgencies in Syria to maintain public support.⁴³³ Al Nusra’s actions have brought beneficial press and more support for al Qaeda by cooperating with more secular

421 See Joscelyn, *supra* note 34 (reporting that due to the insubordinate nature of ISIS, they were cut off from al Qaeda).

422 *Id.*

423 See also *id.* (attempting to distance themselves from ISIS’s actions).

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

425 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>.

426 *Id.*

427 *Id.*

428 See Joscelyn, *supra* note 34 (stating that Zawahiri urged for a sense of unison between the Syrian jihadist groups).

429 See Eulich, *supra* note 425.

430 Robert Chesney, *Annals of Associated Forces: AQ, AQI and al Nusra*, LAWFARE (June 11, 2013), <http://www.lawfareblog.com/2013/06/annals-of-associated-forces-aq-aqi-and-al-nusra/>.

431 See *id.* (stating that Al Nusra is gaining more support over the years).

432 Aymenn Al-Tamimi, *ISIS, al-Qaeda compete for supremacy in global jihad*, AL MONITOR (Feb. 11, 2014), <http://www.al-monitor.com/pulse/originals/2014/02/isis-qaeda-zawahiri-baghdadi-jihadist-syria-iraq.html#>.

433 William McCants, *How Zawahiri Lost al Qaeda*, FOREIGN AFFAIRS (Nov. 19, 2014), <http://www.foreignaffairs.com/articles/140273/william-mccants/how-zawahiri-lost-al-qaeda>.

groups and not using the brutal tactics used by Baghdadi.⁴³⁴

Even after being disavowed from al Qaeda, ISIS has been successful in Iraq as an independent jihadist insurgency.⁴³⁵ ISIS is still the largest and most violent Sunni Jihadist group in Northern Iraq and Syria.⁴³⁶ ISIS holds the most territory and successfully uses proto-state building techniques to build strongholds.⁴³⁷ ISIS still has vast financial resources from criminal conduct in Mosul and Northern Iraq.⁴³⁸ On February 5, 2014, only two days after being disowned by al Qaeda, ISIS seized villages in Saladudin.⁴³⁹ ISIS used this attack to show their dominance in the region and send the message that ISIS will not be discouraged by al Qaeda.⁴⁴⁰ Baghdadi has begun referring to himself as Emir al-Mu'mineed, displaying his intentions to become a regional leader.⁴⁴¹ Baghdadi claimed that he is a descendant of the Prophet Mohammed's family and therefore is the rightful Caliph.⁴⁴²

As of May 2, 2014, ISIS still holds territory both in Iraq and Syria.⁴⁴³ In Iraq, ISIS has held onto Fallujah and Ramdi.⁴⁴⁴ ISIS has successfully fought against the Iraqi government to maintain its territory. In response to the Iraqi government's efforts to force ISIS out of Fallujah, ISIS has released gruesome videos of ISIS members killing government forces.⁴⁴⁵ One video, released in March 2014, shows an ISIS fighter moving down a row of kneeling Iraqi soldiers and executing each soldier with a pistol.⁴⁴⁶ ISIS has also released a video of ISIS members burning the bodies of Iraqi soldiers and dragging the corpses behind a truck.⁴⁴⁷ Iraqi army units have reportedly carried out extrajudicial killings of ISIS fighters in Fallujah.⁴⁴⁸ In March, ISIS closed the gates of the Euphrates River, south of Fallujah, to flood the surrounding rural areas to prevent Iraqi security forces from getting into Fallujah.⁴⁴⁹ ISIS controls rural areas to the west and south of Baghdad.⁴⁵⁰ Currently, ISIS has Baghdad surrounded and is poised to move into Baghdad.⁴⁵¹ ISIS has set up loose administration, providing limited civil services, and loose justice systems in every territory that

434 Peter Bergen, *A terror group too brutal for al-Qaeda*, CNN (Feb. 5, 2014), <http://www.cnn.com/2014/02/04/opinion/bergen-al-qaeda-brutality-syria/>.

435 See Al-Tamimi, *supra* note 432.

436 *Id.*

437 *Id.*

438 *Id.*

439 Duraid Adnan, *Islamic Militants Extend Battle into Another Iraqi Province*, N.Y. TIMES, Feb. 5, 2014, http://www.nytimes.com/2014/02/06/world/middleeast/islamic-militants-extend-battle-into-another-iraqi-province.html?_r=0.

440 See *id.* (stating that ISIS is attempting to reflect attention on their weakness by using violent tactics).

441 See Al-Tamimi, *supra* note 432.

442 Thomas Joscelyn, *Zawahiri makes another attempt at reconciliation in Syria*, THE LONG WAR JOURNAL (May 2, 2014) http://www.longwarjournal.org/archives/2014/05/zawahiri_makes_anoth.php#.

443 *Id.*

444 See Cockburn, *supra* note 410.

445 See Pasha, *supra* note 398 (reporting on the different messages ISIS has released to impose fear).

446 *Id.*

447 *Id.*

448 *Id.*

449 *Id.*

450 See Pasha, *supra* note 398 (drawing a parallel description by referencing the Iraq war in 2006 and 2007).

451 *Id.*

it holds.⁴⁵² The United States has reportedly used surveillance drones over the Anbar province to provide intelligence to the Iraqi forces.⁴⁵³ ISIS held onto territory in Syria between Raqqa and Deir Ezzor after successfully pushing back al Nusra.⁴⁵⁴ ISIS aims to link this territory to the territory that ISIS controls in Northern Iraq to facilitate movement between the two countries.⁴⁵⁵

Beginning in early May 2014, Zawahiri extended an olive branch to Baghdadi and called on Baghdadi to leave Syria and return to Iraq.⁴⁵⁶ Zawahiri states that if ISIS returned to Iraq, al Qaeda would welcome ISIS back as an affiliate.⁴⁵⁷ Zawahiri states that the expansion of ISI into ISIS has led to Muslim bloodshed and a “political catastrophe for the people of the Levant”.⁴⁵⁸ Zawahiri stated that ISIS has also benefitted Assad by dividing the Jihadist cause.⁴⁵⁹ Zawahiri called for ISIS and other insurgencies to create a common sharia court to resolve their differences.⁴⁶⁰ On May 25, 2014, Zawahiri released another statement where he quoted a letter from Baghdadi from October 2012 in which Baghdadi called Zawahiri Emir and Sheikh, acknowledging Zawahiri’s authority and Baghdadi states that ISIS was operating under the command of al Qaeda.⁴⁶¹ Baghdadi has not responded to Zawahiri’s offer to rejoin al Qaeda.⁴⁶²

ANALYSIS OF PHASE 5:

During Phase 5, ISIS is operating as an autonomous insurgency and does not meet the Johnson Standard of an associated force of al Qaeda. The United States could not use the AUMF to target or detain ISIS members during phase 5. Although ISIS still meets the first requirement of the Johnson Standard by maintaining its organization and continuing to launch armed attacks, ISIS is no longer fighting in association with al Qaeda and is not fighting against the United States or its coalition partners. As discussed in the analysis of phase 4, ISIS maintained its strong leadership and organizational structure. ISIS’s structure allowed them to expand into new territory and to use proto-state building techniques in the territory that they hold. ISIS’s continues to launch attacks across Iraq and Syria. ISIS still meets the first requirement of the Johnson Standard.

The combination of ISIS disobeying al Qaeda, al Qaeda disavowing ISIS, and ISIS not attacking U.S. or coalition forces make it impossible for ISIS to meet the second requirement of the Johnson Standard. ISIS’s refusal to obey al Qaeda’s orders shows that ISIS does not want to operate under al Qaeda’s command. Al Qaeda’s decision to formally disavow ISIS demonstrates that

452 Douglas Ollivant & Brian Fishman, *State of Jihad: the reality of the islamic state in Iraq and Syria*, WAR ON THE ROCKS (May 21, 2014), http://warontherocks.com/2014/05/state-of-jihad-the-reality-of-the-islamic-state-in-iraq-and-syria/#_.

453 See Pasha, *supra* note 398 (reporting on the United States surveillance tactics).

454 *ISIS seeks to link its Syrian and Iraqi Territory*, ASHARQ AL-AWSAT (May 16, 2014), <http://www.aawsat.net/2014/05/article55332332>.

455 *Id.*

456 See Joscelyn, *supra* note 442.

457 *Id.*

458 *Id.*

459 *Id.*

460 *Id.*

461 See Joscelyn, *supra* note 442.

462 *Id.*

al Qaeda does not want to be associated with ISIS's brutal tactics. ISIS succeeded in building up its reputation, procuring resources, planning and executing attacks, without the help of al Qaeda. ISIS has become its own autonomous insurgency. Unless ISIS goes back towards relying on al Qaeda in the future, there seems to be no way that the United States could use the AUMF to target ISIS in Iraq or Syria. Although Zawahiri has offered ISIS to rejoin al Qaeda, Baghdadi and ISIS have not indicated that they want to rejoin al Qaeda. Currently, ISIS has rejected al Qaeda and is no longer fighting alongside al Qaeda. Further, ISIS is not fighting against U.S. or coalition forces as the Johnson Standard requires. Currently, the United States could not use the AUMF to target or detain ISIS members in either Iraq or Syria. ISIS would have to rejoin al Qaeda by obeying Zawahiri's order to return to attack and attack the United States or one of the coalition forces for the United States to use the AUMF to target ISIS. Under the current condition, the United States would need a separate Congressional authorization to attack ISIS either in Syria or Iraq. The United States can still continue to provide military aid to Iraq to help Malaki combat ISIS.

CONCLUSION

The difficulties in applying the Johnson Standard become apparent when analyzing AQI's development into ISIS. The group's non-linear development and fluctuating relationship with al Qaeda make it difficult to determine at what points ISIS is an associated force of al Qaeda. As the phases of ISIS's development reflected, when the group was weak and non-threatening, they relied more heavily on al Qaeda for support, therefore meeting the Johnson test. However, when the group became more powerful, it moved away from al Qaeda and focused on its own. This pattern occurred under both Zarqawi and Baghdadi's leadership. Applying the Johnson Standard showed that when AQI/ ISIS was the most threatening, the United States did not have the authority to combat them under the AUMF. However, when the group was weak and less of a threat to the United States, the group more closely associated with al Qaeda and met the Johnson Standard. The problem here is that the United States has no interest in targeting a terrorist organization when they are weak and non-threatening. If the goal of incorporating the concept of co-belligerency into the AUMF was to allow the United States to combat groups, like ISIS, that are affiliated with al Qaeda, the Johnson Standard is not useful because it does not allow the United States to target the group at its most threatening. When the group is most threatening, the United States would have to seek an additional Congressional authorization or settle for providing aid to the host state to combat the group. If this trend repeats itself with other al Qaeda affiliates, the United States will not be able to use the AUMF to target al Qaeda affiliates when the United States would most need to.

Al Qaeda is experiencing a trend where it is affiliated fluctuate in how heavily they rely on al Qaeda. AQI's development demonstrated that the group only turned to al Qaeda for help when the group was weak and facing collapse. As al Qaeda's affiliates gain control in their own regions, the group does not want to submit to al Qaeda's authority. When the affiliates no longer need al Qaeda for support, the affiliates pursue their own goals and focus less on achieving al Qaeda's mission. As these groups expand it becomes more difficult for al Qaeda to control them from afar. Zawahiri's decision to disavow and disown ISIS showed just how little control al Qaeda had over ISIS. As al

Qaeda's affiliates break away from al Qaeda's authority, the United States cannot rely on the AUMF to combat these groups.

The Johnson Standard is not useful to the United States because it has no room for fluctuation in the group's association with al Qaeda and cannot be applied as the group becomes more independent from al Qaeda. The Johnson Standard has no sort of timeframe or threshold level of association with al Qaeda. As al Qaeda-linked groups fluctuate between relying more heavily on al Qaeda and acting more independently, the United States will constantly have to reassess whether the Johnson Standard is met and the group can be targeted under the AUMF. This puts the United States in the precarious position of having to constantly evaluate the evidence to make sure the group is still associated with al Qaeda and potentially putting the United States in the position where it has to cease actions against a group as the group becomes more independent from al Qaeda. If al Qaeda continues to lose control over its affiliates and these affiliates become more independent, we will eventually reach a place where the associated forces doctrine is no longer applicable at all. As these groups gain power and shirk off their allegiance to al Qaeda, the groups can no longer be targeted under the AUMF. This creates a situation where many al Qaeda inspired groups exist, but the United States does not have the authority to do anything to target them. The Johnson Standard is not well equipped to deal with fluctuations in al Qaeda's relationship with its affiliates.

If the United States wants to directly combat terrorist groups that are affiliated with al Qaeda, the United States either needs to seek individual Congressional authorizations to do it or the United States must be content to supply aid to the host states. Since the Johnson Standard does not allow the United States to combat an al Qaeda affiliate when the group is the most threatening, the United States must seek another legal basis if it wants to combat the group. The United States could pro-actively seek individual Congressional authorizations to use force against each group. While going to Congress for authorization to attack each al Qaeda affiliate would be cumbersome, it would put the United States on a more solid legal foundation. The United States could also forgo the idea of combatting al Qaeda affiliated groups all together. The United States could still provide military aid to the host state where the group is operating to help the host state combat the group. If the group ever directly attacked the United States, it could then go to Congress for an authorization to use force in order to retaliate against the group. Any of these options would be a more solid legal foundation than the United States' current position.

Modern al Qaeda is far different from the group that attacked the United States on 9/11. Al Qaeda is no longer one singular threat. Al Qaeda has evolved into a network of jihadist groups that all share an ideology, but do not agree on the best way to achieve their collective goals. As al Qaeda has splintered into an amorphous network, it has become increasingly difficult to determine which of these cells constitute associated forces of al Qaeda. Making the analysis more difficult, recent trends demonstrate that as al Qaeda linked cells develop, the groups become more autonomous and independent from al Qaeda. This means that as groups become stronger and more threatening, the groups also become less clearly associated with al Qaeda. The Johnson Standard is not well equipped to analyze this type of constantly fluctuating threat. Under the Johnson Standard, the United States would not be able to attack these groups at their most threatening when they become

more independent from al Qaeda. If the United States determines that it is in their interest to attack these groups, a new standard or a new Congressional authorization is needed that would authorize the United States to do so regardless of the groups fluctuating relationship with al Qaeda. Otherwise, the United States will have to accept that as the groups become more independent, the United States will no longer be able to take action against them as associated forces of al Qaeda under the AUMF.