

September 16, 2014

Senator Robert Menendez, Chairman
Senator Bob Corker, Ranking Member
Senate Committee on Foreign Relations
444 Dirksen Senate Office Building
Washington, DC 20510-6225

via email

Dear Senator Menendez and Senator Corker:

OpenTheGovernment.org urges you to press for public disclosure of all Office of Legal Counsel memoranda and other legal opinions setting forth the legal rationale for the United States to use military force against the Islamic State in Iraq and Syria (ISIS). Congress cannot meaningfully exercise its Constitutional power to authorize force if the Executive uses secret legal opinions to extend past authorizations in ways that Congress never anticipated or intended.

The Obama administration has stated that it already has the authority it needs to launch airstrikes against ISIS in Syria, but has given shifting, incomplete explanations of the source of that authority. Last week, administration officials stated that Congress did not need to vote to authorize strikes against ISIS (also commonly known as ISIL or the Islamic State) because the President could rely on the post-September 11, 2001 Authorization for the Use of Military Force (AUMF). An administration official acknowledged that ISIS had publicly split with Al Qaeda, but said that the AUMF still applied to ISIS based on its past relationship with Al Qaeda, its role in the Iraq war, and ISIS's "position – supported by some individual members and factions of AQ-aligned groups – that it is the true inheritor of Usama bin Laden's legacy."¹

But the 2001 AUMF does not authorize force against all anti-American terrorist organizations that are arguably "the true inheritors of Usama bin Laden's legacy." It authorizes force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."² The leadership of ISIS had no known role in the September 11 attacks, and the administration's recent statements acknowledge that the group first affiliated with Al Qaeda in 2004.

The Obama administration has argued for some time that the 2001 AUMF authorized military action against "associated forces" of Al Qaeda even if those affiliates had no role in the September 11 attacks, but has also assured Congress that there were meaningful limits on what constituted an "associated force." Department of Defense General Counsel Stephen Preston testified to the Senate Foreign Relations Committee in May that to be an "associated force," a group had

to be both (1) an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban and (2) a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners.³

¹ <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>

² <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm>

³ <http://www.foreign.senate.gov/download/preston-testimony-05-21-14>

Al Qaeda specifically disavowed conducting operations with ISIS earlier this year.⁴ According to the *New York Times*, the administration has said it has no secret intelligence that the groups have reconciled,⁵ so it is difficult to understand how it could remain an “associated force.”

The Obama administration has said that “2002 Iraq AUMF would serve as an alternative statutory basis”⁶ for military action in Iraq—but this is inconsistent with prior administration statements that the Iraq war has ended, and that the 2002 AUMF “is no longer used for any U.S. Government activities.”⁷ Administration officials have also cited the President’s power under Article II of the Constitution to act in self-defense of the United States to attack ISIS—but this contradicts its repeated assurances that ISIS does not pose an imminent risk of attack on U.S. soil.⁸

Instead of trying to explain the case for war in confusing and often anonymous soundbites, the Executive Branch should publicly release the OLC memos and other binding written analyses that explain the purported legal basis for strikes against ISIS, and its legal interpretation of the AUMF more generally. When the United States enters a war, the public and Congress need to know who the enemy is, and under what legal authority U.S. forces are operating. It would be unacceptable in a democracy for Congress to authorize force in secret. It is equally unacceptable for the Executive Branch to secretly interpret and expand past Congressional authorizations. Accordingly, we hope you will use the upcoming committee hearing to press for full disclosure of the relevant OLC opinions.

Thank you for your consideration.

Sincerely,

Defending Dissent Foundation
Friends Committee on National Legislation
Government Accountability Project
Just Foreign Policy
OpenTheGovernment.org
Project on Government Oversight (POGO)
Sunlight Foundation
Win Without War

Cc: Members of the Senate Foreign Relations Committee

⁴ http://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html

⁵ <http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html>

⁶ <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>;
http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html?_r=0

⁷ <http://www.whitehouse.gov/blog/2011/10/21/president-obama-has-ended-war-iraq>;
<http://www.msnbc.com/msnbc/can-obama-act-iraq-without-going-congress>

⁸ E.g. <http://www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation> (“we have not yet uncovered specific plotting against our homeland”); <http://www.dni.gov/files/documents/2014-09-03%20Remarks%20for%20the%20Brookings%20Institution.pdf> (“At this point, we have no credible information that ISIL is planning to attack the U.S.”).