

Drafting an Effective Authorization for Use of Military Force

Introduction

Within days of the 9/11 attacks, Congress passed an authorization for use of military force (AUMF) against those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons.”¹ This language is widely understood as authorizing force against al Qaeda, who planned and committed the attacks on the United States on 9/11, and the Afghan Taliban, who harbored al Qaeda before and after the attacks.

The 2001 AUMF is expressly limited to using force to prevent future acts of terrorism against the United States by the entities responsible for 9/11.²

Yet since its passage, and for longer than any war in the nation’s history, the executive branch has been using the 2001 AUMF as the primary legal basis³ for military operations against an array of terrorist organizations in at least 14 different countries around the world,⁴ including against associated forces and successor entities of those responsible for 9/11.

The executive branch’s continued reliance on the 2001 AUMF for military operations far beyond what Congress originally authorized undermines Congress’ important constitutional role as the branch responsible for the decision to go to war. The lack of any sunset provision or reporting requirements in the 2001 AUMF also limits the ability of Congress to conduct meaningful oversight of military operations and the foreign affairs of the United States.⁵

Some have argued that any new AUMF should not include constraints on time or geography and that the authorization should be as broad as possible to cover threats that may materialize at a later date. This approach would not only cede to the president Congress’ constitutional power over declaring war, it would be inconsistent with over two hundred years of congressional practice in drafting AUMFs.

A comprehensive analysis of congressional force authorizations going back to 1790 shows that Congress has included geographic limitations in 56 percent of AUMFs (19 total); restricted permissible military operations 37 percent of the time (13 total);

¹ <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

² Congress expressly rejected the executive branch’s request for broad and open-ended authority to use military force against other terrorist groups without specific authorization from Congress. See https://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm_term=.yfdMEx3qa#.clg0N7zOo. See also <https://www.justsecurity.org/40549/isis-aumf-now-next-important/>.

³ The executive branch has also relied on the 2002 Iraq AUMF to justify its counter-ISIL campaign. See *e.g.*,

<https://www.defense.gov/News/Speeches/Speech-View/Article/606662/>.

⁴ Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress, <https://fas.org/sgp/crs/natsec/pres-aumf.pdf>.

⁵ U.S. entanglements with Iranian and Russia-backed pro-Assad forces in Syria, where the United States is fighting ISIS, demonstrate just how far the 2001 AUMF has been stretched. See <http://foreignpolicy.com/2017/06/16/white-house-officials-push-for-widening-war-in-syria-over-pentagon-objections/>.

and included a sunset provision in 29 percent of AUMFs (10 total).⁶

Supreme Court precedent, dating back to 1800, confirms Congress' power to restrict the scope of force authorizations. In *Bas v. Tingy*, the Court held that Congress could authorize wars that were "limited as to places, persons, and things."⁷ Congress has continued to include limits in AUMFs, with more recent examples including the 1983 AUMF for Lebanon and the 1993 AUMF for Somalia, which both limited the type of operations permitted, specified the location where force could be used, and set an expiration date.

Importance for National Security, Human Rights, and U.S. Leadership in the World

Continued reliance on outdated and ill-defined war authorizations that blurs the line between war and peace undermines national security, U.S. leadership in the world, and human rights both at home and abroad.

War authorizations confer extraordinary powers on the president—powers that outside of war would amount to egregious violations of human rights. Wartime rules were designed for the unique circumstances of armed conflict between opposing armed forces. As a result, the laws of war sometimes permit killing as a first resort, detention without charge or trial, and the use of military tribunals—actions that are otherwise contrary to basic American values and human rights.

The United States has long been a global leader on human rights, leveraging its example to influence other nations to improve their own human rights records. The United States has rightly criticized other nations for improperly invoking wartime authorities in the name of national security. But the

ability of the United States to level this criticism effectively demands that it demonstrate that its own use of wartime authorities is lawful and appropriate. Continued reliance on ill-defined authorities or questionable legal theories that enable the use of wartime authorities outside the lawful boundaries of war not only harms U.S. leadership on human rights, but U.S. national security as well.

The current status quo puts the United States at odds with allied nations, counterterrorism partners on the ground, and local populations whose help is critical to effective counterterrorism. As a result of doubts about the lawfulness or legitimacy of U.S. actions or policies, allies and partners withhold critical cooperation, consent, and intelligence information. Local populations also turn against the United States, fueling terrorist recruitment and propaganda and increasing attacks against U.S. and allied forces.

Assuring U.S. allies, counterterrorism partners, and local populations that the United States respects human rights and the rule of law—including important limits on where, when, and against whom wartime authorities may be employed—will improve cooperation, undermine terrorist recruitment and propaganda, and reduce attacks against U.S. forces.

Putting the country on a new course is also needed to ensure that the United States does not set dangerous precedents that are detrimental to its long-term interests. The policies, practices, and legal justifications used by the United States today will be used by other states tomorrow. Expansive interpretations of a state's authority to use wartime powers—such as lethal force as a first resort, military tribunals, and detention without charge or trial—embolden other states to use such practices. Constraining the use of these exceptional authorities to circumstances meeting the legal threshold for armed conflict and to where their use is militarily

⁶ See Appendix 1, http://nsnetwork.org/cms/assets/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.

⁷ *Bas v. Tingy* 4 U.S. (4 Dall) 37, 40 (Justice Chase) and 43 (Justice Washington) *available at* <http://caselaw.findlaw.com/us-supreme-court/4/37.html>.

necessary, will provide a model for other states of how to use wartime authorities lawfully, strategically, and responsibly.

Not only is it unlawful to apply wartime authorities to address terrorist threats off the battlefield, it is also unnecessary. The United States has a robust array of diplomatic, law enforcement, and intelligence resources to mitigate the threat of terrorism. And ultimately, partner nations in which terrorist threats reside must take the lead to address those threats head on, and effectively, with the support of the United States. The United States also retains the authority to act in self-defense, including using military force, when there is an imminent threat that cannot be addressed through other means. Wartime authorities such as an AUMF are not necessary to take such action.

By tailoring congressional war authorizations to the conflicts to which they are intended to apply and conducting regular oversight of war, Congress provides a crucial check on the executive branch, ensuring that presidents do not stretch wartime killing, detention, and trial authorities beyond the bounds of armed conflicts authorized by Congress.

How to Draft Authorizations for Use of Military Force Effectively

If Congress decides to pass a new AUMF, that authorization should reflect the hard lessons of the last decade and a half by including the following elements. These elements have garnered bipartisan support⁸ and reflect an effective approach to drafting

an AUMF that empowers the United States to counter the terrorist threat, uphold the rule of law, and maintain the global legitimacy that is crucial to the success of the mission:

- ☑ **Specify the Enemy, the Mission Objectives, and Geography;**
- ☑ **Reporting Requirements;**
- ☑ **Compliance with U.S. Obligations Under International Law;**
- ☑ **Supersession/Sole Source of Authority Provision;**
- ☑ **Sunset Clause.**

There are many ways these fundamental elements can be incorporated into a new AUMF. This issue brief discusses each of the elements, along with background information, analysis of the most prominent ISIS AUMF proposals, and examples of suggested language for including these elements in a new AUMF. The proposals included in this analysis are those by Senators Bob Corker (R-TN) and Tim Kaine (D-VA);⁹ Representative Eliot Engel (D-NY);¹⁰ Senators Tim Kaine (D-VA) and Jeff Flake (R-AZ);¹¹ Representative Adam Schiff (D-CA);¹² Senator Todd Young (R-IN) (which is the same as Representative Jim Banks' (R-IN) proposal);¹³ Senate Majority Leader Mitch McConnell (R-KY) (which is the same as Senator Lindsey Graham's (R-SC) proposal).¹⁴

⁸ http://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-7759fc1eacc_story.html; <http://justsecurity.org/20546/intellectual-but-political-aumf-consensus/>; <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf>. These elements have also gained the support of a coalition of human rights, civil liberties, and faith groups: <http://www.humanrightsfirst.org/sites/default/files/AUMF-letter-final-text-June-19-2017.pdf>.

⁹ <https://www.foreign.senate.gov/imo/media/doc/DAV18476.pdf>.

¹⁰ https://www.justsecurity.org/wp-content/uploads/2017/06/ENGEL_Discussion-Draft-AUMF-2017.pdf.

¹¹ <https://www.scribd.com/document/349417741/5-25-17-AUMF-Resolution>.

¹² <https://www.congress.gov/115/bills/hjres100/BILLS-115hjres100ih.pdf>.

¹³ <https://www.congress.gov/115/bills/sjres31/BILLS-115sjres31is.pdf>.

¹⁴ <https://www.congress.gov/114/bills/sjres29/BILLS-114sjres29pcs.pdf>.

Specify the Enemy, the Mission Objectives, and Geography

Background

Specifying the group(s) against which force is authorized; the objectives, or purpose, for authorizing force; and where the use of force is permitted prevents the executive branch from overstepping Congress' intent behind the AUMF. The 2001 AUMF¹⁵ was passed to authorize force against those responsible for the 9/11 attacks—namely al Qaeda and the Taliban. Congress had earlier rejected a broader AUMF proposed by the Bush Administration that was not tied to the perpetrators of the 9/11 attacks.¹⁶ Members of Congress on both sides of the aisle explicitly stated that the 2001 AUMF was intended to be limited to those who attacked the United States on 9/11.¹⁷ For example, Rep. Lamar Smith (R-TX) said: “The resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday”;¹⁸ and Rep. Jan Schakowsky (D-IL) said: “This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity.”¹⁹

However, the 2001 AUMF did not explicitly name al Qaeda and the Taliban, referring instead to those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons.”

This lack of specificity coupled with the failure to include reporting requirements²⁰ or a sunset provision²¹ allowed the executive branch to expand

the scope of the 2001 AUMF to groups and locations that Congress did not intend. Any new AUMF should correct these deficiencies by being clear about who the enemy is, what the mission objective for authorizing force is, and where force can be used.

Drafting a provision authorizing force against a specific enemy for a specific purpose in a specific location

An effective AUMF should include a provision that specifies the purpose or objective for authorizing force and then connects that purpose with a specified enemy. The AUMF should also be clear about where the use of force is authorized. For example:

“The President is authorized to use necessary and appropriate force to protect the national security of the United States against [insert named group(s)].”

and

“The authority granted in section [insert number] does not authorize the President to use force in countries other than [insert countries].”

The proposals from Representative Eliot Engel (D-NY) and Representative Adam Schiff (D-CA) authorize force against a specific enemy for a clear purpose, however, both proposals permit the president to unilaterally add in new groups if the president determines that these groups fit the AUMF's definition of “associated forces” of the names enemies. Senate Majority Leader Mitch McConnell (R-KY) and Senator Lindsey Graham's (R-SC) proposal has a clear purpose but does not clearly specify the enemy and allows the president to expand the AUMF to “associated forces,

¹⁵ <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

¹⁶ https://www.buzzfeed.com/gregoryjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm_term=.gn5qMp02d#.odxa6LQoE.

¹⁷ <https://www.justsecurity.org/40549/isis-aumf-now-next-important/>.

¹⁸ http://avalon.law.yale.edu/sept11/house_proc_091401.asp.

¹⁹ *Id.*

²⁰ See section 2 of this issue brief, Reporting Requirements.

²¹ See section 5 of this issue brief, Sunset Clause.

organizations, and persons, and any successor organizations.” The proposal from Senators Bob Corker (R-TN) and Tim Kaine (D-VA) specifies the enemy but does not specify the purpose for authorizing force. As a result, it is unclear what the use of lethal force is designed to achieve. While section 2 of this AUMF discusses the “purpose” of the legislation, this is not the same as specifying the purpose for authorizing force.

Specifying the enemy

Explicitly stating the groups against which force is being authorized in any new AUMF will ensure that congressional intent cannot be overridden by subsequent executive branch interpretation.

Some have expressed concerns that an AUMF should not tie the president’s hands or prevent the president from responding with force to emerging threats or unknown enemies. However, pre-emptively authorizing force against groups that do not pose a threat to the United States is both an unconstitutional delegation of congressional war powers and unnecessary for national security. The president has authority under Article II of the Constitution and Article 51 of the U.N. Charter to target groups that are currently unknown, but in the future pose an imminent threat to the United States.

Failing to properly define the enemy also feeds into the narrative that the United States is at war with Islam. This undermines the support of our allies and partners on the ground and provides a powerful recruitment tool for extremist groups.

Specifying the mission

Specifying clear mission objectives in an AUMF helps prevent the executive branch from using the authorization beyond what Congress intended. Mission objectives also discourage mission creep and guard against using the authorization to justify perpetual armed conflict, as the AUMF will expire when the purpose for which force was authorized is achieved.

Perpetual war erodes the important line between war and peace, which undermines human rights protections around the world. Wartime authorities can confer extraordinary powers on the president. They allow actions that would otherwise be egregious human rights violations, such as killing as a first resort, proportionate civilian harm, military trials, and detention without charge or trial. Using wartime powers outside of war threatens fundamental human rights protections, delegitimizes the mission, and damages U.S. efforts to win hearts and minds, resulting in significant strategic costs.

Specifying the geography

Explicitly limiting war authorities to countries where there are declared theaters of active armed conflict helps ensure compliance with international norms and public understanding that the United States is fighting a specific group (or groups). A geographical restriction also helps counter the extremist narrative that the United States is involved in a global war against Islam and provides for increased congressional oversight of the conflict. Including a geographical restriction will not impact the president’s ability to respond to new threats with force. The president retains, under Article II of the Constitution and international law, the authority to use force in self-defense against any group that poses an imminent threat to U.S. forces or civilians, irrespective of the location of that threat.

Associated Forces

Three administrations have now stretched the 2001 AUMF far beyond its intended targets by claiming that the AUMF authorizes force against “associated forces” of al Qaeda and the Taliban—even though the term “associated forces” does not appear in the AUMF itself.²² Because the authorization has been stretched to apply to associated forces, it is now being used to justify operations around the world against over half a dozen organizations, including groups that did not exist on 9/11.

To prevent this or a future administration further expanding the AUMF to new groups without congressional approval, any new AUMF should explicitly state that it does not authorize force against associated forces. This would require the president to obtain approval from Congress before using force against a new group.

It may be helpful to include in a new AUMF a definition of associated forces that complies with the laws of war so that Congress ensures it only adds new groups to the AUMF if it is lawful and appropriate. The president should provide the legal and factual basis for designating a new group an associated force to ensure that Congress has sufficient information to determine whether it is lawful and appropriate to authorize force against this new group in the same AUMF. If the new group is unconnected to the conflict authorized by the AUMF, Congress should pass a separate AUMF to deal with this separate conflict.

Requiring congressional approval to add new groups

Some AUMF proposals allow the president to add new associated forces and notify Congress shortly after, following which Congress can vote to remove

the group from the AUMF through expedited procedures. For example, the Corker/Kaine proposal requires the president to notify Congress within 48 hours of adding a new associated force, and the Kaine/Flake proposal requires the president to notify Congress “upon the determination” that a new group is an associated force. Both proposals include expedited procedures for Congress to remove the new group from the AUMF.

There are several problems with this approach: first, it permits the president to use force against a new group before even notifying Congress that the group has been added to the AUMF; second, the only way Congress can vote down the president’s designation is by a veto-proof supermajority in both houses of Congress, effectively ceding to the executive branch Congress’ constitutional power to declare war;²³ and third, the expedited procedures could be changed by either house of Congress through a simple majority vote.²⁴

To maintain the constitutional balance of war powers, any new AUMF should require the president to obtain affirmative approval from Congress before expanding the scope of the AUMF to cover any new group.

Defining associated forces in accordance with the laws of war

National security law experts across the aisle agree that any definition of associated forces should only include those groups who can legally be targeted under the laws of war.²⁵ Otherwise, the AUMF could authorize the president to use lethal force in a way that violates U.S. legal obligations, which would be untenable. To comply with the laws of war, the definition of an associate force should apply to

²² <https://www.govtrack.us/congress/bills/107/sjres23/text>.

²³ <https://www.defenseone.com/ideas/2018/04/corker-kaine-bill-aumf-forever-war/147516/>.

²⁴ <https://lawfareblog.com/fast-track-nowhere-expedited-procedures-and-new-aumf-proposal>.

²⁵ <https://www.lawfareblog.com/intellectual-not-political-aumf-consensus>. See also <https://www.justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement.pdf>.

organized armed groups who are parties to the conflict against the United States. For example:

“An organized, armed group that has and continues to be engaged in active hostilities against the United States alongside [insert named enemies], respectively, as a party to an ongoing armed conflict with the United States.”

Some have argued that an AUMF must be flexible, so the president can continue to use force against groups who change their name or their allegiance. This is not the case. If a group changes its name or allegiance, it is still the same group and will still be covered by the AUMF.

The president’s Article II authority to defend against sudden attacks

Some AUMF proposals authorize force against associated forces without defining that term or have defined it broadly to include groups who are not currently fighting the United States but may become a threat at some point in the future.²⁶ This is both unwise and unnecessary.

Experience under the 2001 AUMF has shown that uncertainty about who is a legitimate target has harmed U.S. efforts to win hearts and minds—the ultimate goal of counterterrorism—and damaged perceptions of American legitimacy globally.

Further, the president retains independent authority, aside from any AUMF, under Article II of the Constitution to use force in self-defense against groups that attack the United States or pose an imminent threat of attack. The president also has this power under Article 51 of the U.N. Charter.

The problem with authorizing force against “successor entities”

Some AUMF proposals, for example the Obama Administration’s proposal,²⁷ suggest authorizing force against “successor entities” or “successor organizations.” These terms have attracted significant criticism from national security law experts, as they would excessively broaden the scope of an AUMF. As law professor and former Department of Defense special counsel to the general counsel Ryan Goodman said, “successor organization” is not a legal term and does not have a stable meaning in policy either.²⁸ Goodman has noted that authorizing force against successor entities amounts to “asking Congress to endorse [the Obama Administration] theory that looped the Islamic State under the 2001 AUMF as a ‘successor’ to al Qaeda.”²⁹ This “dangerous methodology” could be used to allow the executive branch to interpret the new AUMF to target groups that do not exist and against whom Congress never intended to authorize force.

As noted above, the president has inherent constitutional authority to use force in self-defense against groups that attack the United States or pose an imminent threat of attack. Authorizing force against “successor entities” or “successor organizations” would amount to a substantial delegation of congressional war powers to the president.●

²⁶ See e.g. proposal from Senate Majority Leader Mitch McConnell (R-KY) and Lindsey Graham (R-SC), which authorizes force against “associated forces, organizations, and persons, and any successor organizations” The proposal does not define “associated forces” or “successor entities.”

²⁷https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf.

²⁸ <https://www.justsecurity.org/40534/congress-add-successor-organizations-authorizing-war-isis/>.

²⁹ <http://foreignpolicy.com/2015/02/12/obamas-forever-war-starts-now-aumf-isis-islamic-state/>.

Reporting Requirements

Background

Regular and specific reporting requirements promote democratic accountability, ensure compliance with domestic and international law, and enable Congress to fulfill its constitutional oversight function. Reporting requirements in an AUMF provide a critical safeguard against endless war and provide transparency that is crucial to maintaining legitimacy and support for the mission both at home and abroad.

✓ Regular reporting enables Congress to fulfill its constitutional war powers duties

The Constitution vests the power to declare war in Congress. As stated in an expert report on war powers, “Congress does not complete its war powers duties by authorizing the use of force abroad.” Rather, Congress “should also conduct appropriate and regular oversight of the strategic use of force, monitor the domino domestic legal effects of the authorization, and, when appropriate, revise or rescind the authorization.”³⁰ The 2001 AUMF did not contain any reporting requirements and the 2002 Iraq AUMF only required the president to report on “matters relevant” under the resolution. With these minimal obligations, the executive branch did not publicly disclose all the groups the United States was fighting under those AUMFs until 2015.³¹ The lack of thorough and specific reporting requirements in the 2001 and 2002 AUMFs has impeded Congress’ ability to fulfill its constitutional duty to oversee the longest war in U.S. history.

✓ Reporting requirements needed to keep Congress and the public informed

To sufficiently keep Congress and the public informed of the scope and progress of the mission, any new AUMF should, at minimum, require the president to provide regular public reports on:

- The groups considered covered under the AUMF;
- The numbers of civilians and military personnel killed on all sides of the conflict;
- The legal and factual basis for targeting particular groups in particular locations;
- The legal and factual basis for any uses of force in countries other than those named in the AUMF; and
- The legal and factual basis for any uses of force against entities that are not named in the AUMF.

Several AUMF proposals include other important reporting requirements, most notably the proposal from Representative Eliot Engel (D-NY), which also specifies that much of the information must be unclassified, including the groups covered, geographic scope, and numbers of casualties. By contrast, several other proposals do not contain many reporting requirements and do not specify that the reports must be unclassified, including the proposal from Senators Bob Corker (R-TN) and Tim Kaine (D-VA). This proposal requires the president to report only to relevant congressional committees and leadership when force is used against new groups or in new countries.

Experience has shown that when the executive branch is given the option to classify information on using force abroad, it will take that option and share only limited information publicly.³² To ensure that

³⁰http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf.

³¹ <https://www.defense.gov/News/Speeches/Speech-View/Article/606662/>.

³² See e.g. <https://www.nytimes.com/2018/03/14/world/africa/niger-green-berets-isis-firefight-december.html>; <https://www.lawfareblog.com/we-read-new-war-powers-report-so-you-dont-have>.

both Congress and the public are sufficiently kept informed about operations conducted pursuant to the AUMF, any new authorization should explicitly require the president to provide these reports in unclassified form. ●

Compliance with U.S. Obligations Under International Law

Background

The Supreme Court has long held that domestic statutes must not be interpreted to violate U.S. obligations under international law if any other possible interpretation exists. An explicit statement in any new AUMF that operations must only be carried out in compliance with U.S. international legal obligations would bolster global confidence in the United States as a nation that complies with the rule of law. It would enhance the legitimacy of the mission, aid in the effort to win hearts and minds, and encourage cooperation from allies and partners on the ground.

Authorizing “necessary and appropriate force”

The Supreme Court held in *Hamdi v. Rumsfeld*³³ that the 2001 AUMF’s authorization for the president to use “necessary and appropriate force” required that this force comply with U.S. obligations under international law. As such, one way to ensure any new AUMF requires compliance with these obligations is to authorize the use of “necessary and appropriate force.” For example:

“The President is authorized to use necessary and appropriate force to [insert mission objectives]³⁴ against [insert named group(s)].”

Drafting a provision that requires explicit compliance with U.S. international legal obligations

A separate provision that explicitly requires compliance with U.S. obligations under international law would go one step further to demonstrate, both

at home and abroad, that the United States is committed to these legal obligations, including under the U.N. Charter, international human rights law, and the law of armed conflict where applicable. It would underscore that when Congress authorizes the use of force, the president is required to abide by both the terms of the AUMF and the international legal obligations of the United States. For example:

“The authorities granted in this resolution may only be exercised consistent with the United States’ obligations under international law.”

The AUMF proposal from Representative Eliot Engel (D-NY) includes an explicit statement requiring compliance with international law. All other AUMF proposals discussed in this issue brief require compliance with international law by authorizing “necessary and appropriate force.”

³³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁴ See Section 1 of this issue brief, Clearly Specify the Enemy and the Mission Objectives.

Supersession/Sole Source of Authority Provision

Background

The executive branch has claimed that existing AUMFs—namely the 2001 AUMF (authorizing force against al Qaeda and the Taliban) and 2002 AUMF (authorizing force against the Saddam Hussein regime)—already provide sufficient congressional authorization for the president to fight ISIS.³⁵ This was first articulated in 2014, after the United States returned to Iraq and began using force against ISIS.³⁶

Before the administration made this claim, national security law experts believed that ongoing military operations would require Congress to pass a new ISIS-specific AUMF.³⁷ While ISIS had once been an ally of al Qaeda, the two groups had since split and were then fighting against each other. The Obama Administration justified including ISIS under existing AUMFs by saying that ISIS had essentially become the new al Qaeda as “some al Qaeda operatives ... believe ISIL is the true inheritor of Osama bin Laden’s legacy.”³⁸

More recently the Trump Administration has claimed that the 2002 Iraq AUMF now provides authority to fight ISIS in Syria.³⁹ Given that Congress passed the 2002 Iraq AUMF to authorize the use of force against the Saddam Hussein regime in Iraq, the assertion that the law also authorizes force against another entity in another country demonstrates just how far the executive branch has gone in expanding the scope of this AUMF without congressional authorization.

Given the executive branch’s assertion that these existing AUMFs already authorize the use of force against ISIS, if a new AUMF does not repeal both the 2001 AUMF and 2002 Iraq AUMF, it should make clear that any new AUMF that authorizes force against ISIS is the sole source of authority to use force against ISIS. Without this clarifying language, a new authorization could expand and confuse the administration’s war-making powers, rather than clarify them. As law professor Jennifer Daskal said in congressional testimony, failing to include such a provision “opens up the possibility of a future executive relying on the 2001 AUMF as an end run around any restriction in an ISIL-specific AUMF it doesn’t like.”⁴⁰

Drafting a supersession provision

An effective supersession provision should clearly state that only the new AUMF provides statutory authority to use force against ISIS and that the new AUMF supersedes any other statutory authority to use force against ISIS. For example:

“Notwithstanding any other provision of law, section [insert section of the AUMF that authorizes the use of force] shall henceforth supersede any preceding statutory authorization for the use of military force with respect to ISIS.”

Such a provision would ensure that existing AUMFs could not be used to disregard congressional intent and circumvent the requirements of a new authorization. ●

³⁵ <https://fas.org/man/eprint/frameworks.pdf>.

³⁶ <https://www.rollcall.com/news/heres-the-administrations-legal-justification-for-isis-isil-war>.

³⁷ <https://www.justsecurity.org/40549/isis-aumf-now-next-important/>.

³⁸ <https://obamawhitehouse.archives.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>.

³⁹ <https://www.documentcloud.org/documents/4411374-Legal-and-Policy-Frameworks-on-US-Use-of.html>.

⁴⁰ <https://www.justsecurity.org/21220/sunsets-supersession-alternatives-another-cpc/>.

Sunset Clause

Background

Sunset clauses have been included in nearly one-third of prior AUMFs.⁴¹ These provisions set a future date for Congress and the executive branch to reexamine the AUMF in light of more recent conditions and, if necessary, reauthorize and refine the legislation to suit those conditions. One of the most significant shortfalls of the 2001 AUMF and 2002 AUMFs is their lack of a sunset clause.

Including such a provision would have prevented the executive branch's unilateral expansion of the scope of these authorizations to groups and locations never intended by those who voted for it.

Bipartisan national security law experts recommend including a sunset clause in any new AUMF.⁴² These experts also call for the 2002 AUMF to be repealed and for the 2001 AUMF to be sunset. This would mandate a review by Congress and the executive branch to determine the appropriate scope of war authorities to fight al Qaeda, the Taliban, and "associated forces."⁴³

Sunsets are responsible mechanisms of congressional oversight that strengthen our democracy. Including a sunset in any new AUMF provides an opportunity for Congress to exercise its war powers and weigh in on the scope and progress of the war.

Several AUMF proposals include sunsets for both the new AUMF and the 2001 AUMF. The proposal from Representative Engel (D-NY) amends the 2001 AUMF to explicitly authorize force against ISIS, and sunsets the authorization after three years. The

proposal from Representative Adam Schiff (D-CA) and the proposal published in *Lawfare* by national security law experts fold the 2001 AUMF into a new AUMF that targets ISIS, al Qaeda, the Taliban, and "associated" forces. This "consolidated" AUMF then sunsets after three years.

The proposal by Senators Bob Corker (R-TN) and Tim Kaine (D-VA) is also a consolidated AUMF, but it does not include a sunset clause. Instead, the proposal includes a "quadrennial review," requiring the president to submit a proposal to Congress to "repeal, modify, or leave in place" the AUMF. Congress could then consider the president's proposal via an expedited procedure. If Congress did not act, the AUMF would remain in place. As such, this provision would not serve the forcing function of a sunset clause. It would repeat the same mistake made in the 2001 and 2002 AUMFs that has allowed three administrations to continue to expand the scope of these authorizations without congressional approval.

Many prior AUMFs have included sunsets

Sunset clauses have been included in 10 prior AUMFs—almost a third of the total number of AUMFs. Examples include the 1983 AUMF for Lebanon (18 months) and the 1993 AUMF for Somalia (4 months).

Other national security legislation includes sunsets

Sunset clauses are included in several post-9/11 national security statutes, including provisions of the USA PATRIOT Act⁴⁴ and of the Foreign Intelligence Surveillance Act ("FISA") Amendments Act.⁴⁵ Congress has proved itself capable of renewing

⁴¹ See http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf, p. 24-26.

⁴² https://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759fc1eacc_story.html?utm_term=.60400d8c3455. See also <https://www.lawfareblog.com/intellectual-not-political-aumf-consensus>.

⁴³ *Id.* For more on the concept of "associated forces," including how to define this term in an AUMF, see Section 1 of this issue brief, Specify the Enemy and the Mission Objectives, which has subsection on Defining "Associated Forces."

⁴⁴ <http://thehill.com/policy/national-security/243850-obama-signs-nsa-bill-renewing-patriot-act-powers>.

⁴⁵ <http://www.politico.com/story/2012/12/congress-extends-foreign-surveillance-law-085563>.

these authorizations—with important revisions—on numerous occasions.

Sunsets do not tell the enemy when the United States will end military operations

An AUMF sunset does not set an arbitrary deadline of U.S. involvement in war, tell the enemy when military operations will end, or allow the enemy to bide their time until the authorization expires. An AUMF sunset is a forcing mechanism for a conversation between Congress and the executive branch on the state of the armed conflict and the appropriate legislation to authorize the use of force for that conflict. If the conflict is ongoing, the AUMF can be reauthorized or refined to suit changed circumstances.

In congressional testimony, law professor Bobby Chesney said that sunsets were “highly desirable as a matter of democratic accountability.”⁴⁶ Former secretary of defense Ash Carter called a three-year sunset a “sensible and principled” provision, notwithstanding that the conflict may last longer than three years.⁴⁷ And former Department of Defense general counsel Stephen Preston said that a “properly structured” sunset provision with “some mechanism for renewing the authority in advance of the sunset” would not serve as an end date for the conflict but rather would signal to our partners and adversaries that we are “committed to our democratic institutions and we have set up a mechanism to fight this fight as long as we have to fight the fight.”⁴⁸

Sunsets do not deprive the president of the authority to target new threats

Setting a sunset date for either existing AUMFs or a new AUMF would have no effect on the lethal authority the president already has to respond, with force, to new threats. The president has inherent authority under Article II of the Constitution to use

force in self-defense against emerging groups that either attack or pose an imminent threat of attack to the United States. The president also has this power under Article 51 of the U.N. Charter.●

⁴⁶<http://docs.house.gov/meetings/AS/AS00/20150226/103019/HH RG-114-AS00-Wstate-ChesneyR-20150226.pdf>.

⁴⁷ <https://www.defense.gov/News/Speeches/Article/606652/>.

⁴⁸ <https://www.justsecurity.org/40601/2-points-stephen-preston-congressional-war-authorization-isis/>.