

How to Improve President Obama's ISIS AUMF

There have been renewed calls¹ for Congress to pass an authorization for the use of military force (AUMF) against the Islamic State in Iraq and Syria (ISIS) following President Obama's recent announcement that he will expand the deployment of special operations forces in Syria.² Should Congress move forward with an ISIS AUMF, Human Rights First urges Congress to ensure that the new law avoid the shortcomings of the 2001 AUMF and the 2002 Iraq AUMF. These authorizations failed to precisely identify the target and define the mission and lack sufficient transparency and reporting requirements. These shortcomings have enabled policies that have eroded human rights protections and the rule of law for nearly a decade and a half.

This document sets out how the Obama administration's ISIS AUMF proposal³ can be improved to empower the United States to counter the terrorist threat while also upholding the rule of law, maintaining global legitimacy, and protecting human rights. Our AUMF recommendations⁴ satisfy the "Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL,"⁵ which have garnered bipartisan support⁶ and articulate a prudent approach to drafting an effective ISIS AUMF.

To satisfy these Principles, President Obama's AUMF should:

- ✓ **Specify the enemy and mission objectives:** The administration's draft clearly states that it authorizes force against ISIS. This is important, as failing to name the enemy with sufficient specificity creates unnecessary ambiguity that can be misread to apply to groups that Members of Congress did not intend to authorize force against. The clear statement in the administration's AUMF that force is authorized against ISIS should be retained and it should also specify clear mission objectives for which the use of force is authorized. These would prevent the executive from overstepping Congress' intent behind the authorization, discourage mission creep, and ensure that the authorization will not be used to justify perpetual armed conflict, which erodes the important line between war and peace and undermines human rights protections around the world.
- ✓ **Refine the definition of "associated forces" to comply with international law:** The administration's definition of "associated persons or forces" is overbroad and should be refined so that the AUMF only applies to groups that are parties to the armed conflict under the laws of war,⁷ and thus against whom the use of force is both lawful and appropriate. By authorizing force against groups or individuals associated with a "closely related successor entity" of ISIS, President Obama's AUMF could permit a future administration to use force against groups or individuals who are not parties to the armed conflict. Congress should not authorize force preemptively against emerging threats or unknown enemies. 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.⁸ Currently unknown groups that pose an imminent threat to the United States in the future can be targeted pursuant to the president's authority under Article II of the Constitution and under Article 51 of the U.N. Charter.
- ✓ **Strengthen reporting requirements:** The reporting requirements in the administration's proposal are too vague, requiring the president to report to Congress every six months on "specific actions taken pursuant to this authorization." For adequate

¹ <http://www.nytimes.com/2016/04/27/opinion/obamas-last-chance-to-end-the-forever-war.html>.

² https://www.washingtonpost.com/world/national-security/obama-to-announce-plans-to-grow-us-special-operations-force-in-syria/2016/04/24/93a2108a-0a6a-11e6-a6b6-2e6de3695b0e_story.html.

³ https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf.

⁴ <http://www.humanrightsfirst.org/sites/default/files/AUMF-ISIL-Background.pdf>.

⁵ <https://www.justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf>.

⁶ <http://wpo.st/YcPX1>; <https://www.lawfareblog.com/intellectual-not-political-aumf-consensus>.

⁷ Under international law, an armed conflict against a non-state armed group, like ISIS requires: (1) hostilities at a minimum level of intensity, such as when they are of a collective character or when the government is obliged to respond with military force, rather than relying on police forces; and (2) the non-state groups involved must be considered "parties to the conflict," meaning that their armed forces are sufficiently organized, shown by the existence of a certain command structure, and the ability to sustain military operations, ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997 para. 561-568.

⁸ See e.g. http://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html?_r=0.

congressional oversight, the AUMF should require the president to provide regular reports that keep Congress and the public informed of the scope and progress of the mission. Reports should include information about the groups considered covered under the ISIS AUMF, the numbers of civilians and military personnel killed on all sides of the conflict, and related legal analysis, including the legal basis for targeting particular groups or using force in countries other than Iraq or Syria. Regular and thorough reporting is important to ensure compliance with domestic law and the laws of war, to ensure sufficient transparency, and to maintain legitimacy at home and abroad.

- ☑ **Refine provision requiring “necessary and appropriate force”:** Any AUMF should explicitly require compliance with U.S. obligations under international law. One way to achieve this is to authorize the president to use “necessary and appropriate force.”⁹ President Obama’s AUMF authorizes the use of U.S. Armed Forces “*as the president determines* to be necessary and appropriate.” This separate presidential determination is unnecessary. The provision should be refined to simply authorize “necessary and appropriate force.” This clear statement requiring the use of force to be carried out in compliance with U.S. obligations under international law would bolster global confidence in the United States as a nation that complies with the rule of law. This will aid our effort to win hearts and minds and will encourage cooperation from our allies in the fight against ISIS.
- ☑ **Retain the sunset clause:** Human Rights First supports the administration’s 3-year sunset clause.¹⁰ This provision acts as a forcing mechanism, requiring Congress and the administration to reexamine the AUMF at some future date in light of more recent conditions, and if necessary, reauthorize and refine the legislation to suit those conditions.¹¹ Sunset provisions have been included in nearly a third of prior AUMFs.¹² As Secretary of Defense Ashton Carter testified to the Senate Foreign Relations Committee last year, an AUMF sunset clause is a “sensible and principled provision.”¹³
- ☑ **Include a supersession/sole source of authority provision:** The administration’s draft should include language that makes it clear that it is the sole source of authority to use force against ISIS. As President Obama has claimed that the 2001 and 2002 AUMFs authorize military action against ISIS,¹⁴ without language clarifying that the ISIS AUMF supersedes these laws, a new AUMF could expand and confuse the administration’s war making powers, rather than clarifying them.
- ☑ **Set a sunset date for the 2001 AUMF:** The 2001 AUMF, which was passed to authorize the use of force against those responsible for the 9/11 attacks, has been interpreted to authorize the use of force against groups and in situations that were never intended by Congress.¹⁵ Setting a sunset date for the 2001 AUMF would force a review by Congress and the administration to determine the appropriate scope of war authorities to fight al Qaeda and its “associated forces.” Setting a sunset date for this nearly-15-year-old law has bipartisan support.¹⁶
- ☑ **Retain the 2002 AUMF repeal:** Human Rights First supports the administration’s proposed repeal of the 2002 Iraq AUMF. An ISIS-focused AUMF provides the administration with the necessary authorities to use force against ISIS and would obviate the need for the 2002 Iraq AUMF, which was designed to target the Saddam Hussein regime.

⁹ <http://justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf>; http://justsecurity.org/wp-content/uploads/2015/03/BackgroundPaper-Administrations-Proposed-ISIL-AUMF.2.24.Final_.pdf; <http://justsecurity.org/19928/suggestions-clarifying-amending-draft-aumf/>.

¹⁰ Myth v. Fact: Sunsets in AUMFs, <http://www.humanrightsfirst.org/resource/myth-v-fact-sunsets-aumfs>.

¹¹ Professor Robert Chesney recently testified that sunset provisions are “renewal or forcing function provisions” that “create an occasion after a certain period of time for the authorization, if appropriate, to receive the fresh imprimatur of a Congress and a president, acting on the most recent conditions.” Hearing before the House Armed Services Committee, February 26, 2015, video available at https://www.youtube.com/watch?v=FQd4w68QM_c.

¹² http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.

¹³ Secretary Carter, Hearing before the Senate Foreign Relations Committee, March 11, 2015, video available at <http://www.c-span.org/video/?324700-1/john-kerry-ashton-carter-general-martin-dempsey-testimony-use-force-isis>.

¹⁴ http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html?_r=1.

¹⁵ See, e.g., 147 CONG. Rec. H5654–H5676 (Sept. 14, 2001) (Rep. Jan Schakowsky: “This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity. It is not a carte blanche for the use of force.” Rep. Lamar Smith: “This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday.”).

¹⁶ Above, n 4. See also <https://www.justsecurity.org/17761/senator-rand-pauls-proposed-declaration-war-aumf-isis/>.