

The Problems with the AUMF and How to Fix Them

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 had harbored al Qaeda before and after the attacks.

The 2001 AUMF is also expressly limited to using force to prevent future acts of terrorism against the United States by the entities responsible for 9/11, not their associated forces, successor entities, or unaffiliated terrorist organizations.²

Yet for nearly 16 years, 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 seven different countries around the world.⁴

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 restricts the ability of Congress to conduct meaningful oversight over military operations and the foreign affairs of the United States.⁵

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

Continued reliance on outdated and ill-defined war authorizations that blur the line between war and peace undermine national security, U.S. leadership in the world, and human rights both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

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 https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.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/>.

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 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.

Setting 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 necessary, will provide a model for other states on 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 not necessary. 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 through the use of 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

support⁶ and reflect an effective approach to drafting an ISIS 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 and the Mission Objectives;**
- ☑ **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.

Specifying the group(s) against which force is authorized, as well as the objectives for authorizing force and where, prevents the executive branch from overstepping Congress' intent behind the AUMF. Regular and specific reporting requirements promote democratic accountability, ensure compliance with domestic and international law, and enable Congress to fulfill its critical oversight function. Also, 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 in the fight against ISIS.

Given the executive branch's assertion that existing AUMFs already authorize the use of force against ISIS, if a new ISIS-specific AUMF does not repeal the 2001 and 2002 AUMFs, it should make it clear that the ISIS AUMF is the sole source of authority to use force against ISIS. Moreover, including a sunset in any new ISIS AUMF would provide a key opportunity for Congress to exercise its war powers and weigh in on the scope and progress of the longest war in U.S. history.

Including these provisions in any new AUMF would provide the precision and clarity necessary to prevent the erosion of human rights protections and ensure U.S. global leadership on counterterrorism.

⁶ 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>.